The Journal of Contemporary Legal Issues

Volume 23 | Issue 1 Article 9

12-16-2021

Multimember Legislative Bodies and Intended Meaning

Jeffrey Goldsworthy

Multimember Legislative Bodies and Intended Meaning

JEFFREY GOLDSWORTHY*

I. THE MEANING OF ORDINARY COMMUNICATIONS: MARY AND THE SHIP "PEERLESS"

Intentionalists agree that the meaning of an ordinary communication is either identical to or depends heavily on what the speaker or author intended it to be. But the "or" marks a disagreement between "subjective" intentionalists, such as Larry Alexander and Richard Kay, and "objective" intentionalists such as me.[1]

Subjective intentionalists claim that the meaning of any communication is whatever its speaker intended it to mean. Objective intentionalists find this dubious because it seems possible for the meaning that people intend to communicate to differ from the meaning they do communicate. It surely cannot be the case that, whenever we speak or write with the intention of expressing or implying something, we are guaranteed to successfully express or imply that thing simply by virtue of having that intention. People can intend to say or imply something but fail to do so, and conversely, they can say or imply something they did not intend. When we are told that we have misunderstood what someone meant, we often defend ourselves by replying: "I now realize what she meant to say,

 Emeritus Professor of Law, Monash University; Professorial Fellow, The University of Melbourne; Adjunct Professor of Law, The University of Adelaide.

1. For an extended exploration of this disagreement, see JEFFREY GOLDSWORTHY, *Subjective versus Objective Intentionalism in Legal Interpretation*, in MORAL PUZZLES AND LEGAL PERPLEXITIES; ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 170–88 (Heidi M. Hurd, ed., 2019).

but that's not what she did say," or "He may not have intended to imply that, but he did."[2] Subjective intentionalists must deny that such replies can be strictly correct: if the meaning of someone's utterance is identical to the meaning she intends it to have, then she can only *appear* to, but cannot *really*, say something other than what she intends to say. That strikes me as counterintuitive.

When people fail to communicate the meaning they intend to communicate, the meaning they do communicate must be something else. In such cases, the meaning of their utterance—their speech act—is surely the meaning they inadvertently communicate, not the one they intended to communicate. If A's utterance fails to communicate the meaning A intended to communicate to his intended audience (through A's fault, not theirs), but communicates some other meaning to them instead, that other meaning—and not A's meaning—must be the meaning of A's utterance. That meaning is what A's meaning appears to his intended audience to be, given evidence that is readily available to them, including the conventional meanings of A's words and other clues as to his intentions such as shared background knowledge of his beliefs and values, and the context in which the utterance was made.[3] Objective intentionalism, therefore, holds that what people *appear* to say or imply, in the light of all the evidence readily available to their intended audience, is what they *do* say or imply.

Mary must attempt to interpret a memorandum signed by both of her two employers that refers to the ship "Peerless" sailing to Athens. Unknown to them, there are two ships with that name and destination, and they had different ships in mind. Mary cannot contact either of them for clarification. We are asked what Mary has been instructed to do (not what she should do).

I assume that Mary discovers that there are two ships. If the only available evidence of her employers' communicative intentions is the memorandum, then the meaning of her instruction is irredeemably ambiguous. That is all that can be said in answering the question—the issue is then what she should do about it, which we have been asked not to consider.

If other background or contextual evidence is available to Mary suggesting (erroneously) that her employers had in mind one of the two ships rather than the other, then depending on the strength of that evidence she might be entitled to conclude that she has been instructed to deal with that ship. Such further information might consist, for example, of one of the employers having previously referred to that ship, or some past dealing by the firm with it. This is, of course, a matter of probability rather than

---

2. Jeffrey Goldsworthy, *Moderate versus Strong Intentionalism: Knapp and Michaels Revisited*, 42 SAN DIEGO L. REV. 669, 677 (2005).

3. *Id.* at 670–71.

certainty, but we often understand a communication to be intended to mean what seems more likely than some alternative.

If other contextual evidence suggests to Mary that her employers had in mind different ships—perhaps she finds other communications in which they refer to different ships—then she would be aware that the problem is not one of ambiguity but of partial incoherence. If the intended recipient of a communication has good reason to conclude that its authors had inconsistent communicative intentions, then to that extent the communication has no coherent meaning. Mary knows that instructions are not "operative" if they have not been agreed to by both partners, and in this instance, no coherent instruction has been agreed to. She might therefore be justified in doing nothing (although we have been asked not to discuss that issue).

II. THE MEANING OF STATUTES: THE TAX ON IMPORTED FRUIT

The disagreement between subjective and objective intentionalists carries over to the meanings of statutes and other legal texts. The way in which these texts should, as a matter of law, be interpreted is ultimately determined by legal norms established by the conventional practices of legal officials, especially judges.[4] It cannot be determined merely by philosophical truths about linguistic meaning in general, although they can be made relevant by practice-based norms.

As for the interpretation of statutes, for at least six centuries common law courts have maintained that the primary object of statutory interpretation "is to determine what intention is conveyed, either expressly or by implication, by the language used,"[5] or in other words, "to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."[6] Interpretive principles have also regulated the kinds of evidence of such intentions that is admissible in court. The admissibility of "legislative history" has been of particular concern and has varied over time and across common law jurisdictions.

Sometimes the meaning that the lawmaker intended to communicate remains obscure, or even incoherent, even after the judge has exhausted all admissible evidence of it. The common law of statutory interpretation

4. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 8 (1997).
5. SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 1 (1883).
6. Attorney-General v Carlton Bank [1899] 2 QB 158 at 164 (Eng.).

provides an array of further principles (or presumptions or canons) of interpretation that help to determine the meanings of statutes in these and other situations. The "legal meaning" of a statute could be said to be the result of applying all relevant interpretive principles.

There is theoretical debate about the nature of many of these principles, and the consequences of applying them. Some assist in ascertaining the legislature's communicative intentions. Others appear to require a higher than ordinary standard of proof of certain kinds of legislative intentions, such as intentions to encroach upon traditional common law doctrines or legal rights. Yet others arguably function as tie-breakers, resolving otherwise unresolvable indeterminacies in communicative content in favor of long-standing common law rights and other principles.[7] These principles help to supplement the meanings of statutes that would otherwise be under-determinate.

Some common law interpretive principles, in exceptional circumstances, permit or require correcting or rectifying statutory meaning. These circumstances are confined to ones in which judges must act creatively in order to serve as the legislature's "faithful agents," for example, by correcting a scrivener's error, "reading down" a provision to ensure that it is constitutionally valid, and fabricating a so-called "implication" to ensure that a statute achieves the legislature's obvious and immediate purposes in enacting it, or does not inadvertently violate the legislature's presumed standing commitments to important legal principles (such as that of *mens rea*).

None of this alters the central intentionalist thesis that statutory interpretation is concerned *first and foremost* with inferring the communicative intentions of the legislature from all admissible evidence.

In the case of the statute taxing imported fruit, we are not told whether similar interpretive principles have been established in Lex. If they have been, the judge must apply them; if not, he will have discretion to decide what principles of interpretation he ought to apply. If I were the judge I would apply objective intentionalism.

The lawmakers who enacted the statute had inconsistent intentions about what they were communicating by enacting it, although the inconsistency is partial and limited. We are told that the judge knows this: he or she has "learned all the facts related above." I assume that this includes the facts set out in footnote 2, concerning the deceptive and corrupt conduct of the legislative aide, although that does not seem crucial to answering the main question.

---

7. Non-intentionalists, of course, argue that these principles protect such rights and principles regardless of legislative intentions.

A preliminary issue is whether or not the judge has acquired this knowledge in accordance with whatever legal principles in Lex—if any—govern the admissibility of evidence of legislative intention. If he has, this knowledge can influence his effort to ascertain the statute's legal meaning, but otherwise, it cannot. If there are no such principles, the judge is legally free to take this knowledge into account, although as an objective intentionalist I would refuse to do so if the facts were not reasonably accessible to lawyers (on whom the public rely for legal advice) in general. This is because objective intentionalists deny that the meaning of any utterance—and especially of an important public document such as a statute—depends on private, esoteric information. Evidence of legislative intention must be reasonably available to its intended audience. I will assume either that the knowledge was acquired through admissible evidence, or that it was reasonably accessible to lawyers in general.

The main question is what the judge should decide, although this seems to mean "decide whether the tax applies to" tomatoes and kiwis. On this interpretation, the question is similar to that asked in the case of Mary: what does the communication (here, the statute) mean, rather than what should the audience (the judge) do in the face of irresolvable incoherence?

The judge knows that the lawmakers had inconsistent communicative intentions about whether the word "fruit" has its culinary meaning or its botanical meaning. The proportion of votes within the legislature—also known to him—is such that he cannot attribute either meaning to the legislature as such. He should conclude that the legislature intended to tax everything that is a fruit according to both the culinary and botanical meanings of "fruit," but had no coherent intention regarding any product that is a fruit according to one meaning but a vegetable according to the other.

"Kiwis" —often known as "kiwifruit" (but originally a Chinese gooseberry) —are fruit according to both the culinary and botanical meaning. The statute clearly applies to them regardless of the lawmakers' partially conflicting communicative intentions.

The judge should conclude that the statute has no coherent meaning that determines its application to tomatoes, which are fruit according to the botanical meaning, but not according to the culinary one. In that and any similar case, in which a product falls within the area of statutory incoherence, the next question for the judge is whether other established interpretive principles can help to resolve the problem. In the United States, given the

precedent in *Nix v Hedden*,[8] about which a competent and conscientious American legislature should be deemed to have been informed, there would be a strong case for deciding in favour of the culinary meaning. But if the jurisdiction of Lex has no such precedent, the judge must find some other way to deal with the incoherence. There might, for example, be a tie-breaking principle requiring the resolution of an otherwise irresolvable incoherence in a tax law in favour of the taxpayer. The clause forbidding any "discrimination among types of fruit" is useless, because it is vitiated by the same incoherence. In the absence of any helpful interpretive principle, the judge would have to exercise a law-making discretion. To hold the entire statute to be void for incoherence would be too extreme, given that the incoherence should affect only a tiny number of products.

The fact that the lawmakers might not have enacted the statute at all, if they had not been deceived by the corrupt legislative aide, is irrelevant. The lawmakers have enacted the statute, which is therefore valid law. Judges have no constitutional authority to invalidate a statute on the ground that it was enacted only because some number (even a majority) of the lawmakers were deceived. It is the lawmakers' responsibility to ensure that they are not deceived before enacting a statute.

8. 149 U.S. 304 (1893).