

Word-Meaning in Legal Interpretation

by Walter Sinnott-Armstrong

(Dartmouth College)

When judges decide how to interpret laws, they cite many factors to support their favored interpretations. Among these factors, judges often cite the meanings of the words in the laws and the intentions of the legislators who passed the laws. These two factors have led to two schools of thought about legal interpretation: textualism and intentionalism.

At the most general level, *textualists* claim that the meanings of the words in the text should guide interpretation, whereas *intentionalists* claim that an author's intentions should guide interpretation. These doctrines could be adopted for all interpretations, or at least all interpretations of language, including interpretations of literature, the Bible, and everyday conversation, in addition to law. However, since there might be differences among the standards of interpretation in various areas, or even among different actors in a legal system, we will focus exclusively on legal interpretations by judges. *Judicial textualists* claim that the common meanings of words in laws should guide judicial interpretations of those laws, whereas *judicial intentionalists* claim that such interpretations should be guided by the intentions of legislators (or of earlier judges when precedents are interpreted).

This crude characterization leaves it unclear whether textualists claim that word-meanings are the *only* thing that should guide interpretation. If so, we will call them *exclusive* textualists, because they exclude factors other than the text. *Exclusive judicial textualism* implies that judges should never base their legal interpretations on anyone's intentions. Analogously, *exclusive legal intentionalism* implies that judicial interpretations should never be guided by common meanings of words in laws. Such exclusive intentionalists might grant that words can be used as evidence of intentions, but it is fundamentally only intentions that matter, in their view.

Many compromises fall between exclusive intentionalism and exclusive textualism. One position is that *both* authors' intentions *and* common word-meanings should guide interpretation in every case. An alternative holds that intentions are primary in the sense that clear authors' intentions always override word-meaning when these factors conflict, but word-meanings still determine the correct interpretation when authors' intentions are unclear. Or one could hold that word-meanings are primary in this way. Yet another possibility is that intentions are primary in some areas of law (say, private contracts and wills) whereas common word-meanings are primary in other areas of law (such as criminal and constitutional law). It is not clear whether such intermediate views should be classified as "intentionalist" or "textualist", so we will just call them *mixed views*.

Such mixed views seem attractive, but the extreme positions have been popular among legal theorists. Justice Scalia, for example, argues that it “is the *law* that governs, not the intent of the lawgiver.”ⁱ Scalia, thus, seems to be an exclusive textualist. On the other extreme, exclusive intentionalism has been held famously by Stanley Fish, who says, “XXX”.ⁱⁱ The debate between these extreme positions has raged for a long time.

Recently, Larry Alexander and Saikrishna Prakash have given new and interesting arguments for exclusive intentionalism.ⁱⁱⁱ They maintain that there is (and can be) no such thing as common public meanings of words apart from any author’s intentions.^{iv} This conclusion obviously rules out exclusive textualism. In addition, it leaves no room for any kind of mixed view. If Alexander and Prakash are correct, it doesn’t even make sense to ask when word-meanings matter or how much they matter in relation to intentions, since word-meanings do not exist independently of authors’ intentions.

Against these arguments, we will defend the coherence and importance of word-meaning. In Part I, we will more precisely define the thesis that Alexander and Prakash deny and we defend. In Part II, we will show why Alexander and Prakash’s arguments fail to rule out word-meanings. In Part III, we will put these debates in a larger theoretical context and show why word-meaning is important to legal interpretation.

I – What is Exclusive Intentionalism?

Alexander and Prakash argue against what they call “an especially strong form of conceptual textualism.” This is “the position that texts can be interpreted without any reference, express or implied, to the meaning intended by the author of the text.” (2) This thesis needs to be clarified in several ways in order to specify the claim that we will defend here.

First, we take “texts” in this quotation to refer to *some* texts, not all texts. Some texts cannot be interpreted at all, since they are meaningless, so nobody should believe that all texts can be interpreted without reference to authors’ intentions. Moreover, we can also admit that some meaningful texts cannot be interpreted properly without reference to authors’ intentions. So our claim is only that some texts can be interpreted independently of author’s intended meanings. This qualification is fair to Alexander and Prakash, because they want to show that “Intention Free Interpretation is an Impossibility.” (their subtitle!) This strong thesis cannot be true if even *some* texts can be interpreted independently of an author’s intended meaning. Hence, they need to deny that *any* texts can be interpreted in that way.

Second, their thesis denies a possibility — that some texts *can* be interpreted in a certain way. To defeat this claim, we do not need to say that any texts *must* be interpreted independently of authors’ intended meanings. We also do not need to claim that texts *should* be interpreted this way or even that it is *important* to interpret texts this way. All we need to claim is that it is *possible* to

interpret texts this way. Accordingly, we admit that particular utterances of texts *can* also be interpreted in another way. In our view, a particular use of a certain text on a certain occasion can be interpreted in two ways. We can ask what its speaker-meaning is. That depends on the author's intended meanings.

Alternatively, we can ask what its word-meaning is. That does not depend on this author's intended meanings. Since we admit both kinds of meaning, we do not deny that texts can be interpreted according to their authors' intended meanings. But we do claim that texts can also be interpreted in another way that is independent of their authors' intended meanings. That possibility is what Alexander and Prakash deny.

Third, it is crucial to notice that Alexander and Prakash's thesis is about "the meaning intended *by the author of the text.*" (our emphasis) Word-meaning might depend on other intentions of the author or on meanings intended by other people. Perhaps the meaning of a word is best analyzed in terms of what common speakers would usually intend if they did utter that word in a standard context. We take no stand here on whether that analysis of word-meaning is correct. Even if it is, word-meaning still does not depend on the intentions of a particular author on a particular occasion. "The meaning intended by the author of the text" can diverge radically from what common speakers would usually mean by the same word. We will discuss examples of this divergence below. The point for now is simply that the issue between us and Alexander and

Prakash is not about intentions in general but is rather about a specific intention of a specific person, namely, the author.

It is also worth noticing that the relevant intention is about meaning (see their Appendix II). When a speaker utters a sentence, the speaker usually intends to perform a speech act (such as commanding) and also to bring about some effect (such as to change behavior or to make people happy). The goal that a legislator intends to bring about by voting for a law is sometimes called the legislator's *purpose*. When enough legislators share a purpose, their purpose can then be called the purpose of the law. However, this goal or purpose is distinct from "the *meaning* intended by the author of the text." (our emphasis) This meaning is not the author's goal, although it might be the author's means to that goal. What is intended is not an effect in the world but rather a meaning. The speaker intends to convey a meaning. What we claim and they deny is that some texts can be interpreted independently of this specific kind of intention in the author of the text.

Alexander and Prakash obscure this issue by calling this thesis "intention free" textualism. We do not claim that meanings are free or independent of *all* intentions. Hence, it is misleading to describe our view as "intention-free". We will see that many of Alexander and Prakash's arguments fail because they forget that their opponents can invoke some intentions, even while claiming that word-meanings are independent of the author's intended meaning.

Finally, it is also crucial to determine who the author is. Suppose I quote someone intending to mean something very different from what he meant. I say, “that’s the exception that proves the rule”, meaning “that’s the exception that *supports* the rule or proves that it holds”. The original author of this saying meant “that’s the exception that *tests* the rule or determines whether the rule holds.” Also suppose (as is the case) that most people in my day use this expression to mean what I mean by it. Then a textualist can hold that, at the time when I utter these words, they mean what I meant by them. What is not so clear is: Who counts as the author? It seems most natural to say that what I mean depends on what I intend, not on what the original author of those words intended, perhaps long ago. In other words, the speaker-meaning of a use of a text on an occasion depends on the intentions of the person who is using that text on that occasion. However, this analogy has striking implications for legal interpretation. It suggests that it is *not* the intentions of the framers or ratifiers of the Constitution that determine the speaker-meaning of the Constitution today. Instead, it is the intentions of speakers today who are using clauses in the Constitution to mean something else, at least if most people today mean what they mean and not what was originally meant. I doubt that Alexander and Prakash would welcome this result. In any case, they need to decide whether “the author” is the original author (framers or ratifiers in the case of the Constitution) or contemporary users of those same words. Luckily, we do not have to decide. In our mixed view, *both* what was meant originally *and* what is

usually meant today can be relevant in different kinds of cases, but a third relevant factor is word-meaning, and that factor is independent of both original and current speaker-meaning by particular speakers on particular occasions, past or present.

II – Arguments for Exclusive Intentionalism

Now that Alexander and Prakash's thesis is clear (we hope), it is time to ask whether it is true. They give five arguments against the possibility of word-meaning. We will take on these arguments one by one.

i – The Intention to Use a Certain Language

First, they point out (8) that, if someone uses the word “canard”, we cannot know what this speaker means until we know which language this speaker intends to use. “Canard” means “duck” in French, but the same string of letters or sounds means “fib” in English. Of course, it is often easy to tell which language someone is speaking by whether the surrounding words are French or English, but that is just evidence of the author's intent.

We grant that we cannot tell *what this speaker means* until we know which language this speaker intends to speak. That is because speaker-meaning depends on speaker's intentions. That is not in dispute. Indeed, it is close to a

tautology. It is also beside the point. Remember that our position is that texts or uses of texts can be interpreted *either* by speaker-meaning *or* by word-meaning. Hence, we grant that uses of texts have speaker-meanings. We also grant that those speaker-meanings depend on their author's intent. None of this begins to show that there cannot be word-meanings or that those word-meanings are not independent of authors' intentions.

Moreover, the intention that we need to know in order to determine whether a speaker intends to be speaking French or English is simply an intention regarding one language or the other. It is *not* an intention to mean anything specific by any specific word in that language. Thus, even if Alexander and Prakash's example does show that speaker-meaning and word-meaning do depend on *some* intention, it does not show that either kind of meaning depends on the specific intention that is relevant to our dispute. Word-meaning can be independent of a speaker's intention to mean anything by a word in a particular use even if it is not independent of other intentions, including the intention to speak in one language instead of another.

The word "canard" has one word-meaning in English and a different word-meaning in French. To know which of these meanings (or something else) is intended by a speaker in a particular use, we need to know which language the speaker intends to speak in. However, the speaker might intend to speak in French but still not intend to mean what this word does mean in French. The speaker might, for example, intend to speak in French but falsely think that the

word “canard” means “pig” in French. Then this speaker might intend to speak French but still intend to mean “pig” by “canard”. This speaker’s ineptitude does not, however, change the word-meaning of “canard”. The word “canard” still means “duck” in French (and “fib” in English). That is how we know that the speaker is inept and mistaken about what this word means in French. Thus, neither the meanings of words nor the possibility of word-meaning is affected by a particular speaker’s intentions on a particular occasion.

The same point applies to dialects. Alexander and Prakash give the example of “chips” meaning “French fried potatoes” in British English but thinner, crispier “potato chips” in American English (what the British call “crisps”), as well as “microchips” in the dialect of computer geeks. (9) So what? We can still say that the word “chips” has one word-meaning in British English (namely “French fries”) and a different word-meaning in American English (namely “crisps”). The fact that words can have different meanings in different languages and dialects does not show in the least that words do not have *any* word-meanings.

Alexander has responded in conversation by asking whether a word takes on a new word-meaning when it is used to mean something new by two people or three or four or more. In some contexts, “bad” means “good”, but how many people need to use it to mean “good” in order for the word “bad” to gain that new meaning as a word-meaning?

We admit that we cannot specify a number, but this is no surprise and no problem. I also cannot specify a number of years after which people become old; yet some people are old. Similarly, our inability to specify how many speakers must use a word with a certain speaker's meaning in order for that word to take on a new word-meaning does not show that no word has any word-meaning. These can be clear examples on both sides despite a large area of vagueness in between. Arguments from the heap (sometimes called slippery-slope arguments) are no better here than elsewhere.

Besides, as we will explain below, it is really too simple to ask whether a word has a certain word-meaning. To be precise, we need to say that a word has a word-meaning *in a given language*. The word then has that word-meaning only if that language exists. The language exists only if an adequate speech community uses that language. In this view, then, we can see that the vagueness concerns only which speech communities and languages exist. Without solving that problem, we can still say that a word has meaning in a language. That is enough to defend the thesis that some words do have word-meanings, assuming that some languages exist.

ii - The Intention to Mean Something Rather than Nothing

Alexander and Prakash's second argument (10) is that whether a string of symbols is meaningful or is a text at all depends on whether it was produced by

an author who intended to mean something by it. Hence, one cannot know whether a series of marks is a text or is meaningful without first determining its author's intentions.

The problem with this argument is that it focuses on the wrong intentions. One intention is the intention to mean something as opposed to nothing, that is, to say something meaningful. Another intention is the intention to mean something in particular as opposed to something else. Our dispute with Alexander and Prakash concerns the latter. We claim (and they deny) that texts can be interpreted by word-meanings independently of "the meaning intended by the author of the text" (2). The disputed thesis does not concern the intention to mean something as opposed to meaning nothing. Hence, we can grant that no text has a meaning independent of *all* authors' intentions. Indeed, we can grant that no string of marks is a text or has a meaning independent of some (actual or hypothetical) author's intentions to mean something (as opposed to nothing) by that text—that is, some author's intention to produce a meaningful text.

Although we do not need to go so far here, it does seem to us that pattern of marks can have a word-meaning without being produced by any author, much less by any author who intends that pattern of marks to be meaningful.^v Suppose lightening strikes a tree next to an intersection and leaves marks on the tree that exemplify the pattern "STOP". An observer who speaks English says, "Wow! Look at those marks! I can't believe it. Lightening produced a word." A friend who speaks only French then responds (in French—we'll translate),

“Really? What does it mean?” The English speaker answers (again in French), “Those marks mean STOP in English.” This last claim seems both intelligible and true to us. But everyone in the conversation knows full well that the marks had no author who intended them to be meaningful. Therefore, no author’s intention to produce a meaningful text is needed in order for a series of marks to have word-meaning.

The case becomes even clearer when the speech community enters the story. Suppose that drivers who approach the intersection and see the tree regularly stop just as if a normal stop-sign were there. This goes on for years. Drivers coming the other way come to expect this. The marks on the tree have gained word-meaning throughout this community. Moreover, it is legally enforceable. One day someone drives past the tree without stopping and is hit by a driver on the cross street who was expecting the other driver to follow the usual pattern of stopping at the tree. The other driver is from this community and knows that drivers are expected to stop at the tree. It is not a no-fault jurisdiction, so a court awards damages to the driver who was hit by the other driver who did not stop at the tree, and this decision is upheld on appeal. We do not think that this decision is obviously wrong. That shows that the marks on the tree have a legally enforceable word-meaning. Hence, an author’s intention to produce a meaningful text is not necessary either for word-meaning in general or for word-meaning to be legally enforceable. What gives the marks their

meanings are the ways in which they are *understood* by the community, not the way in which they were *produced*.

Alexander and Prakash suggest two responses. First, they say that the community must interpret the tree marks by imagining an author and asking what a normal speaker would have meant by the sign if an author had produced the sign. We do not deny that many drivers will engage in such imaginative fiction. However, it is not necessary. If a particular driver named Carol knows that all or most other drivers take the sign to mean “STOP”, so drivers coming on the cross street will expect other drivers to stop when they come to the tree, then Carol can say on that basis that the tree sign means “STOP” even if Carol resolutely refuses to engage in any fiction about any author with any intention.

Moreover, consider those who do imagine an author. How do they know what a common speaker would have meant by those marks? Simple: they know what those marks mean in English. They know the word-meaning of those marks in English. If they did not know the word-meaning, then they would not be able to imagine what a common speaker would have meant by those marks. To see this, just imagine that lightening produces a Chinese character that you do not recognize. Then someone asks what an author would have meant by that mark if an author had produced that mark. You would have no way to answer. That shows that any postulation of a hypothetical author with specific intentions depends on a prior grasp of the word-meaning of the marks in a language. So, even if it were necessary to postulate a hypothetical author, that need could not

be used to show that there are no word-meanings. Indeed, it might be used to show the opposite – that we need to assume word-meanings.

The second response by Alexander and Prakash to our tree example cites the multiplicity of languages. In another possible language, the same marks “STOP” might mean “HELLO” or anything else. There are no limits. So how can we say that “STOP” has the word-meaning that it does rather than one of its other possible meanings?

The answer is that we don’t say that, at least when we are being precise. Properly speaking, a set of marks does not have a single word-meaning. What it has is a word-meaning *in a language*. Thus, “STOP” means “halt” in English, even though it means “hello” in another possible language. Since our tree sign lives in the context of an English speaking community that interprets it in light of its meaning in English, it should not be misleading to say that the tree sign means “halt” as shorthand for saying that the tree sign means “halt” in English. Once we get the idea that the tree sign has one word-meaning in one language and a different word-meaning in another possible language, all we need to ask is which word-meaning matters. That question already presupposes that word-meanings exist. And that question is often easy to answer, as it is in our tree example. What matters, at least in some (though not all) uses, is determined by the context, since that determines how the set of marks will be interpreted. In other cases, where there is an author who intends to mean something in a certain language, the important word-meaning will usually (though not always) be the

word-meaning in the language that the author intended to use. This admits some role for some intentions in some cases. However, that is no problem for us in our dispute with Alexander and Prakash. As we already argued, even if which word-meaning is important does sometimes depend on which language the author intends to speak, that does not show that word-meanings cannot be independent of “the meaning intended by the author of the text.” (2) That intention involves much more than an intention to speak a certain language such as Standard English. Thus, word-meaning can be independent of the former even if it does (sometimes) depend on the latter. For these reasons, Alexander and Prakash’s second argument fails just as did their first argument.

iii – The Intention to Mean Something Rather than Something Else

Alexander and Prakash’s third argument begins with an example:

“Consider some people who come upon marks on the ground that are shaped like a ‘c’, and ‘a’, and a ‘t’. They begin to debate whether the marks mean ‘domestic tabby cat’, ‘any feline’, or ‘jazz musician’.” (11) After this start, Alexander and Prakash add three endings.

In their first variation, the debaters are “told that the marks were made by water dripping off a building. Their debate over meaning should now cease: No author, no meaning.” (11) We agree, of course, that there is no speaker-meaning. That does follow from the absence of any speaker or author. We also agree that

the marks have no definite single meaning, so it is silly to debate about which meaning the marks have. Nonetheless, it does not follow that the marks have no meaning at all. The marks might have all three meanings – “tabby”, “feline”, and “jazz musician” – in different dialects or idiolects within a single language. Our claim that words have meanings independent of what the author intends them to mean does not imply that each word has a single meaning. Words can be ambiguous. When a word is truly ambiguous, it is silly to debate about which meaning the word really has. It has both or all of the meanings. You can still debate about what the speaker meant, but that is ruled out if there is no speaker. So we can easily explain why the debate in Alexander and Prakash’s example is just as silly as it seems to be.

Alexander and Prakash might respond that what is really silly is to think that the water marks have any meaning at all, much less three meanings. However, we already argued in our discussion of the stop-sign caused by lightning that marks with no author can have word-meanings. The point there applies here as well and shows how the marks ‘c’, ‘a’, and ‘t’ can have word meaning without any author.

In their second variation, the marks were caused not by water but by a person who “tells them that he never intended to make letters. Rather, he was marking out the contours of patches of a vegetable garden.” (13) This variation might seem significantly different from the dripping water. Here there is not simply an absence of any intention at all. There is a seemingly contrary intention

and, perhaps, a positive intention not to mean anything. Alexander and Prakash infer that these marks have no meaning in this variation.

That does not follow. I might intend to utter meaningless gobbledygook but, by chance, utter words with meanings in Swahili. Imagine that a Swahili speaker hears me and says, "I didn't know you spoke Swahili." I respond, "I don't speak Swahili. What do those sounds mean in Swahili?" He responds, "They mean 'You are a cow.'" Of course, I as speaker did not mean anything by these sounds. That is why he is not offended. But he and I still agree that the sounds I uttered have word-meaning in Swahili. This shows that sounds or marks that were intended not to have any meaning can still have word-meaning. That lesson applies to Alexander and Prakash's second variation on their "cat" example. Even if the person who made those marks intended to mark out the contours of patches of a vegetable garden, and even if he positively intended not to mean anything by those marks, those marks can still have a word-meaning within a language.

In their third variation, the person who made the marks "informs [the debaters] that he was writing an ode to his beloved tabby." They claim, "That should settle the debate: 'Cat' here means tabby." (11) This is a strange conclusion to draw. A tabby cat is a type of cat, so "cat" cannot really mean "tabby". Suppose I have a daughter and no sons; then I say, "I have a child." The word "child" here does not mean "daughter". The word "child" refers to the more general classification that also includes sons, and my sentence says that

I have something that falls within that more general classification. Similarly, in Alexander and Prakash's third variation, the marks "c-a-t" do not mean tabby. Even if it is used to describe a tabby, the word "cat" means some more general classification into which tabbies fall.

Alexander and Prakash might respond that "cat" here means "domestic feline." But why say that it means "domestic feline" rather than just "feline"? The latter includes wild felines such as tigers and lions, but the former does not. The speaker's cat does fall into the narrower classification, "domestic feline", and the speaker has in mind a domestic feline, but we already saw that this is no reason to think that the word means that narrower classification. Perhaps the speaker, when asked whether his ode applies to lions, would respond, "That's not what I meant." But what he meant might be different from what his words meant. The speaker might not have thought at all about lions or about whether lions fall under the claims in his ode. This indeterminacy in his intention makes it hard to tell whether the speaker-meaning is "domestic feline" or just "feline".

That's no problem for defenders of word-meaning. We can just say that the word "cat" has several meanings within English, and this speaker means neither of those word-meanings in particular. The case does, however, pose more of a problem for exclusive intentionalists like Alexander and Prakash. They claim that what marks mean is determined solely by an author's intention. If so, and if this speaker does not intend "domestic feline" and also does not intend "feline", then this word has neither meaning. The speaker also cannot

have intended “cat” to mean the disjunction “either domestic feline or feline”, since that is equivalent to “feline”, which the speaker did not intend. Besides, it seems misleading at best to ascribe a disjunctive intention when the speaker never even considered either disjunct as opposed to the other. Thus, Alexander and Prakash’s views seem to imply that the word “cat” in this third variation does not have any meaning. That is not what they wanted, and it is not plausible.

The choice between “feline” and “jazz musician” raises other issues, because neither includes the other. A defender of word-meaning could again say that the word “cat” has both meanings within English, but this time it is clear that this speaker does not mean “jazz musician”. The speaker’s intention determines which word-meaning is the speaker-meaning. That is no problem for the defender of word meaning. Nor is it a problem for exclusive intentionalists.

There is, however, another approach worth considering. Word types are distinct from word tokens. If I write the word “cat” twice on a chalkboard, there are two tokens of one type. Suppose that I add “means feline” after one token, and I add “means jazz musician” after the other token. Then it might seem natural to say that, even though the word-type “cat” has both meanings in English, the first token of the word-type “cat” means “feline”, whereas the second token of the word-type “cat” means “jazz musician.”

However, it is misleading to talk of the meanings of word tokens. To see why, consider Alexander and Prakash’s own example (in their note 26) of cutting

the word “cats” out of a magazine article on “The Big Cats of Africa” and pasting it into an ode to tabbies. Here there is a single token of the word “cats” in different contexts. Of course, the speaker-meaning varies between the different contexts. The meaning of the word-type does not change, since the word-type has both meanings on both occasions. It is the same type, after all. We could say that the word-token changes its meaning as we take it from context to context. However, it is mysterious how and why this could happen if the meaning of the word-token is separate from the speaker-meaning. We suspect that anyone who thinks that this token changes its meaning is confusing the meaning of the word-token with speaker-meaning, which does change. If the meaning of the word-token is distinct from the speaker-meaning, then it is hard to see why it would change from context to context when the token does not change. The only change in context that would make the word-token seem to change its meaning is a change in the intention of the speaker who is using the token. That suggests that what really changes is speaker-meaning, not any sort of word-meaning. If that is right, then there is no need to talk about a separate meaning for word-tokens at all. We can talk simply of word-meaning (which is the meaning of a word-type) and of speaker-meaning (which is what the speaker means by a token of the word-type in a context).

Yet another possibility is to say that a word-in-a-context has a meaning. Then, when the word “cats” is cut out of the magazine and pasted into an ode to tabbies, the word-in-the-first-context has a different meaning than the-word-in-

the-second-context. The problem, again, is to individuate contexts. Differences between contexts won't matter, at least to Alexander and Prakash, unless there is some difference between the intentions of the authors in the contexts. But then we can go back and say again that the meaning of a word-in-a-context is not really distinct from the speaker-meaning on that occasion.

In any case, none of this shows that we can do without the notion of word-meaning, since we cannot even begin to figure out the meanings of a word-token or of a word-in-a-context unless we already know the meaning of the word-type. If we do not know what the word-type "cat" means, then we would not know which word in the title "Big Cats of Africa" to cut out and paste in our ode to tabbies. Similarly, if the title were in Chinese, then I would not know which character to cut out and paste in an ode to tabbies. This shows that word-meaning is needed for speaker-meaning, even in the odd kinds of cases that Alexander and Prakash discuss.

One final kind of case is perhaps worth exploring. Suppose a linguistics teacher writes the letters "cat" on a chalkboard as an example of ambiguity. The teacher intends the word to be meaningful, but she does not intend it to mean "feline", she does not intend it to mean "jazz musician", and she does not intend it to mean "feline or jazz musician". Since she has no particular intention, the word would seem to have no meaning, according to exclusive intentionalists. But the word does have at least one meaning in this context. Otherwise, it could not serve as an example of ambiguity. Meaningless strings of letters are not

examples of ambiguity. In contrast, it is easy for a defender of word-meaning to explain what is going on here. The word “cat” has two meanings, and it is ambiguous in this context, because neither meaning is intended as the speaker-meaning. This kind of case, thus, shows the need for word-meanings that are independent of what speakers mean.

iv – The Intention to Mean Something Deviant

The next argument by Alexander and Prakash cites two kinds of cases where words are used to mean something other than what they usually mean. In one example, Mrs. Malaprop, “asks you to make sure the ‘autobahn’ is pulled next to the sofa when she comes to visit you – and you know that she intends for you to move the ‘ottoman’.” (12) Alexander and Prakash seem to hold that the word “autobahn” in this case means “ottoman”, because that is what Mrs. Malaprop means by it.

If this is their argument, they conflate speaker-meaning with word-meaning. Because of her intention, what Mrs. Malaprop means – her speaker-meaning – is about the ottoman. Nonetheless, the word “autobahn” still means a German highway. Its word-meaning does not change when she misuses it. That is how we know that Mrs. Malaprop made a mistake. If the word “autobahn” actually meant “ottoman” when she used it, then there would be nothing wrong

with her utterance. Thus, far from undermining word-meaning, this example cannot be understood without postulating word-meaning.

In a note, Alexander and Prakash ask, “Is Mrs. Malaprop misspeaking in English, or is she speaking ‘Malapropenglish’? Is slang that has yet to be validated by the O.E.D. ‘English’ or something else? We can’t see that this is answerable in any way other than by arbitrary stipulation.” (15) We agree that any answer to the question about slang would be arbitrary in most contexts. In the case of Malaprop, however, she is clearly trying to speak standard English. Her intention is reason to claim that she is misspeaking English. Still, this does not matter to our main dispute. Even if she were not speaking English or trying to speak English, her word “autobahn” still has a word-meaning in English (it’s listed in the OED) or, at least, German.

It might not matter for practical purposes what the word means in this case. As Alexander and Prakash say, “if you’re a dutiful child, you’ll pull up the ottoman and not attempt to relocate a German highway.” (12) But that’s just because she is a nice woman, and her mistake was so clear that nobody got misled. We could interpret her utterance either according to her speaker-meaning or according to her word-meaning. Polite people will choose her speaker-meaning, because there is no point in being snippety. In contrast, we would have reason to interpret her according to word-meaning if Mrs. Malaprop wrote public laws. Imagine that, as Queen, she promulgated a law declaring that it is illegal to own an autobahn. A subject reads the law then buys an ottoman,

thinking that this is legal because the law is about autobahns. It would be unfair to find this subject guilty of disobeying the law, even if she meant “ottoman” when she said “autobahn”. The point is that laws should often be interpreted by their word-meanings because citizens who try to obey the law usually reasonably assume that those words have their common word-meanings, and people often do not have access to the intentions of legislators. This won’t always be the case, but sometimes it is, and then it seems only fair to interpret the law by its word-meanings rather than by its intent. Exclusive intentionalism cannot do justice to (or in) such cases.

Alexander and Prakash’s other example does not involve a change from a common meaning to a deviant meaning. Instead, it involves a meaningless sound that is used with a deviant meaning: “If a speaker says, ‘Gleeg, gleeg, gleeg,’ it means what the speaker intended it to mean, even if to others it sounds like nonsense.” (12) We grant, at least for the sake of argument, that “Gleeg, gleeg, gleeg” has the speaker-meaning that the speaker intends. As before, however, this string does not thereby obtain a word-meaning. To see why, imagine that a police officer says “Gleeg, gleeg, gleeg” to you. Then she arrests you for not moving your car. You complain, but she explains, “When I said, ‘Gleeg, gleeg, gleeg,’ what I meant, and what my words meant was, ‘Move your car immediately.’ So you disobeyed a direct order of a police officer.” This is obviously unfair to you, but it would be hard to see why *if* the police officer’s words really did mean “Move your car immediately.” What makes it unfair is

that police orders, like laws, should be issued in common language with common meanings. Exclusive intentionalists cannot capture this aspect of public language.^{vi}

Notice that this case is not like “the third-base coach’s pulling on his ear with the successful intent to convey the idea ‘Bunt!’” (12 n27) What makes that signal meaningful is not merely that the coach has a certain intent. It is that the coach told the batters in advance what this signal means. If the coach pulls on his ear without this intent, and the batter bunts as a result, the coach cannot fairly criticize the batter, because the coach did in fact give a meaningful signal, even if the coach did not intend to do so. Conversely, if the coach intends pulling his ear to have this meaning, but he neglected to tell the batters what this signal means, then, if he gives the signal but the batters do not bunt, he cannot fairly charge the batters with disobeying his signal. Such cases, then, suggest that what gives the signal meaning is not the coach’s intent but the convention and common understanding shared by the coach and the batters. Far from supporting exclusive intentionalism, such cases support its denial.

v – Context and Absurdity

Alexander and Prakash’s fifth and final argument is really a group of distinct arguments. The first deploys a standard example: “a ‘keep off the grass’ sign usually means something different on a lawn from what it means over a

drug counselor's office." (12-13)^{vii} This is supposed to show that "texts must be read in context" (12) and "The additional contextual information is, unsurprisingly, information that provides evidence of the intent of the *actual* author." (13) Alexander and Prakash conclude, "context is universally regarded as relevant only because it is evidence of authorial intent." (13)

This argument has several gaps. First, even if the sign should be interpreted in light of what the author intended to mean, that does not show that the sign does not have independent word-meaning. Otherwise, it would be hard to explain why the lawn-keeper or drug-counselor chose a sign with those words instead of other words. If word-meaning did not matter, they could choose a sign with any words and those words would magically come to mean whatever they intend them to mean. They could, for example, post a sign that reads only, "Gleeg, gleeg, gleeg." To explain why they chose the signs that they did, we need to postulate meanings of the words on the sign. Of course, the words might be ambiguous. However, as we saw before, the fact that a word has more than one meaning does not show that it has no word-meaning.

Second, the fact that the sign should be interpreted in light of its context does not show that it should be interpreted in light of "the intent of the *actual* author." (16) Suppose the drug counselor puts the sign "Keep off the grass" on the wall over his desk in his office. He intends to tell his clients not to step on his grass on the way out. However, a certain client does not know his intention. This client thinks that the counselor is telling clients not to use marijuana. The

client then steps on the grass on the way out. The drug counselor sees him do it, so he yells, “Don’t bother to come back. I cannot help clients who directly disobey my orders.” The client would have a legitimate complaint, and not just that the penalty is harsh or that he deserves a second chance. The client could legitimately complain that it was reasonable for him to interpret the sign as meaning, “Don’t use marijuana,” and he did not disobey *that* command.

Admittedly, the client did not know the counselor’s intended meaning, so Alexander and Prakash could respond that the client’s interpretation was reasonable only because of his ignorance. But suppose that we are observers who do know the counselor’s intent. We could still say that it is unfair to interpret the sign as the counselor intends, because that interpretation is contrary to the meaning that most speakers would probably have intended in the context in which the words appear, so the sign can reasonably be interpreted in such a way that the client is not guilty of disobeying it. The context is, then, relevant not because it is evidence of authorial intent, as Alexander and Prakash claim, but rather because it is evidence of how it is reasonable for readers to interpret the sign. If that’s right, this example cannot even show that the counselor’s intentions are important to interpretation.

A different kind of context — linguistic context — gets invoked in an example of scrivener’s error: “if a statute containing ten provisions about ‘cars’ has an eleventh dealing with ‘cas’.” (14) According to Alexander and Prakash, exclusive textualism implies that “the eleventh should be understood as

gibberish.” (14) We agree, of course, that “cas” here should be interpreted as “cars”. But what does this show? It does not show that word-meaning is incoherent or unimportant. Indeed, we could not tell that “cas” was nonsense if we did not know that it lacks the kind of word-meaning that “cars” has. The most that this example shows is that some reference to legislative intention is needed in order to interpret “cas” as “cars”.

The same point is supported by the scrivener’s error in the Seventeenth Amendment. We interpret that Amendment as making a permanent change in the way Senators are elected. Our interpretation cannot be based on the word meaning, which suggests a change for six years only. Instead, our interpretation seems to be based on reasonable speculation about what the legislators intended. If so, some reference to legislative intention is needed for interpretation.^{viii}

This is enough to refute exclusive textualists who hold that intention has nothing to do with interpretation. This is a problem for Justice Scalia or John Manning, both of whom Alexander and Prakash criticize on this basis. (13-14) We will let Scalia and Manning defend themselves, since we do not claim that interpretation can be done properly without any reference to any intentions.

Our admission is still compatible with mixed theories which hold that both intentions and word-meanings are and should be factors in interpretation. Word-meaning might even still be primary in the sense that laws should be interpreted by their common word meanings, even when those conflict with legislative intentions, except when the word-meanings meet a high standard of

absurdity (such as that it should be clear to all or most citizens that the legislators did not intend the literal word-meaning). When the word-meaning is very absurd, the general public does not base its acts on the absurd interpretation, so they cannot claim to have been unfairly misled by the words of the law. That makes it less problematic to invoke legislative intentions in this restricted range of cases.

None of this refutes the claim that Alexander and Prakash set out to refute. Their target was the claim that “texts can be interpreted without any reference, express or implied, to the meaning intended by the author of the text.”

(2) The fact that *some* texts have scrivener’s errors might show that *those* texts cannot be interpreted without reference to *some* intentions of authors. However, it does not show that *all* texts must be interpreted by or only by the author’s intended meaning. Nor does it show anything wrong with the notion of word-meaning independent of speaker-meaning or speaker’s intent.

Perhaps a misunderstanding has occurred. Alexander and Prakash make very strong claims, but maybe they should be interpreted more charitably.

Perhaps they did not mean what their words mean. We admit that exclusive judicial textualism is indefensible, because some reference to legislative intentions is necessary in some cases. Maybe they will admit that exclusive judicial intentionalism is also indefensible, because some reference to the meanings of words in laws is necessary in some cases. We cannot go home for a good night’s sleep yet, however, because the hard task remains. We need to

determine when word-meaning matters (and why), when speaker-meaning matters (and why), and how to solve conflicts between these factors in interpretation. An adequate theory of interpretation is bound to be complex. It cannot rest on any one factor alone. Alexander and Prakash seem to deny this, but, if they did not mean to deny it, then we are happy to interpret them in accordance with their intentions.

III – Word-meaning in the Law

It should be clear by now why word-meaning matters to the interpretation of marks on the ground, office signs, baseball signals, and odes. Word-meanings must be cited to explain dialects, malapropisms, ambiguity, irony, metaphor, and so on. But why is word-meaning important to *legal* interpretation in particular? To answer this question, we need to place our linguistic points in the context of legal theory.

Many legal theorists seem to present law almost as a private conversation between judges and legislators. This view lies behind, for example, the metaphor of a judge as “a faithful agent of the lawmaker”, which Alexander and Prakash invoke often. (23; see also Appendix I) When I tell my agent (say, my stock broker or literary agent) what to do on my behalf, the conversation is between me and my agent. Other people might listen and might care what we do, but the

main goal of our conversation is normally to serve our purposes and affect our actions, rather than the interests and actions of other people.

In such private conversations, what matters most to interpretation is usually the speaker's intentions. My agent's job is to fulfill my intentions, so my intentions guide my agent's interpretation of what I say. This point also comes out in conversations with Mrs. Malaprop. If we interpreted her according to the meanings of her words rather than according to what she intended to say, we would be impolite, she would be offended, and nothing would be gained, apart from laughs for insensitive jokers. In contrast, when we interpret Mrs. Malaprop according to her intentions, we get along with her, and nobody gets hurt. No listener is misled by what she says, so no reasonable expectations are violated if we interpret her by her intentions instead of by her words.

The same points might seem to apply to law if law were merely a private conversation between legislators and judges. Presumably, legislators are nice people, like Mrs. Malaprop, who do not aim to mislead. If nobody else was involved, and if judges could tell that legislators did not intend to say what their words mean, then nothing legitimate would be gained by interpreting legislators according to their word-meaning. Of course, judges might gain something for themselves by taking legislators at their word. Judges would gain power if they could choose to interpret by word-meaning instead of by speaker-meaning whenever they like the word-meaning better. But then judges would seem as selfish as the insensitive jokers who have fun at Mrs. Malaprop's expense.

Of course, this model of law is way too simple. Legislators and judges are not engaged in private conversations. The public listens. Moreover, the public is not eavesdropping. The conversation is directed at the public insofar as the goal of law is to control public behavior and serve the public interest. Thus, law is often a public conversation between legislators and citizens.

Law is also often cited in conversations between citizens and other citizens. One person can affect another person's behavior by invoking the law: "Get off my property or I'll have the police arrest you for trespassing." "If you sign this contract, I will give you that money, but then you will be legally required to do these things for me. If you fail, I will sue." Normal people say such things to each other (or assume them) because of their understanding of what the law is.

Because the law involves and affects normal citizens in such ways, it needs to be publicly accessible. Citizens need to be able to interpret the law. How can they do that? They might ask lawyers, but that can quickly become expensive. Citizens might research legislative intent themselves, but that can take lots of time and training, and the evidence is often unavailable, skimpy, or conflicting. Citizens might guess what legislators intended, but that can be risky. Consequently, citizens often interpret laws on the basis of what the words in those laws normally mean. These public word-meanings are usually accessible to competent speakers of the language. This method of interpretation, thus, seems both natural and reasonable in many contexts.

One such context is copyright law. Suppose I need to determine whether I need to get permission for quoting a passage from someone else's book. I might go to a lawyer, but maybe I can't afford one, so I read the law myself. Most laws are much more complicated, but imagine that this one reads simply, "Permission from the copyright holder is required for quotations of more than one hundred words from a song or more than five hundred words from any other source." Then it is reasonable for me to assume that I am not legally required to get permission to quote four hundred words from a poem. I do not need to check the records to make sure that the legislature did not intend to include poems as a kind of song in their idiolect. If they did intend that, they should have written the law differently, and I should not be held responsible for their error. If the author of the poem sues me, then the judge should interpret the law according to its actual word-meaning, so I should not have to pay any damages or even a permission fee after publication, since I acted reasonably in interpreting the law as I did. If the legislature wants to change the law so that it reads "... from a song or poem ...", then they may do so. But that changes the law. Before that change, the meaning of the law is determined by the word-meaning of "song", even if the legislators all intended to include poems. When word-meaning is clear, it trumps intention, at least in this area of law.

The point is even clearer in the context of criminal law. Oversimplifying again, suppose a law reads, "Nobody may carry a handgun with a barrel under six inches long and a knife with a blade over six inches long." A citizen reads

this law and wants to abide by it, so he carries a gun with a barrel under six inches long and leaves his foot-long knife at home. When he is arrested, he argues that the law forbids carrying both weapons, but he was carrying only one. The prosecution argues, of course, that the legislature intended, “Nobody may carry *either* a handgun with a barrel under six inches long *or* a knife with a blade over six inches long.” This intention is shown by how the legislature described the law in debates. The judge, of course, might hold that the gun toter’s interpretation was unreasonable, because it was obvious what the legislature meant. However, if it is reasonable for the gun toter to interpret the law according to its literal word-meaning, then the judge should not convict the gun toter. Later the judge and prosecutor can send a note to the legislature asking them to reword the law. In the meantime, the judge should interpret the law so that it does not forbid what the gun toter did. Why? Because that is what the words of the law mean.

Behind such examples lie general principles: When a citizen acts in a way that is allowed by the law on a reasonable interpretation, then it is unfair to subject that citizen to either civil damages or criminal punishment for that act. Why? One reason is that the citizen could not know that the act would be subject to such sanctions. Even if some other interpretation is also reasonable, if the interpretation that allows the act is reasonable, this option excludes the ability to know that the law forbids the act.

A similar standard of knowledge holds in science: If observed trends in global temperatures can be interpreted either as natural fluctuations or as caused by human activities, then we cannot know whether or not those trends are caused by humans. Future data might settle the issue, but the current data is not enough to give us knowledge. More generally, when it is reasonable to interpret the data in either of two ways, we cannot know which interpretation is correct. The same holds in law. When either of two interpretations is reasonable, then we cannot know what the law is.

Now add another premise: When someone cannot know what the law is, that person should not be held criminally or civilly liable for violating that law. This principle has been accepted by legal theorists from legal positivists to natural law theorists. It lies behind the traditional requirement that laws be publicized or promulgated. Admittedly, many citizens do not bother to read the law, but, as Fuller wrote, “Even if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify making the laws generally available. This citizen at least is entitled to know, and he cannot be identified in advance.”^{ix}

It follows that a person should not be held criminally or civilly liable for violating a law when that person’s act is allowed by a reasonable interpretation of that law. Add that it is reasonable for common citizens to interpret the law according to its word-meaning in many cases, like the examples above. This

shows why the public meanings of the words in a law should guide interpretation of that law in many cases.

Maybe not all cases. We are assuming that it is reasonable to interpret “guns and knives” as a conjunction in the example above. This might be questioned. Still, when it is reasonable to interpret the law by its word-meaning, citizens should not be sanctioned for abiding by its word-meaning.

It might not be reasonable to interpret a law by its word-meaning in some cases, such as when word-meaning obviously conflicts with intention. Examples include scrivener’s errors, such as in Alexander and Prakash’s “statute containing ten provisions about ‘cars’ [that] has an eleventh dealing with ‘cas’.” (14) This law should be interpreted by its intention, as we already granted. But that hardly shows that intention or speaker-meaning should trump word-meaning in cases where the mistake is less obvious, so the public might be reasonably misled or confused.

We also admit that, in other areas of law, it is less clear whether word-meaning or speaker-meaning should guide interpretation. As an example of constitutional law, consider the religion clauses of the first amendment. They read on the surface like a command from the ratifiers to legislatures to be enforced by judges. Where do ordinary citizens fit in? The answer is that ordinary citizens who read the words of the first amendment form legitimate expectations that certain kinds of laws will not be passed or will be struck down if they are passed. The citizens then act on their expectations. To violate

legitimate expectations based on reasonable interpretations is unfair. Other things might be worse, so judges might have to bring other factors into their decisions. But surely the word-meaning of the law has significant weight even in constitutional interpretation because of its effects on the public.

There might even be some areas of law where word-meaning should not guide judicial interpretation at all. Perhaps intent is all that matters in private contracts and wills. We take no stand on that possibility. Our thesis is only that word-meaning is coherent and is an important and even decisive factor in interpreting many kinds of laws. It is surprising that anyone would deny such a modest thesis.

NOTES

ⁱ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1987). As Alexander and Prakash point out (note 3), it is not clear that Scalia's textualism is totally exclusive, since he allows corrections for "scrivener's errors". However, like them, we are more interested in the positions than in who held them.

ⁱⁱ Source for Fish?

ⁱⁱⁱ "Is that English You're Speaking?: Why Intention-Free Interpretation is an Impossibility," by Larry Alexander and Saikrishna Prakash, *San Diego Law Review* 41 (2004), pp. XXX-XXX. All parenthetical page references in the text and notes are to this article unless otherwise indicated.

^{iv} Exclusive intentionalists also rule out sentence-meaning, so they would not be satisfied by the view that words have no meanings by themselves but only in the context of sentences. To avoid having to repeat "meanings of words and/or sentences" and "word-meaning and/or sentence-meaning", we will refer simply to word-meaning. We intend this notion broadly enough to encompass sentence-meaning as well. This simplification will not affect our main points, because exclusive intentionalists deny both sentence-meaning and word-meaning.

^v See also Fred Schauer, "Formalism", *Yale Law Journal* 97 (1989), pp. 509 ff.

^{vi} Alexander and Prakash's example of "strategery" resembles that of "Gleeg, gleeg, gleeg" insofar as "strategery" is not a word in standard English. That is why we do not discuss it separately.

^{vii} See also Gerald Graff, "'Keep Off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson," 60 *Texas Law Review* 405, 407-8 (1982)

^{viii} Another possibility is that we base our interpretation not on any intention but instead on a practice, namely, the common practice of reading the Seventeenth Amendment as making a permanent change in how Senators are elected.

^{ix} Lon Fuller, *The Morality of Law*, p. 51.