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OBJECTIVE INTENTIONALISM AND DISAGREEMENT

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Abstract
Intentionalist theories of legal interpretation are often divided between objectivist and subjectivist variants. The former take an interpretation to be correct depending on what the reasonable/rational lawmaker intended or what the reasonable/rational audience thinks they intended. The latter take an interpretation to be correct where the interpretation is what the speaker actually intended. This paper argues that objectivism faces serious problems as it cannot deal with disagreement: reasonable and rational persons can often disagree as to what the interpretation of a text should be. It also defends subjectivism against criticisms by objectivists.

Intentionalism is not a monolith. When considered closely intentionalist theories are often divided into *subjective* and *objective* strands.[1] While both theories aim at recovering lawmaker intentions, the objectivist mediates this recovery through the standard of a reasonable or rational person (in this paper the term lawmaker encompasses both legislators and

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1. The use of objectivist and subjectivist terminology is especially prevalent in the law and language literature, where it was first used by Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* Philosophical Foundations of Language in Law 231 (Andrei Marmor & Scott Soames eds., 2011). This literature has subsequently been developed by Asgeirsson and Goldsworthy. *See* Hrafn Asgeirsson, *Expected Applications, Contextual Enrichment, and Objective Communicative Content: The Linguistic Case for Conception Textualism*, 21 Legal Theory 115 (2015) [hereinafter Asgeirsson, *Expected Applications*]; Hrafn Asgeirsson, *On the Possibility of Non-literal Legislative Speech*, *in* Pragmatics and Law: Practical and Theoretical Perspectives (Francesca Poggi & Alessandro Capone eds., 2017) [hereinafter Asgeirsson, *Non-literal Legislative Speech*]; Jeffrey Goldsworthy, *Subjective Versus Objective Intentionalism in Legal Interpretation*, *in* Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander (Heidi Hurd ed., 2018). The debate in law and language, however, has primarily been between what I call subjectivists and audience-objectivists.

Outside the law and language literature, the notions of subjective and objective intent have also been discussed by Justice Scalia in Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1998), at 16–17.

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constitutional framers). This paper argues that subjectivism is a better theory than objectivism.

Subjectivism posits that an interpretation is correct if it matches the actual intentions of the lawmaker.[2] Proponents of subjectivism include Larry Alexander and Richard Kay.[3] Objectivism can be further divided between *lawmaker-objectivist* and *audience-objectivist* theories. The *lawmaker-objectivist* contends that an interpretation is correct if the interpretation is what the *reasonable or rational lawmaker* would have intended. Proponents of lawmaker-objectivism include Justice Stephen Breyer and to some extent Justice Aharon Barak (although Barak balances both actual and reasonable intentions).[4] The *audience-objectivist* posits that an interpretation assigned is correct if the interpretation is what a *reasonable or rational audience* would think the actual lawmaker intended.[5] Proponents of audience-objectivism include Jeffrey Goldsworthy, Andrei Marmor, and Scott Soames.[6] The difference between the two types of objectivism boils down to the role of the reasonable or rational person. For the lawmaker-objectivist reasonableness/rationality is imputed to the lawmaker, whereas for the audience-objectivist reasonableness/rationality is imputed to the audience. When referring to both audience- and lawmaker-objectivism, I shall just use the term objectivism.

The main argument I put forward against objectivism is the problem of disagreement: reasonable and rational people can come to radically different conclusions. Using a test of reasonableness or rationality can thus lead to contradictory interpretations of a legal provision. There are several responses an objectivist might make; for example, the most plausible would be declaring indeterminacy. Nevertheless, I show that they are all

2. By accepting that some interpretations are *correct* and others are not, I am assuming what Lucy calls the Orthodox View of adjudication where objective legal principles and content do exist. If the reader does not believe in objective legal principles and law, then there is little reason to do any theorizing on legal interpretation anyway. William Lucy, Understanding and Explaining Adjudication (1999), at ch. 1. Even on the Orthodox View, I am not committed to there being only *one* correct interpretation for any legal provision; there could be a range of interpretations that are correct.

3. Larry Alexander, *Originalism, the Why and the What*, 82 Fordham L. Rev. 539 (2013); Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703 (2009).

4. Stephen Breyer, Active Liberty (2006), at ch. 6; Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 19, 66–67 (2002) [hereinafter Barak, *A Judge on Judging*]; Aharon Barak, Purposive Interpretation in Law (2007), at ch. 7 [hereinafter Barak, Purposive Interpretation].

5. Asgeirsson frames audience-objectivism as: "A speaker asserts p only if a rational hearer, knowing the relevant conversational background and context, is warranted in taking her to be intending to assert p." Asgeirsson, *Non-literal Legislative Speech*, *supra* note 1, at 74–75, 81. There is a small distinction in the way we define audience-objectivism as he frames objectivism in terms of what the rational speaker "is warranted" in their inference. I take this as already incorporated into my definition (i.e., a rational audience will only make inferences that are warranted).

6. Goldsworthy *supra* note 1; Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 Fordham L. Rev. 597, 598 (2013); Andrew Marmor, The Language of Law (2014), at 19. Endicott suggests that this is what judges are doing when they say they give effect to legislative intentions. Timothy Endicott, *Arbitrariness*, 27 Can. J. L. & Juris. 49, 60 (2014).

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unsatisfactory and in many cases undermine the very normative motivations for objectivism in the first place.

In Section I, objectivism and subjectivism are more carefully distinguished and their normative motivations are set out. In Section II, the problem of disagreement is introduced and I respond to objectivist defenses that rely on the average reasonable or rational person. The objectivist might try to resort to the Uniqueness Thesis in epistemology, which states that fully rational agents never disagree—hence switching to a standard of perfect rationality. I argue in Section III that even if uniqueness holds, the problem of disagreement is still insurmountable for the objectivist. Section IV then defends subjectivism against potential objections and last, Section V explains why the problem of disagreement applies to legal interpretation but not areas like tort or criminal law.

Due to limitations of space, two related issues, which do not affect the overall argument, are glossed over in this paper. The first is whether lawmaker-objectivism is an intentionalist or purposivist theory. Justice Barak, for example, labels himself as a purposivist.[7] Further, there is reason to believe that intentionalism and purposivism are not interchangeable since intentionalists might focus on something like communicative intentions (I intend for utterance *u* to mean *m*) while purposivists might focus on purposive intentions (I intend for *u* to mean *m*, to achieve some goal).[8] However, I do not explore these nuances because the problem of disagreement applies regardless.

A second issue that this paper does not address is the existence of lawmaker intentions; I assume that they do exist. There are several reasons why this is not a problem. First, there is already a rich literature on the feasibility of attributing intentions to groups.[9] Not every paper on intentionalism must retrace this debate. Second, subjectivists, audience-objectivists, and some lawmaker-objectivists[10] believe that lawmaker intentions do exist. Hence, this paper should be read as an internal debate between intentionalists. Third, while some lawmaker-objectivists need not rely on real lawmaker intentions due to their commitment to hypothetical lawmakers, this paper still highlights a major problem they must grapple with.

7. Barak, *A Judge on Judging*, *supra* note 4, at 66; BARAK, PURPOSIVE INTERPRETATION, *supra* note 4.

8. One could theorize this by relying on the distinction that speech act theorists make between illocutionary and perlocutionary intentions. JOHN SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS (1979), at 3. Barak also makes the distinction between the "interpretive intention" of a lawmaker and the "policies the legislature sought to realize." *See* Barak, *A Judge on Judging*, *supra* note 4, at 74.

9. RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011); Daniel Farber & Phillip Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); David Tan, *Uncommon Legislative Attitudes: Why A Theory of Legislative Intent Needs Non-Trivial Aggregation*, 34 RATIO JURIS 139 (2021).

10. Barak, *A Judge on Judging*, *supra* note 4, at 66–67.

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I. OBJECTIVISM AND SUBJECTIVISM

Before introducing the problem of disagreement, a few conceptual issues must be addressed at the outset. I first discuss the reasonableness/rationality standard and how objectivism and subjectivism might be lead to different conclusions in practice. Finally, I consider what the possible normative motivations are for these different theories—which will be relevant in subsequent sections to showing that objectivist responses to the problem of disagreement fall short.

A. Rationality and Reasonableness

Both versions of objectivism posit a reasonable or rational person. For simplicity, I will use the term *rational person* from here on.[11] The reader need not a worry that the reasonable and rational person might be different concepts since my central arguments only rely on two fairly thin propositions that apply to both.[12] The first is that reasonable and rational persons do not make spurious inferences. The second is that there are different standards of reasonableness or rationality by which a person might be judged. I refer to interpretations that a rational lawmaker intends, or a rational audience infers as a *rational interpretation*.

The proposition about *standards of rationality* requires some elaboration. I shall consider two standards: the *level* and *perspective* of rationality. The *level* of rationality corresponds to the capability of the rational person. The level might be set at the standard of perfect rationality where an agent makes no mistakes. Alternatively, we might impose a merely good or average level of rationality where an agent makes competent inferences but might still commit mistakes. For now, I shall assume that the objectivist only imposes a standard of average or good rationality. We shall return to standards of perfect rationality in Section III.

Another kind of standard is the *perspective* of rationality. A rational interpretation from a linguistic perspective (e.g., the interpretation should be p given the linguistic evidence and facts) is not necessarily a rational interpretation from a moral perspective (e.g., the interpretation should be p given the consequences of enforcing p). The objectivist must thus also specify the perspective of rationality by which an interpretation is judged.[13]

11. The term rational person is used since the epistemologists I engage in Sections II and III tend to use the term rationality rather than reasonableness.

12. For an example of a conceptual distinction between reasonableness and rationality, *see* Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313, 318–319 (1996).

13. By positing different perspectives of rationality, I am not denying that there might be universal rules of rationality (I remain neutral on the issue). Rather, even if universal rules of rationality exist, they would be applied very differently in different domains. This is evidenced by the simple fact that someone who can reason well about language (e.g., a linguist) might not reason well about economics (compared to an economist).

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In terms of perspectives, audience-objectivists emphasize linguistics as underpinning legal interpretation;[14] hence, they rely on linguistic standards (or perspectives) of rationality. The relevant standard would be something as follows: What would the rational good *language user* who can competently communicate think the lawmaker intended? On the other hand, I propose that lawmaker-objectivists impose more than just linguistic rationality since proponents of lawmaker objectivism explicitly focus on good consequences of laws (I say more about this in Section I.C).[15] I shall refer to nonlinguistic standards of rationality as *normative standards*. For example, a rational lawmaker designing tax laws might be judged according to a standard of good economic policy (what would a rational lawmaker informed of economic policy intend?). Having said that, lawmaker-objectivists, such as Justices Breyer and Barak, still take language and context as constraining correct interpretation.[16] Suppose a statute titled "Financial Act 2020" states: "All banks must satisfy certain hygiene standards." A lawmaker-objectivist would not rely on an environmental standard of rationality and interpret the rational lawmaker as intending for the word "banks" to include both financial institutions and riverbanks. To some extent, the text must constrain the correct interpretation.

B. Applying the Theories

A major practical difference, as shall be discussed in Sections II.D.3–4, is that some versions of objectivism might be forced to state that there are no correct interpretations when rational disagreement is present. This is the case even if the objectivist judge is convinced that their interpretation is best. In comparison, a subjectivist judge can stand by their own reasoned judgments regardless of whether rational people disagree. More will be said about this later.

In the meantime, let us consider more concrete differences. First, let us distinguish theories that focus on real intentions (audience-objectivism and subjectivism) and those that do not (lawmaker-objectivism). To show how they come apart, consider §92 of the Australian Constitution, which requires that trade between Australian states must be "absolutely free." Historically, two major interpretations of §92 were a free-market and a free-trade interpretation. The free-market interpretation requires that no direct restriction can be imposed on interstate trade.[17] The free-trade

14. Soames, *supra* note 6, at 102; MARMOR, *supra* note 6, at 11.

15. BREYER, *supra* note 4, at 12.

16. Justice Breyer says: "The judge will ask how this person [the reasonable member of Congress] . . . aware of the statute's language, structure, and general objectives (actually or hypothetically) *would have wanted* a court to interpret the statute . . . ." *Id.* at 84. *See also* BARAK, PURPOSIVE INTERPRETATION, *supra* note 4, at 92 ("The language . . . must be able to bear the purpose of the norm.").

17. Commonwealth v Bank of New South Wales (1949) 79 CLR 497, 639 (Austl.). *See also* SARAH JOSEPH & MELISSA CASTAN, FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW (4th ed. 2014), at 395–396.

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interpretation requires that no laws can discriminate between states such that the discrimination amounts to trade protectionism.[18] The modern High Court has adopted the free-trade interpretation based on the premise that §92 was introduced to deal with concerns regarding free trade rather than economic regulations generally.[19]

Subjectivists and audience-objectivists both want to recover—albeit in slightly different ways—what the *actual* lawmaker intended. Hence, they would side with the High Court on this issue; what concerned the actual framers of the Constitution is of ultimate importance. The lawmaker-objectivist, however, is not bound by what the actual lawmakers thought. If the normative standard of rationality is political, then a libertarian judge might very well be justified in siding with the free-market interpretation of §92.

Second, let us contrast the two theories that focus on actual lawmaker intentions: subjectivism and audience-objectivism. Practical differences emerge if the audience-objectivist places limitations on (i) the context available to the rational person, or (ii) the level of rationality. As an example of (i), Goldsworthy argues that the context that is available to the rational audience must be *readily accessible*.[20] An example of (ii) would be where correct interpretation is set at the level of average rationality.

To illustrate these constraints, consider the Therapeutic Goods Act (1989) (Cth), which regulates the sale of medicines and other therapeutic goods in Australia. Of interest is the word "biologicals," which occurs in various parts of the legislation and is defined in §32A as anything that comprises, contains, or is derived from human tissues or cells *not including nonhuman animals*. Imagine a world where we had the exact same statute but §32A did not define "biologicals." Instead, the definition for the real-world §32A was agreed upon during statutory debates and a copy of the debates can only be found in the parliament's library, which is only open to parliamentarians, judges, and barristers.

Now consider the constraint on context. On Goldsworthy's readily accessible evidence condition, the copy of the debates is not part of the context since it is not accessible to the public.[21] Hence, a rational audience that is

18. Cole v Whitfield (1988) 165 CLR 360, 394 (Austl.).

19. *Id.* at 391–394.

20. Jeffrey Goldsworthy, *Moderate Versus Strong Intentionalism: Knapp and Michaels Revisited*, 42 San Diego L. Rev. 669, 671–672 (2005).

21. Alexander argues that this does not differentiate subjectivism from audience-objectivism and that both theories need a version of readily (or in Alexander's terms publicly) available evidence. He argues this because (a) a rational speaker would only take into account readily accessible evidence and (b) even if there were private evidence, no one could discover the true intentions of the speaker without getting access to this private evidence—both objectivists and subjectivists would be equally led astray by the private evidence. Larry Alexander, *Appreciations and Responses*, *in* Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander 423 (Heidi Hurd ed., 2019).

I agree that these reasons suggest that subjectivists and audience-objectivists will often agree, but I dispute that they will *always* agree. Alexander's proposition (a) assumes that lawmakers

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constrained by such evidence might think that "biologicals" refers to anything that comprises, contains, or is derived from *any animal* tissues or cells (including nonhumans). The audience-objectivist would thus take that broader definition as the correct interpretation. Nevertheless, a subjectivist judge who did have access to the debates would take that definition into account. As for the constraint on *rationality*, suppose the sitting judge only manages to recover the definition with the assistance of barristers and clerks. The average rational person, including nonlawyers, would not have been able to do so (without years of legal training). A constraint on levels of rationality would prevent this definition from being part of the law. The subjectivist judge would not care about this complexity and would still follow all steps of the reasoning.

C. Motivational Differences

There are different motivations (or justifications) for adopting the different theories. The subjectivist is concerned with interpretations *matching* the actual intentions of lawmakers rather than their rationality. Objectivists cannot guarantee that the correct interpretation will *match* that of the actual lawmaker; for example, in Section I.B the rational libertarian lawmaker might not intend the same thing as the actual lawmakers. Additionally, when constraints are added on context, what might be rationally inferred given accessible evidence might not be what the actual lawmakers intended.

There are several reasons why a subjectivist will demand matching between correct interpretation and what was actually intended. First, there are legitimacy and separation-of-powers arguments: the intentions of lawmakers must be upheld because they are the only ones with lawmaking power.[22] Second, a subjectivist, at least of the kind I endorse, takes legal provisions as communications from lawmakers. Communication is the process of using text and words to transmit messages from speakers to audiences.[23] Intuitively then, if a speaker intended to communicate p, and p

are always rational and perfect communicators. That might not always be the case. As for proposition (b), this in-text hypothetical is a counterexample where the "readily accessible" requirement makes a difference. Further, I suspect that the reason that Alexander believes subjectivists too need a readily accessible criterion is that there is an equivocation with "readily accessible" meaning evidence that the public at large can access and comprehend or "readily accessible" meaning that at least *some* people, even if not the average person, can obtain the evidence. Alexander seems to be taking "readily accessible" as meaning the latter—which is why he would say that no one could ever get at what the speaker really intended unless it was public or readily accessible in this sense. I take Goldsworthy as meaning the former (even if he does not, it is plausible that an audience-objectivist might mean this).

22. Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 140–141 (2010).

23. This idea of communication as transmission is often attributed to Shannon and Weaver. *See* CLAUDE SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (1949), at 6–7. This notion of transmission has also been adopted by philosophers and linguists. Peter Pagin, *What Is Communicative Success?*, 38 CAN. J. PHIL. 85, 88, 91 (2008); DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION (1st ed. 1986), at 3–5.

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is not recovered by the audience, in what sense has successful communication (or correct interpretation) occurred?

Audience-objectivists likely value legitimacy as well since they attempt to recover real lawmaker intentions.[24] Nevertheless, they are willing to give up exact matching of lawmaker intentions, that is, rational interpretations can be correct even if they do not match the actual intentions of the lawmakers. I propose that there are two motivations for giving up on matching. *First*, a rational standard reduces the evidential burden on the audience. Subjectivism imposes a high evidential standard since identifying the correct interpretation requires knowing what is in the lawmakers' minds.[25] This is not always transparent. For an audience-objectivist, the audience can fail to grasp what was actually in the lawmakers' minds but there is still a correct interpretation as long as the audience has made a rational inference. *Second*, audience-objectivism might be attractive for those who emphasize ordinary or public meaning.[26] For rule-of-law reasons, what lawmakers intend should be constrained by what ordinary people or the public would think about the meaning of provisions.[27] A standard of a good or average rational audience might track the way most people assess communication.

Lawmaker-objectivists, at least of the normative kind discussed here, are less concerned with the actual intentions of lawmakers. Instead, they emphasize the consequences and effects of the law. Recall that rationality can have different perspectives, and in this case the rationality of the lawmaker is proposed from a normative perspective. For example, Justice Breyer argues that democratic ideals encourage judges to interpret law such that it "helps a community of individuals democratically find practical solutions to important contemporary social problems."[28] Justice Barak also emphasizes democracy but focuses on its "internal morality" of "dignity and equality of all human beings."[29] In addition to democratic concerns, Justice Barak also argues that courts play an important institutional role in bridging law and society.[30] This involves understanding "the purpose of law in society and to help the law achieve its purpose."[31]

24. Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 San Diego L. Rev. 493, 503, 518 (2005).

25. Goldsworthy says: "the meaning of a communication cannot be something hidden within the speaker's mind and inaccessible to its intended recipient." Jeffrey Goldsworthy, *The Case for Originalism*, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 48 (Grant Huscroft & Bradley Miller eds., 2011).

26. For a linguistic analysis of ordinary meaning *see* Brian Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation (2016); Thomas Lee & Stephen Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788 (2018).

27. Lee & Mouritsen, *supra* note 26, at 793.

28. Breyer, *supra* note 4, at 12.

29. Barak, *A Judge on Judging*, *supra* note 4, at 39.

30. *Id.* at 28–29.

31. *Id.* at 28.

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A natural question for the lawmaker-objectivist is why posit a rational lawmaker instead of requiring that laws directly respect normative values. For example, why ask what the rational democratic lawmaker intended when you can just stipulate that the correct interpretation is the one most compliant with norms of democracy? One explanation is that lawmaker-objectivists allow for *pluralism*: when considering the effects of a law, there are many equally good consequences of the law. Justice Barak states that "two judges may reach two opposing, reasonable results . . . there is no single, unique solution."[32] The standard of a rational person is meant to track this pluralism in the world: there is not just *one* rationally intended interpretation; there can be many.

Another explanation is that limitations on the standard of rationality are a *constraint* on the correct interpretation. Justice Barak, for example, states that the rational author is used to balance ideal values "as it exists for someone situated in the position of the real author."[33] So the standard of a rational lawmaker may prevent the judge from assigning interpretations that stray too far from what actual lawmakers intended. For example, a group of economists might take a certain interpretation as being ideal after using sophisticated mathematical modeling. The real legislators, who were not economists, did not carry out this modeling. The *average* rational lawmaker standard blocks these overly sophisticated interpretations as they would unlikely be able to come to the same conclusion as the economists—thus bringing the standard of rationality closer to the actual lawmakers (as compared to the ideal economic modelers).

II. THE PROBLEM OF DISAGREEMENT

The problem with objectivism is that rational people often disagree (at least at the level of average rationality; I deal with perfect rationality in Section III).[34] Rational lawmakers might disagree over the appropriate consequences of a bill while rational audiences might disagree about what the lawmaker intended to communicate. In general, there is a whole range of topics over which rational disagreement[35] can occur, such as the existence of God, what is morally good, and even how to interpret law.[36] What then is the correct

32. BARAK, PURPOSIVE INTERPRETATION, *supra* note 4, at 209.

33. *Id.* at 151.

34. It might appear that Asgeirsson's requirement that the rational audience be *warranted* in coming to their inferences is no longer a minor point, *supra* note 5. Rational audiences might come to different conclusions but they are only *warranted* to come to one conclusion. This line of reasoning is basically what epistemologists call the Uniqueness Thesis, which I discuss in Section III.

35. For some general work on rational disagreement and law *see* Adam Dryda, *The Epistemology of Theoretical Disagreement*, *in* METAPHILOSOPHY OF LAW (Pawel Banas, Adam Dryda & Tomasz Gizbert-Studnicki eds., 2016).

36. For disagreement in the legal case, consider the number of dissents that one finds in courts. For example, Epstein et al. found that 62 percent of US Supreme Court cases in 2011 had at least one dissent. Lee Epstein, William Landes & Richard Posner, *Why (and*

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interpretation for an objectivist when rational persons disagree? I argue that objectivism has no good answer to this question and call this the **problem of disagreement**.[37]

As an example of rational disagreement in law, consider the American case of Smith v. United States.[38] In this case, a statute stipulated that those convicted of drug trafficking offenses would receive a higher penalty if they *used* a firearm in relation to that offense. On the facts, the defendant offered to trade firearms for drugs and the issue was whether this constituted *using* a firearm. The defendant argued that a higher penalty should only be incurred if the firearm was *used as a weapon*. The majority ultimately rejected this argument and decided that the defendant did use a firearm by trading it.

From an audience-objectivist perspective, both majority and dissenting judges presented rational linguistic justifications for why their interpretations were intended. In the majority, Justice O'Connor stated that "the words 'as a weapon' appear nowhere in the statute" and "[h]ad Congress *intended* the narrow construction [the] petitioner urges, it could have so indicated."[39] Thus she decided that even using a firearm for barter would incur a higher penalty. In dissent, Justice Scalia noted: "When someone

When) Judges Dissent: A Theoretical and Empirical Analysis, 3 J. Legal Anal. 101, 106–107 (2011). Songer et al. show that the Supreme Court of Canada had a dissent rate of 10 to 40 percent between 1980 to 2005. Donald Songer, John Szmer & Susan Johnson, *Explaining Dissent on the Supreme Court of Canada*, 44 Can. J. Pol. Sci. 389, 392 (2011). Lynch shows that over the period between 1981 and 2003, dissent occurred in the High Court of Australia between 40 and 50 percent of the time. Andrew Lynch, *Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981 – 2003*, 33 Fed. L. Rev. 485, 497 (2005).

There is no reason to think that rational disagreement would disappear at the *average* level of rationality if we switched from a societal notion of rationality—what people perceive to be averagely rational—to some normative standard of what is averagely rational. On both accounts we are dealing with people who make mistakes. Hence, it would be very surprising if, at the average level, agents all made mistakes in the same way to end up with the same conclusions.

37. Gideon Rosen raises this problem as an objection to Soames. Gideon Rosen, *Deferentialism and Adjudication*, *in* The Nature of Legal Interpretation: What Jurists Can Learn from Linguistics and Philosophy 255 (Brian Slocum ed., 2017). Rosen seems, however, to accept that cases of rational disagreement are simply hard cases for the objectivist, and notes that other theories would have their own hard cases. *Id.* at 255. Further, Rosen does not think that the objection here is that "[the objectivist] makes an easy case hard." *Id.* at 256. Instead, Rosen thinks that the real problem is that the potential for various rational interpretations risks audiences imputing intentions the lawmakers did not really have. *Id.* at 256. While I agree that imputed intentions are undesirable, I think that Rosen underestimates how hard these cases really are. I show in Section II.D, when discussing the notion of instability, that the way these hard cases are generated is highly problematic.

This objection has also been raised in areas outside of law where the consensus on a topic is taken as a presupposition or necessary element for some concept. *See* Noel Carroll, *Art Interpretation: The 2010 Richard Wollheim Memorial Lecture*, 51 Brit. J. Aesthetics 117, 130 (2011); Timothy Horgan & Mark Timmons, *Troubles for Michael Smith's Metaethical Rationalism*, 25 Phil. Papers 203, 212 (1996); David Enoch, *The Disorder of Public Reason*, 134 Ethics 141, 164–170 (2013).

38. Smith v. United States, 508 U.S. 223 (1993).

39. *Id.* at 229 (emphasis added).

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asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane."[40]

While Justice Scalia is a well-known textualist, several law and language scholars have shown how his reasoning can be adapted in an intentionalist sense: speakers generally intend to communicate the stereotypical properties of the referents of their words.[41]

From the lawmaker-objectivist perspective, Justice O'Connor presented reasons why the majority decision was superior from a policy perspective. Writing on behalf of the majority, she opined that the purpose of the provision was to regulate death and injury related to drug trafficking.[42] She then argued: "Imposing a more restrictive reading of the phrase 'uses . . . a firearm' does violence not only to the structure and language of the statute, *but to its purpose as well*."[43] Hence Justice O'Connor thinks that a strict standard, where any use of weapons would be punished, might be effective as a deterrent. While the minority did not consider policy-based reasoning, it would also be a rational policy that a more targeted approach be taken (only penalizing those who use firearms as weapons) rather than applying a universally strict standard. Rational lawmakers can have very differing views on how statutes should operate.

The objectivist has four possible ways to deal with the problem of disagreement: (i) *Persuasion*: while there might be multiple rational interpretations, choose the interpretation that one is most persuaded by, (ii) *Acceptance*: claim that all rational interpretations are correct, (iii) *Selection*: allow for any rational interpretation to be chosen, or (iv) *Indeterminacy*: claim that rational disagreement causes indeterminacy, that is, there is no correct interpretation. I argue that all four are unattractive—special emphasis will be given to the Indeterminacy option as that seems to me to be the most plausible response and is also one that has been put forward in the literature.

A. The Persuasion Option

While rational persons might make good arguments or have good reasoning processes, being *persuaded* by their arguments or reasoning is another matter.[44] There are many great philosophers whom I am not persuaded by, and no doubt the reader is in the same position. The Persuasion option allows that there are multiple rational audiences or lawmakers who might

40. *Id.* at 242.

41. Scott Soames, *Towards a Theory of Legal Interpretation*, 6 N.Y.U. J. L. & LIBERTY 231, 238–239 (2011); Robyn Carston, *Legal Texts and Canons of Construction: A View from Current Pragmatic Theory*, *in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 22 (Michael Freeman & Fiona Smith eds., 2013).

42. *Smith*, 508 U.S. at 240.

43. *Id.* at 240 (emphasis added).

44. This might be slightly controversial given the Equal Weight View in epistemology; I address this further below in Section II.

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have different arguments for what should be intended or inferred. Nonetheless, judges should choose the arguments they are most persuaded by despite the differing views.

The Persuasion option can either be framed as a metaphysical theory of "what *constitutes* correct interpretation" or an epistemic theory of "what an assessor is *justified* in taking as correct given the evidence." These are radically different theories; just because an audience is justified in thinking p given the evidence available does not make it the case that p is correct (on whatever correctness conditions you impose). For example, medical procedures three hundred years ago might have been well justified given the available evidence, but would not be "correct" in the sense of increasing the probability of survival. Keeping that in mind, the Persuasion option cannot be framed metaphysically as a theory of correctness as it would not escape the problem of disagreement—because the option would state that the correct interpretation of a provision is the rational interpretation an assessor takes to be the most persuasive. If this were the test, then there can be many different assessors who are persuaded by many different rational interpretations—the problem repeats itself.

Having the Persuasion option as an epistemic theory, on the other hand, either makes it banal or self-defeating. It would be banal because any feasible theory of interpretation—including subjectivism—will mandate that an audience infer correct interpretation based on their all-things-considered judgments (i.e., what they are persuaded by). Even worse for audience-objectivism is that it collapses into subjectivism; a subjectivist judge would also determine what they think the lawmaker most likely intended based on their own best reasons. The audience-objectivist might try to prevent collapse by agreeing that correct interpretation is what was actually intended, but a judge should limit their evidence to what is readily accessible. The audience-objectivist would then claim that the constraint on evidence might produce different outcomes from the subjectivist (otherwise, collapse still occurs). But this becomes self-defeating; it is an epistemic theory that encourages false[45] beliefs—it accepts that the actual intention and the correct interpretation, given full evidence, is p but the evidential constraint possibly forces a judge to take something other than p as correct, even where a judge has access to the full evidence (see the example in Section I.B). Hence, objectivism is only interesting if it is a metaphysical theory about correct interpretation rather than just epistemic best practice. Nevertheless, as a metaphysical theory, it is plagued by the problem of disagreement.

45. False in the following sense. Suppose we have total epistemic access and have God's viewpoint where all legally relevant facts are accessible. Further, suppose that "p is the correct interpretation" is true since p is what the lawmaker intended. The audience-objectivist, for reasons given in text, will be forced to say that there are cases where "p is the correct interpretation" is true, but a judge is forced to not believe that proposition.

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B. The Acceptance Option

The Acceptance option is implausible. If all rational interpretations are correct, then Acceptance leads to either *inconsistency* or *overdetermination*.

Inconsistency occurs where both *p* and not-*p* are rational interpretations. In such a case, the Acceptance option would require a judge to take both as correct. This is untenable since it would follow that the law is now both *p* and not-*p*. Not only is this incoherent, but it would also lead to an obligation on citizens to both do something and not do something.

Overdetermination occurs where there are a large number of rational interpretations that are consistent and yet significantly different. The *Smith* case can be modified to show this. Suppose that there is evidence that the weapon-use (dissenting) interpretation was intended, but that it is also clear that Congress did *not* intend that just any weapon-use incur a higher penalty. Nonetheless, it is not clear what specific weapon-use was intended to be captured. Further, suppose that the evidence suggests four possible candidates for correct interpretation: use of a firearm as a weapon incurs a penalty if it (a) is discharged, (b) is used to threaten, (c) causes grievous bodily harm, or (d) injures a person in any way. Overdetermination occurs if we take all of the above as intended together: any weapon-use in accordance with (a), (b), (c), *or* (d) leads to a higher penalty.

This is problematic. From the audience-objectivist perspective, this combination means almost any weapon-use of a firearm incurs the higher penalty despite the clear evidence that Congress did not intend for that to be the case. From the lawmaker-objectivist perspective, adopting *all* these interpretations might lead to worse consequences than adopting each of them individually, since they are motivated by very different policy reasons. The last two interpretations above penalize those who cause harm and might be justified on some kind of harm principle. The first two interpretations lead to a higher penalty even without evidence of injury and might be justified on a law-as-deterrent principle. Adopting all of them undermines the policy reasons for adopting each individual candidate interpretation in the first place.

The objectivist might retort that any theory allowing for multiple correct interpretations—whether objectivism or something else—also adopts the Acceptance option. Hence, such theories result in inconsistency or overdetermination. If the reader thinks that theories of legal interpretation should allow for multiple interpretations then the problem of disagreement is a general issue, not one specific to objectivism. First, it is unlikely that nonobjectivist theories would result in inconsistency since it is possible to accept that there can be multiple correct interpretations and yet have a consistency requirement. Such a constraint is not available to the objectivist since the very essence of objectivism (on the Acceptance option) is that all rational interpretations are correct.

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As for overdetermination, it is very possible to have a theory that allows for multiple interpretations yet avoids this. Recall that overdetermination is defined as cases where *many* correct interpretations are *significantly different*. One could create a theory that only allowed for multiple correct interpretations if they were few in number and mostly applied in the same way. Objectivism on the Acceptance option cannot do this because the core principle, what a rational person would do, would include overdetermined interpretations.

If the objectivist decides to take the Acceptance Option but eliminates any inconsistent or substantially different interpretations, then it is unclear how such a theory is objectivist when so many rational interpretations are eliminated. Further, in difficult cases—where theories of interpretation matter most—the candidate interpretations are usually inconsistent or significantly different. Introducing a constraint eliminating these candidates would result in indeterminacy since these inconsistent and different candidates would all be eliminated. In such cases the problems with the Indeterminacy option—Section II.D—below will apply.

C. The Selection Option

Where *p* and not-*p* are rational interpretations, the Selection option allows judges to choose between them. Unlike the Acceptance option, where *all* interpretations are correct, the Selection option allows a judge to choose any one.

The problem with the Selection option is *arbitrariness*. A decision may be said to be arbitrary if there is no reason for that decision.[46] We can distinguish between *first-order* and *second-order* arbitrariness. A decision *p* is first-order arbitrary if there is no reason for choosing *p* compared to an alternative *q*. A decision *p* is second-order arbitrary where there are reasons for both *p* and *q*, but *p* is chosen without considering whether the reasons for *p* are better than *q*.

The Selection option is not first-order arbitrary since all interpretations are rational. It is, however, second-order arbitrary. A judge might prefer the justification of *p* to *q*, but that same judge could equally choose *q* as being correct as long as there is some reason for *q*. While a judge is free to choose the interpretation they prefer, the Selection option does not force them to do so. A judge might personally be persuaded that one interpretation is better than the others, but any rational interpretation could be correct.

Second-order arbitrariness is undesirable for three reasons. The first is that judges are permitted to deviate from what they think is the most rational decision. A judge could select the interpretation that they think is

46. Endicott says that "[a]n arbitrary decision in general is one that is not distinguished, by reasons in favour of it, from an unreasoned choice." Timothy Endicott, *Arbitrariness*, 27 Can. J. L. & Juris. 49, 70 (2014).

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wrong, and yet still make the correct interpretation. One would expect, and in fact prefer, that judges explain their reasoning and follow it in making decisions.[47] This, however, is not required for the Selection option. Hence, objectivism allows for some level of irrationality since a judge can decide contrary to what they think is the best-reasoned choice and still be correct. This seems at odds with objectivists' focus on rationality. Agents in some cases might be justified in abandoning their reasoned judgments. Raz explains that this might be the case when there is conflicting advice from someone with superior expertise or someone with higher institutional authority.[48] But judges on a court of the same level are equals in terms of institutional hierarchy and level of expertise. Thus, there is no reason for a judge to defer to the reasoning of other judges who disagree.

A second worry with second-order arbitrariness is that correct interpretations can be decided by chance (as long as the possible interpretation is a rational one). In *Smith*, the judges could have flipped a coin to decide what the outcome should be, and they would still be making a correct interpretation. The probabilistic nature of legal chance is hard to reconcile with the rule of law.[49] If we want predictable and stable law, one would not expect the content of law to be decided by chance, just as we would not decide who runs the government by flipping a coin (as compared to an election).[50]

Third, avoiding second-order arbitrariness is still within the cognitive competence of judges. One might think that avoiding fourth-order arbitrariness is too demanding: where there should be reasons for adopting the reason for adopting the reason for adopting the reason for choosing *p*. Unlike these higher-order levels of reasoning, it is perfectly within the cognitive capacity of judges to avoid second-order arbitrariness as this level only requires a judge to consider the various arguments for and against some

47. NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION MAKING (2002), at 88, 114–115.

48. *See generally* his work on second-order reasons. JOSEPH RAZ, PRACTICAL REASON AND NORMS (1999), at 36– 46.

49. Cases of incommensurability might be a counterexample to this: where neither is *p* better than *q* nor *q* better than *p*, nor are they equal. No comparison can be made. Grant argues that incommensurable decisions are examples of arbitrary decisions that satisfy the rule of law. In my terminology, he argues that these are cases where there is no first-order arbitrariness but there is second-order arbitrariness. However, the second-order arbitrariness of incommensurability is very different from the second-order arbitrariness of the objectivist. In the case of incommensurable values, it is logically impossible to remove the second-order arbitrariness. In the case of the objectivist, the second-order arbitrariness occurs simply because the decision-maker and someone else disagree. To use Duxbury's term, using chance in the objectivist case would be "blind" and "mindless," but it might be the case that using chance in the incommensurability case is actually a fairly reasonable way to resolve disagreement. James Grant, *The Ideals of the Rule of Law*, 37 OXFORD J. LEGAL STUD. 383, 397 (2017); DUXBURY, *supra* note 47, at ch. 4.

50. Duxbury does mention that in some circumstances chance is a good way to handle disagreement. For example, consider an egalitarian group of people who cannot decide what to do in a certain case. It seems fair in that case to decide to draw lots to decide which option to take. Handling disagreement in this way could work in the case of ties (e.g., the court is split). However, where a majority of the court reasons a certain way, it is unclear why a decision by legal chance is an option. DUXBURY, *supra* note 47, at 71.

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interpretation (the reasons for *p* or not-*p*), and decide which is the most convincing (e.g., there are good reasons for choosing the reasons for *p*). This is exactly what one would expect of a competent judge but is irrelevant on the Selection option.

D. The Indeterminacy Option

A fourth possibility for the objectivist is to say that in cases of rational disagreement, *there is no answer* as to what was intended. This is the Indeterminacy option. I start by clarifying what is meant by indeterminacy in this context and then subsequently address two reasons why this is not a plausible path.

1. Clarifying Indeterminacy

By *indeterminacy*, I mean that the *core principles* of a theory of legal interpretation cannot assign interpretations to provisions. A theory of interpretation, however, might allow *supplementary principles* to then take over and determine legal content. From now on, I will use the term *correct interpretation* to refer to content that core principles assign to text and *supplementary interpretation* to refer to the content identified by supplementary principles.[51] Indeterminacy says that there is no correct interpretation even though there still might be supplementary interpretations.[52]

Correct interpretation is used as the label for the output of core principles to indicate that core principles are *better* in some way than supplementary principles (at least for theories that do distinguish core and supplementation). I am not committed to saying that only the outputs of core principles constitute law, although certainly some scholars might think that supplementation only occurs where there are gaps in law. Instead, I am merely committed to core interpretations being ranked higher than supplementary interpretations, *by the theory itself*; otherwise there would be no reason to prioritize core before supplementation.[53]

A fairly well-known example of core and supplementary principles is the interpretation and construction distinction used by originalists.[54] The core principle of originalism stipulates that the correct interpretation of a text is

51. I am neutral on whether a theory of interpretation will always be able to supply supplementary interpretations.

52. We could distinguish between initial indeterminacy (where there is no correct interpretation but there might be supplementary interpretation) and ultimate indeterminacy (where there is no correct interpretation and no supplementary interpretation). Nevertheless, such a distinction is not necessary for the arguments I make.

53. It might be questioned whether objectivists might consider principles other than the rational standard to be a part of the core principles. This might very well be possible, but the objectivists I am targeting do not seem to do so. Hence, by objectivism in this paper I am focused on those who purely use the rational standard as core.

54. Lawrence Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 9 (2010); Randy Barnett, *Interpretation and Construction*, 34 Harv. J. L. & Pub. Pol'y 65 (2011); Keith Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999).

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its original meaning. Indeterminacy for the originalist occurs when original meaning cannot be identified or applied. In those cases, reliance on non-originalist principles must be used to determine the law (what they refer to as construction, which is an example of a supplementary principle). A core and supplementary distinction can also be applied to intentionalism, core principles being ones based on finding lawmaker intentions, whereas supplementary ones refer to nonintentionalist principles.

Soames, whom I consider an audience-objectivist, argues that indeterminacy is just a feature of law and that when it arises, a judge has to step in to rectify the law.[55] Slocum disputes that the problem of disagreement is unique to objectivists since subjectivist audiences too will use supplementary principles if the evidence is unclear.[56] Further, the *Equal Weight View* in epistemology might lend credence to Indeterminacy: when cognitive peers disagree, equal weight should be given to each peer.[57] Hence, where there is rational disagreement, judges are justified in suspending their judgment since they must take their opponents' views as seriously as their own. Some levels of indeterminacy and reliance on supplementary principles are a reality we all have to accept.

Despite all this, the Indeterminacy option is not satisfactory for two reasons: first, it results in metaphysical indeterminacy for the objectivist, and second, objectivism is still highly unstable (by this, I mean judges have to give up on their reasoning at the slightest possibility of rational disagreement). The common idea across both reasons is that the indeterminacy an objectivist faces is much worse than that of the subjectivist.

2. Metaphysical and Epistemological Indeterminacy

One response to Soames and Slocum is that they conflate *metaphysical* and *epistemological* indeterminacy. Metaphysical indeterminacy occurs if there is no answer as to what the correct interpretation of a text is. The core principles of objectivism come up empty. In contrast, epistemological indeterminacy occurs if there *is* a correct interpretation, but it is unclear what that correct interpretation is.[58] The epistemology of correct interpretation concerns how one can apply core principles to gain knowledge or beliefs about lawmaker intentions. For example, linguistic principles might function as such for linguistically minded theorists: e.g., find the most relevant interpretation, the most informative interpretation.[59]

55. Scott Soames, *Response to Chapter Ten: Comments on Rosen*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 277 (Brian Slocum ed., 2017). Goldsworthy independently, in conversation, has also raised this as a possible response to the problem of disagreement.

56. SLOCUM, *supra* note 26, at 86–88.

57. Adam Elga, *Reflection and Disagreement*, 41 NOÛS 478 (2007).

58. For debates on legal determinacy *see* Robert Lipkin, *Beyond Skepticism Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990); Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134 (1990).

59. These are derived from Grice's communicative maxims. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989), at 28.

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All theories of legal interpretation will have some amount of epistemological indeterminacy. No matter how well one follows core principles there are some cases where the intentions of the lawmaker cannot be recovered. The objectivist adopting the Indeterminacy option, however, is committed to metaphysical indeterminacy since the rational standard *is* their core principle. By building rationality into the definition of correctness itself, objectivism's inability to resolve rational disagreement entails that we cannot say what correct interpretation is. We thus end up with a theory of interpretation containing core principles of rationality that lead to no correct interpretation, despite those core principles aiming at correctness. This is a more radical conclusion than mere epistemological indeterminacy. This distinction also negates the application of the Equal Weight View as it is only meant to apply to beliefs, not reality. The fact that some peers might disagree on who Jack the Ripper was (the epistemic issue) does not entail that no one was Jack the Ripper (the metaphysical issue).

In contrast, a subjectivist can admit that there is epistemological indeterminacy but reject metaphysical indeterminacy. This is because correct interpretation occurs when one identifies the lawmakers' intentions. So metaphysically, as long as there are intentions, there is some correct interpretation; one might just not be able to identify those intentions—the epistemic issue. For example, the context might not be rich enough or the lawmaker just used the wrong words, so even following the right principles will not guarantee the identification of lawmaker intentions.

An objectivist might comment that metaphysical indeterminacy is unproblematic since supplementary principles can fill in the gaps anyway. Two natural problems with supplementation arise if metaphysical indeterminacy is widespread—which is likely to be the case given the potential for disagreement. First, if supplementation is *law creation*—indeterminacy of correct interpretation being indeterminacy of law itself—it turns out that under objectivism judges are frequently creating law (putting at risk the separation of powers). Second, as noted before, supplementary principles are considered secondary to core principles. Thus, if objectivism requires too much supplementation, it is a theory that takes supplementation as suboptimal and yet puts it center stage. It is not clear why one would be an objectivist if objectivist principles are often ignored. While it is possible for there to be normative reasons for a theory of interpretation that is reliant on supplementation, such a theory has not yet been provided by objectivists.

Hence, on certain views of law and theory construction, metaphysical indeterminacy is highly problematic. This paper has not, however, defended the above views—supplementation being law creation and a procedure that should only be used in rare cases—and so will not treat metaphysical indeterminacy as a decisive reason against objectivism, although it is certainly an important thorny issue that objectivists must address.

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Instead, a more fatal problem with indeterminacy is that it leads to what I call *instability*, which I will turn to in the next two subsections.

For those who do take metaphysical indeterminacy as important, an objectivist might still respond that indeterminacy at the point of *application* renders subjectivism equally indeterminate. For example, it might be ascertained that legislators intended for a provision to mean p but they did not think through all the effects of p. This also seems like a form of metaphysical indeterminacy since it goes to the application of legal content, and not just how we inferred that content. As a preliminary comment, it is not clear to me that intentionalism requires intentions all the way down from interpretation to application (e.g., perhaps there is a separate application theory to interpretation theory).

However, if intentions permeate everything, notice that such application indeterminacy also plagues the audience-objectivist since they too target actual legislators: if the subjectivist is unclear as to the intended application, similarly the rational audience would also realize that the actual legislators were unclear about those applications. The audience-objectivist is hit twice with indeterminacy. First when there is rational disagreement leading to indeterminacy of correct interpretation, and second when it is unclear what the intended application is (even if there is no rational disagreement about what was intended). Hence, there are two layers of metaphysical indeterminacy for the audience-objectivist, while the subjectivist only suffers from one.

The lawmaker-objectivist too suffers from application indeterminacy. Since we are using average rationality, it is unlikely that the rational lawmaker thought through all possible effects of an interpretation. Additionally, the problem of disagreement bleeds through into the application level since there might be many different applications that a rational lawmaker might have intended. For these two reasons, lawmaker-objectivists will also have two layers of indeterminacy as opposed to the one layer for the subjectivist.

3. Instability (Part 1): A Worse Type of Indeterminacy

Not everyone accepts that metaphysical indeterminacy is worse than epistemological indeterminacy. Lipkin argues that a legal system is equally "incompetent" or "illegitimate" whether the indeterminacy is metaphysical or epistemic.[60] Further as noted above, an objectivist can still offer supplementary interpretations even with metaphysical indeterminacy. The objectivist might also comment that pushing the indeterminacy into the epistemic level does not help a subjectivist in any practical sense as it is still unclear what the correct interpretation is.

60. Robert Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595, 605 (1992).

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Nevertheless, the indeterminacy of objectivism, epistemic or otherwise, is more *unstable* than any indeterminacy a subjectivist will face. I use the term *instability* to describe the fact that for the Indeterminacy option, the mere presence of rational disagreement leads to indeterminacy. This happens whether or not a judge is persuaded by one rational person's position over another's. Hence, as soon as there is any actual, or even possible, rational disagreement then there is no correct interpretation. In contrast to the Selection option, which permits a judge to depart from what they think is the most rational judgment, indeterminacy amplifies this by *forcing* judges to depart from their judgments. Again, there seems to be an odd tension between objectivism's focus on rational standards and the mandate that judges depart from their reasoned judgments.

If the objectivist wants to rely on what *they* think is on balance correct despite what anyone else thinks, then that is the Persuasion option and not the Indeterminacy option (Section II.A). The Persuasion option says that the judge gets to follow their reasoned judgments in the face of rational disagreement, but the Indeterminacy option says that where rational people disagree there is *no* correct interpretation. Further, as explained above, the Persuasion option is either a banal epistemic constraint or a metaphysical theory that still generates multiple rational interpretations.

Subjectivists do not face instability since rational people can disagree but the disagreement does not affect the correctness of an interpretation. Hence, the subjectivist can follow the interpretation they are most persuaded by since they believe it to be correct; this is unaffected by another's dissent. This is a result of the fact that one can personally assign a very high credence to some position, and can be quite justified in doing so, despite rational persons disagreeing. What follows is that a subjectivist need not even claim *epistemic* indeterminacy since they might have high confidence in their views. The subjectivist audience, once having made their all-things-considered judgments, can follow their persuasions.

Thus, the indeterminacy of objectivism is more systemic since a subjectivist is barred from following interpretations that a judge might have a high level of confidence in. This is particularly problematic since instability occurs as long as there is some *possible* alternative reasoning pathway. It is in more complex legal contexts where there will be disagreement and that is when theories of interpretation are needed most. Yet, that is when objectivism will tend to lead to indeterminacy. Instability is thus an ever-present part of the Indeterminacy option unless dealing with cases where there is no rational disagreement.

An objectivist might again invoke the Equal Weight View to say subjectivists should not be so confident about their position in the face of multiple rational interpretations. The Equal Weight View says that where equally rational people disagree, we should give the same weight to our opponents' reasoning processes as we do our own. As a result, we should have some

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epistemic humility and lower our confidence about our position; instability is just a good epistemic habit.

This would be an incorrect use of the Equal Weight View. The Equal Weight View does not lead to instability where there are more than two persons—which is the case in court decisions. Suppose that three judges are deciding a matter, two who believe *p* and one who believes not-*p*. The Equal Weight View tells us to give equal weight to the beliefs of each judge (e.g., one-third credibility to each judge).[61] If I were a judge who believed *p* there would be no reason for me to suspend judgment according to the Equal Weight View (since two-thirds of the court supports *p*), but that is what is required by the Indeterminacy option.

Further, the Equal Weight View is not intended to lead to instability in the context of complex issues such as the right political, moral, and legal theories (or at least is much less persuasive in these cases). Elga, one of the main proponents of the Equal Weight View, argues that it does not lead to "spineless" agents who suspend judgment whenever there is disagreement.[62] The reason is that it is often unclear who your peers are in multidimensional issues.[63] As an example, I would hope that this paper would lead an objectivist peer to have less confidence in their views, but that does not mean that both the peer and I should give up on having strong opinions on the matter.

Even if the Equal Weight View did generate epistemological indeterminacy, this would not aid the objectivist. The instability of the Indeterminacy option leads to *both* metaphysical and epistemological indeterminacy. The rational lawmaker/audience standard leads to metaphysical indeterminacy and the Equal Weight View, as my hypothetical objectivist wishes to use it, leads to epistemological indeterminacy. Nonetheless, for the reasons previously given in Section II.D.2, a subjectivist will only suffer from epistemological indeterminacy generated by the Equal Weight View, but not metaphysical indeterminacy. Thus, subjectivism still ends up with more certainty.

4. Instability (Part 2): Undermining the Normative Motivations of Objectivism

Epistemic debates aside, instability also causes normative problems for objectivism. *First* the resulting indeterminacy is at odds with the normative motivations for the rational person standard. Recall that a lawmaker-objectivist is motivated by pluralism of possible lawmaker intentions. As it turns out the Indeterminacy option provides the opposite result—there is often *no* answer as to what a rational lawmaker intended. If anything, the lawmaker-objectivist is forced to embrace the Acceptance option if

61. Elga, *supra* note 57, at 484–485, 494. For an application of this to criminal law, credences, and courts, *see* Lee Youngjae, *Reasonable Doubt and Disagreement*, 23 LEGAL THEORY 203 (2017).
62. Elga, *supra* note 57, at 492
63. *Id.* at 492–493.

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pluralism is their main concern. On the other hand, the audience-objectivist—just like the subjectivist—aims at recovering actual lawmaker intentions due to concerns of legitimacy, although the objectivist balances this with what is epistemically accessible. Nonetheless, instability prevents an objectivist judge from adopting an interpretation they are absolutely confident (or persuaded) was intended by the actual lawmaker given the readily accessible evidence before them.

Further, the objectivist is motivated to endorse rational audience inferences and rational lawmaker intentions because they are epistemically permissive (which also complements the rule-of-law and pluralism motivations): the rational standard is supposed to allow for average inferences that are "good enough," even if we haven't identified what the actual lawmaker intended or the best normative reading of a legal text. But it turns out instability causes the rational standard to be highly restrictive: it removes all interpretations that are subject to rational disagreement since there is only correct interpretation where everyone agrees. Given how intractable instability is from the rational standard, the Indeterminacy option is actually even more restrictive than subjectivism.

This is more than just a characterization of objectivism as an impure theory heavily reliant on supplementation. A highly impure theory would be defensible if the implementation of core principles was normatively ideal, but practically difficult. For example, actual lawmaker intentions are ideal in subjectivism for reasons of legitimacy, but suppose it turns out to be quite hard to identify what the lawmakers thought. This difficulty does not lessen the normative attraction of real lawmaker intent; it is simply an empirical obstacle. The issue with the Indeterminacy option is that its core principle itself—there is only correct interpretation where there is no rational disagreement—is antithetical to the underlying motivations of objectivism (for the reasons discussed above).

A *second* normative problem with instability is that it makes it harder to minimize supplementation compared to subjectivism. A theory that can comparatively minimize supplementation is better off since the core-supplementary distinction presupposes that core principles are prioritized over the supplementary. The reason for this prioritization will likely come down to the normative underpinnings of the theory. Thus, the more that core principles can be used, the more the underlying normative objectives are satisfied.

The problem is that instability is inescapable for the objectivist but is not an issue for the subjectivist. An agent with average rationality has been defined as an agent that makes mistakes. Since these mistakes might occur at different parts of the reasoning process, the inferences made will differ. Suppose that we are dealing with a reasoning process that is not simple (as many issues of interpretation are not). Further, suppose that there is a sequence of true premises leading to conclusion *A* and another sequence leading to conclusion *B*, and so a perfect agent should infer *A* & *B*. Since we

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are dealing with average agents, some might derive *A* but not *B*, while others might conclude the opposite. As long as we allow mistakes, different conclusions can be arrived at. Additionally, as highlighted above, the disagreement need not be actual, there simply has to be some possible rational person that disagrees. Rational disagreement is thus inescapable unless we cordon off mistakes to certain parts of the reasoning process, but this seems unmotivated. If rational disagreement is inescapable, at least with nonstraightforward interpretations, then so is indeterminacy.

In contrast, subjectivism can avoid supplementation both theoretically and practically. Theoretically, actual lawmaker intentions can be discovered if lawmakers keep clear records of every reason and intended legal effect behind the words of a legal text. Practically, the subjectivist can make realistic recommendations to avoid supplementation, at least for statutory interpretation. For example, perhaps drafters need to keep all drafts of bills and a record of all discussions. Explanatory memoranda and bill digests should become more extensive and have a more prominent role in statutory interpretation. Additionally, parliament could provide more specific paradigm applications of the provisions they enact. None of these seem practically infeasible. What is practically infeasible is the end of any rational disagreement about law.

Even if objectivism and subjectivism equally use supplementation in the actual world, all else being equal, a theory is better if it can minimize supplementation in more possible worlds. There are several reasons for this. The first is that there is a certain *robustness* to the theory: the theory can apply its core principles in a larger range of scenarios. This is normatively desirable because the more correct interpretations it can identify over a large range of scenarios, the more the underlying normative justifications of the theory can potentially be met. Further, as explained above, these scenarios are not entirely hypothetical; there are practical steps that can be taken to actualize them—as opposed to the nonrobust objectivist. Hence, subjectivism becomes a more realistic theory as well. Additionally, there is reason to think that the robustness of a theory itself is a theoretical desideratum: one would think that a theory of interpretation that only functioned well for insurance statutes would be comparatively worse than a theory that functioned equally well but for a wider range of statutes. Perhaps the objectivist might dig in and say that nothing "possible" counts, not even practical possibilities. Nonetheless, at the very least we can say that if objectivism and subjectivism are equally bad in the actual world (for not satisfying core principles), subjectivism has the *potential* to be a better theory. When combined with all the other issues with the Indeterminacy option, subjectivism should be seen in a much better light.

E. Concession: Could an Objectivist Live with Disagreement?

An objectivist could concede the above arguments but claim that the concerns are overrated by arguing that legal disagreement rarely occurs. So

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even if the options above are problematic, it is only rarely so. Leiter has conjectured that there is much agreement on the majority of legal cases that do not go to a superior court.[64] First, even if Leiter is correct, the point here is a *comparative* one: the objectivist has to face this problem whereas the subjectivist does not. Second, and more important, it is in controversial appeal cases with much disagreement where theories of legal interpretation are the most important. However, in turns out that it is in these complicated cases, when theories of interpretation are needed most, that objectivism fails.

III. PERFECT RATIONALITY: THE UNIQUENESS THESIS AND ITS FAILURE

The arguments in this paper so far rely on the existence of rational disagreement with average rational persons. However, some epistemologists subscribe to the *Uniqueness Thesis* (I shall refer to this as uniqueness), which denies that fully epistemically rational agents disagree. The intuition is that perfect reasoners do not make mistakes, thus when presented with the same evidence they should reason the same way: "There is just one rationally permissible doxastic attitude one can take, given a particular body of evidence [for fully epistemically rational agents]."[65] A *doxastic attitude* is generally defined as a belief, disbelief, suspension of belief, or other belief-like attitude.[66] Uniqueness says that fully epistemically rational agents will always reach the same belief (or set of beliefs) given the same body of evidence.[67] Hence disagreement will not occur. For terminological simplicity I shall henceforth refer to fully rational epistemic agents as *fully* or *perfectly rational agents*.[68]

64. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. Chi. L. Rev. 1215, 1230–1232 (2009).

65. Roger White, *Evidence Cannot Be Permissive*, *in* Contemporary Debates in Epistemology 312 (Matthias Steup, John Turri & Ernest Sosa eds., 2d ed. 2013); *see also* Christopher Meacham, *Impermissive Bayesianism*, 79 Erkenntnis 1185, 1193 (2014).

I should add that this has nothing to do with Dworkin's Right Answer Thesis (RAT). The RAT is about the metaphysics of law. All legal propositions are either true or false. In fact, subjectivism is sympathetic to RAT since there is always a correct interpretation—the interpretation the real lawmakers intended. Uniqueness is about epistemology. It simply states that fully rational agents will agree with each other. It does not guarantee that legal propositions are either true or false. Ronald Dworkin, A Matter of Principle (1986), at ch. 5.

66. Tjerk Gauderis, *On Theoretical and Practical Doxastic Attitudes*, 5 Logos & Episteme 425, 425–426 (2014).

67. In this paper, I assume a binary model of belief where the two doxastic attitudes to a proposition are either "believe p" or "disbelieve p." If one subscribes to a graded model then the doxastic attitude might be the belief in a hypothesis with 0–1 probability (sometimes called a credence). *See generally* David Christensen, Putting Logic in Its Place: Formal Constraints on Rational Belief (2004).

68. For a more concrete example of the fully rational agent, Horgan and Timmons characterize Michael Smith and Bernard Williams as defining a fully rational agent as one who (a) does not have false beliefs, (b) has relevant true beliefs, and (c) deliberates correctly. *See* Horgan & Timmons, *supra* note 37, at 205.

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The objectivist might thus modify their definition of correctness to impose a standard of perfect rationality: an interpretation is only correct when intended by the fully rational lawmaker or inferred by the fully rational audience. If uniqueness is true there will be no inconsistency of interpretations, since a fully rational agent will not assign *p* while another assigns not-*p*. Arbitrariness and indeterminacy seemingly[69] go away since the fully rational audience and lawmaker will always converge on the intended interpretation.

Many object to uniqueness[70] but I shall not criticize the thesis here. Instead, I argue that even if true, uniqueness does not save objectivism. First, uniqueness does not prevent more than one rational interpretation from arising. Second, it is hard to fix the evidence for objectivism since objectivists posit hypothetical speakers and audiences. Third, and crucially, the concept of the fully rational agent undermines any motivations or normative justifications for adopting objectivism in the first place.

A. The Problem with Equally Rational Interpretations

Uniqueness does not guarantee a single interpretation; it only ensures that two fully rational agents who have the same evidence will not disagree. Being uncertain (i.e., suspending judgment) is itself a doxastic attitude;[71] hence, uniqueness does not prevent uncertainty. For example, provide a badly written legal provision to a fully rational agent, and the agent will still be uncertain as to the intentions behind it. Hence, it is a possibility that any fully rational agent will take multiple interpretations as equally rational (or at least as being indeterminate as to the correct intentions). If these candidate interpretations are significantly different, the problems of the Acceptance, Selection, and Indeterminacy options arise even in the absence of disagreement.

The objectivist might retort that the subjectivist similarly would not be able to tell the difference (given that the fully rational agent cannot). The subjectivist with the same evidence as the fully rational agent would be stuck with the same options. Nevertheless, the subjectivist is still not committed to overdetermination, arbitrariness, or indeterminacy being a part of the metaphysics of correct interpretation. The subjectivist can put it down

69. I show in Section III.A that they reemerge in another form.

70. Thomas Kelly, *How to Be an Epistemic Permissivist*, *in* CONTEMPORARY DEBATES IN EPISTEMOLOGY 298 (Matthias Steup, John Turri & Ernest Sosa eds., 2d ed. 2013); Gideon Rosen, *Nominalism, Naturalism, Epistemic Relativism*, 35 NOÛS 69 (2001); Anthony Brueckner & Alex Bundy, *On "Epistemic Permissiveness"*, 188 SYNTHESE 165 (2012). There are also metaethicists who dispute uniqueness in regard to moral disagreement. *See* Horgan & Timmons, *supra* note 37, at 209–213.

71. Jane Friendman, *Why Suspend Judging?*, 51 NOÛS 302, 303 (2017). Alternatively, if the reader takes uncertainty to be the *lack* of an attitude then the Uniqueness Thesis must be modified to allow for this. For example, it cannot be the case that if the fully rational agent only knew that two types of animals existed—cats and dogs—that the agent would be able to know if evolution is true or false. The Uniqueness Thesis must surely allow that the agent would be able to have a lack of a doxastic attitude (assuming the reader does not take uncertainty itself to be a doxastic attitude).

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to the limited evidence presented. The objectivist will have to say that their core principles are intrinsically overdetermined, arbitrary, or indeterminate since the definition of correctness itself is premised on rationality. For those who do not find metaphysical indeterminacy troubling, the next two problems still pose serious hurdles for the objectivist.

B. Problem of Evidence

Uniqueness applies when a specific piece (or set) of evidence is presented to the fully rational agent. Supporters of uniqueness accept that if fully rational agents were given different sets of evidence then difference inferences would follow. Hence, to avoid the proliferation of rational interpretations, the objectivist needs to ensure that the evidence is fixed. This turns out to be hard to do for objectivists due to the hypothetical persons that they posit.

1. Lawmaker-Objectivist Evidence

For an intentionalist, evidence of lawmakers' intentions, actual or hypothetical, would surely include the background beliefs, features, and dispositions of the lawmakers. Knowing whether a lawmaker intended to be harsh on crime would require evidence of the lawmaker's general beliefs about crime or dispositions toward criminals. For a lawmaker-objectivist the evidence is impossible to fix since the lawmaker is hypothetical; hypothetical agents have no real beliefs, features, or dispositions.

The lawmaker-objectivist will have to rely on some counterfactual test: e.g., based on a fully rational agent with these features, they would believe such and such. But there is no defining way of deciding what beliefs, features, or dispositions the entirely hypothetical lawmaker should have. Further, even if we did fix *some* features—e.g., the highly intelligent politician making a law about immigration—it is still unlikely that these features would precisely determine the background belief, features, or dispositions needed to identify lawmaker intentions. An intelligent politician might believe a myriad of different things about immigration, which would affect their lawmaking intentions.[72] Because we cannot precisely fix the evidence, the problem of disagreement resurfaces: fictional rational lawmakers, even

72. For a more detailed examination of the problem of vagueness and indeterminacy in counterfactual intentions *see* Natalie Stoljar, *Counterfactuals in Intentionalism: The Case Against Intentionalism*, 20 Adelaide L. Rev. 29 (1998); Ronald Dworkin, Law's Empire (1986), at 325–327.

Stoljar also argues that an intentionalist theory that does not rely on counterfactuals would be thin. Stoljar, *supra* at 30. I shall not comment on this as it seems to be a variant of the criticism on the possibility of lawmaker intentions, which is not examined in this paper (for reasons given in the introduction). Dworkin argues that intentionalists need a counterfactual theory because individual lawmakers have too many mental states. Dworkin, *supra* at 322–324. It seems to me that this worry is overblown as we can isolate the intentions of the lawmakers in terms of how they want the law to change (in Dworkin's terminology, what they *hope* the law will be). Dworkin criticizes such a move, stating that lawmakers' "hopes very often do them no credit"; for example, suppose that most legislators in parliament want the law to change in a certain way that pleases their friends and lobbyists. *Id.* at 323. I do not see this as a problem; intentionalists readily accept that lawmakers might hope for immoral or selfish consequences.

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if fully rational, would intend different things if they started with different background beliefs about what is desirable or not.

The lawmaker-objectivist might retort with a seemingly simple solution: give the actual beliefs of the actual lawmaker to the fully rational agent. However, actual beliefs would include irrational beliefs that the real lawmaker might have. Faulty premises lead to faulty conclusions, even if the reasoning from premises to conclusion is perfect. Consider a legislative provision that requires persons who are "undesirable" to be deported, where it is also quite clear that the parliament thinks musicians are undesirable and the country is better off without them, and this law is intended to target them. For our purposes, suppose that the standard of rationality is what the fully rational lawmaker thinks is best for the country. If the fully rational lawmaker has to take as a premise the undesirability of musicians and that it is best for the country that undesirables be deported, then it follows that musicians should be deported. If the premises here are true, the deportation of musicians is rationally inferred. Nevertheless, the ultimate conclusion is not sound due to the false premises. Taking irrational beliefs as part of the context undermines the entire reasoning of objectivism: the fully rational agent still ends up making unsound conclusions.[73]

It might be commented that subjectivists too will have to accept the irrationality of the lawmakers. However, this is internally consistent for subjectivism since the subjectivist is not the one imposing rationality on the lawmaker. It is the lawmaker-objectivist who does so. The whole point of subjectivism, see motivations in Section I.C, is to follow the exact intentions of the lawmakers. While accepting irrationality might make the normative foundations of subjectivism slightly less attractive (at least to some scholars), subjectivism's methodology is still consistent. However, accepting irrational beliefs in order to impose a rational standard for correct interpretation would render the objectivist's methodology incoherent. Methodological incoherence is far more problematic than mere normative undesirability since a methodologically unsound theory cannot even do what it was meant to do.

A further lawmaker-objectivist solution might be to take the real beliefs of the real lawmakers then remove any irrational beliefs. In some cases, this would lead back to hypothetical beliefs because irrational beliefs may be the only context for a provision. Suppose that in the migration case, the term "undesirable" was entirely shaped by the lawmakers' hatred of musicians. Removing this context would leave no other clues as to what should constrain the very broad language of the term "undesirable." Thus, there is no evidence either the fully rational lawmaker or the lawmaker-objectivist would have to create hypothetical beliefs. In other cases, the removal of irrational beliefs

73. GERALD GAUS, ON PHILOSOPHY, POLITICS, AND ECONOMICS (2007), at 10. A response might be that an objectivist is purely concerned with perfect inference and not concerned with the ultimate soundness of the argument. I do not think any real lawmaker-objectivist would subscribe to this.

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might lead to an interpretation purified of any of the actual motivations behind the law, thus straying too far from reality. The problem with this is that lawmaker-objectivists still want interpretations to be constrained and not entirely left to the whims of the fully rational person (see Section I.C).[74] One of the motivations for positing a rational lawmaker—as opposed to applying norms directly—was to keep judges grounded in the actual statute and avoid entirely re-creating it. Removing irrational beliefs from the context will undermine these commitments of the lawmaker-objectivist.

A lawmaker-objectivist might question how frequently such irrationality occurs; if lawmakers are rarely irrational then providing actual beliefs to the fully rational agent would work most of the time. The frequency is irrelevant because subjectivist methodology is never rendered incoherent by a lack of lawmaker rationality. Therefore, even if lawmakers are rarely irrational, lawmaker-objectivist methodology is still more susceptible to incoherence than subjectivism. Thus in comparison subjectivism is still a better theory.

2. Audience-Objectivist Evidence

While the audience-objectivist does not need a hypothetical lawmaker, their hypothetical audience also raises issues, at least on standard views of *linguistic context*. Recall that audience-objectivists think of legal texts primarily as communicative devices and, from a communicative perspective, the evidence of communicative intentions is the relevant linguistic context. What I mean by this is that an audience tries to recover communicative intentions by looking for clues in the linguistic context along with the utterance.

The two most popular views of linguistic context are context as the *perspective* of the speaker, or context as the *common beliefs* of both speaker and audience.[75] The perspectival view avoids the issue of the hypothetical audience since only the speaker is involved, but Stalnaker rightly comments that this conception of context is too broad (at least for intersubjective communication).[76] In my room at the moment, there are black splashes of dirt on the wall. Construction work is happening outside. It does not seem that these facts of the world, despite falling within my perspective, were relevant to any part of my argument before I mentioned those facts.

The most popular alternative, *the common belief model*, takes into account the beliefs that both speaker *and audience* have in common.[77] These include

74. Justice Barak explicitly says that the correct interpretation must still be balanced by actual intentions. Barak, *A Judge on Judging*, *supra* note 4, at 66–67. Justice Breyer notes that a judge is still restrained and cannot choose interpretations that they personally think are the most just. Breyer, *supra* note 4, at 17–20.

75. For a general overview *see* Robert Stalnaker, Context (2014). The perspectival view is called the centered-possible worlds view in philosophy of language. However, the point of centered-possible worlds is generally to represent the perspective of speakers. To avoid wading into the technicalities and terminology of philosophy of language I have called it the perspectival view. Shen Yi Liao, *What Are Centred Worlds?*, 62 Phil. Q. 294, 297 (2012).

76. Stalnaker, *supra* note 75, at 24. *See also* Michael Tomasello, Origins of Human Communication (2010), at 3–6.

77. Robert Stalnaker, *Common Ground*, 25 Linguistics & Phil. 701, 701–702 (2002).

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commonly held social norms or manifestly evident features of the communicative act.[78] One way to explain the common belief model is that speaker beliefs are only relevant insofar as the audience is also aware of, and can ascertain, them. Hidden beliefs that only the speaker knows cannot possibly be part of the linguistic context—by definition the audience cannot use them as evidence to recover communicative intentions. A part of how common beliefs narrow context is that they remove these hidden beliefs.[79] Further, it is likely that these common beliefs would be used by the speaker in deciding how to frame their utterance, since the speaker would not expect an audience to know their own hidden beliefs. Thus, defensible theories of linguistic context must reference audience beliefs in some sense to at least identify what is accessible to the audience.

Given how important audience beliefs are, the fact that an audience-objectivist posits a hypothetical audience then raises the same counterfactual problems discussed in the preceding section. The option of using the real beliefs of the actual audience is not open to the audience-objectivist, as there is a multitude of actual audiences for any given statute. There is no one piece of "real" audience beliefs that can be fixed as evidence. Thus, the audience-objectivist cannot fix linguistic context or evidence either.

Admittedly there is a genuine problem with context in general where there are multiple audiences. Since legal texts are directed at multiple people, it is not clear whose beliefs are relevant for a subjectivist either. I propose, although it is not necessary for this paper, that the solution will have something to do with what the speakers *expect* the audience will know or believe. Regardless of the solution, there is some danger of linguistic context not being fixed for a subjectivist either due to multiple audiences. However, the lack of fixed evidence is not a problem for the subjectivist since they can accept that there might be epistemological disagreements about the right standards of evidence. This does not lead to indeterminacy since the subjectivist can still be persuaded that something was intended despite disagreement, and disagreements about the appropriate evidence do not affect the correctness of interpretation (as explained in my discussion of instability in Sections II.D.3–4). It is the objectivist who has to fix the evidence in order for uniqueness to work; otherwise the problem of disagreement arises.

C. Tension with Motivational Bases

The most problematic issue with the fully rational agent is that it is idealized to the point that it becomes useless. Enoch points out that the use of

78. *Id.*

79. Hidden beliefs might very well be relevant from the perspective of *total epistemic access*—God's viewpoint—of what is being communicated (at the metaphysical level). However, in cases of *partial epistemic access*—the evidence available to audience members—hidden beliefs are not relevant (at the epistemic level).

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idealizations must be justified and is not always relevant.[80] Conceptualizing the purest water imaginable is not pertinent to debates about water distribution in the real world. The same question can be posed here: What is the point of knowing that there is some *theoretical* agent that could work out the correct interpretation? I argue that these idealizations are in tension with the motivations for objectivism proposed in Section I.C. Additionally, in general there are no attractive legal motivations for a fully rational agent.

In Section I.C, I suggested that the audience-objectivist was likely motivated to decrease the epistemic burden on audiences and to track ordinary meaning. For the lawmaker-objectivist the benefit might be to allow for a plurality of interpretations and to constrain judges from departing too far from the reality of what lawmakers were concerned about. The fully rational agent jeopardizes these motivations.

Consider the audience-objectivist. First, the fully rational audience sets as high an epistemic standard as that of the subjectivist. The *fully rational agent* is some ideal reasoner who can perfectly follow all the rules of some epistemic logic. People are not perfect computational machines who make no mistakes when making inferences. Hence, the audience-objectivist loses any epistemic advantage it had over subjectivism. Second, when we use the concept of a fully rational audience we also give up on capturing ordinary meaning. What the fully rational agent will infer is not always what the ordinary person would infer. There is after all a large literature on biases that creep into the reasoning heuristics ordinary people use, which a perfect reasoner would not be susceptible to.[81]

For the lawmaker-objectivist, a motivation for using the rational lawmaker was to ground the judge in reality. However, the fully rational lawmaker is not just the average intelligent lawmaker. They are more akin to the sophisticated economist with complicated mathematical models, in Section I.C, which the lawmaker-objectivist would like to avoid. A second motivation was to allow pluralism, but the fully rational lawmaker reduces pluralism since perfect reasoners do not disagree on matters. Lawmaker-objectivists might argue that reducing pluralism in this manner is acceptable as only pluralism at the fully rational agent level is permissible. If ideal reasoners cannot come to a unique solution to policy problems, then any remaining

80. David Enoch, *Why Idealize?*, 115 Ethics 759 (2005); David Enoch, *Against Public Reason*, *in* 1 Oxford Studies in Political Philosophy 120 (David Sobel, Peter Vallentyne & Steven Wall eds., 2011). Enoch goes further and argues that ideal persons never tell us anything about norms. I am not committed to that in this paper.

81. The most well-known paper being Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974). It should be noted that some argue that reasoning with biases is actually more accurate than unbiased reasoning. Gerg Gigerenzer & Henry Brighton, *Why Biased Minds Make Better Inferences*, 1 Topics Cognitive Sci. 107 (2009). It does not matter for my argument whether average or perfect rationality is more accurate; what matters is that they are *different* and that average rationality can lead to different conclusions whereas perfect rationality might not. Both sides of the heuristic bias debate accept a difference between the levels of rationality.

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solutions are fine—these are *genuine* cases of pluralism. Nonetheless, we are not perfect reasoners and thus are unable to detect genuine cases of pluralism. But if we cannot identify genuine pluralism then it becomes unclear why we should use a hypothetical standard of a *perfect* person rather than just apply normative values directly.

Not only do existing motivations for objectivism conflict with positing fully rational agents, but there also do not seem to be any motivations that could make a standard of perfection attractive. There are two problems with imposing perfect rationality as a standard of correct interpretation. First, judges, while highly intelligent, are not perfect and so in many cases will be reasoning imperfectly. Making the correctness of an interpretation depend on perfect reasoning thus imposes an onerous and impractical burden on judges. Second, it is unclear what legal norms would ever support such a theory of correctness. Ideals of the rule of law, justice, legitimacy, human rights, and other values do not require the judiciary to be superhuman. Hence, there is also unlikely to be any normative justification for such a standard. Conversely, requiring that correct interpretations of law be based on perfect reasoning is antithetical to rule-of-law values such as transparency and predictability as the correct interpretation of law will not be easy for the average citizen to understand.

Uniqueness thus gets the objectivist out of the problem of disagreement but leaves objectivism ungrounded from any coherent normative justification.

IV. DEFENDING SUBJECTIVISM

I now defend subjectivism against two objections unique to it (i.e., they do not apply to objectivists): the fact that any text can communicate any interpretation (the Humpty Dumpty problem), and the possibility that we can never find out what was intended (the Accessibility problem). As I am only comparing intentionalist theories, I do not address general objections against intentionalism.

A. The Humpty Dumpty Problem

One problem with subjectivism is what some call *Humpty Dumpty* meaning or communication.[82] This is the notion that a speaker can use any words

82. The first use of the phrase "Humpty Dumpty" as an attack on certain views in the philosophy of language—that I could find—was in Alfred MacKay, *Mr. Donnellan and Humpty Dumpty on Referring*, 77 PHIL. REV. 197 (1968). Asgeirsson, Slocum, and Goldsworthy have discussed it more recently in the law and language literature. SLOCUM, *supra* note 26, at 68; Asgeirsson, *Expected Applications*, *supra* note 1, at 120 n.20; Goldsworthy, *supra* note 1, at 178.

Both Goldsworthy and Slocum use Humpty Dumpty as a critique of subjectivists whereas Asgeirsson points out that sophisticated subjectivists have to introduce constraints to avoid Humpty Dumpty problems. As shall be seen I reject both of these views by stating that communication is, in fact, Humpty Dumpty–like in nature and that this is not unintuitive even without constraints.

The phrase Humpty Dumpty is a reference to Lewis Carroll's version of Humpty Dumpty: "'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'" LEWIS CARROLL, THROUGH THE LOOKING GLASS (1871) (ebook), at ch. 6.

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to communicate any interpretation they want. For example, a speaker might use the words "petting cats is fun" to communicate that *eating vegetables is healthy*. Subjectivism entails that an audience who interpreted the statement as *eating vegetables is healthy* would be correct in doing so. Similarly, in law, a lawmaker might intend for the words in a statute to have a very different meaning from what they normally do.

My response is to concede this, but I don't think this is really a bullet to bite. On my preferred version of subjectivism, legal provisions are used to *communicate* messages or thoughts (or whatever notion of communicative content the reader prefers). It is intuitive to think that communication is about message transference. Let's say I want the reader of this paper to believe that I really like Dr. Who. How should I do this? Well, I use the words "I really like Dr. Who" to hopefully cause the reader to believe that *I really like Dr. Who*. If the reader recovers that message, then they have assigned the correct interpretation. Otherwise, they have an incorrect interpretation because communication fails.

If communication (and by extension statutory and constitutional communication) is about message transference, it follows that it is the message that is of primary importance while words or texts are only instrumentally important.[83] Words or texts are just methods of *representing* or *coding* a message. In a community, words often have a conventional interpretation, for example, "dog" in English is typically taken as referring to dogs. Nevertheless, we can use words in atypical ways to communicate as well: e.g., "What's up dog" is meant to ask how the audience is doing rather than indicating that the speaker is talking to an actual dog.[84] This shows that words are not the end goal of the picture; it is recovery of the intended message.[85] Words

83. Greenberg has argued that statutes should not be viewed as mere pieces of communication. Greenberg, *supra* note 1. As this article is only addressing other intentionalists, I shall put aside attacks by nonstandard picture theorists such as Greenberg.

84. For more details on this, see how linguists deal with semantics and pragmatics. Semantics Versus Pragmatics (Zoltan Gendler Szabo ed., 2005).

85. See Donald Davidson's comments that conventions of language are not necessary for communication:

> Knowledge of the conventions of language is thus a practical crutch to interpretation, a crutch we cannot in practice afford to do without—but a crutch which, under optimum conditions for communication, we can in the end throw away, and could in theory have done without from the start.
>
> The fact that radical interpretation is so commonplace—the fact, that is, that we use our standard method of interpretation only as a useful starting point in understanding a speaker—is hidden from us by many things, foremost among them being that syntax is so much more social than semantics.
>
> . . .
>
> In conclusion, then, I want to urge that linguistic communication does not require, though it very often makes use of, rule-governed repetition; and in that case, convention does not explain what linguistic communication is, though it may describe a common feature.

Donald Davidson, *Communication and Convention*, 59 Synthese 3, 16 (1984).

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and text are only useful as a *medium* through which we try to communicate messages.[86]

There several reasons to think that Humpty Dumpty–ism is actually an intuitive notion of communication (and by extension subjectivism). First, it is possible to *not* use any words at all and still be able to communicate. Consider Grice's example of King Herod presenting the head of John the Baptist to Salome as creating the effect of Salome believing that Herod had executed John the Baptist.[87] Grice doesn't think it would be right to say "the action of showing the head of John the Baptist" *means* that John the Baptist has been executed. However, I don't see any reason why it would be infelicitous here to say "the action of showing the head of John the Baptist" *communicates* that John the Baptist has been executed. Alternatively think about people raising their hands to communicate that they are surrendering, or me putting my hand on my stomach to indicate to a lunch partner that I am too full for dessert. There is an insufficient pattern among these actions—unlike sign language—to truly say that these actions constitute a language. Yet they can still cause people to form attitudes toward interpretations. The fact that we can engage in communication even without a language goes to show that words are *not* intrinsically important to communication.

Second, there is linguistic evidence that shows that Humpty Dumpty communication is a standard part of language. Consider the notion of *implicatures* discussed by linguists (I shall not explore the details of implicatures here; suffice it to say they can be thought of as linguistic implications):[88]

> Question: What time is it?
> Answer: Bus 900 just went by.
> Context: Bus 900 always stops at this location at 8 a.m.
> Implicature: It is 8 a.m.

In the above example, the statement "Bus 900 just went by" is taken to implicate that it is 8 a.m.[89] Nevertheless, the implicature that it is 8 a.m. is nothing like the words: "Bus 900 just went by." Yet we take the implicature

86. In essence, legal interpretation is a kind of mind-reading exercise. However, rather than taking this as controversial I agree with Noel Carroll when he says, "mind reading is indispensable to human life; it makes co-ordination of our activities possible . . . the everyday interpretation of the words and deeds of our conspecifics aims at the retrieval of what is going on in the minds of others . . . our mind-reading capacities are very reliable . . . in general we are extremely good at discerning the intentions, beliefs desires, thought processes, and so on of others." Carroll, *supra* note 37, at 127. In fact, there is a whole study in cognitive science and philosophy of mind on how humans can seem to be mind readers as is required in social life. *See* THEORIES OF THEORIES OF MIND (Peter Carruthers & Peter Smith eds., 1996).

87. GRICE, *supra* note 59, at 218.

88. *Id.* at 26.

89. Example taken from JACOB MEY, PRAGMATICS: AN INTRODUCTION (1993), at 40.

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to be communicated. In essence, implicatures are commonly accepted instances of Humpty Dumpty communication.[90]

Last, it is unlikely that Humpty Dumpty–ism would occur with any frequency. In reality, to properly communicate people will often try to use words in the same way that others do. This is especially the case in law where groups of drafters, lawyers, and politicians oversee legislation being passed. Hence, on a subjectivists' point of view, ordinary meaning is a major aspect of communication. In most cases, the ordinary meaning of words will converge with the lawmakers' intended content. Sometimes mistakes happen, and in those cases, we defer to the lawmakers' intended interpretation over the ordinary meaning.[91] Nonetheless, it is epistemically useful to first presume that the ordinary meaning is intended.[92]

B. The Accessibility Problem

Another worry about subjectivism is that the intended interpretation is not always transparent.[93] Recall that this paper assumes that a lawmaking body can have intentions and thoughts. Nevertheless, even with this assumption, it is not always clear what the innermost thoughts of other people are.

First, I have already stated that if objectivists have to rely on the fully rational agent then they have an equally burdensome theory (Section III.C). It is hard to know what other people are thinking, but it is also hard (perhaps harder) to know what some idealized fully rational agent is thinking. Second, this critique conflates the *epistemology* and *metaphysics* of correct interpretation. At risk of repetition, subjectivism splits apart the metaphysical question of what constitutes correct interpretation from the epistemological question of how to determine what was intended. Subjectivists do not think that these epistemic standards should affect what constitutes successful communication or correct interpretation.

90. There might be some remaining worries with subjectivism as it might license *guessing* what was communicated. Suppose some bystander by pure luck guessed that "Petting cats is fun" was used to communicate *eating vegetables is healthy*. Should we consider communication as having successfully occurred and thus conclude that the audience has the correct interpretation? These worries should be lessened by noting that an audience member who guesses the intended interpretation is still trying to figure out what was being communicated. They are still trying to make an effort at recovering the speaker's communicative intentions. Guessing without any basis is bad because it is a *defective* method of trying to infer the intended interpretation, but that is an issue for the epistemology of communication. Subjectivism is a theory of what *constitutes* communication and is not about the *epistemology* of communication. Hence, it seems to me that guessing does not affect whether an interpretation is correct or incorrect.

91. Questions might be raised as to how this would operate in cases of technical language. I propose that ordinary meaning is contextual. The ordinary meaning of "contract" in a pub will be different from the ordinary meaning of "contract" in a law lecture. When people refer to technical language they just mean the ordinary meaning of a text in the context of some specialized group of people.

92. See similar point in Richard Kay, although he doesn't make the metaphysical-epistemic distinction. Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. L. Rev. 703, 712 (2009). *See also* James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of 'Original Intent'*, 6 Legal Theory 109, 111 (2000).

93. *See* Slocum, *supra* note 26, at 68; Goldsworthy, *supra* note 1, at 178.

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As an analogy, consider the correspondence theory of truth. On this account of truth, a proposition is true where the event that the proposition describes *actually* occurred in the world. It is not a criticism of correspondence theories that sometimes we can't figure out whether the described events occurred or not. Consider the proposition "On the 23rd of February 1960 at 3 p.m. my father was thinking about cats." There is no way I can identify the mental state of my father on that day at that time. Nevertheless, this does not entail that there is no answer as to whether that proposition is true or false. In a similar fashion, just because it is sometimes impossible to figure out the intentions of the speaker does not mean that there is no truth as to whether something was or was not communicated.[94]

V. CLOSING REMARKS: RATIONALITY AND LEGAL DOCTRINE

In summary, objectivist theories are problematic as they use tests of rationality, which break down in the face of rational disagreement. Where rational disagreement is present, objectivists are forced to either accept all rational interpretations as correct, select one as correct, or declare the law to be indeterminate. The first option leads to inconsistency. The second option leads to arbitrariness. The third option leads to instability where the law immediately becomes indeterminate simply because of disagreement. None of these options seem feasible. The objectivist cannot just accept rational disagreement and ask a judge to choose the interpretation they are persuaded by; this would be either a banal epistemic theory or a theory of correctness that still generates multiple conflicting interpretations.

In closing, I would like to comment that the arguments here do not apply to reasonableness or rationality tests outside of interpretation (for example negligence and criminal law). *First*, in legal interpretation, reasonableness and rationality are used to *identify* legal doctrine. In torts and criminal law, reasonableness *itself* is the legal doctrine. If there is disagreement as to what should have been reasonably foreseen in a torts case, it is possible for the judge to just state that there is no negligence. There is still a legal outcome: the plaintiff fails to win their suit. In essence, it is possible to avoid the problem of disagreement by permitting a judge to only find negligence in cases where there can be no disagreement over what is reasonably foreseeable. However, this cannot be done with legal interpretation since rationality is what *identifies* the correct interpretation of law in the first place. If a judge can only identify correctness in cases of absolute

94. In this sense, subjectivism is similar to metaphysical realism (I thank Patrick Emerton for pointing this out to me). I do not have space in this paper to discuss whether criticisms of metaphysical realism would affect subjectivism, but at least it seems to me that if they are linked, then subjectivism and metaphysical realism appear to be more commonsensical than idealism and other similar theories.

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certainty when interpreting provisions, there will be numerous pieces of legislation that end up being indeterminate. This is because there will be very few cases with interpretations that every rational person will agree upon (at least with complex legislation of the type where theories of statutory interpretation are needed).

Second, in torts and criminal law what is examined is the reasonableness of acts (or omissions) of some person and whether that *same* person should have taken those actions (or lack of action). In interpretation, the rationality of *someone else's* interpretation affects the *judge's* (a different person's) interpretation. It makes sense to say that the actions of *x* are permissible if *x*'s actions fall within a range of reasonable behavior. It is another thing altogether to say that *x*'s beliefs must change just because *y* has equally rational beliefs.

Third, using the test of reasonableness might be less arbitrary in the context of torts and criminal law. Endicott persuasively argues that vague standards of law are sometimes fairer than precise standards.[95] It would be arbitrary, for example, if a parent was negligent only if they met some prescribed number of hours where they did not watch over their kids. Nonetheless, due to the reasons explained in Section II, it does not seem like there are any such benefits in the interpretive case (or at least the benefits are outstripped by the arbitrariness and indeterminacy that ensues).

Hence, the problem of disagreement does not encroach into substantive legal doctrines like torts and criminal law. In interpretation, however, the objectivists' use of rational and reasonable standards is perhaps less than rational.

95. Timothy Endicott, *The Value of Vagueness*, *in* Philosophical Foundations of Language in the Law (Andrei Marmor & Scott Soames eds., 2011); Timothy Endicott, *The Impossibility of the Rule of Law*, 19 Oxford J. Legal Stud. 1, 7–8 (1999).

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