

Indeterminacy, in *The Philosophy of Law: An Encyclopedia*, C. B. Gray, ed. pp. 398-400, (Garland Reference Library of the Humanities, v.1743) Garland Publishing, (1999) (Code A955)

Indeterminacy

A practical definition of law is that it is society's attempt to shape and regulate human conduct by means of signs, signals, and words, backed by the force of the state. But signs, signals, and words do not "hook onto" the real world by themselves; they must be interpreted and applied by the people who want to obey them and by the judicial system that wants to enforce them. Accordingly, the legal system is preoccupied with matters of interpretation. Indeed, some scholars assert that law is solely a matter of interpretation, that there is no such thing as the plain meaning of a word or signal. Consider one of the clearest possible signals: the familiar traffic signal light. Does red always mean "stop" and green always mean "go"? What if the red light is stuck; must automobiles stop and wait at the intersection for hours until it is repaired? A British firefighter's union called for a work slow-down; it instructed its drivers to stop at red lights even on the way to a fire. The relevant statute provided simply that "all vehicles" must stop at the red traffic signal. A court held that "common sense" did not require fire engines to comply with the traffic signal. But the court was unable to explain its apparent departure from plain meaning.

Are any words plain enough to hook onto the real world without the need for interpretation? Proper names would seem to serve this function. Plato, in his early and neglected dialogue, *Cratylus*, speculated if the name Homer was the name of particular definite person, a noun like "tree" was similarly the name of a particular and definite object. There could be many objects satisfying the term "tree" just as there could be many persons answering to the name Homer. Early in the twentieth century Bertrand Russell contributed the second significant analysis of indeterminacy and nominalism. Russell contended that a proper name isn't a "word" at all. Unlike proper names, words can have indeterminate applications, and some (like "a square circle") no application at all.

As an example of an indeterminate application, Hilary Putnam asks of the seemingly plain word "tree," whether the number of trees in Canada is odd or even. Apart from the practical difficulty of counting all the trees, no answer is possible because of indeterminacy. Should bushes or hedges count as trees? Is a sapling a tree? Does an elm tree in a V-shape count as one tree or two? If your answer is one because it has the same root, would you apply the single-root theory to the banyan tree, whose roots drop down from the ends of its branches forming many other banyan trees all of which are interconnected?

H.L.A. Hart has suggested that each word has a "core" incontrovertible meaning as well as indeterminate "penumbral" meanings. A maple tree is clearly a tree, but bushes and hedges are within the penumbra of the word "tree." Yet Hart's distinction can itself be problematic in some cases. Consider the word "persons" in the Fourteenth Amendment to the U.S. Constitution which grants to "persons" due process and equal protection of the law. Courts have held that corporations are "persons" within the meaning of this provision. Recent American decisions have held that a fetus less than three months old is not a person, but a fetus more than six months old is very nearly a person. Hart's core/penumbra distinction does not appear to help in interpreting whether the word "persons" applies to corporations or fetuses.

The third and most recent philosophical development of indeterminacy began in 1960 with Quine's work on radical translation. Quine argued that a linguist who is compiling a dictionary of an alien culture cannot be sure that the translations are correct. Although the linguist may translate the native word "gavagai" as "rabbit," there is no way to prove that what the linguist means by the word "rabbit" is what the natives mean. By extension we can never prove that any meaning we give to a word is the same meaning assigned to that word by any other person even in our own culture; the other person might have

a radically different conception. Yet we and the other person usually "get along" in daily life making the assumption that there is a commonality of meanings, and in practice this seems to work without too many rude surprises.

The large majority of lawyers and judges today appear to regard themselves as moderate formalists. They accept Russell and Hart, but are unwilling to go so far as Quine. Moderate formalists believe that words have core meanings, and that most words do not give rise to problems of interpretation in most cases. Indeed, they view most cases as "easy cases" that do not require interpretation of the applicable legal rules. To be sure, the "easy cases" are not appellate court cases in which attorneys and courts struggle over the application of various rules of law to the facts of the case. But appellate court cases are a minute fraction of the cases that arise in everyday life. Most "easy cases" are not litigated.

However, it is difficult to describe even one "easy case." Recall that a red traffic signal can be problematic in some situations. One attempt to describe an easy case was the suggestion that a homeowner who eats ice cream in the privacy of her home cannot possibly be contravening any law, no matter how the law is interpreted. But consider the following radical change of context: she deliberately eats the ice cream in front of a child who is starving. Here, eating the ice cream would violate the law against child abuse.

Lawyers earn their living by disputing the meanings of words, questioning whether a statute really applies to their client's situation. If a case involves a great deal of money, one side will surely argue that certain rules of law apply to the case and the other side will just as surely argue that those same rules of law, properly interpreted, do not apply. Lawyers will seek additional facts in order to reinterpret the context, either clarifying or casting further doubt upon whether the alleged rules of law apply to the case. As the argument proceeds, the very words in contention may appear to the judge or decision-maker to become increasingly vague, ambiguous, and indeterminate. The fact that a judge decides the case for the parties does not settle the meaning of the words. In the next case, the facts will necessarily be different, and a new cycle of disputed interpretation and application could begin.

Is it possible that the "easy cases" of everyday life are only easy because no one wants to spend the time and money to litigate them? Can an easy case become a hard case simply by litigating it? Or does the infusion of additional financial resources eventually reach diminishing returns? Do most cases halt at some level of determinacy and resist any further attempts to be unraveled? These are the present philosophical battle-lines; answers so far have been, well, indeterminate.

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