

The Occasions of Law (and the Occasions of Interpretation)

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Abstract

When John Searle observed that there is “no remark without remarkableness,” he made a point about the pragmatics of conversation that is importantly applicable to legal interpretation. Just as the act of remarking, according to Searle, presupposes some reason for the remark, so too does the act of legal interpretation presuppose a reason to interpret. This paper explores this phenomenon, and identifies the distinct occasions that call for an act of interpretation.

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1. Introduction

“No remark without remarkableness” is one of the philosopher John Searle’s most profound insights.¹ It may be true, for example, that Professor X is not drunk, but if I *say* that Professor X is not drunk then something else is going on, and my statement has a more complex meaning. More specifically, by saying—*remarking*—that Professor X is not drunk, I am implying that there is a reason for saying that he is not drunk. Searle’s important point is that the most plausible reason for saying that Professor X is not drunk is that there is something remarkable—something worth remarking about—about his not being drunk. In some contexts this remarkableness might stem from the way in which a person might be different from other people. If some person were two meters in height, for example, my asserting that “You are two meters tall” would be worth asserting precisely because most people are not that tall, and thus there is something remarkable about this person’s height. But in other contexts the remarkableness is a remarkableness within some individual and not across individuals, and thus when I remark that Professor X is not drunk, the more plausible implicature—philosophical terminology for the conversational implication²—is that Professor X is drunk on other occasions. And so although the literal meaning of “Profes-

¹ Searle 1969: 144-45.

² See Grice 1989, Davis 2014.

sor X is not drunk” is that Professor X is not drunk, the implication of saying it—of remarking on it—is that he is drunk on other occasions.

Searle’s basic and profoundly important idea, therefore, is that an assertion—a remark—presupposes a reason for offering the assertion, and that the most typical presupposition lying behind a true assertion is the plausibility of its negation. We assert something as true only when its not being true is plausible, or conceivable. That plausibility might come, as I have just noted, from the existence of the negation for other agents, or it might come from the existence of the negation for the same agent (or other object of the assertion), or it might come from the existence of some person actually asserting the negation. If one person says that the earth is round, the plausibility, in context, of the negation may come from a setting in which some other person has (sincerely) asserted that the earth is flat.

2. The Occasions for Rules

If Searle’s point is sound, and I believe that it is, then much the same idea applies to rules, another topic about which Searle’s writings over the years have been extremely and properly influential.³ Rules, or more precisely regulative rules in Searle’s typology, do not, of course, assert. They prescribe, and thus they say what ought to be the case and not what is the case.⁴ Prescriptions may order, or command, or request, or suggest, or recommend, but in some way they indicate what it is that the speaker wishes to take place. But then, in the same spirit as “no remark without remarkableness”, we can again observe that a prescription presupposes the (empirical) plausibility of the behavior that the rule prohibits or that the prescription seeks to have occur.

A few examples will illustrate the point. Some years ago there were signs on the Massachusetts Turnpike, a high speed limit access motorway extending from the state’s western border to the Atlantic Ocean on the east, that instructed motorists that they were not permitted to drive backwards (against the flow of traffic) on the Turnpike if they happened to miss their intended off-ramp. For most drivers in most places such a warning would seem absurdly superfluous, because going backwards on a limited access motorway is so dangerous that no one in their right mind would think of doing it. But the very existence of the warning in Massachusetts tells us something about Massachusetts drivers. After all, there must be a reason why Massachusetts sees a need to warn against behavior that in most other places would seem simply beyond comprehension. And thus the fact that driving in reverse on the Massachusetts Turnpike is prohibited, and the fact that the prohibition is the subject of a specific warning, tells us that the behavior is genuinely conceivable for Massachusetts drivers, even if the behavior is not for more normal drivers in more normal places.

Consider to the same effect the rules of practice for the Supreme Court of the state of Wyoming. Among the rules for the behavior of lawyers arguing cases before the Court are rules governing the time that is allocated to each party for an argument, the requirements for written filings (briefs) with respect to length, form of citation, and so on. But most interesting is the rule (technically a

³ Especially Searle 1969.

⁴ For my own analysis of rules, and on rules as prescriptive generalizations, see Schauer 1991.

guideline, but presumably an enforceable one) instructing Wyoming lawyers as to how they should address the judges of the court during an oral hearing, including one instruction telling lawyers that they should not refer to the judges as “you guys”.⁵

“You guys”?!?! One might reasonably have thought it inconceivable that a lawyer during the formal context of a legal argument would address the members of the court as “You guys”, but plainly such an assumption would be mistaken, at least in Wyoming. Were it not for the plausibility of the behavior that most of us think unthinkable, Wyoming would not have thought it necessary to prohibit it. Wyoming’s rule thus signals the plausibility of behavior whose existence would not otherwise have crossed our minds.

For a third example, consider the Third Amendment to the Constitution of the United States, a part of the Bill of Rights, which was ratified and added to the original 1787 Constitution in 1791.⁶ In many respect, of course, many of the world’s constitutions are quite similar to each other, protecting similar rights and otherwise doing at least some similar things.⁷ But the United States Constitution, unique among the constitutions of the world, prohibits the “quarter[ing] of troops in private homes”. It does, of course, seem like a very bad idea for the state to require that homeowners convert their homes into barracks for the housing of soldiers, whether for the short or the long term, but it is such a bad idea that no modern state has thought it necessary to guard against it. In the United States of 1791, however, the recollections of the British doing just that during the period prior to (and during) the American Revolution were sufficiently salient to justify inclusion in a Bill of Rights of a provision that would now seem to most constitutional drafters in most countries as superfluous.

Finally, and more briefly, I note an article in a relatively recent issue of a scuba diving magazine, the title of the article being “Don’t Pet the Sharks”.⁸ I am a scuba diver myself, and it has never occurred to me to pet a shark. But the title of the article, even without more, has informed me that others obviously feel differently, and the prohibition has provided information about the empirical plausibility of that which I had previously believed implausible. And so too with the warnings at the British Midland Airways counter at Heathrow Airport in London, reminding people that it is against the law to assault an airline or airport employee. Again, we can assume that the warning arises out of the genuine likelihood that people will indeed assault airline counter employees. I suspect, but do not know, that one does not find similar warnings in countries with smaller amounts of violence against service employees. And thus if positive remarks—assertions—presuppose remarkableness, then negative prohibitions presuppose a certain kind of non-remarkableness. They presuppose the plausibility of the behavior that the prohibition prohibits.

3. The Occasions of Law

All of these examples, and the deeper point that they are designed to illustrate, can tell us a great deal about what I call “the occasions of law”. Not only is law

⁵ Wyoming 2014: 229-35.

⁶ U.S. Const. amend. III.

⁷ See Ginsburg, Elkins and Simmons 2013: 61-95.

⁸ *Sport Diver* 2010: 3-4.

not inevitable, but specific instances of law—whether they be prohibitions, requirements, permissions, or something else—exist against a background of non-law. Law in the broadest sense is an exception, and a great deal of human behavior and human interaction takes place without the intervention of law.⁹ It is only when something goes amiss that law is called upon to remedy the gaps and the problems that exist in our pre-legal existence.

Not only is law an exception in this sense, but it is also not the only exception. In one of his later essays, Hans Kelsen described law as a “specific social technique”.¹⁰ And although it may not be especially noteworthy to describe law as a social technique, Kelsen’s description of the social technique as “specific” is telling. What Kelsen understood, and properly so, was that there are various techniques of governance, of coordination, of control, and of much else available to, figuratively, a society’s institutional designer, with law being merely one of those various and multiple techniques.

Thus, insofar as there exists a social desire for behavioral change, or, as most of my examples were designed to illustrate, a social desire to protect certain existing behavioral patterns and social norms against outliers, the designers of social institutions have a number of alternatives for achieving those goals. Consider again the example of the prohibition on the petting of sharks. To the best of my knowledge, petting sharks is not currently unlawful in most of the waters of the world, including the waters that are part of the territorial borders of various nations. But now suppose, realistically, that there develops a concern about such behavior, either because of its environmental consequences to the sharks, or because of the danger to the people who pet them. In the face of such concern, one possible response would be to make it illegal to touch or approach a shark. But the important point is that this is not the only possible response. Another alternative might be a series of speeches by respected public figures warning of the undesirability of petting sharks. Still another might be the construction of underseas barriers separating the sharks from divers. And still another might be an educational campaign in schools (as we now see with respect to environmental and climate change issues) designed to inculcate an anti-shark-petting norm from an early age.

The example is somewhat silly and unrealistic, but is designed to illustrate Kelsen’s basic point—that law exists not as a universal antidote to all of society’s problems or as a universal approach to all of society’s goals, but instead as a particular technique arguably suited for some problems and goals but not for others. Determining when law is appropriate and when it is not will require specification of just what we mean by law in this context, and then delving more deeply into the fit (or absence of fit) between law and various social problems and social goals. This is not the occasion, in part for reasons of space, to explore either of these issues. Nevertheless, Kelsen’s basic idea is instructive, because it highlights from a different direction the non-universality and the non-ubiquity of law. Lawyers, of course, are apt to overstate the importance of their own enter-

⁹ Obviously a great deal here turns on the definition of “law”, but for present purposes I understand law simply as the state-connected institution for the creation and enforcement of regulative and constitutive social rules, an institution including enacted and published rules, courts, judges, lawyers, and police officers. The conception of law with which I work here is thus relevantly similar to that developed in Hart 2012.

¹⁰ Kelsen 1941: 75-95 and Kelsen 1957: 231-56.

prise in the grand scheme of things, but that pathology is hardly unique to lawyers. I have little doubt that dentists, architects, artists, and barbers all do the same thing, although it does not appear that dentists and barbers are as hegemonic as lawyers about the pervasiveness and importance of their enterprise. Still, it is worthwhile being cautious when listening to lawyers talk about the importance of law. This is not to say that law is unimportant. But it is to say that many other things are important as well, and that law occupies only one corner of our larger social existence.

4. The Problems of Making Law with Hard Cases

Although the examples with which I commenced this essay were designed to highlight the way in which legal rules and legal control more generally arise in response to specific needs, specific threats, and specific instances of the lack of legal control, it is worth pointing out the way in which legal responses to perceived needs for law may often be misguided, and in a particular way. Specifically, it is often the case that the need for a legal rule arises from a particular incident. Perhaps, for example, that only one lawyer had ever referred to the judges of the Supreme Court of Wyoming as “you guys”, but, as is often the case, a single glaring event may be the impetus for legal change or the creation of a legal rule.

Insofar as this is true, however, and I admit it may be more frequent in common law systems where specific controversies may provide the platform for judicial law-making, it does suggest that the process of law-making may be unsystematic in rarely noticed ways. Specifically, let us begin with the proposition that any rule, and therefore any legal rule, covers multiple instances. Rules are general, and that is part of what makes them rules.¹¹ And because rules are by their nature general, it is the task of the law-maker to imagine the field of instances that some rule will cover. To make a rule prohibiting vehicles in the park, for example,¹² the rule-maker must imagine the field of vehicles, or, more specifically, the field of vehicles that might, absent the rule, be driven into the park.

So far so good, but now a new dynamic comes into play. Led by Daniel Kahneman and the late Amos Tversky, the research agenda known as heuristics and biases studies those irrationalities of human decision-making that often impede sound and rational judgment.¹³ And although Kahneman and Tversky and their followers have identified a large number of such irrationalities, the one that is especially relevant here is what has come to be known as the *availability heuristic*.¹⁴ The basic idea is simple—we imagine that that which is closest to us, or easiest to see—that which is most available—as being more representative of some larger set or larger class than it actually is. If we go to a party and meet ten people, three of whom as doctors, we may think that doctors comprise a larger percentage of the population than is in reality the case. If there happened to be

¹¹ See Schauer 1991. See also, and relevantly to the argument in the text here, Schauer, 1995: 633-59.

¹² The example, ubiquitous in jurisorudential writings, comes originally from Hart 1958: 593-629. For (too) extensive analysis, see Schauer 2008: 1109-1135.

¹³ See, for example, Tversky and Kahneman 1974, 1981 and 1986. For overviews, see Kahneman, Slovic and Tversky 1982, Plous 1993.

¹⁴ Tversky and Kahneman 1973. See also Reyes, Thompson and Bower 1980.

an earthquake yesterday, we are similarly likely to believe that earthquakes are more common than they actually are.

And so too with the specific events that prompt the making of legal rules.¹⁵ When faced with a highly salient event seemingly in need of a legal or rule-based response, the availability heuristic warns us that we or the rulemaker may think the particular event is more representative than it actually is, and predictable error in judgment will tend to produce a rule that covers a large number of instances (as all rules do) as if the other instances resemble the precipitating instance, even though the other instances are in reality more different from the immediate event than the rulemaker initially imagined.¹⁶ To give just one example, when the American law of defamation was dramatically changed in 1964 in the United States Supreme Court case of *New York Times v. Sullivan*,¹⁷ a decision that has somewhat influenced the law in various other countries, the case before the Court was one in which the plaintiff's reputation was almost certainly not damaged at all, in which the offending publication had essentially no presence in Alabama (the state in which the suit arose), and in which the entire motivation behind the lawsuit was to punish the newspaper for its liberal views about racial integration. But the rule that emerged out of that case—the requirement that the falsity of the accusations be knowing and intentional if the plaintiff is a public official—plainly encompasses a wide range of far different circumstances, often with perverse results.

5. The Occasions of Interpretation

The previous section has focused on the occasions on which law and legal regulation initially arise, but many of the same considerations apply to legal interpretation under existing laws as well. Under one view, one most prominently associated with Ronald Dworkin, every act of legal application is an act of interpretation.¹⁸ For Dworkin there are no easy cases in any conventional sense, and what we perceive as easy cases are in reality the product of the full interpretive enterprise.¹⁹

Such a view of interpretation seems counter-intuitive. For one thing, Dworkin's conclusion is parasitic on Dworkin's own Dworkinian theory of law in which there are few if any boundaries between what the positivist thinks of as legal rules and the larger array of social, political, and moral rules, principles, and norms.²⁰ In addition, however, Dworkin's picture denies the phenomenology by which some instances of law application appear easy, straightforward, and mechanical, while others are uncertain and troublesome. And although I acknowledge that the distinction I draw is in some sense stipulative, I believe that most of us most of the time reserve the idea of interpretation for those instances in which we perceive a quandary, or a difficulty, or a problem.²¹ To say that I interpret the stop sign as ordering me to stop seems highly counter-intuitive. Maybe at some level I am indeed interpreting it, but it seems far more

¹⁵ See Schauer and Zeckhauser 2007: 68-87.

¹⁶ See Schauer 2006; Schauer and Zeckhauser 2011.

¹⁷ 376 U.S. 254 (1964).

¹⁸ Dworkin 2006, 1986, 1977.

¹⁹ Dworkin 1986: 350-54.

²⁰ Dworkin 1984: 263-71.

²¹ See Schauer 1992.

consistent with ordinary usage and ordinary understanding simply to say that I am understanding it, just as I understand other straightforward uses of language.

Even if we reserve the idea of interpretation for those instances in which there is a difficulty of some variety, however, it remains useful to distinguish among four types of difficulties. One, the most standard example in the law about, and the commentary on, interpretation, is the rule that is linguistically vague or ambiguous with respect to some application. Hart's "No Vehicles in the Park", when applied to bicycles, roller skates, and baby carriages, for example, is a rule of this variety.²² Although, following Hart, the rule and its language may have a settled meaning at the core, at the fringes, or at the penumbra, we remain uncertain about the rule's application to some number of other instances. At that point many of the debates about legal interpretation come to the fore,²³ and here we encounter questions about whether we should refer to a ruler's purpose, or instead to the actual intentions of its actual drafter, or perhaps instead to the outcome that would be the best policy, all things considered. But although these are different approaches to what the law should do in cases of linguistic indeterminacy in a governing statute, regulation, or constitutional provision, the basic idea is that the occasion for interpretation arises in the first place from the phenomenon of linguistic indeterminacy.

Second, and perhaps it just a variant on the first, is the case of open texture. Open texture, the writings of too many American legal academics notwithstanding, is not a synonym for vagueness. Rather, as Friedrich Waismann, who identified the phenomenon with the German word *Porosität*, later translated by W.E. Kneale as open texture, maintained, open texture is the possibility of vagueness of a previously non-vague term when confronted with a previously unimagined application.²⁴ Open texture is not vagueness. It is the ineliminable possibility of vagueness of even the most non-vague term. Using an example from J.L. Austin,²⁵ we might understand "goldfinch" as a non-vague term, such that there are necessary and sufficient conditions for determining whether a bird was a goldfinch or not. But if we were then confronted with a creature that we believed to be a goldfinch, but which then proceeded to explode, or to quote Virginia Woolf, we simply wouldn't know what to say. That is open texture, and because old legal rules must confront the modern world, it is a common interpretive problem in law.²⁶

Third is the case, and perhaps it is not interpretation at all, of factual and not legal indeterminacy. It is a requirement of the United States Constitution, for example, that the President be thirty-five years of age. But perhaps some potential President's birth certificate is unclear, or has been lost. Here we know what the rule requires, but we must "interpret" the facts in order to determine whether the rule has been followed or violated. And although such issues may rarely surface in appellate courts, they are of course the principal concern of trials,

²² See Hart 1958.

²³ In the context of American law, see Nelson 2011.

²⁴ Waismann 1951: 117-44, Schauer 2013.

²⁵ Austin 1946: 148-87.

²⁶ As with, for example, the question whether patents may be obtained for laboratory created living organisms, a phenomenon plainly neither extant nor envisaged at the time that most patent laws were enacted. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

where interpreting conflicting facts and conflicting accounts is a large part of what trial courts are designed to do.

Finally, and perhaps most interestingly, is the case of a rule that gives a clear answer, but where for some reason the clear answer is morally, politically, or otherwise unacceptable. Dworkin's favorite example of *Riggs v. Palmer*²⁷ is a case of this type. The applicable rule in the New York Statute of Wills was not unclear. It was not vague, ambiguous, or in any other way linguistically indeterminate. But it was equally clear that the rule when applied according to its terms would allow Elmer Palmer, who had murdered his grandfather, the testator, in order to claim the inheritance, to obtain the inheritance. So although the law, conventionally understood, clearly dictated an outcome, it was equally clear that the outcome so dictated was morally appalling. Under Dworkin's view, avoiding the rule was still a case of application of law, but to legal positivists of a certain variety, the result was simply an example of the fact that making a decision often involves more than the law. Indeed, for Hans Kelsen²⁸ and Joseph Raz,²⁹ it always involves more than the law.

Each of these four varieties of legal quandary presents interpretive problems, but the problems they present are different, and the resources applicable to solve those problems will vary with the nature of the problem. This is not the occasion to offer an interpretive theory for each of these, but until we distinguish the four we cannot even begin to do so. More fundamentally, and more directly related to the theme of this paper, it is important to distinguish the conventional question about how we should interpret the law from the less visible but more fundamental question of when we should set forth on the enterprise of legal interpretation. These are the occasions of interpretation, and just as we need to know the occasions of law in order to understand when and how law exists, so too do we need to understand the occasions of interpretation to know when, how, and why law is interpreted.³⁰

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²⁷ 22 N.E. 188 (N.Y. 1889).

²⁸ Kelsen 1967.

²⁹ Raz 1979.

³⁰ An earlier version of this paper was delivered to the Argentinian Association of Legal Philosophy, in Salta, Argentina, on August 22, 2017, and I am grateful for audience comments and questions on that occasion.

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