


2011

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## Recommended Citation

76 Brook. L. Rev. 1033 (2011)

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# Statutory Interpretation, Morality, and the Text

*Lawrence M. Solan*<sup>†</sup>

In this essay, I wish to explore the question of whether certain approaches to statutory interpretation can be regarded as wrongful. My argument concerns instances in which interpreters take advantage of linguistic accident to license arguments that flout the intent or purpose of a law. Philosopher Bernard Williams calls reliance on literal meaning in this manner “fetishizing assertion,”<sup>1</sup> and considers it tantamount to lying.

If linguistic practices that rely too heavily on linguistic accident are wrongful, then serious ethical questions present themselves to the legal system. For if we acknowledge the problem, we then are forced to ask ourselves how comfortable we are with a rule of law that cannot rely fully on the law as written to sustain its legitimacy. In this brief essay, I raise these issues, and comment on their relationship to questions of judicial candor in cases concerning the interpretation of statutes. I conclude that especially when there is doubt about meaning, or suspicion that the legislature has erred, it is essential to turn to the purpose of the law in order to avoid the moral consequences of assertive fetishism. I further argue that recourse to purpose, contrary to the views of many, actually reduces the range of judicial discretion, and that those who associate purposive interpretation with judicial activism appear to be subject to a cognitive bias—the conjunction fallacy.

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<sup>1</sup> BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 100-10 (2002).

## I. MORALITY, SPEECH, AND INTERPRETATION

Lying is an immoral act—at least most of the time. It is prohibited in many legally relevant contexts. Lying under oath is perjury.<sup>2</sup> Lying in business affairs is fraud.<sup>3</sup> Lying to government officials is a crime in itself.<sup>4</sup> Lying in the course of acting as a lawyer is sanctionable misconduct.<sup>5</sup>

In some, but not all, of these contexts, misleading another person into believing to be true something the speaker believes to be false is also both immoral and legally prohibited. A truthful, but misleading, statement can be just as much a fraud as a false statement.<sup>6</sup> In fact, fraud is defined to include both species of deception. In some instances, it might even seem worse for a person to scheme to misdirect his target through a series of truthful statements than it does to tell an outright lie. While the liar has to take responsibility for his falsehood, the deceiver can feel virtuous at not having said anything false while arriving at the same result: successfully leading someone to believe something to be true that the speaker knows is false.<sup>7</sup> For this reason, many moral philosophers draw no distinction between the two.<sup>8</sup> Bernard Williams goes even further, denouncing reliance on the truth for moral justification of a fraudulent act as immoral in its own right.<sup>9</sup>

How does deception work? Like persuasion, deception depends on a change in the state of mind of the hearer (or reader).<sup>10</sup> To succeed, the deceiver calculates the inferences that a person is likely to draw from a speech act and leads the target to draw just the inferences that will accomplish the task

<sup>2</sup> 18 U.S.C. § 1621 (2006).

<sup>3</sup> For definitions, see RESTATEMENT (SECOND) OF TORTS §§ 525-26 (1977).

<sup>4</sup> See 18 U.S.C. § 1001 (2006).

<sup>5</sup> See MODEL RULES OF PROF'L CONDUCT § 8.4 (2010).

<sup>6</sup> See RESTATEMENT (SECOND) OF TORTS § 529 ("Representation Misleading Because Incomplete: A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.")

<sup>7</sup> See Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 439-40 (1997).

<sup>8</sup> See, e.g., T.M. SCANLON, WHAT WE OWE TO EACH OTHER 320 (1998); JENNIFER SAUL, LYING, MISLEADING AND WHAT IS SAID (forthcoming) (manuscript at 10-13) (on file with author).

<sup>9</sup> WILLIAMS, *supra* note 1, at 100-10.

<sup>10</sup> Philosopher J.L. Austin refers to this as the "perlocutionary effect" of the statement. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 108 (J.O. Urmson ed., 1965).

of deception.<sup>11</sup> The better the calculation, the more likely the deception. And these calculations are easy enough, at least much of the time. It is not at all difficult to deceive, because we are all aware that people tend to draw the inferences we intend them to draw in everyday conversation. In fact, we say the things we do with those inferences in mind. If I ask you, as your guest, “where’s the telephone,” we both understand that I am asking you if I can use the phone, and the assumption is that I will not use it in a way that will cost you money (or at least no more money than our relationship would bear within the bounds of politeness). Neither of us has said any of this, but I know what you will infer before I speak. In essence, we both apply Grice’s cooperative principle, which says that we construe conversations to proceed as a cooperative interaction, drawing whatever inferences we need to draw for that to happen.<sup>12</sup> You draw those inferences as the hearer, and I adjust what I say around the inferences that I (correctly, we hope) predict that you will draw.

Now, let us assume that you and I are negotiating some kind of deal. I know that if you speak with Hannes before signing on the dotted line, you will find out that the deal is unfair to you, and I also know that you want to speak to Hannes because you value his counseling. It is the kind of conversation that you would only have with Hannes in person if he is available. I would rather that you and Hannes not speak. You ask: “Have you seen Hannes recently?” I answer truthfully: “I saw Hannes in Washington last week.” What I didn’t add was that Hannes is now staying at a hotel in New York two blocks from where we are having our conversation, and that I just had dinner with him there last night. With only a little luck, your trust in me will cause you to snap at the bait, and I will be home free. In our story, I have committed an immoral act, whether or not you believe that telling an actual lie would have been an even greater affront (I personally do not think so).

Now let us ask whether, just as one can act immorally by misdirecting someone with statements that are literally truthful, one can act immorally by construing a statement of another in a manner consistent with the words, but

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<sup>11</sup> This perspective is consistent with the signal approach to communication, described in Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007).

<sup>12</sup> H. P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 41, 45 (P. Cole & J. Morgan eds., 1975).

inconsistent with the inferences that the context dictates would be reasonable to draw. That is, can I commit a reciprocal moral wrong if I make it your problem that your words can be construed in a manner contrary to your intended communicative desires, and perhaps, contrary to your interests, even when I know what you are trying to say? I think the answer is yes. Going back to our conversation about Hannes's whereabouts, let us assume that, after seeing Hannes in Washington last week, I have not seen him since. I have no idea where he is now. You, however, would gain some advantage from my acknowledging that I had seen him yesterday, although I hadn't. You then tell others that I did not deny having seen Hannes yesterday when I said that I had seen him last week, and that I spoke indirectly when you asked about Hannes, casting suspicion on my honesty. You never lie, but you have insincerely taken my words to imply things I never intended them to imply, and that the normal rules of implicature would not support. This makes you an immoral listener, just as the first story made me an immoral speaker.

Of course, your immoral act does not end with your having intentionally misconstrued my words. For you have not only misconstrued them, but you have presented your interpretation to others knowing that you did not fairly report the substance of my message, in order to deceive them without presenting them with a bald-faced lie. I will not here address the morality of the person who privately perverts the intended meaning of a communication without letting anyone know about it. When the distorted interpretation is reported, though, the interpretive act has been transposed into a deceptive speech act, which is precisely what we saw to be uncontroversially immoral above. That is why the two acts are reciprocal moral wrongs.

Moreover, we would draw the same conclusions about your morality if you were to take advantage of an error I made in what I said. Assume that I met Hannes on Tuesday of last week. We both know this because you were also there. In a subsequent conversation with you, I accidentally refer to having seen Hannes on Wednesday. We both know that by Wednesday, Hannes had flown to London, and that I didn't see him that day and could not have seen him that day even if I had wanted to see him that day. Nonetheless, knowing that I

had made a simple speech error,<sup>13</sup> you find a way to take advantage of the fact that I said Wednesday instead of Tuesday, perhaps implying that I was scheming with Hannes, or that I am a liar, or something else that you know not to be true. Again, you never lie, but you construe my words both insincerely and ungenerously, and then report your construal to others. Lawyers do this all the time when they engage in aggressive cross-examination of an opposing witness. It is insincere in that context, whether or not it is justified or required by the lawyer's obligation to advocate zealously. Should statutory interpreters behave similarly? Nothing in the nature of the adversarial system, which is what justifies the cross-examiner, suggests that they should be given similar license.

## II. USING STATUTORY LANGUAGE TO FLOUT PURPOSE

I suggest that judges sometimes behave toward legislatures and toward litigants just as you behaved toward me in our hypothetical stories about Hannes, whether you took advantage of an inference that was available but not a fair interpretation of my words, or whether you took advantage of a mistake. They take advantage of linguistic indeterminacy to interpret language that undermines the communicative intent of the speaker, in this case, the legislature. Sometimes, the indeterminacy results from a presumed chain of inferences, as in our hypothetical. At other times, it results from vagueness or from ambiguity. In still other cases, judges take advantage of errors in drafting.

Before I illustrate this point with examples from case law, I wish to make two points. First, these problems do not arise in every case. Typically, cases involve precisely the situation that the statute was enacted to address. Thus, as is

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<sup>13</sup> In everyday interactions, we routinely compensate for grammatical errors of others and construe the utterances as they were intended to be construed. For recent studies, see Lyn Frazier & Charles Clifton, Jr., *Quantifiers Undone: Reversing Predictable Speech Errors in Comprehension*, 87 *LANGUAGE* 158 (2011). Frazier and Clifton note that such compensation for grammatical errors may be more prevalent in informal speech than in the construal of formal writings, a fact obviously relevant to the legal context. *See id.* at 167-68. This distinction among registers suggests that individuals confronted with obvious errors in formal settings are more likely to be consciously aware of the mistake, and then must decide how to construe the language: as literally written, or as an error. The fact that we so routinely compensate for speech errors in a manner respectful of communicative intent suggests that self-consciously doing the opposite in formal settings flouts social norms and is construed as such.

often true with controversial statutory cases, we are dealing with situations that occur at the margins. Moreover, even when judges have the opportunity to flout the legislature's intent or purpose, they usually do not do so because they regard their roles, at least in part, as furthering the will of the legislature.<sup>14</sup> This essay, then, is truly about outliers.

Second, the judicial practices that I criticize might be defended as the best practices even if I am right that they are laced with immoral linguistic games. That is because sticking closer to the text than to a set of expected inferences has its own systemic advantages, many of which are described in the literature defending textualism.<sup>15</sup> One may argue that the risk of an occasional misreading of communicative intent is a small price to pay for the democratically salient principle of legislative primacy. This argument is convincing in some contexts, but not in the ones that form the subject of this essay. I return briefly to this question later.

The cases that most clearly illustrate my point are ones in which the statute is susceptible to multiple interpretations, whether because of syntactic ambiguity, lexical ambiguity, or vagueness (i.e., the case involves a borderline case of a statutory word), and a court chooses to ignore the purpose of the legislation and to take advantage of the linguistic opening. Consider *Ledbetter v. Goodyear Tire & Rubber Co.*, decided by the Supreme Court in 2007.<sup>16</sup> It is an unfair employment practice under the Civil Rights Act to discriminate against "any individual with respect to his compensation . . . because of such individual's . . . sex."<sup>17</sup> Ledbetter claimed that she was being

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<sup>14</sup> See, for example, *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2010), for a recent case in which the majority opinion, 131 S. Ct. at 1080-81 (Scalia, J.); the concurring opinion, 131 S. Ct. at 1085-86 (Breyer, J., concurring); and the dissenting opinion, 131 S. Ct. at 1086-87 (Sotomayor, J., dissenting), all make specific reference to the intent of the legislature. I discuss the debates about the propriety of referring to legislative intent, and the fact that judges of all political and philosophical stripes refer to such information in LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* ch. 3-4 (2010).

<sup>15</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (arguing that since statutes are legislatively enacted and intentions are not, that the proper role of courts is to construe only the language of the statutes themselves); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (arguing that with an enhanced theory of word meaning, it becomes less necessary to look outside the statutory language itself, thus constraining judicial decision making).

<sup>16</sup> 550 U.S. 618 (2007).

<sup>17</sup> 42 U.S.C. § 2000e-(2)(a)(1) (2006).

paid less because of her sex.<sup>18</sup> The statute has a 180-day statute of limitations. Although her claim was filed more than 180 days after the discrimination had allegedly begun, Ledbetter argued that her claim was timely as long as it applied only to those paychecks issued in the past 180 days.<sup>19</sup> In other words, her claim was that each time that Goodyear paid her less than they would have paid her if she were male, she had been subject to discrimination.

In a 5-4 decision, the Court rejected this position, accepting instead Goodyear's argument that the ordinary meaning of "discriminate" would focus on the decision to pay her less, made long ago, and not on the ministerial act of cutting a paycheck.<sup>20</sup> Of course, the Court was right about that. And the Court does often employ the canon that statutory words should be construed in their ordinary sense.<sup>21</sup> Justice Scalia has explained that the canon is used as a surrogate for investigating intent: "The question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."<sup>22</sup>

Nonetheless, it defies common sense to think that Congress intended to create a safe harbor for salary discrimination not discovered within six months. As Justice Ginsburg noted in dissent, unlike promotion decisions, compensation decisions are "hidden from sight," and comparative information becomes known only after time, if at all.<sup>23</sup> The decision literally gives an employer leave, after six months, to say to an employee, "I just want you to know that I am paying you less because you are a woman, and I have been doing it for long enough that I can do it forever." The statutory language licenses the majority decision—it is surely not without basis. But the majority has taken advantage of a linguistic opening to flout the purpose of the statute. I suggest here that this practice is morally wrong in everyday life, and I can see no reason for it to be less so when judges engage in it.

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<sup>18</sup> *Ledbetter*, 550 U.S. at 621-22.

<sup>19</sup> *Id.* at 624-25.

<sup>20</sup> *Id.* at 628-29.

<sup>21</sup> For discussion of the ordinary meaning canon, including linguistic justification, see SOLAN, *supra* note 14, at 53-81.

<sup>22</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)) (internal quotation marks omitted).

<sup>23</sup> *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).



In 2009, Congress amended the law to make this interpretation no longer available, requiring that the statute of limitations be reset with the issuance of each paycheck.<sup>24</sup>

More difficult are cases in which it appears that the legislature erred. Unlike cases involving statutes whose literal meaning is ambiguous, these cases actually do pit the literal meaning of the statute against the goals that the legislature was attempting to accomplish. And not all errors are the same, as Jonathan Siegel pointed out in his important work on this issue.<sup>25</sup> The easier of these cases involve scrivener's errors in which the legislature seems to suffer a written slip of the tongue. *United States v. Locke*<sup>26</sup> illustrates this problem. A statute requires that a person claiming mineral rights on federal land file a statement with the Bureau of Land Management "prior to December 31 of each year."<sup>27</sup> Although it is possible that Congress intended to require that claimants file by December 30, the likelihood is that Congress meant to say "by" instead of "prior to." Thinking that the statute required only that the claim be filed by year end, Locke filed his claim for his mineral mine in Nevada on the last day of the year.<sup>28</sup> The Bureau of Land Management held him in default of the filing requirement and proceeded to take away the mineral rights.<sup>29</sup> The situation was made worse by the fact that a member of Locke's family had called the Bureau's office and was told that the filing had to be made by the end of the year.<sup>30</sup> However, the doctrine that the government may not be estopped as a result of its errors made this fact appear to be legally irrelevant.<sup>31</sup>

Justice Thurgood Marshall's majority opinion showed little sympathy for the Lockes. On its face, such an opinion, although perhaps justifiable in its respect for the language that

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<sup>24</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. It is often the case that legislative overrides of judicial decisions occur in so-called "plain language" situations where a court argues that it has no choice but to rule in a manner that the legislature no doubt did not intend. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347 (1991). For discussion of congressional overrides in the context of the civil rights laws, see Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

<sup>25</sup> Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

<sup>26</sup> 471 U.S. 84 (1985).

<sup>27</sup> 43 U.S.C. § 1744 (2006).

<sup>28</sup> *Locke*, 471 U.S. at 89-90.

<sup>29</sup> *Id.* at 90.

<sup>30</sup> *Id.* at 89 n.7.

<sup>31</sup> *Id.*

the legislature actually used, is morally questionable. The legal system is taking advantage in two different ways of a legitimate misunderstanding that the system itself caused: by enacting a statute that was “a trap for the unwary,” as Judge Posner has noted,<sup>32</sup> and then by misinforming a member of the public about what the law said because the government workers themselves had fallen into the trap. I would hold Justice Marshall and those who voted with him morally blameworthy if it were not for a footnote in the opinion that threatened the government with abandonment of the “no estoppel” doctrine when the case was remanded.<sup>33</sup> Lawyers for the government read the footnote and gave the mineral rights back to Locke.<sup>34</sup> Thus, the case successfully applauds language-based rule of law values without allowing one side or the other to take undue advantage of a communicative error. Most cases, however, do not accomplish these goals simultaneously.<sup>35</sup>

Less nuanced is Judge Bybee’s dissenting opinion in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.*<sup>36</sup> The Class Action Fairness Act liberalizes removal to federal court of class actions filed in state court, and calls for removal decisions to be appealed as follows:

[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed *if application is made to the court of appeals not less than 7 days after entry of the order.*<sup>37</sup>

This is obviously a legislative error. Congress meant to say “not more than 7 days . . .” What sense does it make to say that an unsuccessful party must wait a week, and then has until the end of time to appeal? Arguing that the language should be applied as written, Judge Bybee adduced textualist rhetoric.

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<sup>32</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 267-68 (1990).

<sup>33</sup> *Locke*, 471 U.S. at 89 n.7.

<sup>34</sup> I describe this history in more detail in SOLAN, *supra* note 14, at 109.

<sup>35</sup> For one that does not, see *Bowles v. Russell*, 551 U.S. 205 (2007), in which a judge had misinformed a prisoner of the time that he had to file an appeal, and the Supreme Court ruled that the law should be interpreted literally, since the statute was jurisdictional in nature, *id.* at 206-07, an interpretation that is legitimate, but not necessary given the statutory language.

<sup>36</sup> 448 F.3d 1092, 1094 (9th Cir. 2006) (Bybee, J., dissenting). For further discussion of this case, see Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009), and my response to Professor Siegel, Lawrence M. Solan, Response, *Opportunistic Textualism*, 158 U. PA. L. REV. PENNUMBRA 225, 228-29 (2010), <http://www.pennumbra.com/response/104-2010/solan.pdf>.

<sup>37</sup> 28 U.S.C. § 1453(c)(1) (2006) (emphasis added).

Arguing that Congress did not make a scrivener's error, which a court might have the right to correct, Bybee continued:

Section 1453(c)(1) makes perfect sense; it is fully grammatical and can be understood by people of ordinary intelligence. That we think Congress might choose a different word if it decides to redraft the statute hardly means that someone made a "typographical error" that the court may blithely correct. "It is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result."<sup>38</sup>

Of course, the fact that the sentence is grammatical has nothing to do with whether the legislature committed an error in drafting. Bybee would have been on stronger moral grounds had he forthrightly admitted that the legislature made an error, but that in his view the legal system should trade some of its moral authority in an individual case for certainty, which brings credibility to the system. Instead, he engaged in fetishizing the assertion notwithstanding the legislature's obvious communicative intent.

Finally, let us look at a more difficult situation, one in which the legislature erred by writing a statute inconsistent with its purpose not because it used the wrong language, but because it based its legislative decision on erroneous facts. Consider *United States v. Marshall*,<sup>39</sup> a case that is well known to law students. It pits Judges Easterbrook and Posner against each other in the Seventh Circuit. Perhaps for that reason, the circuit court opinions are studied more than is the Supreme Court's affirmance.<sup>40</sup> Marshall was convicted of distributing more than ten grams of "a mixture or substance containing more than a detectable amount of LSD."<sup>41</sup> The LSD, which weighs next to nothing, was sold on blotter paper, which is more than 100 times as heavy as the drug itself.<sup>42</sup> Nonetheless, both the Seventh Circuit and the Supreme Court affirmed the convictions. This, as Judge Posner wrote in dissent, resulted in the penalty per dose of LSD to exceed the per-dose penalty for other drugs to an extent that makes little sense.<sup>43</sup> The best explanation is that Congress wrote a law in which LSD was treated like powder

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<sup>38</sup> *Amalgamated*, 448 F.3d at 1098 (Bybee, J., dissenting) (internal citations omitted).

<sup>39</sup> 908 F.2d 1312 (7th Cir. 1990).

<sup>40</sup> *Chapman v. United States*, 500 U.S. 453 (1991).

<sup>41</sup> *Marshall*, 908 F.2d at 1314-15.

<sup>42</sup> *Id.* at 1315.

<sup>43</sup> *Id.* at 1332-34 (Posner, J., dissenting).

drugs, such as heroin, because those who wrote the law did not know that the various drugs covered by the statute were neither manufactured nor sold in a comparable way.<sup>44</sup>

Not all legislative errors are created equal. Judge Easterbrook's majority opinion is not about taking advantage of linguistic accident, but rather about taking advantage of legislative ignorance. There is no doubt that Congress intentionally punished LSD as it did. Favoring consideration of purpose in deciding which of two available readings should be accepted does nothing to compromise respect for the constitutionally mandated legislative process. Correcting linguistic errors in drafting intrudes further into the legislative process, but does no more than attempt to arrive at the legislature's communicative intent. As noted above, we routinely compensate for grammatical errors in the speech of others, unselfconsciously drawing from the language the intended meaning.<sup>45</sup>

The correction of legislative errors that concern mistakes of fact resulting in the enactment of senseless laws are more difficult, however. When the mistake is a scrivener's error, the statutory interpreter who corrects the error says in essence, "You said *x*, but you meant to say *y*." When, in contrast, the mistake is one of basing a law on an erroneous set of facts, the interpreter who corrects the error instead must say the equivalent of, "You intended to accomplish goal *g* by virtue of enacting law *x*. But *x* does not accomplish *g*. Rather, *y* does. So I will change *x* to *y* to assist you in achieving *g*." Changing a law to better accomplish the legislature's goal is more of an intrusion into the legislative process, and reasonable judges and scholars are likely to disagree about its propriety. Perhaps the appropriate solution of this case would have been to declare the law unconstitutional as applied, since the penalty, in the statutory scheme, lacks a rational basis.

### III. STATUTORY INTERPRETATION AND JUDICIAL CANDOR

Judges must both decide disputes and explain the reasons for their decisions. Often, it is suggested, judges make decisions based on personal values, their own politics, or perhaps an unarticulated sense of the best decision under the

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<sup>44</sup> See *id.* at 1333-34.

<sup>45</sup> See Frazier & Clifton, *supra* note 13.

law, which then must be justified post hoc. Gaps between reasonable inferences about what drove a judge to decide a case and the reasons for the decision that the judge articulates create the inference that judges are not being candid. David Shapiro describes the importance of judicial candor:

A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power. In the absence of an obligation of candor, this constraint would be greatly diluted, since judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail. In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another. Moreover, lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.<sup>46</sup>

As Judge Posner points out in *How Judges Think*, the issue of candor arises more with the judges of high courts, the Supreme Court in particular, since those jurists have far more discretion than do lower court judges.<sup>47</sup> Moreover, the cases most likely to generate published opinions are the more controversial ones, increasing the likelihood that a judge's personal values will infiltrate the decision-making process.

It is hard to believe it an accident that the five most conservative justices voted as they did in *Ledbetter* (the employment discrimination statute of limitations case), and that the four more liberal justices opposed them in dissent. It appears that the justices had reason to vote as they did based on their political and personal values, and used the linguistic opening as an opportunity to further these values. Not all cases involving assertive fetishism involve a lack of candor, just as not all cases that concern candor raise the moral issues discussed here. Nonetheless, the relationship between the two issues creates particularly troubling set of examples. Judges who simultaneously construe statutes in a way consistent with the language but inconsistent with the statute's purpose, do so to further their own values, and hide the ball about all of this.

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<sup>46</sup> David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (footnotes omitted).

<sup>47</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 269-323 (2008) (chapter entitled "The Supreme Court Is a Political Court").

As for whether this lack of sincerity is appropriate, I agree with Professor Shapiro that it should be kept to a minimum. A recent article by Micah Schwartzman argues that judicial sincerity is important to a democracy, for people are entitled to know the reasons behind the ways in which the state treats them.<sup>48</sup> While the lawyer may be insincere, the judge plays a different role. Yet, as Judge Posner points out, the requirement that judges write only about legitimate legal arguments severely restricts their decision-making options, and preserves rule of law values at least in part.<sup>49</sup> The practice essentially tells judges: “Whatever your actual motivations for making a decision, unless you can justify it in legal terms to the legal community, you should not go there.” I surely do not recommend that judges cease this practice. However, when other values are self-evidently driving the decision-making process, this practice most likely comes at some cost in credibility.

A model for judicial sincerity in this context is Chief Justice John Marshall’s decision in *United States v. Wiltberger*.<sup>50</sup> A statute that federalized crimes committed on American vessels on the high seas, defined “high seas” to include rivers in other countries for most of the crimes, but failed to do so for the crime of manslaughter, with which Wiltberger was charged.<sup>51</sup> Marshall, in his opinion, admitted that the legislature most likely intended to include this crime, but decided that the rule of lenity, which at the very least prohibits courts from expanding criminal liability beyond any reasonable reading of the statute, was the more important principle to apply.<sup>52</sup> Thus, Marshall placed other values above the intent of the legislature. But he did not do so by either ignoring and flouting that intent as an opportunity to impose his own values, nor by pretending that he was unable to discern the legislature’s intent in such an obvious case. Rather, he placed his own hierarchy of values on the table, an act of judicial candor and commitment to avoiding the immorality of disrespecting communicative intent while pretending not to be doing so. Reasonable minds can disagree with Justice

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<sup>48</sup> Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-91 (2008).

<sup>49</sup> See POSNER, *supra* note 47. A recent article by Mathilde Cohen takes a similar position, arguing that judges need to be candid about the legitimacy of the arguments they make, but not about their belief in them. Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision-Makers Lie?*, 59 DEPAUL L. REV. 1091, 1098 (2010).

<sup>50</sup> 18 U.S. (5 Wheat.) 76 (1820).

<sup>51</sup> *Id.* at 98.

<sup>52</sup> *Id.* at 99.

Marshall's ruling, but he cannot be accused of falling prey to assertive fetishism.

#### IV. CONCLUSION

I have argued in this essay that the legal system loses some moral high ground when judges take advantage of linguistic indeterminacy to flout the intent of the legislature to accomplish its goals. How important this is depends in part upon how much legitimacy is lost when the law operates in a manner that is inconsistent with the moral intuitions of citizens.<sup>53</sup> I assume that there is at least some loss of legitimacy when judges make arguments that are both transparently insincere and wrongful in their treatment of language.

I conclude by addressing some objections that may be made in response to my analysis.

First, the legislature's purpose is not always obvious. When statutes contain compromise, the purpose of a statute is to accomplish legislative goals to the extent that the compromises have allowed these goals to go forward. As Justice Scalia describes it, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."<sup>54</sup> To some extent, Scalia is correct. Nonetheless, when the question is which of two readings of a statute licensed by the language is the better one, we are not dealing with a question of unexpressed purpose or intent. In *Ledbetter*, for example, it is difficult to come up with any reason for Congress to have written a statute consistent with the majority position. My point is not that looking at text should be replaced by looking at purpose; in fact, I cannot think of anyone who takes that position as a general matter. Rather, my point is that when language is either uncertain or clearly mistaken, it is simply wrong to use the uncertainty to interpret a law in a manner that thwarts the communicative intent of the law.

Second, one reason for reliance on text is that the legislature wrote the text, so sticking to the language creates fewer opportunities for judicial activism. Again, this is true when the decision is between paying attention to the language

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<sup>53</sup> See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995), for discussion about the loss suffered by a legal system with large gaps between the intuitions of the community and the dictates of the code.

<sup>54</sup> *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

on the one hand, or unexpressed purpose on the other. But paying attention to both *ipso facto* reduces judicial discretion. For the intersection of two considerations (in this case language and purpose) can be no greater than either of the considerations individually. To conclude otherwise reflects an error in reasoning that Kahneman and Tversky have called “the conjunction fallacy.”<sup>55</sup> In their most famous example, a feminist named Linda who takes a job as a bank teller cannot be more likely to be a “feminist bank teller” than to be either a feminist or a bank teller.<sup>56</sup> Yet people engage in this fallacy as a result of the mental models they form about the intersection of these traits. By the same token, if linguistic indeterminacy leaves two sensible interpretations, requiring that judges examine these interpretations with respect to furthering the legislature’s purpose cannot, as a logical matter, expand the number of possible readings that the judge has the discretion to impose.

Third, there is one important difference between my stories about everyday deception on the one hand, and the undermining of legislative purpose on the other: the latter is transparent. When I deceive you about Hanne’s whereabouts, you cannot turn to a record, or to a dissenting opinion to learn the truth of the matter. On the contrary, if I am successful at deceiving you, you will never discover the truth. That is my very goal. Nonetheless, the presence of a public record, which includes opinions that run contrary to the offending one, does not excuse an individual judge from taking responsibility for a morally unjustified position. The fact that a bad act—even a bad interpretive act—is discoverable does not convert it into a good act. But the transparency does provide a partial vindication of the legal system as a whole, and is a positive attribute of the American legal order.

Far more serious an objection to my position is the fact that the legal system might be doing the best it can whether or not I am right about the status of using language to flout purpose. If, for example, the kinds of cases that I describe rarely arise, but the value of focusing on linguistic nuance as a general matter enhances rule of law values, then perhaps it is best to tolerate small moral failures at the margins of a just and legitimate system. For example, a great deal of value is placed on requiring that statutory interpretation respect the

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<sup>55</sup> Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983).

<sup>56</sup> *Id.* at 299.



legislative process that led to the law's enactment in the first place. I personally do not accept the argument that such linguistic fidelity excuses the legal system from acting in a way that we would regard as immoral in our everyday lives. The loss of legitimacy is not worth any perceived gains, and when it comes to construing statutes whose language is susceptible of only a single interpretation, there is no gain. However, if those who defend the status quo recognize the obligation to defend this balance of insincerity at the margins against the benefits of practices that reinforce formal and systemic values, then progress will have been made.