

## Interpretation and indeterminacy

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Legal interpretation is a reasoning process. In legal practice and adjudication, it is sometimes necessary to find reasons for a conclusion as to what something means. A legal interpretation offers reasons for ascribing a legal meaning to an object (the object, typically, being the communicative act of an authority or of a person or institution to whose communicative acts the law gives legal effect –such as parties to a contract). A *good* legal interpretation gives good reasons for ascribing a legal meaning to the object.

This view of interpretation, and of its role in law, is in some respects compatible with the original, perceptive, and provocative things that Andrei Marmor has had to say about legal interpretation since his 1993 book, *Interpretation and Legal Theory*. But the view of legal interpretation as a process of reasoning creates a problem in explaining the relationship between indeterminacy and interpretation. I will address that problem by discussing Marmor's latest work on the subject, in Chapter 6 of *Philosophy of Law*,<sup>2</sup> titled 'The Language of Law'. I will point out ways in which I think that Marmor's account of legal interpretation is helpful and convincing. But I will not dwell at length on the points that I think are sound, as Marmor has already made them. I will concentrate on two points at which I think there is reason to disagree with the account in *Philosophy of Law*.

First, Marmor suggests that interpretation is called for just when the decision maker applying the law needs to resolve an indeterminacy in the content of the law. I will argue that the situation is almost the reverse: if the law on some point is indeterminate, then a decision maker responsible for applying the law needs to resort to something other than interpretation. And interpretation is generally needed in order to decide whether the law is determinate on some point.

Secondly, Marmor argues that although cooperative maxims can be used to get at a true understanding of communication in ordinary conversation, such maxims are not ordinarily at work in understanding the communications of a lawmaker, because the communicative acts of lawmakers are 'strategic' rather than cooperative. I will argue that the situation is more complex than Marmor suggests. There are elements of cooperation and strategy in both ordinary conversation and in lawmaking; but it is a fundamental necessity of legal order that the institutions of a legal system communicate on a cooperative basis that sustains legal analogues of the standard conversational maxims.

### 1. Is interpretation needed when, and only when, there is indeterminacy in the law?

Interpretation is not needed in order to work out the requirements of the law, unless there is some particular doubt or disagreement as to the meaning of some object of interpretation. Marmor says that 'interpretation is only the *exception* to understanding what the law says, not the standard way of grasping its content' (137). In *Philosophy of Law* he argues, as he did in *Interpretation and Legal Theory*, against the thesis that interpretation is ubiquitous.

We could use the word 'interpretation' for anything, of course, and in particular we could use it for whatever is going on whenever anyone understands any communicative act. But Marmor gives good reason for his view that there is work to be done, in some cases, in

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<sup>2</sup> ANDREI MARMOR, *PHILOSOPHY OF LAW* (Princeton University Press 2011). I will refer to this book by page numbers in parentheses in the text.

deciding what communicative content to ascribe to an act of communication, and that the term 'interpretation' is theoretically useful for designating that work. That work –however we designate it– is a task of reasoning. Marmor, I believe, agrees with this claim: 'we use the word "interpretation" to designate a unique type of reasoning or understanding'.<sup>3</sup>

Sometimes no such process of reasoning is needed to grasp the meaning of an act of communication. You might think that because some question as to the meaning of such an act may depend on the context in which the communication is made, there is a general need for interpretation, to decide what meaning to give to the act in the context in question. But Marmor says that the relevant aspects of the context may be 'common knowledge' between speaker and hearer, and then the hearer can 'grasp the relevant content without any particular difficulty or need for interpretation' (140).

What is it that makes interpretation necessary? Marmor moves from the thought that no interpretation is needed when there is no difficulty in understanding the communication, to the thought that interpretation is needed when there is some indeterminacy in the content of the communication. And, in his view, that is when the need for interpretation arises in law in particular:

'The law requires interpretation when its content is indeterminate in a particular case of its application.' (145)

He identifies three main sources of indeterminacy in law –conflict of norms, semantic indeterminacy, and pragmatic indeterminacy– and he argues that these phenomena create the need for interpretation.

The attraction of the view is obvious: if there is no need for interpretation when the application of a legal directive to a particular case raises no doubt, then it seems obvious that interpretation is needed only when there is some unanswered question as to how the directive applies. But there is a problem. It is a big one, so I will call it 'the Problem'.

Start from the notion that I asserted at the outset: that interpretation is an exercise in reasoning and, specifically, that legal interpretation is the activity of identifying legal reasons that support a conclusion as to the meaning that is to be ascribed to a legal communication.<sup>4</sup> Now suppose that in a particular case, an interpreter succeeds in finding good legal reason to ascribe one meaning rather than another to the law. Then, there is no indeterminacy in the law. If there is reason to treat the law as requiring *this* rather than *that*, then the law is determinate on the issue.

**The Problem:** the task of legal interpretation is to identify reasons for a conclusion as to the content of the law. Insofar as the content of the law is indeterminate, there are no reasons that require one conclusion. So while interpretation may be a way of identifying an indeterminacy in the law, it cannot resolve an indeterminacy. So, contrary to what Marmor says, indeterminacy in the law cannot give rise to a need for interpretation.

Let me illustrate the Problem with respect to the sources of indeterminacy that, according to Marmor, give rise to a need for interpretation.

### **Conflict of norms**

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<sup>3</sup> ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 9 (Hart Publishing, 2nd Revised edition 2005).

<sup>4</sup> See Timothy Endicott, *Legal Interpretation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 109-122 (Andrei Marmor ed., Routledge 2012). Note again that Marmor is himself committed to this notion: from the beginning of his work on interpretation; he has written of 'a kind of reasoning which we distinctively call interpretive' (*INTERPRETATION AND LEGAL THEORY*, *supra*, 9).

First is conflict of norms (146). Two legal norms may contradict each other, he says, one requiring the same conduct that the other prohibits. There may be a third norm that resolves the conflict (so that the conflict, as a matter of law, is merely apparent or *prima facie*). But he says that there is often no such conflict-resolving norm, and then 'the conflict... is a genuine conflict—one for the courts, presumably, to figure out' (146). He implies that such a genuine conflict is an indeterminacy in the law, giving rise to the need for interpretation.

But here is the Problem: if interpretation is a process of reasoning as to what content is to be ascribed to the law, then it may take interpretation to figure out whether there is a genuine conflict. But interpretation cannot help to 'figure out' what is to be done in the case of a genuine conflict. In such a case, the courts that, presumably, need to resolve the conflict, must do so through an act that is law-making in a sense that calls for it to be distinguished from interpretation. For in interpretation, the task is to identify reasons for a conclusion as to what the content of the law is. But a new normative decision is needed to resolve a genuine conflict, and such a change is not interpretive, as it cannot be justified on the basis of reasoning as to what content the law has.

### **Semantic indeterminacy**

This is the second form of indeterminacy that, Marmor says, creates a need for interpretation. He says that vague words have borderline cases, 'that is, cases in which it is indeterminate whether the word applies or not' (147). He implies that interpretation is required in such a case, and adds that 'I would venture to guess that most cases of statutory interpretation that courts tend to deal with concern borderline cases of vague terms in the relevant statute' (147).

But here is the Problem: if it is indeed indeterminate whether a word applies or not, then interpretation won't resolve the matter, if interpretation is a process of reasoning as to what meaning to ascribe to a communicative act.

Marmor talks of vague terms such as 'vehicle', and we can illustrate the Problem by reference to an actual instance of interpretation of a legislative use of that term. In *Garner v Burr* [1951] 1 KB 31, the judges disagreed as to how to interpret the Road Traffic Act, 1930, which required that a 'vehicle' should only be used on a road if it was fitted with pneumatic tires. The prosecution said that Mr Burr's chicken coop was a vehicle, because he fitted wheels to it and pulled it down the road behind his tractor. Perhaps Marmor would say that in a case like this, the chicken coop is a borderline case of a 'vehicle', so that the application of the statute to the case is indeterminate, with the result that a need for interpretation arises in order to resolve the indeterminacy.

In the decision, the appeal court reversed the Magistrates' decision, and held that on the true interpretation of the statute, Burr had broken the rule by pulling a chicken coop down the road without pneumatic tires. Remember that interpretation is a reasoning process, and indeed the Lord Chief Justice offered reasons for treating the act as having a meaning according to which Burr had committed an offence:

'I think that the Act is clearly aimed at anything which will run on wheels which is being drawn by a tractor or another motor vehicle. Accordingly, an offence was committed here. It follows that [the magistrates] ought to have found that this poultry shed was a vehicle within the meaning of s. 1 of the Road Traffic Act of

1930.’<sup>5</sup>

If the Lord Chief Justice’s interpretation was good, then there was no indeterminacy in the law in respect of its application to this case. Properly understood (properly interpreted), the law made it an offence to do what Burr had done. If the magistrates’ interpretation was correct, then there was no indeterminacy: properly interpreted, the law did not make it an offence.

I am sure that courts very often need to resolve indeterminacies in the law, and no doubt they very often say that the law requires this or that, when actually the reasons for a conclusion either way are incommensurably strong. In such a case the law is indeterminate, and the court could have decided the issue either way without departing from the law. Suppose that this was the case in *Garner v Burr* (you would need to assess the legal reasons for and against the prosecution before you could reach that conclusion). Then there was an indeterminacy in the law, and there was no reason for concluding either that he had or had not committed an offence. But the Problem is that a conclusion that there is such an indeterminacy would be the result of a good interpretation (the result of success in identifying what reasons there are for a conclusion as to the meaning of the legislative act); it is not capable of giving rise to a need for interpretation, and it is not capable of being resolved by interpretation.

### **Pragmatic indeterminacy**

Finally, we can say something similar about the third form of indeterminacy that, according to Marmor, creates a need for interpretation. As an example of pragmatic sources of indeterminacy, Marmor points out that implicatures may arise from legislative acts, and he gives the example of an implicature that a list of express exceptions to a legislated rule is an exclusive list. But sometimes,

‘Judges tend to be rather skeptical, and perhaps rightly so, of the legislature’s ability to determine in advance all the possible justified exceptions to rules it enacts. Sometimes, therefore, courts simply ignore the implicature; they treat a list of exceptions as suggestive rather than exhaustive.’ (153-154)

Marmor argues that a court in such a case, which ignores ‘the communicative content that was not quite asserted but only implicated’ by the legislation (154), may not be failing to follow the law; it may be dealing with a case of indeterminacy.

Here is the Problem: an implicature is a reason to treat a communicative act as having a particular content; it might well take good interpretation to identify an implicature. If there is an implicature that a list of exceptions is exclusive, then a court may need to decide whether to ignore the implicature. But I don’t know why we would call the decision to ignore an implicature ‘interpretive’. And suppose that it is indeterminate whether there is such an implicature. That means that there is no reason to conclude that there is such an implicature, and no reason to conclude that there is no such implicature, and the court will have to fashion a new norm (a norm that the list is to be treated as exclusive, or that it is not). Interpretation can help to identify implicatures, but not to decide a case when it is indeterminate whether the court must give effect to an implicature.

### **Solving the Problem?**

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<sup>5</sup> *Garner v. Burr* 1 KB 31, 33 (1951). This case is discussed further in Timothy Endicott, *Law and Language*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Fall 2010 Edition, Edward N. Zalta ed.), <http://plato.stanford.edu/archives/fall2010/entries/law-language>.

It seems that Marmor has things just backwards: the task of interpretation may well need to be carried out in order to decide whether the law is indeterminate in its application to a particular case, but once we reach the conclusion that the law is indeterminate, that amounts to the conclusion that there is no reason to ascribe to the communicative acts in question a legal meaning that resolves the issue at stake. And then, interpretation –a process of identifying reasons– cannot help to resolve the indeterminacy.

Yet, you will say, there is good sense in Marmor's notion that we don't need to interpret when the law is perfectly clear. And we must have gone wrong somewhere, if the Problem that I have identified leads to the conclusion that there is no role at all for interpretation –because we do not need interpretation when the content of the law is determinate, and interpretation cannot help when the content of the law is indeterminate.

We can resolve this puzzle. We can do so by reference to the case of *Garner v Burr*. Was Mr Burr's chicken coop a borderline case? Marmor defines 'borderline cases' as 'cases in which it is indeterminate whether the word applies or not' (147). He does not define 'indeterminacy', but I will suppose that when it is indeterminate whether the word applies or not, there is no reason to conclude either that it does apply, or that it does not apply. But by Marmor's definition of 'borderline case', we cannot conclude that Mr Burr's chicken coop was a borderline case, until we have decided whether there is reason for saying that it was or was not a vehicle. Now, what I have told you about the case is already enough for you to see that there is a puzzle about this, and you know that it was a point on which the lawyers and the magistrates and the judges disagreed (and it is evident that they could give reasons for their views either way). So, it seems to me, *Garner v Burr* was patently a case that called for interpretation of the legislation. But we cannot conclude that *Garner v Burr* was a case 'in which it is indeterminate whether the word applies or not' (i.e. whether there was an indeterminacy in the applicability of the term 'vehicle' to Mr Burr's chicken coop) until we have done the interpretive work.

So there is plenty of room for interpretation in law. Not to resolve indeterminacies in the law. Contrary to what Marmor suggests, interpretation cannot do that. But interpretation is needed whenever reasoning is needed in order to decide what a communication means. Marmor is quite right that we don't always need to engage in interpretation in order to understand the law. But I propose a different account of what it is that makes interpretation necessary. The phenomenon that gives rise to the need for interpretation is not indeterminacy, but the possibility of doubt or contention. Interpretation is needed when arguments can be made in favour of differing conclusions as to the meaning of a communicative act. Then you or I need to engage in reasoning to decide what conclusion to reach.<sup>6</sup> There may be good reason in favour of one conclusion, and then there is no indeterminacy. But it may well be that there is no conclusive reason either way, and then there is an indeterminacy.

## **2. Do cooperative maxims play a role in the use of language in law?**

In association with the account of pragmatic indeterminacy, Marmor offers an original view of the role of implicatures in law (more precisely, in legislation). Many legal theorists have commented on the role in law of conventions of implicature analogous to the conversational maxims that H.P. Grice identified in ordinary conversation. The maxims that Grice identified have obvious parallels with maxims or 'canons' of statutory interpretation and of other forms of legal interpretation. I am not aware that anyone has done a very systematic or very successful job of explaining the parallels; when that job is done, it will have to take account of Marmor's striking suggestion that legislation is different from ordinary conversation in a

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<sup>6</sup> I defend this view in *Legal Interpretation*, supra.

way that prevents any general parallel. Legislative communication, Marmor says, is 'strategic', whereas ordinary conversation is cooperative. Cooperation, as Grice pointed out, is the basis for the conversational maxims. So Marmor concludes that analogues of the conversational maxims do not ordinarily arise in law.

...the conversation between the legislature and the courts, so to speak, is not one of a cooperative exchange of information. ...The enactment of a law is not a cooperative exchange of information. Legislation is typically a form of *strategic behavior*. ...The process of legislation is plagued with strategic behavior that tries to overcome the lack of initial cooperation among the relevant agents. And then, once we have the result of this process, it becomes very difficult to determine which aspects of it are relevant to determining the content of the legislative speech, and which aspects ought to be ignored. (154, 157)

Marmor allows that courts may develop norms of statutory interpretation that 'could create some kind of Gricean maxims for the legislative context', so that, 'to some extent, and greatly depending on the interpretative culture of the courts, some Gricean maxims might be present even in the legislative context' (157). But that is exceptional. In ordinary conversation, such maxims arise from the cooperative principle, but they do not ordinarily arise in the strategic use of communication in legislation.

There certainly is something to the idea that implicatures in legislation may be uncertain, and that the uncertainty may be manipulated both by legislatures and by courts. Marmor gives vivid illustrations: courts may ignore an implicature that a list of exceptions to a statutory rule is exhaustive; legislatures may engage in 'double-talk' (156) in which they craft a defence of duress in criminal law in such a way that it will look restrictive to people put under more or less duress by criminals, but will look liberal to the court that has to decide whether to hold the defendant guilty of an offence.

But ordinary conversation is rife with the ignoring of implicatures, and with double-talk. As soon as there are three of us chatting, there are opportunities for person A to make a point by saying something that conveys to B the implicature that B is very clever, while conveying to C the implicature that B is very stupid. So the first ground for objecting to Marmor's distinction between ordinary conversation and legislation is that whatever he means by 'strategic' (and he does not really explain the idea), we all engage in strategic behaviour very ordinarily as part of very ordinary conversations.

Marmor points out that legislative communication involves multiple 'speakers' in a complex internal interaction before legislation is passed, and in a complex external interaction with multiple parties such as courts and would-be criminals. But it seems to me that for all those complexities, ordinary conversations very commonly become much more complex. After all, ordinary conversations include accounts of what others have said, and statements made on behalf of the speaker and one or more others, and so on and so on. We should remember, for example, that ordinary conversation includes utterances by which parents, teachers, employers, big sisters and so on exercise authority. There is no general basis for saying generally that ordinary conversation involves cooperation in a way that legislation does not. The categorical difference between ordinary conversation and legislation is that ordinary conversation is much more complex.

And most importantly, the open-ended nature of conversation means that the purposes potentially under pursuit are much, much more various and undefined than the purposes of legislation. Marmor suggests that 'an ordinary conversation' is 'a cooperative exchange of information' (154). But exchange of information is only one of the unlimited myriad of purposes that may be pursued in an ordinary conversation, and exchange of information is always engaged in for further purposes. Whatever Marmor means by

‘strategic’, there can be no justification for a general claim that those further purposes are non-strategic in ordinary conversation. There is nothing out of the ordinary about a conversation in which the participants have very different purposes that include being generous, sounding clever, making a good impression, encouraging someone, embarrassing someone else, causing confusion, being economical with the truth, etc. etc. All that unlimited plethora of purposes, of course, is compatible with what Grice says about conversational maxims. In order to converse, we need to cooperate even when we are conversing for strategic purposes. And the conversants in a legal system need to cooperate even when the legislators are acting for strategic purposes. Perhaps Marmor is skeptical about the old jurisprudential issue as to whether law necessarily has a general point or purpose that could sustain cooperation. But that skepticism would have to be very radical indeed to lead to the conclusion that ordinary conversation has more of a unifying purpose than communications by lawmakers within a legal system.

The second ground for rejecting Marmor’s distinction between ordinary conversation and legislation is that legislative communication needs to involve Grice’s Cooperative Principle. Look at the way in which Grice justified his proposed principle:

‘Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction. This purpose or direction may be fixed from the start (e.g., by an initial proposal of a question for discussion), or it may evolve during the exchange; it may be fairly definite, or it may be so indefinite as to leave very considerable latitude to the participants (as in a casual conversation). But at each stage, *some* possible conversational moves would be excluded as conversationally unsuitable.’<sup>7</sup>

This cooperative principle is not really very demanding, and it seems to me to be satisfied much more regularly and uniformly in the relatively simple and highly regulated ‘talk exchanges’ of legislation, than in ordinary conversation. In fact, we can say this with generality. I suppose that Grice thought that he could generalize about ordinary conversation (‘our talk exchanges do not normally consist of disconnected remarks...’) because there is so much day-to-day discourse that does depend on the cooperative principle, and needs a sustained readiness to act on the maxims that he identified. But it seems to me to be much more ambitious to generalize about such an open-ended category as ordinary conversation, than to generalize in this respect about legislative communication.

Given the unlimited, diverse purposes for which people engage in ordinary conversation, abandoning all cooperation can actually be a rational thing to do, or even the right thing to do (although, of course, only in exceptional circumstances). In legislation, if cooperation breaks down, the rule of law breaks down. And the separation of powers between legislature and court depends on adherence by the courts to legal analogues of the conversational maxims.

Take for example, what we might call the master implicature of legislation, which is that the rights and duties established by legislation are to be rights and duties under the law of the jurisdiction. The Hunting Act 2004 c.37, s.1, asserts that

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<sup>7</sup> H. Paul Grice *STUDIES IN THE WAY OF WORDS* 26 (1989 Harvard University Press). The principle is: ‘Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged’ (Ib.) –and, we might say, it involves the correlative principle that the audience in question is to treat the speaker as having complied with the principle.

‘A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.’

Nowhere does the statute assert that this offence is a *legal* offence. But there is an implicature –supported by the legal analogue of the conversational maxim of relevance– that the offence in question is a legal offence. A court that ignored this implicature would be ignoring the law.

The general necessity for legal analogues of the conversational maxim of relevance could be further defended by offering any number of more particular illustrations of the conduct of courts in statutory interpretation, when they draw conclusions that are not asserted in the statute, from the fact that the legislature has enacted the text of the statute in the context in which it has done so. But ironically, we can defend it very economically by using an illustration that Marmor himself offers, when he illustrates the possibility of implicature in legislation:

‘In many familiar cases, some communicative content is implied, though not quite asserted, by the speaker in the particular context of his utterance. Consider, for example, a municipal ordinance requiring restaurants to have “clean and well-maintained bathrooms indoors.” Even if the regulation does not explicitly mention this, surely we would assume that a restaurant that had impeccable bathrooms that are kept locked at all times would violate the ordinance. That the restrooms need to be open for patrons to use is content that is clearly implicated by such an ordinance.’ (151)

Marmor’s suggestion is that such an implicature is some sort of exception to the general principle that legislative communication is ‘strategic’. But why should we think that the implicature arises in the bathroom case? The answer is obvious: the implicature arises from the cooperative principle –and, we might say, a particularly strong instance of the cooperative principle, which requires courts to give effect to legislation. If the court did not draw the implicature, it would be vitiating the regulation. If courts adopted a general strategy of ignoring such implicatures, they would be sabotaging the role of the lawmaker, and that would amount to abandoning the rule of law. Courts do not generally do that (if they do, their legal system suffers from a pathology). And they should not generally do that, if there is reason for them to cooperate in giving effect to legislation.

Courts do not always act on the implicatures of legislation, of course: they sometimes play along with clever arguments of advocates, and create unreasonable loopholes in legislative schemes. But of course, people sometimes ignore implicatures unreasonably in ordinary conversation, too.

So on this point, too, I propose that we should depart from Marmor’s argument in *Philosophy of Law*. But we should not do so without noting the core of insight in the argument: the role of implicatures in law really does generate a great deal of doubt and disagreement (and therefore much need for interpretation), and can generate indeterminacy too.

The implicatures that can potentially arise from legislation vary tremendously. Marmor overgeneralizes when he claims that legislation is not a cooperative exchange. In fact, like all the pragmatic aspects of human communication, it is more or less cooperative and can involve implicatures that are clear and undeniable and cannot legitimately be ignored, as well as arguable implicatures that can generate doubt, disagreement and indeterminacy because of the lack of clarity as to whether they arise, and as to their force. Consider:



- the implicature that legislation has legal effect
- the implicature that bathrooms must be open when the lawmaker has required restaurants to have them
- the implicature that list of exceptions is exclusive.

A court that ignores the first of these implicatures would be abandoning the rule of law. A court that ignores the second would be vitiating one particular regulatory measure by a lawmaker. As for the third, for reasons that Marmor gives, it may be unclear whether it arises in some particular context, and if so, what force it has in light of other considerations that a court may legitimately act upon.

We should conclude that the content of the law made by legislation includes what the legislation asserts, and also those implicatures that courts have conclusive reason to act upon; this is quite an unclear and controversial category, of course, and leaves all sorts of room for doubt and dispute about the law, and for indeterminacy in the law. As I have argued, doubt and disagreement are different from indeterminacy; when the interpreter has reason to conclude that a proposition is implicated by legislation (e.g., the proposition that bathrooms must be open to customers when the lawmaker has required restaurants to have bathrooms), there is no indeterminacy on that issue, even if someone disagrees with it. But if there is no conclusive reason either for the view that the proposition is implicated, or for the view that it is not, then there is an indeterminacy in the law.