

## NOTES • DISCUSSION • BOOK REVIEWS

# A Fullerian Challenge to Legal Intentionalism?\*

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Legal intentionalism, the theory that the legal meaning of the statute book is a function of the legislative intentions of its authors, is often contrasted with legal literalism, which holds that a provision's legal meaning is a function of its literal meaning.<sup>1</sup> Each theory purports to explain the practice of statutory interpretation. Legal literalism's claim to do so was famously disputed by Lon Fuller, who argued that literal meanings can imply outcomes which, intuitively, are legally incorrect (Fuller 1958). Scott Soames has recently suggested that Fuller's counter-examples also refute primitive versions of legal intentionalism (Soames 2009). I argue, first, that "Fuller-proofing" legal intentionalism undercuts the theory's explanatory ambition; second, that Fuller's examples in fact pose no challenge to legal intentionalists.

On Soames' account, there are three kinds of legal cases: those that are easy, those that are merely literally hard, and those that are genuinely hard (*ibid.*, 403). Literally hard cases are ones in which the legally correct outcome is clear, but at odds with the provision's literal meaning. Genuinely hard cases are those in which a provision's "overall linguistic content" leaves the legal question undetermined. In such cases, "everything asserted and conveyed in adopting the relevant legal texts" (*ibid.*, 409) is insufficient to resolve the case.

In his celebrated exchange with H.L.A. Hart, Fuller stipulated a hypothetical enactment, "It shall be a misdemeanor to sleep in any railway

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<sup>1</sup> In this context, an utterance's "literal meaning" is the proposition generated by the symbols in question and the appropriate community's conventions on linguistic meaning.

station" (Fuller 1958, 664). Fuller asks us first to consider the case of a businessman who was waiting until 3 a.m. for a delayed train. When arrested, the businessman was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. Second, we are to consider a man who had brought a blanket and pillow to the station and had obviously settled in for the night. This man was arrested before he had a chance to go to sleep. We are supposed to agree that, intuitively, the legally correct outcome is that the second defendant is guilty (the tramp), whereas the first is innocent (the businessman). Fuller concluded that, since the literal meaning of the provision entails contrary outcomes, legal literalism is shown to be false. Soames (2009, 415–7) agrees, but believes that what was *conveyed* in adopting the provision *also* entails the contrary outcomes.

At first glance, Soames' concern seems misplaced. After all, Fuller himself remarked that, "We have no trouble in perceiving the general nature of the target toward which the statute is aimed" (Fuller 1958, 664). We can plausibly attribute to Fuller's lawmaker the intention that train stations not be used as places for sleeping. The provision's legislative intent would then entail outcomes consistent with our intuitions. Ostensibly, legal intentionalism has nothing to fear. Soames is unconvinced. Noting that, "[t]here is, after all, a distinction between *what one actually says* in a given context, and *what one would say*, if one considered things more carefully", Soames doubts there are "grounds for thinking that what lawmakers actually assert *in all Fuller-type cases* must be nuanced enough to determine the correct outcome in every problematic future application" (Soames 2009, 416). Accordingly he concedes that what is conveyed in adopting a provision might entail incorrect legal outcomes.

To solve the problem, Soames complicates his initial thesis. He suggests that lawyers conventionally prefix the operator "roughly" or "approximately" to a provision's legal meaning. This prefix is the contribution, "of the genre of lawmaking itself," to what is said in the adoption of a provision (ibid., 417). The effect is to make a provision's legal meaning, "somewhat indefinite, open-ended" (ibid.). Given its conventional prefix, whatever content is conveyed by a legal provision will fail to entail particular outcomes. Consequently, it cannot entail counter-intuitive outcomes such as those otherwise thought to arise in Fuller-type cases. As such, the claim that a provision's legal meaning is determined by the content it conveys is no longer contradicted by Fuller-type possibilities.

The difficulty with this account of legal meaning is that it overlooks the phenomenon of legal agreement. Within any practice of statutory interpretation, there are countless questions for which everyone agrees that the law entails determinate, obvious answers. We do not consider such answers "roughly" or "approximately" correct, or that the law leaves it somewhat indefinite or open-ended as to the decisions to which interpreters are legally committed. This is just the phenomenon of "easy" cases, cases for which

statutes leave only one legally credible outcome. Contrary to Soames' initial taxonomy, which recognizes such cases, the prefix he claims to be conventionally attributed to a provision's legal meaning excludes their existence. Just add a second tramp to Fuller's hypothetical, one found fast asleep in station, accompanied by pillows, blankets and a hot water bottle. Legal interpreters would not consider the man's breach of Fuller's ordinance to be in any way indeterminate. They would answer that his breach is emphatic.

In overlooking the phenomenon of legal agreement, Soames' response to Fuller-type cases leaves unexplained a key feature of our practice of statutory interpretation. Before leaving our assessment of Soames' retooled legal intentionalism, we will briefly consider a possible friendly amendment. Rather than pointing to a conventional prefix, Soames might instead follow the lead of legal literalists and claim that, conceptually, the content of a legal norm does not determine how it ought to be applied (Atria 2002; Navarro 2001; Elkins 1999).

Drawing a distinction between a statute's logical and legal implications, Fernando Atria imagines a provision according to which it is prohibited to sleep in train stations. To establish the provision's legal implications, the interpreter must decide *how* it is to be applied. There are more or less "formalist" ways of doing so, each yielding a different legal outcome. Should the provision be strictly applied, that is, should its logical implications be deemed its legal implications, Fuller's businessman would be found guilty (since he lost consciousness) and the tramp would not (since he was still awake). Applied "less formally," neither man would be guilty. Applied "with a very low degree of formality," the businessman would be innocent but the tramp guilty. Thus, Fuller's puzzle is solved; both literalists and intentionalists can deflect Fuller-type cases by reference to the appropriate formality with which to apply the ordinance at issue. A provision's legal meaning—whether determined by its literal meaning or its legislative intent—does not itself bear legal implications. A decision on how formally the provision ought to be applied is first required.

Unlike Soames' suggestion, Atria's solution is consistent with the broad agreement on most legal questions: legal answers are not indeterminate, simply reached by way of a two step process. On inspection, however, drawing a distinction between a statute's logical and legal implications equally handicaps the attempt to explain the practice of statutory interpretation.

What is the origin of the norms determining the formality with which legal provisions are to be applied? Presumably, these norms of application vary from place to place. Otherwise, it would be impossible for a provision to prohibit loss of consciousness in train stations. That is implausible. Conversely, if these norms are locally generated, the question is, by whom? Perhaps they are determined by the local Constitution, or by the provisions of an interpretation statute? Two difficulties emerge. First, whereas a

jurisdiction may not have enacted any constitutional or statutory provision addressing the question of how formally statutes ought to be applied, we would not insist that the businessman's acquittal is contingent on the prior enactment of such a provision.<sup>2</sup> Second, even if the first thing every jurisdiction did was to enact such a provision, it is unclear how any such provision could be specific enough to determine the level of formality necessary to produce the appropriate legal implication in each of the countless cases featuring a legally obvious outcome.

The norms determining the appropriate formality with which to apply legal provisions might alternatively be understood as consisting of local interpretive traditions or conventions. If, however, the aim is to explain the practice of statutory interpretation, the question of how local legal interpreters come to settle upon particular conventions of application formality will urgently arise. Moreover, the second difficulty, accounting for how so many legal questions seem to have obvious, determinate answers, remains as pressing. How could a jurisdiction's interpretive conventions be so detailed as to determine the appropriate formality with respect to every such question? It seems that drawing a distinction between a provision's logical and legal implications is no more conducive to explaining legal practice than characterizing the statute book as prefixed by a "roughly" operator. It is time to revisit Soames' premise that Fuller-type cases pose a challenge to legal intentionalism.

Recall Soames' distinction between what one actually says on a given occasion and what one would have said on greater reflection. Soames worried that there were bound to be occasions where what the legislature actually said diverged from what it would have said on further consideration. The worry is well-founded. It may be, however, that our legal intuitions always favour the outcome entailed by what the legislature actually said over any entailed by what it would have said on further consideration. If so, the feared divergence is consistent with the claim that the statute book's legal meaning is a function of the (actual) legislative intentions of its authors.

Our readiness to criticize legislators' policy failures suggests that our legal intuitions do indeed favour outcomes entailed by what was actually said. We regularly disapprove of legislators' decisions to enact particular legal provisions. Such disapproval generally occurs when the legal implications of some provision are thought to be all too evident. A belief that legislators would have reached a different view on a matter had they been better informed or more reflective is consistent with treating what they actually said as legally decisive. Legislators may themselves coherently believe that what they said in enacting a particular law has clear, and clearly harmful, legal implications.

<sup>2</sup> Certainly, no such proviso was suggested by Fuller himself.

A Fuller-type case itself shows our readiness to attribute determinate legal meaning in the face of apparent public policy failure: If we really *did* think that, in enacting Fuller's byelaw, the legislature's intention was to prohibit mere loss of consciousness, we would surely consider the tramp innocent and the businessman guilty. We might well think that legislators would not have adopted the provision had they given more attention to the matter or had been better informed as to its likely consequences. But that thought does not affect our intuitions about the legally correct outcomes. This suggests that our legal intuitions would always favour the outcome entailed by what the legislature actually said over any entailed by what it would have said on greater reflection. "Fuller-proofing" legal intentionalism is thus unnecessary. The theory faces challenges, but the Fuller-type case is not among them.

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