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“INTENSIONAL CONTEXTS” AND THE RULE THAT
STATUTES SHOULD BE INTERPRETED AS
CONSISTENT WITH INTERNATIONAL LAW†

*John M. Rogers**

Striving for consistency—for consistency, that is, properly understood—must characterize legal reasoning in order for the reasoning to deserve to be called “legal.” It may conceivably be “good” or “moral” for identically situated persons to be treated differently by institutions with power, but doing so can hardly be called “legal.” Very careful attention must be given, of course, to what is meant by “identically situated,” as no two different persons can be 100% identically situated. Their names, for instance, are different. By identical, we must mean no relevant distinction, or no distinction that serves a purpose that we can articulate and defend. Of course, people may have very different concepts of what is a relevant distinction and what is not, based on different conceptions of what is good, or valuable, or desirable. Evaluation of what distinctions are relevant is integral to the legal enterprise. The better it is done, the better law will serve the purposes that law is intended to serve.

It is impossible to evaluate distinctions if consistency is not demanded. An argument that is inconsistent (in the sense that there is no defensible distinction justifying different treatment to similar situations) is therefore *legally* indefensible. For this reason, logic is bound up in the law. Sound legal reasoning must be logical legal reasoning. Otherwise the enterprise is flawed, if not doomed. Illogic is accordingly a bane of the law. It is thus with open arms that scholars should welcome Professors Rodes and Pospesel’s insightful treatise on symbolic logic for legal analysis.¹ Law cannot be “too” logical.

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1 ROBERT E. RODES, JR. & HOWARD POSPESEL, *PREMISES AND CONCLUSIONS: SYMBOLIC LOGIC FOR LEGAL ANALYSIS* (1997).

If seeming logic leads to intuitively unsatisfying results, a troublesome answer is to eschew logic. A preferable answer is to explain the flaw in the logic. In their chapter on "Intensional Contexts," Rodes and Pospesel alert us to a logical flaw that, once explained, may help us reject legal results that give logic a bad name in the law. They use symbolic logic to do this.

However, some bad law that seems to result from logical flaws may be more accurately attributed to differing value judgments or a differing weighing of public interests. If a legal result is criticized purely on the grounds that the logic fails, when in fact the logic is defensible but the policy is not, then it is just as hard to evaluate the criticism as in the reverse situation where there is a hidden flaw of logic. I am led to this observation from the seeming applicability of Rodes and Pospesel's treatment of intensional contexts to a legal rule that I have recently been devoting some attention. That rule is the canon, or maxim, that statutes will be construed, if possible, to conform to the international law obligations of the United States.

What follows is a description of the rule, along with examples of its application, and a traditional legal justification of the rule on policy grounds. This is followed by my criticism of application of the rule in a particular case, *United States v. Palestine Liberation Organization*,² where the identified policies do not warrant its application. Next, I examine whether that criticism *itself* is subject to the criticism that a logical argument, along the lines of Rodes and Pospesel's, would have done just as well. In the end I reject this. In doing so, I evaluate whether perhaps some of the challenging examples used by Rodes and Pospesel are more easily explained and resolved using traditional legal analysis than through symbolic propositional analysis.

I. THE RULE OF INTERPRETATION THAT STATUTES COMPORT WITH INTERNATIONAL OBLIGATIONS

The doctrine that United States courts will strive to interpret United States law consistently with international law goes back at least to the time of Chief Justice Marshall.³ In *The Schooner Exchange*,⁴ he interpreted "general statutory provisions [describing] ordinary juris-

2 695 F. Supp. 1456 (S.D.N.Y. 1988).

3 The very concept of canons, or maxims, of statutory construction has been subjected to extensive criticism, but the criticism has not detracted from the widespread judicial use of such rules of interpretation. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 23-27 (1997).

4 *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116 (1812).

diction of judicial tribunals" not to extend to a private suit claiming title to a French naval vessel where immunity from such a claim was an international obligation of the United States to France.⁵

The Supreme Court had applied the maxim of statutory construction even earlier, in *Murray v. Schooner Charming Betsy*.⁶ In that case, the Court interpreted a U.S. statute forbidding commercial dealings with France by any person under the "protection" of the United States as not applying to a U.S.-born person who had gone to Danish territory and taken on Danish citizenship there. According to Marshall,

an act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.⁷

Subsequent cases have repeatedly followed the rule that United States statutes will be interpreted, if possible, consistently with the international obligations of the United States, whether those obligations arise from customary law, as in *The Schooner Exchange* and *The Charming Betsy*, or from treaty.

In *Chew Heong v. United States*⁸ the Supreme Court considered whether Congress, by statute, had withdrawn the privilege of a Chinese laborer to return to the United States, a privilege held to be protected by an 1880 treaty with China. The Supreme Court found the statute did not limit the entry of Chinese laborers who had been in the United States when the treaty went into effect but who had left prior to the legislation in question. The statute, passed in 1882 and amended in 1884, precluded the immigration of Chinese workers, with the exception of such workers who had been in the United States before November 17, 1880 (the date of the Treaty).⁹ The statute, however, required as the only evidence of the right of re-entry a certificate issued by U.S. Customs upon departure.¹⁰ Chinese who left the U.S. before the statute was enacted of course had no such certificate. Chew Heong was one such worker. He was thus effectively excluded by the literal language of the statute. The Supreme Court interpreted the language requiring a certificate as applying only to Chinese labor-

5 *Id.* at 146.

6 6 U.S. (2 Cranch) 64 (1804).

7 *Id.* at 118.

8 112 U.S. 536 (1884).

9 An act to execute certain treaty stipulations relating to Chinese, ch. 126, § 2-3, 22 Stat. 58, 59 (1882) (amended 1884), reproduced in *Chew Heong*, 112 U.S. at 544.

10 § 4, 22 Stat. at 59-60, reproduced in *Chew Heong*, 112 U.S. at 544-45.

ers departing the United States after the 1882 statute was passed.¹¹ A stricter interpretation, the Court found, would put the United States in violation of its treaty obligation to China.¹²

We can initially identify two distinct but related ideas that support the rule that statutes will be interpreted to comport with the international obligations of the United States. The first we may call legislative. That is, when a court is faced with two possible constructions of the law, and the court is not entirely sure which is correct, it in effect has a legislative choice. Particularly in a common law jurisdiction,¹³ it may be argued that the court should make the choice that better furthers public policy from its own perspective. In this way, the court acts as a sort of interim legislature, deciding which way the statute should operate until the legislature says otherwise. Knowing that the interests of the United States are generally furthered by the nation's compliance with its international obligations, the court chooses the option which it sees as better supported by public policy. That better choice is the interpretation that better enables the nation to benefit from the international legal system.

Some lawyers, judges, and scholars will reject the idea that the courts in our constitutional system should legislate in this way, or would confine such legislation to the most limited of circumstances.¹⁴ For them, the second justification of the interpretive rule is more persuasive—the court's role is to ascertain the intent of the legislature. That is, the court is not to determine what is good public policy when interpreting ambiguous statutes, but may look at public policy to determine what the legislature intended. Since legislatures presumably want what better serves the public interest, the interpretation that better serves the public interest is more likely what the legislature wanted. Where international law is involved, a court can reasonably conclude that the legislature would prefer the choice that keeps the nation in compliance with its international obligations. This argument may have more of a fictional air to it, but it fits more comfortably with traditional notions of the respective roles of the legislative and judicial branches.

In his majority opinion in *Chew Heong*, Justice Harlan appeared to rely upon both ideas. He stressed the importance to the United States

11 *Chew Heong*, 112 U.S. at 548, 554–55.

12 *Id.* at 549–50.

13 Cf. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 51–52 (2d ed. 1985).

14 Textualists, for instance, don't like this idea because it requires an ambiguity and they like to think that in almost all cases texts have a determinate meaning.

to remain in compliance with its obligations, but he always tied this to the inferred intent of Congress:

If, as claimed by [Chew], the Treaty of 1880, fairly interpreted, secured to him, at the time of his departure for Honolulu, the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right, the court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country. "There would no longer be any security," says Vattel, "no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises." . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.¹⁵

The interpretive rule was promoted to a "clear statement rule" in *Benz v. Compania Naviera Hidalgo*¹⁶ and *McCulloch v. Sociedad Nacional de Marineros de Honduras*.¹⁷ In these cases the Supreme Court interpreted the statutory jurisdiction of the U.S. National Labor Relations Board not to extend to operations of foreign-flag ships employing alien seamen, even though the broadly-worded jurisdictional provisions literally encompassed such vessels when there was "a question of representation affecting . . . transportation . . . between any foreign country and any State [of the United States.]"¹⁸ The statute was held

15 *Chew Heong*, 112 U.S. at 539-40 (citations omitted).

16 353 U.S. 138 (1957).

17 372 U.S. 10 (1963).

18 See 29 U.S.C. § 159(c)(1) (1994), *quoted in McCulloch*, 372 U.S. at 15 n.5 ("Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing . . ."); *Id.* § 152(6) (1994), *quoted in McCulloch*, 372 U.S. at 15 n.3 ("The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.") (emphasis added).

not to warrant an exercise of jurisdiction by the National Labor Relations Board that would violate U.S. obligations to Honduras, absent a clearer expression by Congress:

[I]f the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews. Therefore, we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department, but also by the Congress. In addition, our attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship. . . .

. . . We therefore conclude . . . that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." Since neither we nor the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election.¹⁹

Although the *McCulloch* case is more often cited, the theory for requiring Congress to express clearly its intent to violate international obligations is more clearly laid out in *Benz*.

The theory, analytically distinct from those of interstitial policymaking and accurately determining intent, may be called functional. That is, under our Constitutional system, any action that is likely to elicit foreign protest ought to be clearly attributable to one of the political branches—the President or Congress—since those arms of the government are better suited to deal with or respond to such protests. In *Benz*, Justice Clark (a former U.S. Attorney General) relied directly upon the following historical sequence: The Supreme Court in a 1928 case, *Jackson v. S.S. "Archimedes,"*²⁰ had interpreted narrowly a federal statute prohibiting advance wage payments to merchant seamen. The statute was held not to extend to advance payments made by foreign vessels while in foreign ports, even where the recipient was an American and the ship was sailing for the United States, because Congress had not "specifically made" such a "sweeping" provision.²¹ When proposals were subsequently made in Con-

19 *McCulloch*, 372 U.S. at 20–22 (citations and footnotes omitted).

20 275 U.S. 463 (1928).

21 *Id.* at 470. The words extending the statute to "foreign vessels while in waters of the United States" were limited to payments in the United States, *id.* at 466–68, and the words of an amendment voiding wage advances "whether made within or without

gress to extend the Seamen's Act to just such situations, a "storm of diplomatic protest resulted," including vigorous denunciations from eight major maritime nations.²² "In each instance the bills died in Congress."²³ The point drawn by Justice Clark from this historical example was that the political branches bear the responsibility for United States infringements of international obligations. Under our system the political branches are more able to deal with, and perhaps avoid, the consequences of such infringements.

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.²⁴

A necessary corollary is that the political branches must *be seen by foreign states* as responsible for the actions that they perceive to infringe upon their rights. Only if the Congress (or the President) acts *clearly* to affect those rights is the protest likely to be directed where and when it belongs—at the political branches when they act. If the political branches act ambiguously—thereby avoiding or postponing protest—and the Court interprets the action in a way that violates international obligations, the diplomatic heat may be directed at the Court, a body with little functional capability for dealing with it.²⁵

There are thus three mutually reinforcing, but analytically distinct, theories for courts to prefer statutory interpretations that keep the United States in conformity with its international obligations. First, it is good policy when competing interpretations are not dispositive. Second, it is a good way to ascertain what the legislature actually meant. And third, infringements of foreign state rights should be

the United States or territory subject to the jurisdiction thereof" were held not to apply to foreign vessels, *id.* at 469–70.

22 *Benz v. Campania Naviera Hidalgo*, 353 U.S. 138, 146 (1957).

23 *Id.*

24 *Id.* at 146–47.

25 My colleague, Michael Healy, suggests that this theory is not based on *ambiguity*, since the "ambiguity" arguably arises *because* the clear statement rule is applied. He notes that it would be more accurate to say that Congress is acting without either debating or legislating as to the particular application of the act to foreign states. The result is perhaps more legitimate if framed as a "background rule" rather than as a "clear statement rule," since the Court can then simply say that Congress acts aware of the background rules. Either way, the result is that foreign states do not need to be as concerned about the effect of broadly worded statutes.

clearly stated so as to direct protest or retaliation where it belongs—toward the political branches.

All three theories contemplate that when Congress *does* act clearly, the courts of the United States must follow that clear action, rather than any “higher” international law. All of the cases cited assume this, most of them explicitly. But just how clear does the Congress have to be? In some cases the required level of clarity has been reached.

In the *Head Money Cases*,²⁶ decided the same day as *Chew Heong*, the Supreme Court upheld a federal statute levying “a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States.”²⁷ The taxpayer argued that implementation of this statute violated treaty obligations to foreign powers.²⁸ Although the Court doubted whether treaty provisions were violated, it chose to reject the argument instead on the ground that Congress in any event has the power to pass laws for the “enforcement, modification, or repeal” of treaty obligations, insofar as such obligations are “the subject of judicial cognizance in the courts of this country.”²⁹ There appeared to be no question as to how the statute should be interpreted. The words “each and every passenger, not a citizen of the United States” apparently were clear enough.

Also clear enough was Congress’ response to *Chew Heong*. The U.S.-China treaty of November 17, 1880, permitted the United States to limit the entry of Chinese workers, but permitted Chinese workers who had entered before that date and gone back home, to return to the United States³⁰ A federal statute required such workers upon their return to present a certificate obtained from U.S. Customs when they had departed the United States³¹ That statute was interpreted in *Chew Heong* not to apply to returning laborers who had left the United States before the certificate requirement was enacted in 1882.³² Congress subsequently perceived fraud on the part of new workers who claimed to have been in the United States before 1880, and in 1888 enacted a new statute simply making it

26 112 U.S. 580 (1884).

27 An act to regulate Immigration, ch. 376, 22 Stat. 214 (1882), *reprinted in Head Money Cases*, 112 U.S. at 589–90.

28 *See Money Head Cases*, 112 U.S. at 585.

29 *Id.* at 599.

30 *See supra* notes 8–15 and accompanying text.

31 *See supra* notes 8–15 and accompanying text.

32 *See supra* notes 8–15 and accompanying text.

unlawful for any [C]hinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.³³

The 1888 Act also voided departure certificates issued under the previous act. In *Chae Chan Ping v. United States*,³⁴ the Supreme Court upheld the exclusion of a Chinese laborer who had lived in California from 1875 until 1887, and who had a departure certificate entitling him to return. As in the *Head Money Cases*, the Court rejected the argument that Congress had no power to determine how or whether the United States would comply with its treaty obligations. There was no question as to the interpretation of the statute; it was assumed to conflict with the treaty obligation.³⁵

These cases are all consistent with each of the theories for the interpretive rule that statutes are to be construed where possible as consistent with international law obligations.³⁶ First, if no ambiguity exists, there is no room for interstitial policy-making. Second, there is no need to figure out by looking at international law what Congress meant if Congress by the statute in the *Head Money Cases* cannot have meant the head tax not to have been paid, or if Congress by the statute in *Chae Chan Ping* cannot have meant that Chinese laborers be readmitted. Finally, if the legislation is clear enough to put a potentially offended foreign state on notice, then the functional purpose of the clear statement rule is met. In these cases Congress appeared to know exactly what it was requiring, and foreign ministries of foreign states could likewise figure it out.

We can make the following conclusions about the rule of interpretation:

1. It helps the United States remain in compliance with its international obligations, thereby furthering the national interest by increasing the ability of the nation to get the benefit of the international legal system.
2. It applies regardless of whether the international legal obligation is one of treaty law or customary law.

33 An act to supplement an act entitled "An act to execute certain treaty stipulations relating to Chinese," ch. 1064, 25 Stat. 504, 504 (1888).

34 130 U.S. 581 (1889).

35 *Id.* at 600-10.

36 The only issue we are treating here is the *interpretation* of the statute, in light of the alleged violation of international law. An argument that a treaty of the United States is constitutionally *superior* to a later-enacted statute (explicitly rejected in *Chae Chan Ping* and the *Head Money Cases*) is a very different one and not dealt with here.

3. At the same time, it preserves the ability of the elected political branches (Congress and President) to have the final say with respect to issues other than the interpretation of the U.S. Constitution. Final say regarding constitutional interpretation is a special prerogative of the unelected, independent courts in our system, best preserved by not expanding such final authority to other areas.

Moreover, the fact that the decisions of the political branches are ultimately determinative of how our nation acts in the international legal system does not in the least undermine the effectiveness of the international system of binding obligations. Each nation determines for itself which arm of its government will make such decisions.

More recent cases reflect the same consistent understanding. In *Weinberger v. Rossi*,³⁷ the Supreme Court interpreted a statute that protected American dependents on foreign military bases from employment discrimination "unless prohibited by treaty."³⁸ An executive agreement between the United States and the Philippines, binding in international law, gave preference to Filipino employees at military bases in the Philippines.³⁹ Some American employees of a U.S. naval base challenged the preference.⁴⁰ The American employees relied upon the statute, while the U.S. Government relied upon the treaty exception. The Supreme Court was required to interpret Congress' use of the word "treaty" in the statute. The word could have the international connotation of a written, binding international agreement, or it could have the more limited meaning of a "Treaty" under the United States Constitution, that is, an instrument that under Article II requires consent by two-thirds of the U.S. Senate.⁴¹ The executive agreement involved in *Weinberger* was an international "treaty" but not an Article II "Treaty."⁴² The Court interpreted the word "treaty" in the *statute* in the broader sense, to include internationally binding executive agreements, so as to avoid an interpretation that would result in an international law violation on the part of the United States to the Philippines.⁴³

37 456 U.S. 25 (1982).

38 5 U.S.C. § 7201 (1976) (amended 1978).

39 Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines, May 27, 1968, U.S.-Phil., art I, 19 U.S.T. 5892, 5892-93.

40 See *Weinberger*, 456 U.S. at 28.

41 *Id.* at 29-30.

42 *Id.* at 30-31.

43 *Id.* at 36.

The Court's reasoning fit perfectly with the first and second theories for the rule of interpretation:

[I]f Congress intended to limit the "treaty exception" in § 106 to Art. II treaties, it must have intended to repudiate these executive agreements that affect the hiring practices of the United States only at its military bases overseas. One would expect that Congress would be aware that executive agreements may represent a *quid pro quo*: the host country grants the United States base rights in exchange, *inter alia*, for preferential hiring of local nationals.⁴⁴

This is a pointed expression of the national interest supporting compliance with international law obligations, combined with attribution to Congress of a recognition of that interest.⁴⁵

The rule of interpretation also continues to thrive with respect to customary law. The rule is so deeply embedded in our law that it is sometimes hardly mentioned. For instance, in *United States v. Columba-Colella*,⁴⁶ the Fifth Circuit reversed a federal criminal conviction of a British national accused of receiving in Mexico an automobile previously stolen in the United States. The criminal statute on which he was convicted provides: "Whoever receives . . . any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both."⁴⁷

Under customary international law, one state may not criminally prosecute the national of another state for an action (1) outside the territory of the prosecuting state, (2) not directed at the governmental functions or national security of the prosecuting state, (3) with no intended or actual effect in the prosecuting state, (4) except for certain crimes against the international system, such as piracy.⁴⁸ In a

44 *Id.* at 31–32.

45 In *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984), the Supreme Court applied the rule of interpretation to uphold a treaty limit on airline baggage loss liability, where the treaty tied the amount of the limit to the gold standard, but a later U.S. statute had taken the United States off the gold standard.

46 604 F.2d 356 (5th Cir. 1979).

47 18 U.S.C. § 2313(a) (1994).

48 See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300–05 (4th ed. 1990); S.Z. Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 5, 17–34 (M. Cherif Bassiouni & Ved P. Nanda eds. 1973); Harvard Research in International Law, *Jurisdiction with Respect to Crime: Introductory Comment*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935); John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 448 n.5 (1987); Lotika Sarkar, *The Proper Law of Crime in International Law*, in *INTERNATIONAL CRIMINAL LAW* 50 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

careful opinion, the Fifth Circuit came to the conclusion that under these principles of customary international law the British national could not be tried by the United States, and reversed his conviction.⁴⁹ Although almost all of the opinion examines the relevant international law,⁵⁰ one sentence links the international law to the law of the United States, that is, to the law that Fifth Circuit judges are sworn to uphold: "We find that because the defendant's act in this case is beyond its competence to proscribe, Congress did not intend to assert jurisdiction here under 18 U.S.C. § 2313."⁵¹

The situation in *Columba-Colella* is precisely the type of situation where the rule of interpretation is most properly applied. The statutory language is very general. It does not reflect specific congressional intent to cover a situation involving a foreigner acting abroad, but does apply to a large number of situations in which there would be no international violation, such as where the automobile is received by an American, or received by a foreigner in the United States. Thus, *Columba-Colella* is very different from the *Head Money* and *Chae Chan Ping* cases, where interpreting the general language not to violate the treaty obligation would have made the statutory language virtually inoperative.

The "boundary-crossing" jurisdictional requirement on the receipt of stolen automobiles in the federal criminal statute in *Columba-Colella* was presumably included by Congress to eliminate any argument that the statute exceeded *federal* power under Article I of the United States Constitution.⁵² If the "boundary-crossing" provision of the statute was intended to preserve state as opposed to federal jurisdiction, there is no reason to attribute to the words the unrelated effect of infringing on international obligations. By not interpreting the statute to go so far, the court furthered the public policy of keeping the United States in compliance with its international obligations, and comported with what presumably would be the intent of Congress if Congress had thought about the subject, taking international law

49 See *Columba-Colella*, 604 F.2d at 359.

50 *Id.* at 358-60.

51 *Id.* at 360.

52 As explained in *United States v. Lopez*, 514 U.S. 549, 558 (1995):

Congress is empowered to regulate . . . persons or things in interstate commerce, even though the threat may come only from intrastate activities. *See, e.g., Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez v. United States*, 402 U.S. 146, 150 ([“F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)”).

into account. The interpretation also served the functional purpose of requiring Congress explicitly to extend the statute to activities by foreign nationals abroad, if that was the desire of Congress. Governments of foreign nationals could then properly direct their protests toward the political branches of the government.

II. THE *PLO* CASE

The rule of interpretation was applied with extraordinary, probably excessive, force in a 1988 case involving the Palestine Liberation Organization (PLO).⁵³ Prior to the PLO-Israeli peace process, the PLO was treated by the United States as an illegitimate terrorist organization. The PLO had, however, obtained a measure of respectability in other quarters, including the United Nations, which invited it to become an "observer" in 1974.⁵⁴ The United States, as host country to UN Headquarters, had entered into a treaty with the United Nations in 1947, known as the Headquarters Agreement, that provided:

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) representatives of Members . . . , (5) other persons invited to the headquarters district by the United Nations . . . on official business.⁵⁵

The United States accordingly permitted the PLO observer mission to set up an office in New York. In 1987 the U.S. Congress passed a statute (the Anti-terrorism Act of 1987 or "ATA") explicitly finding the PLO to be "a terrorist organization and a threat to the interests of the United States, its allies, and to international law."⁵⁶ The statute made it unlawful for the PLO,

notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of [the PLO].⁵⁷

How clear can you get? Not clear enough, according to the U.S. District Court in New York where the U.S. Attorney General sought an

⁵³ See *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988) [hereinafter *PLO*].

⁵⁴ See *id.* at 1459.

⁵⁵ Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, U.S.-U.N. art. IV, § 11, 61 Stat. 756, 761.

⁵⁶ 22 U.S.C. § 5201(b) (1994).

⁵⁷ 22 U.S.C. § 5202(3) (1994).

injunction to close the office of the PLO observer mission to the UN.⁵⁸

The court first determined that the United States was under an international obligation to permit the PLO mission to remain in New York. This conclusion was based on the language of the Headquarters Agreement, United States practice under that treaty, the position of the U.S. Executive Branch as expressed by the Department of State, as well as the repeatedly stated position of the UN General Assembly.⁵⁹ Applying the rule of interpretation, the court found that the ATA did not clearly enough require violation of the international obligation.

First, the court reasoned that the ATA did not mention the observer mission or the Headquarters Agreement.⁶⁰ Second, the words "notwithstanding any provision of law to the contrary" did not say "notwithstanding any *treaty* to the contrary."⁶¹ Third, no "member of Congress, at any point, explicitly stated that the ATA was intended to override any international obligation of the United States."⁶²

While the court's reasoning may have a superficial plausibility about it, it is not supported by any of the theories that underpin the rule of interpretation. First, it is a stretch to say that there is any interpretative gap for the court to fill here. There is only in the most fictional sense an ambiguity as to whether the language covered the mission in New York. It is true that the language is general, but the mere fact of generality does not raise the possibility of implied exceptions.

An exception that eliminates all or a large portion of the effect of general statutory language is much harder to infer than an exception that leaves most of the effect of the general statutory language intact. Thus the general language in *The Schooner Exchange* (general jurisdiction over property disputes), in *McCulloch* (transportation involving foreign commerce), and in *Columba-Colella* (receiving stolen automobiles that had been transported across an international border) all retained the bulk of their effect after being interpreted not to extend so as to violate international obligations. In contrast, the general language in the *Head Money* cases (each and every passenger), would have applied only rarely if an exception had been inferred for nationals of states with whom the United States had friendship treaties, because of the large number of such states. And the statutory

58 See *PLO*, 695 F. Supp. at 1460.

59 *Id.* at 1465-68.

60 *Id.* at 1468.

61 *Id.*

62 *Id.* at 1470.

language in *Chae Chan Ping* (any Chinese laborer), at least in the view of the Court, would have been engulfed by an exception for Chinese alleging they had been in the United States before 1880. There were only two PLO offices in the United States at the time of the ATA, one in Washington, D.C. and the observer mission in New York.⁶³ To say that general language applying to “offices, premises, or other facilities” might apply to only one of them is to read away fully half of the general applicability of the words.

It is especially hard to reconcile the second theory of the rule of interpretation with the holding in the *PLO* case. Did Congress actually intend to close the PLO observer mission in New York? It is hard to deny that it did, in light of the legislative history that the court itself relied upon. As the court said, [“t]he proponents of the ATA were, at an early stage and throughout its consideration, forewarned that the ATA would present a potential conflict with the Headquarters Agreement.”⁶⁴ The Secretary of State and the Legal Adviser of the State Department had written letters to that effect.⁶⁵ The court’s conclusion was not that Congress did not mean to close the mission, but rather that Congress did not necessarily intend to violate the Headquarters Agreement:

The only debate on this issue focused not on whether the ATA would [override any international obligation], but on whether the United States in fact had an obligation to provide access to the PLO. Indeed, every proponent of the ATA who spoke to the matter argued that the United States did not have such an obligation.⁶⁶

The court concluded that the ATA and its legislative history therefore did not “manifest Congress’ intent to abrogate” the obligation to comply with the Headquarters Agreement.⁶⁷

The court’s argument thus boils down to this: Congress did not understand the international legal implications of closing the mission. The court did not decide whether Congress meant to close the mission. Such analysis turns the second theory of the rule of interpretation completely on its head. That theory is that Congress’ words should be interpreted to comport with international law because we assume that Congress legislates in conformity with the international obligations of the United States. If we assume that Congress *misunder-*

63 The Washington office was closed in December, 1987 under the provisions of the Foreign Missions Act. *See* Palestine Info. Office v. Shultz, 853 F.2d 932, 935 (D.C. Cir. 1988).

64 *PLO*, 695 F. Supp. at 1469.

65 *Id.* at 1470 & nn. 35–36.

66 *Id.* at 1470.

67 *Id.* at 1471.

stands those obligations, then by that very assumption, the content of the obligations no longer serves as a guide to actual Congressional intent.

The third theory also does not support the court's conclusion. The international implications of the legislation were from the start very clear to the members of the international organization to whom the United States owed the obligation. The UN General Assembly responded to passage of the ATA well before the action was brought to enforce it in court.⁶⁸ Indeed, before the ATA's prohibition on PLO offices went into effect, the Secretary-General of the United Nations had obtained an advisory opinion from the International Court of Justice to the effect that the United States was bound to arbitrate the dispute precipitated by passage of the ATA.⁶⁹ There was thus no question that the ATA was specific enough to bring the international issue to the attention of the foreign obligees of the United States, and that protest would be accordingly directed to the appropriate political branches. The structural purposes of the clear statement rule would thus have been amply met by an order enforcing the plain meaning of the ATA.

The structural theory of *Benz* and *McCulloch* was based on the primary assignment of operating in the international legal system to the political branches of the government. The district court in *U.S. v. PLO* turned this theory on its head and instead effectively applied a different kind of structural theory. That is, the courts will not enforce directions from Congress based on erroneous interpretations of international law until Congress has considered and explicitly rejected the court's interpretation of that international law. This type of structural argument assumes the superiority of courts in determining and applying international legal obligations. In that sense the opinion is wholly unprecedented.⁷⁰

68 *Id.* at 1467 n.27 (citing G.A. Res. 42/229A, Agenda item 136 (March 2, 1988)).

69 *Id.* at 1461 (citing Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (April 26, 1988)).

70 The decision is also troublesome because it was used by the Executive Branch to circumvent the clear intent of Congress. Although the President had signed the ATA, the Executive Branch had consistently opposed the requirement that the observer mission be closed. *See id.* at 1466-67. The ATA contained a provision requiring the Attorney General to institute legal action to close the mission, 22 U.S.C. § 5203(a), and the U.S. Justice Department complied by bringing the suit. Certainly it would have been irresponsible within the U.S. legal system for the Attorney General, in the face of such a clear directive, simply not to have sought enforcement of the statute. It was perhaps equally irresponsible not to appeal the decision of the district court in this case, yet that is what the Department of Justice decided.

III. AN EASIER ANSWER?

Rodes and Pospesel's treatment of "intensional contexts" suggests that there was an easier way to criticize the result in the *PLO* case. That is, that the reasoning was illogical and the conclusion therefore invalid. Rodes and Pospesel, for instance, posit an argument they call "Smith's Beliefs":

Smith believes that all Lutherans are Protestants.

Jones is a Lutheran.

So, Smith believes that Jones is a Protestant.⁷¹

Rodes and Pospesel explain that this is an invalid argument which, understood properly, has no valid expression in symbolic logic: "It is clearly possible for the premises of this argument to be true and the conclusion false (Smith may not know Jones or he may mistakenly think that Jones is Catholic)."⁷² Rodes and Pospesel then identify ways to recognize the types of troublesome expressions that seem to permit such invalid conclusions.⁷³

The argument suggests the following reproach for my criticism of the *PLO* case. Why did I not simply argue that the district court made the same logical error as in Smith's Beliefs, to wit:

Congress intends that its statutes comport with international law.

International law does not permit closure of the PLO mission to the UN.

So, Congress intended its statute not to require closure of the PLO mission to the UN.

Assuming that this is a fair restatement of the reasoning of the court in the *PLO* case, why is this not just as illogical as Smith's Beliefs? It is a formulation that appears to parallel all of the examples of syllogisms that Rodes and Pospesel term defective. Other examples are:

The decision not to appeal can be praised as keeping the United States in conformity with its international obligations, but it subverted the constitutional allocation of authority among the three branches. The President could have vetoed the legislation as a whole, but having signed it he should be required to comply with it. The only exception should be if the statute is unconstitutional. Even in cases of asserted unconstitutionality, the Department of Justice generally appeals such determinations by lower courts to the U.S. Supreme Court. A lower court holding that a statute does not mean what it says, combined with an executive determination not to appeal, amounts to two branches acting in cahoots to deprive the third branch of its legitimate power. Such a distortion of our domestic system of separation of powers is not required by the international legal system, which operates generally without regard to which domestic arm carries out the state's international obligations.

⁷¹ RODES & POSPESEL, *supra* note 1, at 298.

⁷² *Id.*

⁷³ *Id.* at 302.

You can learn from the dictionary that a person who collects butterflies is a lepidopterist.

George collects butterflies.

So, you can learn from the dictionary that George is a lepidopterist.

and

Pat hates Communists.

Natasha is a Communist.

So, Pat hates Natasha.

and

O'Brien believes that all Irish children should learn Gaelic.

Maureen is an Irish child.

So, O'Brien believes that Maureen should learn Gaelic.⁷⁴

In each case the reasoning appears defective according to Rodes and Pospesel.⁷⁵ That is, in each case the first two premises may be true while the last not. The dictionary may say nothing about George. Pat may like Natasha (not knowing, for instance, her political preferences). O'Brien may not even know of Maureen's existence.

The fallacies are likely to occur, according to Rodes and Pospesel, when the first premise is *de dicto* (about a statement) and not *de re* (about a thing).⁷⁶ A *de dicto* statement ascribes a property to a statement or proposition, while a *de re* statement assigns a property to an individual or thing rather than to another statement.⁷⁷ Thus in the first example, the first sentence tells the reader something about the *statement* "a person who collects butterflies is a lepidopterist," and, in the third example, the first sentence tells the reader something about the *statement* "all Irish children should learn Gaelic." The premise of the second example is also *de dicto*, presumably because it is the logical equivalent of "Pat thinks that Communists are evil," and thus tells the reader something about the *statement* "Communists are evil."

Rodes and Pospesel point out that it is not always easy to determine whether a premise is *de dicto* or *de re*,⁷⁸ and that some interpretive effort is often needed to apply the distinction.⁷⁹ Once a premise is identified as *de dicto*, however, it risks being the basis of a logically defective syllogism.⁸⁰

⁷⁴ *Id.* at 310.

⁷⁵ *Id.*

⁷⁶ *Id.* at 302-08.

⁷⁷ *Id.* at 306.

⁷⁸ *Id.* at 305-06.

⁷⁹ *Id.* at 308-09.

⁸⁰ *Id.* at 302-03, 308.

The examples I have quoted from Rodes and Pospesel involve statements where, as a matter of propositional logic, the relevant criterion is truth. Rodes and Pospesel suggest that the analysis can be used, however, to criticize a *legal* conclusion.⁸¹ Rodes and Pospesel examine the holding of *Commonwealth v. Duchnicz*,⁸² in which a man was held not guilty of rape because the victim consented, where at the time of intercourse the victim had mistaken the defendant intruder to be her husband.⁸³ Rodes and Pospesel identify the following reasoning as defective:

Defendant Duchnicz rapes victim Jane only if she does not consent (to make true the proposition)⁸⁴ that Jane Doe has intercourse with Duchnicz. Jane Doe's consent is demonstrated by the following subproof:

A. Jane Doe consented (to make true the proposition) that Jane Doe has intercourse with the man in her bed.

81 As I have argued elsewhere, a meaningful analogue to truth in legal logic is "lawness." John M. Rogers and Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 998-99 (1992). In other words, talking logically about the law requires treating "what the law requires (provides)" as the criterion for validity, rather than "what is true." A scientist may say:

Humans over 18 years of age have forgotten their baby experiences.

John is a human over 18 years of age.

So, John has forgotten his baby experiences.

If the first two statements are *true*, then the third statement is also *true*. In contrast, a lawyer may say:

Citizens over 18 have the right to vote.

John is a citizen over 18 years of age.

So, John has the right to vote.

If the first statement is *the law*, and the second statement is true (as a matter of fact or law, or both), then the third statement is *the law*.

Of course, if the logician is wedded to the idea that the relevant criterion must be truth, another way to express the legal syllogism is as follows:

It is the law that citizens over 18 years of age have the right to vote.

It is the law that (or *Under the law*) John is a citizen over 18 years of age.

So, *it is the law that* John has the right to vote.

Note that this appears to put every statement about the law in the *de dicto* category.

82 42 Pa. C. 651 (1914).

83 RODES & POSPESEL, *supra* note 1, at 297. Rodes and Pospesel suggest that the court "could not find a way around" the woman's consent. *Id.*

84 Rodes and Pospesel insert the "make true the proposition" language (set off here with parentheses inserted by me) to emphasize the *de dicto* nature of the premise. Consent makes sense as a legal matter, only if it relates to an action of another. It can of course refer to a proposition if the proposition describes an action, and that is what is the case here. But if consent is, in contrast, being used to mean assent to the truth of a statement (whether a statement about an action or some other statement), then its meaning is taken altogether too far from the law.

- B. The man in Jane Doe's bed was Duchnicz.
 C. Therefore, Jane Doe consented (to make true the proposition) that Jane Doe has intercourse with Duchnicz.⁸⁵

This reasoning is said to be defective,⁸⁶ but is it?

The answer appears to depend on the meaning of "consent." Consent can have a number of meanings. Three possibilities are:

Victim consents₁ by acting outwardly so as to give a reasonable actor the belief that victim does not object to the action.

Victim consents₂ by not objecting inwardly to the action of a defendant at the time of the action.

Victim consents₃ if and only if she would not object inwardly to the action of the defendant if she knew certain facts (such as the identity of the actor).⁸⁷

These and other definitions of consent often do not need to be distinguished. In a typical case, for instance, a victim's outward action reflects the victim's inward thoughts, and the victim either knows the identity of the defendant, or it doesn't matter. In such cases it is not necessary to be as precise about the definition of consent. In a case like *Duchnicz*, it becomes important.

Where consent is a defense in intentional crimes and in intentional torts, the law must balance the interests of persons acting in the reasonable belief that there has been consent to contact (and the in-

85 RODES & POSPESEL, *supra* note 1, at 309-10.

86 More precisely, Rodes and Pospesel reason:

The argument appears to have a valid symbolization only by employing the predicate 'Jane Doe consents to make true the proposition that Jane Doe has intercourse with x.' The predicate is illicit because it attempts to express a proposition with an incomplete phrase ('the proposition that Jane Doe has intercourse with x').

Id. at 310. The idea here appears to be that the syllogism translates validly into symbolic logic only if the phrase "the man in her bed" is a "variable" (the equivalent perhaps of "whatever man is in her bed" rather than of "the particular man who was actually in her bed at the time"), and "placing a variable in an intensional context" is not permitted by the logical system Rodes and Pospesel are using because it leads to the same kind of fallacy as presented by Smith's Beliefs. *Id.* at 302.

87 To make the precise definitions correspond to the "make true the proposition" language of Rodes and Pospesel, the definitions would read:

Victim consents₁ by acting outwardly so as to give a reasonable actor the belief that victim does not object to making true the proposition that the action occur.

Victim consents₂ by not objecting inwardly at the time of an action to making true the proposition that the action of the defendant occurs.

Victim consents₃ if and only if upon later learning certain facts (such as the identity of the actor) she would not have objected inwardly to making true the proposition that the action of the defendant occurs.

terest of society in encouraging or permitting such contact) with the interest of potential victims in avoiding unwanted pain or contact. The balance may be different depending on the crime or tort involved, since society may have more or less of an interest in encouraging or permitting the contact, and society may have more or less of an interest in ensuring freedom from unwanted contact. The first definition of consent (consent₁) places a high value on the interests of persons acting in the face of outward manifestations of nonobjection.⁸⁸ Consent₂ places a greater value on maintaining the mental peace of the victim, since it makes the actor affirmatively responsible for ascertaining the actual desires of the victim. Consent₃ protects not just the mental peace of the victim at the time of the act, but also the mental peace of the victim at a later time. The third definition may be more warranted where the contact has a stigmatic or humiliating aspect, such as in the case of sexual intercourse. These definitions do not correspond to Rodes and Pospesel's distinction between *de dicto* and *de re* statements. Instead they incorporate different social policies about what activity society wants to protect or deter.

If consent is defined precisely enough to take care of the factual situation to which it is being applied, then the syllogism that Rodes and Pospesel describe is perfectly valid. Consider the following:

- A. Jane Doe consented₁ that Jane Doe has intercourse with the man in her bed.
- B. The man in Jane Doe's bed was Duchnicz.
- C. Therefore, Jane Doe consented₁ that Jane Doe has intercourse with Duchnicz.

With consent precisely defined, this syllogism is perfectly acceptable. If Duchnicz reasonably believes that Jane Doe agrees to have sex with him, then there is consent₁. If Duchnicz deceived Jane Doe, or knew of her mistake and took advantage of it knowing it could make a difference to her decision, there would not be consent₁.⁸⁹ These con-

88 Thus in the famous case of *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891), a ship passenger sued a shipping company on the basis of a vaccination by the ship's surgeon that she claimed she did not agree to. The Supreme Judicial Court of Massachusetts rejected the claim since "[t]here was nothing in the conduct of the plaintiff to indicate to the surgeon that she [plaintiff] did not wish to [avoid] quarantine and to be vaccinated, if necessary, for that purpose." *Id.* at 266.

89 Thus, even a hundred years ago, courts had no difficulty finding consent to be vitiated by deceit. In *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881), a woman undergoing childbirth had agreed to the presence of a person who was not a doctor. She was permitted to recover against that person "upon afterwards ascertaining his true character," where the court assumed that nondisclosure of the person's lay status amounted to deceit. *Id.* at 148.

clusions are consistent with the social policies that support the definition of consent₁.

Now consider the syllogism using consent₂:

- A. Jane Doe consented₂ that Jane Doe has intercourse with the man in her bed.
- B. The man in Jane Doe's bed was Duchnicz.
- C. Therefore, Jane Doe consented₂ that Jane Doe has intercourse with Duchnicz.

This syllogism also works fine. Recall that consent₂ means not objecting inwardly to the action of a defendant at the time of the action. If Jane Doe did not inwardly object to intercourse with Duchnicz because she thought he was her husband at the time, then she consented₂. This conclusion is consistent with the policy that supports the definition of consent₂. That is, the harm of the contact that is primarily abhorred by society is that suffered at the time of contact, and not later. Thus there are perfectly reasonable tort cases where a material mistake by plaintiff does not vitiate consent.⁹⁰ In the context of a criminal proceeding for rape, it seems bad to define consent this way. It inadequately deters deception by aggressive men, and it places too little value on protecting victims from the shame and mental distress of having been deceived. The counter-argument, weak as it may be, is that the heavy criminal penalty for rape should not be imposed for what is essentially fraud.⁹¹

Finally, consider the syllogism using consent₃:

- A. Jane Doe consented₃ that Jane Doe has intercourse with the man in her bed.
- B. The man in Jane Doe's bed was Duchnicz.
- C. Therefore, Jane Doe consented₃ that Jane Doe has intercourse with Duchnicz.

This syllogism also works fine. Recall that consent₃ means not objecting inwardly to the action if she knew the identity of the actor. Jane Doe presumably did not consent₃ that she have intercourse with the man in her bed, since she would object inwardly (not to mention outwardly) if she knew the identity of the actor. Therefore since A is

90 In medical malpractice cases, for instance, the failure of a doctor to give information about how risky a procedure is does not automatically invalidate a patient's consent to be operated upon, even if knowing would have caused the patient to refuse treatment. See W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS 121 (5th ed. 1984) (showing that the plaintiff must also prove that the failure to inform was careless).

91 By analogy in the tort context, a man who takes indecent liberties on the false pretext that he is a doctor is liable for battery, while a man who pays for sex with a counterfeit bill is not. See *id.* at 120.

not the case, C cannot be concluded. Jane Doe did not consent₃ to intercourse with Duchnicz.

All of this is not meant to demonstrate that one definition of consent is preferable to others. Rather it shows that with precision of definition, the syllogism is perfectly acceptable for lawyers and courts, even where the troublesome characteristics identified by Rodes and Pospel are present. It really does little good to criticize the holding of *Duchnicz* for the invalidity of its logic; the logic is impeccable if the meanings are clear and consistent.

If we now look at the canon or maxim that statutes be interpreted consistently with international law, we can identify two perfectly reasonable meanings of Congressional "intent" to comply with international law:

Congress intends₁ to conform a statute to another law when it does not want to conflict with that other law even if Congress is mistaken as to the content of that other law.

Congress intends₂ to conform a statute to another law if and only if it does not want the statute to conflict with that other law *as Congress would interpret* that other law.

These definitions—like the various definitions of consent—often do not need to be distinguished. In a typical case, for instance, a court can attribute to Congress the same understanding of the other law at which the court arrives. In the classic cases applying the rule of interpretation regarding international law—from *The Schooner Exchange*, *The Charming Betsy* and *Chae Chan Ping* to *Rossi* and *Columba-Colella*—there is no indication that Congress understood the content of the international legal obligation of the United States any differently from the courts. In such cases it was not necessary to be very precise about the definition of intent. In a case like the *PLO*, it became important.

The canon that statutes be construed consistently with international law balances the value to society of U.S. conformance with international obligations with the value to society of having the elected, politically-sensitive branches of government make foreign policy decisions rather than independent and relatively isolated courts. The first definition of intent (intent₁) places a relatively higher value on the former consideration. Intent₂ places a greater value on the latter. Only by weighing the values and interests involved can one interpretation be said to be better than the other. My analysis was an attempt to do this. Because of the nature of international law as a system of horizontally-enforced binding obligations, and the need for courts to preserve their legitimacy by reversing Congress only for constitutional

violations, intent₂ is the preferable interpretation. But these definitions do not correspond to Rodes and Pospesel's distinction between *de dicto* and *de re* statements of law. Instead they incorporate different social policies about what courts should have the power to decide.

If intent is defined precisely enough to resolve the *PLO* case, then the syllogism of the court in that case is perfectly valid:

- A. Congress intended₁ that its statute comport with international law.
- B. International law does not permit closure of the *PLO* mission to the UN.
- C. So, Congress intended₁ its statute not to require closure of the *PLO* mission to the UN.

With intent precisely defined, this syllogism is perfectly acceptable. Since intent₁ is not dependent on a proper understanding of international law in either the premise or the conclusion, Congress did not intend₁ to close the *PLO* mission.

Now consider the syllogism using intent₂:

- A. Congress intends₂ that its statutes comport with international law.
- B. International law [as interpreted by Congress] does not permit closure of the *PLO* mission to the UN.
- C. So, Congress intended₂ its statute not to require closure of the *PLO* mission to the UN.

This syllogism also works fine. Recall that intent₂ means "wants [based on its own interpretation of international law]." The conclusion here is logically sound: Congress would not want to close the mission if it interpreted international law to preclude such closure. The problem in the *PLO* case was that Congress apparently interpreted international law differently. The legislative history showed that Congress was under the impression that international law *did* permit the closure of the *PLO* mission. While the reasoning here is valid, premise B is contrary to what the court found, and therefore the conclusion is not valid.

Thus with precision of definition, either syllogism is perfectly acceptable for lawyers and courts, even where the troublesome characteristics identified by Rodes and Pospesel are present. It really does little good to criticize the holding of the *PLO* case for the invalidity of its logic; the logic is impeccable if the definition is clear and consistent. It is instead necessary to examine the underlying policies that lead to one legal definition versus another.⁹² The fact that Congress

⁹² This is not to say that *stare decisis* is not important. Consistency is integral to the law, and if values are weighed so as to lead to one balance, strong policy consider-

and the court had differing understandings of international law required the court in the *PLO* case to choose one definition of intent over the other. That decision can be criticized without saying that a logical fallacy occurred. Indeed, it may obscure thoughtful policy analysis to criticize the decision solely on logical grounds.

Going back now to the nonlegal examples used by Rodes and Pospel, we may legitimately wonder whether the same precision of definition enables us to say that the reasoning in those cases was not defective after all. Recall the following:⁹³

You can learn from the dictionary that a person who collects butterflies is a lepidopterist.

George collects butterflies.

So, you can learn from the dictionary that George is a lepidopterist.

“Learn” can mean “derive sufficient information independently to conclude,” but it could also mean “derive information to apply specifically”.

Pat hates Communists.

Natasha is a Communist.

So, Pat hates Natasha.

“Hate [Communists]” can mean “dislike people one knows to follow [Communism],” but it can also mean “bears ill-will toward those who follow [Communism] regardless of whether their views are known.” Similarly:

O’Brien believes that all Irish children should learn Gaelic.

Maureen is an Irish child.

So, O’Brien believes that Maureen should learn Gaelic.

“Believes that all Irish children” could mean “believes about people that one knows to be Irish children,” but it could also mean “believes about people who are Irish children regardless of whether they are known to be Irish children.”

The differences in meaning can be sharpened by examining the effect of the difference. The lawyer who is asked for meaning is accustomed to asking, “Why do you want to know?” Let us say for instance, that a certain form may be filled out only with information “learned

ations support making the same balance in subsequent indistinguishable situations. See John M. Rogers, *Lower Court Application of the “Overruling Law” of Higher Courts*, 1 LEGAL THEORY 179, 186–87 (1995). But as Rodes and Pospel clearly explain, a precedent may be consistent with two different subsequent applications. See RODES & POSPEL, *supra* note 1, at 335. For example, either intent₁ or intent₂ could be used to explain the cases that preceded the *PLO* case.

⁹³ RODES & POSPEL, *supra* note 1, at 310; see also *supra* text accompanying notes 67–68.

from a dictionary." Under one meaning of "learned from a dictionary," the words "George is a lepidopterist" may be entered; under the other, they may not. To determine whether the words may be entered, it avails us little to examine the logic of the syllogism. Instead we have to ask what reasons underlie the limitation.

In the second example, assume we are constrained by the directive not to seat Pat next to "someone he hates." Can we seat Pat next to Natasha in the exceptional circumstance that we know that she is a Communist but Pat does not? Under one meaning of "hate" we can, under the other we cannot. There is nothing wrong with the logic if the meaning is the latter.

Similar observations could be made about O'Brien's belief. For instance, we may be asked to give Gaelic dictionaries to "those who O'Brien believes should learn Gaelic." Under one definition of "believes should learn Gaelic," Maureen should get a dictionary even though O'Brien mistakes Maureen to be English.

Perhaps the most difficult example to parse this way is Smith's Beliefs, which Rodes and Pospesel flatly state is an invalid argument:⁹⁴

Smith believes that all Lutherans are Protestants.

Jones is a Lutheran.

So, Smith believes that Jones is a Protestant.

Yet even here, if we ask why we care whether or not Smith believes Jones is a Protestant, we can identify two meanings of "believes [that Jones is a Protestant]" that must be distinguished in the special situation where Jones is a Lutheran but Smith thinks Jones is Catholic.

Suppose that Smith's wife dies and leaves \$1,000 to each of "Smith's Notre Dame classmates that Smith believes are Protestants." Jones appears in court to claim his share, and demonstrates that "Smith believes that all Lutherans are Protestants" and that Jones is a Lutheran. Smith admits on the witness stand that he never heard of Jones. Does Jones get the \$1,000? Under the logic of Smith's Beliefs, above, Jones seems entitled to the money.

Let us hypothesize two factual situations that could have led to the unusual bequest. In the first scenario, Smith's wife knew that Smith believes that Mormonism is a Protestant religion, although she was not sure whether Mormonism is indeed a Protestant religion. She also knew that Smith had forgotten the religious affiliation of all of his classmates. She wanted to accommodate her husband's admiration for non-Catholics who attended Notre Dame. In these circumstances it is logical to interpret "believes are Protestants" to mean "believes

94 *Id.* at 298.

their actual religion is a Protestant religion." Jones should get the money.

On the other hand, if Smith's wife wanted to reward classmates of Smith that actually accompanied Smith to Bible study in college, but to exclude from those particular acquaintances the ones who had recently renounced their religion, then "believes are Protestants" could mean "knows regarding a particular individual that that individual accepts Protestant tenets."

Under the former meaning, the syllogism of Smith's Beliefs is *perfectly valid*, and Jones should get the money. Under the latter meaning, the premise simply cannot be demonstrated without assuming that Smith knew a personal fact about millions of individuals, and Jones of course therefore loses. But if the premise *could* be demonstrated somehow, the conclusion would be valid. To evaluate the conclusion requires an understanding of the meaning of "believes to be Protestant," and once that is ascertained the logic is clear.

The different meanings attributable to the first leg of Smith's Beliefs might be characterized by Rodes and Pospel as *de dicto* and *de re* interpretations of the statement that Smith believes all Lutherans are Protestants. Rodes and Pospel indeed stress the need to be careful in ascertaining whether a *de dicto* or *de re* meaning is intended.⁹⁵ But they draw a puzzling conclusion from the observation. They posit the following statement:

(S4) Green believes all tenured members of the Philosophy Department to have Ph.D.'s.⁹⁶

The statement could have two meanings identified by Rodes and Pospel:

(S4A) Green believes of each and every individual who is a tenured member of the Philosophy Department that he or she has a Ph.D. *or*

(S4B) Green believes (the proposition) that all tenured members of the Philosophy Department have Ph.D.'s.⁹⁷

The two meanings of S4A and S4B are obviously different. In S4A, the speaker means that each actual tenured member of the Philosophy Department (e.g., Professors White, Black, and Brown), is believed by Green to have a Ph.D. White, Black, and Brown are presumably *accurately* characterized by the speaker (as believed by Green to have a Ph.D.), and it is not necessary for Green to even know

95 *Id.* at 308–09.

96 *Id.* at 308.

97 *Id.*

that White, Black, or Brown is a professor at all for the statement to be true. In S4B on the other hand, Green believes something about a category of persons. The speaker attributes beliefs to Green arising from Green's knowledge of university promotion requirements rather than from Green's acquaintance with individual professors. (This is akin to the difference between Smith's knowledge about religions versus his knowledge of his buddies' religions.) According to Rodes and Pospesel, S4A is a *de re* statement and S4B is a *de dicto* statement.⁹⁸ Either statement could lead to the following conclusion:

(S5) If Gray is a tenured member of the Philosophy Department, then Green believes that Gray has a Ph.D.

Rodes and Pospesel suggest the following strategy for choosing between S4A and S4B as the "more satisfactory" interpretation of S4: "In the absence of any evidence, the conservative choice would be the *de dicto* reading, because it will block potentially invalid inferences such as the inference to S5, or the one drawn in the 'Smith's Beliefs' argument."⁹⁹ This suggestion is puzzling because S5 sounds more illogical as a consequence of the *de dicto* (S4B) meaning than as a consequence of the *de re* (S4A) meaning.

In any event, if we are consistent in our assignment of meanings, S5 is a valid inference *regardless* of whether we are using the S4A meaning or the S4B meaning. Once again, let us hypothesize different scenarios for making the statement S4. Under S4A, remember, Green is familiar with the individual educational accomplishments of certain people, but may not know their affiliation. Let us say that Green has invited White, Black, Brown, and Gray to a club meeting, along with some other people. The invitation says that invitees believed by Green to have a Ph.D. will be invited by Green to give a talk. Some of the invitees wonder whether Gray will be invited to talk. One of them, a person called "A," states S4,

Green believes all tenured members of the Philosophy Department to have Ph.D.'s.

meaning S4A:

Green believes of each and every individual who is a tenured member of the Philosophy Department that he or she has a Ph.D.

The conclusion S5 is perfectly valid:

If Gray is a tenured member of the Philosophy Department, then Green believes that Gray has a Ph.D.

98 *Id.*

99 *Id.* at 309.

That is, the listener who accepts *A*'s statement as true in the sense of S4A can validly use the knowledge that Gray is a tenured member of the Philosophy Department to conclude that Green believes that Gray has a Ph.D. No one in this example has any thought that *Green* knows the employment affiliation of anyone.

Now contrast the situation where Green knows a lot about university promotion policies but does not know the educational background of any specific person. He is, for instance, a university consultant who is asked to make a list of eligible persons for an office that requires a Ph.D. He uses a university roster compiled by rank and department to make a list of possible candidates, those he believes to have Ph.D.'s. Now two people, *A* and *B*, know the above facts. Person *A* expresses S4 to person *B*:

Green believes all tenured members of the Philosophy Department to have Ph.D.'s.

with the meaning of S4B:

Green believes (the proposition) that all tenured members of the Philosophy Department have Ph.D.'s.

The conclusion S5 is once again perfectly valid:

If Gray is a tenured member of the Philosophy Department, then Green believes that Gray has a Ph.D.

That is, if listener *B* accepts *A*'s statement as true in the sense of S4B, then *B* can validly use *B*'s independent knowledge that Gray is a tenured member of the Philosophy Department to conclude that Green believes that Gray has a Ph.D. and that Gray is therefore on the list.

In other words, the inferences are invalid only if the meanings are shifted. There is no more likelihood of false inference when the meaning is shifted from a *de dicto* meaning to a *de re* meaning than when the meaning is shifted from a *de re* meaning to a *de dicto* one. It is therefore questionable to prefer a *de dicto* or *de re* interpretation because of the relative likelihood of an invalid inference.

IV. CONCLUSION

I should note that in other sections of their admirable book, Rodes and Pospel stress clearly and persuasively the need for precise definition of legal statements to avoid the logical fallacy of "equivocation" (using shifting meanings of the same words to come to false conclusions).¹⁰⁰ The points they make in those other sections appear sufficient to resolve the assertedly invalid reasoning in *Duchnicz* and

the various “intensional context” hypotheticals that bear such a resemblance to the *PLO* holding.

All of this is not meant to diminish the value of devotion to logic in legal analysis. On the contrary, the points are made out of an abundance of caution *not* to give ammunition to the anti-logic people. We have to be careful not to criticize *Duchnicz* and the *PLO* case, no matter how bad those cases may be, without examining the underlying policy reasons for excusing acts that are consented to, and for attributing to Congress the intent to conform to international law. If legal conclusions like those in *Duchnicz* and the *PLO* case are characterized as failures of logic because the reasoning is invalid even when the meaning of “consent” or “intent” is *determined*, then there is a danger. The danger is that the members of the polity to whom legal opinions containing such criticism are addressed—readers of opinions and receivers of legal advice—will intuit (rightly) that more is going on than the type of formal logical defect that Rodes and Pospesel suggest. The members of the polity will ultimately demand more justification for legal analysis that lacks such a policy component, and they may do so by inartfully demanding that logic be disregarded in favor of “justice.” For those of us who believe that logic furthers justice, that would be—in those memorable words from classic television’s *The Life of Riley*—“a revolting development.”