

INTENTION IS ALL THERE IS: A CRITICAL ANALYSIS OF AHARON BARAK'S PURPOSIVE INTERPRETATION IN LAW

*Stanley Fish**

INTRODUCTION

In the body of the Article that follows, I shall be describing and assessing the arguments of Aharon Barak's *Purposive Interpretation in the Law*.¹ My interest in that book, however, is parasitic on a larger interest in what has been called, variously, originalism, original intent, intentionalism, and subjective intentionalism. It has been for some time the prevailing view that by whatever name it is called, this view of interpretation is no longer taken seriously. It has been referred to as a dead horse, a discredited idea, a patent absurdity, and a misguided attempt to bind us to the "dead hand of the past."²

What is it, exactly, that stirs up so much opposition? Here is Robert Bork's definition, offered in an opinion piece lamenting the reluctance of any but members of the Federalist Society to identify themselves as originalists:

Originalism simply means that the judge must discern from the relevant materials—debates at the Constitutional Convention . . . newspaper accounts of the time, debates in the state ratifying conventions, and the like—the principles the ratifiers understood themselves to be enacting. The remainder of the task is to apply

* Davidson-Kahn University Professor and Professor of Law at Florida International University. B.A. University of Pennsylvania, 1959; Ph.D. Yale University, 1962.

¹ AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., Princeton University Press 2005).

² Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 8 (2006); see, e.g., H. J. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Powell argues that the framers were not themselves originalists. But the question is not what view of interpretation the framers happened to have, but which view of interpretation is correct. If the correct view is originalism, in one of its versions, the fact that the framers had a contrary view is only of biographical, not interpretive interest. If interpretation works a certain way, but you think it works in some other way, the interpretation of your words will proceed in accordance with interpretation's correct definition, not yours.

those principles to unforeseen circumstances. . . .³

If pressed, I might quarrel with one or two of Bork's formulations, but I think his account of originalism is pretty much on target. In addition, I agree with Bork when he opposes originalism to the project of "arriving at pleasing political results" and concludes that fidelity to "the original understanding" is the antidote to making "the Constitution the plaything of willful judges."⁴

The phrase "original understanding," however, is ambiguous. It could refer to what the original author or authors had in mind, to his, or her, or their intention, or it could refer to how the words would have been understood by literate and informed persons at the time of their utterance or publication. The difference marks the distinction between two kinds of originalism, textual originalism and intentional originalism. The most prominent proponent of textual originalism is Justice Scalia who firmly rejects any recourse to intention when it comes to legal interpretation: it is, he insists, what is said, not what is intended, that is the object of inquiry. "Men may intend what they will, but it is only the laws they enact which bind us."⁵ The words, Scalia and other textualists argue, are there, right on the page. The intention is either embodied in them or hidden from us in some psychological black hole. Intention therefore is either superfluous or dangerous because it leads away from the solidity of the text in the direction of unconstrained speculation. "[U]nder the guise . . . of pursuing unexpressed legislative intents, . . . judges will in fact pursue their own objectives and desires."⁶

At bottom, originalist textualism of the Scalia kind identifies meaning with convention.⁷ It says that when you want to know what an utterance means, consult the dictionary or, if the text is an older one, find out what the words would have been taken to mean by a reasonable, informed person at the time of their production. Originalist textualism also asserts that because words or signs (vehicles of meaning need not be verbal) are conventionally correlated with meanings, the meanings they conventionally bear will be understood independently of any worry about an intender or an intention. Scalia makes this point in a review of Steven Smith's *Law's Quandary*. Rejecting Smith's contention that only "persons, not objects, have the property of being

³ Robert Bork, *Slouching Toward Miens*, WALL ST. J., Oct. 19, 2005.

⁴ *Id.*

⁵ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16, 17 (Amy Gutmann ed., 1997).

⁶ *Id.* at 17-18.

⁷ See, e.g., Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 269 (R. George, ed., 1996) ("In the cycle of convention and intention, convention comes first . . . in the sense that the content of any intention is that which it has when interpreted by reference to the conventions of interpreting such expressive acts at the time.") An intentionalist originalist would say, following H. P. Grice, that it is the other way around.

able to mean,” Scalia declares, “[i]f the ringing of an alarm bell has been established in a particular building, it will convey that meaning even if it is activated by a monkey.”⁸

To the anti-intentionalist originalist, that is a knockdown argument. But an intentionalist originalist—and it’s time to come out from behind the curtain; I am one of this small but hardy band⁹—will respond that the bell would not convey a meaning if those who hear it know that a monkey has activated it, any more than it would convey a meaning if they know that it has been activated by a picture falling off a wall. The case would be a different if those who hear the bell and know that a monkey has activated it also know that someone has trained the monkey to push the alarm button in the event of smoke; for then the monkey as well as the bell would be understood to be the vehicle of the trainer’s intention. But if the monkey pushed the button just because its color attracted him, the sound produced carries no message; it is the result of accident, not design. To be sure, those in the building who did not know that a monkey had activated the alarm, might believe that the bell meant “be alert to a danger,” but they would be mistaken, and once the mistake had been pointed out to them, they would no longer believe that they had received a message. Smith is right; only persons (or other kinds of intentional agents like the spirit of God) are capable of meaning.

What is true of the pushing of an alarm button is also true of the issuing of a word or a sentence. Larry Alexander and Salkrishna Prakash imagine “some people who come upon marks on the ground that are shaped like a ‘c’ an ‘a’ and a ‘t,’” and “they begin to debate what the marks mean.”¹⁰ But then they find out “that the marks were made by water dripping off a building.”¹¹ Their debate, say Alexander and Prakash, “should now cease”¹² because, as the products of accident, the marks don’t mean anything. They then extend the moral to the Constitution. “Without an author . . . intending to convey a meaning through these marks, our seemingly grand ‘Constitution’ is nothing but a randomly-generated mass of inked shapes that merely resembles a text.”¹³ Those who *read* the Constitution, as opposed to merely noting the existence of marks, “explicitly or implicitly do so with an author in

⁸ Antonin Scalia, *Law & Language*, FIRST THINGS: J. RELIGION, CULTURE & PUB. LIFE, Nov. 2005, at 37 (2005).

⁹ Others are Steven Knapp, Walter Michaels, Steven Smith, Paul Campos, Larry Alexander, and Salkrishna Prakash.

¹⁰ Larry Alexander & Salkrishna Prakash, “*Is that English You’re Speaking?*” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 977 (2004).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 976.

mind. *And they have no choice but to do so.*"¹⁴

The italicized assertion makes a point that is often missed by those who oppose intentionalism. Being focused on intention is not an approach to interpretation—one possible method in competition with other methods—it *is* interpretation. Absent the presumption that the shapes you have encountered—c, a, t, black marks on a white background—are designed, are purposively produced, there is nothing to be done with them in the way of meaning.¹⁵ And if you do do

¹⁴ *Id.* (emphasis added).

¹⁵ The fact that meaning, in the sense of something purposively produced, cannot occur in the absence of an intention and cannot be construed apart from a specification of what the intention is, renders originalist textualism a non-starter. For you can't start with a text that isn't there—isn't yet a text, but is only marks and shapes, until it is regarded as the vehicle of some author's intention. In recent years a number of legal theorists have proclaimed themselves originalists, but their arguments identify them as textualists originalists and therefore as originalists mired in confusion. Thus, for example, Jack Balkin, urges that "[w]e ask . . . what the people who drafted the text were trying to achieve in choosing the words they chose." Jack Balkin, *Abortion and Original Meaning* 15 (Yale Law School Research Paper No. 128, 2006). This sounds promising, but within a couple of pages, Balkin says that at least some of the time we can get our answer from the text without any recourse to intention or "underlying principles": "When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textualist command." *Id.* at 17. But there is no textualist command, for there is no text until the assumption or assignment of an intention has transformed it from a mass of shapes into something that *means*. And once it has become a text through the quickening power of intention, the specification of the intention can be challenged.

An interpreter can say, I think that you are mistaken about what they had in mind. Balkin bases his textualism on the apparently self-interpreting force of clauses mandating (commanding) that the President must be thirty-five years of age. *Id.* at 18. But thirty-five, like any other word or sign, is conventional; that is, it stands in for something, not naturally, but as a matter of a correlation of mark to meaning chosen by an intentional agent. Therefore it is always possible to ask, although the question may at first seem odd, what does thirty-five mean; that is, when the framers set down thirty-five, what did they have in mind? If it could be determined that what they had in mind was a certain level of maturity in relation to average length of life and other historically specific factors, it would be possible to argue, and argue without absurdity, that when they wrote thirty-five, they meant fifty, on the reasoning that what they were after was that level of maturity, and not a number (although the number stood in for it). I am not making that argument or even claiming that it would be successful, but the fact that it can be made and might, in some set of imaginable circumstances, be successful, is enough to firm up my point, which is that no piece of language, no matter how "concrete" it may seem, is self-declaring; rather it declares within, and as the product of, an intention, and when we have been persuaded to a new account of the intention, "it" will declare differently and do so with an equally apparent immediacy and concreteness.

Balkin's chief purpose in his essay is to affirm "fidelity to the original meaning of the Constitution" as opposed to "fidelity to original expected application." *Id.* at 3. But since by "original meaning" he means "original textual meaning" (which he pointedly opposes to original intention), his "approach"—the wrong word; there are no approaches to interpretation and original intention is not one; it is just the correct specification of that interpretation always and necessarily is—rests on an entity that doesn't exist; and therefore the interpretive conclusions (about abortion and other matters) he claims to draw from it do not follow as matter of logical or normative course. (That doesn't mean that those conclusions are incorrect; only that their correctness or incorrectness cannot be linked to Balkin's interpretive "approach.")

The same criticism can be made of other self-identified originalists who turn out to be textualists, proponents of an interpretive approach or method or theory (all bad words) that begins by assuming the centrality of something that does not exist. *See, e.g.,* Barnett, *supra* note 3, at 9

something in the way of meaning with them, it is because you are already assuming design, assuming intention, whether self-consciously or not. That is, you have no choice but to do so.¹⁶

Just as intentionalism is not a method in competition with other methods, neither is it a theory in competition with other theories. It is the answer to a theoretical question—what is the meaning of a text? (any text, not a particular text)—but the answer is not itself a theory; it’s just the right answer to the question, and therefore the right definition of what interpretation necessarily is, an attempt to specify what some purposive agent meant by these words, marks, sounds, paintings, gestures, etc. It is not an answer you apply; it does not entail an

(“That language has an accessible public meaning is what enables interpersonal communication. If words do not have an objective meaning beyond the subjective intention of speakers and writers, we would never be able to understand each other.”). This is to confuse meaning, which cannot occur or be discerned apart from intention, and communication, which is an empirical and contingent matter. As I argue below, public meanings are a resource for intentional agents, not a constraint on what they can or cannot do. See Keith E. Whittington, Address at the AALS & American Political Science Association Conference on Constitutional Law: The New Originalism 117 (June 8, 2002), <http://aals.org.cnhost.com/profdev/constitutional/whittington.pdf> (“What is at issue in interpreting the Constitution is the textual meaning of the document, not the private subjective intentions . . . of its author(s).”). Again a document has no meaning apart from those intentions (“subjective,” for reasons I shall detail below, is a red herring). Whittington says that the “discovery of a hidden letter by James Madison revealing the ‘secret, true meaning of a constitutional clause would hardly be dispositive to an originalism primarily concerned with what the text meant to those who adopted it.” *Id.* at 117. Yes and no. We would have to inquire into the intention informing the letter. Is it a joke? Is Madison being mischievous? If it is decided that he is being serious and reporting on his understanding of what he and his colleagues had in mind, then, while the letter might not be dispositive, it would certainly be weighty and it might outweigh “what the text meant to those who adopted it.” *Id.* That doesn’t mean that we should then immediately run out and change all the laws and decisions now revealed to rest on a misunderstanding of what was meant by the constitutional clause. It is always possible to decide, for reasons of prudence and good order, to set aside the (newly discovered) true meaning of a text for a meaning that will be more serviceable. Just don’t claim that deciding to do that is a form of interpretation; it is the abandoning of interpretation. In general Balkin, Barnett, and Whittington are offering themselves as better textualist originalists than Scalia. It is a contest no one should want to win.

¹⁶ It follows then that the distinction between speaker’s meaning and utterance meaning, often invoked by critics of intentionalism, can not hold. Anti-intentionalists assert that the very existence of sentence meaning—meaning that can be apprehended independently of any specification of intention—proves that meaning can do very nicely all by itself. The intentionalist’s counter-argument is that sentence meaning, in the sense claimed, does not, in fact, exist. It is true, of course, that one often experiences sentences immediately, without any intervening worry about intentions, but that merely means that an intention (within which sense opens up) has been assumed. When you ask somebody to clarify his or her meaning—were you issuing an invitation or just stating a fact?—it will be because you are not sure about the intention of which the words uttered were the vehicle, and the words alone won’t tell you. And when you hear a sentence as meaning one thing, but are subsequently corrected—I was just laying out the alternatives, not making a promise—the ambiguity will inhere not in the words but in the intention behind them. For an elaboration of this point see Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 629-35 (2005); see also Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651, 664-68 (2005). For a contrary view, see David Hoy, *Intentions and the Law: Defending Hermeneutics*, in LEGAL HERMENEUTICS 174-79 (Gregory Leyh ed., 1992).

approach. Intentionalism doesn't decide questions of interpretation; it merely tells you what they are—questions about intention—and therefore tells you what you will always be doing if you are interpreting.¹⁷

Intentionalism does not, however, tell you how to do it. One of the unfortunate consequences of thinking of intentionalism as a method and a theory is to saddle it with expectations it could not meet and should not be asked to meet; the expectation, for example, that the intentionalist thesis—a text means what its author or authors intend—will direct you to the text's meaning, or rule in or out evidence of its meaning, or provide a set of directions for realizing its imperative. It has no imperative; it doesn't go anywhere; it just specifies where you already are when you try to figure out where to go next. You already are operating within the assumption of something designed (intended), for if you were not—if you regarded what was before you as an *object* rather than as a message—there would be no reason to assign it a meaning, or (and this is the same thing) no reason to reject any meaning someone wanted to assign it. It would function as a Rorschach test.

This last is absolutely crucial, for it goes to a concern voiced by everyone who enters these waters, the concern that there be a constraint, something that allows us to say that there are right and wrong interpretations. Interpretation cannot be a rational activity in the absence of such a constraint. If interpretation is to be rational and not arbitrary there must be something to be interpreted, something prior to the interpreter's efforts, something the interpreter is trying to get right, something in relation to which an interpretation can be rejected.

What could that something be? There are only two possibilities: the text and the intention of the author. But the text isn't really a possibility because a text doesn't become a text—the vehicle of a message—until the assumption of purposive design, of intention, is in place; take that assumption away and the text dissolves into a mass of shapes (remember c, a, t) that mean nothing and, because they mean nothing, can be made to mean anything.

Some find a third candidate for constraint in the needs and perspective of the current generation of interpreters. They argue that because a constitution “is bound to be read in changing ways as time

¹⁷ See on this point, Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution*, in LEGAL HERMENEUTICS, *supra* note 16, at 196 (“Intentionalism, as we understand it, is methodologically useless. In fact, one consequence of our version of intentionalism is that there can be no useful interpretive method. For if interpretation is just a matter of figuring out what some author or authors intended on some particular historical occasion, then interpreting can amount to nothing more than fining out whatever one can, by whatever means available, about what the authors in question are likely to have intended.”) In short, when looking for evidence of intention, you go to wherever you think you might find some. You are therefore surely doing something, but it is not, in the usual sense, methodical.

passes and circumstances change,”¹⁸ the text should be regarded “not as containing a declaration of the will and intentions of men long since dead . . . but as declaring the will and intentions of the present inheritors and possessors of sovereign power.”¹⁹ But if this is your “method” why bother with the text of the Constitution (or any text) at all? Why not take the shorter route and just enact statutes that reflect your will and be done with it? The proponents of the “living Constitution” or the “dynamic Constitution” or the “best that can be Constitution”²⁰ are not urging another form of interpretation; they are urging its abandonment by removing from it any constraint whatsoever. Rather than defending against the Rorschach test accusation, they embrace it and make it into a principle, the principle of no principle. Saying that you don’t want to be bound by the dead hand of the past is saying that you don’t want a constitution, or at least not one taken seriously.

So in the end, the only possible constraint against the deprecations of willful interpreters is the intention of the author. But how, it will be asked, can intention be a constraint if, rather than being embedded in the text (from which it could be extracted), it resides elsewhere—in the mind of an author, or even worse, in the mind of a collective, or even worse than worse, in the mind of a collective whose members have been dead for over 200 years? What kind of a constraint is it that won’t show itself, but must be sought and may, in fact, never be found?

These are real questions that speak to real problems, but those problems do not undermine in the slightest the thesis that a text means what its author or authors intend. If that is the only thesis that makes rational sense (because it alone rescues interpretation from the charge of being arbitrary), the difficulties of implementing it do not invalidate it; they just define the interpreter’s field of work, which, like any other field of work, contains obstacles, hazards, and possibilities of error.²¹ (Think of theodicy: a believer does not cease trying to discern the will of God because it can only be seen through a glass darkly and is often misidentified.) It is only if intentionalism were a method that we would expect it do the work and repudiate it if it didn’t. Once it is understood that the intentional thesis is nothing more (or less) than the right answer to a very old question—what does a text mean?—all objections to it

¹⁸ Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship*, 24 MELB. U. L. REV. 1, 14 (2000).

¹⁹ A. INGLIS CLARK, *STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW* 248 (1997).

²⁰ See RONALD DWORKIN, *LAW’S EMPIRE* 348 (1986). A statute’s meaning, says Dworkin, is not “fixed once and for all; rather, as part of a continuing story (of the history of interpretive efforts), the statute’s “interpretation changes as the story develops.”

Dworkin confuses the changeability of interpretation with the changeability of its object. If there is no stable object—if the meaning of the text is always changing, as opposed to accounts of it always changing—what then are interpretations interpretations of?

²¹ See Fish, *supra* note 16, at 636-48.

fade away and all the demands usually made of it are transferred to the empirical labor of trying to figure out what some purposive agent—his, her, theirs, or its identity is also an empirical matter—meant by these signs. That’s all there is to it. There is nothing more to be said, and there is certainly nothing more to be said of a theoretical nature because interpretation is not a theoretical activity. And if it is not a theoretical activity, there can be no theory of it.

I. AN OVERVIEW OF BARAK’S ARGUMENT

Aharon Barak would not agree, for he has written a lengthy book that promises to provide us with just such a theory. Indeed, the book is in large part a response to the fact, as he sees it, that despite the gallons of ink spilled on the subject, “there are no clear interpretive theories”²² of law. My thesis, as I have already said, is, first, that there could not be one (because interpretation is not a theoretical activity), and, second, we don’t need one (for the same reason).

Barak’s project, like mine, is an attempt to answer the question, what is the meaning of a text? And in the course of his exposition he moves back and forth between the three answers I have identified in my introduction. (1) A text, legal or otherwise, means what its author or authors intend. (2) The text itself, unless it is carelessly drafted, contains sufficient clues to its own meaning and should therefore be both the beginning and the end of inquiry (with legislative history and other “external” sources of information piecing out a middle if necessary). (3) The text means what those who ratify and/or interpret it take it to mean at the time of interpretation. Most theorists of interpretation (a category I believe should have no members) argue for one of those answers and reject the others. Barak, however, argues for all three.

In fact he is committed to arguing for all three the moment he declares, as he does early on, that “[e]very meaning that an interpreter gives a legal text must have an Archimedean foothold in the language of the text.”²³ By this he does not mean that the text wholly determines its own meaning, but, rather, that while the interpreter may have some discretion in what he or she decides (and “discretion” has its own chapter in the book), that discretion is bounded by the meanings words can have as a matter of lexical fact. Moreover, Barak adds, giving to a text a meaning “beyond its semantic meaning” is simply “not an act of interpretation, and it must rely on non-interpretive doctrines.”²⁴ An

²² BARAK, *supra* note 1, at 44.

²³ *Id.* at 19.

²⁴ *Id.* at 18.

activity is interpretive only “if it confers meaning on a text that is consistent with one of its (explicit or implicit) meanings, in the (public or private) language of the text.”²⁵

A word, then, in Barak’s view, may have more than one meaning (he approvingly quotes Holmes who says that a word “may vary greatly in color and content according to the circumstances”), but it may not have infinite meanings: “Language is not . . . infinitely malleable.”²⁶ The range of meanings it might acquire in different contexts establishes the limiting framework within which responsible interpreters perform their labors. Parsing the language of a text may not be all there is to interpretation—“I begin with language, but I do not end with it”—but “[n]evertheless the end of every interpretive process must remain within the bounds of language.”²⁷

It is the notion of a bounded flexibility—the text’s language constrains, but not entirely—that opens up a space for the other two answers to the question “what is the meaning of a legal text.” What can stabilize the possible multiple meanings words and sentences can reasonably have? Barak’s answer is “purpose,” a word that at once includes the idea of intention and is more capacious than intention as it is usually understood. Purpose, he tells us, is what animates the text and it is what the interpreter attempts to specify. He or she wants to know what some purposive agent had in mind in producing these words. The words alone will not tell you, in part because, given the (limited) multi-vocality of language, they will tell you too many things. But if you grasp the purpose within which the text was produced, that multi-vocality will be reduced and you will be that much closer to zeroing in on its meaning. The text in turn, because its range of meanings is finite, will help guide you to the specification of its informing purpose. Text and purpose work together in a nice (and not vicious) hermeneutic circle:

The interpreter understands the language of the text against the background of its author’s “true” intent, not what he or she might infer the intent to be just from reading the text.²⁸

....

We look to the language of the text, other texts, the history of the text . . . in order to learn about the purpose of the text.²⁹

....

We therefore presume that the language of the text supplies

²⁵ *Id.*

²⁶ *Id.* at 24.

²⁷ *Id.* at 19.

²⁸ *Id.* at 29.

²⁹ *Id.* at 111.

information about its subjective purpose.³⁰

But while “[p]urpose is the substance that gives meaning to the form,”³¹ there is often, says Barak, more than one plausible purpose that might be posited for a legal text, and that is where discretion comes into play.³² There are “situations in which the interpreter of a legal text . . . encounters a number of potential purposes”³³ In those situations, “the interpreter should use discretion to formulate, as objectively as possible, the purpose at the core of the legal text.”³⁴ This discretion, however, is, in Barak’s account of it, limited and bounded in the same way the polysemy of language is limited and bounded. It is to be exercised in relation to a narrow range of “reasonable results,”³⁵ that is, results that make sense given the system and values of the law. It is with respect to purposes as it is with respect to word meanings: “Judges never have absolute freedom of choice. The scope of their freedom varies from issue to issue, but it is always bounded.”³⁶ Indeed, “[j]udicial discretion accompanies the interpreter throughout the interpretive process.”³⁷ As one moves from the words to a search for the purpose that animates them and back again, “[l]inguistic discretion becomes legal discretion.”³⁸ There’s no avoiding it. “We cannot avoid using judicial discretion.”³⁹

In Barak’s argument, both the scope and necessity of discretion increase as one moves further in time from the moment of the text’s production, and therefore (or so he contends) further and further from the control of its original author:

As the text ages, the law by its nature, weakens the control of the author over the text he or she [or they] created, and strengthens the control of the legal system—which tries to bridge the gap between law and society’s changing needs—in the form of objective purpose.⁴⁰

By “objective purpose” Barak means the purpose or intent of the legal system at its highest level of abstraction, that is “the values, objectives, interests . . . that the text is designed to actualize in a democracy.”⁴¹ As time passes, he contends, those values, objectives

³⁰ *Id.* at 135.

³¹ *Id.* at 93.

³² There is a family resemblance here to H.L.A. Hart’s notion of the core and the penumbra. See H. L. A. HART, *THE CONCEPT OF LAW* (1961).

³³ BARAK, *supra* note 1, at 207.

³⁴ *Id.*

³⁵ *Id.* at 209.

³⁶ *Id.* at 211.

³⁷ *Id.* at 214.

³⁸ *Id.*

³⁹ *Id.* at 210.

⁴⁰ *Id.* at 191-92.

⁴¹ *Id.* at 148.

and interest supercede the local and particular values, objectives and interests of the individual author or authors. When this happens the “content of the objective purpose” itself changes in accord with “the values and principles at the time of interpretation.”⁴² Rather than being “frozen in time,” objective purpose, Barak declares, “changes with time.”⁴³

Now there are two ways to read this. Either Barak is saying that the abstract values the law is designed to actualize will have different particular instantiations at different times because the understanding of what is demanded by those values will have changed (e.g., we have come to see that the principle of equality demands equal rights, including voting rights, for women); or he is saying that contemporary values trump the values the original author may have had in mind, and that the old must give way to new, lest “obsolete social perspectives . . . hold contemporary society hostage.”⁴⁴ The difference may seem small, but it is significant. It is a difference as to where you start. Do you start with society’s present needs and values and then work the ancient text over until it can be brought into line with them? Or do you start with the ancient text and the purposes it embodies and respond positively to society’s present needs and values only when they can be brought into line with those purposes? Do you assume an unchanging level of meaning and purpose which may be differently inflected without losing its timeless integrity, or do you assume that under the pressure of today’s imperatives even that basic level of meaning and value may have to be transgressed and transcended?

At times Barak seems to be on the one side of these questions, as when he declares that interpretation “must be dynamic . . . so that it advances modern reality,”⁴⁵ or that we do not “seek the intent of the text’s author . . . Instead we give a contemporary objective meaning to the work.”⁴⁶ At times he seems to be on the other, more normative, side when he defines a legal text as one “intended to regulate human relations in the future” by means of “rules that will apply for years.”⁴⁷ Again the difference is real and crucial. It is one thing to ask how would the drafters of the Constitution have ruled if they had been confronted with this particular issue not within their original contemplation (internet regulation, gay marriage), and quite another to ask how can we stretch and bend their language so that it seems to fit (a word Barak uses several times) our present urgencies? If we ask the

⁴² *Id.* at 154.

⁴³ *Id.* at 154.

⁴⁴ *Id.* at 192.

⁴⁵ *Id.* at 155.

⁴⁶ *Id.* at 157.

⁴⁷ *Id.* at 191.

first question, the answer we come up with may more than occasionally be seen to thwart our desires (and we may decide that it is time for new legislation or an amendment); if we ask the second, the odds are that our desires will always be satisfied, at least after we have done a little work. On balance Barak seems to come down on the side of what we now call “presentism,” for he celebrates giving a meaning to the work “that is disconnected from the author’s intent and may even conflict with it.”⁴⁸

This then, in broad outline, is Barak’s model of interpretation. It is a model characterized by an interplay between constraints already in place—the meanings words can have in the language, the purposes recognized as legitimate by the system—and a flexibility within those constraints that leaves room for a discretion so wide that, at times, it seems right to call interpretation an act of “creation.”⁴⁹ The text constrains, but not wholly; purposes constrain, but in many cases there is more than one plausible purpose to choose from; and by virtue of this looseness within defined parameters, we are allowed to, and in fact obligated to, read the text so that it means what we need it to mean today. So, following Barak, we can say simultaneously, and without apparent contradiction, that the text means what its author intends, and also means what its semantic structure allows it to mean (because in Barak’s view the semantic structure is a constraint on what authors can intend), and also means what contemporary interpreters, alert both to history and society’s present needs, take it to mean (so long as they respect standard disciplinary purposes and standard dictionary definitions). Barak seems to have found a way of outflanking and disarming the three opposing answers to the question “what does a legal text mean?” by blurring their hard edges so that they all bleed into one another in a triumph of eclecticism. When he says “my approach is eclectic,”⁵⁰ he isn’t kidding.

II. THE TEXT AS CONSTRAINT

But does that “approach”—a word I will put pressure on later—work? Is it coherent? Do its parts hang together? I think not, and, in fact, I find every one of Barak’s key arguments flawed, and flawed in related ways. Let’s begin where he begins, with a view of language as not entirely determinate but determinate enough to rule out willful and arbitrary interpretations. His example returns us to the (drearily) familiar territory of vehicles and animals in the park⁵¹: “When a statute

⁴⁸ *Id.* at 157.

⁴⁹ *Id.* at 218.

⁵⁰ *Id.* at 222.

⁵¹ The *locus classicus* of this type of example is HART, *supra* note 32.

forbids dogs from entering a municipal park, determining that the ban extends to lions, too, is a non-interpretive activity.”⁵² Not really. Suppose that the statute was written in response to a succession of incidents involving dogs. At the time of drafting and passage there were no lions to worry about; only dogs were thought to be a nuisance and a danger. Later on, however, some people in the municipality begin to keep pet lions (assume for the sake of argument that there is no law against it) and want to walk them in the park. The lion owner points to the statute and says, “it only mentions dogs, not lions.” But the municipality’s lawyer responds (citing city council deliberations, newspaper accounts, etc.) that the drafters of the ordinance were concerned to ban animals that constituted a danger to public health and safety. They wrote “dogs,” but meant by “dogs” “non-human creatures who might create waste and seem threatening to park-goers.” Therefore their intended meaning included lions (or panthers or pigs or snakes). Whether or not this argument proved persuasive, it would nevertheless be an interpretive argument, an argument designed to establish what the drafters had in mind when they produced those words.⁵³

This hypothetical falls into the category of what Barak terms “hidden intent,” an intent not obviously derivable from the words as they are conventionally understood. “The real question,” says Barak, “about hidden intent is this: Under what circumstances may an interpreter, in formulating the intent of the text’s author, take into account an intent learned from sources external to the text?”⁵⁴ I would rephrase the question to read, “Under what circumstances may an interpreter, in formulating the intent of the text’s author, take into account information about what the author had in mind when he or she set down those words?” This rephrasing, rather than assuming (as Barak’s original does) that the text has its own integrity in relation to which information about hidden or special or private intentions is “external,” gives the intender the power to say what his words mean. If the meaning of words is assigned by the author and not by the text (which cannot do the assigning because in the absence of intention it is not a text, only a shape), information about what the author had in mind would then not be external to the text; it would configure the text and make it what it is. Once this shift is made, Barak’s question becomes circular: “Under what circumstances may information about the meaning of the text be taken into account when trying to determine the meaning of the text?” and the obvious answer is, under any and all circumstances.

The problem with what I have just said from Barak’s perspective is

⁵² BARAK, *supra* note 1, at 17.

⁵³ See Fish, *supra* note 16, at 638.

⁵⁴ BARAK, *supra* note 1, at 122.

that it pays no deference to the capacity of language to constrain, even partially, the act of interpretation. It would be more accurate to say, however, that I relocate the constraint in the intention of the author. Barak says over and over again that “language cannot take on any meaning an interpreter wishes.”⁵⁵ Exactly so. But language *can* take on any meaning an *intender* wishes. This does not mean a situation without constraint, but one in which the constraint on interpretation is the author’s intention. An interpreter cannot disregard that intention and still be said to be interpreting—intention, not the structure of language, keeps the game honest—and in fact the interpreter’s efforts to figure out what that intention is defines his task.

But doesn’t an intender have some relationship of responsibility to the meanings words ordinarily have as specified by standard dictionary entries? It depends. Barak is on firm ground when he insists that legislation “must speak in a language that its target audience understands, that is, in the public language,”⁵⁶ and that therefore judges who interpret legislation must “begin with the assumption that language is employed in its natural and accepted use as a means of communication among people.”⁵⁷ There is, however, a sleight of hand being performed here in the pairing of “natural” and “accepted” as if they were the same thing. They are not. “Natural” means “belongs to the general order of things.” A natural language use would be one demanded by the very nature of language and its (supposedly) invariant properties. “Accepted use,” on the other hand, is usage in accordance with conventions, and conventions are by definition artificial. Conventions are man (and woman) made, sometimes as the result of specific acts of stipulation (if you raise your hand at an auction, you’ve bought the pink elephant), sometimes as the result of habits of behavior that have “taken” in specific populations (for some, but not all, Americans, “cool” means admirable and just right). Conventions then, have an historical life (which can be very long), and they can be repudiated or ignored or allowed to die or even repealed. When they are in force, it is in particular places and times. They are not inherently universal (or eternal) even when they are more or less universally accepted.

I make this point in order to make another: what Barak calls “public language,” language produced and understood in relation to standard dictionary definitions, is conventional; it is the sum of agreements and practices, not of perdurable and historical norms. A dictionary doesn’t tell you what meanings go naturally with what sounds (that is the fantasy Plato has fun with in the *Cratylus*); it tells

⁵⁵ *Id.* at 24.

⁵⁶ *Id.* at 103.

⁵⁷ *Id.* at 138.

you what meanings are *more often than not* associated with what sounds (or marks). A dictionary is a statistical report, not a normative one; it tell you about the usage most people employ (in ordinary situations), not the usage demanded by some linguistic essence. Barak gets it exactly wrong when he says that “[t]he dictionary determines what meaning *may* be given to the text.”⁵⁸ Dictionaries don’t determine anything. They are an historical record of the intentional uses to which words have been put in the past. Nothing prevents that record from being added to; the record is not a constraint, but a resource, and the intending agent is free to ignore it. That is, an author who wishes to intend something need not bind herself to the word-meaning correlations found in the public language of the day, although she may choose to do so for political or sociological reasons. She can say “dogs” and mean “dogs, lions, pigs and snakes;” she can say “dogs” and mean Newton’s Third Law; she can say (or write) “dogs” and mean anything she likes.

But won’t that mean that the prime purpose of language—communication of ones thoughts to others—will be frustrated? Not necessarily. If the correlation of meaning to sound employed by an author/intender is known to just one other person, communication will have occurred. We typically say that these two share a code that amounts to a private language; but the language is private only in the sense that those who share it constitute a very small group, one much smaller than the group whose members share—and rely on—the code of public language. For public language is also a code (that’s what it means to be conventional).

The difference between it and private language is one of size, not kind. It is just a matter of conventions (codes) in place for a few people vs. conventions (codes) in place for a lot of people. That is certainly a difference, but it is not a theoretical difference, and the question of which code or conventional system a speaker or writer deploys is not a theoretical question; it is a question of the empirical situation within which the act of encoding is being preformed. Barak is right to declare that if the situation is one of framing legislation, there is an expectation (amounting almost to an obligation, but an empirical not a theoretical one) that legislators will hew to word meanings that conform to accepted usage (which is, remember, a statistical concept). It is a canon of construction that “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meanings.”⁵⁹ But the expectation is one framers and legislators can choose to disappoint, and while unhappy consequences may well follow (those who live under the law will not know what it is) and as a result unhappy citizens may vote

⁵⁸ *Id.* at 107.

⁵⁹ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

the legislators out of office, they will have been voted out because they performed their job badly, not because they gave to words meanings they could not bear (a favorite locution of Barak's). Words, wholly conventional as they are, can bear any meaning at all, although in this or that real world context—drafting legislation, giving directions, ordering pizza—you might be well advised (it is advice, not a law deriving from the true order of things) to mean by your words what most people would assume (it is an assumption based on expectations and habit, not on language's natural limits) you to mean.⁶⁰

What this all means (it's hard to get away from the word), is that while a speaker or writer can resolve to respect the meanings words conventionally have in ordinary usage, that resolve is a *part* of his intention, not a constraint on it. “Public language”—word-meaning correlations known to and accepted by a great many people most of the time—is a resource for speakers and writers (it allows them to predict the response of one, very large, population), not a limitation on what they can mean by the words they employ. And it follows then that it is the speaker's decision to employ the conventions of public language rather than others available to him (including ones he invents on the spot), and not some natural and unchanging fact about “language,” that constrains the interpreter. It is a primary task of interpretation to determine (if it can be determined; interpretation can always fail) what conventional set of meaning usages—what code—the speaker or writer is using; for if the interpreter were to misidentify the code—and remember, public or ordinary language is a code too—both the author's intention and meaning would be wrongly characterized. In short, and to make the point again, what a word or set of words mean is entirely up to their author.

⁶⁰ Lawrence B. Solum makes a similar point, but in a way that reifies sentence meaning, the meaning words supposedly have independently of the assignment of intention. Solum writes,

When the author knows that the reader will not know very much about the author's intentions, then you had better go with sentence meanings if you want to communicate.

That is, you had better go with the meanings that can be attributed by readers who have only the scantiest information about your semantic intentions.

Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 148 (2007). By writing “sentence meanings” instead of standard dictionary meanings, Solum implies that sentence meanings are readable apart from intention. But what he is really advising is that authors in certain institutional situations should resolve to use words in ways that conform to standard usage. That is, it can be part of an author's intention in certain circumstances to confine himself or herself to standard usage. In many situations it will be the default assumption of readers and hearers that the author or speaker whose words they are processing is employing language in standard dictionary ways. That is an assumption about intention and it is within that assumption, not independently of it, that what Solum calls sentence meanings and I call meanings conforming to standard usage emerge. In short there is no such thing as an independent category of sentence meaning that is intention free and free standing. When Solum says “there are sound normative reasons to use sentence meaning,” he grants sentence meaning an independence that it does not and could not have. *Id.* What he should have said is that there are sound reasons, not normative but circumstantial, to adhere to standard meaning-mark correlations known to one's audience.

Barak would seem to acknowledge as much when he discusses the language of contracts and wills:

A text in private law expresses the autonomy of the private will. The parties to a contract may formulate the terms of the contract as they wish. They may use a private code. They may decide that, in their contract, a horse is a donkey, and a donkey is a horse. Similarly, a testator may formulate his or her will in his or her own private code. He or she may call the wine cellar a “library,” and the bottles of wine, “books.” In that case the range of semantic possibilities includes the private meaning as well as the accepted meaning in the given language. . . . Of course, the private code or language cannot remain entirely private. Those who use a private code must give the interpreter a key to understanding it. Once they do, the interpreter should use the key [to] interpret the text according to the intent of the author⁶¹

What Barak may not quite see is that public language—the language of accepted meanings—needs a key too. It is just that almost everyone (except perhaps non-native speakers, children, and the mentally disabled) already has it and doesn’t have to actively seek it. In the end, the distinction between public and private (except with respect to the size of the language-possessing population) will not survive analysis and interrogation. Consider, for example, a “dying” language now spoken by only two people or even by one. Is it public or private? By the usual definition of language—a set of semantic and syntactical rules systematically deployed so as to permit the making and comprehending of the binary distinctions (singular/plural, past/present, actor/action, action/object etc.) necessary to communication—it is as public or any other. It’s just that the public is tiny. And on the other side, if by “private” you mean a dialect known to some people but unknown to the vast majority of the world’s speakers, every language that is not God’s language or the world’s language—that is, every language—is private.⁶² The moment you acknowledge that public

⁶¹ BARAK, *supra* note 1, at 103.

⁶² Another way to put this is to say that so called jargons of the trade are not special cases with respect to a set of normative sentence meanings; what some theorists call normative sentence meaning or objectified meaning is simply the jargon of a very large trade, the trade of ordinary language, which again is a statistical not a normative concept. John F. Manning, who in general has a quite sophisticated account of these matters, is correct when he says, “the first impulse of even the strongest purposivist is to try to read the statute in light of the accepted semantic import of the text.” John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 88 (2006). However, Manning makes the usual mistake of assuming that purposivism—reading in the light of intention—is an approach to or method of interpretation. It is, as I have said repeatedly, the form interpretation necessarily takes; it is not an option one could chose or decline. It is often true that interpreters (again necessarily purposivist if they are interpreting and not doing something else) will read statutes or any other text within the assumption that their authors are employing standard usages, that is, the assumption that standard usages are the ones authors’ intend to employ. In many circumstances that will be a default assumption which will

language is as conventional as any of the linguistic practices to which it might be contrasted, the privileged position of public language—except with respect to political and sociological contexts that demand its use for empirical, non-theoretical reasons—disappears. Sometimes you choose to bind yourself to it; sometimes you choose not to. It's entirely your call, which doesn't mean that there will be no consequences, but that the consequences, if you incur them, will issue from the world of habit and social/disciplinary decorums, not from the world of abstract norms.

Which gets me once again to my main point (so far): since public language—ordinary usage, generally accepted meaning, dictionary meaning—is not a constraint on what an author can intend by this or that word or set of words, there is no constraint, at least no one inherent in language, on what an author can intend by this or that word or set of words. Of course, as I have already acknowledged, there are other kinds of constraints, including the constraint Barak insists on, the fact that “[a] piece of legislation is not a linguistic or logical riddle. It is intended to send a message.”⁶³ Because legislation is intended to send a message that tells citizens which behaviors are lawful, interpreters of

not be abandoned until it proves problematic or fruitless. In short when looking for evidence of intention the standard meaning of words is a good place to start. Manning contends that what distinguishes textualists from purposivists is that the former give priority to “semantic usage” that “points decisively in one direction” over “evidence that relates to questions of policy.” But this assumes that something called semantic usage can point anywhere independently of some assumption about policy, that is some assumption about what it is that the user of language is trying to do. *Id.* at 93. It is only when some assumption of purpose is in place that semantic usage points somewhere, perhaps decisively, perhaps not. Absent that assumption, semantic usage will point nowhere and will not even be semantic usage; it will be just shapes or marks. In the same paragraph Manning begins a sentence, “[e]ven when clear contextual evidence of semantic usage exists . . .” *Id.*

Again Manning seems to believe that such evidence exists apart from any prior specification of what it is evidence of a particular intention. He does not always seem to hold that belief. At points, he acknowledges that he includes in his category of “contextual” the author's or authors' intention. *Id.* at 93-94. But he slips away from that acknowledgement and repeatedly reifies semantic usage or objectified meaning. He even has an analysis of the shorthand that leads him to so slip. “[E]ven though social and linguistic context is essential to the conclusion that a ‘no dogs in the park’ ordinance would not ordinarily apply to a domesticated pet pig, it is forgivably intuitive (if technically inaccurate) to state that applying that ordinance to a pig sacrifices the plain meaning of the enacted text.” *Id.* at 80. Manning here is saying that even though “plain meaning,” or self declaring meaning, does not in fact exist, is a fiction—because as he himself says, “context of course is essential even to determine the way words are used in every day parlance”—it is still acceptable, if technically inaccurate, to use the phrase.” *Id.* at 80. No it isn't, because those who give themselves this leeway quickly forget that when they refer to plain meaning, they are referring to a convenient fiction.

Instead, like Manning, they begin talking about objectified or plain meaning and confer on that non-existent entity the status of a free standing baseline in relation to which considerations of purpose can either be let in or excluded. This is what happens to the notion of plain meaning in Manning's own essay. He may know that it is not a notion that stands up under interrogation, but nevertheless he makes it stand up and be a thing of its own again and again.

⁶³ BARAK, *supra* note 1, at 103.

legislation begin with the assumption that the meanings being employed are the standard ones known to most citizens. Thus the canon of construction quoted above: “unless otherwise defined, words will be interpreted as taking the ordinary, contemporary common meanings.”

This, however, is a rule of thumb, not a rule in the hard, formal sense. It says begin by hypothesizing that the text’s authors intended the words they used to have their ordinary, contemporary common meanings, and see how far it gets you. (It is a default assumption, not a direction that you must do this and nothing else.) And if the hypothesis doesn’t get you very far, doesn’t lead to a conclusion that satisfies—you say to yourself, that just doesn’t make any sense—you revise it and try something else. Perhaps you do a little historical work and discover that some of the key words were being used in ways once standard but now obsolete, or that the meanings of some key words depend on a special context of knowledge—a scientific theory, a jargon of the trade, a political shorthand—not immediately obvious. (In short, you get to the “otherwise defined” part of the *Perrin* canon of construction.) Do you then decide, too bad, they should have made it clearer; I’ll just go with the standard meanings, even if they’re not theirs? You might, if there were a canon of construction in a particular branch of law that told you that you must do so; but if you did that—if you set aside the meanings you now know the author to have intended for the meanings she would have intended had she bound herself to common contemporary usage—you will certainly be doing something, but it won’t be interpretation. Interpretation is the act of trying to figure out what the author, not the dictionary, meant by his or her (or their) words.⁶⁴

⁶⁴ See, on this point, STEVEN SMITH, *LAW’S QUANDARY* 106-07 (2004). Smith supposes that a recipe calls for the ingredient “sugar”, but there is good reason “to believe that the . . . cook who wrote the recipe had an idiosyncratic usage and . . . he really intended what most people would call “salt.” Would it be right, asks Smith, to say that while he intended a reference to one substance, he used a word that most people use to refer to another substance, and so we will add sugar? “Pity the poor diners who are victims of a chef with this textualist approach to reading recipes.” Those who insist on the speaker’s meaning/sentence meaning distinction would describe this example thus: his sentence said sugar, but he meant salt. No, his sentence (not the dictionary’s) says “the substance some people call sugar but I call salt.” The sentence would say sugar if someone else said it, but not if he says it. In any instance, the supposed distinction between speaker’s meaning and sentence meaning is really a distinction between a sentence uttered by one person and a sentence uttered by another person. This is a point missed by Lawrence Solum who offers a criticism of Smith’s recipe example. Solum, *supra* note 60, at 136. Solum imagines a woman who writes a recipe in which she intends to list as an item the spirit known conventionally as rum. She however thinks mistakenly that the liquor she wishes to include in the recipe conventionally has the name whisky. Subsequently, when she learns that what she calls whisky is called by most people rum, she decides to try her recipe using whisky (as conventionally referred to) rather than rum (whose name in her mind was whisky). She finds that she likes the result when the recipe is made with what everyone but her calls whisky rather than with rum (confused yet?). According to Solum she would now say, “the recipe that I submitted is not the one that I intended, but it is actually a very good recipe,” and thereby be saying that “the recipe that she wrote is not the recipe that she intended to write.” *Id.* But the recipe that she

III. OCCAM'S RAZOR OR TOO MANY INTENTIONS

But Barak, as we have seen, does in fact divide the responsibility for meaning between the author and the dictionary (in the name of ordinary usage), and then throws in the “intent of the reasonable person” and the “intent of the system”—fictional constructions that didn’t and couldn’t author or mean anything—for good measure. As a result, he licenses interpreters to pick and choose between these putative meaning-sources as needed, and is, as I noted earlier, quite unfazed by the prospect of giving a text a “meaning that is disconnected from the author’s intent and may even conflict with it.”⁶⁵ But once you start down that road, why stop with ordinary usage and the intentions of various hypothetical entities? After all, the category of disconnected-from-and-in-conflict-with the author’s intent has infinite members, and therefore an infinite set of interests to which the interpreter can defer in reaching his or her conclusion about what something means. It is hard to see, however, why detaching yourself from any obligation to a text’s author, in the name either of the system, or of a personified abstraction, or of contemporary values, or of what Jesus or Elvis would have said, counts as saying what the text *means*. Rather it is saying what the “reasonable person” would have meant by it or what the highest level of the system’s aspiration would have wanted it to mean, or what the compiler of a standard dictionary (modern or historical) would have taken it to mean, or what we today, confronted by vexed issues and volatile times, need it to mean.

wrote *is* in fact the recipe that she intended to write. She intended the substance conventionally called rum but did not use the name that conventionally identifies it. Those who read the recipe assumed—it is as I have said above a perfectly good default assumption—that she was using words in accordance with conventional rather than idiosyncratic usage. In short they heard the words as issuing from an intention different from the one she actually had.

The confusion has nothing to do with words and their supposed meanings and everything to do with intentions, which must be in place before words can even be words. Solum goes on to assert that if she were asked whether someone who used whisky rather than rum “was making a mistake about the meaning of her recipe she might say, ‘no I made the mistake. They just followed the recipe.’” *Id.* No they didn’t. They misidentified her intention which was to use a mark meaning-correlation other than the mark-meaning correlation found in standard dictionaries or lists of liquors. They didn’t follow *her* recipe; they followed the recipe of an intender other than she. It is their mistake not hers. She might say, I see why they misidentified my intention; they assumed that it was my intention to adhere to standard usages but it was not. Solum concludes that in the end she would deny that “the meaning of her recipe is identical with her semantic intentions” but the meaning of the recipe *is* identical with her semantic intentions. *Id.* Her recipe does not split in two as those who adhere to the speaker meaning-sentence meaning distinction would contend. Her recipe means exactly what she intends it to mean; as the intender she is the one who gets to specify the meanings of the words she employs. Of course if she chooses meanings that are not standard, she risks not communicating her meaning; but whether or not it is communicated the meaning is still hers and is not altered by any misapprehension of it, even by one she may be thought responsible for.

⁶⁵ BARAK, *supra* note 1, at 157.

None of these determinations is uninteresting and you might well think that the law should take them seriously. But none of the agencies and entities you would be taking seriously—reasonable persons, public language, the system of law, etc.—wrote the text in question, and by moving away from the author or authors who actually did write it, you would not be refining or enriching or enhancing the act of interpreting; you would be abandoning it and taking up some form of re-writing or re-fashioning instead. Barak admits as much when he declares that while his approach “acknowledges the need to give expression to the real intent of the author . . . when there is no credible information about that intent . . . then the interpreter abandons legislative intent in favor of the fundamental values of the system.”⁶⁶ I would put it differently: When there is no credible information about the intent of the author, you abandon interpretation, which *is* the effort to determine that intent and try something else. Trying something else, like putting a fictive intention in the place of the one you were unable to specify, might be just what the situation requires—you have to do *something*—but just don’t call it interpretation.⁶⁷

The reason Barak sometimes calls it interpretation is that he grounds his account of interpretation in a linguistic constraint that runs out, and when it does run out, discretion kicks in, and “dynamic” or “creative” interpretation takes over, interpretation (not really the word) that moves further and further away from what the text meant for those who produced it and closer and closer to what the interpreter thinks the text ought to mean today. Once meaning is pried away from the author and given, even in part, to an abstract entity like “public language,” there is no reason not to give other parts of it to other entities—the system, fundamental values, contemporary aspirations—until at some point it floats entirely free of anything an author might have had in mind. To be sure, the author and his or her (or their) intention is repeatedly proclaimed by Barak to be the absolute center of purposive interpretation—“[w]e will never face a situation of the absence of purpose.”⁶⁸ “A piece of legislation with no purpose is a piece of nonsense.”⁶⁹ “The issue is not the intent that emerges from reading the text, but rather the message that the text’s author . . . intended to send through the text”⁷⁰—but in the end intention as a locus of meaning and therefore as a constraint on its specification is more honored in the breach.

One reason that Barak doesn’t stick with intention as the locus of

⁶⁶ *Id.* at 303.

⁶⁷ See Fish, *supra* note 16, at 636-40.

⁶⁸ BARAK, *supra* note 1, at 119.

⁶⁹ *Id.* at 223.

⁷⁰ *Id.* at 29.

meaning is that he thinks there is more than one. There are at least, by his account, two, and perhaps three. The first kind of intention he terms “subjective” and/or “real.” Subjective or real intent is “the true intent of the author at the time the text was created.”⁷¹ It is, he says, a “physical-biological-psychological-historical fact.”⁷² The second kind of intention Barak calls “objective” intent or purpose. Objective intent is the intent not of the “actual” author but of “the reasonable author.” At an even “higher level of abstraction,” it is the “intent of the system” as it is expressed in the system’s “values, objectives, interests, policy and function.”⁷³ In either form, objective intent is “not a physical-biological-psychological fact,” but is, rather, a “legal construction that reflects the needs of society.”⁷⁴ (Right there you see the text being detached from the umbilical cord of its author’s intention and given over to the purposes society may have at the time of interpretation.)

It is this positing of multiple intentions for a text that produces the project of purposive interpretation and gives it something to do. Given that “[p]urposive interpretation assumes that every legal text has multiple objective and subjective purposes,”⁷⁵ it is necessary to “synthesize and harmonize”⁷⁶ these purposes so that a single meaning can be determined and the law’s business can get done. This is where purposive interpretation does its work: “The central question that purposive interpretation resolves is the relationship between subjective and objective purpose.”⁷⁷

But suppose there were no “relationship” between subjective and objective purpose; suppose there were an identity or a total disjunction. Suppose that either subjective and objective purpose do not come apart, as Barak’s argument and project require them to do, or that they do come apart, but belong to different realms of inquiry. From either direction, purposive interpretation would then be deprived of a task to perform, for there would be nothing for it to resolve. This is the argument I want to pursue and I will begin by challenging the relevance of “subjective intention,” as Barak describes it, to any inquiry into meaning.

The first thing to say is that insofar as subjective intention (or purpose) is an entity worthy of separate study, it belongs to psychology rather than to an account of interpretation. The investigation of “a physical-biological-psychological fact”⁷⁸ requires, among other things, a

⁷¹ *Id.* at 120.

⁷² *Id.*

⁷³ *Id.* at 148.

⁷⁴ *Id.*

⁷⁵ *Id.* at 113.

⁷⁶ *Id.* at 118.

⁷⁷ *Id.*

⁷⁸ *Id.* at 120.

theory of mind, an account of physiology and its relationship to cognitive processes, a program of controlled experiments designed to infer mental states from observable phenomena, and so on. The act of interpretation, legal or otherwise, requires none of these. Rather it requires an understanding (and specification) of what role an actor/author is performing in a particular institutional setting. As an interpreter what you are interested in is not what is going on physiologically or psychologically in the intending agent's mind—which synapses are firing and on what side of the brain, which grievances or ambitions have been brought to the task—but what he or she or they *had* in mind given the quite limited range of purposes that might belong to persons engaging in this or that area of legal performance. Much of the criticism of intentionalism stems from the mistaken notion that it requires looking into people's heads, but it requires nothing of the kind. It may be odd to say so, but intentionalism has nothing to do with psychology.⁷⁹

Imagine, for example, a group of legislators, people charged with the task of framing laws. Imagine further that they are considering the question of campaign finance regulations. They produce a text and you want to know what it means. You don't read it through the lens of what you may happen to know about their psychological and neurological profiles. You read it through the lens of the set of intentions—institutional not psychological—they could possibly have had given the legal history of the issue and their place in the system, the intentions (or purposes) of tightening campaign finance regulations, or loosening them, or modifying them or eliminating them, or all of the above. (A complicated piece of legislation might defer to many constituencies and preferences in the course of its unfolding.)

The “actual” author, then, *is* the author-as-institutional-actor, at least for legal purposes; the other sense of “actual”—tied to psychology and physiology—is irrelevant, not to the legal point.⁸⁰ What about the

⁷⁹ See Fish, *supra* note 16, at 646-47. Steven Smith (Law's Quandary) worries (136-137) that we do not have any theory that explains individual consciousness, never mind the collective consciousness legal interpretation seems to require. SMITH, *supra* note 64, at 136-37. Not to worry. We don't need one.

⁸⁰ John Manning, in *What Divides Textualists from Purposivists*, asserts that Justice Scalia and other textualists are trying “to capture the understanding of an idealized, rather than an actual, legislator.” Manning, *supra* note 62, at 83. By “actual legislator” Manning and other textualists mean a legislator who may be half asleep, hungry, thinking about nothing and therefore someone with no particular intentions at all; they would add that should such a legislator have particular intentions, it is difficult or impossible to open up his or her head and extract them. But intentionalism, as I have said above, does not require entering the minds of “actual” or “subjective” legislators. Intentionalism requires only the positing of someone who has accepted an institutional role and whose actions can be rationally understood in relation to that role. There is no need to examine or even speculate about his or her mental landscape. If there is an actual legislator whose intentions are crucial, he or she is neither particularized independently of an institutional role nor idealized in the sense of being a fiction. He or she is a legislator, or in other

“reasonable author?” Can we get rid of that category too? Yes we can if we understand, as Barak almost does, that the “reasonable author” rather than being an interpretive device is a device brought in when interpretation has failed. Barak hypothesizes a “legator who made a will dividing her property among her children without specifying what each child was to get.”⁸¹ What to do? First, says Barak, find out “if there is enough information to indicate what the testator would have said, at the time she made the will, had she been asked how much each heir would get.”⁸² But suppose no such information turns up. What then? Then, Barak continues, “[j]udges turn to the next and higher level of abstraction—how a reasonable testator would respond.”⁸³

The sequence of his sentences suggests that this second step is no different in kind from the first step of trying to figure out what the testator would have done if the question “how much to each?” had been posed to her. But in fact it is entirely different. Trying to figure out what the testator would have done is an exercise that remains faithful to her intention, because it is an extension of the desire to know it. True, the constructed intention you come up with will be one she may never have had, but it will be a construction built on what you have found out about her habits (did she always leave the same tip at restaurants or did she leave more or less on the basis of service?), her attitudes toward family (did she feel that blood was thicker than anything, including performance or non-performance of filial duties?), the nature of her relationship with her children (did she dote on one and ignore or scorn the others?), and so on.

The intention of the “reasonable testator,” however, is a construction in another sense: It is built not on the person and history of the real testator, but on an idealized fiction. That is, although the effort to come up with an intention she might have had is a construct, it is a different construct from the one referred to with the phrase “reasonable testator.” The difference is between imagining what she reasonably might have intended and imagining what an imagined reasonable person might have intended. This is a difference Barak does not recognize as we can see when he asks, how would a reasonable testator respond?, and answers: “In a democratic society founded on equality, the answer would be that each child gets an equal share.”⁸⁴ So now we have the will being written by an imagined believer in equality about whose

institutional contexts, a parent or a teacher or a traffic cop or a checkout clerk. With respect to all of those actual persons, we read their intentions in relation to the job they are performing; and those are real intentions even though they have not been unearthed by brain surgery or psychoanalysis.

⁸¹ BARAK, *supra* note 1, at 186.

⁸² *Id.* at 186-87.

⁸³ *Id.* at 187.

⁸⁴ *Id.*

intentions we can proceed to ask questions. But the real testator may not have been a believer in equality at all, and when you dislodge her in favor of an abstraction drawn from political theory, you have lost all contact with what *she* might have intended, and therefore with what *she* might have meant. And the moment you do that, you are no longer interpreting; you are re-writing. There may be a rule here—when the effort to find out what the author meant fails, invent an author and ask what he or she would have meant—and it may be a good rule, for after all, the will does have to be probated, but it will not be a rule of interpretation. Indeed, it will have nothing to do with interpretation.

In saying this I am merely ratifying Barak's dictum that interpretation is a rational act. "I define legal interpretation as follows: Legal interpretation is a rational activity that gives meaning to a legal text."⁸⁵ That is, legal interpretation is neither whimsical nor arbitrary: "A coin toss is not interpretive activity."⁸⁶ Neither, I would say, is positing a fictional author in place of the real one and inquiring into his or her (non-existent) intentions. It might be a rational activity in the sense that you could explain why you did it: the law's business has to be done; it would be nice if we had enough information to determine what she had in mind, but since we don't, the next best thing is to presume that she wanted to be fair and egalitarian and reasonable and proceed from there. That's rational, and certainly more so than flipping a coin (which *is* rational at the beginning of a football game), but it is not interpretive.

At this point someone always objects, why not? And who are you to say what is and is not interpretive? Aren't you just foisting (or attempting to foist) a stipulative definition on us? It is certainly true that if you want to call something (including flipping a coin for that matter) interpretation, I can't stop you. And, as a matter of fact, I don't have a strong stake in the *word* interpretation; it's the rationality of the activity, by whatever name, that I am interested in, so let me rephrase: if what you're trying to do is figure out what somebody meant by something, asking what somebody else might have meant by it is not going to get you there (although it will get you somewhere). As Barak himself observes, "[i]t is not clear why we should consider the intent of a reasonable testator, rather than the intent of the actual testator whose will is the subject of interpretation."⁸⁷ Just so. Of course, as I have already acknowledged, there are conditions under which you might decide to do just that, but those would be conditions that will have led you to conclude that the search for the actual testator's intentions is unlikely to succeed and has gone on long enough. However useful the

⁸⁵ *Id.* at 3.

⁸⁶ *Id.*

⁸⁷ *Id.* at 123.

concept of the “reasonable author” might be, it is not an interpretive concept; it does not get us closer to what the author meant. Rather, its being invoked is a signal that the effort to get closer to what the author meant has been abandoned; perhaps for very good institutional reasons, but abandoned nevertheless.

That’s what I mean when I say that the device “reasonable author” has nothing to do with interpretation (if we can agree to continue to use that word). So two down: the “actual-psychological-physiological” author has nothing to do with the process of interpretation because he or she is a physio-medical entity, not an institutional one. And the reasonable (or objective) author has nothing to do with the process of interpretation because he or she didn’t author the text that is to be interpreted. That leaves only the “intent of the system,” that is, the set of “values, objectives, interests, policy, and function”⁸⁸ presupposed (but not necessarily explicitly invoked) as the general background of every performance in the law. No legal text, says Barak, can be read independently of these values, objectives and interests—“[t]here is always a purpose to guide the interpreter in pinpointing the legal meaning of a text”⁸⁹—although the overarching purpose or intent of the system will be inflected differently with respect to different branches of the law. While wills, contracts, and statutes will all be “enacted against the backdrop of these fundamental values and principles”⁹⁰ the shape of the enactment will vary according to the specific purpose of the particular branch of law: is the desired goal or object of achievement the honoring of a testator’s wishes, or the protection of the rights of parties to a valid contract, or the accomplishment of certain social goods? Each of these more or less specific purposes will have its place in, contribute to the definition of, and ultimately be defined by, the intent of the system, by those very general purposes which, Barak explains, “constitute a kind of ‘normative umbrella’ spread over [every legal text].”⁹¹

So can we do without the category of the “intent of the system” as I think we can do without the categories of the reasonable author and the biological-psychological author? Yes and no. Without the system and the intentions or purposes informing it, no action in law will make *legal* sense. For both the framers and interpreters of legal texts, acting within the intent of the system goes without saying. But that is why there is nothing to say about it and why invoking it cannot be a move in the game over which it presides. Acting within the intent of the system is not something you can decide not to do, nor is it something you

⁸⁸ *Id.* at 148.

⁸⁹ *Id.* at 119.

⁹⁰ *Id.* at 152.

⁹¹ *Id.* at 149.

decide self-consciously to do. Just like the air you breathe, the intent of the system is all around you and you needn't worry about it unless, for some reason, you are deprived of it. It is precisely because the "intent of the system" is constitutive of legal action—shapes it, makes it intelligible, makes it legible—that legal actors don't have a positive obligation to take it into account. They will already be taking it into account by virtue of the fact that they know where they are—a law office, a court—and don't think for a second that they are somewhere else. A lawyer or a judge doesn't walk into a courtroom and ask "when does the movie begin?" or "do you sell fresh pesto?" Nor does either ask (except rhetorically in the context of some legal strategy), "let's see, what is it, again, that we do around here?" The knowledge of where the legal actor is or what he or she is supposed to be doing there is not an add-on to his or institutional presence; is not information that has to be recalled or relearned; it is the internalized knowledge that comes along with having been initiated into a set of practices. Background knowledge doesn't have to be invoked and invoking it won't get you anywhere, for you are already there. It is within the precincts of background knowledge that system-specific acts are being performed by competent practitioners, that is, by practitioners whose minds are filled with and configured by the lessons no one need remind them of.

Thus when Barak says that an interpreter must "assume" the "fundamental conceptions of the legal culture" as a "basis" for determining "the meaning of the text,"⁹² one wants to ask what would it mean not to so assume? How could someone for whom the fundamental conceptions of the legal culture were a mystery be able to move around in that culture without bumping into furniture and machinery of whose significance he was ignorant? And when Barak declares that, with respect to interpretation, that "we need not always start with a clean slate," I would respond that we cannot possibly start with a clean slate and still be somebody capable of starting. So it makes no sense to say that "an interpreter *refers* to the fundamental values of the system,"⁹³ or that judges "*should* operate within society's established central framework,"⁹⁴ as if these acts were positive obligations judges could default on rather than obligations they have already signed onto simply by agreeing to be identified as judges. Words like "refers" and "should" imply that there could be a distance between one's institutional identity and the values one resonates to such that the institution's values would have to be affirmatively embraced.

There is no such distance. An interpreter who was not already proceeding within the assumption of the fundamental values and

⁹² *Id.* at 162.

⁹³ *Id.* at 164 (emphasis added).

⁹⁴ *Id.* at 167 (emphasis added).

intentions of the system would not be able to take the first step in prosecuting the interpretive task. Nor can there be any distance or tension between the agent's purposes and system's purposes. The system's purposes are the agent's the moment he or she enters the system in good faith, and if an agent happens to have other, external purposes and prefers them to the system's, we don't say that the system's purposes must be reconciled with the external ones; we say that the external ones must be abandoned (at least for the duration of the *legal exercise*), so that the agent can once again be a fully integrated practitioner rather than an outlaw.

Barak is always imagining a condition of fissure which can then be healed by his system. The work of purposive interpretation, he declares, is to forge a "synthesis between a norm's objective and subjective purposes":

On the one hand, interpreters presume that the purpose of the norm is to realize the author's intent. On the other, they presume that the norm's purpose is to realize the intent of the legal system.⁹⁵

But there is no need for any synthesis because the two purposes are already together: The author who produces language with the intention of effecting a legal end—distributing property, entering into a contract, framing a piece of legislation—is already the bearer and representative of the systems norms and intentions.

What this means is that urging legal actors to align themselves with the intent of the system is superfluous advice; they are already and necessarily there. Which also means that while the "intent of the system" is a perfectly good descriptive category—it identifies the values, objectives, aspirations etc. within which everyone in the enterprise necessarily works—it is not an interpretive category and does no interpretive work. That is, you can't invoke it (except as a purely ceremonial reminder: "we do Justice here"); you can't refer to it except again ceremoniously (you're already referring *within* it), you can't choose it (it already has chosen you), you can't choose against it (then you wouldn't be a legal actor at all); and, most importantly, you can't offer it as a reason for concluding X rather than Y. If X and Y are legitimate alternatives within the system, the system will support either of them; the work of determining which is correct will have to be done by something other than the system's *general*—that is, everywhere informing—intent.

⁹⁵ *Id.* at 91.

IV. PURPOSIVE INTERPRETATION AS METHOD AND THEORY

The “intent of the system” thus joins the “physical-biological-psychological intention” and the “reasonable author’s” intention as forms of intention that are of no help in the interpretive process, one because it is a piece of physical data that is without institutional (as opposed to medical or neurological) significance; one because it is the intention of a fictional entity that did not produce the text you’re trying to interpret, and the third because it is a global intention that practitioners cannot help having. What, then, are we left with? We are left with the intention of the real author, not the psychologically-biologically-physiologically real author (although he or she or they will surely be that too), not the imagined reasonable author (whether or not the real author is reasonable is one of the things you may be inquiring into), but the author-as-institutional actor who will necessarily be the author acting within the intent of the system. The interpretative task is nothing more (or less) than to figure out what *that* author—testator, legislator, framer, contract-maker—meant by these words, and the question, to which Barak’s entire book is intended to be the answer, is how do we go about doing that? What is going to help us?

To this point our analysis has amounted to a catalogue of those things that *won’t* help. The notion of public language or accepted usage won’t help because its interpretive relevance depends on the author’s intention to deploy it, and the words of the text can’t deliver that (crucial) piece of information. (Remember, intentions come first, words with meanings second.) The category of “discretion” won’t help because, rather than advancing the search for the author’s meaning, discretion licenses a departure from it in the name of creativity or flexibility or present-day values. “Actual,” “reasonable,” “objective,” and system-wide intentions won’t help because they are either inert with respect to purpose, fictional, or always and already pre-supposed. The only arrow remaining in Barak’s theoretical quiver is “purposive interpretation” itself, the idea that “the purpose of all legal texts is to realize authorial intent,”⁹⁶ an idea that sends the interpreter off in search of a text’s purpose: “Purposive interpretation views purpose as the context in whose light the text should be given meaning.”⁹⁷ Together these (and many other similar statements) do seem to add up to a methodological recommendation one might follow: when interpreting, first determine purpose; that is, do purposive interpretation, not some other kind.

But there is no other kind. Despite Barak’s use of the word,

⁹⁶ *Id.* at 146.

⁹⁷ *Id.* at 93.

purposive interpretation is not an “approach.” It is not a *method* of interpretation; it is a *definition* of interpretation. It tells you that if you are interpreting you are in search of the purpose or intention informing (and shaping) the text; you are in search of the intention of the author. It doesn’t tell you anything else. And once it tells you that, there is nothing more to say, although there is a lot to do.⁹⁸ Barak thinks that there is a lot more to say (this is a book of nearly 400 pages) because he thinks, first, that purposive interpretation is a method or an approach, and, second, that it is in competition with other methods and approaches and so must be argued for: “My goal is to convince the reader that purposive interpretation . . . is superior to other systems of interpretation”⁹⁹ He devotes an entire chapter to a consideration and critique of purposive interpretation’s supposed rivals, but in the course of that chapter it becomes clearer and clearer (although perhaps not to him) that interpretation without purpose (intention) at its center is not merely ineffective or incomplete; it is not interpretation. Thus “Old Textualism” is rejected because, despite protestations to the contrary, “it does not take authorial intent seriously.”¹⁰⁰ “New Textualism,” textualism of the kind Justice Scalia claims to practice, is rejected because it “completely ignores legislative intent, focusing on the understanding of the reasonable reader” and, therefore, as Barak rightly observes, on the understanding of the judge: “who is this reasonable reader, if not the judge?”¹⁰¹ Pragmatism is rejected because “In pragmatic interpretation . . . the guidance of purposive interpretation, directing the interpreter to search for and achieve the goal of the text,

⁹⁸ Once again let me anticipate the objection that in saying so I am merely offering a stipulative definition. No, I am offering a rational definition in response to the fact that, traditionally, three answers have been given to the question, “what is the meaning of a text?”: a text means what its author intends; a text means what its language, reasonably construed according to accepted usage, says it does; a text means what its interpreters take it to mean. My argument throughout has been that the second and third answers don’t work; the second because accepted usage, rather than constraining an author’s intention (and thereby constraining the act of interpretation) is a resource an author may or may not choose to deploy; the third because giving over responsibility for a text’s meaning to persons or fictions who didn’t write it—modern judges exercising “discretion,” the reasonable author, the ideal author—is a license for re-writing (if you don’t like the meaning the author intended, or if you couldn’t care less what the author intended, make it up as you go along). For interpretation to be a rational activity and not a form of what H. L. A. Hart calls “scorer’s discretion,” there must be an object prior to and independent of the interpreter’s activities, an object in relation to which you can marshal and assess evidence and measure progress. See generally HART, *supra* note 32. The text cannot be that object because until an intention has been posited for it, it is radically unstable, it doesn’t stand still. The desire of the interpreter cannot be that object because it is a moving and ever changing target; it doesn’t stand still. The only object of interpretation that makes it a rational activity rather than a free-for-all is the intention of the author. Which is not to say that the intention of the author is immediately and perspicuously available; it is, rather, what the interpreter seeks. It is the lode-star that at once guides the interpreter’s efforts and is their goal. It keeps the game honest.

⁹⁹ BARAK, *supra* note 1, at xi.

¹⁰⁰ *Id.* at 271.

¹⁰¹ *Id.* at 282.

does not exist”¹⁰² “Free interpretation” (his name for the postmodern-deconstructive-critical legal studies jurisprudence of power) is rejected because it “negates the guiding power of interpretive rules” and is “[i]n essence . . . not interpretive at all”¹⁰³ but a form of politics. The criticism in each instance is the same: the offending system lacks a mechanism of restraint and the restraint it lacks is authorial intent; absent “the guidance of purposive interpretation,”¹⁰⁴ interpreter/judges can go in any direction they like. Take away purpose, and it all falls apart. Purposive interpretation—interpretation anchored in the act of a purposive agent—is not an option one could choose or reject; it is the thing itself.

This conclusion is implicit in almost everything Barak says, but he still writes sentences like this one: “[I]f the goal of interpretation were to give a text its most aesthetically pleasing meaning, we might choose a different interpretive system than if the goal of interpretation were to realize the intent of the text’s author.”¹⁰⁵ But giving a text its most aesthetically pleasing meaning is not an interpretive goal, unless you think there is a cosmetic-surgery school of interpretation at the behest of which you say things like, “well, this is what it means, but it’s kind of dark and depressing isn’t it, so let’s lighten it up a bit” or “I know the book’s themes don’t coalesce, but let’s pretend they do so we can present it as aesthetically pleasing.” These are of course things you can say (and do), but they are examples not of interpretation, but of some other project (like making a text the “best it can be”) that deliberately leaves interpretation behind. There is no choice to be made between interpretive systems. In fact, there are no interpretive systems. There’s just interpretation (which *is* the attempt to realize the intent of the text’s author) pure and simple, and it’s not a system.

By that I mean (as I said in the introduction) it’s not a method. When you understand, as Barak does fitfully, that to interpret is to figure out the intention of the author, your understanding does not amount to a recipe or a game plan. Just because you know what interpretation is (and know too what isn’t interpretation) doesn’t mean that you know how to go about doing it. “Go out and do purposive interpretation” is a redundant exhortation—that’s what you’re doing if you’re interpreting—and one that doesn’t tell you anything about how to proceed. All the questions remain open, including the question of who or what is doing the intending. So I know I’m after the intention of a purposive agent, of an author, but who is he, she, they or it, and where will I find evidence of what he, she, they or it intends? The answers to

¹⁰² *Id.* at 288.

¹⁰³ *Id.* at 297.

¹⁰⁴ *Id.* at 288.

¹⁰⁵ *Id.* at 220.

these questions will not be found in any theory of interpretation because interpretation is not a theoretical activity; it is an empirical one. With respect to interpretation, there is only one theoretical question: What is the meaning of a text? The question is theoretical because it is general; it asks not what is the meaning of this or that text, but what is the meaning of any text? And the answer to a theoretical question is general too and does not extend to the elucidation of particulars. The right theoretical answer to the only theoretical question is that a text means what its author intends. Once it has been delivered, it falls silent and leaves interpreters to do all the work.

Barak believes that the work is theoretical and that the achievement of his book is to present the theory that will perform it:

[F]ew scholars have attempted a general interpretive theory that applies to all types of legal texts. Purposive interpretation aspires to that goal.¹⁰⁶

The aspiration is to be at once comprehensive and general: “This book . . . presents purposive interpretation as a general system of interpretation to be used for all legal texts.”¹⁰⁷ It is, Barak claims, “a general, unified approach to interpretation”¹⁰⁸ No it isn’t. It’s a general description or definition of interpretation, and as a definition it does apply to all legal (and non-legal) texts. No matter what the text or what the area of law, purposive interpretation is what you are going to be doing if you are really interpreting. Just how you go about doing it is something the definition—a text means what its author intends—won’t tell you. The only methodological lesson purposive interpretation delivers is a negative one: look for purpose and intention and don’t look for anything else (like what the ideal author would have meant by the text or what present-day legislators would like the text to mean.) Questions like “whose purpose?” and “where do you find evidence for it?” must still be asked, and answers can be found, as Barak acknowledges, anywhere and everywhere.

How do we determine the purpose of a text? “We look to the language of the text, other texts, the history of the text, and the general values of the system”¹⁰⁹ What do we do when there is more than one plausible candidate for the purpose of a text? “Purposive interpretation has no simple answer to these difficult questions,” for its “tool kit contains no clear and sharp ‘rule of adjudication’ or meta-rule.”¹¹⁰ How do we balance the competing values found in the legal system? “There is no single ‘balancing formula’ because the “diversity

¹⁰⁶ *Id.* at 94.

¹⁰⁷ *Id.* at xi.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 111.

¹¹⁰ *Id.* at 183.

of situations mandates a diversity of balancing formulas.”¹¹¹ Can we look to circumstances far a field, in time and place, from the historical emergence of the text? Can we look at biographies, legislative history, newspaper accounts, the congressional record? “The interpreter seeks intention in all of these places.”¹¹² In short, no approach, no method, no theory, just good old-fashioned empirical inquiry in the course of which you mine for evidence, put it together when found, and build it into an account of the author’s intention and therefore of the meaning of his her or their text.

Now it is the nature of empirical inquiry that different inquirers will come to different conclusions because acts of judgments (about whether this piece of information is relevant or whether that institutional value should be emphasized) are being performed, and acts of judgment are, by definition, debatable. Barak is right then to say that “two judges may reach two opposing, reasonable results,”¹¹³ but he is wrong to see this commonplace occurrence as evidence that “[j]udicial discretion exists.”¹¹⁴ No, it is evidence (hardly needed) that two interpreters, fully competent and equally credentialed, will often disagree about what is and is not pertinent to the task at hand. There is no discretion here, if by discretion is meant an area in which the interpreter/judge is left free to strike out in this or that direction. That is Barak’s definition:

It is as though the law stops walking at an intersection, and the judge must decide—without a clear and precise standard—which direction to take. Discretion is the freedom to choose between multiple legal solutions.¹¹⁵

But notions of “choice” and “freedom” have absolutely nothing to do with interpretation. Interpreters are not choosing the conclusions they come to, and they are certainly not doing so freely. Rather they are being *persuaded* to them. That is, in the course of sifting and assessing evidence they become convinced that this rather than that is the case. Convictions or beliefs as to the truth of a matter are precisely what you do not choose. One does not say, “I choose to believe that Satan is the hero of *Paradise Lost*” or “I choose to believe that the religion clause of the First Amendment sanctions prayer in the schools.” One says, rather, “for the following reasons based on the weight of the evidence I have considered, I am convinced that Satan is the hero of *Paradise Lost*” or “given the circumstances surrounding the writing of the First Amendment, I am convinced that the framers would not have regarded

¹¹¹ *Id.* at 180 (citations omitted).

¹¹² *Id.* at 143.

¹¹³ *Id.* at 209.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 208 (citations omitted).

school prayer as an establishment of religion.” In neither case (or in any other that might be imagined) would I be choosing anything. Nor would I be exercising discretion. I would be following my investigation to whatever conclusion it led me, and the conclusion would be one in which I rested (at least until it was dislodged by new evidence I found persuasive), not one I had chosen.

Barak moves from a correct observation about argument—it can produce opposing reasonable convictions—to a wrong account of interpretation—it permits and even mandates discretion, or, as he sometimes calls it, “creation.”¹¹⁶ But what he sees as discretion is in fact nothing more or less than garden-variety disagreement. The parties to the disagreement do not think of themselves as agents of discretion or creativity; they think of themselves as agents of truth, and each regards the other as a purveyor of falsehood. But judgments of truth and falsehood (at least with respect to interpretation) have no place in Barak’s argument. Indeed, they become unavailable to him as soon as he proposes to build his system on the shaky base of a porous linguistic constraint—the constraint of public language or accepted usage—that allows some meanings, but not all. Given that constraint, an interpreter is at least barred (or so Barak claims) from understanding “dogs” to mean “lions,” but in many cases there remains a “range of semantic possibilities,”¹¹⁷ and it is in the space opened up by that range that discretion comes into play. Moreover, since discretion is “unavoidable”¹¹⁸ (I am still rehearsing Barak’s argument not approving it), there will always be a moment when a choice has to be made, and all one can ask is that the choice be a reasonable one. One cannot ask that it be the absolutely correct or true one because the system, marked at every level by discretion, is not fully determinate. Therefore—and this is the conclusion waiting for him from the beginning—“[t]here is no ‘true’ interpretation”¹¹⁹ just as there is “no ‘true’ meaning.”¹²⁰

But this conclusion follows only if we buy into Barak’s picture of an interpretive process constrained by a language that is somewhat elastic at its borders, but tightly wound at its center. I argued earlier (and declare again) that there is no such constraint, and that an author is free to mean anything he wishes by the words he employs. Contrary to what one might expect, however, removing the constraint of language does not free interpreters, but binds them closer than they would have been bound were language constraining in the loose manner Barak describes. What they are bound to is the intention of the author—the

¹¹⁶ *Id.* at 218.

¹¹⁷ *Id.* at 98.

¹¹⁸ *Id.* at 114.

¹¹⁹ *Id.* at 218.

¹²⁰ *Id.* at 9.

intention that turns marks into texts—and it is a key part of their task to figure out which language system—public, private, jargon of the trade, allegorical, symbolic, mystical, whatever—the author was using. Paradoxical as it might seem, getting rid of the constraint of language returns truth to the interpretive process because there is now something (the author’s intention) to be right or wrong about, whereas in Barak’s picture of a bounded indeterminacy you could only be “kind-of” right. By exchanging a linguistic constraint for an intentional one we regain the possibility of a true interpretation and a true meaning in the form of a true account of what the author intended.

To be sure, there is no mechanism for determining which of two (or more) accounts claiming to be true really is true, and therefore the field will often be populated by rival reasonable accounts. Barak notes this ubiquity of dispute and concludes from it that “there is no single, unique solution”¹²¹ to a legal problem. No, what the ubiquity of dispute—the impossibility of shutting it down—shows is that there is no solution immune to challenge and revision. The fact that interpreters will more often than not debate the identity of the true interpretation doesn’t mean that there isn’t one. Indeed, it is only if all parties are convinced that there is a true interpretation that the history of their efforts and their arguments makes any sense. So the “search to discover what the legal meaning of a text ‘truly’ is” is not, as Barak asserts, “futile.”¹²² It is necessary and constitutive. Without it interpretation becomes the weightless and irresponsible affair Barak is always trying to keep at bay.

CONCLUSION

The intention of the author, then, is the answer to everything. It provides interpretation with an object. It recovers the category of truth. It removes discretion and creativity from the process. And it does away with the need for a whole lot of machinery. What has Barak got against it? Why isn’t he satisfied with it? Why does he go to the trouble of erecting this complex edifice? He gives his reasons in chapter eleven. His first reason is that intentionalism, or as he calls it, subjective intentionalism, is rarely the focus of interpretation anyway: “[M]ost subjective systems are not really ‘subjective’ at all because they do not investigate the actual will of the author.”¹²³ By “actual will of the author” he means the physical-biological-psychological will, the will as it might be ascertained by measuring brain waves, inquiring into mental

¹²¹ *Id.* at 209.

¹²² *Id.* at 9.

¹²³ *Id.* at 265.

states, performing controlled experiments, etc. But, as I have already argued, that will or intention is irrelevant to the interpretive process which is interested only in the intention of the author-as-institutional-agent, someone trying to do something within the presuppositions and imperatives of a purposive system. Collecting psychological or neurological evidence is no part of interpretation's business. So the fact that intentionalism pays little or no attention to "subjective" intention is all to its credit and not a mark against it. Barak's second reason for refusing to be satisfied with intentionalism in its simple, unadorned form is that "intentionalism . . . does not provide a solution to all the interpretive problems that the judge faces,"¹²⁴ and, indeed, it is sometimes impossible even "to know what the intent of the author(s) was."¹²⁵ This, however, is a "flaw"¹²⁶ only if intentionalism is a method rather than the right answer to a question. Intentionalism, to make the point yet again, tells you what you are doing when you are interpreting; you are looking for the author's intention. It doesn't tell you how to find it and it doesn't guarantee that you will find it. The failure to discover "what the intent of the author(s) was" is not a failure of intentionalism, but a failure of empirical inquiry, and empirical inquiries, as we know, fail all the time. Empirical impasses (and there are many more of them than Barak lists) take nothing away from the correctness of the intentionalist thesis which could be weakened only if it could be shown that there is some better answer to the question (again a definitional not a methodological question) "what is the meaning of a text?"

Barak believes that purposive interpretation is that better answer because its scope and ambitions are much larger than the narrow goal of specifying the intention of the author. Purposive interpretation, he claims, "facilitates viewing the text as part of the totality of the system as a whole and helps the text and its interpreter fulfill their roles in a democracy."¹²⁷ In short, purposive interpretation answers more questions than mere intentionalism (which often cannot even answer its own question.) Yes it does, but the questions it answers are not interpretive ones, but questions posed after interpretation—the search for the author's intention—has failed or been discarded in favor of another project. *Then* you ask, what would the reasonable testator say or what resolution best fits with the values of the system or what decision will advance the flourishing of democracy or what alternative will most preserve fundamental human rights?

These are all good questions and it is easy to see how asking and

¹²⁴ *Id.* at 266.

¹²⁵ *Id.* at 266-67.

¹²⁶ *Id.* at 266.

¹²⁷ *Id.* at 268.

answering them might help someone charged with the duty of making a decision when clear evidence of what the author intended has not been discovered or when some other imperative—the preservation of the social order, the maintenance of the system’s responsiveness and efficiency—is thought to trump the imperative of finding out what a text means. As Barak repeatedly says, the tasks law is asked to perform are complex and varied, and it would be unrealistic to assume either that they could all be accomplished by specifying the intention of some author or that, if information about the author’s intention is lacking, they should be left undone. This doesn’t mean, however, that interpretive avenues other than the search for intention should be explored; rather it means that interpretation is not always what you want to be doing when you’re trying to bring resolution to a legal problem. All I’m saying (for the umpteenth time) is that if interpretation, rather than bringing about some desirable social result, is in fact what you’re doing, there’s only one way to do it. Bringing about a desirable social result belongs to the dangerous territory of fashioning the law to suit our present purposes, and this brings me to Barak’s third reason for rejecting intentionalism: “[I]t fails to view the text being interpreted as a creature of a changing environment,”¹²⁸ and therefore it “freezes the meaning of the text to the historical point in time of its creation, rendering it irrelevant to the meaning of the text in a modern democracy.”¹²⁹ I trust it will be no surprise if I respond that determining (not freezing; that is a prejudicial term) the meaning of the text at the point in time of its creation is what interpretation is supposed to do,¹³⁰ and that substituting for that meaning a meaning friendly to modern democracy is not interpretation, but re-writing. Modern democracy’s needs did not author the text and when you make modern democracy’s needs the text’s author, you have broken free of any and all constraints on what you then declare the law to be. Barak complains that under intentionalism, “the interpreter becomes subordinate to the historical author.”¹³¹ Yes, and that is exactly what should be the case if the game is a serious one. Intentionalism’s resistance to the pressure of present-day desires is not, as Barak thinks it is, a “flaw.” It is a badge of honor. It is perfectly understandable that twenty-first century citizens would want laws and constitutions calibrated to their values and urgencies. Let them write and pass such laws, and if the constitution seems to block their passage, let them amend it.

After so much critical analysis, it may seem odd of me to conclude by saying that there is a great deal to admire about Barak’s book. It is

¹²⁸ *Id.* at 267.

¹²⁹ *Id.* at 268.

¹³⁰ See Scalia, *supra* note 8.

¹³¹ BARAK, *supra* note 1, at 268.

comprehensive, magisterial, generous in its acknowledgment of the work of others, scrupulous in its consideration of even the arguments it rejects. Above all, on the main point, Barak is absolutely right. There is no coherent view of interpretation without purpose at its center. He is also right on important subsidiary points, as when he firmly rejects the position of those who “contend that there is no intent, or that it cannot be identified, and that the search for it is a fiction.”¹³² If a statute is passed, it is, he says, obviously “the joint intent that brought about passage.”¹³³ There may be difficulties in identifying that intent, but these difficulties “are a far cry from the dogmatic conclusion that it is impossible to know the . . . intent of any piece of legislation.”¹³⁴

This is letter perfect and there are many other statements with which I find myself agreeing. I get off the train, however, when Barak insists on making purposivism into a method rather than a definition of interpretation and then finds the very heart of purposivism—the intention of the author—inadequate to the methodological task and therefore in need of the supplemental machinery that fills his pages.

That machinery is not without interest. Quite often discussions of “purposive presumptions” (presumptions reflecting the basic aims and values of the legal system) and the role they play in different areas of the law (wills, contracts, statutes, constitutions) as well as strategies for weighing and balancing them in particular situations, are insightful and yield heuristics an interpreter might well find helpful.

What they do not yield is a theory; just rules of thumb or ad-hoc pieces of advice: when you run into this kind of problem or puzzle, try this, and if that doesn’t work, try this other thing over here. Where the book succeeds, it succeeds because of its author’s vast practical knowledge of what the task of judging involves. Where it fails it fails because of its author’s theoretical ambition, an ambition that asks more of intentionalism than it could ever give. What intentionalism can give (I say for the last time) is the right answer to the question “what is the meaning of a text?” Having given that answer, intentionalism has done its work and can do no other. All it has to offer—and it is enough for me if not for Judge Barak—is its splendid parsimony.

¹³² *Id.* at 260.

¹³³ *Id.* at 133.

¹³⁴ *Id.*