A Synthetic Approach to Legal Adjudication

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When faced with a dispute concerning how a given legal provision (whether constitutional or statutory) applies to a particular set of facts, how should a judge proceed? It is commonplace to say that, in the first instance, she should look to the meanings of the words that constitute the provision itself. If she is lucky, then the relevant meanings are clear; and if the facts are not in dispute, then the resolution is obvious. Unfortunately, this rarely happens. Almost every interesting dispute that arises under the law is the product of disagreement among reasonable and competent speakers of the language of the relevant provision. If the meaning of the provision is not clear, then, even if the facts are fixed, how the judge should proceed is a matter of controversy. A reasonable first step would be to consider the various factors to which she might reasonably appeal. In this respect, there are three main suggestions.

One suggestion arises from the recognition that language is used for the purpose of communication, and that communication involves both a speaker and a hearer. Especially in cases of ambiguity, a speaker might use a word intending it to mean one thing while the hearer may understand the same word to mean something else entirely. It is perfectly conceivable that I should ask you to spray pesticides on the bank, meaning you to

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spray the river bank, while you understand me to be asking you to spray the local savings-and-loan. In determining how to apply a legal provision, a judge might therefore look to three kinds of meaning: (i) word meaning (what the words of the provision mean, considered independently of the intentions of those who adopted them and independently of the intentions of those to whom they are addressed), (ii) speaker meaning (what those who adopted the provision took it to mean), and (iii) hearer meaning (what those to whom the provision is addressed take it to mean).

A second suggestion arises from the fact that legislators have a number of legislative intentions operating at different levels of generality. A municipality might adopt an ordinance banning vehicles from the park in order to beautify the relevant neighborhood, improve public safety, reduce smog, or perhaps reduce noise.[1] The same municipality might adopt the same ordinance with the more specific intention of removing skateboards or motorcycles from the park. In determining how to apply such a provision, a judge might therefore look to one (or both) of two kinds of intention: general intention or purpose (what the legislators generally intend the provision to accomplish) and specific intention (how the legislators specifically intend the legislation to apply).

A third suggestion arises from the widely held belief that it is part of a judge's function to avoid serious injustice whenever possible. Thus, though a basketball rule might state that "during an altercation, all players not participating in the game must remain in the immediate vicinity of their bench," it seems unduly harsh to penalize a player for violating the rule if he left the bench during an altercation in order to go to the bathroom or if his purpose in leaving the bench was to prevent one of his teammates from harming a spectator.[2] In determining how to apply such a rule, a judge might therefore look to a theory of justice or to moral theory more generally.

As might be expected, those in the legal academy who have devised theories of legal adjudication have run with each of these suggestions. And because there is often a premium on theoretical simplicity, many theorists have sought to elevate one particular factor while denigrating the others. In one camp, there are Textualists, for whom word or hearer meaning is paramount. For the Old Textualists, the relevant kind of meaning is the "plain meaning" elucidated in the dictionary (word meaning). For the New Textualists, the relevant kind of meaning is what any reasonable and competent hearer would understand the word to

1. The example is adapted from H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

2. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH L. REV. 1509, 1509–10 (1998).

mean in context (hearer meaning). In another camp, there are committed Intentionalists, for whom some version of speaker meaning is paramount. A number of these theorists are also Purposivists, inasmuch as they look to the general legislative intention or purpose driving the adoption of the relevant provision. Finally, in yet another camp, there are Normativists, for whom moral theory is the touchstone of adjudication.

The advocates in these various camps include some of the most brilliant legal minds of our generation. It is difficult for me to believe that any one of them is completely mistaken. It is far more likely that each of these advocates has glimpsed a part of the truth while the desire for theoretical simplicity blinds him to the reasonable criticisms of his opponents. In my view, the proper theory of adjudication gives a suitably circumscribed role to each of word meaning, hearer meaning, speaker meaning, and moral theory. I do not think of this view as a form of eclecticism. It is principle, not whim or intuition, that explains why each of these factors deserves its place in the sun without dominating the others. The most defensible theory of adjudication, I contend, is a principled synthesis of the main theoretical alternatives.

Before laying out the reasons for adopting a synthetic approach, I want to emphasize that I am not proposing a theory of legal *interpretation*. There are many who take for granted that the proper function of a judge is to interpret the law, in the sense of explicating its meaning: witness Alexander Hamilton's dictum that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[3] There is something to this: explication of meaning is certainly *part* of what judges should do when they adjudicate. But the ultimate function of a judge is to adjudicate, that is, to resolve legal disputes, and there are many disputes that cannot, and many that should not, be resolved by appeal to the explication of meaning. Consider, for example, whether the ordinance banning vehicles from the park should be held to apply to ceremonial tanks.[4] On its own, no plausible account of the meaning of "vehicle" is sufficient to resolve this issue. Or let us suppose that we all agree that the meaning of a text is what its author(s) intended it to mean. If it should happen that those who promulgated the rule stating "no vehicles in the park" intended

3. THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

4. *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 357–58, 380 (Andrei Marmor ed., 1995).

these words as a code for "no dogs in the city" without apprising the inhabitants of the relevant municipality of this intention, then it would surely be wrong for a judge to hold that the ordinance bans dogs from the city, but does not ban cars from the park.

A theory of adjudication is founded on a theory of the proper function of the law and of the proper function of judges in relation to the law, the other branches of government, and the citizens who are subject to the law. As such, it is a branch of political theory rather than a branch of hermeneutics or the philosophy of language. At the same time, because (in any theory of adjudication) it is at least part of a judge's function to interpret the law, any political theorist who promises us an answer to the question with which we began should be open to insights that may be gleaned from contemporary semantic theory.

With these preliminaries out of the way, let me begin by setting out some commonplace assumptions about the function of law and the functions of the branches of government that are responsible for creating, interpreting, and enforcing the law.[5] The function of law is to constrain the behavior of those to whom it applies according to common and public rules. It should be emphasized that laws cannot constrain behavior unless they are publicly accessible. It is not necessary that citizens be familiar with every word of the legislative record; what is necessary is that it require no more than minimal effort for citizens to find the relevant provisions. In a system wherein governmental legitimacy rests on the consent of the governed—and wherein it is unthinkable that the governed would consent to be bound by rules that are hidden from them—the publicity of law is fundamental. This conception of the function of law issues in what has come to be known as one of the most important rule of law values: notice. As Moore puts it, notice requires that citizens "know before they act what consequences the law will attach to their behavior."[6]

In addition to the public, regulative function of law, it is also important to emphasize that, at least in legal regimes governed by written constitutions, there are different kinds of laws that have different legal status. The function of any constitution is to serve as the blueprint for a society. Its fundamental purpose is to create the various branches of government, stipulate their functions and powers, and articulate the ways in which they are designed to interact with each other and with the governed. If the framers and ratifiers of the constitution happen to be suitably

5. I do not think of these assumptions as controversial. But if you are inclined to reject them, then I offer the sequel as an attempt to articulate the consequences of these assumptions within a theory of adjudication.

6. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 316 (1985).

enlightened, then the constitution also functions as a repository of fundamental moral and political values, including a specification of legal rights that may not be abridged by ordinary legislation.[7] In such a case, the system contains both fundamental law—established by constitutional ratification and, in some cases, encapsulating moral principles—and nonfundamental law, established by statute. The only formal constraint on statutes in this system is that they be consistent with constitutional provisions; as a matter of political theory, there is no additional background requirement mandating the overall moral acceptability of statutes.[8]

Finally, let us consider what may be assumed about the functions of the various branches of government in a tripartite system such as the one in place in the United States. In such a system, the legislative branch is responsible for making law, the executive branch is responsible for enforcing the law, and the judicial branch is responsible for deciding disputes that arise under the law. Although there are circumstances in which the judiciary may find it necessary to strike down legislative enactments because they conflict with constitutional requirements, the function of the courts in relation to laws that do not so conflict is to give effect to the legislature's semantic intentions in a way that respects the notice requirement. Although judges and legislators are occasional antagonists, they are also partners in the greater scheme of preserving and protecting the legislature's lawmaking function. If matters were otherwise, then the system would allow for government by whim rather than by law.

So much for political theory. Let us now consider what may be learned from contemporary semantics. Gottlob Frege once argued that, at least for the purposes of science, ordinary language contains infelicitous modes of expression, such as context dependence, ambiguity, and vagueness.[9]

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7. Mind you, this is a contingent matter: considering the historical development of the U.S. Constitution, it should be kept in mind that the ratification of the Bill of Rights was largely a matter of historical chance. If the Anti-Federalists had not screamed and hollered as they did, the greatest protection from government a citizen could hope for might well have remained for years at the level of a ban on such esoteric legal stratagems as bills of attainder and letters of marque.

8. Although many would argue that tax cuts for the super-rich would be immoral when public funds are scarce, few would deny that the tax cuts passed by Congress and signed into law by George W. Bush are legally binding.

9. GOTTLOB FREGE, *On Sense and Meaning*, *in* COLLECTED PAPERS ON MATHEMATICS, LOGIC, AND PHILOSOPHY 157, 169 (Brian McGuinness ed., Max Black trans., Basil Blackwell Publisher Ltd. 1984) ("The logic books contain warnings against logical mistakes arising from the ambiguity of expressions. . . . It is therefore by no means unimportant to eliminate the source of these mistakes, at least in science, once and for all.").

We need not agree with Frege that these kinds of expression are always a barrier to efficient scientific communication, but it cannot be doubted that these three phenomena *can* get in the way of successful linguistic exchanges.[10] Luckily, theorists of adjudication can safely ignore the phenomenon of *explicit* context sensitivity. The reason for this is that explicitly context dependent expressions, such as indexicals ("I," "you," "today") and demonstratives ("this," "that"), are designed to refer to particulars; hence, they do not appear in statements, such as legal provisions, that are couched in general terms. What *cannot* be ignored, however, is ambiguity, vagueness, and *implicit* context dependence.

An ambiguous expression is associated with more than one meaning. Ambiguity in legal provisions generates disputes over how the provisions should apply to the facts. Consider a case in which an expression E has two meanings, M1 and M2. In the case of a dispute having its source in the ambiguity of E, one side will likely insist, and not without reason, that E be understood as having meaning M1, while the other side will insist, also not without reason, that E be understood as having meaning M2.

A precise understanding of vagueness requires an understanding of the two main components of linguistic meaning, sense and reference. According to standard (Fregean) semantics, the sense of an expression is its contribution to the proposition expressed by any sentence of which it is a component, and the referent of an expression is the object or property that contributes to fixing the truth or falsity of the propositions expressed by the sentences of which it is a component.[11] Among philosophers of language, argument rages over whether the sense of a singular term (proper name, indexical, demonstrative) is identical to its referent.[12] But most philosophers of language would agree that there are cases in which the sense of an expression differs from its referent. For example, many would agree that the sense of "bachelor" is not this or that bachelor, or even the set of all bachelors, but rather consists in some descriptive condition (such as the condition of being an unmarried eligible adult male) that determines what in the world is to count as a bachelor. Argument also rages over whether sense always determines reference.[13] But few would deny that it is often the case that the sense of

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10. When my father drove my mother anywhere, it always drove him bats when she told him to go "that way." To this day, Mom continues to insist that Dad should have known that "that way" means "left."

11. *See generally* FREGE, *supra* note 9.

12. For a summary of the debate, see generally DAVID KAPLAN, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives and Other Indexicals*, *in* THEMES FROM KAPLAN 481 (Joseph Almog et al. eds., Oxford Univ. Press 1989).

13. *See generally* 2 HILARY PUTNAM, *The Meaning of 'Meaning'*, *in* MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215 (Cambridge Univ. Press 1975).

an expression fixes its referent. Thus, the referent (or extension) of the term "bachelor" is determined by the descriptive condition that is the term's sense.

A vague expression has a sense that does not clearly fix what is to count as its referent. The word "bald" is vague because the descriptive condition associated with it does not, by itself, determine whether someone with some, but very little, hair on his head is to be counted as an element of the word's extension. By contrast, the arithmetical descriptor "even," as applied to the natural numbers, is not vague, since the descriptive condition associated with it (namely, the condition of being divisible by two) fixes exactly which objects belong in the word's extension. Vagueness, no less than ambiguity, has the potential to generate legal disputes. Consider the now familiar municipal ordinance banning vehicles from the park. The problem here is that the sense of the word "vehicle" does not precisely fix the word's extension. The local veteran's association wants to place a ceremonial tank in the park as part of a war memorial. The city council refuses to go along. A judge must decide whether the word "vehicle" applies to ceremonial tanks. The descriptive condition associated with "vehicle" (roughly, the condition of being able to carry persons from one place to another) does not provide sufficient guidance here. A ceremonial tank *could* move *if* it had an engine. But, of course, there is a sense in which the tank *cannot* move if it *does not* have an engine.

The phenomenon of implicit context sensitivity is best explicated with the help of examples. The word "I" is explicitly context sensitive in the sense that its referent is quite plainly determined in part by the context of utterance; when it is uttered by me, the word refers to me, but when it is uttered by you, the word refers to you. By contrast, the word "tall" is only implicitly context sensitive. Although its referent is determined in part by the context of utterance, this fact is not immediately apparent. In the typical case, the set of individuals "tall" contributes to picking out is determined by the noun with which "tall" is combined. A tall athlete is an athlete who is taller than average when compared to athletes. But a tall basketball player is not a basketball player who is taller than average *when compared to athletes*: a tall basketball player is a basketball player who is taller than average *when compared to basketball players*. Now, imagine a rule applying to basketball players that says: "If you are tall, then your health care premium is higher than it would be if you were short." To whom exactly does this rule apply? Does it apply to basketball

players of greater than average height *for a person*? Does it apply if they are of greater than average height *for an athlete*? Or does it apply to those who are of greater than average height *for a basketball player*? The problem here is neither that the word "tall" has multiple meanings, nor that the word is vague. The problem is that the word is context sensitive.

With the help of the basic assumptions of political theory outlined above and an understanding of the sorts of linguistic phenomena that have the potential to (and standardly do) generate legal disputes, it is possible to begin the task of describing and defending a synthetic theory of adjudication. As noted above, there are situations in which a legal provision is unambiguous, precise, and context insensitive. In such situations, disputes rarely arise. But should the question be raised whether—and, if so, how—a particular provision applies in such circumstances, then the right answer is the one proposed by the Old Textualist. Given that the text has a clear unitary meaning that determines a clear unitary referent (or extension) and that this should be plain to any competent speaker of the relevant language, the judge should hold that the text should be understood in light of its plain meaning and applied to those objects that fall under the extensions fixed by the senses of the relevant words. Here, an Old Textualist approach is consistent with a proper conception of the function of law, a proper conception of the judiciary's function in a tripartite system of government, and rule of law values, including notice.

For example, there is no question that, as things now stand, Arnold Schwarzenegger cannot be elected President of the United States. Article II, Section 4 of the U.S. Constitution states that "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President."[14] The meaning of the provision is clear. A citizen is "natural born" if he was born on U.S. territory. Moreover, the Constitution was "adopted," that is, went into effect, in 1789. Because, as a matter of fact, Schwarzenegger was born in Austria many years after the Constitution was adopted, Article II, Section 4 clearly entails that he is not eligible to be President.

Old Textualism is a recipe for a perfect world, but the world is not perfect. Let us start with what judges should do in the face of ambiguity. In our "bank" example, a city ordinance requires me to spray the bank with pesticides. I think that the rule requires me to spray the river bank, but the city wants me to spray the local credit union. The city takes me to court. How should the judge decide how the relevant rule applies? Old Textualism provides no assistance here. Some other approach is

14. U.S. CONST. art. II, § 1, cl. 4.

needed, and (semantic) Intentionalism fits the bill. It seems perfectly correct for the judge to rely on the semantic intentions of those who promulgated the rule in the first place. If the members of the city council used the word "bank" to mean "financial institution," then the judge's decision should favor the city. This is consistent with the assumption that the function of the courts is to give effect to (constitutionally constrained) legislative intentions.

It might be objected that allowing legislative intent to determine the outcome of a dispute generated by ambiguity is not in fact consistent with the rule of law requirement of notice. After all, the intentions of legislators are not immediately accessible to the governed, for whom it might be a significant burden to sift through the legislative record to reconstruct the semantic intentions of a collective. But I do not think it is too onerous to expect the governed to check for easily accessible evidence of legislative intent. If it is obvious from the public legislative record that the relevant rulemaking body intended an ambiguous word to be read one way rather than another (for example, the "bank" provision falls under a general provision governing the proper care and maintenance of financial institutions), then it gives too much power to individuals—and too little power to the legislature—to read the relevant rule as having a meaning distinct from the one originally intended.

But to say that Intentionalism is the proper theory of adjudication *in cases of ambiguity* is not to say that Intentionalism (or even Intentionalism combined with Old-Textualism-for-easy-cases) is the proper theory of adjudication *in every case*. It is a good thing, too, for Intentionalism is an inappropriate response to vagueness.[15] Consider Justice Scalia's example of the legislative provision imposing additional criminal penalties on those who "use a gun" in the course of committing a felony.[16] The problem here is not that the word "use" is ambiguous; the problem is that its meaning in the given context is vague. It is unclear whether "using a gun" applies only to cases in which the gun is brandished or applies more widely to cases in which the gun is merely employed as part of a felonious activity or transaction. If a criminal employed an

15. It is also an inappropriate response to context sensitivity. I invite the reader to apply my remarks favoring New Textualism over both Old Textualism and Intentionalism in cases of vagueness to cases of context sensitivity. The arguments are perfectly parallel.

16. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23–24 (Amy Gutmann ed., 1997).

unloaded gun to hold his trousers up during a drug deal, would this count as "using" the gun in the relevant sense?

In this sort of case, what seems to matter is not so much what sorts of "uses" the members of the legislature intended (or might have thought) to include as part of the extension of "use." What matters, as New Textualists argue, is what a competent and reasonably well-informed reader of the relevant provision would consider to be part of the word's extension. As Scalia notes, anyone subject to this law (except perhaps those who enacted it) would assume that trouser propping employment is not part of the extension of this particular use of "use." Rather, what seems at issue is whether the weapon was brandished—whether it was functioning as a threat to life or health.

The reason for choosing hearer meaning over speaker meaning in this sort of case is that this is the only choice that respects the notice requirement. Although citizens can be expected to determine the *semantic* intentions of their legislators (as in the "bank" example), they simply cannot be expected to determine their legislators' *referential* intentions. Some legislators never stated what sorts of cases they would expect to fall under the relevant provision, and no legislator can be expected to state exactly how she would understand a vague provision to apply in *all* cases. Moreover, because most enactments have their source in legislative compromise, it is typical for legislators to expect vague provisions to apply in different ways. Half of the legislative body might vote for a provision thinking that it applies to a broad range of gun uses, and half might vote for it thinking that it applies to a much narrower range of uses. According to Intentionalism, there is no principled way to decide which of these intentions should predominate. If any reasonable person who understands the relevant provision would take it to apply narrowly, then this is how a judge should take it to apply. For, under these conditions, it seems highly unjust for citizens to be held to a "precisification" of a vague provision that they could not and would not have anticipated in the ordinary course of events.

It might be thought that the right way to think about the gun use example involves appeal to general (as opposed to specific, referential) legislative intentions. It is reasonable to think that the relevant provision was enacted for a reason, namely, to discourage the threatening use of weapons during the commission of a felony. Perhaps the New Textualist way out of the vagueness problem seems promising only because what a reasonable and competent speaker understands in this case is informed by an unarticulated sense of the provision's purpose. But this Purposivist objection is not persuasive. It is also reasonable to think that the relevant provision was enacted for a different reason, namely, to discourage persons from having any weapons handy when they commit felonies.

Like the referential Intentionalist, the Purposivist can provide no principled way to decide among different purposes legislators might have had in mind when they voted for the relevant provision. Whether appeal is made to general or specific intentions, all Intentionalists are in the same leaky boat.

The conclusion to draw from this is that there is a restricted set of cases to which a particularly narrow form of Intentionalism properly applies. This set includes all cases in which a judge must choose among multiple meanings in case of ambiguity. In these cases, the judge is required to follow the legislators' semantic intentions. The same applies in cases of formal (as opposed to substantive) scrivener's error. A formal scrivener's error is an obvious typographical mistake. Consider the example of a provision regulating fisheries that mentions "carp" seventeen times and "cars" only once and in a context in which it is clear that "carp" is intended.[17] Here, it is clear that legislators' semantic intentions should count for more than any version of hearer meaning. Where there is formal scrivener's error, speaker meaning should predominate.

Notice, however, that the same cannot be said for substantive scrivener's error. As in the case of formal scrivener's error, substantive scrivener's error arises when the legislature intends the language of the provision to be read one way, but drafts it in such a way as to say something else. The difference between the two kinds of error is that in substantive scrivener's error there is no clear evidence to suggest that there was any sort of typographical mistake. For example, imagine a statute that was originally intended to apply to both defendants and plaintiffs, but in which the word "plaintiff" was left out as the result of a typographical error. Imagine further that the statute becomes law without any legislators having noticed the error. Should the law be read as applying to plaintiffs? The answer is surely no. Citizens who read the relevant provision can make sense of it without supposing that it contains any sort of typographical error. In accordance with the notice requirement, it would place an undue burden on citizens to require them to determine, of any piece of seemingly clear legislation, whether it includes typographical omissions. Once the error is discovered, there is nothing to prevent the legislature from amending the statute to make it apply to plaintiffs. But before the amendment takes effect, there is no reason to saddle hapless plaintiffs

17. *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 980 (2004).

with legal infractions about which they could not have been expected to know.

It follows from the discussion thus far that, aside from easy cases in which linguistic infelicities do not occur and cases of ambiguity, the proper theory of adjudication is New Textualist. This is correct, as far as it goes. But there is a raging battle among New Textualists over whether moral theory has any role to play in the process of adjudication. On the one side, there are those (such as Scalia) who think that judges should never appeal to moral theory in deciding disputes under the law.[18] As they see it, appeal to moral theory is tantamount to appeal to personal ideological prejudice. For there are almost as many moral theories as there are moral theorists, and it would seem to follow—because judges who base their decisions on moral theory will need to choose among many moral theories—that there is nothing left but personal prejudice upon which such a choice could possibly be made. On the other side, there are Normativists, such as Moore, who think that judges should always appeal to moral theory.[19] As they see it, in constitutional systems of government, the constitution functions as the blueprint for a good society, and because all legislation is designed to give effect to the blueprint, disputes over the application of statutes, no less than disputes over the application of constitutional provisions, are to be decided in light of what is optimal from the moral point of view.

The way out of this debate is to recognize that there is a place for both Normativism and New Textualism in the theory of adjudication. In effect, there are circumstances under which New Textualist judges must appeal to normative theory. These circumstances include disputes over the proper application of provisions containing words of explicit normative import—words such as just compensation, equal protection, due process, cruel punishment, and freedom of speech. Such phrases are imbued with moral significance, but they are also vague. The fact that they are vague is, as I have argued, the main reason for adopting a New Textualist approach to resolve disputes over how they should be applied to particular sets of facts. But New Textualism is not so much mistaken as it is limited in the amount of guidance it gives judges under these circumstances. For example, in part because of its vagueness, the

18. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 133, 136 (Amy Gutmann ed., 1997) (responding to Professor Tribe) ("Judges are *not*, however, naturally appropriate expositors of the [moral] aspirations of a particular age . . . .").

19. *See* Moore, *supra* note 6, at 376 ("A natural law theory of interpretation will say that values can and should enter into the decision of every case and that real values, not just conventional mores, are the values that should be looked to by judges. . . . I shall defend both of these natural lawyer's assertions.").

meaning of the word "cruel" will not, on its own, determine whether this or that form of punishment is cruel. A principled New Textualist judge who refuses to look at moral theory ought simply to throw up her hands when asked to decide whether, say, lethal injections are cruel. But, of course, this is something she cannot do. She must decide, and she must decide in a way that is not *ad hoc*. If the vague word is imbued with normative significance, then there is no way but to consider various moral theoretic approaches to clarifying the extension of the term. A form of punishment is cruel if it inflicts pain gratuitously. This much is clear. But what makes it the case that a certain pain infliction is gratuitous or unjustified? This is the kind of question that only moral theory can answer.

The upshot of all this is that there is a place for moral theory in the theory of adjudication. But notice that this role is restricted to the adjudication of disputes over the proper application of words that have normative import. In other cases, moral theory takes a back seat to some form of word, hearer, or speaker meaning. For example, although it may be *morally wrong* to restrict eligibility for the office of President to natural born citizens, it would not be justified for a judge to read Article II, Section 4 in accordance with moral theory and, as a result, permit Schwarzenegger to run for the Presidency.

It might be objected that constitutions are not merely ways of setting up systems of government, but ways of setting up *good* systems of government. If we accept this, then we must indeed accept the pervasiveness of moral theory in legal adjudication. Unfortunately for Normativists, however, a constitution is not, *per se*, a blueprint for a *good* society. A constitution, by its nature, is no more than a blueprint for a system of government. There are constitutions that set up evil, as well as good, systems of government. The U.S. Constitution is pretty good, on the whole. But this is because the U.S. Constitution sets up more than a system of government; it also sets up significant limits to what government may do, particularly in the way it treats its citizens. It does this by helping itself to normative language, the proper application of which requires nonpervasive appeal to moral theory.[20]

20. Consider the case of *United States v. Kirby*, in which a sheriff who had arrested a wanted murderer on his mail rounds was prosecuted for violating a statute prohibiting obstruction of the passage of mail. United States v. Kirby, 74 U.S. (7 Wall.) 482, 483 (1868). Moore claims that this case supports the Normativist assertion that "there is a general 'safety-valve' question of justice that must be asked in all interpretation."

We have arrived at the following conclusion. In the theory of legal adjudication, each of Old Textualism, New Textualism, Intentionalism, and Normativism has a role to play. But the role of each theory is heavily circumscribed. Old Textualism applies to the easiest cases, the cases in which the relevant dispute does not concern an ambiguous, vague, or context sensitive piece of language. Intentionalism applies when a dispute hinges on the resolution of ambiguity. New Textualism applies when the relevant provision is unambiguous (or has been disambiguated), but remains either vague or context sensitive. And Normativism applies when the unambiguous or disambiguated provision contains language of normative import. There is, then, a robust sense in which the proponents of all these theories are right. But there is also a robust sense in which the typical proponent of each theory is mistaken. For each proponent insists that his theory applies in each and every case. And, in this, he is wrong. It would be a mistake to adopt a New Textualist approach to the resolution of ambiguity, and it would be no less of a mistake to adopt an Intentionalist approach to the resolution of vagueness. It would be a mistake to adopt an Old Textualist approach to language containing linguistic infelicity, and it would be no less of a mistake to adopt a Normativist approach to nonnormative language containing no linguistic infelicity whatever. If there is a moral here, it is that different linguistic problems demand different solutions. Once each theory is given its due and its supporters come to recognize that it does not apply beyond its proper domain, the road is open to synthesis, and, ultimately, theoretical reconciliation.

Moore, *supra* note 6, at 387. But this is too quick. What this case illustrates is the possibility of conflict between legal duties. On the one hand, sheriffs have a legal duty (*qua* sheriffs) to arrest wanted murderers. On the other hand, sheriffs have a legal duty (*qua* citizens) not to obstruct the passage of mail. The *Kirby* case is one in which these duties appear to conflict. The first question a judge should ask here is whether it was possible for the sheriff to discharge both duties, for example, by waiting until the wanted murderer had finished his shift as a mail carrier. If the answer to this question is yes, then the sheriff should be found guilty. Suppose now that the mail carrier was suspected of committing murder *while he was delivering the mail*, or that there was evidence indicating that he might be a danger to others *while on his delivery rounds*. In that case, the mail carrier's arrest is justified, but only on standard exigency grounds. In any event, this case provides no support for the Normativist thesis that every law contains an implicit "prevention of injustice" proviso.