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**Aharon Barak: Purposive Interpretation in Law**

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## What Is Legal Interpretation?

### I. DEFINITION OF LEGAL INTERPRETATION

#### *On the Concept of Interpretation in Law*

“Interpretation” in law has different meanings.<sup>1</sup> Indeed, the word “interpretation” itself must be interpreted.<sup>2</sup> I define legal interpretation as follows: Legal interpretation is a rational activity that gives meaning to a legal text.<sup>3</sup> The requirement of rationality is key—a coin toss is not interpretive activity. Interpretation is an intellectual activity,<sup>4</sup> concerned with determining the normative message that arises from the text.<sup>5</sup> What the text is and whether it is valid are questions related to interpretation, but they are distinct from it. I assume the existence of a valid legal text. The question is what meaning to attach to that text. According to my definition, then, interpretation shapes the content of the norm “trapped” inside the text. The text that is the object of interpretation may be general (as in a constitution, statute, case law, or custom) or individual (as in a contract or will). It may be written (as in a written constitution or judicial opinion) or oral (as in an oral will or a contract implied-in-fact). The word “text” is not limited to a written text. For purposes of interpretation, any behavior that creates a legal norm is a “text.”

<sup>1</sup> See A. Barak, *Parshanut B'mishpat* [Interpretation in Law] 29 (1992) and citations therein. See also W. Twining and D. Miers, *How to Do Things with Rules* 166 (4th ed. 1999); G. Gottlieb, *The Logic of Choice* 95 (1968); A. Barnes, *On Interpretation* 7 (1988); A. Marmor, *Interpretation and Legal Theory* 13 (1992); A. Marmor, *Positive Law and Objective Values* 71 (2001).

<sup>2</sup> See M.S. Moore, “Legal Interpretation,” 18 *Iyunei Mishpat* 359 (1994), and G.L. Williams, “Language and Law,” 61 *Law Q. Rev.* 71, 392 (1945).

<sup>3</sup> See C. Ogden and I. Richards, *The Meaning of Meaning* (10th ed. 1956); M.S. Moore, “The Semantics of Judging,” 54 *S. Cal. L. Rev.* 151 (1981); R. Cross, *Statutory Interpretation* (J. Bell and G. Engle eds., 3d ed. 1995); H. Hart and A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (W. Eskridge and P. Frickey eds., 1994); A. Dickerson, *The Interpretation and Application of Statutes* 34 (1975).

<sup>4</sup> See H. Kelsen, *Pure Theory of Law* 348 (Knight trans. from German, 2d ed. 1967).

<sup>5</sup> See K. Larenz, *Methodenlehre der Rechtswissenschaft* (5th ed. 1983); R. Zippelius, *Einführung in die Juristische Methodenlehre* (1971).

*Constrictive Definitions of Legal Interpretation*

The definition of legal interpretation at the core of this book is not the only possible definition. Some theorists define interpretation more narrowly, others, more broadly. Under a narrower or constrictive definition, there is room for interpretation only in places where the text is unclear, such that there are differences of opinion over it.<sup>6</sup> Similarly, a constrictive definition might restrict legal interpretation to finding the meaning that realizes the intent of the legal text's author.<sup>7</sup> I do not adopt these definitions. According to my theory, every legal text requires interpretation. The plainness of a text does not obviate the need for interpretation, because such plainness is itself a result of interpretation. Even a text whose meaning is undisputed requires interpretation, for the absence of dispute is a product of interpretation. Realizing the intent of the author is the goal of one kind of system of interpretation (subjective interpretation<sup>8</sup>). Interpretation, however, can also give the legal text a meaning that actualizes objective standards (objective interpretation<sup>9</sup>). The definition of interpretation (in contrast to systems of interpretation within that definition) cannot be reduced to merely giving meaning that realizes authorial intent.

*Expansive Definitions of Legal Interpretation*

Legal interpretation may also be conceptualized more expansively than my definition permits. For example, Dworkin defines law itself as an interpretive process:

Legal practice is an exercise in interpretation not just when lawyers interpret documents or statutes but also generally. Propositions of law are not simply descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation, but is different from both.<sup>10</sup>

While Dworkin's approach has been the subject of criticism,<sup>11</sup> an evaluation of his definition and the critique of it are beyond the scope of this

<sup>6</sup> See J. Wróblewski, *The Judicial Application of Law* 88 (1992).

<sup>7</sup> See F.V. Hawkins, "On the Principles of Legal Interpretation," 2 *Jurid. Soc'y Papers* 298, 307 (1860).

<sup>8</sup> See p. 32, *infra*.

<sup>9</sup> See p. 33, *infra*.

<sup>10</sup> R. Dworkin, "Law as Interpretation," 60 *Tex. L. Rev.* 529 (1982).

<sup>11</sup> See M.S. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?" 41 *Stan. L. Rev.* 871 (1989); D. Patterson, "The Poverty of Interpretive Universalism: To-

book. Dworkin's definition lies at the foundation of his philosophic project, and I respect it. My definition, however, is narrower. It lies at the foundation of a different project, whose concern is giving meaning to a legal text. The two projects are distinct but interrelated. From Dworkin's definition of interpretation, one can derive a system of understanding a legal text such as a constitution or statute. In that sense, Dworkin's (expansive) theory of interpretation becomes one of a variety of systems of interpretation (as defined above).

### *The Limits of Interpretation in Law*

My definition of interpretation raises a number of questions of classification. The answers to these questions determine if the standards for interpreting a text can apply to additional legal activities. *First*, does resolving (antinomic) contradictions in a given legal text constitute interpretive activity? In my view, the answer to that question is yes. Imparting meaning to a given text requires resolving internal contradictions within the text itself. *Second*, does resolving contradiction between different legal texts on the same normative plane (two statutes, two contracts, two wills), or on different normative planes (constitution and statute, statute and contract, contract and will), constitute interpretive activity? Of course, giving meaning to *each* of those texts constitutes interpretive activity, but does resolving the *contradiction*—based on the meaning given—constitute an inherently interpretive activity? The question has no clear answer, other than saying that it depends on the tradition of a given legal system. In my view, however—and depending on the particularities of the legal traditions in question—resolving contradiction between norms arising from different texts is a non-interpretive activity. True, in resolving contradictions between different texts, we give meaning to a legal system. But this giving of meaning constitutes interpretive activity only in Dworkin's broad sense. It does not constitute interpretation in the sense I give to the word. For example, the rule of constitutional supremacy—that a statute which violates a constitutional provision is invalid—is a rule that resolves contradictions, but it is not a rule of interpretation. *Third*, does filling in a lacuna or gap in a legal text constitute interpretive activity? The German legal tradition distinguishes between ordinary interpretation (*einfache Auslegung*) and supplementary interpretation (*ergänzende Auslegung*). Indeed, the answer to this (third) question also depends on the legal tradition in question. I personally distinguish between interpretation in the narrow sense—the in-

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ward the Reconstruction of Legal Theory", 72 *Tex. L. Rev.* 1 (1993). See also C.A. 3798/94 *Anonymous v. Anonymous*, 50(3) P.D. 133, 174.

interpretation that gives meaning to a legal text—and interpretation in the broad sense, which includes filling gaps in an incomplete text. The justification in calling the second activity interpretive—if only in the broad sense—stems from the fact that it does ultimately give meaning to a text, determining the normative message arising from it. Referring to the addition of an implied term to a contract, Hoffman writes: “It may seem odd to speak of interpretation when, by definition, the term has not been expressed in words, but the only difference is that when we imply a term, we are engaged in interpreting the meaning of the contract as a whole.”<sup>12</sup> For this reason, I include correcting the language of the text, as in fixing a mistake, as part of interpretation in the broad sense.

Why do I insist on distinguishing between interpretation in its broad and narrow sense? The standards governing these two activities are different. Two separate and distinct systems govern the interpretation of an existing text and the completion of an incomplete text. Sometimes, a judge is allowed to interpret a text but is not allowed to fill a gap in it, as in the case of a criminal statute. Of course, so long as we remain sensitive to the distinctions I note, there is nothing wrong with generally referring to both kinds of activities as interpretive. The point is to avoid loading interpretation (in the narrow sense) with a burden it cannot bear. As we shall see, I take the limits of interpretation (in the narrow sense) to be the limits of language. An attempt to give the text a meaning that its language cannot bear is a non-interpretive project. Trying to cram that project into interpretation in its narrow sense distorts interpretation and undermines the legitimacy of judicial activity.

### *Legal Meaning and Semantic Meaning*

Interpretation in law is a rational process by which we understand a text. Through interpretation, we come to know the normative message of a text. It is a process that “extracts” the legal meaning of the text from its semantic meaning.<sup>13</sup> Interpreters translate the “human” language into “legal” language. They turn “static law” into “dynamic law.” They carry out the legal norm in practice. Legal interpretation turns a semantic “text” into a legal

<sup>12</sup> L.H. Hoffman, “The Intolerable Wrestle with Words and Meanings,” 114 *S.A.L.J.* 656, 662 (1997).

<sup>13</sup> *C.A. 708/88 Shefes & Sons, Ltd. v. Ben Yaka Gat, Engineering and Building Co., Ltd.*, 40(2) P.D. 743, 747: “The basic rule of interpretation in contracts is that the interpreter must choose the legal interpretation that realizes the intentions of the parties from among the semantic meanings of the contractual ‘text’” (Barak, J.). See also F.A.R. Bennion, *Statutory Interpretation* 14 (3d ed. 1997) (distinguishing between the grammatical meaning and the legal meaning).

norm—hence the distinction between the semantic meaning of a text and its legal (or normative) meaning. The semantic meaning of a text is the totality of all meanings that may be attached to the language of the text, in the ideal lexicon of those who speak the language in question (the public language) or in the private lexicon of the text’s author (the private code). To interpret a text is to choose its legal meaning from among a number of semantic possibilities—to decide which of the text’s semantic meanings constitutes its proper legal meaning. The semantic meaning of the text determines its semantic potential or semantic range of activity (the *Bedeutungsspielraum*).<sup>14</sup> The legal meaning carries this potential into practice. Usually, a text has a single, unique semantic meaning in the context of a given event, and that meaning also serves as the text’s legal meaning. In these typical cases, there is complete identity between the text’s semantic and legal meanings. All systems of interpretation will arrive at the same meaning of the text. Because language can be vague and ambiguous, however, a text sometimes has a number of semantic meanings in the context of a given event. Only one of these semantic meanings can serve as the text’s legal meaning. The rules of interpretation become critical in these “hard” cases.

### *Interpretation and Semantics*

Semantics determines the totality of meanings that a text may have in its language (public and private) for various potential fact patterns. We comprehend this totality through language. We understand the text because the language in which it was created is a language we know. Indeed, the linguist inquires into what meanings the text can “tolerate” in its language, in light of the totality of potential contexts. In principle, there is no difference between determining the semantic meaning of a legal text and determining the semantic meaning of any other (nonlegal) text. Linguists examine the range of semantic possibilities for texts. They need to know the rules of grammar and syntax customary in that language. They consult the canons, based in logic, which help them understand the language.

Legal interpreters build on the work of the linguists who determine linguistic range. Interpreters translate the language into law by pinpointing or extricating a single, unique legal meaning. We may therefore conclude that every interpreter of law is also a linguist,<sup>15</sup> but that not every linguist is an interpreter of law. I took this position in one case when I noted that

<sup>14</sup> Zippelius, *supra* p. 3, note 5 at 25. See also Bydlinsky, discussing the “courtyard of the expression” (*Begriffshot*): F. Bydlinsky, *Juristische Methodenlehre und Rechtsbegriff* 438 (1982).

<sup>15</sup> See L.M. Solan, *The Language of Judges* (1993).

interpretation is more than mere linguistics, but rather requires us to find the normative message arising from the text.<sup>16</sup> The linguist ascertains the meaning that the text is capable of bearing, in light of the range of possible contexts. In doing so, he or she sets the boundaries of interpretation. The legal interpreter determines the meaning that the text *must* bear, in the context relevant to legal interpretation. Many rules of interpretation are simply linguistic rules, designed to ascertain the (linguistic) meaning that may be given to the text. They in no way help to determine the text's legal meaning. Thus, for example, the interpretive principle that to express or include one thing implies the exclusion of the other (*expressio unius est exclusio alterius*) is merely a linguistic rule. It teaches us that from the "yes" of the text, we can infer the "no" of another matter. This is a possible, but not a necessary, linguistic inference. It does not establish an "interpretive" principle. It establishes a "linguistic" principle.<sup>17</sup>

*Interpretation, Systems of Interpretation, and Principles  
of Interpretation in Law*

The systems of interpretation in law determine the standards by which interpreters extract the legal meaning of a text from a variety of semantic meanings. Principles of interpretation, which are simply principles of "extraction" or "extrication," thus derive from systems of interpretation. Principles of interpretation are partly principles of language that establish the range of semantic possibilities. They are also—and this is important for our purposes—principles that govern how to determine a text's legal meaning. Interpretation in law determines the meaning of a legal text, and that meaning varies according to the system of interpretation. A system of interpretation based on authorial intent produces a different meaning than a system that asks how a reasonable reader would understand the text. Each system of interpretation produces its own principles of interpretation. These principles are—in the words of Professor Hart<sup>18</sup>—secondary rules. As secondary rules, they determine the scope or range of deployment of the norm extracted from the (primary) text. Note that we have not yet taken a position on the question of how to determine the text's meaning. That question depends on the system of interpretation and the principles of interpretation derived therefrom. The system of interpretation may vary from time to time and from legal system to legal system. We have so far ascertained only the definition of interpretation. We have not yet addressed what the proper system of interpretation is, and what principles of inter-

<sup>16</sup> H.C. 846/93, *Barak v. National Labor Court*, 51(1) P.D. 3, 10.

<sup>17</sup> See p. 108, *infra*.

<sup>18</sup> See H.L.A. Hart, *The Concept of Law* 94 (2d ed. 1994).

pretation derive from it. For example, I do not define interpretation as an inquiry into the intent of the text's author.<sup>19</sup> That inquiry constitutes a specific system of interpretation, one way of extracting the legal meaning from its textual receptacle, but it does not define interpretation itself. We must distinguish between the concept of interpretation, on the one hand, and systems of interpretation, including the principles that derive from them, on the other. There is only one definition of interpretation—rationally giving meaning to a text<sup>20</sup>—while there are many different systems of interpretation and derivative principles.

### *“True” Interpretation and “Proper” Interpretation*

Many jurists embark on a futile<sup>21</sup> search to discover what the legal meaning of a text “truly” is. A text has no “true” meaning. We have no ability to compare the meaning of a text before and after its interpretation by focusing on its “true” meaning. All understanding results from interpretation, because we can access a text only after it has been interpreted. There is no pre-exegetic understanding. At best, we can compare different interpretations of a given text.<sup>22</sup> The most to which we can aspire is the “proper” meaning—not the “true” meaning. I therefore do not contend that purposive interpretation is the true interpretation. My claim is that among the various systems of interpretation in a democracy, purposive interpretation is the best. In no way do I negate the interpretive character of the other systems of interpretation. I claim that there is no “true” meaning, but, unlike Fish,<sup>23</sup> I

<sup>19</sup> For a definition in this vein, see B. Rüthers, *Rechtstheorie* (1999). See also P.S. Atiyah, *Essays on Contract* 272 (1988).

<sup>20</sup> See A. Corbin, 2 *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1960): “Interpretation is the process whereby one person gives meaning to the symbols of expression used by another person.” See also E.W. Patterson, “The Interpretation and Construction of Contracts,” 64 *Colum. L. Rev.* 833 (1964).

<sup>21</sup> See H. Kelsen, *General Theory of Norms* 130 (M. Hartney trans., 1991): “In terms of the positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as ‘correct.’” See also J. Wróblewski, “Outline of a General Theory of Legal Interpretation and Constitutional Interpretation,” 32 *Folia Iuridica* 33, 71 (1987).

<sup>22</sup> See P.G. Monateri, “Legal Doctrine as a Source of Law: A Transitional Factor and a Historical Paradox,” *Rapporti Italiani, Academie Internationale de Droit Compare* 19, 25 (1986): “The process is formed by the application of the various interpretative rules. . . . Because without this process the *interpretandum* is unknown, it follows that at the end we can compare or oppose only different results derived by the application of different rules of construction. . . . It is impossible to compare or oppose the result with the *interpretandum* itself. It’s possible only to compare many interpretative results.” See also B. Bix, *Law, Language and Legal Determinacy* (1993).

<sup>23</sup> See S. Fish, *Is There a Text in the Class? The Authority of Interpretive Communities*, 330, 338 (1980).

do not contend that there is no text. Nor do I claim that the text does not determine the boundaries of its interpretation. Quite the opposite: My claim is that the limits of the text set the limits of interpretation.<sup>24</sup> Within the limits of a text, the normative message that arises is ascertained through interpretation of the text, which cannot be proven “true” or “false.”

### *Interpretation and Validity*

In order to narrow the focus on interpretation, let me distinguish questions of meaning from questions of validity, the former of which are the subject of this book.<sup>25</sup> The validity of a norm refers to the force of that norm in law.<sup>26</sup> Thus, for example, when the author of a text fails to meet the requirements for establishing a norm in the legal system (like the proper form of a contract or will), the norm does not enter into force. Similarly, when an inferior norm contradicts a superior norm (like a statute contradicting a constitution, or a contract contrary to public policy), the inferior norm loses its force. The same applies to a later (and specific) norm that contradicts an earlier (and general) norm. In situations like these, we evaluate the power of the norm in the legal world. We assume a norm of a given scope, and we inquire into its validity.

A question about the text’s meaning, in contrast, inquires into the normative content of the text. Questions of content address the meaning that the text should bear, while questions of validity deal with the status of the norm extricated from the text that has been interpreted. Judges decide both validity and interpretation, but the activity they undertake in each case differs in character, because each activity answers different questions. Rules of validity focus on the norm, responding to the question, “Is norm X valid in this system?” Rules of meaning focus on the text, responding to the question, “What is the content (range of deployment) of text X?” These two inquiries are related, however, and it is not always easy to distinguish between them. For example, one interpretive presumption requires that a text be given a meaning that preserves the validity of the norm it contains (presumption of validity<sup>27</sup>). Furthermore, every text requires interpretation, and its interpretation is a precondition for inquiring into the validity of the norm to be extracted from the text. The inquiry as to whether or not the norm is valid takes place against the backdrop of the given scope of the text from

<sup>24</sup> See p. 18, *infra*.

<sup>25</sup> See W. Twining and D. Miers, *How to Do Things with Rules: A Primer of Interpretation* 186 (4th ed. 1999) 155.

<sup>26</sup> See Kelsen, *supra* p. 3, note 4 at 7,10.

<sup>27</sup> *Infra* p. 173.

which it is extricated—and such scope is the product of interpretive activity. Every question of validity must deal with questions of meaning, but not every question of meaning raises issues of validity. As an empirical matter, most legal traditions conflate questions of validity with questions of interpretation. Thus, for example, Anglo-American judges treat contradictions between norms of equal status—like the rule that a later norm trumps an earlier norm (*lex posterior derogat priori*)—as questions of interpretation. There is no reason to challenge that approach, so long as it is clear that once a judge establishes the meaning of each of the two norms, the rules for resolving the contradiction between them are rules of validity, not meaning.

### *Interpretation and Political Regime*

There is no “true” interpretation. We must seek, rather, proper interpretation. Hence, the interpretative system that is proper in a democratic regime is not necessarily the proper system of interpretation in a totalitarian regime.<sup>28</sup> Each type of regime has a system of interpretation that suits it. For example, when I assert that purposive interpretation is the most proper system of interpretation, I limit this assertion to the context of a democratic regime. Dissenters in a totalitarian regime might rightly prefer a literal system of interpretation to purposive interpretation. The system of interpretation depends on the constitutional requirements in force, and both elements are integrally related to the type of regime. In a given legal system, when the regime type changes, the system of interpretation changes accordingly.

### *The Object of Interpretation*

The object of interpretation is the text. The text is the *interpretandum*. This is true of constitution and statute, case law and custom, contract and

<sup>28</sup> In my view, in a totalitarian regime, one should not use interpretation to express the fundamental totalitarian principles of the regime. One should also avoid interpreting a law according to the will of its totalitarian creator. In such a regime, the interpreter should privilege textual interpretation. There has been substantial criticism of German judges in the Nazi era who looked to the regime’s fundamental totalitarian values in interpreting laws. See I. Müller, *Hitler’s Justice* (D. Schneider trans., 1991); B. Rütters, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (1973); M. Stolleis, *The Law under the Swastika* (T. Dunlop trans., 1998). Similarly, apartheid-era South African judges have been criticized for giving expression to legislative intent (which favored Apartheid), instead of the fundamental values of the system, which reflected the fundamental values of the common law. See D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998); D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). See also C. Sunstein, “Must Formalism Be Defended Empirically?” 6 *U. Chi. L. Rev.* 636 (1999).

will. Interpretive activity extracts or extricates the legal (constitutional, case-law, contractual, etc.) norm from its semantic vessel. We should, however, distinguish between the language that anchors the legal norm and the legal norm extracted from the language.<sup>29</sup> The norm extracted from the text is the product of interpretation. It is not the object of interpretation. The text is the object of interpretation. Consider, for example, a contract between Rueben and Simon for the sale of an asset that does not specify the time of delivery. A few norms might arise from the text: the legal obligation to deliver the asset immediately, within a year, or within a reasonable time. Through interpretation, we determine that the norm arising from the text is the legal obligation to deliver the asset within a reasonable time. The contract (as a text) and the contract (as a norm) are not the same thing. Interpretation engages the text, producing the norm. The norm presents itself to the interpreter after he or she has interpreted the text. In their role as interpreters, judges are not concerned with the status of the norm, its validity, or its relationship to other norms. For example, interpretive rules do not regulate the relationship between a superior norm (like a constitution) and an inferior norm (like a statute). The object of interpretation is the text of the constitution and the text of the statute. Once an interpreter extracts the norm from them, the interpretive work ends, and the non-interpretive work, establishing the norm's validity and status, begins. More precisely, in order to interpret each text, one must consider other relevant texts and the norms extracted from them. A judge's interpretation of the text of a constitution affects judicial interpretation of the text of a statute. Once judges have interpreted the different texts and extracted the legal norms from them, however, they face additional questions—like the validity of the statute and its relationship to the constitution—that are not questions of interpretation. Although a given legal tradition may treat these questions as interpretive, we ought to distinguish between these different types of questions. Henceforth, when I refer to legal interpretation, I refer to the interpretation of a legal text.

### *“A Plain Text Needs No Interpretation”*

Every text requires interpretation. A text cannot be understood without being interpreted. As Professor Wigmore put it, “The process of interpretation, then, though it is commonly simple and often unobserved, is always present, being inherently indispensable.”<sup>30</sup> We access a legal text only after

<sup>29</sup> See G. Hassold, “Strukturen der Gesetzesauslegung,” *Festschrift für Karl Larenz* 214 (1983).

<sup>30</sup> See J.H. Wigmore, *Evidence* §2459 (Chadbourn Rev., 1981).

we have interpreted it, consciously or unconsciously. A text has no pre-interpretive meaning.<sup>31</sup> Professor Tedeschi was quite right in noting that

*In claris non fit interpretatio* (clear rules do not require interpretation): That saying may not be classical Roman, but it is held sacred because of its long tradition, and it is well known by jurists everywhere. However, contemporary scholars increasingly realize the naiveté of the conception it implies—namely that the rule, if not the “clear” rule, can speak for itself. Another person’s thought cannot act upon us unless we comprehend it. It is our very cooperation in that comprehension that constitutes the interpretive process, whether the interpretation is tiresome and difficult or done easily and without our noticing. And here, in this last instance, the interpretation will come, and it is precisely the ease and confidence with which it is done that allows us to conclude that the text or behavior in question is indeed clear.<sup>32</sup>

Indeed, the determination that a text’s instructions are plain, and thus do not require interpretation, is an interpretive determination that succeeds, rather than precedes, the interpretive act. Characterizing a text as “unclear” is a result of the interpretive process, not an occasion to begin it.<sup>33</sup> In some cases, judges unconsciously determine the text’s degree of clarity through interpretation, ironically thus concluding that the text has a plain meaning and need not be interpreted.<sup>34</sup> For other texts, the process takes place consciously—hence the conclusion that the text is unclear and must be interpreted. The assertion that a “plain” text does not require interpretation is not only incorrect, it is also dangerous, because it masks an unconscious act of interpretation. Indeed, the real question is not whether a plain text requires interpretation. The real question is what rules of interpretation are needed to arrive at the text’s plain meaning.

While some trends in case law and legal literature insist that not every text requires interpretation, their proponents define interpretation more narrowly than I do. Those who believe that not all texts need be interpreted

<sup>31</sup> See C. Sunstein, “Interpreting Statutes in the Regulatory State,” 103 *Harv. L. Rev.* 405, 411 (1989).

<sup>32</sup> G. Tedeschi, *Masot B’mishpat [Essays in Law]* 1 (1978). See also H.C. 47/83 *Air Tour (Israel) Ltd. v. Chair of the Council for Antitrust Oversight*, 39(1) P.D. 169, 176: “Every statute, including one whose language is ‘clear,’ requires interpretation. The statute is ‘clear’ only once the interpretation has clarified it. It is not clear without interpretation. Words are not ‘clear’ in themselves. Indeed, there is nothing less clear than the assertion that the words are ‘clear’” (Barak, J.). See also Cr.A. 928/80 *Gov Ari Ltd. v. Netanya Local Planning and Construction Council*, 35(4) P.D. 764, 769: “Even the simplest and clearest instruction appears before us in its simplicity only after we have transferred it, consciously or unconsciously, through the melting pot of our interpretive grasp” (Barak, J.).

<sup>33</sup> See R. Dworkin, *Law’s Empire* 352 (1986): “The description ‘unclear’ is the *result* rather than the *occasion* of Hercules’ method of interpreting statutory texts.”

<sup>34</sup> See F. Schauer, *Playing by the Rules* 207 (1991).

define interpretation as “deciphering an unclear text by selecting from among a number of possibilities that may be consistent with it.”<sup>35</sup> If they define interpretation as such, my disagreement with them is a matter of semantics. I may disagree with the appropriateness of their definition, but that debate is secondary.

### *Does a Plain Text Exist?*

Even a plain text requires interpretation, and only interpretation allows us to conclude that its meaning is plain. That does not, however, mean that no text is plain.<sup>36</sup> To the contrary: The vast majority of legal texts have plain meanings in the vast majority of cases. Only in a minority of cases is a text unclear—in other words, after a preliminary interpretive process (conscious or unconscious), the text still allows for more than one correct solution. Most cases that come before a court fall into this latter category. Indeed, it is impossible to formulate a text that will be clear in every circumstance. We have yet to find a linguistic formulation that covers every possible situation. We can, however, formulate a text that is likely to be unclear only in a tiny number of circumstances. By insisting that all texts, including “plain” texts, must be interpreted, I do not mean to take the pressure off drafters of texts to strive for precision. I agree with Friedmann’s assertion that

While no drafter can anticipate and address every potential development, deviant, unexpected developments are the exception, not the rule. In the absence of such development, parties should turn to a drafter who knows his or her work and who can express their intentions clearly. Parties have a right to expect that, should their document come before a judge, the judge will understand their intentions.<sup>37</sup>

### *Interpreting an Existing Text and Creating a New Text*

Most legal systems say that a judge is “authorized” to interpret an existing text, but not to create a new text (nor to alter an old text). The judge’s job

<sup>35</sup> Friedmann, “On the Interpretation of the Phrase ‘Interpretation,’ and Notes on the Apropim Decision,” 6 *Hamishpat* 21 (2002).

<sup>36</sup> Friedmann understands me to say that “No contract is clear, and contracts are distinguishable only by their varying levels of lack of clarity.” Friedmann, *supra* p. 14, note 35 at 21. That is not my approach. That would be the case only if I shared Friedmann’s definition of interpretation, i.e., as the deciphering of an unclear text. Indeed, if interpretation were the deciphering of an unclear text, and every text required interpretation, then it would follow that every text is unclear. I disagree, however, with Friedmann’s definition of interpretation.

<sup>37</sup> Friedmann, *supra* p. 14, note 35 at 22.

is to interpret a constitution or statute, not to invent (or change) it. The judge is “authorized” to interpret a contract created by the parties. He or she is not “authorized” to draft a new contract. The judge interprets a will made by the testator. The judge is not authorized to make a new will for the testator. At its core, this approach is correct. “Authorization” to alter a text belongs to its author, not its interpreter. Statements in the literature to the effect that court decisions or changes in court decisions brought about change in the text itself are just metaphors.<sup>38</sup> The law delineates the various ways that a text may be altered, but judicial interpretation is not one of them. However, in their non-interpretive capacities, judges do go beyond just interpreting the text to create a new one. In the case of contracts, parties may conduct negotiations, and because of one party’s lack of good faith, the negotiations fail to produce a contract. In some of these cases, the court has authority to decide that because a party violated the principle of negotiating in good faith, the court will treat the parties as though they entered into the contract they were to have created. Judges filling in gaps in contracts engage in similar activity. Filling in a gap involves creating a new text. When a judge corrects a mistake in the contract, he or she changes the contract. As Professor Atiyah noted:

That courts do not make contracts for the parties is an oft-repeated dogma. But . . . this is misleading. In practice, many contracts are held to exist by the courts in circumstances in which the parties did not intend to create one, or did not realize that they were creating one.<sup>39</sup>

The same is true for wills. Judges sometimes are “authorized” to deviate from the language of the will, as when they fill in a gap in the will<sup>40</sup> or correct it. In that case and in others, the will that is executed differs from that written by the testator. The judge has “made” a will for the testator. Judges engage in a similar creative activity in the field of statutes. Judges have the authority to fill in gaps in statutes<sup>41</sup> or to correct mistakes, and in doing so, they create new texts. Nevertheless, there is a distinction between interpreting the text and creating it. In each case in which a judge is authorized to create a new text or to correct an existing text, he or she does engage in non-interpretive activity, relying on non-interpretive doctrines.<sup>42</sup>

(continued)

<sup>38</sup> See L. Tribe, *American Constitutional Law* 90 (3d ed. 2000).

<sup>39</sup> See P.S. Atiyah, *An Introduction to the Law of Contract* 96 (4th ed. 1989). See also E. Zamir, *Perush V’Hashlama Shel Chozim [Interpretation and Completion of Contracts]* 57 (1996).

<sup>40</sup> On filling gaps in wills, see Barak, 5 *Parshanut B’mishpat [Interpretation in Law]* 386 (2001).

<sup>41</sup> See *id.* at 352.

<sup>42</sup> See p. 69, *infra*.