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Introduction

The close connection between philosophy of language and philosophy of law was emphasized by H.L.A. Hart, and has been recognized for decades. As early as in his inaugural lecture, Hart argued that many central issues in jurisprudence depend on an adequate conception of language. Later, in his seminal work, *The Concept of Law*, he made it clear that he saw philosophy of language as playing a foundational role in his theory of law.[1] In the preface to that work, he says:

> [T]he book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meaning of words merely throws light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J.L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena'.[2]

A few pages later, however, Hart warns us that the purpose of his book 'is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested'.[3] Though a methodology of focusing on meaning while eschewing definition may initially seem strange, Hart's approach conformed to that of the leading figures—Wittgenstein, Ryle, and Austin—of the Ordinary Language School of philosophy of his day. The analyses sought by these philosophers were nearly always attempts to trace the intricate web of conceptual connections among different members of a family of related terms, rather than analytic statements of necessary and sufficient conditions for a term to apply to an object.[4] Also in keeping with the philosophy of day was Hart's suggestion that understanding the ordinary use of words in specific contexts is both a form of descriptive sociology and

[1] Hart (1961). (All references here are to the first edition.)
[2] ibid at p v.
[3] ibid at p 17.
[4] For discussion see, eg Soames (2003a, ch 3).

an important key to understanding the social institutions (like the law) in which such usage occurs.

In spite of Hart's linguistic characterization of his methodology, questions about the relationship between language and law did not become central for some decades after the publication of *The Concept of Law*. Partly because of the important substantive issues raised in the book, and partly because it does not contain much that is specific to philosophy of language (apart from the then ubiquitous metaphilosophical conviction that all conceptual connections are ultimately linguistic), commentators have largely ignored Hart's remarks about the role of language in understanding law. This persisted until the mid-1980s, when R. M. Dworkin raised the issue in his critique of what he took to be Hart's method. In *Law's Empire*, Dworkin argued that, in spite of Hart's explicit denial, the only way to understand his theory of law is to assume that it actually does aim to provide a definition of law, in the sense of criteria by reference to which the correctness of the use of the word can be tested. Dworkin dubbed theories of law that adopt this methodology 'semantic theories of law', and argued that such approaches cannot provide adequate interpretations of legal practice.[5]

Dworkin's characterization of Hart's 'semantic' methodology engendered much debate. Many commentators (including Marmor) argued that *The Concept of Law* does not attempt to define or elucidate ordinary uses of the term 'law' or 'legal validity', nor does it presuppose that such a definition of 'law' is possible.[6] Although Hart was influenced by prominent ordinary language philosophers of his time, and to some extent shared their deference to ordinary use in philosophical analysis, this seldom, if ever, led either him, or them, to search for philosophically illuminating definitions. Thus, it is not surprising *The Concept of Law* contains no attempt to define 'law'.

More notable, perhaps, is the paucity of explicitly linguistic, let alone ordinary-language style, analyses in that work. The main foray into philosophy of language in *The Concept of Law* is in chapter 7, where Hart strives to refute a kind of 'rule skepticism' proffered by the American Legal Realists. As he understood them, these theorists claimed that legal rules, by themselves, rarely determine particular legal outcomes. On the contrary, they maintained, such rules can be understood almost any way one likes; hence the outcomes reached by judges and other officials are rarely determined by the rules they cite. Of equal, if not more, importance, the Realists argued, are judges' instinctive reactions to the cases they adjudicate, shaped by their psychological makeup and social circumstances. Hart argued that this 'Realist' picture is an exaggeration, involving a serious misunderstanding of

[5] Dworkin (1986), ch 1. [6] Marmor (2005) at pp 4–8.

language. Although it is true that language is 'irreducibly open textured', it is also true that '[g]eneral terms would be useless to us as a medium of communication' unless they were associated with some core of 'generally unchallenged' cases.[7]

An example Hart gives elsewhere,[8] which has become a jurisprudential classic, involves a legal ordinance prohibiting the use of vehicles in public parks. Since the word 'vehicle' is vague, it has many borderline cases. Does the rule prohibit, for example, the use of bicycles, roller skates, or electric wheelchairs, in the park? These questions cannot be answered by a closer look at what 'vehicle' *means* in English. But it is equally true, Hart argued, that the word has a 'core' extension consisting of things to which it clearly does apply. An ordinary automobile, in working order, is clearly a vehicle, if anything is. Indeterminacies notwithstanding, there must be considerable information one can convey by linguistic communication in general, and legal communication in particular.

Legal rules and directives are, of course, expressed in a natural language. Some of that language may be technical, further specified by other legal rules. But understanding what the law prescribes is bound to depend on general features of linguistic communication. The main mistake of Legal Realists, Hart contended, was in looking only at cases in which the meanings of the sentences used leave unanswered questions about what is asserted or stipulated. In such cases, our use of the sentences determines a vague, incomplete, or partially indeterminate content that fails to provide definite verdicts for some of the circumstances in which we are interested. There are, of course, many cases of this kind. However, a glass half empty is also half full. Language could not be the useful tool that it is for conveying information and guiding action if this were the norm. On the contrary, the meanings of the words we use, together with obvious features of contexts of use, typically determine information contents the evaluation of which are determinate enough to provide the guidance we need in most communicative purposes.

Hart's discussion, in chapter 7 of *The Concept of Law*, of instances of both determinacy and indeterminacy in linguistic communication in legal contexts is our starting point, opening the door to a larger question about the role of language in determining the content of law. How much content is determined by linguistic features of legal communication, and how much is left indeterminate or unspecified? It is a central contention of this collection that advances in the philosophy of language in recent decades enable us to provide a more accurate and nuanced answer to this question than the ones provided by Hart and his contemporaries. Though Hart's general conclusion—that the linguistic

[7] Hart (1961) at p 123.

[8] 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71, 1958, 593–629.

aspects of legal texts determine much content, while leaving some legal issues indeterminate and open to interpretation—is commonsensical and correct, the philosophical payoff is in the details, and the details are complex.

As Hart recognized, vague predicates give rise to borderline cases. These are cases in which there is, in some sense, no definite answer to the question of whether a predicate is, or is not, true of a given object. In such cases, we are often pulled in both directions—being inclined to resist definitive verdicts in favor of equivocal remarks like 'It sort of is and sort of isn't', 'It's not clearly one or the other', or 'It's up to you. You can call it either one, but neither is definitely correct'. In Hart's example, there is 'no saying' whether a bicycle is a 'vehicle' or not. In some contexts it is fine to say that it is, while in others it is fine to say that it is not. No investigation into the facts in virtue of which the word 'vehicle' means what it does could ever settle that just one of these uses is correct, while the other is incorrect.

In recent decades, philosophers of language have developed sophisticated theories that attempt to explain this and related observations. According to one such theory, vague predicates are both partially defined and context sensitive. To say that a predicate P is partially defined is to say that it is governed by linguistic rules that provide sufficient conditions for P to apply to an object, and sufficient conditions for P not to apply, but no conditions that are both individually sufficient and disjunctively necessary for P to apply, or not to apply. Because the conditions are mutually exclusive, but not exhaustive, there are objects not covered by the rules, for which P is *undefined*. This, in turn, gives rise to context sensitivity. Since the rules of the common language, plus all relevant nonlinguistic facts, do not determine P-verdicts for every object, speakers using P in particular contexts have the discretion of extending its range of application to include some initially undefined cases, depending on their conversational purposes. Often they do so by endorsing or denying a proposition predicating P of an object o. When they do, and other conversational participants go along, the class of things to which the P does, or does not, apply is contextually adjusted to include o, plus objects similar to o (in certain respects). In such cases, P is (partly) 'precisified' by narrowing the range of cases for which it is undefined.[9]

This conception of vague language applies both to the enactment and the interpretation of laws. When law-makers employ a vague term in a legal text, they may use it either with its default interpretation (provided by the rules governing its use in the common language) or with a (partially) precisified

[9] For details, see Soames (1999), ch 7; Soames (2003b), (2010b), both reprinted in Soames (2009c); Shapiro and Stewart (2006). Endicott adopts a version of the view that vague predicates are partially defined (2000).

interpretation. In the former case, the application of the law to items for which the term is undefined is left indeterminate, and subject to future interpretation by judicial and other authorities. In the latter case, law-makers wish, and are able, to narrow the range of interpretation by stipulating how the law is to be applied to certain borderline cases. For example, law-makers adopting Hart's ordinance banning vehicles from parks might respond to lobbying on behalf of the disabled by adding a clause 'for the purpose of this ordinance, wheelchairs for the disabled, whether motorized or not, shall *not* count as vehicles'. In such cases, what counts as 'legally P' differs somewhat from what counts as 'P' in ordinary language.

The role of vagueness in interpretation is more interesting and complicated. What should be done when it emerges that the verdict in a case crucially depends on whether or not a vague predicate applies to a given item for which the predicate, as used by the law-makers, is undefined? In principle, several outcomes are possible. In some special cases (though rarely in common law systems), it may be possible to send the matter back to the law-makers for clarification and precisification. In certain other cases, a rule of lenity may dictate favorable verdicts for defendants in situations in which no clear violation is established—where one form of exonerating unclarity involves (linguistic) indeterminacy in the law. However, in many cases neither of these exceptions apply, with the result that judges, and other authorities, are expected to fill gaps by precisifying the governing legal provision in a manner not determined and sometimes not even envisioned by the law-making body. When the relevant judicial decision is such that it sets a legal precedent for similar cases, the result of judicial interpretation is not just an explication, clarification, or application of existing law, but also an (authorized) modification of that law.

Although we have used one particular philosophical theory of vagueness to illustrate these points, analogous points may hold for other theories of vagueness. For example, according to the epistemic theory, vague predicates are always totally defined, with sharp boundaries separating items to which the predicate applies from those to which it does not—eg a single second separating moments when one is young from those when one is not, and a single penny separating one who is rich from one who is not. However, although, for each vague predicate P and item o, P is either true of o or not true of o, there are borderline cases o* for which it is impossible for us ever to *know* whether P is true, or untrue, of o*. So, whereas the previous theory takes borderline cases to be those for which P is undefined, the epistemic theory takes them to be cases for which one can never know how, in fact, P is defined.[10] Although the standard version of this theory does not take vague

[10] The *locus classicus* of the epistemic theory is Williamson (1994).

terms to be context sensitive, the epistemic framework is compatible with that idea, which has been advocated by some epistemicist authors.[11]

How should a proponent of the epistemicist view conceptualize the problem confronting a judge in a case that turns on the application, or non-application, of a vague predicate to a borderline case? One plausible line available to the epistemicist is to reason as follows. If the case is not one that can be returned to the original law-making body for further consideration, and also not one in which a rule of lenity applies, the judge will be faced with the task of reaching a decision that cannot be *known to conform*, or *known not to conform*, to the existing content of the law. Moreover, the values of consistency, of treating similar cases similarly, of rendering the actions of legal authorities predictable, and of making the effective content of legal rules known, or at least knowable, to all concerned will normally conspire to give whatever decision is reached precedential weight. If, over time, the precedent is followed, or if the original court is itself the court of last resort, the effect will be an authorized judicial change in the content of the original legal provision. What was before at best unknowable will come to be known to be legal, or illegal. Although the vague predicate P at the center of this change will not have changed its ordinary meaning, what counts as 'legally P' will have changed, with a resulting change in the law. If this is right, then many of the issues raised by vagueness for theories of legal interpretation will remain more or less constant across different philosophical theories of what vagueness is.[12]

The importance of understanding the consequences of vague language for legal interpretation is consistent with the fact that some issues involving vagueness in the law are normative. Consider, again, the use of the vague term 'vehicle' in Hart's ordinance. Could the law-makers have formulated the prohibition more precisely? If they could, was it a failure of legislative drafting not to? More generally, is avoidable vagueness *always* a defect in the law, or can it sometimes be a useful legislative tool? The essays by Endicott, Soames, and Waldron in this volume argue that vagueness can have value (of various sorts), and discuss the consequences of vagueness for theories of interpretation.

Another area in philosophy of language in which substantial progress has been made concerns the pragmatic aspects of linguistic communication. Philosophers of language and linguists have come to realize that a great deal of successful communication is determined by contextual and normative aspects

[11] See Fara (2000).

[12] This is not to say that the need to make good sense of legal interpretation of vague terms has *no* consequences for determining which philosophical theory of vagueness is correct, nor that there are *no* differences between the lessons for legal interpretation that can be drawn from one theory of vagueness and those that can be drawn from another. There may well be. However, these involve matters of nuance and detail that are beyond the scope of this volume.

of conversational situations, over and above the strictly semantic properties of the words used. As a consequence, the study of these factors—'pragmatics' broadly conceived—has taken on a larger role in theories of linguistic communication and language use than it once had.[13] Marmor's chapter in this volume draws on this extensive literature in pragmatics to elucidate ways in which the contents of legal texts depend on, and are partly determined by, pragmatic features of communication. This philosophical exploration of the pragmatic aspects of legal communication goes in both directions: on the one hand, it enables us to form a more complete and nuanced picture of how much legal content is determined by pragmatic elements of communication. On the other hand, it allows us to contrast certain assumptions commonly made about pragmatic aspects of ordinary conversation with those required to understand the use of language in legal contexts. Whereas communicative interactions in ordinary conversations are often regulated by the goal of engaging in a cooperative exchange of information, linguistic interactions in legal settings are often at least partially strategic rather than cooperative. As a result, the use of language in the law may provide limiting cases of familiar pragmatic assumptions about linguistic communication, allowing us to explore ways in which pragmatic aspects of communication are sensitive to different kinds of interactions, with different normative goals in different contexts.

The general question of how much of the content of a legal text is determined by the semantic features of the text has become acute for a relatively new theory of statutory interpretation, *textualism*. Advocates of this theory are morally and politically opposed to the expansive role often assumed by judges in interpreting statutory and constitutional law. According to textualists, the first rule of interpretation is fidelity to the ordinary meaning of statutory or constitutional language. It is taken to be a corollary of this rule that judges interpreting a legal text should not speculate about what the lawmakers intended to say, or achieve, in enacting the text. As the foremost textualist, Justice Scalia, puts it:

> The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: 'Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I do not care what their intention was. I only want to know what the words mean.' And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: 'We do not inquire what the legislature meant; we ask only what the statute means.'[14]

[13] For a brief overview of the relationship between semantics and pragmatics, see Soames (2010a), ch 7.

[14] Scalia (1997) at pp 22–3.

> I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.[15]

As these quotations attest, the plausibility of textualism depends, in part, on how much legal content is determined by 'the ordinary meaning of the language in its textual context'. In order to make progress, we need to know what ordinary meaning is and how it interacts with context to generate communicated content.

The first step is to distinguish different types of linguistic content—including the *semantic* content of the words and sentences used by a speaker (linguistic meaning), the *assertive* content of the speaker's utterance (what the speaker says, asserts, or stipulates by using those words in the context of utterance), plus further *implicated* content (which, though not asserted, is suggested or implied by the speaker's saying what he or she does in the context). The semantic content is determined by the literal meanings of the words and the syntactic structure of the sentence. The assertive content is the truth-evaluable proposition asserted by the speaker in the context. It is determined by a variety of factors, including the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of speaker-hearers, and obvious features of the context of utterance. Although assertive content is normally of primary importance in linguistic communication, sometimes the communicative content of a remark includes implicated content that goes beyond this. Such content is a function of semantic and asserted content, shared presuppositions of participants in the speech exchange, and recognized norms for acceptable linguistic moves governing the type of linguistic interaction involved (cooperative exchange of information, strategic bargaining, etc).

Thus, one difficulty for textualism is to articulate what 'the text' is supposed to be. Since it is words and sentences that have 'ordinary meanings,' textualists' reliance on this phrase suggests they are thinking of texts not as what legal authorities assert or stipulate, but rather as purely linguistic entities made up of the words used by such authorities. Since the content of a legal provision is most plausibly identified with the assertive content of the relevant legal document, this is unfortunate and has led to confusion.[16] As some of the

[15] *Chisom v Roemer* 501 US 380, 404 (1991) (Scalia J., dissenting).

[16] Prominent textualists like Scalia routinely run together the ideas of (i) fidelity to the meaning of the legislature's statutory language (illustrated by the quotes above) with (ii) fidelity to what the legislature asserted or stipulated in using that language (illustrated by the following):

essays (by Soames and Rosen) in this volume point out, this confusion affects the blanket attack by textualists on appeal to legislative intentions in legal interpretation. Since assertive content cannot be extrapolated without regard to speakers' intentions—both to assert a particular content, and to succeed in so doing by enabling reasonable and attentive hearers to grasp that intention—any defensible form of textualism must distinguish different types of intention, while recognizing the importance for the contents of laws or legal obligations of at least some of them.

Suppose, for example, that a speaker says to a friend she meets late in the evening, 'I haven't eaten anything.' Clearly, the assertive content of this utterance is not identical to the literal meaning of the sentence uttered. No reasonable hearer would take the speaker to have claimed that she has never engaged in the activity of eating. On the contrary, in most contexts the speaker would correctly be understood to have said that she has not yet had dinner (or something similar). In grasping this assertive content, the hearer discerns the content the speaker intends to convey. The role of contextual knowledge is to help the hearer identify the speaker's communicative intention. Though the example is simple, the point it illustrates is important and applies to judicial interpretation of the content of legal texts, where an understanding of the gap that sometimes exists between the linguistic meaning of a legal document and the legal content it is used to assert can be crucial to arriving at correct results.[17]

This is one example of the challenges textualists face in articulating their method of statutory interpretation. These challenges are extensively discussed in the essays by Soames, Perry, and Rosen in this volume. Perry attempts to reinforce what he calls 'meaning-textualism' (as opposed to 'conception-textualism') by explaining how it can accommodate interpretations of constitutional or statutory provisions resulting in legal outcomes that

"You will find it frequently said . . . that the judge's objective in interpreting a statute is to give effect to 'the intent of the legislature'. . . . Unfortunately, it [this principle] does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of the statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry?" (*A Matter of Interpretation,* p 16)

"When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant* your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean." (*A Matter of Interpretation*, p 18)

It is an open question whether, once (i) and (ii) are properly distinguished, textualists like Scalia might opt for (ii) rather than (i). In one of the cases cited (by him) as best exemplifying his version of textualism—namely *Smith v United States*—Scalia's result is implicitly premised on (ii), even though he wrongly defends that result by appealing to (i). For discussion, see Neale (2007) and Soames, in (2009a).

[17] See also Marmor (2008) at p 423.

accord with their original textual meaning, even though those outcomes would have been repudiated by the framers of those provisions (for violating the framer's conceptions of what they were talking about). Though framed as a defense of textualism, Perry's careful application of this point to the prohibition, in the US Constitution, against 'cruel and unusual punishment' is available to proponents of (some) other theories of legal interpretation as well, thus illustrating the utility of the philosophy of language for various interpretive points of view.

Soames' discussion of textualism takes a different tack. While taking it for granted that the content of the law is what law-makers assert (or stipulate) in adopting a legal text, he highlights cases in which what is so asserted has gaps, or is inconsistent (when applied to new facts of an unforeseen case) either with other asserted (or stipulated) legal content or with the clear legislative purpose of the law. In such cases, pre-existing legal content is insufficient to determine feasible legal outcomes. Thus, he argues, if we take 'interpretation' to cover all that judges are called upon to do in deciding 'hard cases', then we need a theory of interpretation that shares textualists' deference to legislative authorities, while transcending the narrow bounds they place on 'interpretation'.

Rosen's essay explores different versions of textualism vs intentionalism in contract law, bringing to light fascinating cases the factual backgrounds of which put maximum strain on textualist ideas, while causing difficulties for both interpretive approaches. One of these cases illustrates another way in which issues in the philosophy of language bear on questions of legal interpretation. The issue is how the referents of uses of definite descriptions are determined. It is common in contracts and other legal documents to target certain objects or individuals designated by such descriptions for specific legal results. Although this may sound unproblematic, difficulties can arise when an object or an individual the parties have in mind as the one to whom a certain legal result is to apply does not satisfy the description they formulated to designate her. These difficulties multiply when someone else, whom the parties do not take to be in the picture at all, does satisfy it. One of Rosen's examples is a real adjudicated case of this kind. Though the facts in the case are complex, and its proper legal resolution is perplexing, an understanding of the relationship between meaning and assertion in situations in which descriptions are used in this way is a prerequisite for disentangling the issues.

In ordinary conversation, we often indicate the individual about whom we wish to make an assertion by using a description like 'John's wife'. At a party at which everyone assumes that the woman, Mary, accompanying John is his wife, I might say 'John's wife just suggested that we go for a swim before

dinner'—thereby conveying Mary's suggestion. Unbeknownst to us, however, John's divorce to someone else is not final, so Mary is not his wife. Although I have made a mistake, misdescribing Mary as being married to John, this does not negate the fact that I asserted that she suggested we go swimming. I may, in virtue of my mistake, also be counted as having asserted the proposition semantically expressed by the sentence I uttered—namely that John's wife suggested that we go for a swim before dinner. So, it could be argued, I have both said something true (about Mary) and something false (about John's wife). Although in the context imagined, the former is surely the most relevant to the conversation, in different circumstances the priorities might be reversed. When this sort of thing occurs in a contract (or other legal document), we face a potential assertive (as opposed to semantic) ambiguity. What are the different potential assertive contents of the clauses containing the relevant descriptions, and which (if any) among them should be taken as incorporated into the content of the contract as a whole? These, and related, questions are discussed in Rosen's essay.

Gideon Yaffe argues that a proper understanding of the use of descriptions is also important to the definition of certain criminal offenses. His topic is *criminal attempts*—crimes defined as attempts to commit other crimes. The question at issue is whether one can be guilty of attempting to commit an offense in cases in which a material condition for committing the offense is not present. For example, can one be guilty of attempted murder by virtue of having attempted to kill someone who was, in fact, already dead? Yaffe draws on recent discussions in the philosophy of language illuminating the distinction between attributive (*de dicto*) and referential (*de re*) uses of descriptions to clarify the problem, and develop a solution.

Though the strengths and weaknesses of (versions of) textualism are discussed in several essays in this volume, Dworkin's theory of interpretation—which is one of textualism's main rivals—is also represented. According to it, understanding the law and determining legal content are normative 'all the way down'. Otherwise put, judges can determine *what the content of the law is* in a given context only on the basis of a normative conception of *what the content of the law should (politically and morally) be*. Legal interpretation, Dworkin claims, can never be detached from its putative moral and political aims, which must be part of any understanding of what the law requires in specific cases. This theory of legal interpretation is deeply suspicious of the idea that non-normative linguistic considerations are capable of playing central roles in determining legal content, and guiding judicial interpretation.

This approach is represented here in Greenberg's essay, which raises a wide range of skeptical points about the constructive role of philosophy of language in elucidating legal interpretation. Like Dworkin, Greenberg believes

that there is always a gap between the content communicated by an act of legislation and the legal impact it has on the normative legal landscape, such as an obligation imposed or a right granted. The initial plausibility of such a gap derives from some familiar aspects of speech act theories. It has been long recognized that there are many contexts in which, by saying something, the speaker has also performed a certain action (in addition to saying whatever it is that the speech asserts), like undertaking an obligation, or appointing a person to a certain official position, or adjourning a meeting. In some cases, the relevant expression counts as the performance of an act of a particular sort only because there are certain rules or conventions in the background that confer this performative aspect on the expression used. In other cases, the performative aspect of an expression is achieved by a successful recognition on the part of the hearer of the speaker's relevant intentions. Speech act theorists are divided about the scope of these two kinds of explanation of performatives, some arguing that the rule-based explanation is central, while others claim the intention-based explanation provides an adequate account of most cases.[18] Greenberg, however, seems to assume special factors at work in legal speech. His discussion suggests, first, that every legal speech, such as the enactment of a law, is a type of performative, and, second, that the only way to account for its performative aspect is to recognize the moral considerations that grant it the particular legal impact it has. Though he does not explicitly articulate this moral intermediary between communicated content and legal impact, he does raise many skeptical points about the assumption that what an act of legislation says or asserts is what the law, at least partly, is. In fact, he comes to doubt that an act of legislation is a *speech* act at all. Though as authors we have bones to pick with his arguments, as editors we value the fact that he calls into question some of the main assumptions that we and other contributors rely on. We look forward to continuing elsewhere the debate begun here.

Although there is considerable disagreement among the authors of this volume about important matters of judicial interpretation, most recognize at least some cases in which the existing corpus of law available to a judge is insufficient, due to the special and perhaps unforeseen nature of the facts of a new case, to reach a correct result. In such cases, the judge may be called upon to formulate a previously unarticulated legal rule that distinguishes the case at hand from previously adjudicated cases, and justifies a verdict that would not

[18] The rule/convention-based explanation of performatives is advocated by Searle (see, eg his (1969) and (1989) at p 535). The intention-based account was first argued by Strawson (1971) at p 170, and is defended by such pragmatists as Bach and Harnish (see, eg their 1979). See also Marmor (2009) at pp 118–130.

otherwise be forthcoming. Such cases raise a number of conceptual problems, including an interesting puzzle about the logic of legal decisions, and the logical form of legal rules.

Suppose that a particular action of type A is involved, which falls under an existing legal rule stipulating that acts of type A are to be accorded legal status X. Suppose further that the factual background of the case includes information about this particular act—namely that it was performed in certain unusual circumstances C—which (for whatever reason) both undermine according it legal status X and have not previously been encountered as potential exceptions to the existing rule. In this situation the judge articulates a new, more complex, rule that stipulates that acts of type A performed in circumstances C are not to be accorded legal status X. How shall we understand this? Suppose (i) we take a legal rule to be a universal generalization declaring an action to have a certain legal status whenever certain factual conditions are met, and (ii) we take a justified verdict in a case to be one that is the conclusion of a logically valid argument from true factual premises plus a legal rule made true by the fact that it is legally valid. Then, if we take the new rule to justify the verdict 'Not X' in the case at hand, it would appear that we must judge the old rule to be false, *and all the previous verdicts in cases governed by it to be unjustified*. In short, it would appear that what was intended to be a rule creating an exception has the effect of falsifying the previous rule, and undermining all previous uses of it, rather than simply limiting its scope. Worse, since any rule, including the new one, can be expected to require similar future adjustments when presently unforeseen cases bring different novel circumstances into play, it would appear that even the new rule must be false. Surely, this cannot be correct. Richard Holton, in his essay for this volume, explains why it is not, offering a conception of the logical form of legal rules, and the logic of legal arguments, that avoids this troubling result.

There is, of course, much that remains to be resolved concerning the relative importance of, and precise relationship between, broadly linguistic and broadly normative aspects of legal interpretation. However, it is fair to conclude that both have roles to play. As authors as well as editors of this volume, we believe that distinctions drawn from the philosophy of language can help clarify the roles of each by providing a framework within which questions about the contents of legal provisions can be made more precise, and competing conceptions of what interpreting the law is, and should be, can be made more philosophically coherent. We offer these essays as contributions to that enterprise.