Taking Interpretive Statutes Seriously

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William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 **Harv. L. Rev.** (forthcoming 2017), available at SSRN.

"Interpretation," as used by Baude and Sachs, names the process that starts with legal texts and ends with their contribution to antecedent law. This is not the same activity as uncovering full linguistic meaning (though this may be necessary to determine legal contribution), nor is it extending or repairing antecedent law.

This article presents Baude and Sachs's case that system-specific law governs interpretation of legal texts. In short, the positive law in particular legal systems generates interpretive principles that shape the legal content established by statutes (and constitutional provisions). The authors' view rejects any theory of law or legal interpretation that insists, on conceptual grounds, that the materials for interpretation are common to legal systems or that mandates a standard of interpretation for parts of our system (e.g., the Constitution) based on conceptual claims alone (such as "the purpose" of a written constitution). Some of the examples Baude and Sachs offer of system-relative legal standards that I find plausible as governing interpretation are: the Dictionary Act, the "repeal-revival rule" of 1 U.S.C. section 108 (according to which new repeals don't automatically revive old statutes), the general savings statute (according to which repeal does not erase liabilities arising under the old statute), and some traditional canons of interpretation such as the "*Mens Rea* Canon" and the presumption against retroactivity.

One of Baude and Sachs's most successful targets is the simplest form of what Mark Greenberg calls the "Standard Picture" of interpretation, according to which the communicative content of a statute is its contribution to the law (because the statute "was authoritatively pronounced"). Larry Alexander's speaker-intention theory is a version of this view. I have always viewed this simple Standard Picture as a nonstarter, since in American law a statute can be unconstitutional (and therefore make no contribution to the law) *because* of its communicative content. Baude and Smith supply many other examples from our legal system where the interpretation of legal texts fails to "track any coherent theory of linguistic meaning" (P. 10).

Many theorists would agree with Baude and Sachs's general point that the answers to the question of the legal content of legal texts "depend on the other legal rules in place" (P. 5). (Think of those with a holistic, coherentist view of law, and anyone believing that the Hartian master rule contains an entire interpretive code.) Their specific claim that in American law, there *are* laws of interpretation is not new, as Baude and Sachs admit. Nor is their more general idea that the standards of correct interpretation vary across legal systems. Hartian positivism, which Baude and Sachs endorse, is amenable to these ideas; the rule of recognition picks out system-relative rules, some of which are about how legal texts contribute to law. But one needn't be a Hartian, or even a positivist, on the nature of law to accept that there are system-relative interpretive rules of law. The Ronald Dworkin of **Law's Empire** can accept this idea. If I understand him, so can Scott Shapiro. (Greenberg, however, could not. On his view, the basic rule for correct interpretation is always this: interpret according to a universal master formula that takes into account all the circumstances, including the existence of alleged interpretive materials. Any rule apparently derived from the universal master formula and one of a particular legal system's

alleged interpretive materials – e.g., a statute, a canon of interpretation – will be of the form, "Interpret such-and-such way as long as the universal master formula is thus satisfied." Such a rule would not fit his account of law, for it is an immediate logical consequent of the universal master formula and does not arise in what he regards as the right way for law.)

Given these facts, it is not necessary to point out why endorsing a Hartian model of law might not be the best philosophical choice in a discussion of legal interpretation, particularly when the authors are identifying interpretive precepts, about which there is considerable disagreement, from court decisions and legal practice (e.g., concerning the Constitution). Even when the authors restrict themselves to alleged interpretive texts (statutes and judicial opinions), it is plain that Baude and Sachs are interpreting the material on problematic assumptions – e.g., that court decisions yield whole precepts, that the authors have correctly identified the relevant interpretive texts and have interpreted them properly (without recourse to the Standard Picture as default), that the product of *this* interpretation is itself a law. In general, Baude and Sachs leave mysterious the grounds on which they interpret the alleged interpretive material and ignore the problem of whether there are such grounds compatible with their claim about system-relative laws of interpretation. (I think there may be.) Nonetheless, these and other difficulties are largely irrelevant to what I take to be the authors' main contribution.

As I see it, their main contribution to the broader philosophical literature on law is the case they make that *how* the contribution to law of legal texts depends on (certain) legal rules is determined *by* these rules, and that these interpretive rules exist in the way that other ordinary legal rules, including those established by the interpretation, do.

Their case has two parts. First, there is an argument by analogy from the (less controversial) existence in the American legal system of laws for interpreting legal instruments such as contracts and wills. Second, the authors demonstrate in detail, through their use of legal argument and their reminder of the use of it by judges and other legal experts, that legal argument in the U.S. goes beyond linguistic meaning of legal texts at crucial points. Instead, statutes and constitutional provisions are read, apparently for legal contribution, by applying standards often accepted as law purportedly drawn from other legal texts (sometimes rather straightforwardly) and system-relative legal practices. There is this interpretive practice, and although, as the authors admit, there is disagreement about its details, they contend—rightly I think—that there isn't disagreement about its existence or all of the details. There *are* easy cases of interpretation.

This enterprise amounts to taking parts of the U.S. Code and other statutes purporting to govern the interpretation of statutes (as well as various interpretive practices) seriously. One can argue that Dworkin's greatest challenge to H.L.A. Hart, one that shaped the discussion in legal philosophy for decades, was to take seriously the practice by judges and lawyers in hard cases of arguing in terms of discovering (rather than extending) law and to suggest that we credit these experts with knowing what they are doing. Baude and Sachs's article is richer and more suggestive of interesting philosophical points than I have had space to detail, yet it can be read as posing an analogous challenge to certain theories of legal interpretation and of law.

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