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# The Pitfalls of Interpretation

Richard A. Epstein

# THE PITFALLS OF INTERPRETATION

RICHARD A. EPSTEIN*

If this were a normal occasion, I would begin my speech by praising Frank Easterbrook for the clarity of his expression, for the acuity of his remarks and for the power and persuasiveness of his prose.[1] Unfortunately, he told us during the course of his lecture that no words have any plain meaning, so even these words of praise are going to be shrouded in the kind of ambiguity that enhance the income producing activity of law professors.

Indeed, it's precisely his overstatement that leads him astray on the question of what is the appropriate mode for statutory interpretation. We are not engaged in moot court; we are not necessarily engaged in socratic dialogue, where the effort is to show that ambiguity can be created where none in fact exists. Rather, we start with a more neutral kind of an interpretation. We recognize that there may be vague statutes. But we also know that even though we could find some ambiguous cases, some difficult cases, some marginal cases, we can also (thankfully) find cases which are rightly or wrongly decided. In a community of readers, there are times we can say that if this is the statute, then that must be the proper result.

Wittgenstein, when he talked about the ambiguities in language, once said that you can always tell a bad philosophical argument because when it's stated seriously, it comes out as a joke. In this particular instance, I refer to Easterbrook's arguments about the ambiguities in the meaning of the term "dog" and in the meaning of the term "thirty-five years."[2] When he gave the alternative con-

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* James Parker Hall Professor of Law, University of Chicago.

1 Easterbrook, *Legal Interpretation and the Power of the Judiciary,* 7 HARV. J.L. & PUB. POL'Y 87 (1984).

2 *See* Easterbrook, *supra* note 1, at 89-90:

> Take a law requiring the leashing of dogs. Does it also cover cats (because it really covers animals), wolves (canines), or lions (dangerous animals)? A court will find these questions were not present in the minds of the legislators, who might have chosen any of these had they thought about it. Similarly, take something that looks very clear indeed, the requirement that the President be thirty-five years old. Does thirty-five denote a number of revolutions of the Earth around the Sun, or was it designed as a percentage of the average life span (so today the President must be forty-five)? Or could the language conceivably denote some number of years after puberty (so today one could be President at thirty)? Each is supported by a constellation of plausible "values." The forty-five year interpretation would ensure that the President is relatively mature and respected compared with others in government; the thirty year rule would allow a gifted person to serve after passing a set of number of years in "adult society," where he or she learned

structions of "dog" in the one case and "thirty-five years" in the other case people in the audience laughed. The reason they laughed is they recognized that he was now engaged not in the ordinary discourse of how we find meaning, but rather in the law professor's game of how it is when we have a statute which says thirty-five years we can make it look obscure, thereby demonstrating not the silliness of the founders, but of your own imagination and intelligence. Instead we want to reserve that level of difficulty for words like "unreasonable" and phrases like "unreasonable search and seizure" or "freedom of speech." We don't want to start by taking on interpretivism, even under the most radically skeptical views of constitutional interpretation, in areas that seem to be fairly secure. Rather, we want to reserve our analytical firepower for those particular cases that need it.

With this as a framework, I think we can actually make a philosophical distinction which might help explain why it is that Easterbrook is simultaneously conducting two enterprises without clearly distinguishing between them. Whenever we have a question about what a certain phrase means — be it to an author or to a reader — we can ask two kinds of questions. One is the question of philosophical adequacy. If we had infinite time, infinite resources, and infinite patience, would the statement remain ambiguous after all efforts at clarification took place? Then you also have to ask the question of reliability: given this statute, these political constraints, and these historical circumstances, can we show that there is a bonafide ambiguity in this particular proposition?

It seems to me that when Easterbrook starts talking about the general proposition — there is no such thing as a clear meaning — he is not arguing from the defective legislative performance, the shortness of time and the like. What he is arguing is that there's something about the nature of language which renders it incapable of clarifying all statements when they are used by a community of readers. As H.L.A. Hart said — and remember, one of the reasons why he is a great philosopher is that everybody can understand him — there is a distinction between words which are vague, words which are open textured, and words which are reasonably clear, over a broad range of circumstances.

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the necessary skills to carry out the job. Indeed, almost any interesting interpretation of old language will have the support of some plausible constellation of "values."

The community of readers may understand what "bald" means, and yet will have genuine difficulty at the margins in deciding whether Richard A. Posner is bald. (It's close.) But that doesn't mean that the term itself is subject to the kind of inscrutable philosophical difficulty which renders it worthless for most of man or womankind. I suggest that much of what parades as philosophical difficulty really is nothing of the sort. Language is a marvelously subtle, powerful, persuasive tool; it enables us to communicate the kinds of nuances that render it a great tribute to human intelligence. The entire pattern of social and historical discourse takes place not because of the occasional unreliability of language, but because of its magnificent reliability. Indeed, there is in the philosophical literature a long debate over the translatability of statements from one language to another language, and the odd phrase that we can find — "*Gemütlichkeit*" in German or "wishful thinking" in English, neither of which renders itself to a precise translation into the other — shows, by the infrequency of the exception, the truth of the proposition that over the vast domain of statements, firm, quick, accurate and reliable translations are possible. Thus, we can be clear not only in one language but in a whole host of languages at the same time.

The other problem is more difficult: what do we do about reliability? This is not a problem attributable to any grave defects in the structure and nature of language itself. It arises because it turns out that the tools were not used by the craftsmen to whom we wished to entrust them. Easterbrook gives all the reasons why statutes are badly drafted: misplaced virtue; partisan deals; and the time pressures committees face.[3] I would also add one which he hasn't mentioned: vanity. All statutes must pass through a number of individuals, and everybody insists that a statute is not a complete entity until it bears some sign of his own handiwork. So what we find is a process of accretion and alteration, in which each person leaves his indelible imprint upon the future of the law by changing some phrase, however unimportant, to discharge his professional duties. Endless individual accretion can convert simple statutes into roaring monsters by the time they have passed their last legislative hurdle.

So how do we interpret statutes within this kind of framework? Well, it seems to me that if we're going to try and construe these

3 Easterbrook, *supra* note 1, at 88-89.

things, there are several suggestions that we would want to dismiss out of hand as accurate guides for interpretation. I doubt — and here I think Easterbrook is right — that we could ever make much of the distinction between statutes designed to advance the public interest and statutes designed to resolve clashing and competing interests. With large and complicated pieces of legislation, it may well be agreed there is some public interest behind the statute. There may also be enormous disagreements as to whether that public interest requires remedial scheme A or remedial scheme B on certain particulars. Nor is it clear that the statute itself is all public or all private, as mixed statutes passed for mixed motives must be the order of the day. If we had two separate modes of interpretation for the different kinds of statutes, we might well have to stop at the comma, shift gears ninety percent and then shift back again, for the draftsmen do not tell us in so many words that this clause was inserted by the insurance lobby, and this phrase by the opposing consumer group, and so on.

The second reason why the public/private distinction offers scant aid in interpretation is that the compromises of competing legislative groups often yield a composite statute better than that originally proposed by either of the two parties. Easterbrook, I think, has this version of statutory interpretation that it always goes from bad to worse. There are many cases in which that is true. Nevertheless, when you have multiple parties with technical expertise in different areas coming to bear on a statute, some improvement may come out of the process to render the aggregate product more coherent than any of the original parts. Sometimes side A can gain only if it takes from side B. Sometimes it can gain by expanding the size of the pie for both sides.

So it seems to me that one cannot make any distinction with respect to those kinds of statutory origins and hope to keep any kind of uniform interpretation. It also seems clear to me that you cannot treat motivation as being dominant with respect to the question of what it is that statutes are supposed to or designed to do. The trap with the canine, dog and leash question — and by the way, have you ever seen what a leash on a buffalo looks like? — is not an argument about semantic meaning. It is a very distinct argument about broad and narrow purposes. The progression begins by noting that the legislature tries to respond to the problem in a given area. It continues by noting that a like problem exists elsewhere, and therefore the legislature ought to respond to it similar-

ly. That's not a point about semantic meaning. It is an offer to extend a statute about dogs to buffaloes. It is an offer that can be safely refused, as ambiguity has nothing to do with the question.

All this, however sensible, doesn't mean we won't have certain problems. Even the most ancient and the most conservative common law construers of statutes always said that next to the statute itself, there was a so-called "equity" under the statute, which meant that there were certain cases so close to the original core that they should be governed under parallel principles, wholly without regard to the express language. That was true in Roman days in the construction of the *Lex Aquilia* and a whole variety of other statutes on tort law. The *Lex* applied only to killing, but it was rightly extended to "furnishing a cause of death." The first covers a mortal blow, the second giving poison to drink without revealing what it is. ("I didn't kill him; he drank it himself." Get it?) The basic point was certainly true in all the medieval statutes relating to the family, distribution and descent. It seems to me that it's also true — or can be made true — in a lot of more modern cases as well.

But how do we handle the question of implication? Here I think Easterbrook is wrong when he says that we simply do not have a community of understanding which tells us what we have, or what to do in dealing with statutory silence.[4] Thus I think it's very helpful to make the kind of observation which is very congenial to those who are familiar with the construction of codes. It is to make reference to what the Germans call "*der allgemeine Teil*," or what can be rendered in English as "the general part." What this says is "Look, we may be prepared to say that anybody who places a piece of cheese in a mouse hole has thereby committed an unlawful act. We may think that we have to figure out what we mean by 'cheese' and what we mean by a 'mouse hole.' Those are both questions of meaning, but we find that there is in the criminal law a deep conviction as to what is said of excusing or justifying conditions with respect to all kinds of conduct."

If a legislature doesn't deal with those excusing and justifying conditions, we will assume that the same universal conditions that attach to other criminal laws will attach here as well. For example, the normal case of murder, as developed in common law jurisprudence, doesn't simply mean killing another human being. We have

4 *See* Easterbrook, *supra* note 1, at 90-92.

to worry about mens rea, self defense, necessity, official execution, war and so forth — an elaborate set of excuses and justifications. What the judges will say, and say rightly, is that if we just have a statute about cheese and mousetraps, then the general part of the law dealing with responsibility is going to be carried over into that statute and form the basis for a system of principled implication. In one sense, this method of statutory construction corresponds to the objective morality to which Michael Perry referred.[5] Nevertheless, it may well be a rather different kind of morality because it's the morality of the rightness and wrongness, of the conditions of free will for individual action. It is most definitely not the rightness and wrongness of some initial social distribution of the good things (intelligence, health, wealth) that we do or do not want in our collective vision of a society.

How will these various modes of interpretation work with a particular statute? I just want to take one, the eminent domain clause,[6] which has the type of awesome sweep — "nor shall private property be taken for public use without just compensation" — that both invites a broad reading and use of the interpretative methods briefly mentioned here.

Thus consider both the equity of the text and its implied exceptions. As to the equity of the statute — and it came up a long time ago — consider the question of whether or not, when the government blows up somebody's house, it's engaged in the taking of private property. We can engage in the argument that in order to take, the state must keep possession. If it simply blows the house up, it hasn't kept possession at all. Therefore, there's no taking, and hence, the government can act with lovely impunity. As I recall, back in the 1870's, with *Pumpelly v. Green Bay Co.*,[7] before judicial activism was a real issue, the Supreme Court came to the very sensible conclusion that if the state first takes title to land and then floods it, it must pay. If the state doesn't bother with the formalities and floods the land straight-away, it's going to have to pay anyhow. I can't understand how anybody in his right mind would want to oppose that particular interpretation.

But now we get to the following situation. It turns out that the reason why the state blows up a particular house — whether or not it's taken title to it — is that the house harbors some obnoxious ac-

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5 Perry, *Judicial Activism,* 7 HARV. J.L. & PUB. POL'Y 69, 73-75 (1984).
6 U.S. CONST. amend. V.
7 80 U.S. (13 Wall.) 166 (1871).

tivity. It's not that they have gambling, prostitution, and so on going on in there; but there are vermin and roaches; bombs regularly blow up in there; and the public water supply is contaminated. And you say, "This is not a house to end all houses, it's a very special house. Look, we know that there's a thing called police power, and that in the private framework, you can take property in self defense. The state can do that for our benefit even though the Constitution doesn't speak about the defense of innocent citizens in those words. Still, given the general set of excusing and justifying conditions, we'd want to read them into the Constitution." Once you accept that argument, there can be enormous debates as to which way the presumptions go with the police power: does it reach gambling, for example?

But that's not the point I'm making. What I'm saying in effect is that at the very least, if these principles of implication can so direct the inquiry, then we're not as free after the principles are applied to do whatever we please just because we want to. We can, and do have constitutional adjudication.

In an odd sense, we are witnessing a disturbing alliance here between Mark Tushnet[8] and Frank Easterbrook,[9] because at the bottom of it, both of them are prepared to say that there are no right or wrong answers. Both of them are prepared to say there are no principles of implication that we can generate from our collective legal culture, so that, in the end, the law professor's game, the socratic cynical game, is the only game in town.

It seems to me that what we really have to do if we're serious about any of this stuff — statutory interpretation, contractual interpretation, and constitutional interpretation — is to figure out the principles of implication, to treat them as a science. We must recognize that the only reason we create a Constitution is that we think that those principles of implication will bind future generations. If there is one principle of construction we can glean from that entire document, it's that the extremes to which Mark Tushnet and Frank Easterbrook in their own separate ways push are both wrong. A full elaboration of an alternative position must await another day. But the central clue must be this: the central question is how private theories of right and wrong can be transferred to matters of public governance. What allows the state to

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8 Tushnet, *Judicial Review,* 7 HARV. J.L. & PUB. POL'Y 77 (1984).
9 Easterbrook, *supra* note 1.

govern while limiting its power to trench on private rights? It is a large question — but it is one to which we cannot afford to give a skeptical answer.