IS ALL JUDICIAL DECISION-MAKING UNAVOIDABLY INTERPRETIVE?

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I. INTRODUCTION

Is all judicial decision-making essentially and unavoidably interpretive? Or, to the contrary, is such a claim incoherent? Legal scholars are divided over this issue. In this Essay I investigate one type of critique offered to combat the claim that all judicial decision-making is essentially interpretive. This specific critique is raised under the banner of Wittgenstein. The basic argument proceeds from an identification of essential aspects of language usage and concludes that interpretation cannot be as omnipresent in legal decision-making as the advocate of the "everything is interpretation" stance would have it.

To critique this argument I will first look at how the "interpretivist" (one who advocates the "everything is interpretation" stance) is characterized by those who adopt the Wittgenstein-inspired critique. Second, I will outline a general form of the attack on the interpretivist claim. While this critique will not be specific to any one scholar it will encompass what I take to be all the major moves arguments of this type can be expected to make. Third, I will argue that the types of arguments put forward in the second section, while being largely correct in their general points on the nature of rule-following and language usage, overlook important aspects of both of these practices when they are investigated in the specific context of judicial decision-making. If this conclusion is correct, it will call into question the applicability (or at least the manner of application) of a Wittgenstein-inspired critique to the legal domain. To help argue for this conclusion I offer a case study where the United States Supreme Court had to decide upon the use of the word "use" in a statute applied to drug trafficking.

The ultimate conclusion of this paper, though, is not one of the unavoidable or ever presence of interpretation or of the non-applicability of the philosophy of Wittgenstein, or ordinary language philosophy in general, to the understanding of what type of use of the law a judge must make when deciding a case. The conclusion offered is much more cautious. My analysis holds that while using a Wittgenstein-inspired critique does point to an overemphasis upon interpretive acts in the

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of judicial decision-making, accepting a non-interpretive stance under-emphasizes the artificiality and constructed nature of the act in question... 

II. ANTI-INTERPRETIVIST CLAIMS

Advocates of interpretivism claim that all judicial decision-making is interpretive in essence. Anti-interpretivists think that this claim exaggerates the presence of interpretative moves in the very act of judgment. There are convincing advocates on both sides of controversy. I am most interested in the claims that scholars have against the interpretivist stance in relationship to a Wittgenstein-inspired analysis. Specifically, it has been claimed that using such an analysis it can be shown that the interpretivist stance is wrong-headed at best, uninformative.

The analysis that purports to show such a result has three main prongs: (a) the “dead letter” prong; (b) the indeterminacy prong; and (c) the parasite prong. Briefly, the dead letter prong claims that the pretivist has been mislead by a picture of language as a “mere dead word” which must be animated by an interpretive act. The anti-pretivist claims that this picture is incorrect and that language use an essentially different nature than such a picture would have it. That language is a dead letter, language is best thought of as a form of life. Again, according to the anti-interpretivist the pretivist greatly exaggerates the presence of indeterminacy in the judge’s act of making a decision. In opposition to the picture of radical indeterminacy is offered a picture of mundane everydayness and comfortableness. Finally, the anti-pretivist claims that the realization that all interpretive actions are unavoidable and pre-interpretive understanding of language forces the conception that interpretation out of necessity can only comprise a small fraction of the activity of judicial decision-making, the majority of such acts must be non-interpretive in nature.

The “mere dead letter” prong

One reason why all judicial decision-making might be unavoidably interpretive is premised upon the claimed inertness of language. If a written law is thought of as an inert object waiting for animation then an interpretive act could serve as the element of animation. And further, if interpretation is the only possible animating act then all use of legal rules would be unavoidably interpretive. That is, to get from the inert rule to the application of such a rule to some activity or event in the world there is a gap that needs to be filled by a further type of activity or process—giving meaning through interpretation.

Wittgenstein devastatingly critiqued this understanding of rule-following, as a type of activity that inherently needs the mediation of some type of interpretation. In Wittgenstein’s words, when we are captivated by this picture “we are looking for the use of a sign, but we look for it as though it were an object co-existing with the sign.” But what could this co-existing thing, interpretation, really add to the understanding of the sign? Either the sign means or brings about a certain action or it does not. For instance, when confronted with a speed-limit sign that reads “SPEED LIMIT 65” one does not go through interpretive motions in order to understand that this means driving over sixty-five miles per hour is unlawful. What could a driver’s statement to the effect that he or she interpreted such a sign to mean that it is unlawful to drive over the sixty-five miles per hour limit mean? And if a driver interpreted a sign reading “SPEED LIMIT 65” to mean it is OK to drive eighty what could another person say to them other than “You are wrong.” A weaker statement such as “Your interpretation of the rule is probably wrong” seems silly and a waste of verbiage. Here, it appears the picture of such a sign as mere dead letters is patently false. In fact, such signs are perfectly understandable and directly alive when they are encountered in the context of driving a car. Once we look to the context, the sign is anything but an inert expression in need of interpretation. It might be in need of more diligent enforcement if everybody ignores it, but even so, interpretation is irrelevant.

A Wittgenstein-inspired analysis of rule-following, then, argues that the appearance of such uses of language as being a mere dead letter is false and accepted (when it is) only because of the adoption of a misleading picture of how we apply or follow such a rule. This mislead-

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this view is that because a legal rule does not, indeed can not, clearly demarcate the realm that it applies to, and because the world isn't categorized a priori into those actions within or without the categories outlined in the rule, the use of a rule effectively must entail an interpretive act.

The anti-interpretivist's critique of this claim follows in almost identical fashion that offered in response to the dead letter view of language. Here the person arguing against the thesis that application of legal rules is essentially indeterminate points to the existence of what in law is called the "easy" case. From the empirical existence of such easy or clear cases the question is raised: why does the interpretivist want to see indeterminacy here? What could this claim of "indeterminacy" mean in the context of the clear case where nobody disputes the outcome? It is important to note that nobody disputes that even the most clearly written and easy to apply law may prove to be difficult to apply in borderline cases or in the face of unforeseen circumstances. But, on the other hand, most legal rules have core instances that are indisputably covered by the language of the rule. If a judge fails to see the applicability of the case to a borderline example, or declines to apply the rule to an unforeseen circumstance, we might very well say this was an area where the law was indeterminate. On the other hand, if a judge fails to apply a law to what is understood by the relevant legal community as a core example of what the rule is aimed at we don't respond by describing such a failure as a result of indeterminacy, but rather as incompetence. While it may seem sophisticated to speak of divergent and eccentric interpretations in such a circumstance, the better response would be to state that the reading was just plain wrong, or at the very least to ask the judge why he or she reached such an interpretation in opposition to the normally understood results.

Return to the speed limit example. If someone claims that a law that read "No one may drive a motor vehicle over the speed of sixty-five miles per hour" is indeterminate we would want to know the basis for such a claim. If we take the rule out of context we might be able to manufacture problems. For instance if the jurisdiction has a raceway and the Highway Patrol insisted upon given any racecar driver a ticket if he or she went over sixty-five we might think an interpretation of the law was necessary. But such examples, isolated as they are, show us the lengths that must be traveled in order to find indeterminacy in everyday

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Stone, supra, note 1 at 9.
I borrow this terminology from Stone as well, id. at 32.

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It is important to note that the speed limit example was chosen simply because it is extremely mundane and everyday in its nature.
rule-following and rule-application. Even as examples like this in the real world application of a speed limit law, would not serve to question the application of the rule to cases which are at the farthest end of what it is aimed at. Once again, in the context of our world, our language and within our language, the claim that application of such a law is indeterminate in some grand manner would be ridiculous.

The anti-interpretivist believes that such a critique applies equally to the idea that legal decision-making. That is, in most cases the judge in applying the law just applies it, end of story. And after the application nobody is concerned about the certainty of the judge in the correctness of his or her decision. To state that such application is radically indeterminate could mean that daily life does not live up to some exacting view of normativity that needs to be unpacked in order to understand its meaning. Regardless, the claim of indeterminacy does not seem to up enough play in the wheels to get to a position strong enough for the interpretivist to make the claim that all legal decision-making is at least partly interpretive. Once again, an analysis of rule-following that puts to keep up eyes on the actual daily use of the rule (to which a postmodernist-inspired analysis would do) seems to be devastating for the anti-interpretivist position.

Parasite prong

The critiques of the “deal letter” and “indeterminacy” claims point to the third prong which is in many ways the most sophisticated and convincing analysis of rule-following, or use of language, along the lines Wittgenstein offers. This analysis claims that interpretation is essentially parasitic upon a large domain of agreement. Because such a domain is necessary for the secondary act of interpretation any claim that everything is interpretation must rely upon, if this critique is correct, a misunderstanding of the nature of interpretation as an act. How can divergent interpretations be dependent upon agreement, you might ask? Well, to interpret an object as art we must have some sense of what to object we are talking about as well as some idea of what “art” means. While the necessary agreement need not be complete, it must be available for the interpretive act to commence. More centrally, we must have substantial agreement in order to use language to interpret anything at all. In other words, it would make no sense to speak of interpretations of art objects unless we have an ability to use the English language and, more specifically, and understanding on some level of what the word “interpretation” must entail. While complete agreement need not be present, a large amount of agreement must be present. If the word “interpretation” had no meaning in daily use then talk about interpretation would have no meaning at all. Talk of interpretation only makes sense if we have some pre-interpretive understanding of interpretation as an act. Interpretation, on this view “is the exceptional, not the standard mode of understanding language.” In order to avoid an infinite regress such interpretation must stop somewhere. To talk of all language use as interpretation seems nonsensical under this theory.

The anti-interpretivist argues that this critique applies in full force to the activity of judicial decision-making. Because such an activity is language-based, and because language use is impossible without a large core of agreement, any picture of what a judge must do when deciding a case as being essentially interpretive ignores the necessary constraints and constitutive conditions that any interpretation functions within. If this is so, then the interpretivist’s claim is incoherent. Most of law, and most legal decisions made by judges, then, must be pre-interpretive in nature.

III. THE INTERPRETIVIST’S REJOINER

I believe that the three prongs of the attack on interpretivism are largely correct and a counter-argument to the global claims of the interpretivist. In what follows, I will treat these claims as if they were true in their broadest strokes (when aimed at language use as a whole). My aim is to argue that the above arguments while effective when offered as global claims about language use in general, are less convincing in the context of the interpretivist’s claims about judicial decision-making. Specifically, I will argue that the anti-interpretivist’s argument offered above: (a) ignores the context within which Wittgenstein is making his analysis and, therefore, generalizes the analysis beyond the boundaries it is best suited for; (b) pulls judicial decision-making out of context and (c) ignores the greater context of what I will characterize as the “Kantian problematic” of modern philosophical thought in general. If my argument is correct all of these aspects combined make the claim that all judicial decision-making is essentially interpretive more intelligible, even if still problematic. Once
Once the holistic aspect of the claim is shown to be less global in import than previously thought, resting upon other non-interpretive domains can satisfy the parasitic needs of interpretation. I see no reason why one smaller area of inquiry or practice cannot be wholly interpretive as long as it relies upon other domains to supply the grist for its interpretive mill. While this conclusion doesn't prove that all judicial decision-making is interpretive, it does raise questions as to the ultimate conclusions one can derive from the parasitic argument in the case of context-bound claims. More careful attention to context may show that the anti-interpretivist commits the same error as the interpretivist.

The judicial context

The arguments raised by the anti-interpretivist also tend to ignore an important trait of judicial decision-making; it takes place in the context of a dispute. If there is no dispute there is no judicial decision to be made. If there is a dispute then the context could be fairly described as one where the opposing parties must have differing interpretations as to either the facts, the law, or the rights at issue. Absent some uncertainty about the ultimate outcome, a judge's involvement would be unnecessary. What this means is that someone in the dispute is claiming that some aspect of the case is not that of a core instance. Even if that claim is wrong, the procedural aspects of the judicial process ensure that a bare minimum of judicial interpretation is required to see the law applied in a clear case to maintain a sense of fairness. What we have is a judicial system, artificial in nature, built on top of everyday life; entering this system implies a breakdown has occurred in the understandings between people and that conflicting right claims must be settled. The judge's application of a law in this context might seem automatic, but in the light of mandatory procedure, a certain amount of interpretive activity is requisite even to establish the case as a core instance. If nothing else the judge must verify that it is a core case and proper procedure has been followed in seeing it as such, a verification which is by its nature a reflective activity (much like deciding whether a strangely shaped piece of furniture is really a table). The activity and reflection of a judge in the simple case can intelligibly be described as interpretive. The interpretive activity may be pretty
fictions” abound; they are created in order to facilitate legal operations. At any given moment in the evolution of a legal system some things now treated with legal certainty are a result of a convenient legal fiction. Conversely, some facts are fictionalized because their presence stand in the way of desired outcomes. In other words the whole legal system is a creative as well as created artifact. While at any given time there must be a large part of the system treated as given for a legal proceeding to proceed, no part of the system is ultimately immune from being called into question. In this light, the legal interpretivist’s claim that “all judicial decision-making is interpretive” carries with it a warning against a formalism that doesn’t see its own roots in what are essentially creative acts.\(^{12}\)

IV. THE USE OF “USE”

In Smith v. U.S.,\(^{13}\) the United States Supreme Court was confronted with the task of applying Title 18 U.S.C. § 924(c)(1) which requires an additional penalty of five years in prison if the defendant during a drug trafficking crime “uses” a firearm. The statute further imposes a thirty-year prison sentence if the gun used was fitted with a silencer. The lower courts split over whether trading a gun in a drug-related transaction was “use” under the statute. The Supreme Court found that when the defendant, John Angus Smith, traded a gun fitted with a silencer for cocaine he had, in fact, used a gun under the wording of the statute. Justice O’Connor’s opinion stated that in ordinary usage one may “use” a gun in more ways than as a weapon. The legal rule resulting was that “[b]oth a firearm’s use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense; both must constitute “uses” of a firearm for § 924(c)(1) to make any sense at all; and both create the very dangers and risks that Congress meant § 924(c)(1) to address.”\(^{14}\) A dissent by Justice Scalia ridiculed this reasoning; “[t]o use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, ‘Do you use a cane?’ he is not inquiring whether you have your grandfather’s silver-handled walking-stick on display in the hall; he wants to know whether you walk with a...
Similarly, to speak of 'using a firearm' is to speak of using it for its active purpose, i.e., as a weapon.\textsuperscript{15} Two years later the Supreme Court revisited the very same case.\textsuperscript{16} This time the issue was whether having a gun in the trunk of a used to transport cocaine for sale was "use" of a gun under the statute. The Court of Appeals held that the defendant could be convicted of "using a firearm during a drug trafficking crime" if the jury could reasonably infer that the gun facilitated Bailey's [the defendant's] commission of a drug offense.\textsuperscript{16} The Supreme Court, in an opinion once written by Justice O'Connor, found this reading of the statute too narrow and against the natural use of language. The court adopted an "ordinary use" standard that distinguished acts included under "use" such as handshaking, displaying, bartering, striking with, and firing or pointing to fire, a firearm from other acts not covered under "use" such as carrying a gun in the trunk of a car while delivering drugs or allowing a gun to be hidden in his clothing throughout a drug transaction. This distinction, according to the Supreme Court, was predicated on the ordinary use of "use." There are at least two ways to read this: (1) it might be thought the majority was being disingenuous in order to get the legal result it wanted; or (2) the majority might actually thought that they were using "use" in an ordinary manner. If the court were using the ordinary-language analysis explanation as a cover for -goals then the hope that some cases cannot be made interpretive nature is unrealistic. This result would be unavoidable because in a case no language would be clear or concise enough to stop such tial gerrymandering. Therefore the threat of interpretation for this possibility is omnipresent. If, on the other hand, the majority thought that either or both of these cases actually reflected everyday use of "use" then we have to admit that even words we use confidently everyday have sufficient play in them to be "fictionalized" at any time. If is correct, then an apparently "easy" case can become "hard" by vising of the language of the law in question. The only way to avoid in turn, would be the judge's determination that such an interpretation is unwarranted (such a conclusion itself being an interpretation).

I think these two cases point towards the legitimacy of the "all social decision-making in interpretive" stance. Not only does "use" a most familiar and ordinary word, one could imagine how the use of language. The trial court judge could have looked at

the statute and claimed, legitimately, that the language was so clear that the outcome could not be in doubt. And the judge would have been right if the parties to the criminal action had not raised the issue. But once "use" had become an issue, appealing to normal usage proves to be less helpful than supposed. Of course the anti-interpretivist will claim that we have here a problem created by a borderline case. Furthermore, the questioning of a word's usage doesn't translate into a proof of the claim that "all judicial decision-making is interpretation."\textsuperscript{17} These responses have real weight, but what the above shows is that even simple, ordinary words can become problematic in the legal context. Any statute can become a quagmire when we seek to apply it.\textsuperscript{18} We come, finally, to the notion that judicial decision-making is an inherently second-order usage of language and operates in a worldly context in which multiple meanings of words are possible.

V. CONCLUSION

Suppose people used always to point to objects in the following way: they describe a circle as it were round the object with their finger in the air; in that case a philosopher could be imagined who said: "All things are circular, for the table looks like this, the stove like this, the lamp like this," etc., drawing a circle round the thing each time.\textsuperscript{19}

I have suggested in this Essay that people on both sides of this debate are inscribing too many circles. The interpretivist is clearly ignoring the mundane, the clerical, and the mechanical, in everyday decisions made by judges. The anti-interpretivist surely is correct when arguing that the dead letter picture of rule-following is incorrect and leads one to ascribe to interpretation an improper role. An "interpretation" would just create another layer of dead letters to worry about. Indeterminacy, as well, is greatly exaggerated by the interpretivist. It just cannot be the case that every decision a judge makes is radically underdetermined. The legal system is largely stable. Finally, and most importantly, the parasitic nature of interpretation must be faced directly. Certainly a picture of all language use as interpretive is incorrect. A linguistic community must be in large

\textsuperscript{15} Perhaps this whole paper really premised upon a dispute over which one of the family of ordinary meanings of "is" we should adopt.

\textsuperscript{16} One must remember that Wittgenstein's use of the concept of family resemblance was offered at least in part to combat the idea that there was necessarily one real "essential" use of any word.

\textsuperscript{17} Ludwig Wittgenstein, \textit{Zettel} 79e (1970).
ment for a language to be used at all. The anti-interpretivist is on
round in wanting to analyze the use of law and investigate judicial
on-making in context.

On the other hand, the anti-interpretivist’s argument is not
proof. First, the context of a judge’s decision in a case is very
ent than the context of philosophical discourse on the nature of
ence and the possibility of knowledge. The philosopher is asking
questions outside of everyday language use. The judicial decision
le in the context of an all too worldly system created for practical
ses. Because of this, the “wheel spinning by itself” aspect of
ophical questions of rule-following is not as present in the case of
al decision-making. So the applicability of the exact same style of
sis that Wittgenstein used for philosophical questions is
onable. Second, judicial decision-making is an activity that occurs
ace of litigation. Litigation, in turn, supposes a conflict; there is
infinite a difference among the parties. Judicial activity seems
is a form of mediation, a mediation which can be described as
retation. Finally, there is the philosophical context of what I term
Antian problematic.” Philosophers in vastly divergent fields claim
our language structures our experience of the world. The existence
ferent language communities warns us of the contingent and
what “interpretive” nature of all our concepts. If we do not accept
version of what philosophers call “naive realism” we must face the
itive nature of our linguistic activity on our practices.

c is all judicial decision-making unavoidably interpretive? Well,
nd no. Certainly the possibility of interpretation looms in every
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day use of words can be disputed. Further, ordinary language
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claimed for it. Pushing “use” back into the world by the
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ed as authoritative. This is especially true if the judge’s authority
one way trumps the authority of everyday language usage.
have not proved that all judicial decision-making is a consciously
pretive act. Certainly the parasite argument proves at the very
that in making a decision the judge must rely upon a given stable
of knowledge and linguistic capabilities. If the interpretivist’s claim
were that there is no non-interpretive element in a judicial decision
then the claim would be absolutely disproven. But this isn’t a claim
the interpretivist has to make. The claim can be that the judge is employed
in figuring out the issues that are in dispute in the case at hand. If there
are two disputants in front of the judge, and the judge states—“This is
an easy case, party “X” has misunderstood the law, and I therefore just
ly apply it”—the judge has come to a decision that interprets, in some
sense, the validity of the claims at issue. I think this is a mundane
example of interpretation, but it is interpretation none the less. The way
a judge uses language in making a decision is not completely analogous
to the way people in an everyday context use language. If a person who
was given a speeding ticket for driving eighty comes to court, he or she
must think that some aspect of the accusation, the law, or the
punishment, is at issue, otherwise why show up (rather than pay the
ine through the mail)? The judge when confronted even with a request
to lower the fee charged is forced to make a “judgment” and why
shouldn’t such a move, no matter how trivial, be called interpretive?
This use of interpretive, in this context, to describe the judge’s function
and activity, does not appear to be a completely superfluous circle drawn
upon the act it is being used to describe.