8

THE INTERPRETATION OF STATUTES

8.1 Statutory Interpretation in the Regulatory State

The methods of the common law have their origins in the Middle Ages, were well refined by the sixteenth century, and persist even today. And because those steeped in the common-law tradition recognize that judges have the capacity to create entire bodies of law, as they did in the early days of tort, contract, and even criminal law, it is not unheard of even now for judges to be asked to take on similar tasks. Judges created much of American antitrust law on a blank slate, for example, when they were forced to interpret the Sherman Antitrust Act of 1890, a statute whose main operative provision simply prohibits "[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce."[1] In enacting such a law, Congress's use of imprecise language was not a matter of carelessness in drafting. Congress plainly knew what it was doing, and it knew how to use narrow and precise language when it wanted to. In writing the Sherman Act in broad and indeterminate language, therefore, and in thus intentionally avoiding concrete language and easily understood rules, Congress was instructing the courts to create, in common-law fashion, pretty much the entire body of antitrust law. A similar approach is exemplified in the principal antifraud provision of the Securities Exchange Act of 1934, Section 10b, which authorizes the Securities and Exchange Commission to adopt regulations prohibiting "any manipulative or deceptive device."[2] And although the commission could have fulfilled its charge from Congress by promulgating detailed regulations governing securities fraud, it instead adopted a regulation—Rule

1. 15 U.S.C. §1 (2006).
2. 15 U.S.C. §78j (2006).

10b-5—that simply barred any "device, scheme, or artifice to defraud."[3] The commission deliberately left it to the courts to fashion, again in the style of the common law, most of the law of securities fraud, including most of the law dealing with insider trading. Much of American constitutional adjudication is similar. Judicial interpretation of phrases like "life, liberty or property," "due process of law," "equal protection of the laws," "unreasonable searches and seizures," "cruel and unusual punishments," and "commerce among the several states," for example, does not look very much like interpretation at all. The broad phrases in the constitutional text—Justice Robert Jackson once called them "majestic generalities"[4]—are best understood as initiating a process of common-law development that is largely unconstrained by the words in the document.[5]

In the modern United States, however, as in most other developed common-law countries, examples such as these are very much the exception rather than the rule. Far more typical in contemporary America is the Occupational Safety and Health Act of 1970,[6] whose twenty-nine detailed sections occupy forty-four pages in the United States Code and are supplemented by another eighty-eight pages of regulations in the Code of Federal Regulations. This is hardly unusual. The Clean Air Act of 1970, with its subsequent amendments, is 464 pages long, and such familiar laws as the Securities Act of 1933, the Civil Rights Act of 1964, and, of course, the Internal Revenue Code are highly detailed statutes typically augmented by even more detailed arrays of administrative regulations, official commentary, and interpretive rulings. In these and countless other instances, the aim of a statutory scheme is the comprehensive and precise regulation of a large swath of individual, governmental, and corporate activity.

Such complex statutory regulation would have pleased someone like Jeremy Bentham, who was committed to the belief that precise and comprehensive legislation would make judicial intervention extremely rare. If citizens and officials knew exactly what was required of them, Bentham

3. 17 C.F.R. §240.10b-5 (2006).
4. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
5. See David A. Strauss, "Common Law Constitutional Interpretation," 63 *U. Chi. L. Rev.* 877 (1996). See also David A. Strauss, "Common Law, Common Ground, and Jefferson's Principle," 112 *Yale L.J.* 1712 (2003).
6. 29 U.S.C. §§ 651 et seq. (2006).

and others have argued over the years, there would be little need for the judicial interpretation, construction, and creativity that Bentham and his followers have found so frightening. Judges might on occasion be required to enforce the law, or to interpret it in highly unusual cases, but in the ordinary course of things, Bentham believed, neither lawyers nor judges would be able to obstruct the operation of precise, publicly accessible, and largely self-enforcing statutory codes.[7]

We know now just how wrong Bentham was. Although detailed statutes are ubiquitous in the modern regulatory state, so too is what is sometimes called statutory interpretation or statutory construction. Perhaps because of poor drafting (recall *United States v. Locke*,[8] discussed in Chapters 1 and 2, in which the only plausible explanation for a "prior to December 31" filing deadline rather than "on or prior to December 31" is a drafting error), perhaps because Congress or another legislative body has found it politically safer to pass off a difficult decision to the judiciary, and mostly because even the most precise statute cannot come close to anticipating the complexities and fluidity of modern life, detailed statutes have increased rather than decreased the frequency of judicial intervention, in ways that Bentham could not have anticipated and in ways that would have appalled him if he had. Courts are constantly called upon to resolve contested interpretations of statutory language, and the prevalence of intricate statutory schemes, far from making statutory interpretation largely irrelevant, has instead produced a state of affairs in which debates about statutory interpretation loom large in contemporary discussions of legal argument, legal reasoning, and judicial decision-making.[9]

7. See Jeremy Bentham, "A General View of a Complete Code of Laws," *in* 3 *The Works of Jeremy Bentham* (John Bowring ed., 1843) (1962). Indeed, Bentham believed that lawyers were so complicit in making the law more complex for their own self-interested reasons that he proposed in 1808 that the system of lawyers' fees be abolished, with lawyers being paid by the state in fixed salaries. This reform, he believed, would eliminate the incentive for lawyers and judges ("Judge and Co." to Bentham) to make the law increasingly less understandable and thus increasingly more dependent on fee-greedy lawyers. Jeremy Bentham, "Scotch Reform," in 5 *The Works of Jeremy Bentham* 1 (John Bowring ed., 1843) (1962).

8. 471 U.S. 84 (1985).

9. For more in-depth treatments of the issues and a sample of the debates in a massive literature, see, e.g., Aharon Barak, *Purposive Interpretation in Law* 339–69 (2005); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); William N. Eskridge, Jr., Philip Frickey, & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2d ed., 2006); D. Neil MacCormick & Robert S. Summers, eds., *Interpreting Precedents: A Comparative Study* (1997); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (2006); Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 *S. Cal. L. Rev.* 845 (1992); John F. Manning, "The Absurdity Doctrine," 116 *Harv. L. Rev.* 2387 (2003); Frederick Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning," 1990 *Sup. Ct. Rev.* 231; Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv. L. Rev.* 405 (1989).

Questions of statutory interpretation do not arise solely in the context of legislatively enacted statutes. The same issues surround the judicial interpretation of administrative regulations, municipal ordinances, and rules of all kinds. Indeed, the kinds of questions that pervade the interpretation of statutes also infuse much of constitutional law. It may be that judicial interpretation of the equal protection and due process clauses of the Constitution is less interpretation than textually untethered common-law development, but the same cannot be said about interpretation of the more detailed provisions of the Constitution. Interpreting the provisions setting out the procedures for legislation,[10] for example, or the word "confrontation" in the Sixth Amendment,[11] is not unlike interpreting statutes enacted by Congress or the state legislatures.

8.2 The Role of the Text

The practice of statutory interpretation typically begins with the enacted words of the statute itself—the marks on the printed page. And this view is largely reflected in the academic commentary on that practice. But although it is widely accepted that the words are the starting point, the question of whether they are the ending point as well is at the center of most of the controversies about statutory interpretation. Moreover, although it seems straightforward to commence the interpretive task with determining what the words of a statute *mean*, what it means for a word or phrase or sentence in a statute or regulation to mean something is just the question to be answered, and it is hardly an easy one. Nor is it a question restricted to the issue of statutory interpretation. What it is for the

10. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986); Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

11. Compare Maryland v. Craig, 497 U.S. 836 (1990), with Coy v. Iowa, 487 U.S. 1012 (1988).

words of a statute to mean something is an inquiry related in important ways to the question of what it means for a word in a contract, will, or trust to mean something. Indeed, sorting out questions about the meaning of meaning[12] is as central in law as it is in philosophy, theology, literary criticism, art, and a host of other interpretive enterprises. And as we shall see, some of the debates about statutory interpretation attempt to address the extent to which, if at all, statutory interpretation resembles the interpretation of a painting by Picasso, a play by Shakespeare, or a passage in the Bible. But that is to get ahead of ourselves. So as a start, therefore, let us return again to the enduring "vehicles in the park" example that was the centerpiece of the 1958 debate in the pages of the *Harvard Law Review* between the English legal philosopher H. L. A. Hart and his American counterpart, Lon Fuller.[13]

Hart opened the debate by offering, in his discussion of the nature of legal rules, the hypothetical example of a rule prohibiting "vehicles" from a public park.[14] Hart employed the example to point out that regulations (or statutes) such as this one invariably had a "core of settled meaning" as well as a "penumbra" of debatable applications.[15] Automo-

12. Cf. C. K. Ogden & I. A. Richards, *The Meaning of Meaning* (1923), an important early-twentieth-century work on language and interpretation by a philosopher and literary theorist.

13. Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harv. L. Rev.* 630 (1958); H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* 593 (1958). The debate was not primarily about legal interpretation but instead about the nature of law itself, with Hart defending a modern version of legal positivism, the view that the concept of law is distinct from the concept of morality, and Fuller developing his own procedural form of natural law theory, the view that law is scarcely law at all if it does not satisfy certain minimum requirements of morality. The debates between adherents of positivism and natural law have occupied center stage in the philosophy of law for generations, and unfortunately both positions have frequently been the subject of ridiculous caricatures. But although the debate between Hart and Fuller about legal interpretation was for both connected with these larger debates in jurisprudence, their interpretation debate and its central example has become sufficiently important in its own right that we can use it to illustrate valuable themes about statutory interpretation while staying well clear of the more abstract jurisprudential debates. See Frederick Schauer, "A Critical Guide to Vehicles in the Park," 83 *N.Y.U. L. Rev.* 1109 (2008).

14. 71 *Harv. L. Rev.* at 606–15. Hart uses the same example in *The Concept of Law* 125–27 (Penelope A. Bulloch & Joseph Raz eds., 2d ed., 1994).

15. The terminology of the "core" and the "penumbra" comes from Bertrand

biles would "plainly" be within the settled meaning, Hart observed, and would thus be excluded from the park, "but what about bicycles, roller skates, toy automobiles? What about airplanes?"[16] And what about baby carriages, which others have mentioned in a subsequent variation on the same example? And, these days, what about skateboards, or motorized wheelchairs? In order to determine in these penumbral cases whether bicycles or skateboards or any of the other examples would count as vehicles, the adjudicator would have to determine the purpose of the regulation and, exercising discretion, allow bicycles and baby carriages into the park (and thus exclude them from the definition of "vehicle") if the purpose of the regulation was to prohibit noise and pollution, for example, but perhaps not if the purpose motivating the rule was to secure pedestrian safety (which bicycles might endanger) or to keep narrow pathways (which baby carriages might obstruct) clear. Indeed, if the point or purpose underlying the rule was not apparent, Hart expected that the judge exercising his discretion in such penumbral cases would act very much like a legislator and take into account the same policy considerations that we would expect to see in a legislature.

Although Hart appeared to distinguish a category of clear applications of a rule from a category of unclear ones, the distinction between

Russell, "Vagueness," 1 *Australasian J. Psych & Phil.* 84 (1923), who distinguished the core from the "fringe." And in this article Russell took on a well-known fallacy that plagues legal as well as political argument. Lawyers all too often argue that if we cannot clearly distinguish one thing from another in all cases, then the distinction is worthless or incoherent. They may argue, for example, that the distinction between navigable and non-navigable waters for purposes of determining whether there is admiralty jurisdiction is incoherent because some waters are navigable at high tide but not low or in rainy weather but not in dry. But that is an absurd argument, and Russell sought to demonstrate it by using the example of baldness. Although there are indeed some men about whom it would be hard to say whether they are bald or not, that does not mean that there is not a usable distinction between those who are clearly bald and those who are not. Edmund Burke made the same point about night and day, pointing out that the existence of dusk does not render the distinction between broad daylight and pitch darkness incoherent. But perhaps the best example comes from John Lowenstein, a baseball player for the Baltimore Orioles, who quipped that "they ought to move first base back a step and eliminate all the close plays." *Detroit Free Press,* April 27, 1984, at F1.

16. The airplane example comes from McBoyle v. United States, 283 U.S. 25 (1931). The case, which probably inspired Hart's own example, involved the question of whether a statute prohibiting taking a stolen vehicle across state lines was violated when a stolen airplane was taken from one state to another.

the core and the penumbra is hardly a bright line. Indeed, with respect to every rule, there will not only be contested questions about how to resolve penumbral cases, but there will also be debates and uncertainty about whether some application is in the core or in the penumbra.[17] Like the penumbra around the sun during a solar eclipse, therefore, the distinction between the core and the penumbra, or between the core and the fringe, is better seen as a scale, spectrum, or continuum than as a crisp demarcation. At one pole of this continuum we will find the least controversial application—a pickup truck entering the park with its driver's family and picnic supplies is just the kind of activity that any understanding of the "no vehicles in the park" regulation would wish to exclude—and at the other end we will see the least controversial nonapplication; a pedestrian walking slowly and admiring the scenery, for example, is plainly not a vehicle. In between, however, we find not a clear category of the contested but rather a scale in which the likelihood of contestation increases as we move away from one pole or the other.

Returning to Hart's own formulation of the shape and attributes of a legal rule, we can now examine Fuller's challenge to Hart's picture. This challenge was not about what a judge was to do in the penumbra. Fuller took little issue with the need for judges to look elsewhere when the words were unclear, although where Hart saw judges exercising quasi-legislative discretion, Fuller would have had judges look for the purpose behind the statute. Still, the disagreements between the two about what judges should do in the penumbra of linguistic uncertainty were relatively minor. More serious were the disagreements about what Hart labeled the core of settled meaning, for here Fuller argued that Hart was mistaken about the idea of a core of settled meaning itself. In response to Hart's assertion that automobiles were plainly within the rule's core, Fuller asked us to consider what should happen if "some local patriots wanted to mount on a pedestal in the park a truck [in perfect working order] used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the 'no vehicle' rule?"[18] The truck would initially seem clearly be a vehicle, Fuller argued, but for him it would just as clearly be absurd to exclude it from the park for that

17. See Timothy A. O. Endicott, "Vagueness and Legal Theory," 3 *Legal Theory* 37 (1997).

18. 71 *Harv. L. Rev.* at 661.

reason. And so, Fuller insisted, the words of a legal rule could not by themselves ever present a plain case for a legal rule's application.

Fuller's hypothetical war memorial is part of a long line of cases, some hypothetical and some real, demonstrating that for any legal rule, the possibility will always exist that applying the plain meaning of the rule's words will produce a result at odds with what the rule was designed to accomplish, or even at odds with simple common sense. In the same article in which he offered the example of the truck used as a war memorial, Fuller also provided the example of a rule prohibiting sleeping in a railway station. The rule would plainly have been designed to exclude a homeless person (whom Fuller, this being 1958, referred to as a "tramp"), but Fuller asked whether the rule would apply to a tired businessman who missed his train and nodded off in the station while waiting for the next one. Such an application would be ridiculous, Fuller argued, by way of reinforcing his point that the words of a rule could *never,* by themselves and without reference to the rule's purpose, determine even a core of so-called settled meaning. To the same effect was Samuel von Pufendorf's example of the seventeenth-century decision in which a statute of Bologna prohibiting "letting blood in the streets," presumably designed to prohibit dueling, was held not to apply to a surgeon performing emergency surgery.[19] And recall from Chapter 2 *United States v. Kirby,*[20] in which the Supreme Court refused to permit the prosecution under a statute prohibiting obstructing the mail of a sheriff who had arrested a mail carrier on a charge of murder, as one further example of the frequency with which the complexities of the world frustrate the efforts of statutory language to anticipate them.

Fuller supported his argument with some clumsy philosophy, occasionally insisting that words have no meaning except in the particular context in which they are uttered. This is a mistake, because the ability of a word (or sentence) to carry meaning at all presupposes that the conventions of language attach at least some meaning to words themselves, apart from the particular context of their use. The word "dog" refers to dogs and not to cats or bats, and although the example is rudimentary, it reminds us that language can operate only if its constituent parts,

19. Samuel von Pufendorf, *De Jure Naturae et Gentium Libro Octo* (1672), as described in 1 *William Blackstone, Commentaries* *59–60.

20. 74 U.S. (7 Wall.) 482 (1868).

whether they be words or phrases or sentences, have meaning themselves, for without it they would be unable to convey the thought of the speaker to the mind of the listener. It makes perfect sense, therefore, to say that the words or text of a statute mean something, although whether what the statute means is what its text means is exactly the matter at issue.

Fuller's misguided foray into the philosophy of language, ironically, detracted from rather than supported his highly valuable central point. The war memorial made out of a functioning military truck really *was* a vehicle,[21] just as the tired businessman really was sleeping in the station, and just as the sheriff in *Kirby* really did obstruct the delivery of mail. What these and countless other examples, both real and hypothetical, show is that the application of the literal language of a rule will now and then produce an outcome that is absurd, ridiculous, or at least at odds with the principal purpose lying behind the rule. And even in less extreme cases, following the literal language of a rule will even more often indicate an outcome that is silly, inefficient, or in some other way decidedly suboptimal. It was Fuller's point that language could not, Hart's example notwithstanding, ever be sufficient to produce a core or clear case, because in at least some instances the clear application of clear language would nonetheless produce an absurd result. Only by *always* considering the purpose behind the rule, Fuller believed, could we make sense of legal rules and indeed of law itself.

There is no need (yet) to resolve the debate between Hart and Fuller, for one of the valuable features of how the debate was framed is in providing a useful framework for considering larger questions of statutory interpretation. At the heart of the framework is a distinction among three

21. Fuller was, of course, stuck with Hart's example, but "vehicle" may not be the best word to support Fuller's point. It is possible that a current ability to move under its own power is definitional of "vehicle," in which case the truck may have ceased being a vehicle at the point at which it was affixed to or even became part of the memorial. But this is a defect only in the example and not in the central point. Fuller could have asked the same question about an ambulance or a fire truck and his point would have remained the same. The same holds true for Fuller's example of the tired businessman, for the fact of his sleeping was a physiological fact not dependent on why or how he was sleeping. And so too with the question whether a "no dogs allowed" rule in a restaurant or store would bar guide dogs for the blind. It is almost certainly absurd to bar the guide dogs, but the fact that it would be absurd to apply the rule to guide dogs does not mean that guide dogs are not dogs.

types of cases. There are the cases in which the statutory language itself provides a plausible answer, those in which the language does not provide an answer, and those in which the language provides a bad answer—an answer that may clash with the legislative intent, with the purpose of the statute, or with some more general sense of the right result. When the language itself provides a plausible answer—the first category—that is typically the end of the matter. If the words of the law provide a sensible solution to a problem or a dispute, even if not the only sensible answer, it is rare for the literal meaning of the words not to determine the legal outcome. Indeed, such cases are unlikely to be disputed, and, if disputed, unlikely to be litigated, and, if litigated, unlikely to be appealed. Lawyers often talk of hard cases, but there are many easy cases as well.[22] When the language of a statute is clear and produces a sensible result, we have an easy case of statutory construction. In such cases, the sensible resolution provided by the words of the statute alone will normally be dispositive.

Once we move beyond the easy cases, however, the matter becomes less tractable, for at this point we encounter hard cases of two different varieties. One type of hard case arises out of linguistic indeterminacy. The words of the statute do not provide a determinate answer to the dispute before the court, either because the language is vague, as with "equal protection of the laws," "reasonable efforts," and "undue delay," or because language that is determinate for other applications is indeterminate with respect to the matter at issue, as with the question whether bicycles or baby carriages or skateboards are vehicles that should be kept out of the park. But there is another type of hard case, and this type is not a function of linguistic indeterminacy at all. Rather, it is the hard case that is hard just because a linguistically determinate result—the war memorial constructed from a vehicle, the obstruction of the mail caused by the legitimate arrest of a mail carrier in *Kirby*, the missed deadline in *Locke*—can plausibly be argued not to be the best, or even a very good, legal outcome. These are hard cases, but not because the language gives no answer. They are hard precisely because the language gives an answer, but the answer that the language gives appears to be the wrong answer.

Because virtually all litigated statutory interpretation cases present one or the other of these two types of difficulty, it will be useful to con-

22. See Frederick Schauer, "Easy Cases," *58 S. Cal. L. Rev.* 399 (1985). And see the discussion in section 2.2, *supra*.

sider them separately. We will look first at the cases that are hard because of linguistic indeterminacy, and then take up the ones that are hard because of a seemingly erroneous linguistic determinacy.

8.3 When the Text Provides No Answer

Implicit in the foregoing framing of the question of statutory interpretation is a reinforcement of a central point not only about statutory interpretation, but also about statutes in general. Statutes—the actual language of the law itself—are important not because they are *evidence* of what the legislature was thinking or intended, but because of what they *are*. Just as *Macbeth* is not only evidence of what was on Shakespeare's mind, and just as the *Mona Lisa*'s importance is not simply a matter of what it tells us about Leonardo da Vinci, so too is a statute important in its own right. It is a primary legal item—part of the stuff of law itself—whose status is not a function of what it may reveal about something else.[23]

Because a statute *is* law and not just an indicator of where we might find the law, it comes as no surprise that its actual language looms so large in legal reasoning. The lawyer who talks too soon or too much about intentions and inferences and broader principles of justice in a case involving the interpretation of a statute is likely to be quickly upbraided by a judge asking, "Yes, but what does the statute actually *say*, counselor?" As we have already seen, the language of a statute may not be the only thing considered in a case involving a statute, and what the statute says may not be the last word on the matter, but to fail to recognize that it is the first word, the starting point, is to misunderstand something very important about the nature of law itself.

Although the words of a statute are almost always the starting point, often those words do not provide a clear answer to a particular question. Sometimes this is because the statute uses vague words, like "reasonable" or "excessive" or "under the circumstances," and in such cases the judge

23. For a contrary view, see Ronald Dworkin, *Law's Empire* 16–17 (1986), claiming that there is a "real" rule lurking behind the formulation of a rule that we might find in some place like the United States Code. Dworkin's larger interpretive account of adjudication may well be sound, or at least partially so, but the claim that there is some sort of "real" rule that is not the rule in the books is more mysterious than helpful.

inevitably must look beyond the statutory language. It is common in such cases to say that the judge has "discretion," although just what that means is controversial. Under one view, the one that Hart adopted when he offered the example of the vehicles in the park, the judge in cases of this kind of linguistic indeterminacy is acting as if she were a legislature and may take into account the full range of policy considerations typically used in legislating in order to determine how the indeterminacies in the statute should be made more specific and how a particular dispute should be resolved. This is not to say that a vague statute offers no guidance. Even though the Sherman Antitrust Act in effect authorized the federal courts to create the body of antitrust law, both the language of the statute and its accompanying legislative history made clear that the point of the law was to prohibit collaborative anticompetitive practices, as opposed to adapting a complete laissez-faire approach. So although the courts had considerable leeway in filling out the details, they were expected to do so with a particular goal in mind.

It is somewhat controversial whether determining the statutory goal should or must draw on the legislative history—the record of what the legislature explicitly intended, typically gleaned not primarily from the statute itself (which is why this history is often called *extrinsic*) but from committee reports, records of legislative hearings, and transcripts of legislative debates. The debate about when such materials should be used, if at all, is an active one, with those who favor using such material arguing that statutes are designed to further legislative intentions so that any evidence of that intention should be usable, especially when the language gives insufficient guidance.[24] Proponents of using legislative history also argue that in cases like the ones we are discussing—cases in which the language itself does not provide an answer—it would be foolish not to attempt to use any available evidence to discover what the legislature would have wanted done in just such a case.[25]

24. For a powerful and comprehensive defense of intentionalist approaches to statutory interpretation, see Lawrence M. Solan, "Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation," 93 *Geo. L.J.* 427 (2005).

25. Traditional British practice excluded consideration of records of actual parliamentary debates, even when a court was attempting to discern Parliament's intentions. The exclusionary practice was justified in part by the view that only the statute itself was authoritative (see Black-Clawson International v. Papierwerke Waldhof-Aschaffenburg, [1975] A.C. 591), in part because records of legislative

On the other side of the debate about using evidence of actual legislative intentions, opponents of the use of legislative history—sometimes called *textualists,* for their unwillingness to go beyond the text of the law—are skeptical about the evidentiary value of records of legislative history. Often different legislators have different goals in mind, so it is not so clear, they say, just whose intentions have been recorded. And sometimes material is inserted into the legislative history by some legislator just to make a point, or to capture the attention of journalists, or to pander to a legislator's constituents, even though that material in no way reflects the collective intentions (assuming that a collective body can have an intention) of the legislature as a whole. What is perhaps most important for most textualists, however, is the fact that it is only the text that was voted on by the legislature. Treating the un-voted-upon legislative history as part of the legislation, they say, is profoundly undemocratic.[26]

The debates about the permissibility (or necessity) of recourse to legislative intent when a statute is unclear should not be confused with arguments about the *purpose* of a statute. It is legislators (or their equivalents) who have intentions, but statutes can have purposes, and it is often possible to determine the purpose of a statute from the words of the statute themselves.[27] Sometimes, of course, the statute will *say* what its purpose is, a phenomenon described (and praised) by Karl Llewellyn as a

debates were thought to be unreliable guides to actual intentions (see Davis v. Johnson, [1979] A.C. 264 [H.L.]), and in part because of a worry that encouraging recourse to hard-to-find legislative records would increase the cost of litigation (see William Twining & David Miers, *How to Do Things with Rules* 291 [4th ed., 1999]). The exclusion of legislative materials was relaxed somewhat in Pepper v. Hart, [1993] A.C. 593 (H.L.), but British practice remains substantially less receptive to the use of such materials than is now the case in the United States.

26. The most influential contemporary textualist is Justice Scalia. In addition to Scalia, *A Matter of Interpretation*, note 9 *supra,* see, e.g., Johnson v. United States, 529 U.S. 694, 715 (2000) (Scalia, J., dissenting); Holloway v. United States, 526 U.S. 1, 19 (1999) (Scalia, J., dissenting); Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264 (1996) (Scalia, J., concurring); Green v. Bock Laudry Machine Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment). See also Frank H. Easterbrook, "Textualism and the Dead Hand," 66 *Geo. Wash. L. Rev.* 1119 (1998); Frank H. Easterbrook, "Statutes' Domains," 50 *U. Chi. L. Rev.* 533 (1983); Manning, "The Absurdity Doctrine," note 9 *supra;* John F. Manning, "Textualism and the Equity of the Statute," 101 *Colum. L. Rev.* 1 (2001).

27. See Felix Frankfurter, "Some Remarks on the Reading of Statutes," 47 *Colum. L. Rev.* 527 (1947); Max Radin, "Statutory Interpretation," 43 *Harv. L. Rev.* 863 (1930). See also Richards v. United States, 369 U.S. 1, 9 (1962).

singing reason, his term for a statute that not only *has* a purpose but that also announces it loud and clear.[28] But even where the purpose of a statute is not explicitly stated in the text of the statute itself, it is often possible with considerable confidence to infer the purpose of a statute from the four corners of the statutory language alone. A rule prohibiting vehicles, musical instruments, radios, and loudspeakers from a park would almost certainly be a rule whose purpose was to prevent noise, and thus this rule might be applied to prohibit a musical calliope on wheels but not a bicycle or a baby carriage. But a rule prohibiting vehicles and cooking fires might be determined, just on the basis of these two conjoined prohibitions, to have as its purpose the alleviation of pollution, such that some marginal cases of vehicles that did not pollute—for example, skateboards and bicycles—might be permitted, while polluting marginal cases—for example, fuel-powered model ships and planes—might be barred.

The debates about the permissible sources of supplementation of indeterminate statutes are extensive. We have taken a quick look at policy, legislative intent, and statutory purpose as alternative forms of supplementation, and we could certainly add a broad sense of justice as well to the list of goals that a judge might have in deciding what to do and where to look when the words of a statute do not provide a clear answer. And for the legal philosopher Ronald Dworkin, most prominently, the judge in such cases must try to interpret the statute so that it best "fits" with other statutes, with reported cases, with the Constitution, with broad legal principles, with equally broad political and moral principles, and with all of the other components of law's seamless web.[29] But even when we add these perspectives to the list, this glance is designed simply to give

28. Karl Llewellen, *The Common Law Tradition: Deciding Appeals* 183 (1960). See also Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 189 (1931). Llewellyn also saw the singing reason as a virtue of judicial opinions as well as of statutes. Karl N. Llewellyn, "The Status of the Rule of Judicial Precedent," 14 *U. Cinc. L. Rev.* 203, 217 (1940).

29. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996); Ronald Dworkin, *Law's Empire* (1986); Ronald Dworkin, *Taking Rights Seriously* (1977). In fact, Dworkin insists that judges do and should look for this kind of fit even when the language of the most immediate statute seems clear, but whether he is right about this is a matter of continuing jurisprudential controversy. See Frederick Schauer, "The Limited Domain of the Law," 70 *Va. L. Rev.* 1909 (2004); Frederick Schauer, "Constitutional Invocations," 65 *Ford. L. Rev.* 1295 (1997).

a flavor of the kinds of issues that are likely to arise when statutes are unclear and the kinds of sources that judges may resort to in such cases. The point is only that statutes are often linguistically unclear, whether intentionally or accidentally, and that although there are large debates about where judges should go in such cases, there are no debates about whether judges must go somewhere, for in such cases no amount of staring at the indeterminate language of a vague or ambiguous statute will provide an answer absent some sort of supplementation from elsewhere.

Before leaving the topic of the indeterminate statute, it may be valuable to distinguish two types of indeterminacy. One type is a consequence of a vague[30] or imprecise statute that furnishes virtually no answers by itself. A statute providing that in cases of disputed child custody the child should be placed so as to further "the best interests of the child," as many state domestic relations statutes specify, is one in which the vagueness of the governing standard requires an exercise of judicial discretion or at least some recourse to purpose, intent, justice, equity, or something else. And because of the pervasive vagueness of the governing standard, this recourse to something beyond the words will be required in virtually every contested case. So too with laws regulating "hazardous" products or "dangerous" animals. We may be pretty certain that chainsaws are hazardous and rattlesnakes dangerous, but for most possible applications the words themselves will need supplementation from somewhere, just because of the linguistic imprecision of the words actually used in the law.

At other times, however, words that seem precise, and words that *are* precise for most applications, will become imprecise in the context of some particular application. Hart's assumption was that "vehicle" was a reasonably precise term, such that for most applications it would be relatively easy to conclude that they were or were not vehicles. It was only

30. A statute that is unclear with respect to some application is sometimes described in the legal literature as "ambiguous," but that is the wrong word for the phenomenon. A word is ambiguous when it is susceptible to two (or more) quite distinct meanings, as when we are unsure whether the word "bank" refers to the side of the river or the place where we keep our money or whether a "vessel" is something into which we put water or something that floats upon it, but this is rarely an issue in statutory interpretation. In interpreting statutes or other legal texts, the problem is usually that the words have no clear meaning rather than one or another clear meaning, and the correct word for this phenomenon is "vagueness" and not "ambiguity."

when faced with an unusual application—roller skates or bicycles or toy automobiles—that the latent vagueness of *any* term—its *open texture*[31]—would come to the surface. So although the application of the Statute of Frauds (requiring a writing for contractual validity) to transactions involving land might seem rather precise, and although it would be precise for most applications, it would be less so if the contract was one for the sale or lease of air rights or beach access. Such cases would lie at the fuzzy edges of the term "land," and here, just as with the pervasively indeterminate statute, recourse to something beyond the words themselves would be necessary to resolve the controversy.

Statutory linguistic indeterminacy, therefore, may be a function either of pervasive statutory vagueness or of cases that crop up at the vague edges of normally precise statutes. The two phenomena are different, but in either case the text alone cannot do all the work. There are disputes about what should be called upon in such cases to carry the load—legislative intent, statutory purpose, good policy, economic efficiency, moral principle, consistency with other parts of the same statute, consistency with other statutes, or the equities of the particular case, for example—but this variety of statutory interpretation is mandated simply by the inability of language to anticipate all of the possible scenarios in a world far more complex than the blunt instrument of statutory language.

8.4 When the Text Provides a Bad Answer

Although many cases of statutory interpretation arise when a statute is indeterminate—whether in general or only in the context of some particular potential application—there is another category that is importantly different. In this category the words *do* give an answer, but the answer seems unacceptable. At the extreme, the answer given by the words will simply appear absurd. This was Fuller's point with respect to the examples of the vehicle used as a war memorial and the businessman who fell

31. The term "open texture" was used by Hart in describing the way in which a clear statute might become indeterminate with respect to some applications, and Hart got it from Friedrich Waismann, "Verifiability," *in Logic and Language: First Series* 117 (A. G. N. Flew ed., 1951). It is worth stressing that "open texture" is not the same as vagueness, but is rather the characteristic of any language, even the most precise language, to become vague in the face of unforeseen applications. Open texture is not vagueness but is rather the omnipresent *possibility* of vagueness.

asleep while waiting for his train, just as it was Pufendorf's with respect to the surgeon arrested under the literal application of a law designed to prevent dueling, and it is the principal theme of those who have argued against the Supreme Court's decision in *Locke*.[32] It is of the essence of law that it be reasonable, so the argument goes, and for that reason, insisting on a literal application of a statute that produces an absurd or plainly unreasonable result is itself absurd. Taking the text as the be-all and end-all in such cases should be avoided just because it is profoundly inconsistent with the fundamental nature of law as the reasonable regulation of human conduct.

As the Supreme Court's decision in *Locke* shows, however, there is another side of the argument. This other side argues, in part, that even allowing the words to give way in the case of a seemingly absurd result is to set out on the road to perdition, for even absurdity can often be in the eyes of the beholder.[33] The question, from this perspective, is not whether it is absurd to deny Locke his land claim, or to prosecute Pufendorf's surgeon, or to evict Fuller's tired businessman from the station, but instead whether anyone—even a judge—should be empowered to decide whether and when some application is absurd or not. The idea of the Rule of Law counsels us to be wary of the rule of people as opposed to the rule of the formal law—the rule of law and not the rule of men, as it was traditionally described—and thus at the extremes a reluctance to trust even a court to determine what is absurd or not will suggest that following the words of a statute come what may might not itself be such an absurd idea after all.[34]

32. See Richard A. Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," 37 *Case West. Res. L. Rev.* 179 (1986).

33. See, e.g., John L. Manning, "The Absurdity Doctrine," 116 *Harv. L. Rev.* 2387 (2003); Frederick Schauer, "The Practice and Problems of Plain Meaning," 45 *Vand. L. Rev.* 715 (1992).

34. In a delightful and enduring essay entitled "The Case of the Speluncean Explorers" (62 *Harv. L. Rev.* 616 (1949)), Lon Fuller demonstrated, some years before he engaged in his debate with Hart, that there were a number of ways of dealing with the unjust results that the straightforward application of the law will occasionally yield. In Fuller's example, a stranded group of explorers in a cave face a problem similar to that of the real shipwrecked sailors in R. v. Dudley & Stephens, L.R. 14 Q.B.D. 273 (1994), and in like fashion proceed to eat one of their number so that the others might survive. Upon being prosecuted for murder after their rescue, the survivors raise a number of defenses, each of which, in Fuller's story, has an adherent on the bench. What is most interesting is that Fuller

Although being unwilling to circumvent the literal words of a statute even in cases of obvious absurdity is a plausible approach, it is not one that has carried the day. In English law there is frequent mention of the "Golden Rule" of statutory interpretation, by which it is meant that the plain meaning of the text will control except in cases of absurdity.[35] In the United States as well, even those who are most wedded to the primary importance of the text would accept, even if at times grudgingly, that so-called textualism allows for an exception in cases of obvious absurdity or readily apparent drafting error.[36]

Absurdity aside, the arguments for taking the text as (almost) always preeminent are not restricted to arguments derived from the Rule of Law value of being wary of the discretion of individual decision-makers, even if they are judges. What is perhaps even more important, as briefly noted above, is the argument from democracy itself. When a legislature enacts a statute, it enacts a set of words, and at no time does it vote on a purpose or a goal or a background justification apart from the words. It certainly does not vote on the intentions expressed in the speeches or writings of individual legislators. Indeed, at times different legislators may well have different intentions or different purposes in mind, and the words enacted may represent the point of compromise among legislators with different goals and different agendas. To take what the legislature has *said* as preeminent is simply to respect a legislature's democratic provenance, so it is argued. But there are things that are said on the other side as well, and it is to this that we should now turn.

The other side of the argument, and one closely connected with Fuller's side of his debate with Hart, sees statutes as manifestations of reason, as expressions of collective legislative intentions, and as legal items having a point or a purpose. And although reason, intention, and

recognizes that there might be several different ways to avoid an unjust outcome. One is to interpret the statute in contradiction of its plain terms. But there are others, including holding the law to have been violated but imposing a minimal sentence, holding the law to have been violated but refusing to enforce the law, and imposing a sentence while urging the executive to pardon the offenders.

35. See Grey v. Pearson, (1857) H.L. Cas. 61; William Twining & David Miers, *How to Do Things with Rules* 279–83 (4th ed., 1999); M. D. A. Freeman, "The Modern English Approach to Statutory Construction," *in Legislation and the Courts* 2 (M. D. A. Freeman ed., 1997).

36. Sometimes referred to as "scrivener's error." See City of Chicago v. Environmental Defense Fund, 511 U.S. 328 337 n.3 (1994) (Scalia, J., concurring).

purpose are three different things, they all coalesce around the view that it is the job of a judge to try to make sense out of a statute rather than just slavishly follow its words down a ridiculous path. Yes, the power to make sense out of a statute might be abused, but we should not forget Justice Story's warning in *Martin v. Hunter's Lessee:* "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."[37] So although it is possible that there are some decision-making environments in which the consequences of the occasional absurd result—allowing Kirby to be prosecuted or barring Locke from his claim—will be less than the consequences of empowering judges to determine which results are absurd and which are not, there may be even more, so the argument goes, in which there is no reason to take such a dim view of judicial power. If so, then there may be many environments in which judges can and should be authorized to interpret statutes guided by reason and allowed to determine which interpretations are unreasonable and which not. In such environments, judges will be within their authority when they attempt to divine what the legislature would have wished done in the circumstances and attempt as well to understand and thus to further the basic purposes of a statute.

Where this latter view prevails, where judges are trusted to pursue reason even if occasionally they get it wrong, it is best to understand the literal interpretation of a statute as *defeasible,* a term we encountered in exploring the common law's methods in Chapter 6. The term, which originally comes from property law and is now frequently found in jurisprudential writing,[38] suggests that there are some circumstances in which a rule or principle or legally indicated outcome might be defeated. In the context of statutory interpretation, therefore, the view would be that the literal interpretation is still the standard and still the approach in the first instance. But not only when the literal interpretation is absurd, but also when the literal interpretation yields an outcome inconsistent with common sense, or inconsistent with probable legislative intention, or inconsistent with the statute's purpose, the judge may depart from literal meaning in order to produce the most reasonable result.

37. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

38. See, e.g., D. Neil MacCormick, "Defeasibility in Law and Logic," *in Informatics and the Foundation of Legal Reasoning* 99 (Zenon Bankowski, Ian White, & Ulrike Hahn eds., 1995); Richard H. S. Tur, "Defeasibilism," 21 *Ox. J. Legal Stud.* 355 (2001).

The same idea might be expressed in terms of a *presumption.* Judges typically start with the text, and they presume that what the text says is what the statute means.[39] But this presumption, like many others, is rebuttable. The presumption shifts the burden of proof, as it were, but it remains possible to argue that the text should not be followed when doing so would frustrate the statute's purpose or the legislator's intent or produce an absurd or unreasonable result. These arguments are rarely easy ones to make. To argue against the plain words of the text (and it is important to remember that we are dealing here with the situation in which it is assumed that the text does have a plain or literal meaning) is never easy and is somewhat like swimming upstream. But in many legal systems, and perhaps especially in the legal system of the United States,[40] such arguments are possible and indeed frequently prevail. And so although it would be a mistake to ignore the extent to which the straightforward meaning of the statutory text is the dominant factor in statutory interpretation, it would be a mistake as well to neglect the important fact that the text, even if it is the starting point, is often not the ending point, and that the final determination of the meaning of a statute is not always the same as the meaning of the words or phrases or sentences that the statute happens to contain.

8.5 The Canons of Statutory Construction

Typically, statutes are not as uncomplicated as the examples that have dominated this chapter. Rather than simply banning vehicles from the park or prohibiting the obstruction of the mails, modern statutes are complex affairs, with numerous sections, subsections, parts, and subparts and with definitions of terms that are often as important or more so than the so-called operative sections themselves. The Securities Act of 1933, for example, controls the process by which issuers of securities must register their offering with the Securities and Exchange Commission before offering the securities to the public. But although the operative Section 5 of the act contains the requirement of registration, almost

39. See, e.g., Crooks v. Harrelson, 282 U.S. 55, 60 (1930). On presumptions in general, see Chapter 12.

40. See Patrick S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (1987).

all of the "action" in the statute as a whole is contained in the definitions, for this is where it is determined what is a security, which offerings are exempt and which not, and when various shortcuts in the registration process are available. The lawyer who does not understand the intricate interplay of the definitions in the statute simply does not understand how the statute works at all.

The Securities Act of 1933 thus presents difficulties in interpretation simply because it is complex, and consequently requires the careful and close reading that is often associated with good legal thinking. But sometimes it is not so clear, even after very close reading, what the words of a statute mean, and not because of vagueness or ambiguity. To make sense of such a statute there has developed over the years a set of *canons* of statutory construction, designed to provide guidance in determining how the words of even a seemingly precise and clear statute should be interpreted.

The canons of statutory construction have occupied entire volumes, and it would be impossible here even to scratch the surface of what they are and how they operate. And, as we saw in Chapter 7, they have been mocked as well, especially by Karl Llewellyn. If there are so many canons of statutory construction that one is virtually always available to support any side of any contested case of interpretation, then the canons turn out to be scarcely more than supplements to arguments made on other grounds, failing totally to provide the guidance that was their original aim.

Despite all of this, however, it might be useful here just to give the briefest flavor of what the canons are all about. Consider, for example, the canon (or maxim) *expressio unius est exclusio alterius* (most of the canons have Latin names, dating back to when the liberal use of Latin was the mark of the sophisticated lawyer). This canon, translated as "the expression of one is the exclusion of the other" and meaning that omissions are to be understood as exclusions, tracks what for many people is just common sense. Consider again the example of the rule prohibiting vehicles in the park. Suppose it can be established that the purpose of the rule is to preserve a quiet environment so that people can relax without the noise or potential danger of motorized vehicles. And suppose the question then comes up whether rock concerts are to be excluded. They are certainly loud and sometimes dangerous and typically interfere with the peace and quiet of those who are not attending. But the rule only prohibits vehicles, and whatever a rock concert is, it is not a vehicle. So the

argument would be that the explicit prohibition of vehicles should be understood as an almost equally explicit nonprohibition of rock concerts.

This example is fictional, but real examples abound. Because Rule 9(b) of the Federal Rules of Civil Procedure requires detailed pleading of allegations of fraud or mistake, it has been held by application of the *expressio unius* maxim that pleading of any other claim need not be detailed.[41] Similarly, the fact that Congress, acting on the authority of the commerce clause in Article I of the Constitution, sometimes explicitly preempts (precludes) state regulation of the same subject has been repeatedly held to entail that nonexplicit preemption is to be treated as the permission of parallel state regulation.[42] And because Congress created a "hardship" exemption for corporations and individuals from some aspects of the Endangered Species Act, it has been held that Congress's expressed exemptions for corporate and individual hardship were to be understood as excluding any such exemption for governmental hardships.[43]

The *expressio unius* maxim is just one of the canons of statutory construction, and there are myriad others. The *ejusdem generis* canon requires that open-ended terms in a statutory list (or its equivalent) be interpreted to include only items similar to those listed. A statutory provision requiring governmental inspection of "fruits, vegetables, grains, and other products" should under this canon be understood to include only foodstuffs, not motor vehicles or televisions, within "other products." And thus in *Circuit City Stores, Inc. v. Adams,*[44] the Supreme Court held that a provision in the Federal Arbitration Act applying a portion of that act to "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" should be interpreted to apply only to transportation workers and not to all nontransportation employees working in interstate or foreign commerce. Another commonly used canon is the requirement that provisions in different statutes, or different parts of the same statute, be interpreted *in pari materia*—together—in order to produce a coherent and internally consistent statutory scheme. Thus courts have interpreted the jurisdictional and procedural provisions of the antidiscrimination provisions of the Civil Rights Act of 1964, the

41. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (193).

42. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

43. Tennessee Valley Authority v. Hill, 437 U.S. 153, 188 (1978).

44. 532 U.S. 105 (2001).

Americans with Disabilities Act, and the Age Discrimination in Employment Act as a unified whole in order to produce, or at least attempt to produce, as much of a unitary and consistent framework of antidiscrimination statutes as the language of the individual statutes could bear.[45]

For purposes of this chapter and this book, little point would be served by cataloging the full array of canons of statutory interpretation. The ones just described give a flavor of how they operate, but Llewellyn seems close to the mark in suggesting that with so many of them typically pointing in opposite directions, it is difficult to see how they can in the final analysis be dispositive in any case. Nevertheless, the canons do in their entirety suggest that even determining the literal meaning of the statute is not always a straightforward process. But they suggest as well that whatever techniques are used, the process of statutory interpretation is typically one that begins with a close reading of the text, possibly supplemented by interpretive aids such as the canons of statutory interpretation. And so although at the extremes the interpretation of statutes may have characteristics reminiscent of pure common-law development, to ignore the way in which the actual language of a statute is the starting point for analysis of cases in which a statute is relevant is to ignore a dominant feature of modern legal systems.

45. See Jennings v. American Postal Workers Union, 672 F.2d 712 (8th Cir. 1982).

9 THE JUDICIAL OPINION

9.1 The Causes and Consequences of Judicial Opinions

It is characteristic of the common law that the judicial opinion occupies center stage. It is not all that matters, of course, but few legal arguments in common-law jurisdictions lack multiple references to the published opinions of judges, and few judicial opinions fail to refer to other judicial opinions. To think about legal reasoning in the common-law world without taking into account the written opinions of judges is scarcely conceivable.

Yet although judicial opinions are an omnipresent feature of modern common-law legal argument, and although the "reasoned elaboration" provided by written judicial opinions is often said to be one of the desirable characteristics of law,[1] it is a mistake to think that all or even most legal outcomes are accompanied by a written statement of the reasons for the decision. Jurors delivering verdicts not only are not expected to provide reasons for their decision, but are typically prohibited from doing so. The Supreme Court decides with full argument and opinion only a tiny percentage of the thousands presented to it,[2] but when it refuses to hear the remainder it typically says nothing other than "the petition for

1. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 143–52 (William N. Eskridge, Jr. & Philip Frickey eds., 1994); G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," *59 Va. L. Rev.* 279 (1973).

2. For the October 2006 Term, the precise count is that the Court received 8922 petitions for certiorari and (rarely) other forms of review, and decided 73 cases with full opinions after briefing and oral argument. "The Supreme Court, 2006 Term—The Statistics," 121 *Harv. L. Rev.* 436 (2007).