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My response to these hypotheticals is going to be useless, although, I hope, in a useful way. It's going to be useless because I'm an English teacher, not a lawyer, and I have no idea what Mary or the judge should do. But, of course, Larry Alexander and Steve Smith already knew this when they asked me to contribute. Presumably, it's in my capacity as a theorist of interpretation and in particular (since the hypotheticals might be understood to raise particular difficulties for intentionalists) as an intentionalist theorist that they asked for my views. But, as an intentionalist theorist, I not only don't have anything to say about what Mary and the Judge should do, I don't even have anything to say about what the texts mean. Why? Because nothing in intentionalism is of any particular use in figuring out the meaning of any text. Why not? Because intentionalism has no normative or methodological value. It tells you what the object of interpretation is, not what it ought to be or how to find it. By contrast, the various theories of legal interpretation (my main example here will be "original public meaning") do exactly the opposite. So this is what I hope will be the useful part. No doubt, the attractions of the therapeutic reading of Wittgenstein are overstated but if ever there were a theoretical practice that made you see the value of making "philosophical problems" "*completely* disappear" (italics his) the theory of legal interpretation would be it.[1] I won't even try to say what Mary should do but I would like to help make

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1. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 51 (G.E.M. Anscombe, trans.) (1958).

the philosophical problem of the theory of interpretation *completely* disappear (italics mine).

Of course, that ambition is itself controversial. In *There's Nothing that Interpretation Just Is*, Cass Sunstein has explicitly rejected it. He says that although "many people believe" that "the very idea of interpretation requires judges to adopt their own method of construing the founding document,"[2] in fact, the claim that interpreting a text is nothing more than understanding what its author meant is really just a "stipulation." In other words, we intentionalists just give our own definition of interpretation and then insist that the other things people do don't count. But, he objects, why should, say, "searching for public meaning rather than authorial intentions," as exemplified by Justice Scalia's belief that "what matters is the *original public meaning* of the document, not intentions at all," not even count as interpreting?[3] And he's certainly right that Scalia and many others have understood original public meaning (not to mention the changing meanings that supposedly go with non-originalism) as an alternative to intentionalism. But they have been mistaken. If you take interpreting a text to mean trying to understand it, then the point of what follows will be that the other "methods" don't actually have anything to do with understanding. Which is why intentionalism is just what interpretation is.

In fact, we can see both the mistake of legal theory and the outlines of a way out of it begin to emerge in one of Scalia's most interesting dissents, when he argued in *Smith v. U.S*. that the majority was wrong to think Smith's offer to trade an automatic MAC-10 for drugs exposed him to the increased penalties prescribed for people who use a firearm in the commission of a crime. In counting the offer to trade the gun for drugs as using it in committing the crime, the Court, he objected, did "not appear to grasp the distinction between how a word can be used and how it ordinarily is used."[4] The word "use" in "use a firearm" *could*, he says,

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2. Cass Sunstein, *There is Nothing that Interpretation Just Is*, 30 CONST. COMMENTARY 193 (2015). His examples are Larry Alexander and me, and I think what he means by "many people" is "almost no one." The text of mine to which he refers is *A Defense of Old Originalism* 31 W. NEW ENGLAND L. REV. 21 (2009). Other relevant texts would include the many essays Steven Knapp and I have written in defense of intentionalism but especially – with respect to texts by more than one author – *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651 (2005). It may also be worth pointing out that intentionalism as Knapp and I argue for it is not a method that judges could be required to adopt; it's an activity they can't help but engage in. But I take Sunstein's slightly misleading language here to be irrelevant since his title makes clear he's got it basically right.

3. *Id.* at 195.

4. Smith v. U.S. 508 U.S. 223 (1993) (Scalia, J. dissenting). "After petitioner Smith offered to trade an automatic weapon to an undercover officer for cocaine, he was charged with numerous firearm and drug trafficking offenses. Title 18 U.S.C. 924(c)(1)

be used to describe anything from using its barrel to scratch your head to using its handle to break a window. But its "ordinary" use in the context of criminal activity is "as a weapon." Thus, in contrast to what he takes to be the Court's claim that a word can be understood to mean anything it can be used to mean–and, of course, in contrast also to the intentionalist idea that it means what its authors meant by it—he (like many textualists) argues that the word should be understood to mean only what it ordinarily means.

But there's an obvious problem with this line of argument, a problem helpfully suggested by the appeal here to how words are used as opposed to the more usual appeal to their public meaning (or, its supposed opposite, "subjective intent"). And we can see what the problem is first, by noting that in asking us to choose between how the word can be used and how it is ordinarily used, Scalia has left out the question of how it actually was used, and, second, by noting that the very idea of how a word is ordinarily used is entirely parasitic on how it is actually used.

Assuming the ordinary meaning of "use a firearm" is use it as a weapon, what makes that use ordinary? Presumably, the fact that (ordinarily, usually, normally, very frequently, etc.) what people actually mean when they say "use a firearm" is use it as a weapon. In other words, ordinary is not functioning here to designate a semantic rule to be invoked independent of use but to designate whatever rule is ordinarily used. Ordinary use is thus linked to some history of actual use. So what I mean by saying that ordinary use is parasitic on actual use is just that ordinary use is a whole lot of actual uses.

But actual use is irreducibly and (I think) uncontroversially intentional. Just to formulate the question of how a word is actually being used is to ask how the person or persons who are using it are using it, what they mean by it. So if we're committed to ordinary, we're required to be garden-variety intentionalists long enough to ascertain the way a word is ordinarily used (what most people mean when they use it). But we're then instructed to repudiate our intentionalism when it comes to interpreting the individual utterance in question–which will now be taken to mean what people usually mean whether or not what people usually mean has

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requires the imposition of specified penalties if the defendant, "during and in relation to . . . [a] drug trafficking crime[,] uses . . . a firearm." In affirming Smith's conviction and sentence, the Court of Appeals held that 924(c)(1)'s plain language imposes no requirement that a firearm be "use[d]" as a weapon, but applies to any use of a gun that facilitates in any manner the commission of a drug offense. Smith v. United States (1993)."

anything to do with what the person (or persons) who produced the utterance actually meant.

If this procedure were universalized, we couldn't possibly follow it. That is, if the instruction were, "take the word as it is ordinarily meant," we would have no way of ever figuring out how any word had ever (much less ordinarily) been meant. Why? Because to figure out what the ordinary use is you have to figure out (many) actual uses but you can't even figure out one if the instruction is to take the word not as it's actually used but as it's ordinarily used. So the idea must be that what we (ordinarily) do is try to understand what people actually mean but, when faced with certain kinds of texts by certain kinds of authors, we require ourselves to ignore what these authors actually meant and instead to impose upon the text they wrote a meaning we have derived from other texts written by other people.

Now that really is a stipulative definition of interpretation. It is entirely intentionalist in the sense that it treats understanding what people actually mean when they write things as understanding how they used the words they used (the only way we can figure out the ordinary meaning) and then it stipulates that when interpreting legal texts, what we ordinarily do won't count. Rather than taking the words to mean whatever we think the author of the text actually meant by them, we will treat them as if they meant what other authors of other texts meant by them. Which is no doubt something we can do (and is maybe even something that, with legal texts, we should do–I take no position on this) but which, because it has no connection to figuring out how the words we are reading were actually used (the whole point of the theory is its indifference to this question) has no interest in interpretation at all. It has nothing to do with how we understand the text; it's a way of not having to understand it.

Understanding any act is understanding what someone did. Understanding a particular text by particular authors is understanding what they did–how they used the words they used. The agent or author's intention is irreducible because there is no way even to identify an act without recourse to what the agent meant to do. And while there are obviously many descriptions under which an act is unintended (I'm writing but I'm also using electricity and moving muscles in my fingers that I don't even know I have), none of those make it a different act. None of them make my use of words to mean whatever I mean by them into some imaginary (call him "Ordinary") person's use of words to mean what other people have meant by them. This procedure may possibly be justified but it cannot be justified by appealing to a theory of what it means to understand speech acts, that is, to a theory of interpretation.

For this reason, there is no such thing as non-originalist interpretation. Substituting an imagined act for the actual one is just replacing the actual

meaning with a different one. But, for the same reason, any form of originalism that describes itself as something other than just understanding what the author or authors did cannot claim the kind of authority (we're interpreting the text not rewriting it!) that the proponents of original public meaning characteristically claim. Original public meaners and all non-originalists invent ways of using words to mean something that is related to but not identical to whatever the authors of the statute or Constitution actually used them to mean. The conflict between them is not a conflict of interpretation, and the normative arguments that writers like Sunstein mistakenly think are intrinsic to interpretation are instead intrinsic to the justification of their inventions. As in, the original public meaning is probably closer to what the Framers meant but the living Constitution may be closer to what we want. Or not.

The point of my argument has been to disconnect such practices from the theory of interpretation, not to denigrate them. In fact, the hypotheticals suggest how they come about and why we may well need them. The word "Peerless" was used in two different ways by two different writers; Mary is, in effect, interpreting two different texts with two different meanings. The answer to the question "what has she been instructed to do "is "two different and contradictory things." Fortunately for her, since the "instructions are only operative if they were "agreed to" by both Smith and Jones and since Smith and Jones are now known to have been mistaken in thinking they agreed, she doesn't have to do anything. But the fruit judge does.

So what should he do? The correct answer here, for every theorist *as* theorist, should be, "I haven't the slightest idea." Why? Because the fact that two or even a whole bunch of people thought they were doing the same thing and doing it together when in fact they weren't may well produce a problem but does not produce a problem of interpretation.

Suppose we see two groups of five people pulling against each other at different ends of a rope, and we're trying to explain what they're doing. Playing tug of war may be a perfectly good answer for all ten of them. But suppose that, hearing us explain the game, one of the people says, "Oh my God, we're supposed to be trying to pull them in our direction? I was just trying to keep my hands in contact with the rope." So he was doing something else. This was a problem for his team but there's no theoretical problem raised by our discovering that instead of ten people all doing the same thing, nine people were doing the same thing and one was doing something different. This is equally (if more troublesomely) true if instead of pulling on a rope, they're writing a law. It's more troublesome in part

because the law is more important but also because with the law there's this thing–the text–and we're asking what it means. But that difference disappears as soon as we remember that asking what this thing means is just asking how the people who used these words used them. Now, we're asking what they did, and the answer is that they did different things. Some used the word fruit to include tomatoes; some used it to exclude them. It's as if this is the primal scene of legal interpretation and mantras like "I don't care what their intention was. I only want to know what the words mean" are (to stick with the therapeutic) the neurosis of legal theory. But try saying that as "I don't care what the words were used to mean, I only want to know what they really mean."[5] What does "what they really mean" mean if it's separated from how they were used?

The wish that in interpreting the text we could say something more about this–that we could appeal to some rule that's different from the rule (or rules) they were using but that nevertheless prevails in determining the meaning– is reasonable but unfounded. But that doesn't mean the problem can't be addressed; it just means it can't be addressed by a theory of interpretation.[6]

For this reason, the objection that Sunstein (and others) have made to intentionalism—it stipulates rather than demonstrates that what the authors mean is what the text means—seems to me mistaken but nonetheless useful. It's mistaken because the situation is just the opposite. It's instructions like the textualist recommendation to take the word as meaning what it ordinarily means that are stipulative since they acknowledge the primacy of what the word is actually being used to mean but tell us to ignore what it's actually being used to mean and to stipulate instead that it will count as meaning what it's ordinarily used to mean. But if the point of my response has been that instructions like these cannot be derived from a theory of interpretation, it hasn't been that they shouldn't (or should) be followed. What's useful about recognizing the irrelevance of the theory of interpretation is just that it gives us a clearer sense of the distinction between the question of what the text means and the question of what we should do, and thus accomplishes at least some of what writers like Sunstein want. That is, it renders the idea of non-originalist interpretation

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5. Perhaps recognizing that the question of intention is a question about action—about how the words were used—helps to suggest the misleading character of the opposition between public meaning and private meaning (or subjective intent). There is no such thing as public meaning because there is no such thing as private meaning—there's just meaning.

6. For a debate about this in the context of literary interpretation, see Walter Benn Michaels, *Eyes Wide Shut: Anscombe/Action/Art* and the essays it responds to by Joshua Landy, Rob Chodat, Magdalena Ostas, John Schwenker and Mathew Abbott. Walter Benn Michaels, *Eyes Wide Shut: Anscombe/Action/Art* (Sept. 10, 2020), https://nonsite.org/eyes-wide-shut-anscombe-action-art/ [https://perma.cc/L232-UZ43].

incoherent (if it's interpretation, it's intentionalist and if it's intentionalist, it's originalist) and thus allows us to see that questions like whether we should produce and then follow constructs like the original public meaning are entirely normative.