THINKING LIKE A LAWYER

A NEW INTRODUCTION TO LEGAL REASONING

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THE USE AND ABUSE OF ANALOGIES

5.1 On Distinguishing Precedent from Analogy

It will strike some readers as odd that in an entire chapter on precedent, and then in another on legal authority, there has yet to be a single mention of the word "analogy." Analogies, after all, are a ubiquitous feature of legal argument and judicial opinions. In law, as elsewhere, people argue that because some current situation is like another from the past, then the current one should be dealt with in the same way as the previous one. And because most analogies drawn by lawyers and judges are analogies to previous cases, it is tempting, as it has been for many commentators, to assume that the legal concept of decision according to precedent, which we examined at length in Chapter 3, is actually a form of argument by analogy, or even that the two are the same.[1]

The temptation, however, should be resisted. Although the use of analogies is pervasive in legal argument, analogical reasoning is not the same as constraint by precedent.[2] The fact that lawyers routinely and

1. E.g., Edward H. Levi, *An Introduction to Legal Reasoning* (1949); Lloyd Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005); Barbara A. Spellman, "Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist—and (in Particular) Studying Analogical and Causal Reasoning—Changed My Views about the Field of Law and Psychology," 79 *Chi.-Kent L. Rev.* 1187 (2004).

2. And thus it is correct to treat them as distinct but related topics, as in, for example, Grant Lamond, "Precedent and Analogy in Legal Reasoning," *in Stanford Encyclopedia of Philosophy* (N. Zalta ed., 2006), http://plato.stanford.edu/archives/sum2006/entries/legal-reas-prec. See also Frederick Schauer, "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) about Analogy," 3 *Perspectives on Psychological Science* 454 (2008).

loosely refer to any previous reported decision as a "precedent" helps foster the confusion, but a genuinely constraining precedent is different from a previous case that may be used analogically. In drawing analogies, we say that some aspect of a current problem is similar to some aspect of a past problem, and thus that we should learn—sometimes to follow and sometimes to avoid—from the previous event. When, for example, it was argued at the time of the first Iraq war, in 1991, that Saddam Hussein was "like" Adolf Hitler, the point was to show that because Hitler was a dangerous dictator who invaded other countries and needed to be stopped, it followed that Saddam Hussein, also a dangerous dictator who invaded other countries, needed to be stopped as well. Because few people would have disagreed with the proposition that it was important to stop Hitler, those who drew the analogy—especially President George H. W. Bush—hoped that others would agree that it was also important to stop Saddam.[3]

The analogical argumentative structure was the same for those who argued *against* the second Iraq war, in 2002, by using an analogy between that war and the war in Vietnam. Then the crux of their argument was that Iraq and Vietnam were both situations in which conventional warfare was impossible and in which American military knowledge of the culture, terrain, and language was minimal. Because Vietnam turned into a long, costly, and ultimately unsuccessful military venture, so the argument went, the similar situation in Iraq presented similar dangers and should therefore be avoided.

This type of analogical argument pervades legal discourse. Consider, for example, the argument that prohibiting same-sex marriage violates the equal protection clause of the Fourteenth Amendment because such prohibitions resemble the prohibitions on interracial marriage that the Supreme Court held unconstitutional in *Loving v. Virginia*.[4] Here the formal structure of the argument tracks that of the Iraq examples above: A prohibition on same-sex marriage is similar to a prohibition on interracial marriage because both prevent people who want to be married from marrying solely because of their immutable personal characteristics. The prohibition on interracial marriage was properly struck down. There-

3. See Barbara A. Spellman & Keith J. Holyoak, "If Saddam Is Hitler, then Who Is George Bush?: Analogical Mapping between Systems of Social Roles," 62 *J. Personality & Social Psych.* 913 (1992).

4. 388 U.S. 1 (1967).

fore, following this logic, the prohibition on same-sex marriage should be struck down as well.[5]

Following the terminology of cognitive psychologists who study analogy, we can refer to the earlier case as the *source*, or source analog, and the current case as the *target*.[6] When a lawyer uses an analogy in an argument (or a judge uses one in an opinion), the lawyer is claiming that some feature of the source case—treating people differently because of their immutable personal characteristics, for example—is present in the target case, and accordingly the target case should be decided in the same way as the source case.

Implicit in this standard picture of analogy is that the person drawing the analogy has a choice of source analogs and selects one from among multiple possibilities on the basis of its being the most useful in making a decision or the most valuable for persuading someone else of the wisdom of a decision already made. Lawyers use analogies, therefore, because they are helpful. They assist in making decisions, they help persuade others of the correctness of decisions already made, and they illuminate aspects of a current situation that may otherwise have been obscured. So when the first President Bush analogized Saddam Hussein to Adolf Hitler in order to encourage support for the first Iraq war, and when opponents of the second Iraq war analogized that war to the American misadventure in Vietnam, they both selected their source analogs—Hitler and Vietnam, respectively—from among multiple potential candidates because of the capacity of the ensuing analogy to persuade those who might otherwise have disagreed with their position.

Although sometimes analogies are used to argue against rather than

5. The characterization in the text is simplified in order to illustrate the argumentative structure, but full arguments in this vein can be found in, for example, William N. Eskridge, Jr., "Equality Practice: Liberal Reflections on the Jurisprudence of the Civil Union," 64 *Alb. L. Rev.* 853 (2001); Andrew Koppelman, "Why Discrimination against Lesbians and Gay Men Is Sex Discrimination," 69 *N.Y.U. L. Rev.* 197 (1994).

6. See generally *The Analogical Mind: Perspectives from Cognitive Science* (Dedre Gentner, Keith J. Holyoak, & Boris N. Kokinov eds., 2001); Keith J. Holyoak & Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (1995); *Similarity and Analogical Reasoning* (Stella Vosniadou & Andrew Ortony eds., 1989); Keith J. Holyoak, "Analogy," *in The Cambridge Handbook of Thinking and Reasoning* 117 (Keith J. Holyoak & Robert G. Morrison eds., 2005); Isabel Blanchette & Keith Dunbar, "How Analogies Are Generated: The Roles of Structural and Superficial Similarity," 28 *Memory & Cognition* 108 (2001).

for some course of action—that cigarettes should not be banned because of the lessons of Prohibition, for example, or that the Supreme Court should not impose substantive (as opposed to procedural) constraints on legislation in the name of the due process clause of the Fourteenth Amendment because of the unfortunate consequences of *Lochner v. New York*[7]—even here the analogies are chosen because of the guidance they are believed to offer, the illumination they are believed to provide, the lessons they are thought to teach, or the persuasion they are thought to facilitate. Those who use analogies do not select analogies that would prevent the selector (or the object of the selector's attempt to persuade) from doing what would otherwise be (to the selector) a good idea, and decision-makers do not select or even see analogies that would impede a course of action that, but for the analogy, would be chosen. In other words, lawyers do not select analogies that they believe will not lead someone—judge or jury—to the conclusion that they are advocating, and judges do not select analogies that they believe will not help the reader of an opinion see the wisdom in their conclusion.

As we have seen, however, the legal concept of precedent is very different. A mandatory precedent will sometimes, by virtue of its authoritative status, block an otherwise preferred current decision. The very fact that we refer to mandatory precedents as "binding" underscores their constraining nature, a constraint that operates precisely because the judge is perceived to have little choice in the matter. Law's use of precedent thus differs substantially from law's use of analogy, for in the latter a previous decision is selected in order to support an argument now, while in the former a previous decision imposes itself to preclude an otherwise preferred outcome.

Consider Justice Potter Stewart's 1973 concurring opinion in *Roe v. Wade*.[8] The most significant precedent was the 1965 case of *Griswold v. Connecticut*,[9] invalidating a Connecticut law prohibiting the sale of contraceptives. For those Justices who agreed with the outcome in *Griswold*,

7. 198 U.S. 45 (1905). *Lochner* was the famous (or notorious) case in which the Supreme Court used the due process clause of the Fourteenth Amendment to strike down a New York statute regulating the working hours in bakeries. The decision prompted a dissenting Justice Holmes to denounce the majority for using the Constitution to choose among competing political and economic philosophies, a task he thought should be the legislature's and not the courts'.

8. 410 U.S. 113, 193 (1973) (Stewart, J., concurring).

9. 381 U.S. 479 (1965).

the result in *Roe* was largely unexceptional. From their perspective, *Roe* merely extended broad principles of privacy and substantive liberty set forth earlier in *Griswold.* Yet although Justice Stewart had been one of the dissenters in *Griswold,* he did not dissent in *Roe.* He continued to believe that the Constitution contained no right to privacy, but he concluded that *Griswold* and other cases had, to his dismay, resurrected the doctrine of substantive due process, and he concluded in *Roe* that the obligation to follow even those precedents he thought mistaken mandated that he follow them in *Roe,* making clear that he then "accept[ed]" the precedential authority of cases with which he disagreed.

Examples of such crisp respect for stare decisis may be rare in the Supreme Court, but they are not unknown. In the 1950s and 1960s, for example, Justice John Marshall Harlan often joined the majority in criminal procedure decisions from whose basic principles he had dissented in previous cases,[10] just as Justice Byron White in *Edwards v. Arizona*[11] in 1981 felt obliged to follow the Supreme Court's 1966 decision in *Miranda v. Arizona,*[12] a case in which he had been among the dissenters, and just as Justice Anthony Kennedy in *Ring v. Arizona*[13] stated explicitly that "[t]hough it is still my view that [the earlier case of] *Apprendi* was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."

These examples come from the Supreme Court, but that is where we are *least* likely to find genuine precedential constraint. Because the Supreme Court hears and decides barely more than seventy cases a year out of the more than nine thousand petitions for review presented to it, and because even the nine thousand represent cases far along in the judicial system, the Supreme Court would be the last place to look for cases whose outcomes are genuinely constrained by a previous decision. As we saw when we examined the selection effect in Chapter 2, legal outcomes genuinely dictated by a rule or precedent are disproportionately unlikely to be litigated or, if litigated, appealed, and thus the population of appellate cases, especially at the Supreme Court level, is heavily weighted toward disputes whose outcomes are not determined or even very much

10. See Henry J. Bourguignon, "The Second Mr. Justice Harlan: His Principles of Judicial Decision Making," 1979 *Sup. Ct. Rev.* 251.

11. 451 U.S. 477 (1981).

12. 384 U.S. 436 (1966).

13. 536 U.S. 584 (2002).

guided by existing precedents. When we examine the United States courts of appeals, however, things are different. Where appellate jurisdiction is a matter of right and not discretionary with the court and where more than 80 percent of the decisions are not only unanimous but also not thought deserving of even an officially published opinion, we find far more cases in which an existing mandatory authority appears to dictate a particular outcome regardless of what the judges believe might be the just or wise outcome but for the existence of binding precedents. And thus, when we take into account the full universe of courts, the point becomes clear: The legal system's use of precedent is not about a lawyer or judge retrieving one from among numerous candidates for the source analog, nor is it about using analogy to help a lawyer make an argument now or helping a judge reach a better decision now. Rather, it is about a judge's obligation to follow a mistaken (to her) earlier decision solely because of its existence. It is, to put it bluntly, about a judge's obligation to make what she believes is the wrong decision. "Stare decisis has no bite when it means merely that court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust."[14]

Perhaps the most striking difference between precedential constraint and the classic case of reasoning by analogy is the typical lack of freedom that a follower of precedent perceives in the selection of the precedent. Whereas analogical reasoners are widely understood to have a choice among various candidate source analogs, such freedom is typically absent with respect to the genuine constraints of precedent. Justice Stewart would have thought bizarre the suggestion that finding another earlier case could allow him to avoid the constraints of *Griswold,* just as Justice White would surely have laughed at the idea that feeling constrained by *Miranda* in subsequent interrogation cases was simply a function of not having been creative enough to select the best source case. Although it is true that on occasion creative and effective advocates can persuade a court to see a case or an issue in an entirely new light, far more often a previous decision about issue *X* looms so large that it is implausible for a judge to avoid that decision by maintaining that the current case is really about *Y* and not about *X*. In a very attenuated sense, no 2004 forest green Toyota Corolla is the same car as any other 2004 forest green Toy-

14. United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 719 (2d Cir. 1955).

ota Corolla, but there is nothing unusual when one owner of such a car says to another that "I have the same car." So too here. Any two previous cases, instances, acts, issues, or events are in some respects different, but in reality their equivalence is often inescapable, and in law (and sometimes elsewhere) it is frequently both obvious and unchallengeable that the current decision to be made is about the *same* question that has been asked and answered on a previous occasion.

Thus, it is characteristic of the ordinary instance of precedential constraint that the current issue is so widely perceived to be the same as one resolved in a prior decision that it is not open—politically or professionally—for the current decision-maker to maintain that there is a relevant difference. A foreign policy decision-maker in 1991 might have been able with roughly equivalent plausibility to analogize Saddam to Idi Amin (a brutal dictator with whose country—Uganda—the United States did not go to war) as to Hitler, but a Supreme Court Justice asked in 2008 to rule on the constitutionality of a state law totally prohibiting abortion would find it virtually impossible—logically, linguistically, psychologically, professionally, and politically—to distinguish that case from *Roe v. Wade*.

Once we understand that in the case of precedent the choice of source decisions is often not *perceived* as a choice at all—and is often simply *not* a choice at all—we can grasp the difference between analogy and precedent. Whereas in the case of analogy the lawyer or judge is looking for assistance in reaching the best decision (or in persuading someone else of the best decision), in the case of precedent the effect is just the opposite. When there is an unavoidable similarity between the source and the target, and when the judge because of the constraints of vertical precedent or stare decisis is required to decide the instant case (the target case) in the same way that the precedent case (the source case) was decided, a judge will be constrained to reach what she will sometimes believe to be a poor outcome. Whereas in the case of analogy a lawyer or judge is looking for a source case in order to help her make the best argument or the best decision now, with respect to genuine precedent the judge will be compelled to make what she may believe to be the wrong decision. Analogy is hugely important in law, and good lawyers and good judges know how to use analogies effectively. But they also understand that precedent may on occasion constrain, and they understand as well that using an effective analogy and recognizing the constraints of precedent are hardly the same.

5.2 On the Determination of Similarity

That arguments by analogy are different from the constraints of precedent does not imply that analogical reasoning is unimportant in law. To the contrary, analogical reasoning is widespread throughout the legal system, and it comes as no surprise that many commentators have sought to explain the mechanism by which lawyers use analogies in making arguments and judges use analogies in justifying their decisions.[15] And although the use of analogy in legal argument may not differ fundamentally from the way in which analogies are used in everyday life, and although analogical reasoning may be as ubiquitous outside of law as within it, analogies are still so common in law that it is important to examine more closely the structure of this widespread form of legal argument.

The crux of an analogical argument is the claim that some act or event or thing that we encounter now is similar to something we have encountered previously. In law, the typical use of analogy involves an argument by a lawyer or a justification of a result by a judge that the current case is similar to another case in the past. But then we must confront the fact that any two things are in some respects similar and in others different. My blue 2004 Subaru Legacy station wagon is similar to your blue 2004 Subaru Legacy station wagon in that they are both blue, both the same make and model, and both from the same model year. But they are different in that one is mine and one is yours, and they almost certainly differ in the number of miles they have been driven and in at least some aspects of their mechanical condition. Likewise, there are obvious differences among black cats, black widow spiders, and black ink, but they are similar in all being black.

If any and every two things are in some respects similar and in others different, then how can we say that one thing is analogous to something else? Isn't one thing analogous to everything else and nothing else just because it is similar in some respects to (almost) everything else and different in some respects from absolutely everything else? So is it not therefore true that any current case is similar in some respects to vast numbers of previous cases and different in some respects from every one of them?

15. See, e.g., Levi, *supra* note 1; Weinreb, *supra* note 1; Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument," 109 *Harv. L. Rev.* 923 (1996); Cass R. Sunstein, "On Analogical Reasoning," 106 *Harv. L. Rev.* 741 (1993).

And if this is so, then how can an argument from analogy even get off the ground?

Let us return to the example we used in discussing precedent in Chapter 3. Suppose (reversing the actual chronology) that it were to have been argued in *MacPherson v. Buick Motor Company*[16] that the (hypothetically) previously decided English case of *Donoghue v. Stevenson*[17] was analogous to the situation presented in *MacPherson,* and thus that the New York Court of Appeals should decide *MacPherson* in the same way that the House of Lords had decided *Donoghue.* Obviously this is not a case of binding precedential constraint. No one would dare suggest that the New York court should decide a case in the same way that the English court decided the same issue because of some mysterious authoritative status of an English case. Simply put, the *MacPherson* court would have been under no obligation at all to treat *Donoghue* as binding or in any other way authoritative. But the lawyer for MacPherson might still have argued that the New York court should be guided by the English court's analogous (he would have said) decision in favor of Donoghue.

In order to make the argument, however, MacPherson's lawyer would have had to demonstrate that the two cases were in some way similar, and Buick's lawyer would have argued in response that they were different. MacPherson's lawyer might have claimed, for example, that both *Donoghue* and the case before the New York court involved consumer transactions, that both involved products whose defects could not easily have been identified by the consumer, and that both involved manufacturers whose ultimate aim was to sell products to consumers, albeit through an intermediate retailer. Because of these similarities, MacPherson's lawyer would have argued, the New York court should follow the lead of the English court's decision in *Donoghue.* In response, Buick's lawyer would then have pointed out that the Buick dealer could have inspected the car before selling it in a way that the retailer of a closed opaque beverage container could not have, that occasional defects in automobiles are to be expected in ways that decomposed snails in ginger beer bottles are not, and that the typical buyer of a car (especially in 1916) had the ability to bear the loss in a way that the typical patron at a café did not.

The most important thing to be said about this scenario is that both

16. 111 N.E. 1050 (N.Y. 1916).
17. [1932] A.C. 562.

lawyers are right. There are indeed similarities, and there are indeed differences. But not all of the similarities are relevant, and not all of the differences are relevant. In a case subsequent to *MacPherson* it would be a bad argument that an identical situation involving a Ford rather than a Buick represented a different case, although of course Fords *are* in some respects different from Buicks. And in a different subsequent case it would be implausible to argue in a breach-of-contract action by a supplier of parts against the Buick Motor Company that because the Buick Motor Company had been liable in *MacPherson*, it should similarly be held liable in this case, although the identity of the same defendant in both cases means that in at least one respect the two cases are similar.

What distinguishes the good arguments from the bad ones, therefore, is not that the good arguments are based on similarity whilst the bad ones are not, because both are based on similarity. Rather, the good arguments appear to draw on a *relevant* similarity, while the bad arguments draw on similarities that are not legally relevant at all, even if those similarities might be relevant for other purposes. So when a lawyer argues that gun dealers should be liable to anyone injured (or to the family of anyone killed) by a gun illegally sold to a minor,[18] he is likely to draw an analogy to the fact that sellers of alcoholic beverages, especially to minors, are often liable to those injured or killed as a result of the actions of an intoxicated purchaser.[19] In this case, the argument is not an argument from precedent in the conventional and strict sense, because there are sufficient differences between the two cases that no judge would be faulted on grounds of failing to follow precedent for refusing to extend the vicarious liability rule for sellers of alcohol to vicarious liability for gun dealers. Rather, the argument is based on the premise that the judge is assumed to think that vicarious liability for bars is a good idea, and that there is sufficient relevant similarity between this issue and a previous issue that the judge thinks was correctly resolved to believe (or at least hope) that the judge who is sympathetic in the alcohol case will be persuaded because of the analogy to be sympathetic in the gun case.

Yet although sellers of beer and sellers of guns may in some respects be similar, in others they are not. Beer and guns are, after all, very different, and so are the typical circumstances in which they are sold. So when

18. See, e.g., Pair v. Blakly, 388 A.2d 1026 (N.J. Super. 1978).

19. See, e.g., Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n, 866 P.2d 1342 (Ariz. 1994).

there are obvious similarities and obvious differences, the lawyer who has chosen one analogy rather than some other is relying on something that makes the similarities relevantly similar. In 1978, for example, the American Nazi Party sought permission to stage a public march in the streets of Skokie, Illinois, a community disproportionately populated by survivors of the Nazi Holocaust.[20] In arguing that public demonstration cases involving Nazis were relevantly similar to the public demonstration cases involving the civil rights protesters of the 1960s,[21] the lawyers for the Nazis drew on some similarities—an unpopular group with a small membership seeking to protest against the views of the majority—while the lawyers for Skokie drew on the obvious differences between Nazis and civil rights demonstrators to argue that this was a bad analogy. Just as the lawyers for the Nazis argued that a judge who thought the civil rights demonstration cases had been rightly decided ought to rule for the Nazis because of the relevant similarities between the cases, the lawyers for Skokie argued that even a judge who thought the civil rights cases had been properly decided had ample grounds to refuse to analogize those cases to one involving Nazis because of the presence of relevant differences.

As with the argument in the Skokie case, and as in countless other cases, analogical argument in law will involve arguments about which similarities and which differences are or should be legally relevant. The lawyers for the Nazis would argue that the point of the First Amendment is to protect unpopular views and groups, and thus the unpopularity of the civil rights demonstrators and the Nazis was the relevant similarity. In response, the lawyers for Skokie would argue that in the Nazi case, but not in the civil rights cases, the marchers intended to cause emotional distress to the observers of the march, and thus the cases were relevantly different.

When these arguments about the relevance or irrelevance of various similarities and differences arise, the determination may hinge on the extent to which a previous case, especially a controlling one, has announced which similarities are relevant and which are not. Thus, the more the question of legal relevance has already been settled by a general

20. See National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Village of Skokie v. National Socialist Party of America, 373 N.E.2d 21 (Ill. 1977).

21. E.g., Gregory v. City of Chicago, 394 U.S. 111 (1969).

rule—as with the rule emerging from the civil rights demonstration cases that marches, parades, and demonstrations may not be restricted because of the viewpoint espoused by the demonstrators—the more an argument from analogy will turn into an argument from precedent. The Nazis won in Skokie (although the march never took place) because the Supreme Court had said in earlier cases that the viewpoint of the speaker, no matter how abhorrent, was not a legally relevant factor. But the more the determination of legal similarity and difference remains an open question, the more analogical argument in law will resemble the analogical arguments that are used in all walks of life. If the civil rights cases had been decided with a less explicit statement about which factors are relevant and which not, and if the civil rights cases had been decided by a court in another jurisdiction rather than by the Supreme Court, the question, like most questions involving dueling analogies, would have been settled by the determination of which of the analogies seemed more persuasive to the judge deciding the case. In this respect, analogical reasoning in law is important, but its importance resides in its pervasiveness and not in its distinctiveness to or in law.

5.3 The Skeptical Challenge

Although lawyers and judges use analogy all the time, and although analogical reasoning in the law has been analyzed, explained, and celebrated in numerous books and articles, there is an important challenge that needs to be considered. This challenge does not deny that analogical reasoning exists, nor does it deny that analogical reasoning is widespread in legal argument and decision-making. What the challenge does deny, however, is that there is very much of deep importance in differentiating analogical reasoning from various other forms of decision-making according to a (legal) rule or according to a policy.[22]

So consider again the analogy between dram shop liability to victims

22. See Richard A. Posner, *The Problems of Jurisprudence* 86–100 (1990); Larry Alexander, "The Banality of Legal Reasoning," 73 *Notre Dame L. Rev.* 517 (1998); Larry Alexander, "Incomplete Theorizing," 72 *Notre Dame L. Rev.* 531 91997); Larry Alexander, "Bad Beginnings," 145 *U. Pa. L. Rev.* 57 (1996); Richard A. Posner, "Reasoning by Analogy," 91 *Cornell L. Rev.* 761 (2006); Richard Warner, Note, "Three Theories of Legal Reasoning," 62 *S. Cal. L. Rev.* 1523, 1552–55 (1989).

of unlawful or negligent alcohol use and gun shop liability to victims of unlawful or negligent gun use. We have seen that there are similarities and there are differences between the two situations. And we have seen that the ability to conclude (or argue) that the latter is analogous to the former is a function of the existence of relevant similarities that are perceived to outweigh any relevant differences. But where does this determination of relevant similarity come from? According to the skeptics, it derives from a determination of relevance that can be found in one of two places. It can be found, sometimes, in a statement in the earlier case, as when the Supreme Court in the civil rights demonstration cases of the 1960s justified protecting the demonstrators under the First Amendment against state restriction on the grounds that neither the unpopularity of the group's views nor the likelihood of a violent audience reaction to those views could justify restricting those who would otherwise be exercising their First Amendment rights. The Supreme Court having said as much explicitly, there was then a rule that made the moral reprehensibility of the American Nazi Party legally irrelevant, and there was another rule that also rendered the possibility of hostile audience reaction equally irrelevant. Deciding the Skokie case involving the American Nazi Party in 1977, therefore, was simply a matter of applying the rule set forth in earlier cases to this situation.[23] There was indeed an analogy between civil rights demonstrators and the Nazis, the skeptics acknowledge, but the analogy, so the skeptics insist, did not determine the result. Rather, the analogy *reflected* or *embodied* the rule that the Supreme Court announced in the cases of the 1960s.

At times there will not be such a clear and preannounced rule, but the skeptical challenge still persists. If the Supreme Court had simply announced in the 1960s that civil rights demonstrators were protected by the First Amendment, and if the 1977 Nazi case then arose with only the civil rights cases having been decided, the Court in the Nazi case would then have had to decide for itself whether the similarities between the civil rights demonstrators and the Nazis were more important for First Amendment purposes than the plain differences. And in doing so, the

23. See Kent Greenawalt, *Law and Objectivity* 200 (1992) ("[R]easoning by analogy is not sharply divided from reasoning in terms of general propositions."); Peter Westen, "On 'Confusing Ideas': Reply," 91 *Yale L.J.* 1153, 1163 (1982) ("One can never declare *A* to be legally similar to *B* without first formulating the legal rule of treatment by which they are rendered relevantly identical.").

Court would not have been able to say simply that the two cases should be decided in the same way (which was in fact the outcome) because the Nazis were relevantly similar to the civil rights demonstrators, because that was exactly the matter at issue. Rather, the Court would have had to come up with a rule or principle that determined what was relevant and what not. And in coming up with this rule, the Court would not have been engaged in analogical reasoning, but would instead have been simply deciding what, as in any other case, on the basis of policy, principle, or something else, the rule ought to be.[24]

A principal motivation for the skeptical challenge is a worry on the part of the skeptics that often the court in the second case is pretending that the analogy preexists the rule that determines relevance, when it is in fact the other way around. The rule determines the analogy, but the analogy does not determine the rule. And pretending that the analogy is doing the work—that the analogy itself without the rule drives the result—masks the fact that the second court is *choosing* the rule that determines relevance. To the skeptics, the problem is that the second court is making a choice but acting as if some natural and deep similarity is dictating the result. The impetus for the skeptics, therefore, is that too much of the praise of analogical reasoning in law is a disingenuous celebration of what is in reality a quite creative exercise on the part of the second court. And although it may be too late in the day to object to widespread judicial creativity, and although there may be nothing at all wrong with judicial creativity, it may not be too late in the day to complain about the disingenuousness of using the language of analogy both to avoid stating what the rule of relevance actually is and to disguise the second court's creative choice with the language of seeming compulsion.

There are a variety of responses to the skeptics, but all in one way or another accuse the skeptics of engaging in psychological reductionism. Drawing an analogy is not just another deductive process, so it is said, and not just a matter of applying a preexisting rule or even a newly created rule. Rather, the ability to go from one particular to another without the existence of a generalization joining the two is a common form of human reasoning, and it should come as no surprise that it exists in law as well. Consider the case of *Adams v. New Jersey Steamboat Company*,[25]

24. See Melvin Aron Eisenberg, *The Nature of the Common Law* 83 (1988) ("Reasoning by analogy differs from reasoning from precedent and principle only in form.").

25. 45 N.E. 369 (N.Y. 1896).

a New York case frequently discussed in the literature on analogical reasoning in law.[26] In *Adams,* the question was the nature of the responsibility of the owner of a steamboat with sleeping compartments to an overnight passenger whose money had been stolen when, allegedly through the company's negligence, a burglar broke into the plaintiff's sleeping compartment. What makes the case interesting is that two divergent bodies of law were both potentially applicable. If the law pertaining to open sleeping compartments in railroad cars was applicable, then the company would not have been liable, but if the law pertaining to innkeepers applied, then the plaintiff would have been able to recover. The question was then whether the steamboat with closed passenger cabins was more like a railroad sleeping car or more like a hotel. The court in fact decided that the law of inns and not the law of railroads should control, but the skeptics would not see this as an example of analogical reasoning. They would imagine that the judge had in mind a rule—even if it stayed in the judge's mind and never appeared in print—that would have established the similarity between the steamboat compartments and the rooms in an inn. But in deciding that the steamboat was more like a hotel than a railroad sleeping car, the response to the skeptical challenge would go, the court did not first imagine what, on the basis of policy or principle, the best rule would be and then determine similarity on that basis. Rather, it looked at the two possibilities and simply "saw" more of a similarity in one direction than another. This might in theory have been reducible to some rule, but the rule did not consciously exist in the minds of the judges at the time they identified the similarity, so in fact for the judges the identification of similarity was a primary mental activity. And the nonskeptics insist that the judges were doing something that people do all the time in professional and nonprofessional decision-making settings, as the very title of a leading book on analogy, *Mental Leaps,*[27] makes clear.

Ultimately, the debate between the skeptics and the traditionalists, if we can call them that, is one to be determined in part with the assistance of cognitive scientists and not solely by lawyers or legal philosophers. It is a debate about how people think, and thus the debate is one about whether people always start with something general and then apply it to the particular, as the skeptical challenge at times appears to suggest, or whether people often start with more particular insights or intuitions and

26. See Weinreb, *Legal Reason, supra* note 1.
27. Holyoak & Thagard, *Mental Leaps*, *supra* note 6.

then seek to explain them thereafter. If much of human reasoning involves this kind of intuitive and nondeliberative leap from particular to particular, then it is important to identify analogy as the way in which this kind of thinking and reasoning frequently manifests in legal argument. But if what some view as an intuitive leap from particular to particular is actually mediated by constructing a generalization at some level of consciousness, then much of the celebration of analogical reasoning in law will turn out to be on psychological thin ice. And not only will the claim be psychologically shaky, it will also represent still another chapter in the long history of lawyers and judges denying the degree of genuine creativity and lawmaking that pervades legal decision-making, at least in common-law jurisdictions.

Even if the skeptical challenge is in the final analysis sound, it is not a challenge to the fact of analogical reasoning in law. It is a challenge only to claims of analogical reasoning's distinctiveness. And in the end this debate, like many others, may not be one that has clear winners and losers. By understanding the debate, however, we may be able to understand not only the central importance of a relevance-determining rule in making the analogical process work, but also the importance of knowing when that rule preexists the drawing of the analogy and when, at least in the eyes of the decision-makers, it does not.

5.4 Analogy and the Speed of Legal Change

Apart from the questions of whether analogical reasoning is distinct from precedential constraint and whether analogies are truly distinctive or merely something else in disguise, there is the normative question of whether analogical reasoning, especially by judges, should be embraced or avoided. In particular, it is sometimes argued that analogical reasoning is by its nature incremental, and thus that analogical reasoning is the vehicle of slow rather than speedy legal change, of proceeding by small steps rather than in large chunks, and of making legal changes against the background of leaving most of law, and even most of the law on that topic, unchanged.[28]

This variety of incremental change is often described in terms of case-

28. See, e.g., Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996).

by-case decision-making, the message being that change should be made only when there is a concrete dispute before some court presenting the opportunity for that change, and only insofar as is necessary to resolve that dispute correctly. And because reasoning by analogy requires that the current decision be connected in some way with the previous decision or decisions, operating analogically is of necessity a way of proceeding incrementally, and thus of proceeding more slowly.

It is of course not always a good thing to proceed slowly, but the question of when it is desirable to proceed slowly and when it is not involves the full scope of normative political, moral, and legal theory. But assuming that it is at times desirable for the law to proceed slowly, there remains the question of how analogical reasoning relates to achieving that end.

As we saw in the preceding section, what is an analogy is not a question that can be answered strictly as a matter of logic, because any two items, events, acts, or decisions are similar in some respects and different in others. And as long as this is so, then there is no a priori or logical reason to believe that analogical leaps must be small rather than large. Strictly as a matter of logic, *MacPherson v. Buick Motor Company* could be found analogous to any case against the Buick Motor Company, any case involving cars, or any case involving sale of products to consumers. So too could *Raffles v. Wichelhaus*[29] be understood as the source for any of a number of analogies about ships, about cotton, or about mistakes of any kind. And *Rylands v. Fletcher*[30] might be analogous to any case involving water, flooding, land, or dangerous conditions.

In practice, of course, this is simply not so. To take *MacPherson* as analogous or as a stepping stone to a decision holding all manufacturers of consumer products strictly liable for all injuries caused to all consumers of those products would strike us as implausible, and that would be so even if we could construct an analogy in which the move from the result in *MacPherson* to blanket strict liability for all manufacturers of consumer products was as logically impeccable as the move from *MacPherson* to a case like *Donoghue v. Stevenson.* The analogies that are in fact persuasive—and analogies are usually designed to persuade—strike us as somewhat more deeply connected, as dealing with things that seem more deeply similar. Whether this is so because of the way people think or be-

29. 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).
30. L.R. 1 Exch. 265 (1866).

cause of the way in which parts of the world just happen to have been constructed is a question more psychological than philosophical, but it is at least possible that to think analogically is to think in ways that build on what we perceive as preexisting similarity. To the extent that this is so, proceeding analogically may turn out to be a more incremental and deliberate approach to legal change than some number of alternatives, but it might be important to bear in mind that this may be far more a matter of patterns of thinking that could be otherwise than of a strictly logical necessity.

8

THE INTERPRETATION OF STATUTES

8.1 Statutory Interpretation in the Regulatory State

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

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

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

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

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

3. 17 C.F.R. §240.10b-5 (2006).

4. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

5. See David A. Strauss, "Common Law Constitutional Interpretation," 63 *U. Chi. L. Rev.* 877 (1996). See also David A. Strauss, "Common Law, Common Ground, and Jefferson's Principle," 112 *Yale L.J.* 1712 (2003).

6. 29 U.S.C. §§ 651 et seq. (2006).

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

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

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

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

9. For more in-depth treatments of the issues and a sample of the debates in a massive literature, see, e.g., Aharon Barak, *Purposive Interpretation in Law* 339–69 (2005); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); Wil-

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

8.2 The Role of the Text

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

liam N. Eskridge, Jr., Philip Frickey, & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2d ed., 2006); D. Neil MacCormick & Robert S. Summers, eds., *Interpreting Precedents: A Comparative Study* (1997); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (2006); Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 *S. Cal. L. Rev.* 845 (1992); John F. Manning, "The Absurdity Doctrine," 116 *Harv. L. Rev.* 2387 (2003); Frederick Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning," 1990 *Sup. Ct. Rev.* 231; Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv. L. Rev.* 405 (1989).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.3 When the Text Provides No Answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.4 When the Text Provides a Bad Answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.5 The Canons of Statutory Construction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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