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Stanley Fish

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Commentary

STANLEY FISH*

Suppose you are walking in the corridors of a law firm and you hear a person in one of the offices say "You have no consideration." What do you take the speaker to have said or meant? You might reasonably assume that you have overheard a snatch of a conversation between a lawyer and a client who is being told that he cannot allege breach of contract because in the conversation he reports between himself and the one he would accuse there was an absence of reciprocally offered inducements of the kind "if you do X, I will do Y" or "if you give me X, I will give you Y." Or, in other words, "You have no consideration." But suppose further you know that the office from which the words issued is occupied by a lawyer who is married to another lawyer employed by the same firm and occupying an office on the same floor. You might then reasonably suppose that you have overheard a quarrel between two spouses one of whom is saying to the other, "Once again you are acting in a way that pays attention only to your needs and desires and ignores mine entirely." Or, in other words, "You have no consideration." There are of course more and mixed possibilities, but you get the point.

The conclusion I would draw from the hypothetical is that the utterance "You have no consideration" does not have a literal or linguistic or ordinary public meaning, does not have a "baseline meaning" that is then varied depending on whether you have (innocently) eavesdropped on a lawyer/client exchange or a spouse/spouse exchange. However you hear "You have no consideration"—as a point made by an attorney or an accusation made by a spouse—or (here is a third possibility; there are others) a criticism of someone's habitual failure to think though things

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carefully—the import/meaning of what you hear, and hear *immediately* without going through some prior and independent kernel meaning, will have emerged in a context of intentional production. Absent such a context either assigned or assumed (it makes no difference), there will be no import/meaning to hear or understand; there will just be noise or marks. The first, indeed the only, act of interpretation is to identify the intentional context of production from which the utterance or writing emerged; that is, identify (or misidentify—you could be wrong, but misidentifying is an exercise of interpretation, not its failure) the speaker and his/her aim in speaking, figure out what he or she had in mind. This is not an option, something you can decline to do because declining to do it is declining to engage in interpretation, a refusal you can certainly perform but one that leaves you with nowhere to go and nothing to do. The basic point was made long ago by John Searle in *Speech Acts* when he explains that an utterance like "I will go" can be heard as a promise, a prediction, a report, a threat, an offer, a resolve; it must, however, be heard as one (or more—you can perform multiple speech acts at once) of these; there is no primary meaning of "I will go" uninflected by illocutionary purpose, only the various meanings it has in its various illocutionary lives. And that is why, as I have been saying now for too many years, there is no textualist position because textualism has no object on which to operate.

So, no specification/identification of an intentional context of production, no utterance and therefore no meaning. Mary's problem in the first of the hypotheticals offered to us is not that she cannot identify the intentional context of production, but that she can identify two carried by or expressed by the same words and is without any way of deciding between them. Therefore she does not know—cannot know—what the words directing her to take a shipment of textiles to the ship Peerless mean. As far as she can tell, she has been given no instruction at all. That is the conclusion reached, through somewhat different routes, by Jeffrey Goldsworthy, Gary Lawson, and Walter Michaels. "If the intended recipient of a communication has good reason to conclude that its authors had inconsistent communicative intentions, then . . . the communication had no coherent meaning."[1] "I would say that Mary has not actually been given an instruction at all.[2] "Mary is, in effect, interpreting two different

1. Jeffrey Goldsworthy, *Multimember Legislative Bodies and Intended Meaning,* 23 J. CONTEMP. LEGAL ISSUES 131 (2021).

2. Gary Lawson, *(Hypothetical) Communication in (Hypothetical) Context,* 23 J. CONTEMP. LEGAL ISSUES 137 (2021).

texts with two different meanings. The answer to the question 'what has she been instructed to do?' is 'two different and contradictory things.'"[3]

Soames and Ekins come to a different, and wider, conclusion in part because their conception of the intentional setting is wider. Soames introduces two factors: (1) long standing office rules understood to be presiding over the enterprise and accepted by all who work within it; and (2) employees who are "reasonable, attentive, and informed."[4] As such an employee, Mary does not receive the written instruction as if it were a one-time, one-off thing; rather, she receives and reads it as something compatible with, and similar to, instructions characteristically issued by Smith and Jones to workers charged with helping them to implement the firm's business. Mary knows, at least in a general sense, what her employers want her to do even before they express their wishes in a writing; they want her to act in a way that contributes to the efficiency and profitability of the firm. That in fact, says Soames, is what they intend, that is, that "their attentive, reasonable and informed employee . . . do what she had most reason to think they were directing her to do."[5] (Even if she knew of the opposing motives attached to the direction she was given, she could have reasonably decided that her employers would have wanted her to proceed because she would think that in the end each would prefer the firm's welfare to his selfish financial scheme.) She may be in possession of an instruction the intention and meaning of which is incoherent or contradictory, but she is fully able to execute her employers' general intention. She is, in effect, in the position of an employee who had been given an order in writing, but finds the final paragraph missing. She can't tell exactly what she is to do, but she is able to responsibly fill in the blanks and be a faithful agent. And, although Soames does not make the point, Mary would be a faithful agent no matter which Peerless she employed.

That is the conclusion Ekins comes to by way of an interpretive category elaborated in his 2012 book *The Nature of Legislative Intent* –a standing intention.[6] A standing intention is one that defines and guides the

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3. Walter Benn Michaels, *Using a Firearm, Using a Word: What Interpretation Just Is*, 23 J. CONTEMP. LEGAL ISSUES 141 (2021).
4. Scott Soames, *Plural Agents, Private Intentions, and Legal Interpretation*, 23 J. CONTEMP. LEGAL ISSUES 149 (2021).
5. *Id.* at 151.
6. Richard Ekins, *Joint Action, Intended Meaning, and (Statutory) Interpretation*, 23 J. CONTEMP. LEGAL ISSUES 123 (2021).

enterprise; it goes without saying and is always in force and it is the motor of the action of all participants. Within the standing intention of the Smith-Jones firm (to ship goods expeditiously and profitably), the co-owners form the joint intention that "Mary should make the shipment by way of 'the ship 'Peerless', an instruction which does not distinguish between the two ships that bear that name." Their further intentions—for one partner that the ship Peerless be the one docked in Plymouth, for the other that the ship Peerless be the one docked in Southampton—are, Ekins asserts, "private," and therefore "do not matter because they are private, not common to Smith and Jones and thus not apt to frame their joint intention."[7] Each may have a different motive for joining that intention, but it is their joining that counts. Had the cost of transport to Plymouth or Southampton been substantially different, the question "which Peerless?" might have affected the joint intention and have been "relevant to the partnership's action." But that doesn't seem to be the case here. Therefore, Ekins concludes, "the partnership's failure to anticipate that there are two ships named Peerless does not mean that Smith and Jones have not formed and conveyed to Mary their joint intention," which is that "shipment be made on the ship Peerless bound for Athens."[8] So an instruction has been issued and understood. Problem solved.

But which problem? Not the interpretive one which still remains. In both Soames's and Ekins's analysis, Mary still doesn't know what the instruction she received means. She has just decided to carry on anyway. Her resolve to do so could be understood as following from a second order intention shared by her with her employers, the intention to further the flourishing of the firm. That intention goes along with or stands behind any first order intention that is issued. Being faithful to it does not require a confident specification of the meaning of the first order intention. You can reason, as Mary does in both Soames's and Ekins's account, that whatever this first order instruction means (as far as she can tell, it means nothing or means something contradictory), it should be taken in a way that benefits the firm's standing plans. The question is, is that reasoning interpretive? Were Mary to reason in that way, would she be interpreting? I think not if interpretation is the effort to figure out what a text or utterance means. On the record, that effort fails and must fail because there is no text in relationship to which it could be made. It is in the wake of that failure that Mary abandons interpretation (which in this example cannot even begin) and tries something else. To specify that something else, as Soames and Ekins do, is to ignore the instruction *we* have been

7. *Id.* at 125.
8. *Id.* at 126.

given to attend only to the interpretive issue and not to the normative issue (what should she do?). Mary can ignore that instruction, but we cannot.

The standing intention to act in a way that benefits the firm's long-range plans is like a canon of construction that tells you to whom the benefit of the doubt should be given in a particular area of law or declares that statutes should be construed, if possible, in a way that avoids a constitutional conflict. Canons of construction are not interpretive directions; they are what we have recourse to when interpretation proper (figuring out what was meant by a text or an utterance) underspecifies our obligations or specifies them in multiple and contradictory ways or specifies them in a manner we find displeasing. In *King v. Burwell*, Chief Justice Roberts cites the canon that the words of a statute must be read "in their context and with a view to their place in the overall statutory scheme."[9] Following that canon (at least this is his claim), he concludes that the phrase "exchange established by the state" must be construed in a way that "depart[s] from what would otherwise be the most natural reading" so that it means exchange established by the state or by the Federal government.[10] Only in this way, says Roberts, can the Affordable Care Act be saved from a reading that would "destroy" health insurance markets when improving them was the Act's clear aim. In dissent, Justice Scalia cites another maxim: "Our task is to apply the text, not to improve upon it."[11] That is, we may not like the "natural reading" of the phrase, but we have no license to reject that reading in favor of one we find more convenient; our job is to interpret the text not to rewrite it in accordance with our desires. Scalia is accusing Roberts of abandoning interpretation and substituting for it the project of "mending" laws that "do not work out" as the would-be-interpreter hoped they would or thought they should. As a strong textualist, Scalia would limit the act of interpretation to construing the words of the relevant text; to go beyond that task when what it yields is insufficient or unsatisfactory is to trade the (relatively) humble role of the interpreter for the expansive role of a legislator.

That arguably is what is done by those who cannot leave well enough (or ill enough) alone when it becomes clear that Mary had not received any coherent instruction. They feel compelled to do or say more. In the case of the kiwi-tomato-vegetable-fruit hypothetical the attraction of

9. King v. Burwell, 576 U.S. 473, 474 (2015).
10. *Id.* at 497.
11. *Id.* at 515 (Scalia, J., dissenting).

doing more is understandable given that it is a judge, not a subordinate functionary, who must decide, and deciding is what judges are required to do. In the context of the hypothetical, the imagined judge must decide both what the text means—here he or she is one with Mary—and how to rule. In Goldsworthy's analysis these two decisions come apart. First "[t]he judge should conclude that the statute has no coherent meaning that determines its application to tomatoes" because on the evidence known to him, tomatoes are vegetables for some of the legislators and fruits for some others. Given this "statutory incoherence" (the text does not mean one thing but two contradictory things), the judge, Goldsworthy says, should go to the next question which is "whether other established principles can help to resolve the problem." Not the interpretive problem—that is irresolvable—but the problem of what to do now in the wake of interpretation's failure. Unlike Mary, the judge cannot just throw up his hands and wait for the employers to return, an option Mary does have (although choosing it is not without possible negative consequences for her as an employee); he must do something and in Goldsworthy's view he would be wrong to hold the entire statute void "given that the incoherence should affect only a tiny number of products." Rather he should look around for some other mechanism such as "a tie-breaking principle requiring the resolution of an otherwise irresolvable incoherence in a tax law in favour of the taxpayer." With that or some other canon of construction in hand, the judge can go about his proper business and issue an opinion.

Goldsworthy's solution to the problem involves, he says, the judge exercising a "law-making discretion." Interpretation has run out, so let's figure out what we can do untethered from the (unanswerable) question of what the text means. Soames, in contrast, believes that the text does have a meaning that emerges when we take into consideration "the public linguistic meaning of the text, the relevant publicly available facts, and the background of existing law into which the new law is expected to fit." As he sees it, there is in fact a public linguistic meaning that can be arrived at. Assuming (as Goldsworthy also does), "that the legislative act isn't an obvious nullity," we should ask which of the two meanings of fruit—the biological one or the culinary one—is the more familiar and which is ordinarily employed when a contrast is being drawn. The answer, Soames declares, is the culinary meaning, and therefore "we should take 'fruit' to bear its second, more restricted meaning in the statute," and the judge, accordingly, should rule that "the kiwis in the shipment should be taxed, but not the tomatoes." Note that Soames doesn't say that "fruit" *actually* bears this second, more restricted meaning (the one that excludes tomatoes), but that we should take it that way so that the judge can go about the business of judging. There is nothing

necessarily wrong with that, especially if it (or something like it) is what the practice of judging requires; but it is not interpretation, an activity rendered impossible by the terms of the hypothetical. That is why Michaels, in response to the question how should the judge decide, says "I haven't the slightest idea." He hasn't the slightest idea because as a self-described non-lawyer theorist he thinks himself competent only to pass on the theoretical question, the question of how to interpret; but because interpretation had been blocked by the impossibility of assigning a single meaning to the word fruit, he declines to pronounce and leaves the further maneuvering, if any, to legal practitioners. He acknowledges that there is a problem: "[T]he fact that . . . 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, he insists, it "does not produce a problem of interpretation."

Soames does consider it a problem of interpretation because he shifts the role of specifying what an utterance means—the basic task of interpretation—from its speaker(s) to the audience: "What lawmakers assert in issuing or adopting a text is what a reasonable and informed audience . . . would rationally take them to intend." He then reasons that for an audience to decide that "fruit" bears its botanical meaning in the statute would be irrational; for if tomatoes are counted as fruits and there is to be no distinction between kinds of fruit (another stipulation in the statute), then no fruits would be taxed. But that would make the statute "vacuous or incoherent or both"—nothing would be taxed so what's the point of the legislation—and that, Soames insists, "can't be right." Instead "we should take fruit to bear its second, more restricted meaning" (excluding tomatoes) with the result that "the kiwis in the shipment will be taxed, but not the tomatoes." So in Soames's analysis the rational audience not the speaker determines meaning, an outcome that flows from his positing of two kinds of meaning, speaker's meaning and communicative meaning. He believes that in the event of a clash between the two—the speaker intends a meaning (or fails to intend one) but his audience apprehends a different meaning—communicative meaning should rule. "[A]gents know that the content to which they will be taken to bear the relevant attitude . . . is that for which they have given sufficiently reasonable, attentive, and informed addressees reason to believe was intended." (I heard him elaborate this point recently at a meeting of the University of San Diego School of Law's annual originalism conference.) If those addressees reasonably believe a speaker to have said Y while he intended X or had

no coherent intention at all, Y is what he has said. Goldsworthy agrees. "When people fail to communicate the meaning they intend," but communicate "something else," the "meaning of their utterance . . . is surely the meaning they inadvertently [non-intentionally] communicate, not the one they intended to communicate." That's simply wrong. A reasonable mistake about the meaning a speaker intended is still a mistake; the meaning survives the mistake and is still *the* meaning. Consider the example of Bill Clinton when he famously said "I did not have sex with that woman." In Clinton's vocabulary (and who can say that it shouldn't be his), "sex" meant intercourse, penile penetration, not oral stimulation. For many in his audience, however, "sex" included oral stimulation, and when it emerged that had in fact engaged in oral sex with "that woman," many concluded, reasonably, that he had lied. But he hadn't. In the code he was deploying, the assertion that he had stopped short of having sex is true. The fact that his audience, receiving his words within another code, heard him denying any sexual activity was a pertinent and consequential *political* fact, but it had no interpretive significance. He said what he meant to say and what he meant to say is what he said. Meaning belongs to the intender; communication is the prey of circumstance affected by innumerable unpredictable and uncontrollable variables and is not the rock on which to build interpretation's church.

Lawson also takes the communicative meaning route: "I am re-framing the question just a bit from "What do you decide?" to "What do you decide is the communicative meaning of the text?" ("Just a bit" is a serious understatement.) He acknowledges that trying "to figure out the conceptual criteria employed by the speaker . . . is surely the theoretical ground and starting point for any act of communication." But no sooner has he said that than he takes it back when he asserts that in certain political circumstances interpretation is "listener—rather than speaker—driven." In a government where "legislators are viewed as rulers or guardians and the populace is viewed as wards," it makes sense, Lawson asserts, to adopt a "speaker-oriented approach" and attempt to discern legislators' intentions. But in a bottom-up government where the populace ultimately calls the shots, it is the people's understanding of what has been said and meant that should trump. In short, what counts as interpretation varies and changes according to the governmental structure in place. But interpretation is a conceptual not a political category, and there would seem to be no principled support for Lawson's thesis. In accordance with that thesis (which again I find puzzling and even bizarre) Lawson seems to decide (or hypothesize) that the government presiding over the production of the fruit/vegetable statute is populace-centered and that therefore we should take "listener's (or public) meaning as the guide." The appropriate question then "is an empirical one about whether a hypothetically constructed

public mind would regard tomatoes and/or kiwi as a fruit." The evidence as Lawson sees it says "yes" to kiwis but does not definitively settle the tomatoes question. So the "hypothetically constructed public mind," an entity put in place of the actual minds – actually the two actual minds with opposing definitions of "fruit"—producing the text, is not a sufficient guide; substituting for the real (if at odds) intenders an imagined intender doesn't solve the interpretive problem. (How could it?) Lawson is then driven to seek the meaning of the text elsewhere—note that he moves further and further away from the scene of interpretation—and he finds it in a canon of construction which says that "ambiguity works *against* application of a law." Since the ambiguity resides in the status of tomatoes, that part of the law cannot be "given effect" which leave us, Lawson concludes, with the "status quo"—the situation before the law was passed —and tomatoes are to remain untaxed: "I would say 'no' to the tomato tax." (I hope that I've gotten Lawson right; I found his points a bit hard to follow in this paragraph.) This sequence of reasoning is intelligible and it does come to a conclusion all of the participants in this discussion (with the exception of Michaels who has nothing to say on the matter) find intuitive, but is it an interpretive conclusion? Once again, I think not. It is in Michaels's words "entirely normative."

Ekins also holds that the tax doesn't apply to tomatoes. He agrees with Soames that a legislature drawing a distinction between fruits and vegetables would not "intend fruit to have its botanical meaning." After all, botanical distinctions are not the kind of thing legislators pass on; settling them is a matter for science, not for legislatures or courts. Culinary distinctions on the other hand are made with respect to people's behavior and people's behavior is always an appropriate object of legislation, including tax legislation. Ekins concludes therefore that "the legislature —as the rational language user and lawmaker that uttered this semantic content intending to convey a certain meaning and thus change the law[s] in the ways that it intended them to change—intended to use 'fruit' in its culinary sense." But according to the hypothetical, there is no rational language user and no specifiable semantic content, or, rather, there are equally rational language users assuming different semantic values for the word they jointly use. How then can one speak of a joint intention having been carried out? Ekins's answer seems to be that the standing intention of a legislature to make "a plan for lawmaking change articulated in some meaning-content" is realized as soon as a vote is taken, even if it is impossible to say what "meaning- content" was voted on. The missing or unavailable

or too rich meaning-content is then supplied by a meaning-content a unitary legislature could reasonably be thought to have, in this case the exempting of tomatoes from a tax on fruit. The fact that the text of the statute did not express that meaning-content does not trouble Ekins who seems to believe that good-faith members of an enterprise like a legislature cannot fail to further its standing intention no matter what they do. He therefore roundly rejects any assertion that "the legislative act misfires" or "that there is no legislative intent" or "that the legislature has somehow left open . . . the meaning of 'fruit.' Again, I find Ekins's argument intelligible and even persuasive insofar as it outlines a method for keeping the enterprise going despite potentially fatal complications. But, again, I don't think what he presents is an account of interpreting.

One final example to make my oft-made point. Suppose the organizers of a public social event—committed to the standing intention of having the event run smoothly and without disruption—send out a flier saying "No canards will be allowed." Such a scenario could present two interpretive problems, one potentially solvable, the other not. If it is not clear whether the organizers meant to disallow "ducks" or "falsehoods," and, like Smith and Jones in the Peerless example, they have gone somewhere where they cannot be contacted, it would still be possible to reason about what they meant by "canard." You might look into the event's origination—Why was it organized and with what hopes in mind? What would threaten or disrupt those hopes?—and come to a conclusion about what they most likely intended. But say you were able to contact the organizers and discovered that some of them meant "ducks" by "canards" and others of them meant "falsehoods." Then there would be no interpretive path you could go down, for what you would have is two texts forbidding different things and no *interpretive* reason to go with one or the other. There might be any number of actions you could take—ask the organizers to reconvene, appoint a new committee, decide to disallow both falsehoods and ducks, decide that both ducks and falsehoods are fine, or that only one is, table the question and let the chips fall where they may—in your effort to have the event come off successfully. None of these actions, however, would count as interpreting; they would be actions taken after interpretation had been rendered impossible; they would be actions designed to keep the enterprise going; they would be actions that follow when the question what does something mean is left behind and we instead ask the question what should we do?