

**Indeterminacy and the Law:  
Language, Meaning and  
Definition in the Legal Context**

**Christopher Hutton  
School of English, The  
University of Hong Kong**

# Common law systems

- Separation of powers: judges are (in theory) independent;
- Judges do not (in theory) “make law” but “apply the law” created by the Legislature;
- Reasoned decisions: higher court legal decisions, are published with the arguments and counter arguments, including dissenting opinions (i.e. where one or more judges disagree with the majority)
- Text-based: judges should be guided by the precise wording of the law and not go beyond the text of the law;
- Questions of word-meaning and textual interpretation are fundamental to common law legal practice and theory;

# “Common sense” views of language?

- Words have meanings and these meanings allow us to express our thoughts and talk about things in the world
- These meanings are stable and relatively fixed, otherwise we would not be able to understand each other
- If you are not sure what a word means, you can find out by looking in the dictionary

# Advanced “common sense”?

- Some words have more than one meaning, for example a range of similar meanings (e.g. “good”) and these are listed in the dictionary in sub-headings
- People sometimes argue about whether a word is used correctly, or disagree about the meaning of a word in a text, but basically society could not function without a common set of linguistic reference points

# Meaning as understood within academic linguistics

- A language is a relatively stable synchronic system of form-meaning pairings
- Meaning is a decontextual property of the words and sentences of a language
- The shared meanings provided by the system make communication possible between speakers of the same language
- Linguistics aims to characterise the nature of the abstract knowledge that enables speakers and hearers to communicate
- Language is a “rule-governed” phenomenon

# Indeterminacy

Definition of semantic scepticism: There are no facts that constitute or determine a sentence's meaning, so that language is indeterminate at the most basic level: there are no objective facts that make it the case that language means one thing rather than another. Thus, there is no point to claiming that a legal rule can be satisfied by some actions but not others since the meaning of the rule is always "up for grabs." (Coleman and Leiter 1993: 568)

Indeterminacy in law involves the thesis that “legal questions lack single right answers”.

Kress, Ken (2003). Legal indeterminacy. In *Philosophy of law and legal theory*, ed Dennis Patterson. Oxford: Blackwell, pp. 253-291.

This [indeterminacy] would imply that “there are no rules for the application of language to any situation”. This is equivalent to the proposition that “any sentence can mean anything”, and thus that “no sentence means anything or that human communication is impossible”.

Solum, Lawrence (1996). Indeterminacy. In *A companion to philosophy of law and legal theory*, Blackwell: Oxford, pp. 488-502.

# Roy Harris

[...] the sign does not “have” its own meaning: it is ‘made to mean’ whatever the circumstances require. And may be made to mean different things by different individuals on the same occasion. More exactly, the contextualization that makes a sign mean something is simultaneously what establishes its identity as a sign.

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# Closure & Indeterminacy

- Law requires determinate outcomes (guilty vs. not guilty); it must reach interpretative “closure”;
- To be consistent and “just”, law must establish constant and recurrent means to achieve closure across varying contexts and timeframes;
- The language of law is key to this, since judges apply the text of the law to an open-ended series of “fact patterns”;
- Can language provide the required stable system of reference (i.e. meanings that are fundamentally constant across contexts) and thereby underwrite the rule of law?

# The great debate?

Language as a fixed code, a stable system of signs, which underwrites social order, expresses the intentions of speakers and writers, enables communication, and guarantees the transparency and coherence of law across its contexts of application

OR

Language as an indeterminate, open-ended practice, lacking a decontextual foundation, constantly escaping the intentions of speakers, onto which all kinds of meanings and notions of order are projected and imposed, but which constantly defies reduction to a determinate system or transparent and publicly available meanings

# H.L.A. Hart

The meanings of legal texts in general are clear but in a minority of cases the judge must of necessity go outside the strict text of law; this is because law is open-textured”, and surrounded by a “penumbra of uncertainty”

Example: “No vehicles in the park”

<b>Easy cases</b>	<b>Hard cases</b>
Buses, commercial lorries, fuel tankers, military vehicles, private cars, motorcycles	(from easier to harder?): bicycle, skateboard, child's bicycle, roller-skates
Core meaning of the word "vehicle"	"Penumbra of uncertainty" in relation to scope of word "vehicle"
Autonomous "internal" decision process	Resort to "external aids": reconstruction of legislative intent; use of dictionaries
Decision is determinate, based primarily on the plain meaning of the rule, judge applies the rule objectively, decision is derived formalistically (mechanically, ...)	Decision involves policy, politics, sociological context; judge must balance competing criteria; a substantial degree of indeterminacy
Objective decision making	Subjective decision making
Legal certainty, predictability of outcome	Absence of legal certainty: arbitrary "justice"?
Judges apply the law	Judges make law

Core meaning

Penumbra  
of  
uncertainty

