Legal Interpretation

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In the Battle of Balaklava in 1854, the Earl of Lucan was in command of British forces facing the valley of death. Russian artillery stood a mile away at the far end, and there were 5000 Russian cavalrymen in the valley. Russian artillery and thousands of infantry with muskets lined the heights on either side. The Earl received this order,

'Lord Raglan wishes the cavalry to advance rapidly to the front - follow the enemy and try to prevent the enemy carrying away the guns. Troop Horse Artillery may accompany. French cavalry is on your left. R Airey. Immediate.'

(www.nationalarchives.gov.uk/battles/crimea/charge.htm)

The Earl ought to have interpreted the order as referring to captured British guns on the heights, which the Russians were removing. Instead, he won a place in military history by interpreting it as referring to the Russian guns at the end of the valley. He ordered the Light Brigade to charge down the valley in a hopeless attack on the Russian artillery at the end. Of the 673 men, some 200 (and most of the horses) were killed or wounded. Interpretation is a creative reasoning process of finding grounds for answering a question as to the meaning of some object. The Earl would have interpreted the order well, if he had found good grounds for answering the question he faced (what meaning was to be ascribed to the reference to 'the guns'?). But then, if the order had said, 'try to prevent the enemy carrying away the captured guns on the heights', the question of interpretation would not have arisen. The Light Brigade would not have entered the valley of death.

The disaster should serve as a reminder to lawyers and to lawmakers: that interpretation is a potentially dangerous reasoning process, and that the need to interpret only arises if a person faced with a decision needs to answer a question as to the meaning of some object.

Deciding what is to be done according to law sometimes takes interpretation. But no need for interpretation arises if no question arises as to the meaning of an object. If you approach a red traffic light in your vehicle, you need to know what it means, but the legal rule does not give you the interpreter's task of finding reasons for ascribing one meaning to it rather than another. And where a controversial and difficult question arises as to what is to be done according to law, interpretation may not resolve it. If, on the best interpretation, the law requires you to do what is reasonable, you will need a technique other than interpretation in order to identify the reasons at stake.

Yet it is easy and attractive to think of legal reasoning generally as a matter of interpretation. This mistake means forgetting just how extravagantly the law may leave matters for decision by the parties to a transaction, or by an institution that must resolve a dispute. Conversely, it means forgetting how tightly, transparently and incontrovertibly the law can bind the parties and the institutions.

The mistake is easy to make because of the charm of interpretation. The charm comes from the tantalizing complex of creativity and passivity that interpretation involves (see Finnis, 1987, pp 362-3; Raz, 2009, Chapters 10 and 12). Judges, instead of claiming authority to invent a resolution to a dispute, have a natural inclination to see what they are doing as interpreting what others have decided (the parties, the
legislature, framers of a constitution, states that signed a treaty, previous courts...). Conversely, when judges are moved (legitimately or illegitimately) to depart from what others have decided, they have a natural inclination to see what they are doing as interpreting what those others have done instead. These natural inclinations of judges correspond to the standard techniques of advocates, who do not say, ‘Please make something up in my client’s favour’, but ‘this is best interpreted in my client’s favour’. Advocates do not ordinarily say, ‘Please exempt my client from this law’ but ‘Properly interpreted, this law does not apply to my client’.

The judges’ inclinations and the advocates’ techniques are related to the best feature of a concern for the rule of law: the determination not to subject the parties and the community to the arbitrary will of an official. But the charm of interpretation can be blinding, and I think that it is healthy to be skeptical about it. So this chapter will be an exercise in skepticism about the importance of interpretation to legal reasoning.

By ‘legal reasoning’, I mean finding rational support for legal conclusions (general or particular- that there is an income tax in English law, that the law requires me to drive on the left in this country, that this defendant is liable to compensate this claimant...). I do not mean by it merely reasoning that identifies the content of the law, but also reasoning as to what is to be done according to law.

Here are the general propositions concerning interpretation that I will rely on, and I hope you can accept them:

- it is of an object (that is, a good interpretation depends on true propositions that refer to the object), and
- it is creative (that is, an interpretation does not simply state what everyone knows if they are familiar with the object, but ascribes to it a meaning that someone else might dispute), and
- it is rational (there can be reasons for arriving at an interpretation).

And here are two specific propositions that I will rely on concerning legal interpretation, which distinguish it from, e.g., literary interpretation or the form of interpretation that is displayed in a performance of a symphony:

- a legal interpretation gives a rule for the application of the law (it is applicative, not generalizing), and
- a legal interpretation is articulate, or propositional (i.e., it can be expressed in propositions).

I will argue that each of the following aspects of legal reasoning need not involve interpretation:

1. Resolving indeterminacies as to the content of the law
2. Working out the requirements of abstract legal provisions
3. Deciding what is just
4. Equitable interference with legal duties or powers or rights
5. Understanding the law

I will see how far I can press the skepticism, for the sake of the exercise. I hope that I will not seem to be making the absurd claim that interpretation is unimportant to legal reasoning. But most legal reasoning is not interpretative. Much of what is commonly called ‘interpretation’ can be done with no interpretation at all.

1. Resolving indeterminacies as to the content of the law
In *Regina v Monopolies and Mergers Commission, ex parte South Yorkshire Transport* [1993] 1 WLR 23 (House of Lords), two bus companies had merged to provide services in an area of Yorkshire covering less than 2 per cent of the area of the United Kingdom, and containing about 3 per cent of the British population. The companies challenged the jurisdiction of the competition tribunal to investigate their merger. The legislation required that a merger should affect ‘a substantial part of the United Kingdom’ in order to be subject to investigation. The bus companies asked the court to interpret that provision, to determine that their territory was not a substantial part of the UK and to impose that interpretation on the tribunal.

The Law Lords rejected an interpretation of ‘substantial’ as meaning ‘more than *de minimis*. They held, on the other hand, that ‘the court should lean against an interpretation which would give the commission jurisdiction over references of the present kind in only a small minority of cases’ (31). They concluded that a substantial part of the U.K. in the relevant sense was a part of the country ‘of such size, character and importance as to make it worth consideration for the purposes of the Act’ (p 32). That was all they would do. The Law Lords agreed that it was their task as judges to interpret the legislation to identify ‘the criterion for a judgment’. But

‘the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. ...Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment ...the conclusion at which the commission arrived was well within the permissible field of judgment.’ (p 32-33)

The *South Yorkshire Transport* case shows that there is no general reason to expect interpretation to resolve indeterminacies in the law. Interpreting the legislation meant ascribing a meaning to it, and the meaning that the judges quite rightly chose was itself very vague and did not resolve the question of just how much of the country had to be affected by a merger, before it would count as substantial. As this case suggests, the connections between indeterminacy and interpretation are all contingent: there may be conclusive, determinate reason in favour of one interpretation, or there may not. The criterion of judgment yielded by a good interpretation may involve all sorts of indeterminacies in its application, or it may not.

It may seem surprising to say that there is no necessary link between indeterminacy and interpretation. It has often been suggested that interpretation is not necessary if the requirements of the law are determinate, and that it is when they are indeterminate that interpretation comes into play:

‘The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or “automatic”, are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.’ (Hart, 1994, 126)

‘If the formulation of a particular rule is inadequate for purposes of determining a particular result in certain circumstances, then there is nothing more to explain or understand about its meaning; what is required is a new formulation of the rule –one which would remove the doubt– and this is what the term “interpretation” properly designates.’ (Marmor, 2005, 117)

These views are attractive because there is no room for interpretation if no question arises as to the meaning of the law. There is certainly room for doubt or disagreement, if there is room for interpretation. But a doubt or a disagreement may well arise without
any indeterminacy. Legal interpretation comes into play when there is a possibility of argument as to the meaning of the law. Interpretation may be needed in order to work out what is determinately the best way of understanding the object of interpretation (where, for example, everyone else jumps to a conclusion about how to understand the object, but you can explain why it must be understood differently). There may be a pressing need for interpretation, even where there is only one right answer to the question at issue. At the Battle of Balaklava there was more than one way of interpreting Lord Raglan’s order, but there was determinate reason in favour of one particular interpretation. The Earl of Lucan’s interpretation was a misinterpretation.

But if no argument can be made, then no interpretation is called for; an ‘interpretation’ arguing the unarguable would not only be a misinterpretation, it would be a pretense, or a failure to interpret, as an irrational argument reflects a failure to argue (Raz, 2009, 299 makes the important point that ‘some interpretations are so bad as to be interpretations no longer’).

The British competition legislation did not determine the extent of the competition tribunal’s jurisdiction, and interpretation could not make it do so; in fact, the best interpretation of the legislation was that Parliament had used the vague requirement of substantiality to confer a discretion on the tribunal (subject to control through judicial review) to determine which mergers were important enough for it to investigate. Determining the undetermined is one of the standard functions of adjudication, and it is not an interpretative function.

2. Working out the requirements of abstract legal provisions

In April 1999, as part of its response to the Kosovo crisis in the former Yugoslavia, NATO launched a bombing raid on the Serbian capital, Belgrade. A single rocket struck a radio and television station, killing 16 people. The victims’ families argued that the European NATO countries had violated the right to life guaranteed in the European Convention on Human Rights (Bankovic v. Belgium (52207/99) (2001)). The defendant countries argued that the victims could not assert rights under the Convention, because the extraterritorial military operation was not within the countries’ jurisdiction for purposes of the Convention.

Article 1 of the Convention provides that ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ In Bankovic, the European Court of Human Rights held that the victims of the Belgrade bombing were not within the jurisdiction of the states under Article 1. The Court approached the problem as one of ‘interpretation’ of the jurisdiction provision in Article 1 and set out to decide what ‘meaning’ to be given to the term ‘jurisdiction’ (Bankovic, para.s 53-63).

In fact, the problem before the Court in Bankovic was not a problem of interpretation. The justices were swayed by the charm of interpretation: they proceeded in their reasoning as if the framers had determined the jurisdiction of states in Article 1, so that the judges’ job was to interpret that article to work out what jurisdiction the states had created by adopting the Convention. But the framers had not determined the jurisdiction at all. And by agreeing to secure rights ‘within their jurisdiction’, the states parties did not determine the extent of their jurisdiction.

I do not mean that there is no need for interpretation of Article 1 (indeed, it needs to be interpreted in order to reach the conclusion that it gives judges an open-ended responsibility). We can certainly interpret Article 1 as implying that not all acts of states are subject to the Convention (or the phrase ‘within their jurisdiction’ would be superfluous). And by use of the travaux preparatoires, we can reach the interpretive conclusion that the jurisdiction was not meant to be restricted to residents. But neither the context in which it was used, nor the travaux, determine the extent of the jurisdiction.
The Court had to determine whether it extended to an extraterritorial bombing raid, and the judges’ role in doing so was not the role of an interpreter. No interpretation—that is, no explanatory account of what the states had done by subscribing to the Convention—can answer the question of what the jurisdiction is. The judges seized on the interpretation of Article 1 as a way of relying on the authority of the Convention, by identifying a category of jurisdiction that the framers had prescribed, and that the states had agreed to. But that is only deceptive: the courts could not work out the extent of the jurisdiction within which a state must secure the Convention rights, by interpreting a provision that they must do so within their jurisdiction.

The case provides a dramatic example of the potential for the charm of interpretation to distort judicial reasoning. If they had faced up to the open-ended nature of the task that the framers and the state parties had handed to them, the judges could have asked the real questions relevant to the question of how far the jurisdiction ought to be extended—questions concerning the overall purpose of the Convention, and the legitimacy of using the remarkable institutional technique of a supranational regional Court to control overseas military operations of the Convention states.

But the judges buried those questions, by pretending that the jurisdiction could be determined by ‘interpreting’ Article 1. Their interpretation was that the Convention used the notion of jurisdiction that is used in international law, which is ‘primarily territorial’, with exceptions in special circumstances. There is no single notion of jurisdiction in international law, and no rationale emerges from Bankovic for the exceptions to the primarily territorial account of jurisdiction that emerges from the case. This lack of a rationale reflects the attempt to answer a non-interpretative question by interpretation.

The Bankovic problem is one instance of another standard function of courts: when lawmakers are not in a position to be specific, the courts very often need to give substance to abstract categorizations. The most famous instances of this problem arise in constitutional and international litigation over fundamental rights. When the courts need to decide what process is due under the United States Bill of Rights, or what counts as showing respect for private life under the European Convention, or what limits on rights can be demonstrably justified in a free and democratic society under the Canadian Charter of Rights, their task seems like one of interpretation. After all, they need to decide the effect of a communicative act that may be understood in various ways. But although interpretative considerations may well constrain their decision in one way or another, we have no general reason to think that interpretation can guide them to a particular conclusion, any more than interpretation can do so when they have to decide whether South Yorkshire is a substantial part of the UK. We have less reason to think it—Article 1 of the European Convention does not even establish a vague test of jurisdiction; it requires the court to determine the jurisdiction.

Thanks to the charm of interpretation, ‘constitutional interpretation’ is very widely used as a sort of euphemism for a judicial constitution-building function that includes a responsibility for the noninterpretative reasoning that is needed to give substance to the community’s broad principles in particular areas of life. Those principles include the principle of the separation of powers, which requires courts not to usurp the functions of constitutional framers or legislators.

Constitutional litigation is, of course, only one instance of this sort of judicial function. Much legal reasoning that might seem interpretative is geared to the working out of the requirements of abstract provisions, the use of which may more or less amount (as it did in Bankovic) to an allocation of power to a court to do what is just and convenient. And decisions as to what is just and convenient are not generally interpretative either.

3. Deciding what is just
When the law confers discretion on a decision maker by the use of an abstract provision, or expressly requires a decision maker to act justly, then legal reasoning requires judgments to be made as to what is just. Ronald Dworkin suggested in *Law's Empire* that such judgments are best understood as the result of interpretation, and that disagreements as to what is just reflect competing interpretations: ‘Justice and other higher-order moral concepts are interpretive concepts’ (Dworkin, 1986, 424n.20; see also 73-76). The idea is defended, broadened and elaborated in his recent work, *Justice for Hedgehogs* (Dworkin, 2011). What is the object of interpretation? I think that there is no satisfactory answer to this question.

In Dworkin’s ‘constructive’ theory of interpretation, a good interpretation fits its object. But that is not enough; the interpreter must also justify the object of interpretation. To find an interpretation that succeeds on the dimensions of fit and justification, the interpreter needs to start with two questions: (1) what is it that the interpretation must fit? And (2) what would make that material look good? Dworkin describes two corresponding stages of interpretation (Dworkin, 1986, 66), the ‘preinterpretive’ stage and the ‘interpretive’ stage, at which the interpreter answers those two questions. At stage 1 the interpreter identifies the material that an interpretation must fit – the ‘interpretive data’ (Dworkin, 2011, 176). At stage 2 the interpreter decides what virtues would make the interpretive data look good.

At stage 3, the ‘postinterpretive’ stage, the interpreter decides what conclusion would best meet the two requirements of fit and justification. An inconsistency with the interpretive data will count against a postinterpretive conclusion, although such a ‘defect of fit’ (Dworkin, 1986, 257) will not defeat an interpretation that shows better overall fit and justification than an alternative interpretation. Dworkin has sometimes suggested that fit is only a threshold (see, e.g., Dworkin, 1993, 111). But if fit were only a threshold, then in choosing among interpretations that pass the test, an interpreter would stop interpreting and would just choose the most attractive option. *Law’s Empire* unequivocally takes the more genuinely interpretative position that, while fit acts as a threshold for eligible interpretations, it also acts as a consideration above the threshold in deciding which interpretation is best: ‘even when an interpretation survives the threshold requirement, any infelicities of fit will count against it’ (Dworkin, 1986, 256).

There are at least two possible accounts of the nature of the interpretive data which an interpretation must fit.

**Interpretation of practices?**

Justice is a quality by which political practices and institutions can be judged. It is their ‘first virtue’, as John Rawls called it (Rawls, 1971, 3). But it is not a practice, and it is not an institution. Yet Dworkin, in a turn of phrase that is linked to his interpretive theory, calls justice both a ‘practice’ and an ‘institution’ (Dworkin, 1986, 73-5). In any community there are certain practices of treating this or that as just and unjust, and of arguing about what is just, and so on (practices typically carried on by and within institutions). Dworkin hinted in *Law’s Empire* at the view that judgments of justice are interpretations of those practices:

‘...justice is an institution we interpret. Like courtesy, it has a history; we each join that history when we learn to take the interpretive attitude toward the demands, justifications and excuses we find other people making in the name of justice.’ (Dworkin, 1986, 73)

In *Justice for Hedgehogs*, this becomes a definite theorem in the theory of justice: the interpretive data are identified as ‘the practices and paradigms of that concept’, ‘our collective behaviour in using that concept’ and ‘the shared practices of calling institutions, people, and actions just and unjust’ (Dworkin, 2011, 157, 162).
The idea is that the interpretive data consist of the judgments of justice and injustice that members of a community have a practice of making, and also of the sorts of argument that the participants in the practice make in defending their judgments. At the post-interpretive stage, a conclusion as to what justice requires in a particular case will be more attractive if it better fits those facts.

Suppose that evidence emerges that a person imprisoned on conviction for a serious offence was framed, convicted on false evidence, and is patently not guilty of the offence. The release of the prisoner who has been framed (through a process authorized by law) is a paradigm of justice. It is an act that can be used as a standard of comparison in explaining to someone what justice is. Dworkin could agree that the release of the framed prisoner is a paradigm of justice. Now consider the role of such a paradigm in his model of constructive interpretation. First, if some interpretation yields the conclusion that the release of the framed prisoner was just, that will count in favour of the interpretation. Fit with a paradigm is part of an argument in support of an interpretation. Secondly, however, if a theory of what is just and unjust yields the conclusion that justice does not demand the release of the framed prisoner, that does not rule out the theory. To reject the paradigm-busting interpretation, we need a competing interpretation that shows that the proposition that justice demands the release of the framed prisoner fits other features of the interpretive data, and is supported by the principles that justify the other paradigms.

The constructive model is in no danger of saying that actions are just because the members of a community think they are just. It insists that even the unanimous opinion of members of a community does not conclude a question of justice. But it still makes justice relative to the practices being interpreted: an argument about justice will have to seek support in those practices.

The practices of a community have a crucial bearing on the demands of justice in all sorts of ways- but not in the respect that a judgment of justice must fit them. The most striking instance of the dependence of justice on practices is, of course, reflected in the fact that justice often demands obedience to the law of a community. The justice of a demand from the government for a percentage of my income may depend (partly but crucially) on mere facts as to whether the legislature has enacted a tax by means that officials happen to recognize as a means of making law. The justice of enforcing a commercial agreement depends, among other things, on whether the agreement was made in a way that the members and the institutions of the community are disposed to treat as a way of making a binding agreement. But justice requires conformity to those practices. In Dworkin's theory, instead, fit with the practices of a community is an ingredient in deciding what justice requires.

Suppose that the English judges are more readily disposed in the 2010s to release prisoners who are shown to have been framed, than they were in the 1970s. Imagine that, in the 1970s, they acted fairly consistently on a principle that the good repute of the criminal justice system needed to be protected against disclosure of its mistakes. And imagine that in their sincere judgment it was not unjust to refuse, on the ground of that need, to reopen criminal cases (suppose that they considered that no one has a right to liberty where a release from custody might injure the prestige of such an important institution). Imagine that the practices of other institutions and the practices of citizens in the 1970s supported this judicial approach. Now imagine that the practices have changed in the 2010s, and the judges consistently act on the basis that it is unjust to keep a prisoner in custody in such circumstances, and the practices of the community in general are also in sympathy with that approach. The question is this: do the facts we have imagined weigh in favour of the conclusion that justice demands the release of patently innocent prisoners in the 2010s, or against the conclusion that justice demanded their release in the 1970s? I think that the answer is 'no'. Those practices are irrelevant to the question of justice. But if judgments of justice interpret the practices of
the community, the change in practice we have imagined is a change in the considerations relevant to such a judgment.

If English judges have changed their approach in the way we imagine, the argument in favour of their new approach has gained no added force. The practice of the judges has, in this regard, simply become more just. The practice of a community cannot appeal to itself to find support for the claim that it is just. We have every reason to fit our practices to what is just, but no reason to fit our view of justice to our practices.

**Interpretation of convictions?**

But there is also, in *Law's Empire*, an alternative account of the interpretive data for justice;

‘...if we take justice to be an interpretive concept, we must treat different people’s conceptions of justice, while inevitably developed as interpretations of practices in which they themselves participate, as claiming a more global or transcendental authority so that they can serve as the basis for criticizing other people’s practices of justice even, or especially, when these are radically different. The leeways of interpretation are accordingly much more relaxed: a theory of justice is not required to provide a good fit with the political or social practices of any particular community, but only with the most abstract and elemental convictions of each interpreter.’ (Dworkin, 1986, 424-5 n.20)

If I am seeking to achieve fit with my convictions, and you with yours, we are not giving interpretations of the same thing. So what ground is there for saying that our interpretations genuinely compete with each other, so that we are disagreeing about the same thing? If the interpretive data consists of the interpreter’s convictions, then disagreement is inexplicable not only because convictions differ, but for a reason that is related but more basic: I cannot offer, as an interpretive consideration that might persuade you to agree with me, the fact that the conclusion I am defending fits my convictions.

It is Dworkin who has done more than any other practical philosopher to focus attention on the need to explain how disagreement can be deep, sincere, and genuine. If a disagreement is interpretive it can only be a genuine disagreement if the disputants are interpreting the same thing. If I am interpreting my convictions, and you yours, we can have no genuine interpretive disagreement and, incidentally, no genuine agreement.

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To summarise: an interpretation needs to find support in the object that is interpreted. Judgments of justice cannot find support in the fact that we engage in the practices that we engage in or hold the convictions that we hold. The point is not that true judgments of justice are liable to be completely inconsistent with human practices (though they will be fundamentally inconsistent with many practices). The point is that the considerations in favour of a conclusion about what justice requires do not grow stronger or weaker as that conclusion shows a better or worse fit with what people do or believe. It is not only that people’s convictions differ fundamentally, and that communities’ practices differ significantly (perhaps that problem can be answered by Dworkin’s suggestions that the ‘leeways’ are drawn less tightly around the interpretive data for justice than for law). The problem is that there is no general reason to try to fit judgments of justice to any body of data.

That does not mean that we are bereft of reasons for judgments of justice—far from it. Reasons that pertain to the needs and interests of the framed prisoner, and to the justification of punishment, and to the nature of the judicial office and so on can
support a conclusion of justice, but not arguments of fit with our convictions or practices. So disagreements about justice are not disagreements between competing interpretations.

There is a particularly salient value for political philosophy in Dworkin's reminder that not even the unanimous opinion of a community settles a question of justice. But a theory of justice should be more radically critical: it should not portray justice as depending on fit with opinions or practices. Perhaps the best way to interpret the extension of Dworkin's theory of interpretation from law to justice is to treat it as a theoretical metaphor, motivated by his general philosophy of value— that is, by the 'unity of value' for which he argues in Justice for Hedgehogs. The interpretive theory is attractive to Dworkin insofar as it privileges an intellectual and moral determination to achieve articulate consistency among one's moral principles. For that theory to flourish, it might be best to relinquish the requirement of fit with interpretive data, though, and to propose not that judgments of justice are interpretations, but that they are more appealing insofar as they are part of a unitary theory of value. This is not the place to discuss whether such a theory is sustainable; it needs other grounds than an interpretive theory of justice.

Finally on the topic of justice, we should note that in spite of everything that has been said above, there may be an interpretive task when the law requires justice to be done. For a person giving effect to such a requirement, it may be a matter of duty to give effect to whatever conception of justice is held by the authority that has imposed the requirement. Likewise with requirements of reasonableness: they may seem on their face simply to leave a court or other decision maker to identify reasons as it may, with no constraint from the law. But a responsible court may sometimes need to consider what a lawmaker meant by reasonableness. For example, in deciding what is reasonable for the purpose of the duty of care in negligence, a court in any common law jurisdiction today will find that it cannot decide what would be reasonable in abstraction from huge bodies of case law; it will need to accord with the reason of the law. A judge might well think that it is unreasonable to impose a duty, and yet hold that it is reasonable for the purposes of the law of the jurisdiction. Similarly, if a court is required to make a 'just' award of costs of litigation between the parties, it may need to decide what counts as just for the purpose of the law by taking into account (and, perhaps, interpreting) a large body of jurisprudence on the issue. Identifying the reason of the law may involve interpretation. The question is not whether the law uses the term 'reasonable' or the term 'just', but how, if at all, the law controls decisions as to what is just or reasonable. If it does so through materials that need interpretation, then a court will need to interpret. But to the extent that it does not do so, no issue of interpretation arises.

4. Equitable interference with legal duties or powers or rights

Suppose that a town bylaw prohibits vehicles in the park, and an ambulance enters the park to rescue a person who has been injured (and suppose that no institution has acted to authorize ambulances to disregard the bylaw). The driver's behaviour may show no disrespect for the rule of law. Is that because the bylaw is best interpreted as meaning something like 'vehicles are prohibited in the park except in an emergency'? Or is it because of noninterpretative considerations?

The considerations that do not involve interpretation are that driving the ambulance into the park in an emergency is morally justified (in fact, it is required) by a concern for the injured person, and is compatible with due respect for the local authority's jurisdiction to regulate the use of the park, even though the authority has banned vehicles. But we could describe the question as one of interpretation, of course. You might say that it would be a poor interpretation of the bylaw to treat it as meaning 'vehicles are prohibited from entering the park even if it means leaving people to die'.
What is the justification for the view that the driver ought to treat himself as exempt from the effect of the bylaw, and the law enforcement officials ought to do so too, and a court as well (if the officials are obtuse enough to try to enforce the bylaw)? We could say,

‘the bylaw is best interpreted as being subject to an implicit exception permitting ambulances to respond to emergencies’.

Or we could say,

‘it would be unconscionable to penalize the driver for an action which was justified by the emergency, and which is compatible with respect for the role of the local authority in regulating the use of the park’.

One justification has the form of an interpretation, the other does not. But the reason for the law to treat it as permissible for the ambulance to enter the park is, of course, the same either way! For the rationale for reading the implicit exception into the bylaw is that it would be unconscionable to penalize the driver for an action which was justified by the emergency, and which is compatible with respect for the role of the local authority in regulating the use of the park. So you do not need interpretation to decide whether it is lawful for the ambulance to enter the park, although you could state your reasoning in the form of an interpretation.

This is actually an extraordinarily common phenomenon: there is very often a potential for equivocation between saying that a legal doctrine is supported by the best interpretation of some communicative act, or that it is supported by legal reasons that are not communicated by that act. One important real-life example is the imposition of procedural duties on public authorities carrying out statutory duties. Lord Mustill said in R v Home Secretary, ex p Doody [1994] 1 AC 531, ‘where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances’ (560). Is the presumption a technique of interpretation? Or a rule of the common law? It has been a popular view among some academics and judges that the imposition of procedural requirements must result from interpretation of the statute, because courts cannot interfere with the legislation (Elliott, 2001). But Byles J said in Cooper v Wandsworth Board of Works (1863) 14 CB(NS) 180, that when a statute does not specify that a power is to be used with due process, “the justice of the common law will supply the omission of legislature” (see p 108). As Lord Justice Sedley put it in R (Wooder) v Feggetter [2002] EWCA Civ 554 (para.44), ‘The process is not one of discerning implied terms but of adding necessary ones. It has been the engine of modern public law, and there is no reason to believe that its force is spent.’

English and American lawyers used to speak of ‘equitable interpretation’ of legislation, equity being a jurisdiction in a court to dispense with the enforcement of legal rights and duties on grounds of conscience. It is a curious sort of idea, which reflects the charm of interpretation: if the courts are exercising a jurisdiction in equity to exempt someone from rules made by legislation, you might say, they are not interpreting anymore, but declining to give effect to the law. The phrase may have passed out of vogue because of the hint that it involves departing from the legislation; these days, judges and lawyers speak of ‘purposive’ interpretation instead. But purposive interpretation is only interpretation if there is something about the object that supports it. What is the consideration that supports the view that it is lawful for the ambulance to enter the park? Nothing about the bylaw, it seems; the support lies in principles that both justify the action and explain why it does not matter that the action is one that the bylaw described as prohibited. The reason for Lord Mustill’s presumption is not a fact about the legislature or its enactment: the reason is justice.
5. Understanding the law

A red traffic light, an income tax, a right to return defective goods under a sales contract – any of these might raise questions of interpretation in particular circumstances, but they need not do so (in fact, they are designed not to do so, and they generally do not do so). The possibility of grasping and following these rules without interpretation reflects a general point about rule-governed behaviour. As Wittgenstein said, ‘there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases.’ (Wittgenstein 1967, §201). This is deeply controversial, but there has been support among some philosophers of law for the idea that not all understanding depends on interpretation (Marmor 1992).

It may seem to be otherwise, because the meaning of any communicative act depends on the context of the communication. And this is a particularly salient feature of legal communications, because of the systematic context in which they are made. Even simple legal communications – think of a “NO TRESPASSING” sign – can only be understood in their context. You may understand the words, but to understand the communication requires a capacity to draw the implications that can be drawn from a knowledge of the legal system (and the powers it gives to persons in control of property, and the remedies and sanctions that turn on the exercise of such powers, and the institutional structures that give effect to the remedies and sanctions, and...). J.L.Austin said:

‘The total speech act in the total situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating.’ (Austin, 1962, 148)

He meant it as a reminder for philosophers, but it is also a maxim for interpreters. And interpretation, you might say, is the task of taking the language we are familiar with and putting it in context. The Earl of Lucan’s problem in the Battle of Balaklava was not that he did not understand the word ‘the’ or the word ‘guns’, but that he did not do a successful job of working out how to ascribe a meaning to their use in the circumstances, so as to make a good job of his task of obeying the order that he had received. You might say, as Austin put it, that his task was to elucidate the total speech act in the total situation. Or you might say (I think it amounts to the same) that his task was to understand Lord Raglan, by asking what he could conclude about the general’s purposes from the fact that he had used these words in these circumstances. And every communication creates the need to understand the particular communicator, in the total situation in which he or she or it is communicating.

It is quite true that all understanding of communications requires a grasp of context, as well as a grasp of the language being used. The word ‘interpretation’ is certainly flexible enough that you might, if you wish, signal this fact about the understanding of communication by saying that all understanding requires interpretation. Yet sometimes, gaining an understanding requires a creative intellectual process of finding reasons for an answer to a question (which might have been answered differently) as to the meaning of the object. Some understanding does not require that process. The distinction is well signaled by keeping the term ‘interpretation’ for that process.

A good grasp of the context and the language may mean that there is no question as to how a person is to be understood. The characteristic moment for interpretation arises when an argument can be made that they meant this, and an argument can be made that they meant that. It is a matter of degree, of course, because there are stronger and weaker arguments. Sometimes only a rather feeble argument can be made that someone is to be understood to mean this, and a powerful and convincing argument can be made that they mean that. Then it is clear what interpretation you ought to reach.
Sometimes no argument at all (or only a sham of an argument) can be made that they mean this. And then you do not need to interpret at all.

**Conclusion**

‘Adjudication and juristic interpretation resist being taken for the constitutive and legislative moments in the life of the law,’ as John Finnis wrote; ‘those moments resist being understood, through and through, as interpretative’ (Finnis, 1987, 362-3).

Not all reasoning to identify the law is interpretative. It is often possible to identify legal duties and rights without needing to interpret. And the law often requires decision makers to guide their conduct by standards that cannot be identified by interpretation.

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**Further reading**