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(Hypothetical) Communication in (Hypothetical) Context

GARY LAWSON*

I will start with the second of our two “group minds” problems, involving potentially differing understandings of fruit, because I think it is conceptually simpler, or at least more amenable to an answer, than is the first problem.

The precise question is how I would handle the problem of application of the fruit tax to tomatoes and kiwi if that problem came before me *as a judge*. That specification of interpretative role is crucial.

At the outset, we need one very important piece of information that is not provided: What is the governmental form of Lex? If Lex is a tyrannical oligarchy, in which judges who rule against the wishes of certain powerful legislators will be summarily executed, I would probably rule in whatever way minimized my chances of being executed. Which legislators are most in control of the machinery of violence in Lex? That is an empirical question that cannot be answered on these facts. If Lex were an evil—for example, socialist—regime that was not so depraved that it routinely executed judges who do not properly serve the regime’s agenda, I would probably rule in whatever way most undermined the regime without getting me or my family sent to a gulag. Again, it is an empirical question that we cannot answer on these facts which course of action will most undermine the evil regime.

But let us assume that Lex is some form of Western-style democracy or republic at least vaguely resembling the United States or the United Kingdom

* © 2021 Gary Lawson. Philip S. Beck Professor, Boston University School of Law. I am grateful to Larry Alexander for inviting me to think about these perhaps intractable problems.

that has not (quite yet) slid fully into a socialist abyss so irredeemably evil that even implicit support for it is morally unacceptable,¹ so that rule-of-law values still have some chance, in a normative calculus, of offsetting the moral imperative of promoting substantive freedom. In that setting, there is a powerful—not inevitable or unanswerable, but powerful—normative case for deciding statutory questions by ascertaining the communicative meaning of the relevant texts. A full justification would require a detailed theory of adjudication, taking into account everything from precedent to natural law to rule-of-law values, and that is not happening in five pages. Accordingly, I am re-framing the question just a bit from “What do you decide?” to “What do you decide is the communicative meaning of the text?,” leaving open the possibility that the morally correct thing to do is to pay no attention at all to the law’s communicative meaning. Given that re-framing:

The law emerged from a multimember legislature, so the relevant communicative meaning is the “intention” of a hypothetical single entity into which each of the concrete minds that compose the legislature is integrated.² The question is: To what things and relations in the world does the concept “fruit” refer? Because the hypothetical entity’s utterances are externally directed—a law in such a regime is not a private diary, or a poem, or a chain novel—the most sensible background interpretative norm, given the metaphysical character of group intentions, is that the hypothetical legislative mind “intends” that the criteria for inclusion or exclusion in a concept come from a hypothetical group mind that is the *object* of the communication.³ That is not an inevitable background rule; one can certainly, in principle, have a communicative act in which the nature of the exercise is for the listener to try to figure out the conceptual criteria employed by the speaker. Indeed, that is surely the theoretical ground and starting point for any act of communication: If the listener is not trying to figure out what the speaker intends, it is hard to describe what is happening as an attempt at communication. The question, however, is whether the best account of the speaker’s intention is precisely that the

1. There is a good-faith argument that the United States has already regressed so far into socialism that, as a moral matter, it is in Galt’s Gulch territory right now. I don’t think it is quite there yet, but I am open to persuasion on the point.

2. For more detail on the metaphysics of joint intentions, see Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENTARY 47 (2006).

3. If we go back to the tyrannical oligarchy, it is quite possible that the best guess about the object of any law emerging from that hypothetical group mind is to sow terror and confusion among the populace, so that one is maximizing the number of potential lawbreakers who the State can oppress. A judge trying to ascertain the communicative content of such a law would choose that meaning which maximizes terror and arbitrary regime power.

listener's conceptual framework should govern in the event of possible ambiguity in the criteria for inclusion in a concept, so that a first-order reference to speaker's intention leads in practice to second-order employment of listener's intention.⁴ The more the legal system is oriented towards social coordination rather than tyrannical control, the more likely the communicative enterprise is going to be listener- rather than speaker-driven in those circumstances where different conceptual criteria could lead to different results. Again, that is far from an inevitable conclusion; it is actually an empirical question which background rule best fits the way in which communication is handled, as a presumptive matter, in such contexts. To some extent, the answer is not separable from the underlying theory of government. If legislators are viewed as rulers or guardians and the populace is viewed as subjects or wards, then a speaker-oriented approach becomes more plausible as the background assumption driving communicative meaning. If the underlying theory of government is agency-based, with the populace as principal and the legislators as agents, the likely presumption is reversed. So, the proper answer to the *communicative* question cannot really be given without some assumptions about the underlying *governmental theory* (here referring to "governmental theory" as a descriptive rather than normative idea).

But taking listener's (or public) meaning as the guide, the question becomes an empirical one about whether a hypothetically constructed public mind would regard tomatoes and/or kiwi as "fruit." In the contemporary Western world, the latter is pretty easy: The answer is yes, kiwi is a fruit. It is a staple in many fruit salads. The former is a factual question in which I would welcome briefing from the parties. Would a fruit salad aficionado be startled to find a tomato nestled among the melons, berries, and kiwi? Quite possibly yes.

In the absence of good information one way or the other about the criteria for inclusion in the concept "fruit," I would say "no" to application of the tomato tax, on the theory that the burden of proof is always on the person asserting a change in the status quo, which in this case would be the taxing authority. Ambiguity works *against* application of a law, and if there is genuine empirical ambiguity about the criteria for inclusion of something as "fruit," the law cannot be given effect in particular adjudications. Thus, it is possible that I would ultimately decide the case

4. See Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1136 (2015).

based on evidentiary allocations of burdens of proof rather than ascertainment of the communicative meaning of the text.

The second problem, involving our old friend *The Peerless*, is to me much harder, because the kinds of default rules involving burdens of proof that can be used to resolve disputes in an adjudicative setting are not necessarily available in these cases. The firm of “Smith and Jones,” a hypothetical mind, has given an instruction that has two possible referents. The key question is what assumptions are most plausible as background interpretative norms for communications from “Smith and Jones.” The empirical question that determines the appropriate background rule is: What is the entity trying to accomplish? Is the entity seeking to maximize profits? In that case, the referent of the term “Peerless” is probably the boat that can ship goods most economically. But if the entity is seeking to maximize the opportunities for graft of its owners—and that is a perfectly possible goal if the entity is a partnership, as it is in this case, or a close corporation—Mary may have a genuinely irresolvable dilemma. There are two equally good possibilities for graft, and the entity could equally mean either one. In that case, Mary has not been given a determinate instruction, beyond the instruction that shipping using one of the two boats is a good idea. Is her instruction in that setting to do nothing or to pick either one of the two possible boats? That is probably a question that can only be answered by reference to the custom or practice in agency arrangements of that kind. The operative legal context, in other words, might provide a background communicative principle. In the absence of any such background principle, I would say that Mary has not actually been given an instruction at all. The words are sound and fury signifying nothing.