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PLAIN MEANING IN CONTEXT: CAN LAW SURVIVE ITS OWN LANGUAGE?

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The history and application of the "plain meaning" rule poses one of the most complex challenges to the workability, soundness and integrity of the legal system. On the one side, the plain meaning rule is often derided for its excessive simplicity and for its failure to understand the role of linguistic convention and historical context in evaluating particular legal commands, whether contained in constitutions, statutes, regulations, or contracts. Yet on the other hand, a rejection of the plain meaning rule poses the real threat that language will fail of its essential communicative purpose if even the simplest of sentences falls prey to nonstop interpretive maneuvers. Put otherwise, the risk in abandoning the plain meaning rule is that a high noise-to-content ratio in legal communications will degrade the rule of law as we know it. An adequate theory of language thus

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has to thread the needle between nasty indeterminacy on the one hand and false precision on the other—which H.L.A. Hart called the effort to walk the fine line between the nightmare and the noble dream.[1]

Some measure of the evident difficulties in discharging this task is built into the title of this Conference. Its initial sentence speaks about plain meaning in context, which in turn raises at least four questions that plainly stand in need of adequate answers. The first set of questions revolves around the meaning, plain or otherwise, of the three key terms in that phrase: plain, meaning, and context. The second set of questions concerns the terms in the last clause of the title: What is law? How can law "survive" anything, let alone survive the very language it uses, when that legal language must have some connection to ordinary language for it to be intelligible at all?

In this article, I shall offer a few observations about these multiple questions. In particular, I shall explore the relationship between ordinary and legal languages and note some arguable differences between them. My general thesis is a positive one, as well-spoken native speakers of the English language should undertake this examination in a positive spirit. I reject the unhappy and unhelpful proposition that the source of the difficulty is that in general language does not work well at all. Instead, the task is to explain why language works as well as it does in a huge number of cases of great importance. We can find the answer in the compelling logic of the classical liberal tradition, precisely because it tracks most closely the conventional uses in ordinary language. That connection is not an accident. As a first approximation (from which, as will become evident, there are many refinements) the key tasks of any social or-

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[1] *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 5 (1977), reprinted in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123 (Clarendon 1983).

der are to control aggression and to facilitate cooperation. Those basic imperatives are critical to the survival of any society. It would therefore be highly improbable that the language that describes and evaluates human action could develop in a fashion that did not reflect these twin social objectives. Yet it would be equally strange if it did not develop some mechanisms by which to incorporate the exceptions to these truisms into some more comprehensive social scheme.

It is clear, therefore, that the articulation of clear linguistic norms is critical to the larger task of social survival. It is equally clear that the success of this system depends in large measure on controlling the level of error that disrupts its routine operation. In dealing with this threat to social organization, it is important to distinguish between two kinds of errors that may creep into both ordinary and legal language. The first type of error is uneventful. It consists of those mistakes that can be corrected within the language by other people who recognize their mistakes, once these have been pointed out to them. In the simplest form, people can misuse a word, make mistakes in subject/verb agreement, mangle the distinction between the indicative and subjunctive moods. These mistakes speak no more to the inherent limitations on the use of language than simple arithmetical errors speak to the inherent weakness of mathematics. In many cases these elementary errors are made by nonnative speakers who first learned English as adults. Such speakers are commonly misinformed as to the meaning of particular terms or otherwise insensitive to the nuances of given phrases. But the fact that corrections can be offered and accepted without dispute is strong evidence of the internal integrity of the English language, which is in turn so necessary for social survival.

It is important to start with a few observations about the use of ordinary language that can then give us some hint as to why legal documents—whether constitutions, statutes, regulations, or contracts—have some distinctive characteristics of their own. The test of an efficient language is one that allows people to communicate as much reliable information as possible with the fewest possible

words. As with most other human activities, the only way to make sense of this process is to assume that the speaker and his intended audience have a desire to maximize some common goal.[2] Just as contracts only work when they generate mutual gains to the parties, so too with most forms of speech. In ordinary economics, that desire is captured in the proposition that in a world of scarcity, the task is to identify both the benefits and costs of information in order to reach a point at the margin where the last unit of effort supplied in the transfer of information is equal to the last unit of benefit that this effort of communication supplies.

To put this point in another fashion, assume for the moment that we can identify a long and laborious mode of communication that accurately covers the outcomes in all possible states of the world in an error-free fashion. The question is whether anyone would choose to adopt that mode. The first obvious observation is that the costs of transmitting and receiving this form of information are likely to be high. The immediate challenge therefore is what happens to the error rate if the information is presented in somewhat more compressed form. We can be confident that this rate will go up, and then ask the further question as to what weight should be attached to any increase in errors relative to the lower costs of communication.

The interaction between the error rate and costs of communication frequently plays out differently in ordinary social contexts than in legal ones. In the former, especially in casual interactions, we are generally prepared to tolerate relatively high rates of error because normally only few negative consequences attach. The errors can be corrected before any real harm occurs, so that if a person in conver-

[2] I put aside the complications dealing with conscious efforts of deception which that are at times the object of particular forms of speech. In many of these cases, as with codes, the effort is to secure accurate communication with friends while achieving concealment from enemies, competitors, or even strangers.

sation uses the word "horse" when he means to use the word "cow," a listener who knows the flow of the conversation can interject with a single question that gets matters right again. Accordingly, shortcuts are the order of the day, depending on how much the speakers can rely on context – a word which can itself take on two meanings that assume great importance in all social and legal settings.[3] The first of these just refers to passages in the same conversation that precede or follow a term and make it possible to understand what is meant. The second refers to the broader set of circumstances that surround the particular utterance. Any system of interpretation has to respond to both sorts of contexts, but must do so in quite different ways.

Taking the first account first, "pronouns" are devices that reduce the number of given words that are needed in order to communicate information. They can only function well if the context establishes the person(s) or thing(s) to which the pronoun *refers* from which it is then possible to understand the persons or things that are the subject of the conversation in question. Pronouns thus have no meaning standing in isolation. The terms "he" or "she" or "it" in the English language usually offer some hint as to male, female or object. But in other languages that need not be the case. In German, for example, gender codes do not have any obvious one-to-one correspondence with external persons or objects, yet native speakers are rarely misled by pronominal use.

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[3] Dictionary.com supplies the authoritative text:
Context–noun
1. The parts of a written or spoken statement that precede or follow a specific word or passage, usually influencing its meaning or effect: You have misinterpreted my remark because you took it out of context.
2. The set of circumstances or facts that surround a particular event, situation, etc.

Philosophical doubts on the completeness of language should not therefore lead to practical worries. Native English speakers negotiate the supposed hurdle posed by the use of pronouns with such speed and confidence that, until the anomalies are pointed out to them, they remain blissfully unaware of the syntactical structure of their own language. How many people know that it is not possible to put intransitive verbs into the passive voice, until it is pointed out to them that "I have been goed" makes no sense at all? Indeed, with permissible grammatical constructions, they routinely decipher the meaning of plural pronouns, without being formally able to articulate the distinctions that they routinely apply. Such difficulties are apparent, for example, with the pronoun "we," which could take two quite different meanings in context. Thus, the sentence "we are all agreed that we shall hire Jones" means that all three people in the conversation are together. But the use of the phrase "we want you to do X now that we are all agreed," means that the addressee in the last case is not part of the "we" who have made the decision. Which sense of the term "we" is only determined by listening to the sentence to its end, at which point the meaning becomes so clear that the question of which sense of the word "we" is intended is answered conclusively by the narrow linguistic context, without reference to any larger social context.

The question of potential ambiguity arises in other settings, most typically with homonyms for common words, which again establish their meaning only in context. To say "Jane went to the bar to celebrate her bar passage, only to find that she was barred at the door" is a perfectly clear sentence in English, even though the use of the term "bar" in this sentence carries three distinct meanings. Once again the most notable feature in these cases is not the potential source of ambiguity in the language, but the unerring way in which native speakers can sort out semantic meaning that is conclusively established by the immediate verbal context. No cumbersome dictionary is needed; nor would it help in the slightest to appeal to the second meaning of context, a set of facts about the external world, even if that context helps us attach a positive or negative evaluation

on the course of events. In most cases, surrounding words and the temporal compression of a communication produces typically only the tiniest level of linguistic indeterminacy.

The point here is not just true as an abstract matter. All languages have pronouns and all languages can attach multiple meanings to the same set of symbols pronounced in the same way (or different symbols pronounced the same way). At this point the term "survival" in the Conference title now has a clearer meaning. It simply means that those linguistic conventions that survive are those that are able to transfer information with a sufficiently low rate of error so that others can rely on them. Even though practice never makes perfect, it does improve the speed and accuracy of communication.

As noted above, the second meaning of the term "context" refers to a set of background conditions or circumstances (those facts that surround a given assertion) that allow us to understand its social significance, broadly conceived. Note that in this sense of the term, the word "context" does not seek to provide the semantic meaning of a given word or phrase, but lets the listener or reader understand what is at stake. The phrase "Jones won the Congressional Medal of Honor" is one whose meaning we understand so long as we know, from context, which Jones we are talking about and what the Congressional Medal of Honor is. But there is nothing in the meaning of this particular phrase that offers a clue that it is noteworthy that Jones was the first foreigner to win the most distinguished award that this nation can confer for battlefield heroism. This second form of context presupposes that we understand the semantic meaning of the term, and demand the explanation (which could have its own linguistic ambiguity) solely to assess why people should know or care about this particular turn of events. The ambiguity in the term context matters, and as with most terms it is usually one that is made clear from—why not—the context. But which one?

In dealing with the question of plain meaning in context, it is clear that we have to address both types of contexts. So too with

legal language, only now the costs of error are far higher than they are in dealing with ordinary language. First, the consequences matter; these words are often designed to structure the social and legal relations between two or more persons or groups, with the result that any small error can lead to a large amount of injustice or inefficiency. Second, error correction is not just a matter of asking the correct question or backspacing on a word processer. The words in question are not generated by a single person who can alter and change them at will, so their costs of correction are far greater than before. Accordingly, much more care is properly taken to prevent the occurrence of some original mistake. It is for that reason that we sometimes say that these words are "written in stone," to stress the notion, once literally true, that it is very difficult to change the engraved provision if later on someone finds a defect in its original formulation.

The distinction between legal documents and social contexts is often suggestive, but it is by no means watertight. Many terms buried in the background of legal documents may have little or no significance at all. Likewise, there are some social contexts where speech or communication otherwise leads to immediate responses that cannot be undone so that enormous care has to be taken to get it right the first time. Thus the wonderful surgical maxim "measure twice, cut once," (which I first heard on ER years ago) takes its power from the melancholy observation that to measure once and to cut twice is a rather more dangerous way to proceed. Indeed, in situations where blood transfusions are required, people are often asked to repeat their name and blood type a dozen times before they receive blood that has been typed and retyped a dozen times as well. In this case, both types of context matter. No one should assume that people do not grasp what it means for two blood types to be incompatible. It is precisely because they understand that the dire consequences of any incompatibility are both difficult to reverse and often fatal that they take the extreme caution to avoid any typing errors.

We have then a model that suggests that compression and abbreviation in language is tolerable when the consequences of error are small. This is no different from the rule that sublime accuracy is less important for people who write on word processors as opposed to those who use calligraphy for wedding invitations. Higher error costs in many situations lead to the emergence of a professional class whose job it is to minimize error. And this can happen with language in a wide range of settings. Traders are tested to see that they understand both hand signals and verbal outcries so as to avoid misunderstandings in fast moving securities markets. People are only allowed to fly or guide planes if they understand the complex terminology that is needed to guide them safely and uneventfully to their destinations. In these contexts, it is almost idle to speak about the weak and uncertain characteristics of language. No errors in execution are permitted here; philosophical skepticism cuts no ice.

Likewise, philosophical skepticism should not be the dominant motif in dealing with legal disputes, regardless of whether they focus on contract, statutory or constitutional interpretation. There are of course many cases on the books in which difficulties with language can generate sharp division of opinion among judges and lawyers as to the proper interpretation of a given word, or more often a given word within a specific textual context.[4] But the selection effects involved in choosing cases for litigation and dispute skew the significance of these cases.[5] The only cases that get chosen for litigation are those which give rise to some measure of disa-

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[4] *See Smith v. United States*, 508 U.S. 223 (1993) (holding that a defendant "used" a gun in a drug offense when he exchanged it for narcotics). *But see Watson v. United States*, 552 U.S. 74 (2007) (holding that a defendant did not "use" a gun in a drug offense when he *received* it in exchange for narcotics).

[5] For the classic account of selection effects, *see* George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

greement in the first place. It thus follows that thousands of interpretive questions are resolved on a daily basis with no posturing and little difficulty, long short of litigation. Indeed, even of the cases that come up for litigation, the issue is often presented on the grounds that both sides agree that the first ten propositions in a given dispute are settled by the contract, statute or constitutional provision, only to disagree on the proper meaning of the eleventh term. It is certainly correct to put all the emphasis on the term that is the source of the dispute. But it is wrong to underrate the success of linguistic interpretation by sampling only the failures, while ignoring all the successes in communication.

Most critically for our purposes, it is equally wrong to think that any unhappy social result in a controversial case should be laid at the doorstep of statutory interpretation. The system of linguistic interpretation should not act as a purification device that allows judges or administrators to cure their objections to a statute whose substantive mandates they regard as unsound. Indeed, as a general rule, bad statutes, when properly interpreted, should lead to socially dysfunctional outcomes. The correct response for silly statutes is repeal or invalidation, not reinterpretation.

Consider the now defunct 1958 Delaney Amendment that stated: "the Secretary of the Food and Drug Administration shall not approve for use in food any chemical additive found to induce cancer in man, or, after tests, found to induce cancer in animals."[6] As drafted this simple text raises two issues. What does it mean, and does it make sense? But these two inquiries can and should be kept separate. On the former, the obvious question is whether or not the Delaney Amendment applies to low dosages of "chemical additive[s]." The general structure of the Food and Drug Act

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[6] *See* Richard A. Merrill, *Food Safety Regulation: Reforming the Delaney Clause*, 18 ANNUAL REVIEW OF PUBLIC HEALTH 313 (1997).

["FDA"] as it existed in 1958 required drugs to be "safe" for use in human beings.[7] That term was never construed to require absolute safety, because that reading would have kept all foods off the market, leading to mass starvation. But it is precisely that absolutist sense of safety independent of dosage that drives the Delaney Amendment, which has to be read in opposition to the general command to which it forms an exception. At this point, it does become a reason to take any chemical additive off the market if it only causes cancer in a single case when used in huge concentrations, for the words "in any quantity" have to be read in between the words "found" and "to induce" in order for the Delaney Amendment to achieve its stated goal. The legislative history confirms this reading, which is the one that it should receive, and which it did receive in *Public Citizen v. Young*.[8]

At this point one caveat is in order. The clear outcome of statutory construction should never be construed as an approval of the point of view. Indeed one added advantage of being clear about what a statute requires is that it helps set up a challenge to it on the ground that it interferes with some fundamental right.[9] Indeed in many cases, the clarity of the statute is a source of comfort for those who want to challenge it on substantive grounds because it removes all the ambiguities of construction that could otherwise block a constitutional or legislative attack on the position.

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[7] The requirement that the applicant show that a product be effective for use was only introduced into the Food and Drug Act by the 1962 Amendments after the thalidomide tragedy. *See* Sam Peltzman, *An Evaluation of Consumer Protection Litigation: The 1962 Drug Amendments*, 81 J. POLITICAL ECON. 1049 (1973).

[8] Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987) (dealing with the analogous provision in the color additive act).

[9] *See* Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, (D.C. Cir. 2007), *cert. denied*, Abigail Alliance v. Eschenbach, 128 S. Ct. 1069 (2008).

I. TEXTUALISM, PLAIN MEANING AND ORDINARY LANGUAGE

A. THE BASIC APPROACH

Now that we have established these preliminaries, it is important to see how they play out both in ordinary language and in legal settings. We start, as noted, from the brute proposition that successful social life requires reliable modes of communication. At this point our first order of business is to see how, in most cases, our legal and social institutions have successfully grappled with communications. In dealing with these issues, there are two kinds of laws to consider. One type, which is quite common today, involves modern statutes intended to fix special problems that are replete with detailed definitional provisions and are intended to leave little or anything to chance.[10] These statutes are so dense that they usually do not generate huge problems of interpretation, whether or not they turn out to be unwise as a matter of social policy. A similar type of statute is one that gives a broad mandate to an administrative agency to articulate rules that are said to satisfy the "public interest, convenience and necessity."[11] At this point, the language is intended to be pliable enough to allow for broad delegations of authority so that little stress is placed on the interpretation of language that is intended to be indeterminate in most cases.

The real challenges therefore tend to be with common law rules, statutory commands or constitutional provisions that do have a substantive bite, but which are in some vital sense incomplete because they are overbroad. Think of general rules that protect the freedom of speech, that impose prohibitions on killing or wounding other individuals, or that forbid stealing property. These proposi-

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[10] For one such statute, see The Biologics Price Competition and Innovation Act of 2009, 111 P.L. 148; 124 Stat. 119 (2009).

[11] *See* The Federal Communications Act, 47 U.S.C. §§ 151 et. seq. (1934).

tions are specific enough to have some real direction and punch. But at the same time, they are seriously incomplete in their ability to deal with every variation of speech, bodily integrity or private property. No one ever believes that all killings are wrong and that no speech should be suppressed. In virtually all cases, commands of this sort require the articulation of a full set of background norms to be made operative, and these norms in turn depend on both issues of semantic meaning and social context alluded to above.

In dealing with these challenges, the plain meaning and textualist approaches—the difference between them will become apparent shortly—turn out to be largely correct, but they are also critically incomplete in one key dimension. In the effort to interpret a short and manageable text, a good deal is necessarily left to *implication* of additional terms that help flesh out the original substantive vision that turns out to be constant over a wide range of circumstances. Many of the central difficulties of textual interpretation arise precisely because the terms that have to be construed are *not* found within the statute or other key text, but are terms that have to be read into it and still need their own explication. The need for speed in language often leads to the elimination of the specific exceptions—and the further qualifications of those exceptions—which are understood but not articulated in ordinary discourse.

The question is how well this task of implication can be undertaken. The principles of implication are not, in my view, chaotic. They do not allow for the constant appeal to such airy notions as a "living constitution," which pays little if any respect to the basic text. By the same token, a sound theory of explication should resist the temptation to reduce questions of linguistic interpretation into matters of public choice theory, as by insisting that a court should read a statute in such a way that it maximizes, for example, the likelihood that the legislature will overturn the prior judicial interpreta-

tion if thinks that this reading is incorrect.[12] In this instance, there is no need to belabor the obvious point that information on those collateral matters is beyond the ability of any court to acquire, often years after the statute is passed, and long after its supporters and detractors have left public life. But it is equally important to note that the effort to indulge in political speculation only leads the inquiry further away from the basic textual choices, which can be addressed by well-established techniques now available to courts. Once these are endorsed, legislatures then can have some confidence that if they draft their statutes in accordance with the general rules of interpretation, there is a fair chance that courts, whose judges are versed in ordinary language skills, will know the rules of the game to deal with the interpretive challenges that follow.

All this is not to say that dominant factions cannot overreach. But if they do, it is odd to think that the best way to counter their misdeeds is to misread the provisions that they have drafted. A far better situation is to adopt, either by judicial action or legislative command, a rule that renders invalid certain kinds of contractual provisions, or one that finds certain statutes unconstitutional. Indeed, there is an extreme improbability of making operational any of these super-sophisticated approaches that make textual interpretation depend either on the state of political play or on some shared judgment that current social expectations require the rejection of older constitutional norms. It is precisely to avoid these dead ends that, with some sensible modifications, the dominant mode of in-

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[12] For variations on this theme, see EINER ELHAUGE, STATUTORY DEFAULT RULES 151-67 (Harvard 2008); Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. L. REV. 489 (2002).

terpretation remains a modified textualism, notwithstanding the endless barbs lodged in its direction.[13].

To explain how this works, recall that reading a text in "context" requires a reader to consider both the semantic and the social contexts of particular language. It is useful to understand how each of these plays out in statutory interpretation. The way in which we get to a precise social understanding is incrementally, that is, through a series of successive approximations from an initial position.[14] With each new refinement, the legal system covers a larger fraction of the relevant cases and, in so doing, sets the stage for further refinements. In this regard, we should think of the process of successive approximation in two ways: one as a formal mechanism for sharpening legal commands and the other as a device for improving social control. The first deals with the key property of ordinary language. The second is an effort to show that the commands that are generated by using that language can bring us closer to a social optimum. The genius of the traditional systems lies in the way in which the two interact.

Start with the formal side of the analysis. When we use the term "prima facie," we make it clear from the outside that further refinements are needed. We refer to our "first (or provisional) impression" to indicate to the reader that more steps in the analysis will be accepted, and indeed, perhaps required.[15] We therefore make a first estimation of what the true state of affairs is, and then refine it with more information.

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[13] For a recent exhaustive compilation, see Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750 (2010).

[14] For a discussion of the method, see Richard A. Epstein, Skepticism and Freedom: A Modern Defense of Classical Liberalism Ch. 4 (University of Chicago 2003).

[15] *See, e.g.*, the burden shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 802-03 (1973).

Think of pleading in both the civil and criminal law as a "marginalist" approach to the organization of social information, which tries to address each new allegation separately as part of a unified argument. The question here is orthogonal to the question of how much factual specificity will be required to state a claim for relief—itself a matter of much controversy.[16] Rather, it just looks at bare bones allegations to decide what issue should be raised at any particular stage of the argument. The demurrer at common law[17] and the motion to dismiss under the Federal Rules of Civil Procedure[18] have just that function. If certain facts are found to be necessary at the particular stage at which they are introduced, we have a more refined system. If they are not, we know that they are irrelevant, but *only* at that particular stage of the argument. With each new wrinkle, we get a more complete sense of the system's operation without precluding further refinements, and these refinements can in principle include using at the later stage of the argument information thought irrelevant at the earlier stage.

Think of this process as a bit like game theory, or like finding limits on an infinite sum in mathematics. I propose one move, and you find the way to limit it. Thus the series $X/2 + X/2^2 + \ldots + X/2^n = 1$ is proved by thrust and counterthrust. It is clear that this number cannot be greater than one, for if we array the points along the line, we see that at each point n, we go only one-half the remaining distance to 1. But if anyone tries to find a number smaller than one that is the upper bound for the series, say 1/128, we take the series out to $1/2^8$, which leaves us only $1/256^{th}$ the way from home. So let any one set any n as large as they like, and we pick n+1 to get half

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[16] For the current controversy in this area, see Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[17] For a discussion, see Ralph Sutton, THE PERSONAL ACTIONS AT COMMON LAW 8, 190, 198 (Butterworth & Co. 1929).

[18] *See* Fed. R. Civ. P. 12(b)(6).

the way further. So in the end the upper limit from summing this infinite series turns out to be 1. Legal rules use the same set of intuitions. It is useful to see how this operates in three separate contexts: the criminal law, the tort law and constitutional adjudication. Although the contexts differ, the methodological responses remain the same.

II. CRIMINAL LAW

Start with the simple criminal law proposition that it is wrong to deliberately kill another person.[19] Clearly, that judgment rests on the view that from behind a veil of ignorance all persons would rather have the security of their own person than the dubious right to kill others with impunity.[20] So this prohibition lies at the heart of every known legal system. Virtually all people think themselves better off on average with the mutual renunciation of force than with its unbridled use. Indeed, just this proposition is the driving force behind social contract theory, which tries to link together two elements. The first is the element of joint gain that comes from ordinary contracts, usually bilateral, between two individuals. Hence the inexact appeal to the term "contract." The second is the need for state coercion to achieve this desirable end, given the transactional impossibility of securing in practice that individualized consent on a case-by-case basis. The number of individuals is too great to allow for successful negotiations, and even if those could take place, some individuals might hold out from a cooperative solution in the hope of extracting some extra benefits for themselves.

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[19] For an early adoption of this idea, see WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Bk. 4, Ch. 14 p. 195 (1765) (defining murder as the willful killing of any person with malice aforethought).

[20] For one discussion of this idea, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 91-92 (Harvard 1995).

Faced with these transactional difficulties, the focus therefore is on the use of limited state coercion to achieve a result from which all individuals benefit. Within this framework, it is easy to see why the criminal law focuses on intentional harms inflicted on others. But at the same time there is this question: surely there is some difference between deliberate killing and murder, even though there is so close a connection between them. The question is how best to hash that difference out with a set of rules that acknowledges the close connection between the two but respects the basic difference. The legal tool that is used to establish that connection is the rebuttable presumption. The first leads to the second in most cases, but not in all. Accordingly, it is a mistake to assume that the prima facie case that combines the actus reus of killing with the mens rea exhausts the domain of the criminal law.

But at this point, since we have only deliberate harms, there is another key question, which is whether a party is *justified* in what he or she does in order to overcome that initial presumption. Not any asserted consideration counts as a justification, for the accused could hardly be allowed to say that he only killed the victim because he did not like his smile or his religion. It is therefore important to rule out all defenses based on these primitive likes and dislikes. But no one has that reaction to self-defense, defense of property, defense of third party issues. These form an inescapable part of the picture, for what are solid, substantive reasons that tie into the original theory of personal autonomy that makes murder so serious an offense in the first place. The basic purpose of the law—protecting personal autonomy—has to allow for a measure of self-help. The phrase is not part of the general rule, and is sometimes ushered into the discussion by the use of the word "unlawful" or "wrongful." But given the theory of successive approximations, a (not so) plain meaning theory requires that we let in justifications, which then drives us back to a normative theory to see which ones are let in and which ones are kept out. The pull of ordinary language on this point is just too strong to ignore.

The same can be said of the justification of consent. Promises are always at issue in dealing with cooperative behavior. In this context, however, the issue is not whether executory promises will be fully enforceable. It is whether an injured party had consented to the harm in question, perhaps to achieve some greater gain, as might happen in surgery or a boxing contest. Unless that consent is allowed presumptively, all gains from trade can be effectively dashed. But again there are qualifications, for the mere fact of consent does not end the issue, because there are ways in which consent may be vitiated as by duress, fraud or incompetence. I will not dwell on these complications here, for my only point is to show that the articulation of the simple case against deliberate harm is just the first step in a far more complex staged inquiry that takes us far beyond the words of the basic statutory injunction. Yet by the same token, it would be most unwise to stop before this journey is completed unless the statutory command itself prohibited that further journey. Yet in most cases, the opposite is true, as when murder is defined as a deliberate killing without lawful justification or excuse, at which point there is no choice but to soldier on.[21]

Cases of voluntary consent to intentional harm, moreover, do not exhaust the situations where the prima facie case of criminal responsibility can be overcome. In addition to defenses based on consent are the allied defenses based on notions of public and private necessity, in both the criminal and civil contexts.[22] In these cases two elements work in combination to explain (as with social contract theory more generally) why some deviation from the ordinary system of property rights should be accepted. First, high transaction

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[21] As in Blackstone, at note 19, supra.

[22] *See, e.g., Rex v. Dudley and Stephens* [1884] 14 QBD 273, showing the evident reluctance to allow the necessity defense in homicide cases, even though it is accepted just about everywhere else. For the civil context, *see Ploof v. Putnam*, 71 A. 188 (Vt. 1908) (recognizing a privilege to enter in cases of private necessity)

costs prevent the formation of voluntary transactions. Second, life and death type situations make the prospect of gains from intervention high. The first condition rules out the necessity defense if people are able to transact for themselves. The second rules out the necessity defense if the stakes are far lower. One cannot just enter someone else's property without permission to mow the lawn when the weeds are high, even if he seeks no compensation. Taken together these two rules let people act to save their own skin in life or death situations, and even to assist others, often with a claim for compensation, in those same situations.[23] The point of these rules is to allow results that as a first approximation track those which would arise for consensual transactions by suspending the exclusive rights that people have to their own person and property.

These rules of implication have arisen within common law tradition, but they are also equally applicable to generalized statutory commands that speak about the need to control the "unlawful" use of force, without explicating exactly what that expression means. Indeed, the use of the common law methodology sheds much light on some of the famous cases that are said to undermine both textualism and plain meaning theory of interpretation. Here is one famous passage that addresses this issue:

> The common sense of man approves the judgment mentioned by Puffenstuff (sic. Puffendorf), that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity', did not extend to the surgeon who opened the vein of a person that

[23] *See, e.g., Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907) (emergency provision of medical services).

> fell down in the street in a fit.[24] The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire – 'for he is not to be hanged because he would not stay to be burnt.'[25]

The correct way to read these examples is within the above framework of the prima facie case that is properly used to explicate the reach and the range of common law rules. Here, the wrong associated with drawing blood is aggression against a stranger. It is not just common sense, but deep legal theory that says that the surgeon who aids a patient in distress is not an aggressor, but someone out there to help. The inability of the person in a fit to consent to the action leads the commentator to quickly rely on the well-established notion of private necessity to fill the gap. The individual in question is not able to speak for himself, and the law thus helps him by granting a limited immunity to those who come to his aid. Within the criminal context, we see a perfectly general defense to a basic criminal prohibition that makes as much sense in modern Detroit as it does in medieval Bologna.

It takes only a modest variation to apply the same logic to the second of Plowden's cases, the party who flees jail in order to escape death. Once again the necessity of the situation allows for a suspension of the rules, so that escaping the prison does not count as a felony. The privilege of escape, however, ends when the necessity ceases, so that it would be criminal for the felon to flee after he is no longer in peril of his life. At this point, he has to turn himself in. The situation is no different from that of the person who is

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[24] *See* John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

[25] *Id.*

stranded in a storm in the house of a stranger. He cannot convert a refuge from the bad weather into a permanent claim on the resources of another, but must depart when the necessity is at an end.

It is critical to note that reading this necessity exception into the basic statutory command does not rest on the ad hoc sentiments of this or that person. It is part of a long and consistent interpretive condition that recognizes that any general command is juxtaposed against a broad set of excusing and justifying conditions that are routinely read into the law. It is not just a matter of common sense, as the commentators state. It is a robust form of common sense that rests on a deep theory whose soundness we disregard only at our peril. This necessity exception (and others like it, for consent and self-defense are necessarily part of the warp and woof of any strong set of classical liberal entitlements) is uniformly recognized across all national boundaries as part of what used to be called, unapologetically, the natural law.[26]

Introducing these notions into the overall system thus does not present any risk of unwarranted legislative discretion or political maneuvering. Nor does it represent an affront to the legislature, which remains free to negate that command if, for example, it fears that the defense of necessity will be abused by some to whom it does not apply. Coherence and legitimacy thus go hand in hand. It also shows how textualism cannot be done without reference to the plain meaning of the anchor text whose complete explication in needed. The idea of necessity is not mentioned in the basic statute, but the full explication of the statutory provision nevertheless depends on interpreting the plain meaning of "necessity." With a bit of patience, and a clear view of the basic theory, "common sense"

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[26] For the origins of the tradition, *see* Gaius, INSTITUTES Bk. I, ¶ 1, and the parallel passages in Justinian, INSTITUTES Bk. I, ¶ 1.

turns out to be made of far sterner stuff than the oft-derided label suggests.

The task of statutory interpretation in the criminal law does not stop with the cluster of issues that surround necessity and consent. Just look briefly at the first of these statutes and ask this question: suppose someone just (or "merely") threatens to draw blood (or use force) on a public street in order to steal goods. Is that case covered by the Bolognian statute? Not under any literal sense of textualism. But it is again covered by a part of the strong classical liberal tradition. The purpose of any social command, be it by statute or common law, is to prevent various types of antisocial behaviors. The prohibitions would be worth little if individuals could easily sidestep them by making threats that are so credible that they need never be carried out. Every sensible system of interpretation covers the threats in order to make good the basic prohibition, in line with the central libertarian tenet that forbids both the use and the threat of force. Once again this particular strategy does not offer an open sesame, for the threats in question must be to use the forbidden means. A threat not to join one for dinner would not be actionable on this view because the decision not to dine with someone else would not be subject to the criminal sanctions after all.

III. TORT LAW

A. PHYSICAL HARMS

The basic system of interpretation is subject to growth in yet another fashion. The two examples from Plowden are concerned with the reach of the criminal law. But there is still the question of whether the civil law, which involves compensation but not punishment, should be restricted to the domain of deliberate physical harms. The short answer to that question is that the civil prohibitions are always broader than the criminal ones. There is no legal system of which I am aware that only allows legal relief for intentional harms. The question therefore is how to integrate the law of accidental harms with that of deliberate harms.

In my view, the incrementalist strategy works best when the prima facie case is drawn in minimalist fashion to leave room for the introduction of the widest range of new circumstances at subsequent stages of the case, which are not needed at the initial stage. Accordingly, at its initial stages, a comprehensive theory of strict liability in tort does not require any demonstration that the defendant intended to harm, or even touch the plaintiff in order to make out a prima facie case. Nor does it require that there be a showing that the defendant could have avoided or prevented the harm that he caused by taking some specified level of precautions that some theory of negligence might require. But the exclusions of these pleas at the first stage of the case does not mean that they are forever irrelevant. They may well be properly introduced at some later stage in the argument, for the system of presumptions need not think of any affirmative defense as absolute either. It can assume that these simply shift the burden back to the plaintiff to show some additional reason why liability should be imposed.

To make the point more concrete, we can start the inquiry with the ordinary language proposition that "he hit me" states a prima facie case in torts.[27] I put the words prima facie case into this sentence in order to show that the method of successive approximations used in mathematics applies. Making this inquiry rests upon a system of push/pull causal judgments that again are common across all cultures and languages. It can be extended to deal with more complex causal chains as well, even before we get to the additional complications with negligence and intentional harms.[28]

When applying the plain meaning, it is vital to resist the skepticism of those who claim not to understand what it means to use

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[27] *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, (1973).

[28] To see how I think that this should be done, *see* Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 4 J. TORT LAW Art. 6 (2010).

force. Nor at this point do we accept the proposition that other activities that leave other people worse off should be treated necessarily as the use of force, lest all conduct be in violation of some nebulous command never to do harm to others. But we do have to worry about the question of evasion. The mother tells her child that he was wrong to hit Johnny. Undeterred, her son comes back, with a denial: "Mom, I didn't hit him, I kicked him." Or "Mom, I didn't touch him. I only hit him with the stick." Or "Mom, I didn't hit him with the stick, I only threw it in his direction, and it just hit him."

These clever responses should all be regarded as blatant efforts of evasion of the basic legal command. The mother wanted her command to be understood as a prohibition against force, and, given the tradeoff between error costs and efficiency of communication discussed above, it is just too inefficient to list all the ways in which the use of force against other children should be subject to condemnation. Hence, we understand that listing the most common form of the wrong covers all the subsidiary variations on the main theme. But it certainly does not carry with it the implication that her son is prevented to do anything that leaves any one else worse off. No one would think that within the instruction "don't hit Johnny" lies the command that you should let him get a higher grade on a test than you lest he be harmed by the disappointment. It makes perfectly good sense to have a universal presumption against the private use of force.[29] It is quite another to insist that each child let the others do better than he or she in school. These simple examples show that the use of analogy is not just ad hoc, but yields clear outcomes on both sides of the line, for the cases of excellence in competition are protected against any legal challenge as a coercive form of behavior.

To prevent circumvention, it is critical to keep the narrow definitions of causation in place. But it still remains critical to add back

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[29] *See* Epstein, *supra* note 19 at 172.

notions of intentional harms and negligence into the mix. The proper way in which to do this is to note that the broad prima facie case of strict liability invites a consideration of a wide range of defenses. Some of these involve notions of causation: the defendant who hit the plaintiff did so because the plaintiff blocked his right of way. There are thus two notions of causation, where the latter displaces the simple paradigm based on force. In similar fashion, there are instances in which people assume the risk of harm, as when they seek to obtain medical treatment, which necessarily involves the infliction of some harm in order to stop greater evils.

Once these defenses are set up, however, they too are defeasible. It will not do for a defendant to say that he had the right of way if he knew of the plaintiff's danger and thus deliberately ran him down. The element of intention now removes the case from the domain of accidents into one of intentional harms. By the same token, the patient who consents to the deliberate harms of a physician may not do so if the harms in question could have been avoided by taking the appropriate steps of reasonable care. We have therefore ways in which defenses based on causation and assumption of risk can be overridden to allow negligence and intentional harms to play a role in the complete analysis. The system can then be expanded to deal with such issues as self-defense and excessive force. I shall not trace out these complications here, except to note that any systematic explication of the harm principle requires that these elements be put into the mix.[30]

The question then is, just how far does this contextualization go? In the illustrations that I have just considered I have looked at a set of social circumstances that are tied to the relative position of the plaintiff and the defendant, but which have absolutely no connec-

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[30] For a discussion, *see* Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

tion to the larger political and institutional framework in which all these interactions take place. In so doing, I have followed the uniform set of practices that guided the matter of linguistic interpretation from the earliest of times. Thus while the rules of self-defense that are set out in the Lex Aquilia—the key statute dealing with delict (a mixture of tort and contract)—are far from perfect,[31] they address the same types of circumstances that remain key to the explication of these defenses to this very day. Indeed, the most powerful lesson that one learns from comparative law is that the contextual elements that arise out of private law are all quite close to one another precisely because what matters in these cases is not how the institutions of social regulation are put into place, but the norms of individual conduct that they are asked to regulate, which in this instance asks how and why force should be wielded in any specific setting. That is of course not the only issue that matters in these and other contexts. The institution of promising and its relationship to contracts is of critical social importance in order to allow private parties to achieve gains from trade over time, and the rules of contracting are amenable to exactly the same kind of logic, whereby parties are allowed to introduce various considerations—force, incompetence, mistake, changed circumstances—which might justify or excuse contractual performance. The perfect concordance across

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[31] For the materials, *see* F. H. Lawson, NEGLIGENCE IN THE CIVIL LAW (Oxford 1950). The title itself contains a serious conceptual error because it makes it appear as though the civil law systems were all tied to a unitary negligence standard, when in fact the rules of liability had elements of strict liability, negligence, and intentional harms. In some key cases, Lawson mistranslates the key Latin term "culpa" to mean negligence, when the more accurate rendition is "culpable" that does not have the same resonance. Thus at one point, the question is the amount of force that a teacher may use to discipline his pupil. Clearly the harms in question are intentional. In dealing with this issue, the Latin text (from Paul) reads praeceptoris enim nimia saevitia culpae adsignatur," which Lawson translates (wrongly) "for excessive brutality in a teacher is counted as negligence." Dig. 9.2. 6. Clearly culpae is better translated as culpable in a case that deals with the deliberate use of excessive force.

systems shows that starting with the plain meaning of core provisions, only to fill in the gaps by implication is the way we should, and in fact do, proceed in most private law settings.

B. THE EXPANSION AND DEGRADATION OF THE HARM PRINCIPLE

The interpretive issues with the harm principle, moreover, have tight links to larger questions of political theory, because notions of harm, and its related conception of coercion, are often ill-defined. The inattention to detail is notable in John Stuart Mill's explication of the "harm principle," and in F.A. Hayek's explication of the kindred notion of "coercion." In his famous essay, On Liberty, Mill wrote:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[32]

Unfortunately, Mill never specifies the scope of self-protection or the nature of the harms to others. Simply stating that paternalism—"his own good"—is insufficient justification for the use of force does not tell us what harms do trigger that response. In a word, Mill was unable to explain the difference between physical and competitive harms, or, for that matter, the difference between harms from monopoly and harms from competition. Nor was he alone. A similar difficulty arises in the work of Friedrich

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[32] John Stuart Mill, ON LIBERTY 21-22 (Harvard 1962).

Hayek who sought to find in the word "coercion" the proper limitation on the use of public force. In his initial stab at a definition, Hayek clearly runs the definition too broadly. "By 'coercion' we mean such control of the environmental or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another."[33]

Standing alone, Hayek's grand formulation will not do. Once again what is missing is any clear linkage between coercion and the threat or use of physical force. Sensing the difficulty, Hayek goes on to offer a more capacious account of causation that explores just that linkage. He thereafter reconstructs much of the common law rules that talk about the law of trespass in which one's own body becomes the instrument of another. Hayek writes: "If my hand is guided by physical force to trade my signature or my finger pressed against the trigger of a gun, I have not acted."[34] That notion parallels in instructive fashion the famous passage from the venerable common law case *Weaver v. Ward*, which states

> therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, prout ei bene licuit) [as it well appeared to him] except it may be judged utterly without his fault.
>
> As if a man by force take my hand and strike you, . . ." [35]

Hayek then goes on in good casuistic fashion to deal with cases where the action is indeed done by a defendant subject to a threat of

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[33] F.H. Hayek, The Constitution of Liberty 71 (The Definitive Edition, Chicago, 2011)

[34] *Id* at 199.

[35] Weaver v. Ward 80 Eng. Rep. 284 (K.B. 1616).

force by another person. Yet he further explains that he will not limit coercion to those physical cases, but falls into error when he concludes that someone who blocks your path along the road has not used coercion against you, when in fact this conduct has long been routinely actionable at common law.[36]

The real difficulties with coercion come, however, in addressing cases where one person refuses to deal with other persons, which literally fit into Mill's broad definition of harm and Hayek's definition of coercion. Yet Hayek quickly realizes that any well functioning competitive market strictly requires that all persons be allowed to refuse to deal with others on terms that they do not find advantageous, so that the refusal to hire a worker, or to accept a job does not count as coercion.[37] But at the same time he recognizes that a person that holds a monopoly position can be required to offer services to others, but not on the terms that his customers demand—at which point his economic ruin is secured—but only terms that to some extent are fixed by the state. Hayek supposes wrongly that it is sufficient in these cases "to insist that his prices be the same for all and to prohibit all discrimination on his part."[38] Yet once again he misses the central common law formulation that the rates be both reasonable and nondiscriminatory in order to prevent the charging of uniform monopoly rates.

Getting from the physical coercion cases to the monopoly control cases cannot be done simply by poring over the term coercion. What is needed is some social welfare explanation as to why the

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[36] *E.g.*, Bird v. Jones 115 Eng. Rep. 688 (K.B. 1845), which distinguished blocking a right of way from false imprisonment, which leaves no exit. See also, Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536), where blocking a right of way is a public nuisance routinely subject to an administrative remedy.

[37] *Id.* at 202. "Nor can it be legitimately be called 'coercion' if a producer of dealer refuses to supply me with what I want except at his price."

[38] *Id.* at 203.

monopolist is allowed to stay in business while the person who engages in the use or threat or force is not. That explanation lies in a larger social theory in which the common element is as follows. The cases of physical coercion are uniformly negative sum transactions, for it is easy to think of sums that a victim would pay in order to be rid of the threat, but impossible socially to imagine that any coercing party could pay the victim enough money to make that transaction go forward. The difficulty with the monopolist is that he charges too much for essential services, which is hardly reason to drive him out of business, even if it is good reason to attempt to use regulation to reduce his return to the competitive rate—a task that turns out to be far more difficult that is supposed.[39]

It is, therefore, both possible and necessary to develop an account of coercion that has three cases: force or the threat or force, monopoly and competition. The key point is that the first two are subject to state restraint, albeit of different forms, while the last escapes condemnation because it tends toward an optimal resource allocation. As the discussion of Mill and Hayek indicate, it is easy to go astray in these treacherous waters. Indeed, the major intellectual confusion triggered an entire political movement. The single most dangerous proposition of the Progressive movement of the first third of the twentieth century was the equation of ruinous competition, i.e. offering lower prices with the result that competitors lose, with either physical harm or monopoly practices.[40] To stop competition, secures the place for all sorts of cartels doled out by political bodies. Yet the decision to treat the refusal to deal in a competitive situation as a wrong is responsible for the creation of monopoly unions under the National Labor Relations Act, which treats collec-

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[39] For the judicial discussion of the problem, see Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

[40] For a long account of the difficulties, *see* Richard A. Epstein, HOW PROGRESSIVES REWROTE THE CONSTITUTION (Cato 2006).

tive bargaining as the norm and then makes the refusal to bargain an unfair labor practice.[41] The statute represents an improper endorsement of a definition that treats the refusal to deal in competitive labor markets as a wrong, and thus flips the standard definition of coercion on its head by making illegal voluntary decisions by firms in competitive markets. This type of intervention bears no relation to other forms of statutory intervention that can make sense by plugging remedial holes in common law systems that are directed toward wrongs that fit the proper definition of coercion, including environmental law (dealing with public nuisances, for example) and trademark law (dealing with misrepresentation and confusion).

IV. CONSTITUTIONAL COMPLICATIONS

As the labor case makes clear, the proper techniques for handling private law disputes should also govern constitutional commands.[42] On this view, the presumption in favor of freedom of contract cannot be overcome by the desire to confer monopoly power on labor unions. Indeed, the broad class of permissible justifications for government intervention is never followed with respect to those constitutional guarantees, where the core prohibition is one that receives judicial respect. For example, the constitutional limitation against abridging the freedom of speech or religion deal with both the problems of circumvention on the one hand, and public justification on the other. In fact the case law does so in ways that closely

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[41] See National Labor Relations Act, 29 U.S.C. § 158(a)(5), conventionally § (8)(a)(5): Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer-- . . .5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [dealing with the definition of an appropriate bargaining unit].

[42] For a further explication of this point, *see* Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

track the basic theory of interpretation set out in the criminal and tort law contexts above. Thus on the circumvention point, it is clear that the one cannot escape the prohibition against "abridging" (i.e. limiting) speech by deciding to "deny" it altogether. Nor is it sufficient to hold that the prohibition applies to speech, as opposed to writing, and opposed to art and drama, which would allow governments (who are the target of these restraints) to gain an unacceptable hold on other individuals. So the term "speech" incrementally becomes "expression," demonstrating that the idea that plain meaning includes close substitutes carries over from ordinary discourse into private law, and eventually into the constitutional framework.[43]

So too with the question of what may justify otherwise unconstitutional behavior. The single largest topic in American constitutional law has been the origin and evaluation of the police power as it limits the various substantive guarantees that are contained in the Constitution. A theory of plain meaning that just looks at particular terms will miss this issue, even if it is able to stop others. Hence, the real question here is what limitations should be placed on the protection of liberty and property in order to advance the health, safety, morals and general welfare of the public at large. It is tempting, as was done in the labor cases, to treat these elements as though they allow the state to regulate in whatever areas it chooses for whatever reasons it wants. But the internal logic of the Constitution suggests a much narrower reading of these exceptions. They only allow the state to regulate (without the payment of compensation) in those instances where the individuals whose interest the government advances were entitled to that same kind of protection. At this point, the earlier distinction between force and fraud on the one hand and economic competition on the other hand should assert

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[43] *See* Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (Vintage 1971).

itself in the constitutional area just as it does in the tort law. Indeed the major revolution on this issue in modern constitutional law is the Progressives' willingness to regulate competitive losses just as if they were individual losses, even though they are really quite distinct in their overall social consequences for the reasons set out above.

The strengths and the weaknesses of the "plain meaning" approach are the same in both private and constitutional law, even if the stakes are far higher in the latter than they are in the former. In both of these cases, there are core terms that need careful explication. But the task of constitutional interpretation, no more than the task of common law and statutory interpretation is not completed by understanding the correct semantic meaning of terms in any given sentence. The original proposition is best understood as the core, or kernel, of a larger system that is not content with the interpretation of constitutional, statutory, or common law commands solely as a matter of explication of the stated terms within a general text. The near ubiquity of a theory of the implied terms shows that it is only possible to complete the task of interpretation by asking the additional questions about circumvention, excuse, and justification that appear with startling regularity in all contexts. The sound examination of text requires us to examine non-textual elements. The idea of plain meaning is not so plain after all. But properly explicated it can lead to a roadmap that links together textual and non-textual elements into a single comprehensive system.