

**BETWEEN PROBABILISM AND PRAGMATISM:
AN ESSAY ON STATUTORY INTERPRETATION**

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This Article examines the credentials of the three dominant modalities of statutory interpretation: textualism, intentionalism, and purposivism. The Article argues that these modalities share an unfulfillable epistemic ambition: the quest to uncover the empirically true meaning of a statute—a communicative act of the individuals authorized to legislate—under conditions of uncertainty. Through critical analysis and examination of the English law classics, the Article demonstrates that this ambition collapses under the weight of factual indeterminacy. Textualism fails when the ordinary meaning of statutory language is unclear; intentionalism falters when the legislator’s intent is uncertain; and purposivism turns ineffectual when the scope of statutory purpose is unverifiable. The Article contends that, in practice, textualism and intentionalism inevitably devolve into probabilism—a procedure that identifies the statute’s most probable meaning based on available evidence—whereas purposivism gives way to pragmatism, which prioritizes cost-benefit analysis and social welfare-maximization. The Article then juxtaposes probabilism and pragmatism against each other and concludes that the choice between these two viable modalities depends on whether one prefers to enhance democracy over welfare-maximization, or vice versa.

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Introduction

Statutory interpretation splits into five different modalities that come into play when the statutory text is not completely unambiguous. These modalities include textualism, intentionalism, purposivism, probabilism, and pragmatism.¹ Sometimes, the applicable statutory text is completely clear, as in the case of a criminal prohibition prescribing that “motor vehicles shall be driven in all circumstances at a speed not exceeding 55 miles per hour”. Such clear-cut cases do not require courts to identify and apply the right modality—one out of five. Clear-cut cases, however, are extremely rare. To understand why, remove the words “in all circumstances” from the aforementioned prohibition on speeding and then ask yourself whether a person is allowed to drive an injured family member to a hospital at a speed of 75 miles per hour. To answer this question, the court may decide to rely on one of those: (1) the meaning of the statutory text, as understood by the general public at the enactment (textualism); (2) evidence indicating what the statute’s drafters had in mind (intentionalism); (3) the statutory purpose or the mischief that the statute aims to avert (purposivism); (4) the statute’s meaning that has the comparatively highest probability of being true, given the drafters’ intent and choice of words (probabilism); or (5) the statute’s meaning that maximizes society’s welfare in tune with what the legislator would have done under similar circumstances (pragmatism).²

¹ For description of these modalities and voluminous literature thereon, see Alex Stein, Probabilism in Legal Interpretation, 107 *Iowa L. Rev.* 1389, 1389-95 (2022).

² Against these modalities stand critical theories that claim that interpretation is a coverup for political decisions. Discussion of these theories falls beyond the scope of this Article. For description and critique of these theories, see *id.* at 1393-94, 1430-36.

Application of these modalities takes courts in different directions, yielding results that may or may not converge with one another.³ In the aforementioned example, driving an injured family member to a hospital at 75 miles per hour may still amount to a violation under textualism (absent the emergency exemption elsewhere in the book of laws). Intentionalism, purposivism and probabilism would require the court to examine the statute's history to identify its goals and the drafters' subjective intent and find out whether the speeding prohibition was meant to be categorical (under intentionalism and purposivism) or most likely so in comparison with other interpretations of the statute (under probabilism). Under pragmatism, in contrast, chances are that the court will find, on social welfare grounds, that the speeding prohibition is overridden by the emergency exception.

This Article develops four general theoretical claims:

- (1) Textualism, intentionalism and purposivism have an epistemic ambition to uncover the true meaning of statutory provisions that call for interpretation.
- (2) This ambition is unfulfillable.
- (3) Textualism and intentionalism consequently collapse into probabilism, and purposivism into pragmatism.
- (4) There are strong epistemic reasons for preferring probabilism over pragmatism, but whether those reasons are compelling enough to offset the utilitarian advantages of pragmatism is unclear.

³ *Id.* at 1389-95.

These claims are illustrated by the British classics of statutory interpretation that include *Fisher v Bell*⁴ (for textualism); *Pepper v Hart*⁵ (for intentionalism); *Smith v Hughes*⁶ and *Corkery v Carpenter*⁷ (for purposivism); and *Royal College of Nursing v DHSS*⁸ (for pragmatism and probabilism).⁹

I develop these claims in the following order. Part I describes how textualism, intentionalism and purposivism work and identifies their failures. Specifically, it explains that each of those modalities has an epistemic ambition—an aspiration to find the factually correct answer to the question “What does the applicable statute mean to say for the case at hand and its likes?”—and then shows that this ambition is unfulfillable. Textualism, intentionalism and purposivism collapse under the pressures of uncertainty. Textualism becomes dysfunctional when judges face uncertainty as to what the statutory text means to say as a matter of fact. Intentionalism becomes inoperative when judges face uncertainty as to what the text’s drafters intended to communicate as a matter of fact. Purposivism, in turn, breaks down under the following line of questions. Once the statutory purpose has been identified, did the drafters intend to have it realized at all costs and by all possible means? Under the simple means-ends rationality, the answer to this question can only be negative; and if so, what, according to purposivism, are the proper means for achieving the purpose underlying the statute? Purposivism offers no answers to these critical questions.

⁴ [1961] 1 QB 394.

⁵ [1993] 1 All E.R. 42.

⁶ [1960] 2 All E.R. 859.

⁷ [1951] 1 KB 102.

⁸ [1981] A.C. 800.

⁹ For historical account of statutory interpretation in England, see Jonathan Green, *The Misunderstood History of Interpretation in England*, 56 *Ariz. St. L.J.* 911(2024).

Based on this discussion, Part II moves on to demonstrate that both textualists and intentionalists must either rely on probabilism or completely abandon their truth-seeking ambitions. Specifically, judges facing an unclear statutory provision must first identify all of its possible meanings by considering every relevant evidence relating to the statutory text and its drafters' intent and then determine which of those meanings is comparatively most probable. In making that determination, judges must ask and answer the following question: Which of the provision's available meanings represents what its drafters most likely intended to communicate through the language they chose to use? Purposivists, in turn, have no choice but to resort to pragmatism and carry out a fully blown cost-benefit analysis that will determine the proper means for achieving the statutory goal. This approach will enable judges to maximize society's welfare under the given circumstances, as required by pragmatism. Hence, textualism and intentionalism collapse into probabilism, while purposivism transforms into pragmatism.¹⁰

In Part III, I carry out a normative comparison between the two finalists: probabilism and pragmatism. Within this framework, I juxtapose the mechanics of probabilism—relative plausibility and reasoning to the best explanation—against undiluted cost-benefit analysis advocated by pragmatism. This discussion underscores the epistemic virtues of probabilism and the utilitarian advantages of pragmatism. Whether probabilism outperforms pragmatism, or vice versa, remains unclear.¹¹

¹⁰ This analytical claim aligns with an important historical account of how statutory interpretation evolved in England: see Green, *id.*, at 964-85.

¹¹ As Jonathan Green correctly points out, "The English courts' eventual resolution of this debate ... was to adopt a kind of objectified purposivism, one that generally abjures the subjective intentions of past legislators and which prioritizes the purpose that a reasonable legislature would have had, given the statute's text and its context of enactment." See *id.* at 925. This approach is conventionally understood as pragmatism: see Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 *S. Cal. L. Rev.* 1653, 1656–

Before proceeding further, I need to address a threshold objection that denies the basic premise of this Article. Arguably, textualism, intentionalism and purposivism have no epistemic ambitions to begin with. Rather, these approaches came into play to help judges uncover (1) the most sensible public meaning of the statutory text (under textualism);¹² (2) the intent that the statute’s well-motivated drafters had in mind (under intentionalism);¹³ or (3) the most effective way to implement the social policy that the statute was put in place to promote (under purposivism).¹⁴ This objection runs contrary to the basic fact: *any given statute is a communicative act that, as such, is an object of understanding and knowledge.*¹⁵ Consequently, whether a statute does or does not say X is either true or false. An interpretive approach that denies it cannot associate itself with an intellectual activity known as interpretation. Interpretation must have an epistemic ambition: whatever form it takes, it must aim at uncovering the truth about its object. Devoid of this ambition, textualism, intentionalism and purposivism will always lose the contest against pragmatism.

60 (1990) (describing pragmatism as an approach capturing judges’ decisions that maximize society’s wellbeing within the statutory bounds).

¹² See, e.g., William N. Eskridge, Jr. *et. al.*, Textualism’s Defining Moment, 123 *Colum. L. Rev.* 1611 (2023) (arguing that textualist judges should act as the legislator’s neutral partners in elaborating statutory provisions).

¹³ See, e.g., Tyler S. Moore, Vittorio Höfle, Intentionalism, and Understanding Understanding, 69 *Am. J. Juris.* 107, 118 (2024) (explaining and defending Höfle’s account of legal interpretation as a predominantly normative, rather than fact-finding, endeavour, while noting that “theories of public meaning originalism and intentionalism have increasingly converged, such that the daylight between the two is now quite thin”).

¹⁴ See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1995) (explaining purposivism as a method that presumes Congress to be comprised of “reasonable persons pursuing reasonable purposes reasonably”).

¹⁵ For arguments that legal interpretation is not about truth and knowledge, see Pierluigi Chiassoni, *Interpretation Without Truth: A Realistic Enquiry* 47 (2019) (defending the claim that “interpretive sentences, being the outputs of textual interpretation of legal provisions, are never apt for empirical truth”; Francisco J. Urbina, Reasons for Interpretation, 124 *Colum. L. Rev.* 1661 (2024) (arguing for thoroughly normative, truth-unrelated, interpretation); see also *id.* at 1692 (restating the view that statutory interpretation proceeds upon “normative reasons” that “are not about any truth about the concept of interpretation, but about values to be realized and fulfilled.”).

I. The Unfulfilled Epistemic Ambition of Textualism, Intentionalism and Purposivism

A. Textualism

Textualism interprets statutory provisions by focusing on the ordinary meaning of the words as understood by the general public at the time of the enactment. Underlying this approach is the irrebuttable presumption that the drafters communicated their intent through language familiar to society when the statute was drafted. The ordinary meaning of the statute's words thus turns into the true meaning of the statute.

For example, a textualist judge interpreting the statutory rule "no vehicles in parks" will determine what "vehicles" included historically, not what they might include today. Textualism ties legal meaning to the historical context of the enactment. Importantly, it does so by asking the judge to ignore the drafters' intent even when the intent is known or easily ascertainable, and the statutory text is ambiguous. Thus, if the drafters intended "vehicles" to exclude bicycles when the word "vehicles" is generally understood to include them, textualism will prohibit biking in parks.

Critics of textualism argue that this rigidity leads to outcomes misaligned with modern realities. Proponents of textualism respond to this critique by saying that interpreting statutes in strict accordance with their ordinary public meaning at the time of the enactment safeguards democracy. Under textualism, authorizing judges to read the lawmaker's unwritten intent into statutory words that say something different would allow judges to make laws in violation to the separation-of-powers principle.

A more powerful line of critique against textualism holds that this approach offers no solution for cases in which the original public meaning of the applicable statutory provision

is unclear. For example, when the original public meaning of the word “vehicle” may or may not include bicycles, asking judges to follow textualism is unhelpful because judges cannot deliver a verdict saying that the statute at bar is unclear. They must decide cases one way or another.

This critique helps identify a deep problem in textualism: this approach to statutory interpretation has two mutually incompatible ambitions. One of those ambitions is epistemic: textualism seeks to uncover the true meaning of statutory provisions. If so, why ask judges to ignore the statute’s history and the drafters’ intent? Suppressing evidence that can help judges uncover the truth about what the statute at bar actually says undermines the truth-seeking ambition of textualism. Textualists address this problem by alluding to the separation of powers in democracy—a noble goal in and of itself. This allusion reflects the democratic ambition of textualism. However, truth and democracy are not the same. One cannot act as a good politician and a good epistemologist at once in all circumstances.

To make things concrete, consider *Fisher v Bell*,¹⁶ a classic decision in which the court resorted to textualism. In that case, a shopkeeper displayed in his shop window a flick knife carrying a tag “ejector knife – 4s” (four shillings). He was prosecuted under the Restriction of Offensive Weapons Act 1959 (ROW), which made it a criminal offense to “offer for sale” flick knives. The court decided that what the shopkeeper did was merely an “invitation to treat” by the seller, not an “offer for sale”. The court reasoned that the rules of contract formation dictate this interpretation. These rules do not allow a shop’s patron to force the

¹⁶ See *supra* note 4.

shopkeeper into a binding knife-selling contract by entering the shop, throwing 4 shillings on the counter and demanding the knife.¹⁷

This reasoning runs contrary to the drafters' intent to use the word "offer" in a broad sense that includes "invitations to treat". Under this interpretation, "offering for sale" included an offer to negotiate a sale of the prohibited item. By suppressing the drafters' intent, the court preferred the textual meaning of the statute over its true meaning. Unsurprisingly, Parliament promptly reacted to the court's textual interpretation of "offering for sale" by enacting the Restriction of Offensive Weapons Act 1961—a statute that made it a criminal offense to "expose" flicking knives for the purpose of sale.¹⁸

B. Intentionalism

Intentionalism prioritizes the drafters' subjective intent over the text's ordinary meaning. Followers of this approach use legislative history—such as law commission reports and parliamentary debates—as evidence upon which to determine what the drafters of the statute at bar intended to communicate. For example, if the drafters of the "no vehicles in parks" statute intended to ban only automobiles, intentionalists would endorse this narrow interpretation even when "vehicle" ordinarily includes bicycles.

Intentionalism proceeds upon a rebuttable presumption equating ordinary language with the true meaning of the statute, while allowing the drafters' subjective intent to override linguistic conventions. For that reason, together with textualism, intentionalism belongs to

¹⁷ *Id.* at 399. For explanation and critique of this "black-letter advertising rule", see Melvin Aron Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance, 82 *Cal. L. Rev.* 1127, 1167-69 (1994).

¹⁸ See Restriction of Offensive Weapons Act 1961, Section 1.

the originalist methods of interpretation.¹⁹ Critics of intentionalism argue that reconstructing drafters' intent is often speculative, especially for old laws or collectively drafted provisions. Additionally, privileging drafters' intent over the enacted text risks undermining the rule of law, as citizens may lack access to lawmakers' private motivations.

My concern here is the oft-present uncertainty of intent. The key question here is "What the drafters of the given statutory provision had in mind when they formulated that provision the way they did?". This question arises after the drafters of the statute implemented whatever intents they may have had, from their subjective point of view. As a result, the drafters' intent, entertained at the time of the enactment, is neither observable nor fully verifiable. Consequently, as explained in my prior work and, subsequently, in Professor Stephen Sachs' important article (with regard to textualism as well), intentionalism suffers from a serious methodological flaw: absence of protocols on how to resolve uncertainties and genuine disagreements over what a given expression says and intends to say as a matter of fact.²⁰

A vivid example of this problem is provided by the House of Lords' decision in the classic tax case *Pepper v. Hart*,²¹ featuring schoolmasters who benefited from a private-school concessionary scheme that allowed members of the staff to have their children educated at the school upon payment of a much-reduced tuition fee: one-fifth of the sum charged to the parents of regular students. This benefit was substantial. Yet, it was only available for spots

¹⁹ See, e.g., John O. McGinnis & Michael Rappaport, Unifying Original Intent and Original Public Meaning, 113 *Nw. U. L. Rev.* 1371, 1375-88 (2019) (explaining textualism and intentionalism as branches of the originalist school of statutory and constitutional interpretation).

²⁰ See Stein, *supra* note 1, at 1399-1401; Stephen E. Sachs, Originalism: Standard and Procedure, 135 *Harv. L. Rev.* 777, 780, 803-15 (2022).

²¹ [1993] 1 All E.R. 42.

not filled by the regular students whose parents paid full tuition. The Revenue contended that this benefit was an emolument, a taxable income defined by the applicable statutory provision, Section 61(1) of the Finance Act 1976, as “the cash equivalent of the benefit”. The schoolmasters disagreed. According to them, because the school lost no tuition from filling up spots left vacant by regular students, and because the costs of running the school are fixed and thus would have been incurred in any event, the benefit they received equals the additional cost to the school of educating their children. This cost could only include meals, stationery and laundry, as opposed to the cost of buildings, facilities and staff salaries. The reduced tuition that the school received from the schoolmaster for taking aboard her or his child was high enough to cover this additional cost, and so “the cash equivalent of the benefit” was nil.²²

The Revenue rejected this calculation. According to the Revenue, the schoolmasters’ “cash equivalent of the benefit” equaled $(c/n)-t$, when c is the total cost of running the school; n is the number of students; and t is the tuition charged to the schoolmaster.²³ From a purely linguistic standpoint, this way of calculating the emolument amount was as plausible as the schoolmasters’ interpretation of the statute.

The House of Lords resolved this disagreement in the schoolmasters’ favour (by a 6:1 majority).²⁴ This decision relied on the explanation provided by the Financial Secretary to the Treasury concerning “the cash equivalent of the benefit” that was documented in

²² *Id.* at 53-54.

²³ *Id.* at 54. From a purely economic standpoint, the schoolmasters’ emolument equaled the difference between the full and the reduced tuition. This difference, however, did not reflect the “cash equivalent of the benefit” because the schools could not recover the full tuition for the spots left vacant by the regular students.

²⁴ *Id.* at 74.

Hansard, the official publisher of parliamentary debates.²⁵ This explanation was held to represent the lawmaker's intent.²⁶ In the words of Lord Browne-Wilkinson, who spoke for the Law Lords' majority,

'I therefore reach the conclusion ... that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear.'²⁷

The House's decision prompted criticism from different angles. Critics argued that this decision unjustifiably relaxed the rule that prohibited the use of Hansard in interpreting statutes for both constitutional and prudential reasons.²⁸ Because these reasons do not necessitate a wholesale rejection of intentionalism as such, they will not be discussed here. Another line of criticism focused on a more fundamental question, namely, whether intentionalism is operationally viable modality. Lord Steyn argued that it is not. On his view, (1) a search for the lawmakers' intent substantially increases the cost of litigation "to very little advantage";²⁹ (2) ascribing lawmakers' "a state of mind deduced from exchanges in debates" is untenable;³⁰ and, finally, (3) "[to] ascribe to all, or a plurality of legislators, an intention in respect of the meaning of a clause ... and how it interacts with a ministerial explanation is difficult".³¹

²⁵ *Id.* at 69.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Johan Steyn, *Pepper v Hart: A Re-examination*. 21 *OJLS* 59, 60-63 (2001).

²⁹ *Id.* at 63-64.

³⁰ *Id.* at 64.

³¹ *Id.* at 65. See also Stefan Vogenauer, *A Retreat from Pepper v Hart? A Reply to Lord Steyn* 25 *OJLS* 629, 658-65 (2005) (acknowledging that ascertainment of Parliamentary intent is notoriously difficult and oftentimes speculative, while arguing that legislative history, and Parliamentary debates in particular, are and should be used as evidence of that intent).

My faith in the empirical method is greater than Lord Steyn's. Brushing the cost of litigation aside,³² I believe it is possible to identify a common goal of multiple individuals acting in tandem and the goal's endorsement that prompted each of those individuals to act toward its realization. From an empiricist standpoint, there is nothing special in such joint-action scenarios that may well include actions taken toward the enactment of a statute by members of a legislative assembly (such as Parliament). I do fully agree, however, with Lord Steyn's third proposition. When a statutory provision is unclear, there is no empirically sound way of answering the all-important question that focuses on the lawmaker's choice of the provision's formulation. Going beyond the lawmakers' common goal that may or may not be ascertainable, this question focuses on the means for realizing this goal that the lawmakers deemed suitable. As indicated earlier, this question asks: "What did the lawmakers have in mind when they voted in favour of the words and the sentences that appear in the statute at bar?". When statutory words and sentences are unclear, the state of mind of the persons responsible for those words and sentences is unclear as well. As demonstrated by Lord Steyn, a ministerial explanation of the statute, akin to the explanation of the words "the cash equivalent of the benefit", cannot resolve this type of uncertainty. Hence, intentionalism is doomed.

C. Purposivism

Purposivism derives meaning from a provision's underlying purpose. To that end, it carries out a normative analysis (as contrasted with the strictly empirical mode of intentionalism).

³² Because statutory interpretation sets up a precedent to be followed in multiple cases without contestation, the cost of litigating over a meaning of an unclear statutory provision should be discounted by this saving. Cf. Richard A. Posner, *Economic Analysis of Law* 743–44 (8th ed. 2011) (analogizing precedent to "a stock of knowledge that yields services over many years to potential disputants in the form of information about legal obligations"). Lord Steyn's critique of *Pepper v Hart* did not take this economy of scale into consideration.

Oftentimes, purposivism employs the “mischief rule” to identify the problem the law aimed to solve. For example, granted that the “no vehicles in parks” prohibition was enacted to reduce pollution, purposivist judges might limit “vehicles” to fossil-fuel-powered transport, even if the drafters intended a broader ban and the word “vehicle” is generally understood to include all means of transporting people or goods.

This approach prioritizes functionally commendable outcomes over fidelity to the text and to the drafters’ intent. Critics of purposivism argue that it involves judicial overreach, as judges might often impose their own views of the statute’s unstated purpose. On the opposite side, purposivism is praised for adapting statutes to evolving societal needs, as is the case with the interpretation of “vehicle” that limits the command “no vehicles in parks” to fossil-fueled means of transportation.

My critique of purposivism employs argument from impossibility. Specifically, I argue that purposivism offers no guidance as to the means that would be legitimate for judges to utilize in order to promote the purpose of the statute at bar. Granted that this purpose is known or readily ascertainable, and that the statute does not authorize its promotion by every possible means—what exactly are the means that judges can and cannot use? This question has no answer, and for that reason purposivism is a non-starter.

To illustrate this point, consider the famous dismissal of a criminal appeal filed by two sex workers, Marie Theresa Smith and Christine Tolan, convicted by the Magistrates’ court of violating Section 1(1) of the Street Offences Act, 1959 (“SOA”).³³ The magistrate found that Smith, a prostitute, stood on the balcony of her apartment, tapped on the balcony railing with

³³ Smith v Hughes [1960] 2 All E.R. 859.

some metal object and hissed at men walking on the street beneath the balcony to attract their attention, start a conversation and invite them to come inside the premises with such words as “Would you like to come up here a little while?”. Based on this finding, the magistrate decided that Smith solicited clients “in a street” in violation of SOA and fined her £5.³⁴ The magistrate reached the same decision with regard to Tolan, who solicited men on four different occasions from her apartment’s window, and sentenced her to pay £30 in fines. On appeal, Smith and Tolan admitted that they solicited clients for prostitution purposes but argued that they did so from a private residence and not “in a street”.³⁵

The appellate court disagreed in a short decision penned by Lord Parker, C.J. Lord Parker observed that SOA “does not say ... that the person who is doing the soliciting must be in the street. Equally, it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street.”³⁶ If so, what makes the appellants guilty of soliciting prostitution clients “in a street”?

Lord Parker answered this question in purposivist terms:

‘For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being ... solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street.’³⁷

This reasoning suffers from *petitio principii*. Granted that SOA’s purpose was “to clean up the streets, to enable people to walk along the streets without being ... solicited by ...

³⁴ *Id.* at 859-60.

³⁵ *Id.* at 859.

³⁶ *Id.* at 861.

³⁷ *Id.*

prostitutes”—why assume that the statute allowed interference with the conduct taking place in private residences? After all, this conduct created no physical disturbance for people walking in the street, and the mere fact that it drew the men’s attention was, arguably, inconsequential. Would Smith be violating SOA if, instead of doing what she did, she decorated her private balcony with a banner saying “Would you like to come up here a little while? Marie Theresa”? If yes, why consider such conduct an action taking place “in a street”? And if not, how does such conduct differ from what Smith and Tolan actually did in their private residences? Arguably, the fact that a prostitute’s solicitation reaches a street does not entail that a conduct creating that effect—the actus reus of the SOA violation—takes place “in a street” as well.

This criticism of the court’s decision³⁸ does not suggest that Smith and Tolan should have been acquitted. Rather, it establishes a single, yet undeniable, observation, fatal to purposivism: purposivism is incapable of resolving disagreements as to the propriety of the means that judges are authorized to prescribe for attaining the purpose of the statute at bar. The court’s decision in *Smith v Hughes*, to use its own language, helped “cleaning the streets” from disturbances that SOA’s drafters considered socially undesirable. However, the cost of attaining this result, manifested in a curtailment of the freedoms enjoyed by individuals within the borders of their residencies, was not insignificant and—critically—had no authorization in the statute’s purpose or words.

³⁸ For a nearly similar criticism of *Smith v Hughes*, see Glanville Williams, *Textbook of Criminal Law* 13 (1983) (spotting a fallacy in the Court’s reasoning from the premise “men on a street were solicited by a prostitute” to the conclusion that the act of solicitation took place on a street as well).

Another good illustration of the “means problem” that plagues purposivism beyond the possibility of repair can be found in *Corkery v Carpenter*³⁹—a case featuring a drunk bicycle rider who was convicted (inter alia) pursuant to Section 12 of the Licensing Act 1872 for being drunk in charge of a “carriage” on a highway. On appeal, the rider did not contest the allegation that he was drunk. Instead, he argued that bicycle was not a “carriage”.⁴⁰

The appellate court disagreed.⁴¹ Lord Goddard, C.J., who wrote the court’s decision, reasoned that “The first thing to do ... is to see what was the purpose of the particular section” and that “it is clear that the word “carriage” is wide enough to include a bicycle for this purpose”.⁴² This is because “the object of the Act is clear: it is the protection of the public and the preservation of public order; and for this purpose ... a carriage can include any sort of vehicle, certainly a vehicle which is capable of carrying a person; and, it may be, a vehicle capable of carrying goods”.⁴³ Both the appellate court and the court below were aware of the fact that common language does not normally treat “bicycle” as a carriage. The reported statement of the facts of the case even included a citation from a then-popular song, *Daisy Bell*, that explicitly distinguished between the two.⁴⁴

This reasoning is deficient. A drunk biker on a highway is obviously detrimental to public order. Yet, there is no reason to believe that the statute in question was put in place to criminalize *any disturbance* of public order on a highway, including drunk biking, as opposed to hazards coming from drunk drivers of fast-moving vehicles. For example, a

³⁹ *Corkery v Carpenter* [1951] 1 K.B. 102.

⁴⁰ *Id.* at 104-05.

⁴¹ *Id.* at 105-07.

⁴² *Id.* at 105.

⁴³ *Id.*

⁴⁴ *Id.* at 103 (“Daisy, Daisy, Give me your answer, do! ... It won't be a stylish marriage, I can't afford a carriage, but you'll look sweet upon the seat of a bicycle built for two!).

drunk carrier of a stroller with a baby in it, who walks on a highway, is at least as detrimental to public order as a drunk biker, but a stroller cannot be considered a “carriage” despite the fact that it is capable of carrying a person. Criminalization of certain types of conduct comes at a high social cost,⁴⁵ and for that reason not all bad behaviors are criminal.⁴⁶ This observation does not prove that Section 12 of the Licensing Act 1872 did not criminalize drunk biking on a highway, but it does establish that no such criminalization can be derived from the Section’s purpose. Purposivism does not work.

II. From Collapse to Reconstruction: The Rise of Probabilism and Pragmatism

The originalist methods of statutory interpretation—textualism and intentionalism—need to account, respectively, for the uncertainties accompanying statutory words and sentences and drafters’ intents. These uncertainties make the *per se* rules of both textualism (“text is decisive”) and intentionalism (“drafters’ intent is decisive”) unworkable. The adherence to these *per se* rules and the consequent failure to account for—and factor into court decisions—the uncertainties accompanying statutory words and sentences and drafters’ intents make each of those methods dysfunctional. The uncertainties that need to be accounted for are factual: all of them derive from the interpreters’ inability to provide a uniquely correct empirical answer to the questions (1) What do the words and the sentences that appear in the statute at bar, as commonly understood, mean to say?; and (2) “What did

⁴⁵ See Williams, *supra* note 38, at 33 (“The general policy is not to use the criminal law if the civil law is sufficient to keep the conduct in check.”). For a similar rationalization couched in economic terms, see Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 *L. & Contemp. Probs.* 61, 61-64 (2012), and writings cited therein.

⁴⁶ See Williams *supra* note 38, at 33.

the drafters of the statute at bar intend to communicate as a matter of fact by using those words and sentences?”.

To properly handle these uncertainties, judges have no choice but to rely upon probability conceptualized in terms of relative plausibility or, as it is often called, “reasoning to the best explanation.”⁴⁷ Within this framework, “best explanation” is one that scores most on coherence, consistency, completeness, articulation, simplicity, and evidential support or consilience.⁴⁸ This choice is dictated by the fact that mathematical calculus of chances is neither suitable nor can be operationalized in the context of statutory interpretation.⁴⁹

Accordingly, judges must base their decisions on the most probable scenario, given what they get to know about the drafters’ intent with respect to the linguistically acceptable meanings of the statute.⁵⁰ More precisely, judges need to ask and answer the following question: “What did the drafters of the statute at bar most likely intend to communicate by choosing the words and the sentences that appear in the statute?”⁵¹ To answer this question correctly, judges must abandon the *per se* rules of textualism and intentionalism. The methodological shift from the absolutist “yes or no” approach to the relative plausibility of the statute’s meanings—determined by the balance of favourable and unfavourable evidence that provides the best explanation as to what the statute does and does not say—changes the rules of the judges’ inquiry. Under probabilism, judges ought to consider *all available*

⁴⁷ For conceptualization of probability in terms of “relative plausibility” or “reasoning to the best explanation”, see Michael S. Pardo & Ronald J. Allen, Juridical Proof and the Best Explanation, 27 *L. & Phil.* 223, 227-42 (2008).

⁴⁸ *Id.* at 227-36.

⁴⁹ See Stein, *supra* note 1, at 1401-04. Note that there is a general tension between legal reasoning and statistical proof: see Pardo & Allen, *supra* note 47, at 243-61.

⁵⁰ See Stein, *supra* note 1, at 1401-04.

⁵¹ *Id.* at 1400, 1401-04.

evidence indicating what the statute’s words and sentences possibly mean and what the drafters possibly intended to communicate by choosing those words and sentences.⁵² While considering the totality of the evidence, judges should accord no a priori preferences to the text, to the drafters’ intent, or to the statute’s history. Failure to consider all relevant evidence on the merits would distort two probability estimates at once: (1) how probable is the meaning that judges attribute to the text of the statute; and (2) how probable is the intent that judges ascribe to the statute’s drafters. The next and final step that judges need to take is this: judges must adopt the statutory meaning that appears to be most probable under the abovementioned criteria.⁵³ As a result, both textualism and intentionalism transform into an altogether different modality, identified as probabilism.⁵⁴

To illustrate this transformation, return to my discussion of the flick-knife case, *Fisher v Bell*, and ask the following question: Did the words “offer for sale” that appeared in ROW certainly refer to an “offer” as understood in contract law? From a purely linguistic standpoint, the words “offer for sale” may describe an interaction between two or more individuals that may or may not create a contract upon the offer’s acceptance. A simple example here is a house or a car carrying a banner “FOR SALE”. For obvious reasons, a passer-by cannot create a contract by telling the house’s or the car’s owner “I buy it”. Yet, the banner “FOR SALE” indicates that people interested in buying the house or the car are invited to discuss the purchase. In this sense, the banner “FOR SALE” constitutes an “offer for sale” (Interpretation A). That being said, it is possible that the drafters of ROW used the words “offer for sale” as understood under contract law, as opposed to just “an invitation to

⁵² *Id.* at 1400.

⁵³ *Id.*

⁵⁴ For illustrative American examples of this transformation, see *id.* at 1410-23.

treat” (Interpretation B). Whether the drafters did or did not intend to adopt this understanding of “offers for sale” is uncertain. As a result, one cannot prefer interpretation A over interpretation B on textualist or intentionalist grounds.

Note, however, that the words “offer for sale” were designated by the drafters of ROW to be an element of a criminal offense. For that reason, it is hard to believe that the drafters’ desire to criminalize offers to sell flick knives depended on the offer’s proximity to create a valid contract. Rather, the drafters have most likely intended to criminalize public endangerment originating from the availability of flick knives and other potentially offensive weapons. More generally, formation of a contract does not normally constitute a condition for imposing criminal liability upon people negotiating a deal. When Bonnie says to Clyde “Let’s rob this bank” to hear the response “We will”, this conversation is short of creating a fully blown agreement, but, arguably, does constitute a criminal conspiracy.⁵⁵ Hence, it is at least more probable than not that the words “offer for sale” that appeared in ROW included invitations to treat. Interpretation A therefore turns out to be more probable than B, and for that reason probabilism requires judges to adopt Interpretation A.

Now consider purposivism along with what I have identified in Part I as the “means problem”. This problem originates from the uncertainty of the means that justify the realization of the purpose underlying the given statute. Assume that the purpose of the statute is known, but the statute is silent with respect to the orders that courts can and cannot give in order to bring that purpose to realization. The drafters’ intent with regard to those orders

⁵⁵ See Williams, *supra* note 38, at 422 (“The detailed means of carrying [the conspiracy] out need not have been settled. The conspirators can be convicted even though the wrong plotted was to be committed only in the distant future.”).

and how far they can go is unknown as well. Under such circumstances, purposivism leaves it to judges to determine the means for attaining the statutory purpose and to formulate the requisite orders and remedies accordingly. Making such decisions requires judges to consider the social cost of the means relative to the social value of having the statutory purpose realized. This cost-benefit analysis is necessary because the drafters of the statute could not possibly intend its purpose to be realized in every case at all costs. Arguably, the drafters' intended the statutory purpose to be realized at a cost that is lower than the benefit of having the purpose realized. This inescapable line of reasoning substitutes purposivism with pragmatism.

To illustrate this substitution and its inevitability, return to *Smith v Hughes* (the solicitation case)⁵⁶ and *Corkery v Carpenter* (the biker case).⁵⁷ Making an adequate purpose-oriented decision in the solicitation case requires judges to consider the social cost of criminalizing conduct taking place in a private domain. Arguably, criminalizing such conduct, even when it inconveniences passersby in a public street, goes beyond the limits of what the state can justifiably do. By the same token, making an adequate purpose-oriented decision in the biker case, requires judges to consider whether a drunk riding of a bicycle is as serious a misconduct as drunk car-driving to justify the imposition of criminal punishment. Arguably, it is not. Here too, the judges must consider the limits of criminal sanction. Both cases consequently force judges into a legislative decision-making—the core feature of pragmatism.⁵⁸

⁵⁶ [1960] 2 All E.R. 859.

⁵⁷ [1951] 1 KB 102.

⁵⁸ See Posner, *supra* note 11, at 1656ff (explaining pragmatism a forward-looking decision-making whereby judges substitute for a benevolent legislator that works toward augmentation of social welfare); Richard A.

Ronald Dworkin famously offered as escape route from this predicament by developing a fact-independent theory of hard cases.⁵⁹ This theory removes statutory interpretation, along with the entire body of common law, from the domain of empirical facts. As a result, statutory interpretation no longer suffers from the problem of uncertainty that dooms textualism and intentionalism to failure. Another key feature of Dworkin’s theory is reliance on moral principles—a feature that separates judging from legislative decision-making and prevents purposivism from transforming into pragmatism. According to Dworkin, judges facing hard cases should proceed analytically rather than empirically.⁶⁰ Specifically, in adjudicating a hard case, judges should elicit general moral principles from statutes, the constitution and common law doctrines, combine those principles into a coherent web (the “fit” requirement⁶¹) and then derive from this web the solution for the case at hand that counts as most attractive from a moral standpoint (the “justification” requirement⁶²). For example, this theory can resolve the solicitation and biker cases by invoking the principle of last resort according to which criminalization and punishment ought to tackle the most egregious types of antisocial conduct.⁶³ Whether a drunk biker on a highway or a sex worker who solicits clients from a private balcony engages in such a conduct is less than certain. If so, judges should limit the scope of the criminal prohibitions in both cases to clearcut

Posner, *The Federal Judiciary: Strengths and Weaknesses* 80, 261, 385-90 (2017) (same); see also Amul R. Thapar & Benjamin Beaton, The Pragmatism of Interpretation: A Review of Richard A. Posner, the Federal Judiciary, 116 *Mich. L. Rev.* 819, 827 (2018) (criticizing “substantive pragmatism” for “unhelpfully [encouraging] judges to strip away the disciplining formalism of textual and precedential interpretation to decide cases based on preferred outcomes”).

⁵⁹ Ronald Dworkin, *Law’s Empire* 246-50, 255-60 (1986).

⁶⁰ *Id.* at 255.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See, e.g., Douglas Husak, The Criminal Law as Last Resort, 24 *Oxford J. Legal Stud.* 207, 207 (2004).

violations of the applicable statute.⁶⁴ In the solicitation case, a clearcut violation only occurs when the solicitation takes place in its entirety in a public place—typically, on a street. In the biker case, the drunk biker commits no clearcut violation because “carriage” typically does not include bicycles.

Dworkin’s critics have argued that his theory is descriptively incorrect,⁶⁵ normatively unattractive,⁶⁶ and operationally not viable.⁶⁷ I will not be pursuing any of these lines of critique. Instead, I will question whether the fit-justification mechanism can generate *legal* outcomes under ideal conditions, conceptualized by Dworkin with the help of Hercules—a fictional and morally omniscient judge.⁶⁸ Assume, as Dworkin does, that Hercules has access to all available moral principles and that his command of metaethics allows him to properly weigh those principles against each other.⁶⁹ Based on that assumption, ask the following question: What makes Hercules’s decision to prefer one moral principle over another law of the land? For example, when Hercules prefers the “last resort” principle to limit the scope of the criminal prohibition in the biker case over the social utility principle that calls for keeping drunk bikers away from highways—what makes this decision legal? And if Hercules’s

⁶⁴ See Glanville Williams, *Criminal Law: The General Part* 586-92 (1961) (explaining and illustrating the rule of strict construction); Note, The New Rule of Lenity, 119 *Harv. L. Rev.* 2420, 2422–23 (2006) (describing the rule of lenity); Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 *Sup. Ct. Rev.* 345, 358 (attesting that the lenity rule has a well-established history in English law). For common law origins and early applications of the lenity rule see 1 *Blackstone’s Commentaries on the Laws of England* *88 (1769). For important American Applications, see *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); *Skilling v. United States*, 561 U.S. 358, 410 (2010) (interpreting criminal statute by using lenity as a fallback principle preceded by language, context and the rule against vagueness).

⁶⁵ See, e.g., Allan C. Hutchinson, Indiana Dworkin and Law’s Empire, 96 *Yale L.J.* 637 (1987).

⁶⁶ See, e.g., Jon Mahoney, Objectivity, Interpretation, and Rights: A Critique of Dworkin, 23 *L. & Phil.* 187, 187-222 (2004).

⁶⁷ See, e.g., Stanley Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 *Tex. L. Rev.* 551, 553-54 (1982).

⁶⁸ See Dworkin, *supra* note 59, at 239-44.

⁶⁹ *Id.*

weighing of the two principles leads him to conclude that bicycle is a “carriage” for purposes of the Licensing Act—what makes that decision legal as well? Put differently, granted that Hercules is savvy and knowledgeable, what makes him a legal authority, as distinguished from a high-end moralist?

To make Hercules a legal authority and treat his moral tradeoffs as part of the law, Dworkin’s theory needs to inject natural law into the law of the land. Unsurprisingly, Dworkin did exactly that by postulating that law is a subset of political morality and as a result legal reasoning inevitably involves moral reasoning.⁷⁰ That law has moral content in it can hardly be denied. Yet, what this moral content is; whether it can be translated into a coherent web of principles; and whether these principles make law a subset of political morality are irreducibly factual questions. The answer to those questions depends on the specifics of the legal system. To find out what these specifics are, judges must carry out a fact-finding investigation rather than moral deliberation. This investigation must identify the lawmaker’s commands, goals, usage of words and sentences, and the circumstances surrounding all of the above.

Law must speak authoritatively: all of its commands must come in the form of protected reasons that originate from the lawmaker.⁷¹ This fundamental requirement does not disappear when the contents of law are uncertain. Satisfying this requirement under Dworkin’s system is well-nigh impossible. As a result, after acknowledging the failures of

⁷⁰ *Id.* at 1 (“There is inevitably a moral dimension to an action at law ...”). See also T. R. S. Allan, *Law As a Branch of Morality: The Unity of Practice and Principle*, 65 *Am. J. Juris.* 1 (2020).

⁷¹ See Joseph Raz, *The Authority of Law: Essays on Law and Morality* 18 (1979).

textualism, intentionalism and purposivism, faithful interpreters of the law must choose between probabilism and pragmatism.

III. Apples and Oranges? Probabilism vs. Pragmatism

The celebrated House of Lords' decision in *Royal College of Nursing v DHSS*⁷² (the *RCN* case) best illustrates the inevitability of statutory interpreters' choice between probabilism and pragmatism. This decision interpreted Section 1(1) of the Abortion Act 1967, according to which "a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner". Back in 1967, the words "termination of pregnancy" referred to a surgical procedure that ended the patient's pregnancy by extracting the unwanted fetus from her womb. In early seventies, things have changed. Advances in the medical science made available the induction: an abortion procedure carried out by pumping a chemical fluid—prostaglandin—into the patient's womb to force a premature labour that expelled the fetus from her body.⁷³ The question brought before the House of Lords was whether this procedure can be carried out by a nurse upon the instructions coming from a qualified medical practitioner—a physician who examined the patient and made the decision to terminate her pregnancy by induction.

Put differently, the question the Law Lords had to answer was this: Would the statutory requirement that a pregnancy termination be performed by a physician be satisfied when a physician prescribes the induction procedure and instructs a skilled nurse to perform it under his or her supervision from afar? The DHS formed the opinion that "the termination can

⁷² [1981] A.C. 800.

⁷³ *Id.* at 803 (procedure described in the Court of Appeal by Lord Denning, M.R.); 820 (brief description of the same procedure by Lord Wilberforce).

properly be said to have been termination by the registered medical practitioner provided it is decided upon by him, initiated by him, and that he remains throughout responsible for its overall conduct and control in the sense that any actions needed to bring it to conclusion are done by appropriately skilled staff acting on his specific instructions but not necessarily in his presence”.⁷⁴ The Royal College of Nurses (RCN) disagreed with that opinion and petitioned for a declaration that the physician must either perform the induction procedure by himself or herself or be present when a nurse carries out the procedure upon his or her instructions. The trial court refused to issue a declaration that the DHS opinion was wrong as a matter of law,⁷⁵ but the Court of Appeal agreed with the RCN.⁷⁶

The House of Lords reinstated the trial court’s decision by a narrow majority consisting of Lords Diplock, Keith of Kinkel and Roskill, against the dissent that came from Lords Wilberforce and Edmund-Davies.⁷⁷ The majority based their decision upon what two of the Law Lords explicitly described as purposive interpretation of Section 1(1).⁷⁸ In the words of Lord Diplock, “Whatever may be the technical imperfections of its draftsmanship, however, its purpose in my view becomes clear if one starts by considering what was the state of the law relating to abortion before the passing of the Act, what was the mischief that required amendment ...”.⁷⁹ Lord Keith of Kinkel, in turn, relied on “policy and purpose of the Act which was directed to securing that socially acceptable abortions should be carried out under

⁷⁴ *Id.* at 800.

⁷⁵ *Id.* at 806 (decision summarized in the Court of Appeal by Lord Denning, M.R.).

⁷⁶ *Id.* at 806-07 (Lord Denning, M.R.); 810 (Brightman L.J.); 814 (Sir George Baker).

⁷⁷ *Id.* at 838.

⁷⁸ Lord Roskill stated that reached the conclusion that the trial court’s decision was correct “simply as a matter of the construction of the Act of 1967.” See *id.* at 838.

⁷⁹ *Id.* at 825.

the safest conditions attainable.”⁸⁰ The dissenters, in turn, relied on textualism. Lord Wilberforce insisted on finding the answer to the question presented “in the terms of the Act itself”.⁸¹ In the same vein, Lord Edmund-Davis decided that the “simple words” of the Act “must not be distorted in order to bring under the statutory umbrella medical procedures to which they cannot properly be applied, however desirable such an extension may be thought to be.”⁸²

Alas, as I demonstrate below, these interpretive methodologies do not actually support the two conflicting decisions. As far as purposivism is concerned, there is no way to connect the purpose underlying Section 1(1) to the prostaglandin-based abortion procedure. This procedure was not merely unknown at the time of the Section’s enactment: it was a paradigm-shifting surgery-free breakthrough. Whether the core idea of Section 1(1)—entrusting abortions in the hands of qualified physicians alone—should stay intact following that major change is a question that has no answer. This question has no answer because raising it goes against the stated purpose of Section 1(1), and because an interpretive methodology that strikes at the heart of the statute’s purpose cannot be associated with purposivism.

On the side of the dissenters, textualism did a slightly better job, but ultimately did not deliver. To see why, consider an abortion procedure that did not exist prior to the enactment

⁸⁰ *Id.* at 835. Lord Roskill was less clear in that regard. He decided that “If one construes the words “when a pregnancy is terminated by a registered medical practitioner” in section 1 (1) as embracing the case where the “treatment for the termination of a pregnancy is carried out under the control of a doctor in accordance with ordinary current medical practice” I think one is reading “termination of pregnancy” and “treatment for termination of pregnancy” as virtually synonymous and *as I think Parliament must have intended* they should be read”. See *id.* at 838 (emphasis added).

⁸¹ *Id.* at 822.

⁸² *Id.* at 831.

of Section 1(1) and that involves actions that properly trained nurses perform better than doctors (drawing blood works here as a good analogy). Correspondingly, assume that the applicable medical protocol requires that nurses, rather than doctors, carry out those actions when instructed to do so by a doctor. Would a nurse following this protocol fit the description of a person who actually *terminates* pregnancy? This pivotal question formed substantial part of the reasoning adopted by Lords Diplock and Roskill.⁸³ If the answer to this question is positive, why is it so, given that the dominant cause that put the pregnancy to an end was the doctor who made the abortion decision and instructed the nurse to do her part in the procedure? Put differently, given that the pregnancy would not have been terminated if the doctor were to make a different decision, and that it could still have been terminated had the nurse not participated in the procedure—why attribute the termination outcome to the nurse? The causation issue here is critical, for if the nurse can be described as a person who terminated the patient’s pregnancy, why not expand the responsibility for this outcome to the hospital’s employees that fixed the patient’s bed and did other necessary preparations for the procedure on the doctor’s instructions? For obvious reasons, textualism cannot resolve substantive issues of causation such as this one.⁸⁴ Absent a statutory text that creates an irrebuttable (or near irrebuttable) presumption of causation, such issues cannot be resolved on textual grounds.⁸⁵

⁸³ See *id.* at 828-29 (for Lord Diplock’s opinion); 837-38 (for Lord Roskill’s opinion).

⁸⁴ This point was famously made by H.L.A. Hart and A.M. Honorè. See H.L.A. Hart & A.M. Honorè, *Causation in the Law* 1-2, 32-44, 62-83 (2d ed., 1985) (identifying the inherent complexity of causal language and explaining that causal statements in law implicate the interplay between explanation and “attribution”).

⁸⁵ This is true in particular about cases that require assignment of “degrees of causation” as a reason for attributing liability to multiple actors. See *id.*, at 122-27; 233-34.

Unsurprisingly, the majority decision in the *RCN* case incorporated plainly pragmatist reasons, alongside the allusion to purposivism coming from Lords Diplock and Kieth of Kinkel. According to Lord Diplock, Section 1(1) suffers from “the technical imperfections of its draftsmanship”⁸⁶ that can be overcome by considering its background and purpose.⁸⁷ These factors included Parliament’s shift toward the pro-choice policy manifested by the desire to legalize abortions that are medically safe while protecting pregnant women from “back-street abortions”.⁸⁸ Hence, although “the wording and structure of the section are far from elegant”, “the policy of the Act ... is clear. There are two aspects to it: the first is to broaden the grounds upon which abortions may be lawfully obtained; the second is to ensure that the abortion is carried out with all proper skill and in hygienic conditions.”⁸⁹ Lord Diplock then estimated that “Parliament contemplated that (conscientious objections apart) like other hospital treatment, [the induction procedure] would be undertaken *as a team effort* in which, acting on the instructions of the doctor in charge of the treatment, junior doctors, nurses, para-medical and other members of the hospital staff would each do those things forming part of the whole treatment, which it would be in accordance with accepted medical practice to entrust to a member of the staff possessed of their respective qualifications and experience.”⁹⁰

This estimation was the core component of Lord Diplock’s decision.⁹¹ Yet, whether it was factually correct was unclear at best given the presence of a different scenario, namely, that Parliament intended to afford abortion patients maximal safety by requiring that abortions

⁸⁶ [1981] A.C. at 825.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 827.

⁹⁰ *Id.* at 828 (italics are mine).

⁹¹ *Id.* at 828-29.

be carried out only by doctors or, at a minimum, in the doctor's presence. Furthermore, because back in 1967 the induction procedure did not exist and abortions could only be performed surgically by physicians, it is hard to imagine that Parliament intended to allow physicians to delegate any part of their job to nurses. Once it is clear that such delegation cannot plausibly be attributed to Parliament, it becomes impossible to explain—let alone justify—Lord Diplock's decision on purposivist (let alone intentionalist) grounds. Lord Diplock's rationalization that team effort in carrying out the induction procedure was somehow contemplated by Parliament should therefore be understood to convey what Parliament *would have done* had the induction procedure been available when it drafted the Abortion Act. Combined with the strong pro-choice rationale adopted by Lord Diplock,⁹² this interpretive move unmistakably signals pragmatism—a decisional framework whereby the judge assumes the legislator's role and tries to emulate its decision.⁹³

The reasoning adopted by Lords Keith of Kinkel and Roskill, who agreed with Lord Diplock's decision, was unabashedly pragmatist. Lord Keith of Kinkel explicitly described the interpretation of Section 1(1) that authorizes “the procedures under consideration” as “more satisfactory” from a substantive point of view.⁹⁴ Lord Roskill, in turn, observed that the interpretation making an induction procedure sanctioned by a physician and carried out by a nurse unlawful, and hence criminal, would transform into a jury instruction to convict both the physician and the nurse. According to him, this instruction “would ... be given with reluctance and acted upon, if at all, with dismay.”⁹⁵ For that reason, Lord Roskill concluded

⁹² According to Lord Diplock, the first policy aspect of the Abortion Act 1967 “is to broaden the grounds upon which abortions may be lawfully obtained” See *id.* at 827.

⁹³ See *supra* note 58 and sources cited therein.

⁹⁴ [1981] A.C. at 835.

⁹⁵ *Id.* at 838.

that Section 1(1) ought to be interpreted as broadly as opined by the DHS. These two opinions expressly alluded to practical consequences, untied to Parliament’s actual contemplation as a reason for preferring one interpretation over another. Such allusions echo a cost-benefit analysis—one of the salient features of the pragmatist school of statutory interpretation.⁹⁶

The dissent written by Lord Wilberforce emphasized that there is “one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question “What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?” attempt themselves to supply the answer”.⁹⁷ Lord Edmund-Davis, too, insisted that his decision in the *RCN* case originated from purely textual reasons.⁹⁸ However, as I already noted, the statutory words “pregnancy is terminated” have no plain textual meaning when applied to a multiparticipant abortion procedure, aptly described by Lord Diplock as “a team effort”.⁹⁹ For reasons I already provided, looking for Parliament’s intent in a case like this is fruitless.¹⁰⁰ Doing so also hardly fits intentionalism as commonly understood, as this modality focuses on the drafters’ actual, rather than hypothetical, contemplations.¹⁰¹

⁹⁶ See *supra* note 58 and sources cited therein. See also Anita S. Krishnakumar, Practical Consequences in Statutory Interpretation, 139 *Harv. L. Rev.* (forthcoming), available at <http://dx.doi.org/10.2139/ssrn.5168470> (spotting and analyzing allusions to practical consequences in decisions self-identified as textualist).

⁹⁷ [1981] A.C. at 822.

⁹⁸ *Id.* at 831-32.

⁹⁹ *Id.* at 828.

¹⁰⁰ See *supra* notes 20-32 and accompanying text.

¹⁰¹ For thoughtful analysis of the “actual intent” requirement under intentionalism, see Caleb Nelson, What Is Textualism?, 91 *Va. L. Rev.* 347, 359-72 (2005). See also *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 625 (2020) (noting that “courts are not well equipped to imaginatively reconstruct a prior Congress’s hypothetical intent”); Emily Sherwin, Rules and Judicial Review, 6 *Legal Theory* 299, 305 (2000) (explaining that hypothetical intent “is quite speculative” and “can easily deteriorate into a question of what ought to happen, in which case ‘legislative intent’ adds nothing.”); Kevin C. Walsh, Partial

This analysis brings the discussion back to the uncertainty problem analyzed in Part II. A significant development unanticipated—and, consequently, not taken care of—by the statute’s drafters at the time of the enactment makes purposivism unworkable. The textualist approach fares no better, save for cases in which the statutory text remains *accidentally* unambiguous. Such cases are relatively rare because words and sentences that appear in statutes are general—a feature that makes those words and sentences overinclusive or underinclusive and consequently open to more than one plausible interpretation.¹⁰² The words “pregnancy is terminated” that appear in Section 1(1) aptly illustrate this feature.

Among the available modalities, only two address the uncertainty problem. As I explained in Part II, these modalities are pragmatism and probabilism. When facing a genuine problem of statutory interpretation, judges must use one of these two modalities to resolve the problem. “Which of these modalities outperforms the other?”—is a very difficult question. Pragmatism has a virtue in that it considers the enhancement of society’s wellbeing directly from the legislator’s perspective. At the same time, unlike textualism, intentionalism, purposivism and probabilism, this method of statutory interpretation is completely *non-authorial*: it does not even purport to reconstruct—in factual terms—what the legislator’s choice for the problem at bar was, might have been or could have been. Under pragmatism, assuming that skilled nurses know well how to administer prostaglandin to an abortion

Unconstitutionality, 85 *N.Y.U. L. Rev.* 738, 753 (2010) (“The hypothetical legislative intent test gets around [the] absence of any actual legislative intent . . . but does so by posing a question whose answer often calls for rank speculation.”); Robert L. Stern, Separability and Separability Clauses in the Supreme Court, 51 *Harv. L. Rev.* 76, 78 (1937) (referring to “bad guesses by the judges as to the intent of the law makers”).

¹⁰² See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 31–34 (1991) (demonstrating that statutory rules are either underinclusive or overinclusive). For designs of legal commands attenuating this problem—“standards” and “catalogs”—see Gideon Parchomovsky & Alex Stein, Catalogs, 115 *Colum. L. Rev.* 165, 172–87 (2015).

patient without doctors' help, the majority's decision in the *RCN* case was unquestionably correct.

Probabilism, on the other hand, avoids addressing the enhancement of society's wellbeing on substantive grounds. Instead, it requires that judges identify on factual grounds what the statute's drafters most likely intended to communicate for the case at bar by using the words and the sentences they chose to use.¹⁰³ Under this criterion, Section 1(1) most likely communicates that a doctor in charge of the abortion procedure—any abortion procedure—assumes full responsibility for that procedure and cannot leave any part of it unattended. The delegation-to-nurses scenario is not impossible, but at the same time unlikely given the wording of the provision and Parliament's desire to keep abortions completely safe.

The upshot of the foregoing discussion is this: the choice between pragmatism and probabilism is a choice between welfare-maximizing utility and truth-maximizing epistemics. Pragmatism, when applied properly, will produce greater social utility than probabilism. However, this utilitarian gain will be coupled with a democratic loss. Under pragmatism, courts' interpretive decisions will be disconnected from the lawmaking authority—the legislature—thereby turning courts into benevolent dictators. For those who require that courts remain faithful to the legislature, opting for probabilism would consequently be a better choice.

¹⁰³ See Stein, *supra* note 1, at 1399-1401.

Conclusion

This Article demonstrated that the traditional modalities of statutory interpretation—textualism, intentionalism, and purposivism—are weakened by their unfulfillable epistemic ambitions, as each fails to provide a reliable method for uncovering the truth it needs. As a result, these modalities inevitably collapse into either probabilism—a search for the most likely meaning based on available evidence—or pragmatism, a modality that prioritizes outcomes that maximize social welfare in line with what the legislature would have decided under similar circumstances.

The choice between probabilism and pragmatism thus emerges as the central dilemma for statutory interpretation in contemporary legal systems. Probabilism offers the epistemic virtue of maximizing the truth in ascertaining the meaning of an unclear statute. Pragmatism, on the other hand, provides the utilitarian advantage of directly enhancing societal welfare, albeit at the cost of distancing judicial decisions from the legislature’s original commands. Ultimately, the Article contends that while both modalities have compelling strengths, the decision between them involves a fundamental—and thus far unresolved—tradeoff between democratic fidelity and social utility.