Original Intent and Legal Interpretation

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Introduction

A judge or lawyer who wants to determine how a law should be applied will often refer to the "intentions" of the lawmakers. Judicial opinions, legal briefs, and scholars' writings seek guidance from what the lawmakers intended their laws to achieve (intended purposes) or how the lawmakers intended their laws to apply (contemplated applications).[1] The idea is encapsulated in passages like the following:

> It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.[2]

A similar idea is employed in US constitutional adjudication.[3] It is applied to written law generally.[4]

Taken literally (and without the suggestion above that it is merely one canon of construction among others), the idea is that the meaning or

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1 Sometimes interpreters apply a counterfactual test and ask how, given the lawmakers' beliefs and values, they would have wanted their laws to apply to situations they did not consider; I will comment on that variation later. I shall not consider lawmakers' intentions regarding the proper approach to interpreting their laws, as adding these would further complicate matters without solving any of the problems for intentionalism that I will discuss.

2 *Riggs v. Palmer,* 115 N.Y. 506 (1889) at 509.

3 In a constitutional context, reference is usually made to "framers' intent". I discuss the difference below.

4 At least in the US. The idea is rarely, if ever, used to interpret judicial precedents, and I assume this limitation hereafter.

proper application of a law is determined by certain historical facts about the mental states of those who made the law at the time they did so. I call this idea intentionalism.

My concern in this paper is intentionalism, its most serious problems, how it might be refined, why refinement may not be possible, and how some seemingly intentionalist legal practice might better be understood differently.

Intentionalism has never been systematically developed or plausibly defended. Some critics seem to accept it in principle only to reject it in practice, as when they say it cannot reasonably be applied because we lack adequate information about lawmakers' intentions or that the results of following original intent are morally or politically unacceptable.

I shall not discuss the consequences of intentionalist interpretation. My argument involves criteria of adequacy that apply to theories generally (not just to theories of interpretation, and not just in law).

As a theory, intentionalism faces some very serious problems.[5] Briefly: (a) intentionalism needs but lacks a plausible justifying rationale; (b) it is ambiguous in significant ways; (c) when lawmakers' intentions conflict, intentionalism derives contradictions from coherent laws; (d) when lawmaking occurs without an intentional consensus, the theory implies that coherent laws lack any proper application. If such defects cannot be repaired, intentionalism is untenable.

As I have noted, legal practice contains intentionalist arguments of two kinds: one concerns intended purposes, the other, contemplated applications. I assume that unrestricted intentionalism endorses both types of argument. But as this duality creates one of the chief problems for intentionalism, I shall later consider whether a revised theory can give priority to one of these intentions.

I shall suggest that intentionalism is not adequately remediable. There is little prospect of refining the idea so that it might provide interpretive guidance. In any case, seemingly intentionalist interpretations are so weakly supported they invite reinterpretation. I shall suggest that many purposive interpretations are better understood as proposing justifying rationales for laws—an approach for which there is a plausible justifying rationale. That mode of interpretation is, however, limited by the availability of genuine justifications. As these are not always available, I suggest there is little prospect of a defensible single-criterion theory of legal interpretation.

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5 Intentionalism conflicts with the judicial obligation to respect interpretive (as well as other) precedents. That problem might be solved by a judicious compromise, and I shall not pursue it here.

The Rationale Problem

Champions of intentionalism often write as if there were no plausible alternative—as if no competent, honest lawyer could sincerely question its approach to written law. This may help to explain why the theory has not been examined closely, save by some critics: it has not been seen, by its proponents, as a **theory** of interpretation. A commentator must therefore attempt to identify rationales for the approach by inferring them from the concerns expressed in discussions that favour guidance by original intent, and must try to elaborate them sympathetically.

a. Some proponents of intentionalism suggest a reason for regarding it as **obviously** the right approach to reading written law: they believe that the meaning of a document is constituted or determined by the intentions of those who created it. This is suggested by the fact that we sometimes seek clarification of a document or utterance by asking what the author had in mind. One writer develops the argument as follows:

> Suppose my wife gives me a grocery list [that] reads in part, "Vegetarian chili — pinto beans, chili powder, Spanish onions, and various appropriate vegetables"...does this text authorize or perhaps require the purchase of tomatoes?
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> ...if I am *interpreting* what this grocery list has to say about tomatoes, then I am attempting to determine if my wife meant tomatoes when she wrote "various appropriate vegetables," and nothing more... Thus if I am asking a question about a text's meaning, I am asking what the author of the text meant to say, for the simple reason that that is the only meaning the text has or could have.[6]

This writer confuses the meaning of a specific text (the meaning of a string of words as they are used on a particular occasion[7]) with what the person meant who used those words (what that person had in mind).

The writer is not sure what vegetables his wife regards as appropriate for vegetarian chili but he suspects that they include tomatoes. We can agree that his practical question is whether to buy tomatoes and that the answer depends on whether his wife had tomatoes in mind.

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6 Paul F. Campos, "A Text is Just a Text", (1996) 19 *Harvard Journal of Law & Public Policy* 327.

7 I assume this qualification hereafter. We are concerned here not with the bare meaning of a string of words but with the meaning of a particular use of words. See, e.g., Jeffrey Goldsworthy, "Implications in Language, Law and the Constitution", in Lindell (ed.), *Future Directions in Australian Constitutional Law* (Federation Press, Sydney, 1994).

The interesting point is that, even when we make these assumptions, we find that, rather than bolster his claim about meaning, his example refutes it.

We can see this by asking how he knows that the grocery list concerns ingredients for vegetarian chili. His story tells us that he learns this from reading the grocery list that his wife gave him. Knowing it is a grocery list (and not a postmodern poem), when he reads "Vegetarian chili—pinto beans, chili powder, Spanish onions, and various appropriate vegetables," he understands that he is to purchase pinto beans, chili powder, Spanish onions, and other vegetables that are appropriate for vegetarian chili. That is, at most, what the grocery list says. His question—whether to purchase tomatoes, which for him is the question whether his wife had tomatoes in mind when she asked him to purchase vegetables appropriate for vegetarian chili—does not arise unless and until he reads and understands the list. An answer to his question would not tell him more about the meaning of the string of words as his wife used them. He already knows its meaning. He understands the grocery list independently of knowing what vegetables his wife had in mind.

For similar reasons, he might wonder whether the language that she used accurately expresses what she has in mind. This familiar question assumes that the meaning of the language used by an author is not determined by what the author had in mind. It is determined, basically, by linguistic conventions of the time.

Suppose that, while composing the grocery list, the writer's wife had been listening to a radio program about a Spanish court's attempt to extradite former General Pinochet from England and that, thus preoccupied, she had written "Vegetarian Chile". Even if he had not heard the radio broadcast and were ignorant of the circumstances, he might make an educated guess that his wife meant vegetarian chili but used the wrong word. Knowing that she had given him a grocery list, he could figure out what she probably meant to write. That assumes he can distinguish what she had in mind from the meaning of the words she used.

It is sometimes said that courts should look first at the texts of written law because they provide the best evidence of the lawmakers' intentions. But it is possible to infer their intentions from the texts they used only if we can understand the texts independently of their further intentions. Looking for evidence of lawmakers' intentions in the legal texts rejects the notion that their intentions determine the meaning of the texts.

We must therefore be wary of any rationales for an intentionalist approach to written law which assume that the meaning of a particular legal text is determined by the lawmakers' intentions. To be justified in interpreting legal texts in terms of original intent, one must have good and

sufficient reason to ignore the normal meaning of texts based on linguistic convention.

b. As I have suggested, support for the idea of appealing to lawmakers' intentions may be found in the practice of seeking to understand documents and utterances by reference to their authors' intentions. This is done not only in conversation and other personal communications but also, for example, in scholarly studies and the interpretation of wills and contracts. The point here is that we may be more interested in what the person meant than in the meaning of the particular inscription or utterance.

Two considerations should make us hesitate to ground an intentionalist approach on such practices. In the first place, endorsements of an intentionalist approach often emphasise that it allows interpretation to be based solely on historical fact; but the examples given do not satisfy that description.

Scholarly studies are often regulated by a "principle of charity". They aim at a generous reading, seeking to identify the most defensible positions that are compatible with the relevant texts, not those that reflect the author's mental state. We learn most from critical commentary that is so conducted, whether the results favour or disfavour the positions that are appraised. When it is so regulated, favourable criticism refines the position that is tentatively defended, and unfavourable criticism avoids the mistake of disparaging a straw man.

Somewhat analogous principles govern the interpretation of legal texts, which are officially interpreted within the constraints of law. Contracts are frequently qualified by courts so as to accord with principles of public policy, and legislation is construed, when possible, so as to satisfy constitutional requirements, regardless of the intentions of the contractors and lawmakers.

In the second place, written law, such as statutes and constitutions, have a different social role from private communications between individuals. Laws lay down behavioural guidelines for people, most of whom will never know much about the lawmakers' mental states. Many of those whose conduct will be regulated by written law do not even exist when it is enacted or ratified. Nor do lawmakers assume that those who will be bound by their laws will have any notion of their (the lawmakers') intentions, save, perhaps, that they intended to create the laws in question. In these respects, at least, written law is substantially and significantly impersonal.

It can be difficult for those who are subject to such laws to become familiar with their detailed provisions. Most of us would find it not merely difficult but impossible to become knowledgeable about the lawmakers'

transient mental states. It would be unreasonable and unfair to hold us accountable under restrictions that the lawmakers had in mind instead of those that they embedded in the language of the law.

c. Champions of intentionalism sometimes suggest that adjudication should implement the "value choices" that were made by those who enacted or ratified the law when they decided to make those legal changes. Authoritative judicial interpretation should be guided only by those past value judgments and should not be affected by value judgments of those who apply the law. Interpretation should in this sense be "value-free". Interpretation guided by fresh value judgments is claimed to distort the written law, because in making fresh value judgments judges are thought to impose their personal values on the law.[8]

There are two problems here. In the first place, the concern to prevent judges from making fresh value judgments when interpreting and applying laws offers no ground for thinking that implementing the lawmakers' value judgments constitutes fidelity to the laws they have officially laid down. We have already acknowledged the commonplace distinction between the public meaning of a document that an author creates and what she had in mind when creating it. Lawmakers' "value choices" are presumably their reasons for the lawmaking that they have done: what they hoped to achieve, and why. The question we must ask is why we should suppose that courts should implement such value judgments when doing so would differ from applying the laws according to their public meaning.

In the second place, we have good reason to believe that fidelity to law sometimes **requires** fresh value judgments by interpreters.

Suppose that the government exercises its power of eminent domain and condemns your house in order to make way for a public highway that is under construction. Let us assume that the constitution of your state (like that of other states as well as of the US federal government) says that "private property shall not be taken for public use without just compensation". Given the facts, this provision tells us you are legally entitled to just compensation.

The constitution does not tell us how to determine when compensation is just, but it assumes there is something to be determined. Its identification would seem to require value judgments. An interpreter must decide, for example, whether just compensation is affected by any injustice that was involved in your acquisition of the house; whether the criterion of whatever compensation you deserve depends on its economic value, rather

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8 Robert Bork, "Neutral Principles and Some First Amendment Problems", (1971) 47 *Indiana Law Journal* 1. The call for value-free adjudication may reflect philosophical scepticism about values, as in the Bork article. It may be combined with an appeal to democratic principles, discussed next.

than its value of another kind; in that case, whether compensation should be determined by its market value or its replacement cost; and so on.

If a judge were interpreting the just compensation clause without assistance from interpretive precedents or if she wished to question such precedents, a reasonable judgment would require her to identify and defend criteria of compensatory justice for such "takings". Defence of the criteria would ideally involve a systematic inquiry into the theory of compensatory justice. It is difficult to see how any such criteria could be defended without the interpreter making moral judgments.

Examples like these, concerning the interpretation of explicit moral language in the law, suggest that sound interpretation and fidelity to written law sometimes **requires** that judges make fresh value judgments.

The original argument therefore provides no reason to suppose that the interpretation of written law must always be based solely on historical facts, such as facts about the lawmakers' intentions, and should never incorporate fresh value judgments by the interpreters.

d. It is sometimes suggested that democratic values require adherence to the doctrine of original intent.[9] Democracy involves popular participation in the governing process, such as voting for representatives who are authorised to make law. It is arguable that democratic values are violated when majorities are tyrannical and oppress groups or individuals. This suggests that democratic values require more than majority rule, that governments must respect and enforce basic rights of individuals and minorities.

On any interpretation, democratic principles are understood to call on us to respect the laws of a democratic society. They provide a special reason for judges to enforce a democratically established constitution and the laws that are created or maintained by a democratically elected legislature.

It is unclear, however, how democratic principles, on any interpretation, provide a reason for understanding written law on the basis of the lawmakers's intentions rather than, say, the laws' publicly ascertainable meaning.

Let us imagine the ideal lawmaking situation. Let us assume that the lawmakers have responsibly exercised their authority to make law, just as

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9 See, e.g., William H. Rehnquist, "The Notion of a Living Constitution", (1976) 54 *Texas Law Review* 693. This argument sometimes emphasises that legislators are elected but judges are not. It has limited force, because the appointment of a federal judge is subject to approval by the US Senate, whose members are elected; it has limited application, as many state and local judges are either elected or can serve beyond an initial term only by election.

the electorate has exercised its authority to place or keep them in office and to express their political judgment about proposed constitutional arrangements or legislation. The lawmakers have deliberated reasonably and have formed well-grounded ideas of what their lawmaking decisions would accomplish and why that would be a good thing overall. The question remains, how we should understand their laws.

No matter how much we expand our description of an ideal democratic process, it does not seem to tell us that the proper way to understand or apply written law is to follow the lawmakers' intentions rather than the meaning of the texts that they have enacted into laws. The challenge for proponents of intentionalism is to provide a reasonable, persuasive case for the approach that they endorse.

The suggested justifications of intentionalism appear to fail. Our consideration of them in fact shows that intentionalism needs support. This does not mean that it has been refuted. It does mean, however, that there is a reasonable presumption against intentionalist practice. We turn now to a more direct appraisal of the doctrine.

A Contradiction Problem

My first example will show how intentionalism can generate contradictions.

Elizabeth and William Stern wanted children, but doctors believed that pregnancy would be dangerous to Mrs. Stern. As the couple wished to continue Mr. Stern's family line, they did not want to adopt a child. Instead, they sought a "surrogate" mother—someone who would receive William's sperm by artificial insemination, carry the baby to term and, if all went well, give the baby to the Sterns. Mr. Stern would be recognised as the father, and Mrs. Stern would adopt the child.

Mary Beth Whitehead wished to take on the surrogate's role. She and her husband, Richard, who agreed, already had children of their own. The two couples were brought together by a private company that made such arrangements.

Mrs. Whitehead followed the prescribed procedures and became pregnant. By the time of delivery, however, she found herself unable to part with her new baby daughter. The Sterns wanted the infant, and Mr. Stern sought legal enforcement of the surrogacy contract.

Mr. Stern's request faced some legal obstacles, which the court was obliged to address. I will discuss only the one that Judge Sorkow of the New Jersey family court specifically noted.

Under the surrogacy contract,[10] Mrs. Whitehead was to renounce her parental rights so that the infant would have no legally recognised mother and Mrs. Stern might adopt her. As Judge Sorkow noted,[11] however, New Jersey statute 9:3-54 prohibits private individuals from arranging for money to change hands "in connection with" an adoption. That language might appear vague, but it suits the adoption context.

Private individuals are not empowered by law to transfer parental rights. Mrs. Whitehead might hand the newborn child to the Sterns, but she could not make Mrs. Stern its legally recognised mother. Only a court could do that. But if Mrs. Whitehead formally renounced her legal rights as parent of the child, Mrs. Stern could petition the court to adopt her.

Under the surrogacy contract Mrs. Whitehead was to be paid $1,000 if she followed all the prescribed procedures but the child were stillborn. (§ 10) She was to be paid $10,000 if the baby were born live, she gave it to the Sterns, and took the legal steps necessary to renounce her parental rights (§§ 1, 4(A)) so that Mrs. Stern could adopt the baby. Unless Mrs. Whitehead did all that, she would not qualify for the $10,000. (§ 4(B)) The surrogacy contract thus provided for money to change hands "in connection with" an adoption. It was the tightest possible connection that private parties could create between a money payment and an adoption.

Judge Sorkow acknowledged the problem. (Baby M at 374, 372.) If statute 9:3-54 applied to the Stern-Whitehead surrogacy contract, then the contract violated the law.

Judge Sorkow offered three arguments against the application of 9:3-54. He observed, for example, that Mrs. Stern "is not a party to the contract" in order to "avoid any possible inference that there is a violation of N.J.S.A. 9:3-54". (Id at 374) Judge Sorkow seems to suggest that the statute would be violated only if Elizabeth Stern signed the contract. But that would be a very narrow reading of the statute, which says,

> No person...shall make, offer to make or assist or participate in any placement for adoption and in connection therewith (1) Pay, give or agree to give any money or any valuable consideration...or (2) Take, receive, accept or agree to accept any money or any valuable consideration... Any person...violating this section shall be guilty of a high misdemeanor. (N.J.S. 9:3-54)

In other words, participating in an agreement to exchange money in

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10 The text of the contract is appended to the opinion of the New Jersey Supreme Court, *In re Baby M,* 109 N.J. 396 (1988) at 470-475, which modified the family court judgment.

11 *In re Baby M,* 217 N.J.Super. 313 (1987) at 374 (hereafter Baby M).

connection with an adoption is illegal, and the Stern-Whitehead surrogacy contract was such an arrangement.

The contract included a clause which said that the money payment to Mrs. Whitehead "is compensation for services and expenses, and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for a consent to surrender the child for adoption". (§ 4) Judge Sorkow accepted this view of the contract (Baby M at 372), but it is implausible. First, the contract made separate provision for reimbursement of expenses incurred by the Whiteheads. (§§ 4(C), 6) Second, if the money payment were for conceiving and bearing a child, Mrs. Whitehead would receive $10,000 if the baby were stillborn, not the stipulated $1,000. Third, the contract required Mrs. Whitehead to give up the baby and renounce her parental rights. Despite its disclaimer, the contract plainly implied that $9,000 was payment for Mrs. Whitehead's surrendering the child for adoption.

As he issued a judgment for Mr. Stern, therefore, it was necessary for Judge Sorkow to provide a better argument that New Jersey adoption statutes, such as 9:3-54, did not apply. Here is a third argument given by Judge Sorkow:

> It is in this court's view that the laws of adoption in this State do not apply to surrogacy contracts... [A review of the legislative history reveals that] at the time that even the most current adoption laws were adopted, no thought or consideration was given to the law's effect or relevance to surrogacy. Surrogacy [contracts were]...unknown when the laws of adoption were passed. (Baby M at 372)

If surrogacy contracts were unknown when the New Jersey legislature last revised its adoption laws, none of the lawmakers could then have thought specifically that those laws should be applied to adoptions made in connection with surrogacy contracts. On that basis, Judge Sorkow reasoned that New Jersey adoption laws did not apply in a surrogacy context.

Judge Sorkow assumed, in effect, that a statute applies to a situation only if the legislature actually considered (and, presumably, approved of) the application, even if that limitation is not implied by the statute and thus clashes with the letter of the law. His application of this principle appears to have the following structure:

LA_n A statute applies only if the enacting legislators (at the time of enactment)[12] thought about the situation and intended it to apply;

F_1 As surrogacy contracts were unknown when the legislature most

[12] I assume this intentionalist qualification hereafter.

recently revised its adoption laws, the legislators could not have thought about surrogacy contracts, could not have consciously intended their statutes to apply in contexts involving surrogacy contracts, and consequently had no such intentions; therefore,

C_1 Statute 9:3-54, which regulates adoptions, does not apply to situations involving surrogacy contracts, including this case.

Judge Sorkow's principle is dubious. The members of the New Jersey legislature probably never thought about many situations to which their adoption statutes would seem to apply. If they never thought about adoptions on Wednesdays, for example, principle LA_n implies that their statutes do not apply to Wednesday adoptions. I venture to say that no one believes this. But if their failure to consider Wednesday adoptions does not render their statutes inapplicable to Wednesday adoptions, why should we believe that their failure to consider surrogacy contracts means that their statutes do not apply when surrogacy is a prelude to adoption?

An intentionalist solution to this problem might seem to be available. Judge Sorkow contrasted surrogacy with cases in which a

> woman is already pregnant... The biological father may be unknown or at best uninterested in his obligations. The woman may want to keep the child but cannot do so for financial reasons. (Baby M at 371-372)

The woman may be financially pressured into giving up her baby. She may later come to regret doing so and may suffer debilitating depression as a consequence. The unregulated transaction might result in a placement that harms the child. Judge Sorkow claimed that,

> In surrogacy, none of these "downside" elements appear. The arrangement is made when the desire and intention to have a family exist on the couples [sic] part. The surrogate has an opportunity to consult, take advice and consider her act and is not forced into the relationship. She is not yet pregnant. (Id)

Suppose the legislature wanted statute 9:3-54 to alleviate problems resulting from unregulated adoptions like those referred to by Judge Sorkow. We can then construct an argument based on those legislative intentions, as follows:

LP_n A statute applies to a situation only if its application serves the purpose (such as alleviating certain problems)[13] that the enacting legislators intended for the statute.

P_1 New Jersey statute 9:3-54 was intended by the enacting legislators to

[13] I omit this qualification hereafter.

protect mothers from undue financial pressures that might lead them to give up infants for adoption when that would not serve the children's best interests, decisions the mothers would later regret.

F_2 In surrogacy contexts mothers are not subjected to undue financial pressures that might lead them to give up infants for adoption that would not serve the children's best interests, decisions the mothers would later regret.

C_2 New Jersey statute 9:3-54 does not apply to situations involving surrogacy contracts, such as this case.

This reasoning would seem to explain further why the statute does not apply in a surrogacy context. If applying the statute on Wednesdays has no causal relevance to serving its intended purpose, then this argument enables us to distinguish Wednesday applications of the statute from applications to a surrogacy context, which do have such relevance.

Unfortunately, the new argument founders on its assumption that surrogacy does not entail the problems referred to by Judge Sorkow. The Baby M case arose from such difficulties. Mrs. Whitehead's behaviour shows that those problems can and sometimes do arise in a surrogacy context. Furthermore, Mrs. Whitehead's predicament may well have had its origins in the prospect of earning $10,000, given the financial pressures on her family. If that's right, then premise F_2 is false, argument LP_n-C_2 is unsound, and conclusion C_2 may be false.

The possibility we are now considering has distressing consequences for intentionalism. To see this, we must first expand LP_n, so that it reads:

LP A statute applies to a situation **if and only if** its application serves the purpose that the enacting legislators intended for the statute.[14]

The expansion of conditional principle LP_n to biconditional principle LP is substantial. Whereas principle LP_n would reduce the scope of a law from what the law's language would seem to determine, principle LP would also expand the scope of a statute beyond the apparent limits of its language.

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[14] Another plausible expansion of principle LP_n is:

LP'A statute applies to a situation **if and only if** its application serves the purpose that the enacting legislators intended for the statute; a statute does **not** apply **if and only if** its application disserves (defeats or tends to defeat) the purpose that the enacting legislators intended for the statute.

Unlike principle LP, principle LP' holds that a statute neither applies nor fails to apply if its application would neither serve nor disserve its intended purpose or if the enacting legislators failed to endorse a purpose for it; it implies that statutes can be applicationally indeterminate even when the enacting legislators endorsed a purpose for the statute. I will turn to this sort of ambiguity later.

The rationale for an expansion is intentionalism, which seems to require the fuller principle because its proponents say, unqualifiedly, that the proper application of a law is determined by the lawmakers' intentions. Recall the quotation that began: "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." [15]

Here is a revised legislative purpose argument for the Baby M case:

LP A statute applies to a situation if and only if its application serves the purpose that the enacting legislators intended for the statute.

P_1 New Jersey statute 9:3-54 was intended by the enacting legislators to protect mothers from undue financial pressures that might lead them to give up infants for adoption when that would not serve the children's best interests, decisions the mothers would later regret.

F_3 In surrogacy contexts mothers can be subjected to undue financial pressures that can lead them to give up infants for adoption when that would not serve the children's best interests, decisions the mothers would later regret, as in this case.

C_3 New Jersey statute 9:3-54 can apply to situations involving surrogacy contracts, and does apply to this case.[16]

This argument does not solve the problem we found in Judge Sorkow's original, contemplated applications argument.

And another problem for intentionalism emerges. Consider the conclusions of the two surviving arguments. Judge Sorkow's contemplated applications argument gave us:

C_1 New Jersey statute 9:3-54, which regulates adoptions, **does not apply** to situations involving surrogacy contracts, such as this case.

The intended purpose argument, suggested by Judge Sorkow's further comments, gives us

C_3 New Jersey statute 9:3-54, which regulates adoptions, can apply to situations involving surrogacy contracts, and **does apply** to this case.

These propositions are inconsistent. If intentionalism provides a foundation for both, then it generates incoherent guidance for those who are called on to apply the law. If the contradiction is generated from a statute that is in fact coherent, as New Jersey statute 9:3-54 appears to be, then intentionalism is responsible for the inconsistency and is untenable.

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15 *Riggs v. Palmer,* 115 N.Y. 506 (1889) at 509.

16 This particular use of principle LP does not actually expand the statute beyond its language but simply allows for the generation of conclusion C_3.

This problem is not an artefact of unreasonable assumptions. It results from applying original intent doctrine straightforwardly to ordinary legislation. In practice, distinct species of legislative intention can conflict, as they appear to do in this case.

Lawmaking is a fallible process. The most responsible legislators might misjudge the effects of a proposed law. It is inevitable that applying a law as the lawmakers intended will sometimes fail to serve or will even frustrate the lawmakers' purpose. In any such case, the application of intentionalist principles generates similar contradictions.

We can imagine ways of enabling intentionalism to avoid contradictions. One is to stipulate a hierarchy among lawmaking intentions. But an arbitrary stipulation would discredit rather than save the theory. And intentionalism suggests no reason for the hierarchy.

Some think that logic or psychology makes contemplated applications subordinate to intended purposes.[17] If apprised of a conflict, a lawmaker would supposedly adjust her attitude towards applications so that enforcement of the law would serve her purposes. If this were true, it would not help in a case like Baby M, however, because the lawmakers could not recognise the conflict prior to enactment.

One might refer instead to their attitudinal dispositions and claim counterfactually that, if they had seen the conflict, they would have adjusted their applicational intentions accordingly.[18] However, what they would do depends on the variable conditions we attach to the counterfactual supposition. Furthermore, the psychological assumption is dubious. Lawmakers might adjust their aims instead of their attitudes towards applications.

To see this, consider another example. A critic of the Supreme Court's equal protection ruling against school segregation in *Brown v. Board of Education* observed that the post-Civil War Congress that proposed the 14th amendment had itself imposed racial segregation on public schools in Washington, DC.[19] If the members of that Congress who supported the 14th amendment were strongly committed to racial segregation, it is quite possible that they would have qualified their

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17 See, respectively, David Brink, "Legal Theory, Legal Interpretation, and Judicial Review", (1988) 17 *Philosophy & Public Affairs* 105, Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992) at 171.

18 For an intentionalist theory seeking guidance from dispositional attitudes, see Richard Posner, "Statutory Interpretation—in the Classroom and in the Courtroom," 50 *University of Chicago Law Review* 800 (1983).

19 Raoul Berger, *Government by Judiciary* (Harvard University Press, Cambridge, Mass., 1977).

aspirations for its equal protection clause so as to permit racial segregation in the public schools. In other words, the lawmakers would have tailored their intended purposes so as to exclude applications that would be unacceptable to them. Intended purposes are not always attitudinally dominant, and we cannot reasonably revise intentionalism by supposing that they are.

Another way to prevent intentionalist principles from generating contradictions is to weaken the principles. We might begin by expanding the relevant principles. For example, we could expand principle LA_n in the way we expanded principle LP_n. We would get:

LA A statute applies **if and only if** the enacting legislators thought about the situation and intended the statute to apply,

which holds that a statute does not apply if the legislators did not think about the possible application or they thought about it and disapproved.

A new problem arises here: an alternative, nonequivalent expansion of principle LA_n is available, as follows:

LA' A statute applies **if and only if** the enacting legislators thought about the situation and intended it to apply; a statute does **not** apply **if and only if** the enacting legislators thought about the situation and intended it not to apply,

which implies that a statute neither applies nor does not apply to a situation if the legislators did not form either a positive or negative intention concerning the situation, because they thought about it but did not make up their minds or because they did not think about it. Principle LA' implies that statutes can be applicationally indeterminate.

Principle LA provides more interpretational guidance than principle LA', but it can also help to generate more conflicts and threatens more frequently to generate contradictions. Intentionalism offers no basis for resolving this ambiguity. For present purposes, I ignore the complication.

The next step is to revise principles LP and LA so as to eliminate contradictions resulting from their application to conflicting intentions. Once again, however, an ambiguity arises: there are alternative ways of weakening intentionalist principles, with competing advantages from the standpoint of intentionalist theory.

One possibility is to weaken principles LP and LA so that they determine an outcome when, but only when, they do not conflict with the implications of other original intent principles, as follows:

LP_x **In the absence of conflicting legislative intentions**, a statute applies to a situation **if and only if** its application serves the purpose that the enacting legislators intended for the statute.

LA_x **In the absence of conflicting legislative intentions**, a statute applies **if and only if** the enacting legislators thought about the situation and intended the statute to apply.

Suppose that the surrogacy situation was as we last imagined it, so that the statute's intended purpose would be served by its application, although the legislators never considered the application. The application of unqualified principles LP and LA would generate a contradiction; but the application of qualified principles LP_x and LA_x would not.

But that solution merely substitutes one problem for another. Under the assumed circumstances, the weakening qualifier prevents either principle from generating interpretational guidance, because the principles offer guidance only in the absence of conflicting intentions. The problem before was that intentionalist reasoning told us too much; now it tells us too little.

Here is an alternative way to weaken principles LP and LA so that their application avoids contradictions but provides some determinate guidance:

LP_w In the absence of **overriding** legislative intentions, a statute applies to a situation **if and only if** its application serves the purpose that the enacting legislators intended for the statute.

LA_w In the absence of **overriding** legislative intentions, a statute applies **if and only if** the enacting legislators thought about the situation and intended the statute to apply.

Modifications like these would prevent intentionalist principles from generating contradictions, without weakening them so much that their application when intentions conflict would not provide interpretational guidance.

The qualifications incorporated into principles LP_w and LA_w allow for the possibility that some legislative intentions sometimes outweigh others. But intentionalist theory implies no such hierarchy of lawmaking intentions, so the two new principles do not tell us how the relevant interpretational guidance may be extracted. Unless that problem can be solved, principles LP_w and LA_w provide as little guidance as principles LP_x and LA_x.

Intentionalist theory does not appear to endorse one particular set of principles. If we try to refine intentionalism so that it does not generate contradictions, we come upon one ambiguity after another, with no apparent resolution. The result is a theory that will frequently be too indeterminate to apply.

An Indeterminacy Problem

Everything said so far can apply when law is made by one person acting alone. But most law is made by groups of persons in legislative assemblies, constitutional conventions, and the like. For illustrative purposes, I will focus on the legislative case.

When a statute is enacted by a legislature, intentionalism would seem to regard as relevant intentions that can be attributed to the legislature as a whole. The first question in this context, then, is how to assign intentions to a legislature. Some theorists have thought it nonsensical to imagine that legislatures have intentions. Intentions are mental states, which legislatures do not have. Legislatures do deliberate and act, however, so we should entertain the possibility that they can have intentions.

That intentions can be shared by a number of individuals makes possible symphony orchestras, football teams, and other forms of cooperation and coordination. It seems reasonable to ascribe an intention to a group when it is shared by the group's members—or at least by a goodly portion of them.

I shall call the condition that must be satisfied for the true ascription of an intention to a lawmaking body[20] an **intentional consensus**.

How shall we define an intentional consensus? The need for a definition might have been obscured by Judge Sorkow's legislative intent argument in the Baby M case. He held that surrogacy contracts had never been thought of when the legislature last reviewed its adoption statutes. If no one had ever thought of surrogacy contracts, no one could have thought specifically of applying the adoption statutes in a surrogacy context. It follows that the conscious approval of such applications could not be attributed to the legislature. For that negative point, no intentional consensus is required. The need for an intentional consensus arises when we entertain the attribution of a positive intention to a legislature, such as the intention that a law serve a particular purpose[21] or that it be applied in a given type of situation.

One commentator has suggested that we think of legislators as casting "intention-votes".[22] A legislator with a purposive or applicational attitude towards a proposed law casts a corresponding intention-vote

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20 The term "body" should be understood broadly enough to cover whatever structured or unstructured collection of individuals or institutions makes the law in question.

21 Thus the purposive intention argument that I constructed for that case did assume an intentional consensus.

22 Paul Brest, "The Misconceived Quest for the Original Understanding", (1980) 60 *Boston University Law Review* 204 at 209-217.

concerning the law. Thus a five-member legislative body which makes law by majority vote might be said to have a given intention when it is shared by three or more of its members.[23]

But intentionalism would seem to count only the lawmaking intentions of those who vote for an adopted law. It would not count the intentions of those who did not vote favourably, because their intentions are not constituents of a legislative act.

A simple majority does not always suffice to enact a law. Sometimes legal change requires a "super-majority". A two-thirds majority in each house of Congress is required to enact a law that the President has vetoed. Ratification of an amendment to the US Constitution requires affirmative votes by three-quarters of the states.

Legislative procedures can involve greater complications, as when they confer special powers upon particular officials. The Constitution empowers the President to veto bills that Congress has approved. As the President participates in the legislative process and his initial veto may result in revision of a proposed law, his legislative intentions should be counted. His legislative role can be more consequential than that of any individual legislator, so his legislative intentions might reasonably count more than those of ordinary legislators in determining an intentional consensus. It is unclear how the construction of an intentional consensus should take account of the President's intentions when they differ from the intentions of some legislators. Though I shall ignore this complication hereafter, it introduces new sources of indeterminacy into intentionalism.

This complication suggests another. Intention-votes might be identified and perhaps even weighted, not according to a person's official role in the lawmaking process, but based on her causal contribution to the legal change.

Intentionalist arguments appear to vacillate between these two criteria. When statutes are interpreted, intentionalist reasoning seems to count only the intentions of those who are officially involved in the lawmaking process, but this is not true of intentionalist interpretations in the constitutional context, which concern "framers' intent". The term refers, for example, to the lawmaking attitudes of those who in 1787 proposed a new constitution for the United States,[24] or who actively supported its

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[23] Though the intentions of legislators may vary, common elements might ground an intentional consensus. Suppose that, when the city council enacted a law banning motor vehicles from the park, all councillors had in mind the safety of park users while just one councillor also saw the ban as promoting a quieter, more restful refuge. We might then regard safety but not quiet as an intended purpose of the law.

[24] Indeed, they acted without prior legal authorisation, as their charge was to

ratification,[25] as well as those in Congress who proposed or supported subsequent constitutional amendments.[26] By contrast, scant notice is given to the intentions of those in the several states whose official votes effected ratification.

The contrast I have drawn is too stark. Ordinary legislation is routinely interpreted by reference to reports from legislative committees, although these and the bills themselves are frequently drafted by hired staff who are not members of the legislature. Bills are sometimes drafted by influential private lobbyists. In the context of statutory construction, therefore, it would seem that intentionalist interpretations are often based, not on the attitudes of those with an official role in the lawmaking process, but on the attitudes of those who causally contributed to the legal change.

How should we resolve this ambiguity of intentionalism? It is plausible to suppose that many of those who vote for a bill in the legislature or who vote to ratify a constitution or a constitutional amendment endorse positions that are taken by those who have designed or advocated the legal change. But we cannot reasonably assume that the number of them who embrace such attitudes are sufficient to constitute an intentional consensus. To assume that would beg the very question I shall raise.

We should look to intentionalism's justifying rationales for a principled answer to these questions. Until plausible rationales are identified, however, the doctrine will retain this additional degree of indeterminacy.

In order to explain a difficulty arising from the need for an intentional consensus, I will ignore the complications I have just discussed. I will pretend that a change in written law requires only a simple majority and I will suppose that the intentions that count are the intentions of those who officially vote for the change.

I will assume, therefore, that an intentional consensus obtains when a given intention concerning the meaning, purpose, or application of a bill is shared at the time of voting by a sufficient number of those who voted favourably so that, given the number of those who voted unfavourably, if only those who shared the particular intention had voted favourably, the bill would have been enacted into law. In short, similar intention-votes must outnumber the unfavourable votes. These are among the weakest conditions we might imagine for an intentional consensus, and among the easiest to

propose revisions of the Articles of Confederation, not a substantially new constitution.

25 Such as the authors of *The Federalist Papers.*

26 The "framers" of amendments to the constitution that was ratified in 1789 have been (members of) subsequent sessions of the Congress that was established under that constitution and given such authority.

satisfy.

The problem is this. The legal rules that tell us how to change the law do not require, assume, presuppose, or imply that those who cast votes have any particular intentions about the legal change, except perhaps to have their votes counted as favourable or unfavourable or as official abstentions. It is always an open factual question what other intentions they actually have. We have no reason to assume that a consensus obtains, and we have good reason to be sceptical.

We can focus on the favourable votes, as the intentions of those who cast them are the only ones that might contribute to an intentional consensus. Let us assume that all those who vote favourably do so intentionally.

Those who vote for a bill need not have the same purpose for it in mind or the same ideas about its appropriate applications. Not all of those who vote favourably even form relevant intentions. Lawmakers do not attend all sessions of the legislative assembly. When present they do not always pay attention to the debate. They do not read all bills on which they vote. In the rushed conclusion to legislative sessions, when many bills are acted upon hurriedly, legislators may vote without any clear idea of a bill's content, purpose, or applications. Lawmakers sometimes vote under party discipline or because they believe their votes will serve some extraneous objective, such as securing their own reelection or favours from lobbyists. When a legislator votes for a bill for such reasons, we cannot assume that she also truly endorses the legislative intentions of those legislators who have some substantive understanding of it.

Imagine that when the city council enacted a law banning vehicles from the park, it did so by a three to two majority, that only two of those who voted favourably actually wanted to ban vehicles from the park, and that the other favourable vote was cast by a city councillor who agreed with the dissenters that cars should be permitted in the park but voted to ban them because he thought a favourable vote greatly improved his chances for reelection. In that case, there is no intentional consensus—either to ban vehicles from the park (because there is too few positive intention-votes) or to allow them there (because the negative intention-votes are not linked with a corresponding legal outcome).[27]

In other words, it is quite possible for there to be no intentional consensus regarding a given change in written law, such as a legislative enactment or a constitutional amendment. And it seems inevitable that this

[27] If it is thought that a majority of intention-votes is not required for an intentional consensus, it is easy enough to imagine an enactment without a distinct plurality of intention-votes. This will be sufficient for the argument that is developing in the text.

sometimes happens.

Let us consider a real example: *Steelworkers v. Weber*.[28] The question it posed was whether Title VII of the Civil Rights Act of 1964 prohibited a program at the Kaiser Aluminium & Chemical Corporation plant in Gramercy, Louisiana, that had been created under a collective bargaining agreement between Kaiser and the United Steelworkers of America. The program trained unskilled employees for skilled jobs. Applicants were admitted according their length of service, save that half of the openings were reserved for African-American employees. This was to continue until African-American representation in skilled jobs at the Kaiser plant was equivalent to the percentage of Blacks in the local labour force.

A white employee, Brian Weber, was denied admission to the Kaiser training program when Black employees with less seniority were admitted. He challenged the program under the Civil Rights Act, which penalises employers who "discriminate against any individual" or "deprive any individual of employment opportunities...because of such individual's race". (§ 703(a))

As a result of severe, long-standing discrimination, African-Americans held few skilled jobs at the Kaiser plant or in other local industry. If that discrimination had ended, then the number of African-Americans in skilled jobs would eventually rise—very slowly. A program like Kaiser's could be expected to accelerate the change. One question facing the Supreme Court was whether the Act outlawed programs that were aimed at the legacy of past discrimination. By a five to two majority, the Supreme Court said no.

Some members of Congress had been worried that the government might impose a program like Kaiser's, and the bill was amended to bar the government from doing so. (§ 703(j)) The Act says nothing about voluntary programs such as Kaiser's. There was little or no discussion in Congress of voluntary programs, so there most likely was no applicational consensus regarding them.

In his majority opinion, Justice Brennan seemed to offer an intended purpose argument. He said, for example: "The purposes of the [Kaiser program] mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy." (443 US 193 at 208) Such an interpretation was radically undersupported by the evidence that he offered, which relied on remarks by only four of the bill's supporters. The bill was controversial, and we have no idea how many others who voted favourably shared its strongest supporters' intentions.[29]

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28 443 US 193 (1979).

29 Justice Brennan quotes remarks by Senators Clark, Humphrey, and Kennedy

There is reason to believe that some who supported the bill did so for extraneous reasons. The US was competing with the Soviet Union for influence within the former European colonies in Africa and Asia. The populations of those newly independent states, who had been subjected to racist domination by European powers, tended to identify with African-Americans. Brutal discrimination in the US, which had become more visible through film and television, was a serious liability to US foreign policy. Given the attitudes of many in Congress, it is likely that some who voted for the Civil Rights Act were concerned with US influence abroad rather than racial justice at home.

Race-conscious affirmative action programs like Kaiser's were controversial, and some legislators who voted for the Act may have embraced a legislative purpose that excluded them. We have inadequate ground to assume that the purpose cited by Justice Brennan, or any purpose, was endorsed by an intentional consensus.

Intentionalism maintains that the meaning, purpose, or proper application of a law depends on the intentions of the lawmakers. In the absence of an intentional consensus, the theory implies that the law lacks determinate meaning, purpose, or proper application. It then implies that the law is indeterminate when we have no other reason to draw that conclusion. As the law's apparent meaning, which centres on its text and prevailing linguistic conventions, is unlikely to be radically indeterminate, unrestricted intentionalism would seem to have some false implications.

We have no idea how frequently this happens. We do not know how often there is an intentional consensus and how often one is lacking.[30] Those who frame intentionalist arguments never explicitly argue that an intentional consensus obtained, and the evidence of intent that they offer always falls radically short of making a plausible case.

The lack of an intentional consensus need not be commonplace to be troublesome. The result, I am suggesting, is that the theory then generates a false claim, that the law in question lacks determinate meaning, purpose, or proper application. Unless false implications are eliminable through principled revision of the theory, they destroy a theory's credibility.

And we have no reason to suppose that these implications of the theory are eliminable. On the contrary, the existence of an intentional consensus seems crucial to most applications of intentionalism. This problem therefore provides another reason for regarding intentionalism as untenable. Until reasonably justified and revised accordingly, it cannot

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and a message from President Kennedy.

30 We cannot be guided by all public statements because some lawmakers misrepresent their lawmaking intentions.

responsibly be used in legal interpretation.

Reconstructing Purposive Interpretations

Although I have argued that the interpretation of written law cannot responsibly be based on the theory that courts should be guided by what the lawmakers had in mind, I do not wish to claim that all seemingly intentionalist interpretations are unsalvageable. I want tentatively to suggest, rather, that we understand some of them independently of intentionalist theory. The salvageable arguments assume different principles, to which the problems of unrestricted intentionalism do not accrue.

There are reasons for trying to salvage purposive interpretations—reasons that do not apply to applicational interpretations.

If intentionalist interpretations reflect unrestricted intentionalism, we should expect to find that some, at least, are supported by systematically marshalled information about the relevant lawmakers' attitudes, sufficient to make a plausible case for an intentional consensus—sufficient, that is, to rebut the reasonable suspicion that a significant fraction of those who voted for the laws (or who were instrumental in effecting the legal changes) did not endorse the sponsors' aims but acted as they did for extraneous political or personal reasons. A striking feature of intentionalist interpretations in practice, however, is that such evidence of an intentional consensus is rarely offered. Sometimes the stated views of a very small fraction of the relevant lawmakers are noted by interpreters (as when the most articulate sponsors of proposed legal changes are looked to for interpretive guidance). Sometimes historical evidence is entirely lacking.

Consider the following purposive interpretation. In 1987 the U.S. Court of Appeals for the Seventh Circuit decided a bankruptcy case involving the application of a 1935 Wisconsin statute that allowed debtors to retain certain implements and tools rather than sell them as part of a bankruptcy settlement.[31] The items that an indebted farmer was specifically allowed by the statute to retain included a mower and a hay loader. A bankruptcy judge and a district court judge, whose decisions were being appealed, had allowed a bankrupt farmer to retain a baler and a haybine, in place of the listed hay loader and mower, although neither implement was listed in the statute. Judge Easterbrook noted:

> A baler not only loads hay on a wagon but also ties it in bales; a haybine not only mows hay but also conditions it. Both the bankruptcy judge and the district judge

31 *In the Matter of Marie Erickson,* 815 F.2d 1090 (7th Cir. 1987).

> concluded that the extra functions of the machines did not prevent their exemption. (Id at 1091)

Judge Easterbrook observed: "The statute is designed to give farmers a fresh start." (Id at 1094) The list of implements "comprises the equipment that in 1935 would have kept a small farm in operation. But small farms now use a different set of equipment... If the statute applies only to farm implements customary in 1935, and therefore omits the [baler and] haybine, it does not achieve its purpose today". (Id at 1092) Although he did not say so explicitly, Judge Easterbrook seems to have assumed that allowing bankrupt farmers to retain balers and haybines in place of hay loaders and mowers would serve the statute's purpose.

If Judge Easterbrook's reasoning assumed unrestricted intentionalism, it would be radically undersupported by the evidence he offered. For the only apparent ground of his interpretation was a law review article[32] that provided no information at all about the attitudes of the enacting lawmakers.

Purposive interpretations offered by judges and lawyers are often like that. If we supposed that they reflect unrestricted intentionalism, then we should regard them as radically underdefended. A striking feature of the legal literature is that purposive interpretations are not treated in that way. I want now to suggest why.

In many cases, the attribution of a purpose to some written law is not purely historical. It is based mainly, if not entirely, upon a different sort of judgment. The purposes attributed to laws seem typically to be regarded by the interpreters as the laws' justifying rationales.

Viewed in the way I am now suggesting, Judge Easterbrook's argument does not presuppose an intentional consensus. In his written opinion—as in many others and in many legal commentaries—what is cited as a purpose appears to be regarded as a justifying rationale of the law under interpretation.

This way of understanding purposive arguments makes much better sense of them than does unrestricted intentionalism. When purposive interpretations are based on the justifying rationales of laws, they cannot fail simply because there was no relevant consensus. Justification-based interpretations can draw insight or inspiration from statements by the original lawmakers, but a justification-guided interpreter may legitimately draw upon other sources, too.

The approach is suggested by some of the familiar intentionalist rhetoric, which occasionally indicates it is concerned to idealise lawmakers'

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32 Thomas H. Jackson, *"The Fresh Start Policy in Bankruptcy Law"*, (1985) 98 *Harvard Law Review* 1393, cited in 815 F.2d 1090 (7th Cir. 1987) at 1094.

intentions. Here is an example:

> Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view... "...In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him the question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, *being an upright and reasonable man,* would have given." [33]

I can suggest a rationale for justification-based interpretation. Law tells us what we must or must not do, threatening sanctions for disobedience. It regulates death and taxes, war and peace, and innumerable other matters that are of direct, vital interest to individuals. Moral justification is required for such governmental actions. Someone whose interests are affected by law has a right to be treated in a morally defensible way. We take this for granted in our everyday thinking about the law, and those who presume to speak on behalf of the law usually claim that it justifies what is done to people in its name.

The required moral justification of particular legal judgments cannot assume the consent of the parties or the fairness to them of the system as a whole. Many of those who come before courts do so under duress and have lacked a reasonable opportunity to affect the content of the laws.[34] Many defendants participate only to avoid default or contempt judgments. We cannot assume that, if they had a choice, they would approve of the laws that determine their fates or that they are morally committed to the law that is applied. The justification of the adverse treatment that some receive as the result of adjudication cannot be based on the generally fair treatment they receive, if they are among those subject to systematic discrimination. What is typically done to people in the name of the law requires substantive moral justification.

The point of a justification-based approach is that its use promises to increase the likelihood that the application of law is morally justifiable. When interpretation renders a law morally justifiable, its application is more likely to be justifiable than the application of the same law under an interpretation that renders it unjustifiable. The more justifiable the law being applied, the more justifiable its applications are likely to be. That provides a reason for interpreting laws so that they are as justifiable as

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33 *Riggs v. Palmer,* 115 N.Y. 506 (1889) at 510 (citation omitted, emphasis added).

34 Many who are affected by a government's acts and policies have no part in determining its laws, e.g., members of other political communities.

possible.[35]

Understood in the way I have suggested, a purposive interpretation involves a complex value judgment, about what best justifies an item of written law. The judgment is complex because one must consider the actual provisions of the law, interpretive precedents, justifications of related laws, and problems of enforcement. Such judgments can be problematic, but responsible lawmakers are frequently called upon to make them.

Justification-based interpretation requires more extended and systematic discussion on another occasion; some themes can only be suggested here. Its rationale is problematic, for experience indicates that courts cannot be relied upon to provide sound justification-based interpretations. The strategy is limited in scope, as not all law is morally justifiable, and unjustifiable laws cannot be given sound justification-based interpretation. The interpretation of unjustifiable laws must proceed differently.

If so, and if the main argument of this paper is sound, then my final suggestion is that there seems little prospect of a defensible single-criterion interpretive theory for law.

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35 Fairness requires that interpretations respect the texts of written laws. But this requirement may be more complex than it appears; consider, e.g., whether Judge Easterbrook's counting a baler as a hay loader and a haybine as a mower exemplifies adequate respect for the legislative text.