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INTERPRETATION AND CONVERSATION*

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I. INTRODUCTION

The objectivity of legal interpretation has often been denied from a linguistic perspective. According to some, legal interpretation cannot be objective because law consists of language, and language is naturally indeterminate. In my view, there is something odd about this argument. For its conclusion to be warranted, language should always be indeterminate, that is, all words, sentences and texts in our language should be indeterminate, and indeterminate at all times. Yet this is clearly not the case. If language were always indeterminate, we would not be able to have a conversation; if language were indeterminate at all times, you would not be able to understand me if I told you loud and clear right now to stop reading this article. But we do have conversations; and you would understand what I meant if had told you to stop reading. In fact, our language seems to be determinate enough for the purposes of most of our daily conversations. If I said "hi" to you, you would, I suppose, say "hi" back. If I told you to pick up a pen right now, you would know exactly what to do. Most of our conversations work, that is, they serve their purposes. And our language seems to be as determinate as these purposes require.

This commonsense observation points towards a different way of dealing with the question of objectivity in legal interpretation.[1] It seems to me that if we knew for sure that law was as determinate as our ordinary conversations, the question of objectivity would be settled for all practical purposes. If our legislators could tell us what to do as well as our mothers can, we would probably be satisfied with the level of determinacy of our legal system. What we have to ask, therefore, is whether legal interpretation is indeed as determinate as conversation. Obviously, the only way to figure that out is

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1. Needless to say, this is one of the most important and most debated questions in modern legal theory. It was at the very core of the Realist Movement in the United States, *Libre Recherche* in France and *Freirechtsbewegung* in Germany. More recently, the question reappeared in the Critical Legal Studies Movement's critique of law's determinacy.

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by comparing both; by comparing our normal conversations with the communicative interaction that takes place when judges interpret legal rules. Through this comparison, we might be able to find enough differences to sustain a claim that the latter, though not the former, is actually indeterminate. Or, conversely, we might find out that legal interpretation can be as determinate as our conversations, which would enable us to say, at least in theory, that judges can interpret legal rules objectively.

This is, essentially, the project undertaken in this article. It compares legal interpretation and day-to-day conversations in order to verify whether one is more indeterminate than the other.

This article is divided into four parts. In the first part, I describe three linguistic problems that apparently differentiate legal interpretation from normal conversations. At first sight, these problems seem to justify a claim that legal interpretation is more indeterminate than normal conversation. However, as is shown in the second part of this article, these problems are merely superficial. For if we look carefully, we will see that they are also present—indeed they are quite frequent—in normal conversations as well. What is more important, these problems do not make normal conversations indeterminate, because users of language have naturally developed a number of devices that reduce their impact. This leads us to the third part of this article, in which I search for and find similar devices in legal interpretation. These devices, I conclude, reduce the indeterminacy of legal rules and make it plausible to believe, as far as the three problems discussed here are concerned, that legal interpretation is objective.

II. THREE PROBLEMS OF LEGAL INTERPRETATION

A. Intentions

Discovering the intentions of the speaker or, more precisely, understanding what the speaker means by uttering a certain sentence seems to be very important in normal communication. Most of the times we understand what the speaker means by understanding what the speaker says, for intentions and literal meaning usually coincide. Sometimes, however, the speaker's intentions do not coincide with literal meaning; they go beyond or even contradict what the speaker says. For instance, when someone arrives at your place and says "I am thirsty," what she means may actually be "Can I have some water, please?"[2] In these cases, understanding the literal meaning of the speaker's utterance is not enough to understand the speaker's intentions.

In other situations, knowing the speaker's intentions helps us avoid uncertainties in communication. Suppose your father sent you to the supermarket

2. This sentence is an example of what Austin called, in his early lectures, implicit performatives. J. L. Austin, HOW TO DO THINGS WITH WORDS , Lecture VI (J.O. Urmson and Marina Sbisa, eds., 2nd ed., 1975). Searle latter defined these sentences as indirect speech acts. John R. Searle, *Indirect Speech Acts, in* THE PHILOSOPHY OF LANGUAGE 176 (A.P. Martinich, ed., 4th ed., 2001).

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to buy detergent. If not complemented, your father's instructions would be problematic, because the term "detergent" can mean either dish detergent or laundry detergent. It is quite likely, therefore, that you would not know what to do when you got to the supermarket. Nonetheless, if you knew, by any other means what the intentions of your father were, you would know what kind of detergent to buy.

These examples show how important the intentions of the speaker are for a normal conversation. It is natural to expect, then, that they play an important role in legal interpretation as well. The problem, however, is that determining the speaker's intentions in the context of legal interpretation seems to be very difficult, if not outright impossible.[3]

To begin with, legal rules are usually created by groups of people rather than individuals: conventions or assemblies, in the case of constitutions, congresses or parliaments, in the case of statutes, and appellate courts, in the case of precedent. How can we say that these collective law-making bodies have intentions? To be sure, we attribute intentions to similar entities, such as trade unions, corporations, and not-for-profit organizations.[4] But this comparison is misleading. Communicative intentions are usually understood as something that we have in mind when we talk, and collective bodies do not have minds. When we attribute intentions to such collective entities, therefore, we are creating a fiction.[5]

For this reason, rather than searching for the intentions of collective law-making bodies, some say, we should be looking for the intentions of the people who compose them: delegates, representatives, senators, judges, and the like. The problem, though, is that discovering the intentions of these people is no easy job. First, it is unlikely that all members of these collective bodies had the same intentions as to the application of the legal rules they enacted or created.[6] Take legislatures, for instance. They are often composed of hundreds of individuals belonging to different political parties, coming from different backgrounds, and working on very busy schedules. It is doubtful that all these individuals had opinions, let alone the same opinions, on all the key aspects of any approved bill.[7] Second, it is almost impossible to determine what the intentions of all these people really were, supposing that they all had some kind of intention.[8] We might be able to discover the intentions of particular individuals or groups involved in

3. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition").

4. Andrei Marmor, INTERPRETATION AND LEGAL THEORY 159 (1992).

5. In fact, as legal doctrine recognizes, these entities are but instrumental concepts which help us regulate the activities of groups of individuals. Hans Kelsen, PURE THEORY OF THE LAW 190 (Max Knight, trans., 1967).

6. Radin, *supra* note 3.

7. All this without mentioning the fact that legislators usually vote for bills because they were instructed to do so by presidents, party leaders, or interest groups. William Eskridge, DYNAMIC STATUTORY INTERPRETATION 16 (1994).

8. *Id.*

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the law-making process, such as sponsors of the bill, members of legislative committees, or authors of collective judicial opinions.[9] However, we cannot say that others shared these intentions, since most lawmakers do not say anything on the record about any particular bill.[10] In the end, the only thing they all approved is the text of the legal rule itself.[11]

All this seems to suggest that legal interpretation lacks an important linguistic tool: access to the intentions of the speaker. This can cause failures of communication and, more important to my analysis here, doubts as to the proper application of legal rules. This uncertainty is the first problem of legal interpretation that can make it more indeterminate than normal conversations.

B. Vagueness

The term "vagueness" is often used in philosophy to refer to marginal indeterminacies in the meaning of words.[12] A word is vague, in this sense, if there are borderline cases in which we cannot determine whether the word applies.[13] A good example is the word "middle-aged."[14] We know for sure that a person is not middle-aged if she is five or eighty, but we have trouble in applying the word to some marginal cases. Is a person who is forty or sixty-five middle-aged? Our inability to answer this question does not come from a lack of knowledge about facts.[15] Rather, we cannot answer the question because we do not have access to the necessary linguistic standards.[16]

Vague words are quite common in legal rules. When the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce . . .,"[17] it is hard to know precisely what it means by "Commerce." Similarly, we know that liability in tort usually requires "negligence," but we often have difficulty in determining if a person behaved negligently or not. The Civil Rights Act of 1964 makes it unlawful for an employer ". . .

9. Radin, *supra* note 3.
10. Eskridge, *supra* note 7.
11. Radin, *supra* note 3, at 871.
12. William Alston, *Vagueness*, 8 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 218 (1967).
13. William P. Alston, THE PHILOSOPHY OF LANGUAGE 84 (1964); Dorothy Edgington, *The Philosophical Problem of Vagueness*, 7 LEGAL THEORY 371 (2001).
14. Alston, *supra* note 13.
15. *Id.* at 84–85.
16. Philosophers debate whether our inability to define the precise boundaries of vague terms is epistemic or ontologic. According to epistemic theories, vague words have precise boundaries, but we can never know their exact location. According to ontologic theories, on the other hand, these precise boundaries simply do not exist. *See* generally Timothy Williamson, VAGUENESS (1994). As revealed in this paper, I tend to believe that vagueness is an ontological phenomenon. With Stephen Schiffer, however, I believe that this controversy has no bearing on the question of indeterminacy and objectivity in law. Whether a vague word is vague because its precise boundaries cannot be known or do not exist does not change the fact that it brings indeterminacy to legal interpretation. Stephen Schiffer, *A Little Help from Your Friends*, 7 LEGAL THEORY 421 (2001).
17. U.S. CONST. article I, § 8, cl. 3.

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to discriminate against any individual . . . ,"[18] but we do not know in every situation what "discriminate" means. For each of these words, we can easily imagine cases in which there will be no definite answer as to whether the word applies.

These examples can be easily multiplied. Think about "due process," "defective product," or "good cause." The law seems to be replete with concepts that are not always precise in meaning; and these concepts tend to create controversy in legal interpretation.

First, in large communities, the law operates through general rules rather than individual directions.[19] So it tends to be abstract, making use of general concepts[20] that are likely to be vague.[21] In addition, being more precise in law-making appears to be neither possible nor desirable.[22] Not possible, on the one hand, because we cannot predict all the circumstances that will affect the application of the rules we are laying down.[23] Not desirable, on the other hand, because we do not know in advance how we may wish to regulate these new circumstances once they appear.[24]

Second, since legal rules use language to settle social conflicts, much hangs on the words employed by these rules. People are sent to jail and are obliged to pay large sums of money depending on how legal terms are interpreted in such situations. Therefore controversy is bound to arise—or to be artificially created—with respect to the application of these words. This tendency towards controversy, combined with the frequent use of vague terms in legal rules, apparently makes vagueness a more difficult problem in legal interpretation than in normal conversations.

C. Complexity

Comprehending a conversation seems to be just a matter of understanding the utterances of our interlocutors, one at a time. In legal interpretation, however, if we want to interpret a single rule, we have to understand a lot about the entire legal system. Every time a judge decides a case, she has to interpret and understand a large number of individual legal rules. What is worse, these rules are produced at different times by different people. Is it possible to interpret a text like that objectively?

Imagine: in order to interpret a simple local ordinance requiring that drivers stop at red lights, a judge must also interpret the state statutes authorizing the city to issue that ordinance and the provisions of the state

18. 42 U.S.C § 2000e-2 (a) (1).
19. H.L.A. Hart, The Concept of Law 124 (2nd ed., 1994).
20. *Id.*
21. Stephen Ullmann, Semantics 118–123 (1970) (identifying the generic character of words as one of the principal sources of vagueness).
22. Hart, *supra* note 19, at 128.
23. *Id.*
24. *Id.* at 129. *But see* Roy Sorensen, *Vagueness Has No Function in Law*, 7 Legal Theory 387 (2001) (arguing that vagueness serves no purpose in law-making).

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constitution concerning the enactment of statutes. In addition, the judge must also interpret other ordinances, statutes, and constitutions at the local and federal levels and verify whether any of these legal rules has an impact on the ordinance at hand.[25]

Problems soon arise because some of these legal rules conflict with each other. In some cases, one rule of the legal system requires individuals to act in a certain way while another forbids them from acting that way. In other cases, one rule of the system gives individuals a certain power but another forbids them from exercising that same power. In those situations, the law becomes indeterminate and interpretation ceases to be objective.[26]

This problem is further aggravated by the fact that due to the usual vagueness of legal rules, we cannot always tell if the rules in question really conflict with each other.[27] They may, on some occasions, but not always. This prevents us from repealing the potentially conflicting rules, thus creating a continuous source of indeterminacy. Good examples of these uncertainties are those originated by certain principles embodied in the United States Constitution, such as due process of law,[28] equal protection of law,[29] and freedom of speech.[30]

We might try to resolve these inconsistencies, but this seems to be quite difficult. We live in a complex society which oscillates between many conflicting ideals. We believe in individualism but we cannot reject altruism.[31] We want our liberty but we think that equality is also important. We believe that government should help us but we are afraid of its powers at the same time.[32] Some argue that unless we resolve these social conflicts, our policies will continue to reflect these tensions and we will never be able to solve the normative contradictions that plague our legal system.

25. This interdependence among legal rules led authors such as Hans Kelsen to say that in order to report the contents of a single legal rule, one would have to start with the Constitution, describe a number of other substantive and procedural rules, and then describe the legal rule in question. The contents of a complete legal rule, under this view, would be something like this: If Congress enacted a statute in accordance with the Constitution, if this statute delegated authority to an agency, if the agency issued a regulation in accordance with the statute requiring individuals to pay a tax, then, if an individual does not pay a tax in accordance with the regulation, courts are authorized to put him in prison at the request of the agency. Kelsen, *supra* note 5, ch. V.

26. Although these conflicts are hardly ever logical contradictions, they are practical sources of indeterminacy. Jules L. Coleman and Brian Leiter, *Determinacy, Objectivity and Authority*, LAW AND INTERPRETATION 226 n. 52 (Andrei Marmor, ed., 1995).

27. I think this is what Joseph Singer has in mind when he says that rules at different levels of generality cause indeterminacy. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 15 (1984).

28. U.S. CONST. amend XIV, § 1.

29. *Id.*

30. U.S. CONST. amend I.

31. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

32. Duncan Kennedy, *The Structure of the Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 213 (1979).

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III. NORMAL CONVERSATIONS

A. Intentions

Our initial analysis suggested that discovering the intentions of lawmakers is practically impossible. This appeared to be so for two reasons: first, collective lawmaking bodies cannot have intentions because they do not have minds; second, it is almost impossible to discover what individual lawmakers had in mind when they enacted a particular legal rule. In this section, I want to investigate how similar issues are dealt with in normal conversations.

I want to conduct this investigation by asking two questions. The first is this: Is it always the case that we have an idea in mind of what we want to communicate? Let us make an experiment.[33] Take the sentence: "The cat is on the mat." Say it aloud, paying careful attention to what you are saying. Can you discern an idea of what you are talking about in your mind? Are you thinking about anything different from the sentence itself? Now try saying it without paying attention. Do you lack anything that you had in your mind before when you were concentrating on the sentence? As this experiment suggests, we do not always have something in mind when uttering a sentence (except, of course, the sentence itself).[34] It is for this reason that we sometimes have trouble explaining what we mean by a sentence we have just finished saying. The difficulty arises because we are trying to say something new rather than explaining what we had in mind before.

At this point, you might object: "It is true that we do not have an idea in mind *when* we utter a sentence. But at least we have an idea of what we are going to say *before* we say it." To be sure, this may be the case. You see a set of keys on your table. You say to yourself: "These keys are Sonia's." Then you think: "I'm going to tell her that they are here." You go and meet Sonia and say: "Sonia, your keys are on my table." In this example, you had clear intentions in mind before you uttered a sentence. But is this always the case? If Sonia were beside you when you saw her keys, you would probably say: "Sonia, look, your keys." Most likely, you would utter this sentence without thinking about it beforehand, and we would say that you intended to tell Sonia that her keys were on your table despite the fact that you had never thought about the matter before.[35]

So we have to answer our initial question in the negative: we do not always have an idea in mind when we utter a sentence. And still, we talk about intentions in communication: we say that someone intended such-and-such

33. Alston, *supra* note 13, at. 24. *See also* Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS § 332 (G.E.M. Ascombe, trans., 2nd ed., 1958).

34. If what we meant by a certain word were ideas we have in mind when we speak, we should have an idea of what a certain word means in mind whenever we uttered it. Also, this idea should be the same whenever we say the word. But is that so? Think about the word "dog." Do you have an idea of a dog in mind whenever you say this word? Is this idea always the same? Alston, *supra* note 13, at 24.

35. Do you think two people having a heated argument think about what they are saying beforehand?

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by uttering a certain sentence, despite the fact that the person had nothing else in mind but the sentence itself. If that is so, why is it problematic that collective lawmaking bodies do not have minds? Or, for that matter, that they have too many minds? The analysis above suggests that this might not be as troublesome as it seems.

This leads us to the second question I want to ask: How do we discover the speaker's intentions in normal conversations?[36] One thing is certain: we cannot enter the speaker's mind in order to find out what he intends to communicate. So we have to discover his intentions by other means. There are three possibilities that I want to explore here: context of the utterance, factual assumptions about conversations, and rules of communication.[37]

Let us return to the example used in the previous part of this article. Your father sent you to the supermarket to buy "detergent" and you want to know what his intentions were. How could you know that without entering his head? Well, the answer would be pretty obvious if you and your father were doing the dishes together when he ran out of dish detergent. It would also be clear if a few minutes before sending you to the supermarket your father were complaining that your mother forgot to buy laundry detergent. In both cases, context would tell you what the intentions of your father were, regardless of what he was thinking about when he gave you the instructions.

Now imagine the following dialogue.[38] Becky says: "Markus doesn't seem to have a girlfriend these days." Joann answers: "He has been paying a lot of visits to New York lately." By this sentence, Joann probably means that Markus has a girlfriend in New York. But how do we know that? When we start a conversation, we usually share certain assumptions about how the conversation is supposed to proceed.[39] One of these assumptions is that our interlocutor will say things that are relevant to the topic we are discussing. When someone says something that is apparently disconnected, therefore, our normal reaction is to try to understand this person's comment in a way that would make it relevant for the rest of the conversation. In our example, we realize that Joann would not have said what she did unless she thought that Markus had a girlfriend in New York.

36. In this paper I will not attempt a definition of what intentions are. This problem is too complicated to be discussed here, and I am not confident I have an answer for it. It seems enough for my purposes in this paper to make some observations on how intentions are identified in conversation and legal interpretation.

37. The following analysis is significantly influenced by the works of Paul Grice, John Searle, and P.F. Strawson. *See* Paul Grice, *Meaning*, *in* THE PHILOSOPHY OF LANGUAGE, *supra* note 2, at 92; Grice, *Logic and Conversation*, *in* THE PHILOSOPHY OF LANGUAGE, *supra* note 2, at 165; John R. Searle, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969); P.F. Strawson, *Intention and Convention in Speech Acts*, *in* LOGICO-LINGUISTIC PAPERS 149 (1971). I use the ideas of these authors as a starting point for the considerations that follow but I do not try to be consistent with the works of any of them. Neither do I try to follow their terminology.

38. Grice, *supra* note 37, at 165, 171.

39. *Id.*

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In other cases, certain rules of communication tell us what the speaker means.[40] As mentioned above, when someone says "I'm thirsty" as soon as she gets to your place, you should understand what she said as a request rather than a statement. In other words, she is asking for water, no matter what she was thinking about when she said "I'm thirsty." Similarly, if you say to a friend "Let's have coffee at four," your friend will understand your statement as a commitment to have coffee, regardless of your thinking it so or otherwise.

These examples show us that we do not always need to know the speaker's ideas or thoughts in order to find out what the speaker means by a certain sentence. Context, assumptions about conversation, and rules of communication can supply the answers that we need. Why is it a problem, then, that we cannot determine what individual lawmakers had in mind when they enacted certain legal rules? In other words, we may be able to find out the intentions of lawmakers in the same way we find out the intentions of speakers in normal conversations, that is, through context, assumptions about conversation, and rules of communication. I shall return to these questions below. But first, let us revisit the issue of vagueness.

B. Vagueness

When I discussed vagueness in the first part of this article, two conclusions emerged: first, that vagueness seems to be more frequent in legal interpretation than in normal conversations; second, that vagueness is apparently more problematic in legal interpretation than in normal conversations. However, as I hope to show now, these conclusions need some qualifications.

First, if we look carefully, we will see that most words in our language are more or less vague.[41] Take, for instance, the word "chair," which seems to be quite precise. Now imagine a long series of chairs in line, differing in quality by hardly noticeable amounts: at one end of the line we have a Chippendale chair and at the other end, a small, nondescript lump of wood.[42] We would probably have trouble drawing the definitive line between chair and not-chair if we were asked to do so. This means that the word "chair" is vague, at least to a certain extent. We may say the same thing about the word "green" to the extent that we do not know for sure how close to yellow or blue something can be and still be identified as green.[43] Even scientific words, such as "gold," have a certain degree of open texture.[44] What if a substance were discovered that looked like gold, satisfied the chemical

40. Searle, *supra* note 37, at 33–42.

41. Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. PHIL. 88 (1923). *See also* Edgington, *supra* note 13, at 374.

42. Max Black, *Vagueness: An Exercise in Logical Analysis*, *in* LANGUAGE AND PHILOSOPHY 25, 32–33 (1949).

43. Willard Van Orman Quine, WORD AND OBJECT 126 (1960).

44. Friedrich Waismann, *Verifiability*, *in* 1 LOGIC AND LANGUAGE 120–1 (Antony Flew, ed., 1960).

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tests for gold, but emitted some sort of radiation?[45] We would certainly have trouble classifying it. This is so because we can never foresee completely all the possible conditions in which words are to be used. Therefore none of our words can be so precise as to exclude all possibility of indeterminacy.[46]

Second, vague words can interfere with conversations as much as they interfere with legal interpretation. Suppose one of your friends sets up a blind date for you with a handsome and funny guy. You go on the date and find out that the guy is neither handsome nor funny. Result: the date is a complete disaster. If the words "handsome" and "funny" were more precise, you would probably have a better idea of what the guy was like before the disastrous night. Now suppose that you are having a discussion with your friend—perhaps about whether she should have sent you on that blind date. You tell her that what she did was wrong, but she refuses to agree. You may well leave the conversation like that, but if you want to settle the issue you will probably have to clarify what the word "wrong" means for both of you. In both examples, we see vagueness interfering with conversations.

At this point, we may retreat to the skeptic's position mentioned in the beginning of this article and conclude that normal conversations are unavoidably indeterminate, therefore making legal interpretation indeterminate as well. However, this conclusion would prevent us from seeing how we deal with vagueness in normal conversations. For is it not true that vagueness seems to have just a marginal relevance in our day-to-day talks? Failures of understanding happen, of course. But, as the mere fact that we call them "failures" indicates, they are not the rule; they are exceptions. What we have to look for, then, are the means by which we overcome vagueness in normal conversations.

The first thing to remember in this respect is that even the most vague words in our language have a core of settled meaning. Take, for instance, a highly controversial concept such as "justice." It is true that we quite often disagree about its application to particular cases, but there are at least a few situations in which we are quite sure as to whether it applies: practices such as slavery and racial discrimination are simply not just.[47] These cases multiply when we are dealing with less vague words. Think about the word "chair" just mentioned above. Although we may sometimes lack standards to apply it, we are quite sure about its application in the great majority of cases.

45. *Id.* at. 120.

46. *Id.*

47. But how could we communicate with someone who denied that racial discrimination is unjust? We would have no problem if this person accepted other common instances of application of the word "justice," let us say, if he agreed that sending someone who committed a monstrous crime to jail is just. But even if he did not, we could communicate with him if he knew that most people hold that racial discrimination and similar practices are unjust. If he did not know that, he could not be considered a competent speaker of the language.

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The truth is that words in ordinary language are usually as precise as they need to be, for their core of settled meaning enables us to have a clear idea of what other people mean when they use them and to understand them precisely in the situations in which they are most likely to be used. We know what our interlocutor is talking about when she says that a given social practice is unjust, because we know that she is comparing this practice to others which are totally repugnant to us, such as slavery and racial discrimination. We also know what we are supposed to do when we are told to buy a chair or to sit in the chair, for we know what a chair is supposed to look like in contrast with other objects we usually find in furniture stores and living rooms. Most of the time, our words are just as precise as the situation requires.[48]

Of course, there will be situations in which vagueness may prevent us from achieving our goals in communication. The example above involving the words "handsome" and "funny" illustrates that. However, we are not powerless against these problems. Once they appear, or once we notice that they might happen, we are usually able to prevent or fix them. If your friend sets up a new date for you with a handsome and funny guy, you will probably ask her to clarify her statement. She will, in turn, tell you what she means by "handsome" and "funny" or, which is more likely, provide you with a more accurate description of your date's physical appearance and sense of humor. In other words, she will either redefine or paraphrase her previous statement, providing you with a more adequate one. The goal of communication will be achieved, and you will have a better view of what your date will be like before you meet him.

Again, definitions and paraphrases are not perfect. Since most of the words of our language are vague to a certain degree, there will always be room for indeterminacy. But that does not mean that we are not able to reduce the level of indeterminacy.[49] Since words are vague in different respects and to different extents, we can eliminate the indeterminacy that one word brings to a sentence by using another word or another sentence. If I describe someone as witty, good-looking, and funny, for instance, you will probably have a better idea of what I am talking about than if I just say that the person is nice. And this is so in spite of the fact that the words "witty," "good-looking," and "funny" are all quite vague. In addition, the context will

48. As Wittgenstein has shown, precision is relative to some purpose: "If I tell someone "Stand roughly here"—may not this explanation work perfectly? And cannot every other one fail too? But isn't it an inexact explanation?" Wittgenstein, *supra* note 33, at. § 88. Dorothy Edgington has the same opinion: "Should we really try to reform language so that it conforms to this ideal of precision? How do we go about it? We could try to stipulate sharp boundaries between our predicates—between red and orange and so on. But this conflicts with another ideal: A language should not make arbitrary, pointless distinctions. The difference between truth and falsity should be a difference that matters." *Supra* note 13, at. 373.

49. As Quine, citing Richards, elegantly puts it: "A painter with a limited palette can achieve more precise representations by thinning and combining his colors than a mosaic worker can achieve with his limited variety of tiles." Quine, *supra* note 43, at. 127.

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usually tell us what aspect of the vague word is hindering communication, thus enabling us to choose words that are suitable to avoid that problem. If I tell you to bring me all the green books on the table, and you look puzzled when you find some books that are almost yellow or blue, I can solve the problem by saying quite simply: "Bring me those too!"

C. Complexity

In Part II.C of this article, I briefly described the complexity involved in interpreting the law in modern legal systems. This process, I pointed out, requires understanding a great number of legal rules. Yet in normal conversations, I assumed, we only have to understand a sentence at a time. But is this assumption correct? Is understanding individual sentences all we have to do in order to communicate? Or, more to the point, what is involved in understanding a sentence?

Again, some examples will help us with these questions. Let us take the sentence "I do" pronounced by a bride at a wedding. What do we need to know in order to interpret it correctly? Of course, we need to know the meaning of the words she said. But this is not enough. We also need to understand and interpret the question that provoked her answer, for the sentence "I do" alone does not mean anything. And for this purpose, we have to know the meaning of what the minister said. But this is not enough either. We also need to know that by saying "I do," the bride is getting married.[50] So, logically, we also have to understand some of what "getting married" entails in legal, moral, and religious terms. To do this we must also have an idea of what law, morals, and religion are; and so on.

Take again the sentence "The cat is on the mat." When you hear it, it does not even cross your mind that the cat it refers to could be hanging on the edge of a mat in vertical position. But, if you think about it, this could be the meaning of the sentence, for instance, if it were reporting on some experiment with cats and mats in space.[51] In other words, in order to know what this sentence means in normal circumstances you have to know something about cats, mats, and gravitational force. If you do not, you will have doubts about what your interlocutor wants to communicate.[52]

These examples demonstrate that in order to interpret the meaning of a sentence, we sometimes have to understand the meaning of many other words and sentences related to it.[53] Without this understanding, we would

50. Austin, *supra* note 2, at. 5.

51. Marmor, *supra* note 4, at 173, citing John R. Searle, *Literal Meaning*, in 13 ERKENNTNIS 207, 215–217 (1978).

52. *Id.*

53. This was one of the main contributions of structuralism to linguistics. *See, generally,* Ferdinand de Saussure, COURS DE LINGUISTIQUE GENERALE (1916). This point is also well illustrated in Quine's analysis of radical translation. *See* Quine, *supra* note 43, ch. II. As is well known, Quine takes this point to extremes, as evidenced by the following passage: "What comes of the association of sentences is a vast verbal structure which, primarily as whole, is multifariously

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be like children who have not yet mastered the language, that is, we would have to ask many questions in order to understand what a single word means: "What is a dog? It is an animal. What is an animal?" And so on. In addition, the examples above show us that knowing the meaning of the words that compose a sentence is not enough in order to understand what the sentence means. It is also necessary, for this purpose, to know a lot about the world in which we live. Otherwise, simple sentences like "the cat is on the mat" become quite indeterminate.

We can now see that understanding a sentence in a conversation is not as simple as it seems: it requires a lot of knowledge about language and the world. Once you take notice of the fact that languages are very rich in words and expressions and that our world is quite complex, you realize that the process involved in understanding a single sentence is not necessarily any simpler than interpreting a legal rule. But how do we cope with this complexity? This is a hard question, and I can make only a few suggestions here.

First, it is important to notice that some of the requisite knowledge to understand a conversation does not need to be precise or complete. In general, all we need is a general idea about the subject matter of the conversation and the context in which it is taking place. To stay with the same example, we do not need thorough knowledge about law, religion, and morality to understand what a marriage is. A general idea is enough. In addition, the requisite knowledge does not need to be valid in all situations. Cats do not usually hang on the edges of mats in vertical position. The situations where this may happen are so few and far-fetched that we are justified in ignoring them.

Second, we have to be careful with our descriptions of reality. They sometimes make things seem more complex than they are.[54] The following example reveals precisely what I mean. In the 1990 Soccer World Cup, Brazilian striker Romário scored a simple yet difficult goal. Trying to highlight Romário's talents, the television announcer described the goal like this: "Romário looked at his companion and started running. He calculated the speed of the ball passed in his direction and adjusted his speed accordingly so as to reach the ball near the goal. As he got to the ball, Romário calculated how hard and fast he had to kick it in order to beat the goalkeeper. He planned and executed all this in only three seconds." This description is not completely wrong but it is quite misleading. If you ask the striker, he would probably say only that he ran towards the ball and kicked it hard and fast. He wanted to reach the ball, he wanted to kick it the way he did, and he

linked to non-verbal stimulation. . . . In an obvious way this structure of interconnected sentences is a single connected fabric including all sciences, and indeed everything we ever say about the world; for the logical truths at least, and no doubt many more commonplace sentences too, are germane to all topics and thus provide connections." *Id.* at 12–13.

54. This is a point very much emphasized in the latter writings of Wittgenstein. *See, e.g., supra* note 33, at § 109.

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wanted to score. But he did not calculate or plan anything. He simply ran, kicked, and scored.

Some ways of describing language have exactly the same effect. To be sure, some of these descriptions are useful. They help us understand how language works and how it is used. But they can be misleading in certain contexts. For instance, linguists and philosophers of language often talk about conversation as being a matter of understanding the meaning of words, applying rules of grammar, or analyzing the context of an utterance. This kind of explanation is helpful, for instance, in teaching a second language or in understanding why a conversation sometimes fails. But when we are talking and listening, we seldom think of meanings, rules, or context. Describing ordinary conversations using these terms gives a wrong idea of complexity.

This brings us to my third point. Complexity is a function of familiarity, education, and practice. As we become more familiar with our language, as we are taught how to use it better, as we have more and more conversations, speaking and understanding become less difficult and more natural. Consider, for instance, the process of learning a foreign language. At first it seems incredibly complex: there are so many words, so many grammar rules, so many standard patterns of conversation. Yet despite this complexity, people who study and practice a second language eventually manage to speak and understand it. To be sure, a lot of effort is required in the beginning, but it becomes natural one day. At some point we cease to think about the words we are hearing, about the grammar rules that are being applied, about the standard patterns of conversation that are being followed. We simply speak and understand the language. We say then, in a rather revealing metaphor, that we have become fluent.

Undeniably, taking part in a conversation is not always easy. Contradictions often appear in our discourse, and we must to learn how to cope with them. But ordinary language does not abandon us in these situations. We have rules that enable us to deal with conflicting statements of our interlocutors. These rules guide our choices and eliminate indeterminacies. Suppose you are having a conversation with a friend. She tells you: "I will not go to the party tonight." You insist, telling her how nice the party will be. She continues to say no. But before going away, she says: "OK, I will go to the party." Two sentences in this dialogue conflict with each other: your friend cannot go and not go to the party at the same time. Nonetheless, you will leave the conversation with the understanding that your friend will go to the party. This is because we usually assume that when people utter conflicting sentences, their intentions are better represented by the sentence they uttered last. Now think about these other two sentences: "I do not like fruits" and "I like apples." In theory, these two sentences contradict each other, but if you heard a person saying both in a conversation, you would probably understand her this way: "I do not like fruits of any kind, except apples." That is so because we usually assume that more specific sentences prevail over more general ones. One

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further example: your friend says: "The test is today." Your professor corrects him: "The test is tomorrow." The two sentences conflict, but you will probably believe your professor. That is so because you believe your professor is a more reliable source of information—about the information concerned in this dialogue, at least—than your friend.

Furthermore, our capacity for understanding is not shaken by the possibility of contradictions. As we saw above, all words are more or less vague, because we can never foresee completely all the conditions in which they will be used. This makes the possibility of contradiction, as much as the possibility of vagueness, an unavoidable reality. Nonetheless, this does not prevent us from communicating. For instance, I usually say in conversations that "I am against killing." Although I hardly ever qualify this statement, people who hear me saying it do not take me to mean that I am against killing in self-defense, for instance. If the situation arises in which making this exception clear is important, I will paraphrase what I said. But most of the time I will just say that I am against killing in general, and people will understand what I mean. The fact that we may eventually contradict ourselves due to the vagueness of our statements does not make us silent. We speak in general terms if necessary and deal with the contradictions as they arise.

IV. LEGAL INTERPRETATION REVISITED

A. Intentions

We finished Part III.B above with two questions: Is it possible to uncover the intentions of collective lawmaking bodies or even individual lawmakers without knowing what they have in mind? In other words, can we find the intentions of lawmakers through the means used in normal conversations: context, assumptions about conversation, and rules of communication? The answer, in my view, is yes.

The role of context in finding out the intentions of lawmakers is quite obvious. When we look at the facts surrounding the enactment of a legal rule and when we find out more about the conduct or activities that the rule regulates, we automatically have a better understanding of what the legal rule means and what the intentions of its makers were. Take, for instance, a case such as Rector, Holy Trinity Church v. United States.[55] The issue in *Rector* was whether a statute prohibiting the "importation or migration of. . . aliens or foreigners, to perform labor or service of any kind in the United States" was applicable to the importation of religious ministers. Although the language of the statute appeared to encompass the importation of religious ministers, the Supreme Court correctly held that "it was unreasonable to believe that the legislator intended to include that particular act." The Court reached this conclusion by looking at

55. 143 U.S. 457 (1892).

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"contemporaneous events, the situation as it existed, and as it was pressed upon the legislative body." The Court determined that the statute had been enacted to prevent the importation of unskilled workers to the United States because they were causing a breakdown in the local labor market. The context therefore suggested that Congress did not intend to include religious ministers in the prohibition, since the market for their services was not affected by foreign competition.

Certain assumptions about communication can also help us. Like listeners in a conversation, interpreters of legal rules also make assumptions about the actions of their interlocutors and the purpose of their enterprise. In normal conversations, for instance, we assume that our interlocutors are rational, even though this might not be true. It is this controversial assumption, however, that allows us to understand what people want to communicate by sentences like "war is war" or "business is business." It is also this controversial assumption that enables us to understand figures of speech such as hyperbole or metaphors. Without this assumption, we would dismiss these forms of expression as pure nonsense.

The same considerations apply to legal interpretation. Judges also assume that lawmakers are rational, and this assumption, though controversial, helps them discover the intentions of lawmakers. Take a case such as Shine v. Shine, for instance.[56] The question in *Shine* was whether an obligation to pay support derived from a court order not embodied in "a separation agreement, divorce decree, or property settlement agreement" was dischargeable in bankruptcy. The language of the statute suggested that the obligation was dischargeable, but the Court refused to follow the literal meaning of the rule. The Court argued that the general intent of the statute was to broaden rather than to limit the categories of nondischargeability. It would be irrational to suppose that a support obligation would become dischargeable just because it had not been expressly foreseen in a separation agreement or divorce decree. Rational legislators would not intend that result.[57]

Rules of communication also play a very important role in legal interpretation.[58] In the first place, these rules tell us what the lawmakers' intentions were by informing us about the literal meaning of the legal rules they enact. They determine the meaning of words and sentences

56. 802 F. 2d 583 (1986).

57. Another good parallel between normal conversations and legal interpretation can be found in the presumption against surplusage. In normal communication, as mentioned above, we usually assume that our interlocutors will only make remarks that are relevant to the purpose of the conversation. That is how we understood, in our previous example, Joan's suggestion that Markus had a girlfriend in New York. The presumption against surplusage operates the same way. We presume that our lawmakers will only insert provisions in legal rules which serve a regulatory purpose. So we tend to discard interpretations of a rule that make one or more of its provisions redundant and therefore irrelevant for legal interpretation.

58. A good list of these rules, also known as cannons of interpretation, can be found in Eskridge, *supra* note 7, at. 323–333.

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and therefore make legal interpretation possible. Beyond that, these rules also help us understand the lawmakers' intent when it is different from the literal meaning. Again, a parallel between normal and legal interpretation will be helpful. When I do something stupid, my girlfriend often says that she will "kill me" if I do that again. But I know that she does not mean what she says. I know that she will not kill me because I understand that her purpose is just to show me how upset she is. And it is a rule of communication, one that I observe in these circumstances, that we should interpret the speaker's sentences in accordance with the purposes she is trying to achieve. I therefore discard the literal meaning of my girlfriend's utterance and look for alternative understandings. Similarly, in legal interpretation, we avoid construing statutes in ways that would be inconsistent with their purposes.[59]

This analysis shows us that the same elements that help us determine the speaker's intentions in normal conversations can also help us discover the intentions of lawmakers. I conclude, therefore, that we have no reason to believe that legal interpretation is any more indeterminate than normal conversations as far as intentions are concerned.

Before finishing this section, though, I want to address two foreseeable objections to my analysis. The first objection can be put this way: "Our assumptions about legal interpretation are often unrealistic. For instance, we suppose that legislators are rational even though they might not be."[60] This remark seems compelling, but it misses the central point of my argument. In normal conversations, we also assume that our interlocutors are rational even though we have no reason to suppose that they are more rational than our lawmakers. Communicative assumptions are just a starting point from which our reasoning proceeds. We are so shocked by the apparent irrationality of a sentence like "war is war" that we start looking for alternative ways of understanding what it means. We may sometimes fail in this quest but, as our example indicates, it would be silly not to try.

A different, though similar objection, commits the same mistake: "Rules of legal interpretation are often inconsistent. There are two opposing rules on almost every point."[61] I concede this much, but that does not mean that such rules cannot help us. The rules that govern normal conversations are also inconsistent in abstract but they help us nonetheless. What is more, we sometimes figure out the speaker's intentions because we know that two opposing rules of communication are putting the speaker in a difficult

59. United States v. American Trucking Associations, 310 U.S. 534 (1940); Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951); Reeves v. Ernst & Young, 494 U.S. 56 (1990).

60. This is, for instance, Judge Posner's opinion about canons of construction. *See* Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 806–807 (1983).

61. For an artful statement of this objection, *see* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed,* 3 Vand. L. Rev. 395, 401–406 (1950).

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position. You ask: "Where does Anna live? I want to visit her." Your friend answers: "Somewhere in the north of the city." You realize that your friend does not know where Anna lives, since he wanted to respond to your question but could not give specific information. He was pressed between two conflicting rules: one that required him to answer the question and another that prevented him from saying something that he did not know for sure.[62] This is an uncommon situation, though. Most of the time, context tells us which rules are more appropriate to the situation, therefore shaping the understanding of the conversation. This process of application may not be easy but it works well enough in normal conversations. We have no reason to suppose that it cannot work in legal interpretation.

A final note: so far I have focused on context, assumptions, and rules of communication as a means of finding out the intentions of lawmakers. Although for lawyers this may sound a bit odd, it is exactly what our analysis of normal conversations suggests. This does not mean, however, that we have to disregard the common methods used in legal interpretation in order to find out the intentions of legislative bodies. Statements of individual legislators, committee reports, and the like are also useful tools in this respect. My analysis does not imply that they should be disregarded. On the contrary, these devices can be understood as part of the context of the legal rule being interpreted or as assumptions about the intentions of the lawmakers. They are additional tools at the interpreter's disposal rather than limits to the inquiry.

B. Vagueness

We saw in Part III.B above that vagueness does not have a material impact in normal conversations for two reasons: first, even vague words have a core of settled meaning; second, we can always define and paraphrase our sentences when the circumstances so require. What I will try to do now is to apply these considerations to legal interpretation.

The first part of this task is clearly the easiest.[63] Although professional habits tend to make us lawyers forget it, we know that even the most general terms used in legal rules have a core of settled meaning. We might not know exactly what the Constitution means by "Commerce," but we know that some activities are not commerce in any meaningful sense of the word. Similarly, we might have some difficulty in defining "negligence," but we know that the word applies to the behavior of drunk drivers, for instance. And despite all the academic controversy about "discrimination," we know for sure that someone who denies a black person a job just because of her race is discriminating. When questions like these are brought to the courts, judges can apply the relevant concepts quite objectively despite their vagueness.

62. *See* Grice, *Logic and Conversation, supra* note 37, at 165.

63. This is the main point of H.L.A. Hart's famous discussion of the open texture of the law. *See* Hart, *supra* note 19, at 124–136.

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Less obvious but equally important is the role of definitions and paraphrases in legal interpretation. The history of law is to a great extent the history of reformulation of legal rules. When new circumstances arise that create doubt as to the application of a rule to a particular set of cases, courts usually paraphrase the rule, making clear whether it includes or excludes that set of cases. In addition, when a word is perceived as excessively vague, courts usually try to define it in more precise terms. In either case, after these reformulations are made, the rule becomes less vague, and consequently some indeterminacy is avoided.

Take the word "negligence," for instance. Confronted with the vagueness of the concept, American courts have provided a three-pronged test for it: negligence depends on the magnitude of the loss if an accident occurs; the likelihood of the accident's occurring; and the cost of avoiding the risk.[64] And in applying this concept to concrete cases, courts have made clear, for instance, that the particular mental characteristics of the actor are irrelevant.[65] The same can be said about the word "discrimination," discussed above.[66] Although a definition has not been provided for this word, courts have made clear, for instance, that it applies to adverse effects discrimination[67] but not to affirmative action.[68]

To be sure, definitions and paraphrases are not perfect. The definition of negligence mentioned above raises a lot of questions. What is a cost and what is a benefit in our society? How do you weigh these costs and benefits? Similarly, although the rule of negligence has been paraphrased in many different circumstances, there is still room for doubt. What we have to keep in mind, however, is that these doubts were not created by the definitions or paraphrases. They were already there! The reformulations raise new questions, but this is done through the elimination of many others.

As our analysis of normal conversations has shown us, our language can be as precise as the context requires. There will always be room for indeterminacy, but this limitation seems to be imposed by our lack of knowledge about the world in which we live rather than our language. If we were able to predict all the circumstances in which we would want words to be used, we would probably be able to stipulate precise definitions for each of them. Unfortunately, however, we do not have such knowledge and we cannot predict

64. This is the classic Learned Hand test. *See* Conway v. O'Brien, 111 F.2d 611 (1940) ("The degree of care demanded of a person by an occasion is the resultant of three factors; the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid that risk").

65. Vaughan v. Menlove, 132 Eng. Rep. 490 (1837).

66. The other example used in my previous analysis, the Commerce Clause, presents a more difficult case. Instead of defining "commerce," courts have being trying to delineate the limits of the power granted to Congress by the whole provision. Be that as it may, there are a great number of precedents on the issue that provide good guidance to the interpreter. *See generally* Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW 305–317 (2nd ed., 1988).

67. Griggs v. Duke Power Company, 420 F.2d 1225 (1972).

68. United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

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the future with the necessary certainty. This brings us back to the practical dilemma of communication in the legal field: we can be more precise but lose the chance of regulating unforeseen circumstances as they arise, or we can be more vague but leave room for indeterminacy in the application of the rules.[69]

The big question, therefore, is not whether legal interpretation can be as precise as we want it to be. Rather, what we need to find out is how much precision we should want.[70] I cannot address this question here. In this article, I am satisfied with the conclusion that vagueness does not present any impenetrable linguistic problem to legal interpretation.[71] There is one additional point, though, that I would like to make. In my view, the dangers of precision in legal interpretation are not as great in the context of adjudication as they are in the context of legislation. Courts define and paraphrase legal rules with reference to particular cases. If they are careful and avoid unnecessary generalizations, they can remove doubts as to concrete instances of the application of legal rules without compromising their ability to decide other cases. They can settle each indeterminacy at a time, thus making law more precise from that point on, without running the risk of unintentionally regulating unforeseen circumstances.

C. Complexity

My previous analysis has shown us that complexity is a common feature of both normal conversations and legal interpretation. Therefore we can guess from the start that legal interpretation is not more indeterminate than normal conversations in this respect.

Indeed, we also share a set of standard interpretations and assumptions about the meaning of legal rules and the facts regulated by them, and this set of interpretations and assumptions enables us to understand how a particular rule should be applied in a given circumstance in spite of all the complexity of the legal system. An American judge does not need to consult the whole U.S. Code in order to decide a case; she has a general idea of what the rules of the Code say and mean and she will rely on this idea unless

69. Or, as Hart puts it: "In fact all systems, in different ways, compromise between two social needs: the need for rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for latter settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case." Hart, *supra* note 19, at 130.

70. Wittgenstein, *supra* note 33, § 71 ("Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?").

71. Even if vagueness in law were an impenetrable linguistic problem, we would not be allowed to conclude that vagueness makes law indeterminate. Even in this case, the indeterminacy caused by vagueness, understood in purely linguistic terms as in this article, could be eliminated by additional resources available to the interpreter, such as morality and politics. Of course, morality and politics might not provide an answer to the question either and may even complicate things further. Kent Greenawalt, *Vagueness and Judicial Responses to Legal Indeterminacy*, 7 LEGAL THEORY 433 (2001).

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there are good reasons not to. Her general knowledge and training in the law enable her to identify which issues are problematic in a case, which rules have a bearing on its solution, and where to look for an answer. To give some obvious examples, she will not worry about administrative law when deciding a tort case; she will not look for an answer to a securities problem in the regulations of the telecommunications industry.

Education, training, and practice also have a significant effect on a lawyer's ability to interpret the law. Law schools teach lawyers how to apply legal rules and, perhaps more important, introduce them to standard interpretations of the law. After law school, younger lawyers receive additional training from older members of the profession. And they learn a lot about the law just by practicing law. After some years of study and practice, a lawyer becomes "fluent" in the language of the law just as we are fluent in our native languages. He may still think that the law is still as fascinating as in the first year of law school, but he will no longer see it as so mysterious and complex.

In my view, we see too much complexity in legal interpretation because our descriptions of it are inaccurate. For instance, we say that a judge interprets the whole legal system to decide a case. This assertion is only true if what is meant by it is that judicial decisions must be and usually are consistent with the whole legal system. But it is plainly false if what is meant is that a judge interprets all the rules of a legal system every time she decides a case. In fact, she interprets a few rules—those that are controversial and important to the case—relies on standard or past interpretations of several others, and simply ignores the rest of them.[72]

Still, as we saw, there are situations in which legal interpretation is complicated, in particular when legal rules conflict with each other. Normal conversations avoid the indeterminacies created by conflicting sentences through rules that enable the interpreter to choose which of the sentences will prevail for practical purposes. Do these rules exist in legal interpretation as well?

In my analysis of normal conversations, I gave three examples of how these rules work. These examples were intentionally selected to match three corresponding rules used in legal interpretation. In civil-law countries, these rules are designated by the Latin expressions *lex posterior, lex specialis,* and

72. I am tempted to use here Neurath's comparison of science with a boat which we have to fix or rebuild piece by piece in order to stay afloat. If we tried to rebuild it all at once, we would make no progress and would probably sink. Because scientific propositions are closely related to each other, it would be impossible to question all of them at once. If the scientist did so, he would have no place where to start his investigations. Quine believed that science and philosophy are in the same boat. *Supra* note 43, at 3. Perhaps law, or at least legal interpretation, is in this boat too. A judge cannot interpret the whole legal system and question all the established interpretations of the law every time he works on a case. This attitude would leave him with no basis to decide. He has to accept and rely in some of the established interpretations; otherwise he would not be able to interpret any rules. More important, he would not be able to criticize the interpretations he wishes to discard because he has no arguments other than interpretations to support his view.

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lex superior. Although these expressions are not frequently used in common-law countries, I think the rules are applicable here as well. The first rule I mentioned in my previous analysis is the most intuitive: if someone utters two contradictory sentences, the last utterance usually prevails. Similarly, when two legal rules conflict, the rule that was last enacted governs. Therefore, if a statute prohibiting a certain form of conduct is followed by another authorizing the same conduct, the conduct becomes authorized. The second rule I pointed out was the following: if someone makes a general comment in a conversation, followed by a specific remark, the specific remark prevails but the general comment continues to be applicable to other circumstances. Likewise, when judges have to interpret a general rule that conflicts with a specific one, they usually treat the specific rule as an exception to the general rule. So if a legal rule forbids killing in general but allows killing in self-defense, killing in self-defense becomes authorized conduct, though killing in other circumstances remains forbidden. The third rule: a comment in a conversation coming from a superior source prevails over other comments. Similarly, in legal interpretation, if a rule conflicts with a higher norm, such as the Constitution, it is usually considered void.[73]

Of course, these rules may have exceptions. But so do the rules we use in normal conversations. If my friend tells me that she will go to the party and then denies it in front of someone that we do not like, I may have reasons to assume that her first utterance is the one that counts. Also, there may be situations in which none of the rules will provide us with an answer. For instance, two rules may be enacted on the same day, by the same source, with the same level of generality. But if something like that happens, as in normal conversations, judges can paraphrase the rules and settle the uncertainty for the future.

This remark is directly relevant to the problem of potential contradictions. As in normal conversations, the potential vagueness of words does not prevent us from regulating conduct. We use vague words in legal rules and wait for the conflicts to arise. When they do, as they inevitably will, we can solve them through the rules above or, if that is not possible, by paraphrasing the vague words in order to resolve the indeterminacy.

At this point, one might tell us that, even though we can, we do not want to solve the conflicts of rules in our legal system because we live in a complex society, torn between conflicting ideals. I will not respond to this objection here. Again, I am satisfied with the conclusion that, from a linguistic standpoint, nothing prevents us from avoiding or settling the indeterminacies created by conflicting legal rules. Nonetheless, without deviating too much from the line of investigation of this article, I think I can say this much: as

73. In legal interpretation, we also have means to decide conflicts between these criteria. Usually, higher laws prevail over any other rules even if the latter are more specific and posterior. Also, specific laws prevail over general ones even if the latter were the last to be created.

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individuals, we are also torn between conflicting ideals,[74] but this does not stop us from making practical decisions in our lives—decisions that realize some of our ideals to the detriment of others. Why can we not do the same in our public lives?

V. CONCLUSION

In this article, I identified three sources of indeterminacy in legal interpretation: the problems of intention, vagueness, and complexity. Further, I believe I have shown that these problems are present in normal conversations as well as in legal interpretation. Finally, I have argued that legal interpretation and normal conversations can overcome these problems by using the same devices: context, paraphrases, definitions, rules, and assumptions about communication.

Based on this analysis, it seems fair to conclude that legal interpretation and normal conversations are equally determinate as far as the three problems discussed in this article are concerned.

Moreover, once we notice that legal interpretation and conversation face the same problems and solve them using the same devices, it no longer seems foolish to believe in the objectivity of interpretation. Granted, some people would say that the level of determinacy of our conversations is the same as total indeterminacy. Yet, for most of us, the fact that interpreting a legal rule can be as objective as understanding a conversation is really worth noting. As mentioned before, most of us would be happy to know that legislators can tell us what to do as well as we can talk to each other. And I believe this is pretty much what a comparison between conversation and legal interpretation suggests.

74. Roberto Unger, PASSION 20 (1984) ("We present to one another both an unlimited need and unlimited danger, and the very resources by which we attempt to satisfy the former aggravate the latter").

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