

1. WHAT IS WRITTEN LAW?

What is written law, properly understood? It craves at least two kinds of inquiry, the legal and the linguistic. But both are moving targets. There are diverse plausible depictions of law, and theories of meaning are no less controversial. As a result, it is sometimes not clear to jurists and scholars in legal studies whether or not debates over norms of jurisprudential deliberation exercised during judicial review are always traceable back to convictions over the proprieties of interpretation belonging to grammar, even when those norms are ostensibly directed at giving advice on how to understand the meaning of provisions. The matter is made somewhat worse as philosophers of law (and, especially, originalists) press for the introduction of ever greater amounts of context into textual meaning, and philosophers of language and linguists push back out of fear of linguistification of every damn thing.¹

A direct method of identifying written law would be to tie the fate of linguistic meaning to legal effect or vice-versa. So, you might say that a written law is just the *regimented meaning* of legal texts in ordinary language, relying on ordinary linguistic resources to identify and clarify the legal implications of a provision within a text. Call this view ‘textualism’, the framework which identifies the explicit contents of provisions with content that is derived from its form.² On this view, the lion’s share of work in explaining the nature and legal significance of statutes can be found in their textual contents, in opposition to those views which make undue reference to contextual evidence.³

There are many varieties of textualism, both potential and actual. What they all share in common is the notion that *objective interpretive methods* in principle fix the meaningful features of sentences independently from the intentions and practices of the Courts. To put it another way: textualism holds that the institution of language has greater *normative weight* over the contents of written law, as opposed to the decisions of Courts and legislature.

To unpack that view, we might say that the textualist position is the union of three principles:

- *The independence thesis*: the methodology that fixes the grammatical meaning of provisions belonging to a provision is independent of the opinions of the Court.
- *The grammatical objectivity thesis*: the methodological criteria that fix meaning in a grammar are always evidentially objective (*convergent*), never subjective (*merely*

¹ On the perils of linguistification, see (Bach, 2013).

² In talking about the proprieties of form, the connection to legal formalism suggests itself. Indeed, there is a sense in which textualism *just is* formalism, if broadly conceived. (Nachbar 2020) But I do not wish to get dragged down into a debate over the meaning and commitments of the term in relation to the legacy of C.C. Langdell.

³ For examples where textual meaning is acknowledged as especially weighty in law, it is helpful to consider the parol evidence rule in English contractual law as an exemplar of textualism. Or, one might consider cases of legislated abuse of ordinary language, as e.g., when the courts decided, erroneously, that tomatoes were vegetables, a textualist might like to say that the decision was a legal blunder because it involved a failure of language.

eccentric interpretations).⁴

- *The contribution thesis*: objective content functions as a definite (*pro tanto*) constraint on correct legal interpretation and its legal effect.⁵

Of the three conditions, the first two are most distinctive of the textualist position. We add the contribution thesis in order to make sure that the truth of the textualist position, if it is true, actually makes a difference to jurisprudence.

Textualism is not the only game in town. Alternatively, it could be that the written law is the authoritative legal meaning, determined (in constitutional contexts) by the jurisprudentially valid opinions of the appropriate governing authority, be they courts or legislature -- call that view *juridical intentionalism*. In that case, meaning will be tied closely to practices of deliberation by the governing structure, especially in the Courts during judicial review, and secondarily to the intentions of the legislators. To put the point another way, the intentionalist will say that the court or legislature enjoys expressive autonomy, as the provision says whatever *they say* it says, according to the rules they use to go about interpretation, according to the appropriate legal ontology. If in the preamble, the legislators and courts have defined tomato as a vegetable, or Pi as 3.1, then that is what it is.⁶

Another possibility: it could be that the written law is the authoritative legal meaning as conceived through subjectively determined models of how it is received by a public -- call that *receptivism*. On this view, what shall matter to written law are the political optics of some interpretation of the law, and whether or not a particular interpretation of law, once asserted, is one that the public will allow you to *get away with*. On that view, the determinations of the Court are only special in the sense that, in developed nations, they happen to generally have more legitimacy than the consensus of a plebiscite; but then in some contexts, a representative opinion offered by a reasonable third person can offer some cogent interpretations that do outweigh Court opinion, just in case it is fairly obvious that the Court will simply not *get away with* their ruling as one done in good faith. These alternative positions both emphasize that the regulative powers of a provision are explained by their role in institutional design, and not vice-versa -- when it comes to written law, the institutions of law and politics outweigh and underwrite the institution of language.

Neither intentionalism nor receptivism assert that *natural language itself*, understood as an objective method of meaning-attribution, imposes *independent* or external normative constraints on the Courts when they deliberate correctly. For the intentionalist, natural language can only impose constraints on the practices of the Courts *from the inside*, as these governing institutions are the true masters of legal meaning. The Court determines how to go about interpretation of written law correctly, full stop. Hence, the intentionalist denies the independence thesis but embraces the contribution and objectivity theses. In contrast, for the receptivist, while there is such a thing as Court-external meaning, its constraints are found

⁴ The convergence requirement can be thought of as a precisification of Andrei Marmor's (2013) standard for objectivity, e.g., as what a reasonable and informed hearer would infer about what some provision entails.

⁵ A similar tripartite distinction occurs in Lawrence Solum (Semantic Originalism, Draft, Nov. 2008, draft cited with permission of the author). Solum refers to the 'clause meaning thesis' and 'fixation thesis', which are originalist instantiations of the objectivity thesis. Yet not all textualists are originalists -- see, e.g., Bentham.

⁶ These examples are regrettably inspired by real cases. On the botanization of tomatoes, see *Nix v. Hedden 149 US 304 (1893)*. There is also a legislative history behind the roundaboutization of Pi, but the story is more sad than amusing -- see the 'Indiana Pi Bill' (House Bill no.246, 1897), and skeptical treatment of folklore surrounding it by (Dudley, 1999).

well beyond the kind of objective method used in the diagnosis of what is said by a text. They are, instead, to be found in the public meaning of the text. Receptivism embraces the independence thesis, but denies the grammatical objectivity thesis (and, in my view, muddies the contribution thesis).⁷

It is worth noting that, among jurists, the notion of ‘public meaning’ is largely associated with textualism.⁸ But it need not be so. If a public interprets a text in bad faith, using methods which place no emphasis on the rule-like structure of law, then they are not textualists. Their customary interpretations might (depending on your theory of law) nevertheless be legally binding; but this is a separate question.

In this paper I argue that textualism is far less attractive as a theory of written law than some of its modern proponents think. For it is not usually sensible to expect the grammatical meaning of a provision to determine its appropriate legal meaning. Factors that are unrelated to grammar in the identification of law (e.g., legal theory, context) do too much of the work.

Here is how the paper goes. In (§2) I briefly explain my assumptions about language and meaning applied to texts, and in particular, why we might expect the grammatical features of a text to be able to supply conditions for explication or clarification of its meaning. These assumptions are meant to be of the sort that the contemporary textualist ought to find amenable – indeed, in my view, these assumptions effectively ‘steelperson’ the textualist position. I identify three constraints on grammatical meaning: charity, composition, and norms of practice.⁹ Each of them functions as a *constraint* on our choice of method of interpretation, yielding different ascriptions of meaning. And once we take all of those constraints on board together, we end up with an objective method for interpreting meaning.

Once taken seriously, the three constraints jointly explain why we ought to observe two platitudes when we attribute content to written law: first, that meaning ought to be rationally expressible as a system of intuitive judgments with respect to prompts about meaning, and second, that it ought not systematically distort ordinary language in a way that would render theoretical disagreements trivial. Any theory that aims to satisfy these two platitudes will have achieved the ‘Goldilocks balance’, finding the best middle choice between uncomfortable philosophical extremes, i.e., the sharp critical theory of artificial language and the regulism of ordinary language philosophy. I suggest that some creative friction arises from our attempts to achieve this balance, and gives us the resources to expect grammar to explicate law.

In what follows, I assume that the case for or against textualism cannot be resolved prejudicially, i.e., by showing that certain general theories of law recommend specific and appropriately powerful theories of the literal and the grammatical. The expectation is that the

⁷ During the course of this investigation, I assume that the very existence of law has been settled by some appropriate theory of legal grounding or other – positivism, natural law, pragmatism, or what have you. I take up a modest stance, relatively indifferent to the success of which particular theory we choose. But my approach is not *too* modest, since I do assume that the criteria for identification of law and conditions for clarification of law *can be* resolved – that the radical rule-skepticism of radical legal realism is incorrect.

⁸ For example, in (Manning, 2005, p. 425), and especially in advocates of public meaning originalism, e.g., (Solum, 2018).

⁹ Regarding norms of practice, this paper does not delve deeply into conventions or related literatures in social ontology, judgment aggregation, and social choice. That discussion is pertinent, since custom looms large in discerning the common-law (for example). However, the pertinent considerations related to convention and custom will play a stronger and more distinctive role in the discussion of non-textualist positions.

reader is not antecedently invested in a particular conception of legal validity. I also assume, without argument, that originalism can be defended without recourse to textualism, though I will have some occasion to comment in passing on the connection throughout.¹⁰

Textualism needs a theory of meaning and a theory of law that jointly create conditions where grammatical meaning has independent and objective normative powers and makes a genuine contribution to law. The search begins in (§3), where I propose two different ways of thinking about grammatical meaning in law which comport with the constraints of charity, composition, and norms of practice: ‘hard textualism’, which emphasizes the context-insensitive aspects of composition and practice, and ‘soft textualism’ which permits generous appeals to context in the evaluation of grammatical meaning. I argue that both provide the conditions for identification and explication of the laws in different ways. But of the two, only the hard textualist theory is distinctive in proposing that language makes a clear and distinctive contribution to law in a way that would secure textualism as a theoretical basis for legal argument during judicial review.

In (§4), I consider two theories of meaning that might satisfy the hard textualist strategy: the *inferentialist* and the *referentialist*. The inferentialist view is no help in providing an independent constraint on legal interpretation, so collapses into soft textualism unless it is artificially buttressed by an appeal to linguistic conventions. Meanwhile, the referentialist family of views run head-long into metaphysical legal realism (or natural law) that many might find alien to their conception of legal validity.

2. GRAMMATICAL MEANING

Any plausible theory of communicative or conveyed meaning has to regard sentence meaning as intrinsically connected with use. However, to be distinctive from contextual jurists (i.e., intentionalists and receiptivists), a textualist has to distinguish between sentence and use meaning. An adequate theory of sentence meaning has many burdens, so far as a theory of law is concerned. First, it must explain *what a provision says*, which is partly made up of what it entails. Second, it must be concerned with contents that are *rationaly understandable* to an educated laity working in intellectual good faith. Third, it must do so on the basis of an *objective* method, not unbridled interpretation. In all of this, it will succeed in part if it can *identify* written laws as a kind, at minimum by providing translation exercises. Additionally, one hopes that the textualist can provide the resources to appropriately *clarify* the meaning of laws that have been thus identified -- though this latter condition is more of a hope than a guarantee. For the sake of presentation, I concentrate on grammatical expressions with indicative or truth-apt contents, though I acknowledge that commands and presuppositions are equally important to law.

My presentation here will take care to avoid certain canards about textualism. (Coney Barrett, 2020) I acknowledge that textualism is not just literalism. Literalism holds that the intuitive contents of a sentence can be isolated (and their contribution to judicial decision-making evaluated) by the use of objective methods alone, and whose contents are exhausted by translation exercises (i.e., semantics). But it is a rare philosopher of law who would believe that literal or dictionary meaning stands alone in the text’s contribution to the

¹⁰ I think the connection is very thin indeed, and that few originalisms have sufficient respect for textual meaning to qualify. This is in stark contrast to those who simply assume that the two are conjoined (e.g., Perry 2011).

discernment of legal effect – to put it another way, a textualist should try to patriate quasi-paraphrases into the study of meaning (i.e., relatively ‘sticky’ or generalized implicatures that are only cancellable with non-trivial cognitive effort by a reasonable person).¹¹ In doing so, the *grammatical meaning* of a text will rise up and beyond its literal meaning to capture the ways that literal meaning can be supplemented by relatively stable general contexts, and which together can jointly make up the contents of what is said (or written) *insofar as* it is grammatically motivated. Understood in this way, any plausible articulation of textualism has to articulate an objective method which is empowered to distinguish between quasi-paraphrases (e.g., conventional implicatures, idioms) and eccentric uses unamenable to approximate reliable paraphrase (e.g., conversational implicature, subtext, malapropisms, or stipulations).¹² Hence, ‘he died’ is a quasi-paraphrase of ‘he kicked the bucket’, but when Yogi Berra said ‘Texas has a lot of electrical votes’, though he meant ‘Texas has a lot of electoral votes’, his intended meaning is not even an approximate translation of what he said.

Moreover, any plausible articulation of textualism must not be fully discharged by pragmatics or utterance meaning – for *the whole point* of talking about sentence meaning is to abstract away the most eccentric features of use, i.e., implicatures. (Grice H. , 1975) Stipulative meaning, which is a particular kind of use, is also singled out for being part of use; yet a stipulation is not in any obvious sense a function of the grammar until it is paired up with terms of assent.¹³ By ‘objective method’, I mean *methodological consilience* of factors that go into the interpretation of sentence meaning.¹⁴ For our purposes, there are three factors: composition, charity, and norms of practice. Each is, at least facially, a reasonable means of fixing the meaning of a sentence, and so the success or failure of the textualist project depends on whether they succeed in the task. Here they are:

1. The cornerstone of semantic inquiry is, arguably, the idea that a sentence has a logical structure which establishes literal meaning. The clearest expression of this idea is in terms of *compositional rules* which permit inerrant substitutions during translation exercises, from which the particles of meaning are assembled to make meaningful sentences. On one popular view, the meaning of a sentence is its truth-conditions. So, on this view, the correct translation of one sentence into another is a function of the correct application of logical operators to sentences, which outputs a substitution that is true under the same conditions as its input. As a result, we get: “ ‘p & q’ is true in a language if and only if ‘p is true’ & ‘q is true’.” The meaning of the right-hand expression piggybacks on the left-hand one -- you can’t have one without the other. Literal meaning is nothing other than a set of truth-preserving literal substitutions of that kind.
2. It is generally thought that these conditions for rational comprehension must

¹¹ See Grice’s *Logic and Conversation* for more on implicatures, including generalized implicatures. He thought this sort of inferential content was not semantic.

¹² Notoriously, this distinction is one that Davidsonian semantics is incapable of making. All updating, no matter how big or small, is a revision of our ‘theories of truth’. (Davidson 2005)

¹³ A line of argument that is inspired by (Textor, 2007), though I do not agree with his assessment of Horwich.

¹⁴ By attributing the difference between textualism and its rivals in terms of methodology and the weight of compositional rules, I am very much in agreement with Nelson J, who observed some time ago that “much of what separates textualism from intentionalism may be less about the *desirability* of the search for legislative intent than about the *mechanics* of that search and about whether a relatively rule-like approach will advance or hinder it.” (Nelson, 2005)

sometimes involve *charitable belief attribution* on the part of the hearer, attributing to the speaker(s) the most true and right beliefs as possible, while still explaining their habitual linguistic behavior. (Wilson, 1959) At minimum, the '*principle of charity*' is required in the context of novel language acquisition while relying only on linguistic behaviors (i.e., no translation manuals on hand). (Davidson, 1973) Presumably, charity is crucial during first language acquisition, if we articulate it in terms of norms and habits of trust. But it would also potentially reflect adult language processing. e.g., it is plausible to expect that an ignorant paranoiac who visits a foreign culture for the first time will likely have a harder time learning the language of people around them than their wise Stoic counterpart, precisely because the former will not be able to attribute broadly true or right beliefs to speakers. In the context of proficient speakers, the principle of charity is supplemented by the '*principle of cooperation*', i.e., that we should interpret the speaker in such a way that assumes they are attempting to cooperatively communicate, in terms of truth, economy, manner, and relevance. (Grice H. , 1975)

3. Arguably, the meaning of a sentence has got something or other to do with *norms of practice which satisfy a coordinative function of speech*, especially related to convention. (Bicchieri, 2006) When we talk about the meaning of any arbitrary sentence, we usually think we are talking about public languages, or languages with shared meaning. After all, it is apparently possible for individuals to vastly misunderstand the sentences they speak. One might say, in line with Tyler Burge's classic example, that a patient who complains "I have arthritis in my thigh" is confused about the meaning of 'arthritis', and hence mistaken, even if it were to turn out that on closer analysis their understanding of the word maps onto some other malady than the one that is conventionally designated.

Each of these criteria plays some kind of role in helping us to complete the sorting exercise between what is said *qua* text and what is implied in the utterance, discriminating between linguistic behaviors with contents belonging to the sentence or provision and those with contents belonging to the eccentricities of use. Those interpretative methods which conform to *all* these constraints -- charity, composition, and norms of practice -- are better candidates for an account of the grammatical contribution to sentence meaning than interpretations based on the hermeneutics of public opinion. We are all better placed to talk about sentence meaning the more that we appeal to *convergence of method*, or convergent argument based on multiple independent sources or reasons. Hence, if the laity, jurist, politician, and judge all look at a provision in good faith, and apply the above-mentioned methods, *and* arrive at the same or similar interpretations, then our talk about 'written law' is going to have some traction.

However, textualists must be wary of being too successful in distinguishing between literal meaning and use. For the humdrum distinction between sentence and speaker's meaning raises a radical, disquieting possibility: namely, that if a sufficiently wide gulf exists between sentence meaning and its use, then it shall result in absurdity. If speaker's meaning and sentence meaning can be divorced in this way in one-off cases, might it also be possible that many competent natural language-users might be *systematically confused* about the literal contents of some type of speech. i.e., the grammatical meaning of some provision is totally incapable of preserving public expectations. While that possibility might be open to us *strictly speaking*, the ways we make sense of these 'qua' qualifiers (e.g., 'strictly speaking', 'technically speaking', 'substantially speaking') do not bear a clear relationship with ordinary

language meaning, i.e., English *qua* English. These sorts of hedge words seem rather like expressions of a higher standard of linguistic performance, reflecting a higher level of proficiency than mere linguistic competence. So, if there is alienation between grammar and public expectations, it is of a qualified and not systematic kind.

This is a more conservative reading of textualism than the one influential reading offered by Scott Soames. Soames argues that these eccentricities of use are the source of legal effect, and that these effects are the sort that a textualist ought to permit.¹⁵ (Soames, 2011, p. 53) Hence, after distinguishing between sentence meaning, modulated sentence meaning, and use meaning (i.e., what is said), he claims that “in every legal case in which there is a difference, it is the third –asserted or stipulated—content that is required by any defensible form of textualism.” (ibid) And the reply to Soames is twofold. (1) If his approach were true, then *no* textualisms would be defensible, since textualism has little to do with utterance meaning. (2) Stipulated meaning is a species of technical meaning, but it is unclear what such qualifiers have to do with grammatical proficiency so much as with mastery.

It feels strange to talk about cases where an informed public is systematically confused about literal meaning.¹⁶ We feel uneasy about theories of content that attribute massive error to the folk because it is a fact that language is normative, in the sense that when we talk about the meaning of a sentence, we are expressing our understanding in terms of *standards of correct usage*. It would be an ironic disappointment if it were to turn out that even the most grammatically conscientious lawyer was comprehensively mistaken about the nature and uses of language. If a meaning theory is willing to consider wide swaths of public interpretation of language use as ‘nonsense’, it raises the possibility that this theory has failed to save the phenomenon, i.e., our intuitive conviction that meaning is systematic.¹⁷

So, the objective methodologist must do two things. First, their method of interpretation of sentence meaning must be *convergent*, reconciling the resources and restrictions of charity, norms of practice, and composition in such a way that allows us to distinguish sentence meaning from use without eliminating either. The grammatical meaning of the text is not appropriately identified with ‘what is said’ in its unique and eccentric context. But, second, they must not overstate the distance between speaker’s meaning and sentence meaning, as is proposed by minimalist theories of sentence meaning. (Borg, 2005) These are facially incompatible goals -- one asks us to find the differences between two sorts of interpretations, the other asks us to find the similarities. All plausible varieties of textualism face a ‘Goldilocks problem’, needing to find a middle position between theories that fully alienate sentence and use and those which fully conflate the two.¹⁸

¹⁵ This position arises from his idiosyncratic view of context, according to which speaker’s intentions are not a parameter. (Soames, 2010, p. 168) Intentions are instead incorporated into the semantics.

¹⁶ The ‘system’ designates the predictable features of grammar (in its regular environment) which are capable of generating new appropriate expressions through rules. Systematic distortion appears whenever these processes are apparently successful but nevertheless result in predictable miscommunication. Historically, the existence of these distortions has served as the impetus for artificial language philosophy.

¹⁷ Hence, I do not say (or suggest) that piecemeal intuitive responses to linguistic prompts are *minimally good evidence* of their meaning. Intuitions are *ephemera*. There is, however, very good reason to explain the system of language, on the understanding that intuitions about meaning play a non-trivial but unspecified part in *reasoning* about that system. A set of rational and persisting intuitions could be *probative* reason to attribute content, just to see what shakes out.

¹⁸ In warning against ‘systematic distortion’ I do not mean to suggest that (a) a theory of written meaning must always strictly adhere to norms of public usage, or (b) even assume that there really must always be some folk consensus on what some term or sentence means. First, there are trade-offs between the norms of a practice,

It bears mentioning, and emphasizing, that these methodological restrictions are not uncontroversial to those who specialize in semantic theory. Much of philosophy of language is concerned with literal semantics, a theory of meaning to context-variant sentences. Meanwhile, our approach widens the ambit to include grammatical meaning, understood as quasi-paraphrastic.¹⁹ But if I am right, this makes no difference to the fate of textualism, which is unattractive regardless.

3. *SOFT AND HARD TEXTUALISM*

How might the textualist explain the possibility that linguistic rules impose constraints on the correct opinions of the judge? On first blush, we can think of two strategies that would weigh practice, composition, and charity against each other in an account of the grammatical meaning of written law. We will refer to them as ‘soft textualism’ and ‘hard textualism’. Both are objective, and both (roughly) correspond to dialectical moves described in the coarse-grained description of penumbral cases. On the one hand, the composition rules and lexical features of the particles of meaning in the text may impose *hard constraints* on our understanding of what is written in terms of *prior* information that is immune to updating. This view is stridently incompatible with ‘living tree’ jurisprudence. On the other, the priors might only impose *soft constraints* on our understanding of what is written, which can be outweighed by especially serious factors involved in *contextual modulation*, i.e., demanded by case, principle, and policy during the course of application. This is the kind of approach to textual meaning that is most compatible with the vision of the ‘living tree’ jurist.

Soft textualism. Consider, as toy example, HLA Hart’s case where we are asked whether or not the by-law of a local park, “No vehicles on the grass”, properly applies when we are considering wheelchairs. On the one hand, if you believe that grammatical meaning is a feature of what rational interpreters comprehend during charitable belief attribution, then you may believe that it is *grammatically* wrong to bar wheelchairs from the grass.²⁰ For, you might think that it looks as though the constraints imposed by prior rules of compositionality can be outweighed by general, charitable expectations about what goes on in context, as a determination of grammatical meaning. On this view, the identification of the legal rule is partly tied to the conditions of its explication, as it draws significantly from its context of interpretation. In a manner of speaking, *charitable attribution of content to overall norms of practice outweigh charitable attributions based on prior rules of composition.*

charity, and composition, so we can expect the desire to stick to regularities of ordinary language can sometimes be supplemented or even mildly subverted during the course of diagnosis. There is always a little friction between the facts of use and evaluation of utility. Oh well. The important thing is that, insofar as we are evaluating literal meaning, those decisions be *made on some grammatically objective basis.*

Second, it is at least possible that competent language-users could have wildly different views about how to modestly explicate the assumed synonymy relations in sentences by authors ostensibly writing in a known language.

¹⁹ In a highly instructive paper on the varieties of content, see Francois Recanati (2003).

²⁰ If we need an ordinary language example that doesn’t involve legislative interference, consider: “Get me a coffee,” said to a barista (borrowing from Soames). (Soames, 2002) If the barista returns with a cup full of unroasted coffee beans, the soft textualist account of meaning allows you to say that they have grammatically misunderstood you in that context. Typically, soft textualists are disposed to look at ‘evil genie’ cases of this sort and conclude that they have less to do with strictness of speech and more to do with bad faith interpreters.

A sophisticated way of describing the soft textualist approach would be in terms of ‘quasi-contextualism’. This view, considered in terms of the philosophy of language, sets out to establish that the contents of what is said in the text can be and are freely enriched by general conventions of interpretation (whether that be derived from contemporary or historical sources, or using institutional or extra-institutional rules). But that free enrichment is only *partly* free – it is the sort of freedom that must be paid by conventions with an appropriate fit. In this way, quasi-contextualism does not lose sight of the source of its contents, namely, the four corners of the text.

Some common-law countries endorse living tree constitutionalism, a political-legal theory that permits soft textualism during judicial review. As Wil Waluchow (2017) notes, Canadian constitutional interpretation authorizes and requires that justices engage in wide liberal interpretation of a constitutional provision, based on changing norms and circumstances. The watershed moment was *R. v. Edwards*, where the superior court (the Judicial Committee of the Privy Council of England) decided that the legal notion of ‘person’ should be updated to include women.²¹ What do we make of this case? Was this a constructed exception to the rule – or was it just a superior explication of a common-law rule already held in force? It is surely true that the bulk of the Lordships’ argument was directed towards the examination of the BNA Act, but this is not a helpful point to consider, since one may interpret a text without committing to *textualism*.

Though Waluchow expresses some sympathy towards the view that such re-readings amount to judicial construction, he does not himself seem to regard such re-readings as instances of judge-made law. Our institutions have to display a degree of flexibility in order to get by (albeit not so flexible that they wreak total havoc with public expectations) -- weak discretion, and wide liberal interpretation, is just *the cost of doing business* in Canadian jurisprudence.²² The upshot (perhaps) is that the grammatical meaning of the statute was freely enriched in *Edwards*, as the basic lexical terms involved (e.g., “person”) changed with our evolving understanding of our values.

Unlike Dworkin’s account, Waluchow’s account seems to satisfy our hopes for a compelling argument in favor of *bone fide* textualism. For his inclusive positivism is based in a political morality that is ultimately limited by legal norms of recognition and change, which themselves reflect social norms that can be described objectively. In these respects (moving beyond the *Persons* case), the law in its grand foundational sense has its share of anodyne

²¹ It has recently been suggested that the *Persons* case rested on a kind of intentions-originalism. (Miller, 2011) The nub of that reading comes down to a supposedly originalistic passage from *Edwards*: “No doubt in any code where women were expressly excluded from public office the problem would present no difficulty”. (*Edwards v. A-G. Canada*, 1930) The passage is of secondary importance in the context of that case, where no explicit exclusion occurred, especially given the subsequent remarks which brought the living tree into our tradition. Moreover, the passage tells us nothing about original intentions: for the entirety of the question concerns *what counts as* grammatical meaning of a code, and whether to prefer soft or hard varieties of textualism, i.e., those where meaning is frozen (e.g., originalism) and those where it is subject to gradual updating (e.g., legal arborism). Clarity of a text derives from either source. Indeed, for his part, Lord Sankey is quite clear in saying that textual meaning is not fully set out by original intent in reference to a case: “the question is not what may be supposed to have been intended, but what has been said”. (8) Miller J correctly notes that, if there is an originalism in the region, it must be original public meaning originalism. And that is all to the good. Except for the fact that it is unclear whether public meaning originalism is a form of textualism at all.

²² The demand for a wide and liberal statutory interpretation has since been codified as the law of the land in Canada: *Legislation Act, 2006*, SO 2006, c 21, Schedule F, s 64(1), and the *Interpretation Act*, (1985) RSC c. I-21.

victories and tragic ironies – even though, in Canada, it happens to be a system that has selected its own moral aspirations and (sometimes) governs itself accordingly. Since that version of morality is drawn on the canvas of legal norms which exist independently of it, the judge’s decision-making can be seen to be burdened by the black letter of law, even when in practice they invoke thoroughly moralistic vocabulary to describe what they are doing.

Yet the price of the soft textualist approach is that it dulls the distinction between textualism and its alternatives. For the advocate of soft textualism suggests that competent linguistic interpretation is far from being fully indebted to the practice of following prior rules and prejudices which is needed in order to conjointly satisfy the principles of objectivity, independence, and contribution. Yet, for that very reason, any readers who feel that linguistic meaning is an *a priori* kind of thing will not want to call this a distinctively *textualist* strategy at all. Indeed, the objective method of attributing meaning, in this circumstance, would have to be inextricable from attributions of meaning derived from seemingly non-linguistic features of the context (e.g., practices of the Court for Hart’s rules of recognition, or reception by the original public for Solum). It may be grammatical meaning and written law, but not of a kind that can be easily disentangled from sociological studies of processes of adjudication or an ethnomethodology of civil deference, in a way that designates a clear role for compositionality as a constraint on content.

And to this objection, the proponent of living tree constitutionalism has no other options but to register their assent. They can do this either by explicitly defending a contextually enriched conception of grammatical meaning (as Hart did), and thereby accepting the validity of eccentrically motivated judicial decisions; or they might simply shrug off the task of defending the independent objective contribution of the written word to legal effect by staying agnostic on the distinctive role of language in law. Both are legitimate moves; persuasive, even. But in either case, it is not clear how they will provide independent motivation for a textualist approach to law, as opposed to a contextualist one.

Hard textualism. On the other hand, if you believe that a systematic theory of meaning is about regulating our linguistic priors, then you might think that the grammatical meaning of the sentence is mostly insensitive to contextual revision – that the principle of charity does not serve as a hard constraint on grammatical meaning, so much as it just helps us to identify the compositional rules and conventions that establish that meaning. This view makes sense of what gets taught in school, when we are told that “*Can* I have a cookie?” is *grammatically different* from “*May* I have a cookie?” despite the fact that these utterances are frequently, obviously, and unsurprisingly used as if they were equivalent in meaning. All hands may agree that there is a technical difference in meaning between those expressions; but the hard textualist will tend to argue that the technical meaning *is* the grammatical meaning on first glance. Hard textualism will be dispositionally ill-tempered towards quasi-paraphrases -- though not necessarily (since it is not literalism), and depending on the details of the favored theory of meaning.

These pedantic theories of language would only *indirectly* or *minimally* require charitable interpretation from rational listeners on any particular occasion of use; presumably, identification and clarification are thereby divorced. A proponent of this view would have it that *attribution of content by way of norms of composition outweighs overall charitable attribution to the norms of the practice*, potentially with special dispensations for conventional implicatures to make sense of idioms. This, or something like it, characterizes the outlook of mainstream originalists working today -- including the relaxed modern originalists who admit that the Court has limited powers to ‘make law’.

The hard textualist strategy has some advantages. It ostensibly provides an objective basis for judgment of grammatical meaning even in an adversarial environment. Furthermore, it ostensibly allows us to be relatively precise in our phrasing. It is useful as a tool in guiding the opinions of the inferior courts. And, finally, it seems to make sense of certain linguistic cultures – e.g., the *Royal Academy of the Spanish Language* in Spain -- which have a centralized institutional body which determines the scope and parameters of linguistic change.

The disadvantage of the hard textualist view is that it intuitively departs from intuitive understanding of what is said in the text, forcing the followers of precedent and interpreters of statute to risk being accused of crafting “judge-made law” whenever they trivially depart from some prior compositional rule or lexical phrase. e.g., if the Charter says that everyone has freedom of expression, “including freedom of the press and other media of communication”, and if the judge decides that this provision means that everyone has freedom to use new technologies (e.g., the internet), and may or may not entail free access to particular venues or applications (e.g., Twitter), then hard textualism would hold that this is judicial construction. But this line of pursuit seems to misdiagnose the decision. The judge did not avail themselves of strong discretion which is typically attributed to clear cases of construction; indeed, it is not altogether clear whether it was even a case of ‘weak discretion’, either. In fact, it is just a modest explication of an obvious, unsurprising effect of the word, the sort of explication that the textualist is at pains to have us believe that they can explain, since they think provision meaning is not fully settled by literal meaning.

The core dispute between hard and soft visions of grammatical meaning has to do with the ways that rules of a grammar compete with charitable attribution in language. At base, this is a matter of *correct linguistic methodology*, not reception of how authors of language are presented as authorities over correct language use.²³ In this manner of speaking, disagreements over what counts as English *qua* English are actually (at least in the first instance) debates over interpretive method. When people disagree about what counts as English, there is a right or a wrong answer, and the rightness or wrongness of the answer ostensibly depends on the objectivity of the procedures used in attributing meaning to expressions. But, in both cases, the written law has something to do with both identifying the meaning of what is said in the text and explicating it on demand. This, so long as charity plays a role -- and it always does, even if just at the margins.

In this section I considered two highly idealized kinds of theories of grammatical meaning, which I called ‘hard’ and ‘soft’ textualism. I suggested that composition rules can be weighed against charitable attribution of content to utterances, resulting in two equally legitimate approaches to grammatical meaning. The presentation was necessary to cleanse the palette against certain influential accounts currently in circulation regarding the contents of texts. By steelmanning the textualist position in a way that does not reduce it to literal meaning, I hope to have put it in its best light, while also taking its distinctive conceptual features plain.

But the discussion has been intentionally rough, floating at the general level. Now we are looking for a characterization of discernment that imposes hard, external constraints on the judgments of the courts and legislature without systematically distorting the law.

²³ I am far from the only one to suggest the tight connection between language and method. See, for example, Postema (ibid).

4. THEORIES OF GRAMMATICAL MEANING

In §2 we found that the strongest case for textualism would appeal to *objective linguistic methods* to demarcate written from unwritten laws. Such an approach would succeed at displacing non-textualisms just in case the chosen objective method of interpretation gave us a robust conception of clarity of meaning, unifying conditions for application and their consequences, while preserving the idea that the use of the interpretive methods at stake can impose hard constraints on legal effect.

However, the discussion was rudimentary. For while we discussed the *ingredients* involved in the attribution of explicit contents to provisions, and some of the kinds of ways that these ingredients can be mixed, we did not discuss specific *recipes* -- i.e., actual theories which combine the ingredients to produce structured meaning. The aim of this subsection is to examine a small sample of theories of meaning a bit more directly, hoping to see if they provide the resources for extra-judicial constraints upon interpretation of a provision. I consider two theories of meaning: *inferentialism* and *referentialism*. Notably, each of these theories is slanted towards illustrating ways of making sense of the cognitive (truth-bearing) contents of law.²⁴

Spoilers: I suggest that referentialism is either committed to a strange metaphysics of law or collapses into receptivism. I suggest that inferentialism provides a tremendously useful means of clarification of legal texts, but does not have the resources to uniquely recommend hard textualism.

Referentialism and Metaphysical Legal Realism

When we talk about written law, we must be talking about a theory of grammatical meaning that is more expressively powerful than just an articulation of the rules of satisfaction for lexemes and rules of composition for sentences. But what accounts for the additional expressive power of language, which allows us to engage in legitimate (though modest) explications?

One thought is to say that our sentences get their content from the set of commonly accepted true beliefs. And we might also say that such true beliefs are essentially tied to claims about *reference*: i.e., facts about language that effectively involve the mental equivalent to pointing at things, facts, and events. Call this '*referentialism*' about meaning.²⁵ On this view, a speech act is meant to focus attention to the thing being pointed at, for the purpose of forming complex mental states that conform to those external affairs. Hence, explicative content can be given an account in terms of denotation, in the sense that new non-obvious information can be gleaned about meaning by discovering new things through perception. On those occasions, the grammatical meaning of a sentence or provision outstrips the content that the speaker intended to convey on some occasion of use. The resources for explication come from 'outside the head', potentially.

Apart from the fact that it makes sense of diagnostic (unsurprising) explications, referentialism can be motivated by observing a few intuitive facts about our legal judgments.

²⁴ I ignore straight-laced emotivist non-cognitivism, on the assumption that there is no discursively sophisticated way to identify law *qua* law when all we have are the semantic equivalents of "boo-this-hooray-that". Imperative non-cognitivist accounts (e.g., Alan Gibbard's) are more plausible, as clearly the law has a significant 'command-like' component. E.g., Hart's primary rules or Austin's general jurisprudence.

²⁵ In this, 'referentialism' is meant to capture what Brandom calls 'representationalism'. (Brandom, 1998, pp. 84-5)

For, ostensibly, our legal claims are *about* something – a quality of judgments that we call ‘intentionality’. The referentialist could then claim that, insofar as our semantics represents anything, it must have at least the pretense of reference, because ‘aboutness’ implies a kind of pointing activity. Granted, though, references to law are probably always sentences about definite descriptions, at least as far as surface grammar is concerned. Still, beneath grammatical form, it is always possible that some real facts are denoted.

There are two versions of the referentialist view: direct and mediated. The direct reference theory considers the facts and things of the world itself as constituents of sentence meaning, and then accounts for sentence meaning as a logical construction that outputs abstract contents with a structure, i.e., propositions or commands. The mediated reference theory tells a similar story, except it allows that the things in the world appear to us in *sense* – ‘the morning star’ and ‘the evening star’ both denote *Venus* in disguise.

The main criticism we can make of the naïve or *direct* version of the referentialist view is that it apparently only offers a distinctively textualist gloss on meaning if there were such a thing as legal system that exists independently of human volition and construction, which we can give a causally reductionist account. Unfortunately, on one highly influential understanding of social institutions (including – or perhaps especially -- legal ones), law is not a system, object, or property that exists independently from the will, let alone the mind. Law is, rather, a form of practice which only exists as a kind of self-fulfilling prophecy -- the act of talking about the institutions of law plays a part in helping to create those institutions. (Searle, 2010) So, for example, the institution of property only exists because there is a sense in which we say it does. Arguably, this is also how ‘persons’ are made. (Hacking, 2004) But then, if direct reference is the correct conception of meaning, then that means the original act of reference to law was unjustified, and that any subsequent justifications which are grounded in customary reasons inherit the original stain of irrational intentionality.

Hence, either this common-sense metaphysical theory is wrong, as legal systems *really are* surprisingly independent of human volition (e.g., referring to mere behaviors of judges conceived as mindless entities, systemic dispositional qualities that have or do not have a reliable capacity to generate pleasure or pain, functional-systemic relations, or perhaps to divine commandments); or our mode of speech is strictly false or fictitious, because there is nothing out there for us to refer to when we talk about law.²⁶ Whatever else we might say about the acceptability of these doctrines, both suggest that our grammar is systematically confused about legal ontology. And that, unfortunately, means that it reflects a monumental failure of charity. In that sense, of course, it fits right in as a case of hard textualism, for whom charity is subordinated to both compositionality and norms of practice. But there is no modesty to a direct reference theory of law, and the direct reference theory has no obvious reply to the accusation that it is a systematic distortion of the language. Traditionally, the reply has been, “Well, so much the worse for ordinary language”, but this is not a move *textualists* can get away with.

The fallback position is the *mediated* theory of reference. e.g., ‘the first Black president of the United States’ and ‘the author of *Dreams from My Father*’ both denote the same person, Barack Obama, but that single person is presented in different objective senses. So, presumably, we must say that reference to law involves reference to a relatively tractable

²⁶ Michael S Moore (1995) holds that law refers to *functional* kinds, where ‘functional kinds’ are those *mind-independent sub-systems which play a causal role in effecting a broader mind-dependent (political) system*. But that would only say that we are speaking of a mind-independent system *in terms of* the role it plays in a greater system – i.e., mediated reference.

pattern of things going on in the world (e.g., bodies and behaviors of a population), though mediated through some objective mode of presentation that is available to the common eye and accessible to public judgments of truth or falsity. (Frege, 1948)

I take it that something like mediated reference may have been involved in Bentham's attempt to capture meaning in law. Famously, Bentham thought that 'rights-claims' were 'nonsense on stilts', as they denoted mere fictions.²⁷ (Bentham, 1838) For him, the meanings of words denoting fictitious entities required translation into concrete, imaginable particular situations or entities. To make sense of the implicit American constitutional right to privacy, for instance, he would make use of a process called '*paraphrasis*', where any proposition featuring a fictitious entity is replaced by one which features a real one. (Murphy, 2014) So, for Bentham, rights are best negatively reinterpreted in terms of *duties possessed by others*, and duties reinterpreted in terms of a *liability to suffer a painful sanction*. In this way, Bentham thinks we will have recovered the 'root of the idea' of a right in dispositional properties, to which we can subsequently refer. (Murphy, 2014, pp. 70-1) So, in a manner of speaking, my liabilities to suffer pains of broken trust when violating the privacy of another person is the factual basis for talking about their right to privacy, albeit mediated through a few conceptual layers. Thus, for Bentham, when we let these layers of interpretation distract us from the referential point of some kind of proposition, we risk losing ourselves to 'nonsense', of law unmoored from its factual and prudential basis.

At core of the mediated reference theory is the idea of *sense*, meaning a difference in *modes of presentation* of a single referent in the world. So, keeping up this idea of a mediated reference theory of law, perhaps we could say is that written law is presented in one way and unwritten law in another way. What is the nature of the difference between these two senses? One possibility, riffing on the ingenious Bentham, would be to say that deontic claims are just a sense in which we speak of *conduciveness to utility*. Yet, if taken seriously, this view closes the door on a great many theories of law that see things from the internal point of view.

Both of these positions, however, are consistent with the diagnosis offered here. The Benthamite can get away with hard textualism, if they toned down their rhetoric (from 'nonsense' to focal meaning, for instance). It remains a live option. Indeed, something like this view still has adherents today among metaphysical legal realists (e.g., Stavropoulos 1996, Moore 1995).

Another possibility is that the difference in senses is a difference in the *attributed author* of the law, potentially conceived of independently from legal authority. For example, provided you were a believer in a particular sort of theory of law, you might say that if a

²⁷ Compare referentialism with *fictionalism*, according to which law is best understood as an authoritative fiction. (Marmor, 2018) Laws, on this view, do not refer to anything in our actual world – but they do refer to things in a counterfactual world. Legal claims get their truth and meaning relative to the world that is the subject of a story. (Marmor, 2013) It is hard to avoid the implication that, to that counterfactual world, the law is metaphysically real, though for us it is merely authoritative.

A reasonable critic of the fictionalist point of view, steeped in other legal/philosophical commitments, might reply as follows: true claims are *at least by default* factual claims about the actual world, and that in this respect, legal claims must be true in a way that fictional claims are not, insofar as they purported to be truth-bearing. Hence, meaningful truth-talk about legal affairs (e.g., 'possession is prime facie evidence of property' in common-law) is not a *felicitous misrepresentation* of the actual world (compared, e.g., to 'Sherlock Holmes lived at 221B Baker St.'). Legal truths concern relations between events in *our* world, with no need to invoke inaccessible counterfactual worlds in the explanation.

constitutional rule that is sourced in the designs of legislature or founders is properly presented as an enactment of the legislature / founders, it is written law, while if those designs are properly presented as an opinion of courts or public opinion, it is unwritten law. (So, for example, in the United States the right to privacy is an unwritten constitutional law.) In both cases, the rule is a token constitutional law, hence authoritative; but the difference owes to one of attributed author. It should be admitted, I hope, that this is a handy distinction to make (irrespective of whether or not you are committed to the view that all constitutional law is sourced in the authority of the legislature).

The drawback, however, is that it is hard to explain what is explanatorily interesting about this distinction while also occupying a 'hard textualist' position. By design, the account of written law as proper attributed authorship leaves legal effects untouched. Textualism's 'contribution' principle lies fallow. One may, of course, coherently maintain the view that provision meaning is authorial meaning. But since it does not in itself make any normative difference, it will be hard to see how it could function as an extra-judicial constraint. That matter will have to be resolved *deus ex machina* by our favorite legal theory. But then we might as well just say that attributions of written law have less to do with what is written and more to do with what is law.

Inferentialism and Convention

A second approach places primacy of explanation of grammatical meaning, not in terms of truth, but in terms of the giving and taking of reasons. We call this family of views *inferential role semantics* (or *inferentialism*). The inferentialist is prepared to agree with the advocate of the anaphoric or literal theory of meaning, which is that sentence meaning is explained by translation/substitution exercises. But inferentialists deny that such exercises appreciate the full capacity for 'truth' to *express* the complex structure of propositional contents of sentences. Instead, our tacit competence with propositions is best understood in light of the practice of discursive scorekeeping that is natural to us sapient creatures – that is, in our practices involving the exchange of *reasons*. The most developed account of inferentialism owes to philosopher of language Robert Brandom. (Brandom, 1998) I will suggest, here, that Matthias Klatt's interpretation and application of Brandom to legal texts is another legitimate contender for hard textualism.

On the inferentialist theory, a semantics and pragmatics of a language involve offering *justification* for the things we rationally assert and assent to. The formal rules of composition for a language are established through basic comprehension of the inferences that are generally permissible for that language. But these formal compositional rules themselves are derived from basic (or "material") inferences that follow from comprehension of concrete relationships between things in the world. So, "Toronto is west of Montreal" co-entails "Montreal is east of Toronto", not because the compositional rules of the language say so, but because of what we know that we are entitled to infer about these cities and what follows from those entitlements. We model the semantics of our language on the basis of these sorts of casuistic judgments, situated in an ongoing Socratic dialogue of making claims and defending them to each other.

The inferentialist's conception of meaning directly recommends a view of clarity, in terms of the union of the conditions for rational assertion, and the perceived consequences of assent to the assertion. Brandom puts it like this: "Writing clearly is providing enough clues for a reader to infer what one intends to be committed to by each claim, and what one takes it would entitle one to that commitment." (Brandom, 1998, p. 121) Brandom finds clarity of meaning in the harmony between the perceived conditions for *commitment* (which are duty-

like) and *entitlement* (permissions-like) in the course of answering both of these questions.

When we ask about the meanings of what we say, we are talking about how we justify what we have said. If I say, for instance, “It is snowing”, the meaning of what I have said can be explained both in terms of the conditions of application of the expression, and inferential consequences of the expression once applied. You can think of these two criteria as two different sorts of questions: i.e., “When it is appropriate for you to say that ‘it is snowing?’”, and, “if it is snowing, then what follows?” On the inferentialist account, the ‘when’ question is answered: just in case you have good reason to believe it is, in fact, snowing. Yet, even so, all sorts of things follow as a potential answer to the ‘what follows?’ question. Some consequences are near-trivial or factual in nature (e.g., you are obliged to also hold that the mean local temperature has dropped outside); some are far more exciting, related to potential for action (e.g., that you could build a snowman, will need a sweater, and that you are obliged to salt the ice on the pavement outside). And, sure enough, a similar formula makes its way into the decisions of the Court: e.g., when Canadian superior courts consider cases of jurisdictional conflict in constitutional law, they recognize the need to identify the “pith and substance” of a statute, which is legalese for its purpose and effect.²⁸

The difference between inferentialism and referentialism is subtle. For none of Brandom’s remarks, in themselves, demonstrate hostility to the idea that our linguistic practices refer to things in the world. What inferentialism denies is that our referential practices are especially *central* to discourse. Inferential practices and institutions are not to be explained in terms the ways that our words fit the world -- rather, the opposite is the case -- our referential relations must be explained in terms of discursive practices and institutions. One might object (reasonably) that, on face value, referentialism does a far better job at describing unsophisticated linguistic success, in at least the sense that seemingly answers the question of how we go about learning our first language (i.e., contexts of radical translation / interpretation). But even if that were true, it would not concern us here, focused as we are on written meaning as a feature of discernment, a non-radical adult context.

If inferentialism is the best formulation of grammatical meaning, it will not be hard to find some legalistic ideas (e.g., liability, reasonableness) already inside of our ordinary linguistic practices. That is, if grammatical meaning is ultimately beholden to norms of justification, then it is entirely possible for us to engage in revisions to grammatical meaning by adjusting them in light of what we believe we are epistemically, prudentially, and even morally obliged to say about legal cases. As Brandom put it, “Semantics must answer to pragmatics. The theoretical point of attributing semantic content to intentional states, attitudes, and performances is to determine the pragmatic significance of their occurrence in various contexts.” (83) The meaning of the text is essentially propositional in character, and made explicit by reference to the means by which we ‘keep score’. (186) And while such attempts to provide reasons for what one says can be idiosyncratic, they are aimed at practices of exchange with others, requiring some attempt at coordination.

Now for the drawbacks. On Brandom’s account, convention in itself plays no special role of meaning except insofar as it reflects proprieties of practice that really are animated by corresponding notions of entitlement and obligation. For that reason, in and of itself, it is not a version of textualism at all -- even its semantics is unmoored from the text, more strongly rooted in a *perspective*, albeit one that has been exposed to social interaction. So, inferentialism does not satisfy the requirements of grammatical meaning, in our sense of a

²⁸ *Constitution Act, 1867, §91-2.*

bearer of content that satisfies an objective method. That having been said, if we were to narrow our attention to those living practices that do indeed reflect conventions – fusing Brandom with David K. Lewis -- we end up with an account of grammatical meaning. And this, in effect, is how Matthias Klatt made good use of inferentialism in his account of Germany's civil law tradition – namely, by supplementing Brandom with the demands of the doctrine of the limits of the wording. (Klatt, 2008)

If it is asked how the wide and liberal interpretive resources potentially found in inferentialism can be reconciled with the limits of the word, the answer (for Klatt) is that we should recognize the respects in which inferential relations are restricted or limited, in relation to commitments and entitlements related to conditions and consequences of use. Such conceptual limits derive from norms of propriety in background assumptions, which in the context of law are distinctively responsive to the *interpersonal inheritance* of relevant commitments and entitlements. (Klatt, 2008, p. 246) On my reading of Klatt, it is this account of the nature of (Germanic) law which distinguishes ordinary inferentialism from a version that is suitable for law. That said, at all points, Klatt holds that the conventions of a linguistic community are textual constraints. (Klatt, 2008, pp. 107-115)

A variety of inferentialism that takes the conventional limits of the words seriously will be capable of providing guidance on how we ought to solve penumbral puzzles in judicial cases in civil law jurisdictions. Moreover, by emphasizing the importance of deciding cases through material inference, it is able to extend into and enrich the common-law, with legal standards or tests confronting cases based on the totality of their facts and being confronted thereby. The result, on the whole, is that we must acknowledge a third category of legal effect besides *interpretation* (found law) and *construction* (made law) -- namely, its *development* (grown law).²⁹

From a developmental approach to grammatical meaning, one must take care to notice that there is no point in giving originalism any special weight. For language meaning is both stable and capable of evolution, depending on evolving notions of what inferences are obvious and/or unsurprising enough to count as materially valid. Neither original intentions nor public meaning originalism play much of a role in the analysis, except for the role they play in settling social conventions – which is to say, no special role at all. Original methods originalism stands out as the most viable of the originalist theories, from the conventionalized inferentialist perspective, though the need for material inference limits its normative reach.

3. CONCLUSION

We have considered the textualist strategy in summary form. We've considered the need for both identification and clarification of law, and then the difference between hard and soft textualism. We went out looking for a version of hard textualism that directs the opinions of the judge on the basis of extra-judicial norms of grammar, and not norms based in morality. In this paper, I have tried to place the textualist view on its best footing. I suggested that, even if we generously extend the domain of grammatical meaning beyond semantic theory, we end up with some limited theoretical options. On this view, textualism can be maintained in two ways: either by adopting a controversial philosophical theory of law (metaphysical

²⁹ Klatt mistakenly holds that Anglo-American jurisprudence does not appreciate the notion of development. (Klatt, 2008, p. 12) For my part, I think something like the idea is already quite familiar to Canadian jurists in the form of living tree jurisprudence.

legal realism), or by Gerry-rigging inferential role semantics around linguistic conventions, and leaving originalism behind.

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