

A Prolegomena to Federal Statutory Interpretation:  
Identifying the Sources of Interpretive Problems

J. Gordon Christy\*

Introduction.

The Constitution allocates sole legislative authority to Congress and ultimate interpretive powers to the federal courts.<sup>1</sup> How to harmonize these powers has remained unclear for almost 220 years.<sup>2</sup> If Congress, the legislature, has the sole authority to legislate, and if the results of legislating are evidenced in statutes, written texts, approved by the legislature, may the courts, in the interpretive process, constitutionally add to or subtract from the substantive or remedial effect of the written provisions of those statutes, including express statutory definitions? In the absence of express statutory definitions, may the courts depart from the common, ordinary, or usual, including in special fields, technical meanings (collectively, as appropriate, “common meanings”), of the words and phrases the legislature uses in statutes?<sup>3</sup> Would not such additions, subtractions, and

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\* J.D. University of Texas at Austin. Associate Professor of Law and Director of Legal Analysis and Reasoning, Mississippi College School of Law. Professor Christy was previously Special Counsel to the Deputy General Counsel of Ford Motor Company, a partner in the Dallas, Texas, law firms of Johnson & Gibbs and Strasburger & Price, and Associate Professor of Law in the University of Oklahoma College of Law.

<sup>1</sup> U.S. Const. art. I, § 1; art. III, §§ 1 and 2. Both the executive and the various administrative agencies must interpret laws in the process of administering them. They, therefore, of necessity have interpretive power. That power is simply not the ultimate power. The final say resides with the federal courts.

<sup>2</sup> If one traces the doctrine of legislative supremacy in the Anglo-American tradition back to circa 1215, which is not entirely unreasonable, then harmonizing these powers has eluded jurists in the Anglo-American tradition for nearly 800 years. To put matters in an even longer-term perspective, the first known code of laws, the Sumerian Code of Lipit-Ishtar, was promulgated circa 2500 B.C. Francis R. Steele, *The Code of Lipit-Ishtar*, 52 Am. J. of Archeology 425 (1948). The need to distinguish the powers of the legislator from those of the interpreter of statutes apparently extends back over 4,500 years.

<sup>3</sup> With respect to any statute, the legislature clearly had the power to add to or subtract from the substantive and remedial provisions of the legislation enacted but did not do so. If the legislature did not exercise that power, can the courts constitutionally do so? The legislature, likewise, clearly had the power to provide special definitions for words and phrases used in statutes. If it did so, may the courts constitutionally depart from the legislatively assigned meanings of those words and phrases? If, on the other hand, the legislature selects given words and phrases to express the law and does not give them special meanings, i.e., does not provide special definitions, it would appear that the legislature had no intention of conferring

departures constitute legislating, a function reserved exclusively to the legislature? If courts, in the interpretive process may constitutionally depart from statutory text, including express definitions, and common meanings, what limits their authority to depart? There must be limits or there is no legislative supremacy. If, in the absence of clarifying theory, courts must, purely as a practical matter, on occasion depart from text and the common meanings of words and phrases, what prevents courts from abusing the interpretive power and becoming the ultimate legislators as well?

Until jurisprudence answers the foregoing questions, we will continue to have incredibly embarrassing lacunae of the most fundamental types in both constitutional law and legal theory. First, and most obviously, after operating under the Constitution for almost two hundred and twenty years, we still do not know how to give effect to the constitutional provision for legislative supremacy. Second, since we have no way of saying when statutes are interpreted properly, the law is a profession that, given the predominate role of statutory law in contemporary society,<sup>4</sup> in significant part cannot justify the results it produces.

There have been numerous attempts to answer the questions above. Although intense intellectual effort ordinarily results in substantial progress, that has not been the case with respect to statutory interpretation. Rather than improving, our understanding of statutory interpretation has deteriorated over time. Proposed answers have proliferated, especially in recent years,<sup>5</sup> and consensus has proved ever more elusive. There are currently at least fourteen theories of statutory interpretation in the United States alone

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any meanings but the common meanings. In light of that presumption, may the courts, in the interpretive process, legitimately depart from the common, standard, or usual meanings of those words?

<sup>4</sup> Antonin Scalia, A Matter of Interpretation 13-14 (1997).

<sup>5</sup> As William N. Eskridge, Jr., notes, since the early 1980s “theories of statutory interpretation have blossomed like dandelions in the spring.” Dynamic Statutory Interpretation 1 (1994).

and no telling how many variants of each.<sup>6</sup> In spite of the number theories available, or maybe because of it, Justice Scalia has candidly admitted: “. . . American judges have no intelligible theory of what we do most,”<sup>7</sup> which is to interpret statutes. One scholar, in a highly thoughtful article, has even been led to set forth what he believes to be grounds for “*reject[ing]* the notion that there *is* a ‘right’ way”<sup>8</sup> to interpret statutes and concluded that we simply “*cannot* resolve the debate.”<sup>9</sup> This scholar believes that the search for the correct interpretive regime must give way to an explanation of “the seemingly endless struggles to determine the appropriate judicial approach to legal language.”<sup>10</sup>

In reflecting on the chaotic state of the jurisprudence of statutory interpretation, the author was reminded of two facts. First, it is well known in cognitive science that solving a problem is often a function of first framing it properly. As the noted epistemologist Alvin Goldman observes: “The importance of how a problem is ‘represented’, or ‘framed’, cannot be underestimated.”<sup>11</sup> “One conceptualization of a problem can make it hard to solve, while another makes it [relatively] easy.”<sup>12</sup> In

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<sup>6</sup> William N. Eskridge, Jr., lists in the neighborhood of thirteen current theories or schools of statutory interpretation, *i.e.*, intentionalism, purposivism, textualism, a group under the heading of “jurisprudential theories” (including liberal, legal process, coherence, and normativist theories, feminist republicanism, deconstruction, social construction, and critical pragmatism), legal realism, and his own theory of dynamic statutory interpretation. *See id.* If we add in the observations of the critical legal studies movement, the number is pushed up to fourteen.

<sup>7</sup> Scalia *supra* n. 4, at 14.

<sup>8</sup> Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretive Debate*, 53 Emory L.J. 523, 558 (2004) (emphasis in original). We might even classify Professor Terrell’s views as a fifteenth theory of statutory interpretation.

<sup>9</sup> *Id.* at 525 (emphasis in original).

<sup>10</sup> *Id.* at 524.

<sup>11</sup> Alvin Goldman, *Epistemology and Cognition* 132 (1986).

<sup>12</sup> *Id.* Goldman illustrates this point with the following example from Michael Posner (“Rephrased from Michael Posner, *Cognition: An Introduction* (Glenview, Ill.: Scott, Foresman, 1973), pp. 150-151”):

Two train stations are 50 miles apart. At 2:00 P.M. two trains start towards each other, one from each station. Just as the trains pull out of the stations, a bird springs into the air in front of the first train and flies ahead to the front of the second. When the bird reaches the second, it turns back and flies toward the first. It continues to do this until the trains meet. If both trains travel at 25 miles per

addition, failure to frame a problem properly can be the result of an outright mis-identification of the problem. Mis-identification means that proposed solutions will not be solutions to the actual problem. Further, with mis-identification, a solution will not merely be difficult, it is likely to be impossible. Second, it is recognized in science that a plethora of competing but inadequate theories almost always signals an underlying failure properly to frame a problem or a mis-identification of the problem.<sup>13</sup>

Those facts led the author to hypothesize that the current conundrum regarding statutory interpretation must be due to a failure adequately to conceptualize and, possibly, even a mis-identification of the problems encountered in the interpretation of statutes. Since jurists generally focus solely on the problems that statutory rule systems present *after* they are formulated, the author began to suspect that it might prove useful to identify the problems we face in *formulating* statutory rule systems. The hypothesis that

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hour and the bird flies at 100 miles per hour, how many miles with the bird have flown before the trains meet?

Goldman points out:

If the problem is conceptualized in terms of the bird's *trajectory*, one must calculate how far the bird goes on each trip between the trains. The problem is then difficult. But if it is conceptualized in terms of flight *time*, it becomes trivial. The trains must travel one hour before meeting (50 miles at a closing speed of 50 miles per hour), and at 100 miles per hour the bird will fly 100 miles.

*Id.*

<sup>13</sup> See Thomas Kuhn, The Structure of Scientific Revolutions (3<sup>rd</sup> ed. 1996). As Stephen Pinker observes: "[I]f some phenomenon seems to make no sense no matter how we look at it, we are probably in ignorance of deep and far-ranging principles." Learnability and Cognition 1 (1991). By "deep," Professor Pinker means "below the surface," not necessarily "abstrusely remote." As Mark C. Barker notes: "The key to resolving a paradox often lies in the imagination. In a paradox where some experience points to one conclusion and other experience seems to point to its opposite, what is needed is not simply more experience. . . . [W]hat is needed is some new idea that can widen the space of hypotheses. Then the conflicting evidence that seemed to lead to contradictory conclusions can be seen to converge on this new possibility." The Atoms of Language 5 (2001). It is worth noting how simple many significant reconceptualizations have been. Nicolaus Copernicus' great insight was simply that things might be the other way around, i.e., that the planets revolve around the sun. Johannes Kepler realized that planets could travel in elliptical orbits. Einstein's theory of relativity in part grew out of the realization that since light travels at a finite speed, the way that different observers in the universe will order events will necessarily differ. And the geometers Lobatchewski, Helmholtz, and others realized that entire new geometries could be constructed by assuming that all lines that in Euclidean geometry are parallel meet at infinity or diverge at infinity. J. Alberto Coffa, The Semantic Tradition from Kant to Carnap: To the Vienna Station 41-61 (1991).

emerged was that only by first identifying in detail the problems faced in formulating statutory rule systems can we truly understand the problems encountered in interpreting statutes and, thereby, discover, or at least have a decent chance of discovering, an effective solution.

This article explains in detail the problems we face in formulating statutory rule systems. By way of introduction, the problems are that it is impossible *ex ante* fully to accomplish three essential tasks. First, it is *ex ante* often impossible fully to formulate and virtually always impossible fully to refine the purposes of a statutory rule system that addresses a complex underlying subject matter. Second, if the underlying subject matter is at all complex, it is *ex ante* impossible to formulate a statutory rule system that is substantively and remedially complete in light of its underlying purposes and other purposes simultaneously operative in the law. And third, it is *ex ante* impossible to ensure that the meanings of the words and phrases that comprise a statutory rule system are in all respects appropriate in light of those purposes. The three foregoing problems give rise to at least twenty-nine distinct sub-problems. The collective effect of these problems is that we regularly encounter situations that the parties who drafted a statute overlooked or failed to anticipate and, therefore, did not address. When we do, applying a statute in accordance with what may be called its “presumptive semantic content”<sup>14</sup> will all too often produce results that are not only legislatively unintended but random, accidental, arbitrary, and also, in varying degrees, irrational, unfair, or unjust.

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<sup>14</sup> The “presumptive semantic content” of a statute is the information encoded in the text on the basis of the words, phrases, and sentences employed, special definitions provided, and, in the absence of special definitions, the common meanings of the words and phrases employed, without regard to the larger context out of which the statute emerges. The presumptive semantic content of a statute may be divided into the “presumptive prescriptive content,” the rules, viewed as commands to courts, evidenced in the sentences of the text, and the “presumptive lexical content,” the common meanings of words and phrases employed and special statutory definitions.

Identification of the problems makes it clear that the above hypothesis is, indeed, correct. Jurists, who generally attribute the law related problems faced in the interpretation of statutes<sup>15</sup> to an ambiguous ambiguity,<sup>16</sup> have, in large part, both mis-identified and failed properly to frame the problems. The fundamental problems faced in connection with statutory interpretation are practical and are only most rarely caused by ambiguity. The solutions, accordingly, are not fundamentally linguistic. Since, as a society, we want our statutory rule systems to be purposively, substantively, and remedially complete, that is, effective, and to produce intended, consistent, and non-arbitrary (that is, rational and, on appropriate occasions, fair and just) results, interpreting a statute consists in determining when a statute should be given effect in accordance with its presumptive semantic content because the matters at issue were clearly to most likely

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<sup>15</sup> There are also linguistic problems associated with the interpretation of statutes. These problems result from an additional, equally important, failing in conceptualization. Jurists, like almost everyone, with the exception of cognitive scientists and linguists (the term now used not only for individuals who have mastered many languages but generally for scholars and researchers in the field of linguistics), do not have adequate conceptualizations of language and linguistic meaning, communication, and comprehension. That problem is only briefly addressed in this article (*see infra* note 17), but is fully addressed in a companion article.

<sup>16</sup> For example, the most exhaustive treatment of statutory interpretation on the American scene is Norman J. Singer's eight volume Statutes and Statutory Construction (2002). Based on a review of the literature, Professor Singer's treatise mentions ambiguity as the only source of the interpretive problems relating to statutes. As if that were not enough, juristic lore does not clearly distinguish between the types of ambiguity. There are, in fact, at least four primary phenomena that are denoted by "ambiguity." The most commonly denoted is conceptual, lexical ambiguity. Occasionally, vagueness is mentioned in connection with ambiguity, although seldom is there an attempt to understand vagueness in depth. (An exception is Timothy A. O. Endicott, Vagueness in the Law (2000).) In any event, as Part IV of this article explains, there is a second form of non-conceptual, lexical ambiguity that flows from the distinction between prototypical and conceptually identical but non-typical uses of words. *See infra*, Part IV, at 56. A third type of ambiguity has nothing to do with the meanings of words and noun and verb phrases *per se* but rather with the role that the denotatum or denotata of a word plays or play in a sentence or phrase. This is known as "syntactical ambiguity." Syntactical ambiguity occurs, for example in indirect discourse. In indirect discourse it is impossible to tell syntactically what is subject and what is direct object. Additional forms of syntactical ambiguity result from sentence constructions that do not make clear the scope of modifiers, i.e., adjectives and adverbs, or the particular referents of pronouns (anaphoric ambiguity). For a sophisticated discussion of syntactical ambiguity *see* Lawrence M. Solan, The Language of Judges 28-92 (1993). And finally there is a type of ambiguity that results when one says or writes something that appears to conflict with something else one holds to be true or claims to be an objective. In this instance the ambiguity is not linguistic at all. Rather the ambiguity relates to the beliefs or intentions and purposes of the communicator. The question in this latter case is which belief or intentions and purposes actually hold, or can the apparent inconsistencies somehow be harmonized?

within the contemplation the parties constructing the rule system and when, in contrast, the matters at issue were overlooked or not anticipated and proper application of a statute requires the much more complex, extensive, indeed, unending tasks of (1) clarifying and refining its underlying purposes, (2) completing inevitably incomplete statutory rule systems in light of their underlying purposes and other purposes simultaneously operative in the law, and (3) modifying the meanings of words and phrases used in statutory rules to bring those meanings into line with the foregoing purposes.<sup>17</sup>

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<sup>17</sup> This may appear to be a quite odd definition of “interpretation,” but it is, in fact, completely in line with the understanding of linguistic interpretation that contemporary linguistics has established. The process of linguistic interpretation is far more complicated and sophisticated than for millennia realized.

For millennia we have erroneously tended to view language as operating solely as a code. This view was first given philosophical respectability by St. Augustine in 400s. Anthony Kenney, Wittgenstein 153-54 (1973). For a discussion of the code theory of language see e.g., C. K. Ogden & A. I. Richards, The Meaning of Meaning 10-13 (1923); I John Lyons, Semantics 32-41 (1977). It is obvious that we do, in fact, use nouns and verbs to represent, e.g., things and actions; adjectives and adverbs to represent, e.g., qualities of things and actions; prepositions to represent, e.g., relations (e.g., “on” and “over”) and direction (e.g., “to” and “away”); phrases to represent, e.g., the things that nouns and verbs represent as modified by the qualities that adjectives and adverbs represent; syntax (in English, position in a sentence) to specify, e.g., subject and direct object; and grammar to represent, e.g., time (“-ed” indicates the past), gender, and number (“-s” represents the plural). Under the code view of language, that is fundamentally all there is to language. All linguistically communicated meaning (information) is encoded in meaning correlates of words, phrases, sentences, syntax, and grammar. By definition, a communicator encodes in language all, and only, the information the communicator wants the recipients of his or her communication to comprehend. Accordingly, on this view, all that recipients of linguistic communications can properly comprehend is the information they obtain by decoding. This view of language, which is at the foundation of textualism, renders it impossible to understand how the legislature could possibly mean more than or something other than the information derivable by decoding statutory text.

The code view of linguistic communication is now philosophically and scientifically known to be false. That is because it is seriously incomplete. In using language to communicate, we do much more than simply encode and decode. The linguistic discipline of pragmatics has revealed that, in accordance with the demands of epistemology, linguistic communicators intend and expect the recipients of their linguistic communications to comprehend, and the recipients may and should comprehend, all the information that is encoded in meaning correlates of words, phrases, sentences, syntax, and grammar *plus all the additional information that the recipients can properly infer from the combination of the linguistically encoded information and all other accessible, relevant information, including in particular, all accessible, relevant information regarding the communicator’s intentions and purposes.* See, e.g., the works cited *infra* notes 29 and 30. That is, linguistic interpretation, or comprehension, includes *both* the obvious encoding and decoding process as well as a sophisticated process of inference drawing that uses as premises all relevant information, including information that may first become available to or be recognized by either the communicator or recipient well after a linguistic communication is uttered or written. The result is that linguistic communicators always mean more than they say or write, meaning, or information, that is derivable by inference. In that regard, statutes are like all linguistic communications. There is absolutely nothing odd or unusual about drawing inferences based all relevant, available information and, on that basis, comprehending information with respect to statutes in addition to the information encoded in statutory text. What is somewhat unique about statutes is the sometimes massive

Given the constitutional provision for legislative supremacy, the process for accomplishing those tasks would ideally always produce objective, politically and ideologically neutral, determinate, and undoubtedly legislatively intended results. The conclusion to this article briefly introduces the interpretive process that the insights above entail.<sup>18</sup> Although that process cannot achieve the ideal, to borrow conceptually from the differential calculus, it can approach the ideal *qua* limit. If we recognize that results we must accept because the probabilities favor them, even if not certain, are determinate, we can in the vast majority of real world situations achieve highly determinate, objective, politically and ideologically neutral results that can be viewed as certainly to most likely intended by the legislature. And when we encounter situations in which the results are unquestionably not determinate, we can, nonetheless, provide justified outcomes, even if such outcomes may on occasion have some unavoidable political or ideological coloring. Since these situations tend to be at the fringes rather than the core of statutory rule systems, that is a quite acceptable, if not perfect, state of affairs.

#### Part I. The Juristic Background.

The juristic lore holds that the source of the problems we encounter in interpreting statutes lies in an ambiguous ambiguity. Ambiguity is supposedly not only the *cause* but *the* cause of our interpretive problems. Since ambiguity is typically associated with words and phrases, some jump to the conclusion that the primary problem in the interpretation of statutes is purely lexical, relating to the meanings of words and phrases.

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amount information that we must draw on relative to that encoded in the communicative text. Indeed, in interpreting statutes it is common that we must actively seek out and use in inferences a large volume of information that appears nowhere in text. Further, we must often infer immense amounts of information relative to that which is textually encoded. Properly viewed, legal reasoning is the process of performing consciously and explicitly the mental operations, in large part inferences, that, in typical communicative settings, we perform unconsciously and automatically.

<sup>18</sup> A full explanation of that interpretive process is reserved for a companion article.

That leads to the search for purely lexical solutions. However, scholars such as H. L. A. Hart, William Eskridge, Jr., and Richard Posner<sup>19</sup> point out that sometimes the problem in understanding what a statute provides traces to the fact that the matter at issue was not contemplated when the statute to be interpreted was formulated. That is clearly not a problem attributable to lexical ambiguity. While both Professor Eskridge and Judge Posner have proposed an especially insightful “faithful agent” approach to these problems, neither has worked out in detail the full implications of his insights. As will become clear, that, in fact, is a significant part of what needs to be done.

Part II of this article explains in general terms the origin and nature of problems encountered in formulating statutory rule systems. Part III expands on the insights of the scholars identified in the preceding paragraph and demonstrates that many of the problems we encounter with respect to statutes are not at all lexical in nature. When that is so, the search for lexical solutions is completely beside the point. Part IV of this article demonstrates that there are, indeed, lexical problems associated with statutes, of which lexical ambiguity is the least. But, Part IV also demonstrates that if the lexical problems are not clearly understood, it is not possible to respond to them intelligently. For example, when faced with what they take to be a lexical problem, some justices and judges resort to dictionaries in, what will become clear, is generally a vain attempt to find the correct statutory meanings.<sup>20</sup> The first mistake these justices and judges, and many

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<sup>19</sup> H. L. A. Hart, The Concept of Law 124-36 (2<sup>nd</sup> ed. 1994); Richard N. Posner, The Problems of Jurisprudence 269-73 (1990); William N. Eskridge, Jr., *Fetch Some Soup Meat*, 16 *Cardozo L. Rev.* 2209 (1995).

<sup>20</sup> There are several articles that discuss dictionaries as aids in statutory interpretation. *See, e.g.*, Samuel A. Thumma & Jeffery L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 *Buff. L. Rev.* 227 (1999) (an exhaustive article but for its failure to question the reliability and accuracy of dictionaries generally); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 *Harv. J.L. & Pub. Pol'y* 71 (1994); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 *Harv. L. Rev.* 1437 (1994).

legal scholars for that matter, make is blithely to assume that dictionaries are sound sources for word meanings, although the fact dictionaries often differ should have given them pause. In contrast, linguistic scholars who specialize in lexical semantics appear to be unanimously agreed that dictionaries are not reliable sources for word meanings.<sup>21</sup> Anyone who takes the time to work out the meaning of a word along the principles outlined by Paul Ziff,<sup>22</sup> Anna Wierzbicka,<sup>23</sup> and other experts in lexical semantics can confirm that fact for themselves.<sup>24</sup> So we are treated to the truly absurd spectacle of

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<sup>21</sup> “A definition expresses a hypothesis about the meaning of a particular word, and it is valid if it accounts correctly for the range of use of this particular word.” Anna Wierzbicka, Semantics: Primes and Universals 183 (1996). Unfortunately, “faith in dictionary definitions is based on an *illusion*.” “[D]ictionary definitions don’t offer anything like a faithful representation of a word’s meaning . . .” “Often, they don’t even try to provide a definition, but instead offer *more or less random lists of quasi-synonyms* . . .” *Id.* at 250, 240 (emphasis added). The problem, among others, is that the cost of producing truly reliable definitions would render any dictionary containing reliable definitions commercially unmarketable. *Id.* at 250. Equally important, it is not bloodless dictionary meanings that we need to know but the meaning of “words in the mind.” It is “words in the mind,” not words in dictionaries, that parties drafting statutes employ. However, “the mental lexicon is . . . a mammoth structure. The relationship between a book dictionary and the human mental lexicon may be somewhat like the link between a tourist pamphlet advertising a seaside resort and the resort itself.” “[A] book dictionary gives us a *spuriously neat*, static and *incomplete* view of the mental lexicon. The differences between words in the mind and words in books are . . . *profound*.” Jean Aitchison, Words in the Mind: an Introduction to the Mental Lexicon 14 (1994) (emphasis added). “[B]ook dictionaries . . . serve a useful, though limited purpose, enabling us to check on the conventional spelling of a word and to find out its *approximate* meaning. Indeed, if we did expect a book dictionary to include the same information as the mental lexicon, then we would undoubtedly require a fleet of lorries [trucks] to carry its microstored edition around in.” *Id.* “[O]rdinary dictionaries are limited in scope in comparison with the mental lexicon. Their organization is oversimple, their content is fixed and outdated, and they contain only a relatively small amount of information about each item.” *Id.* at 15.

<sup>22</sup> Paul Ziff, Semantic Analysis (1960).

<sup>23</sup> Anna Wierzbicka, Semantics: Primes and Universals (1996); Lexicography and Conceptual Analysis (1985).

<sup>24</sup> “[T]here are few things harder than constructing a good definition.” Anna Wierzbicka, Semantics: Primes and Universals 267 (1996).

[C]onstructing a definition which matches a word’s entire range of use is a huge task requiring much more work than most are prepared to put in; and the temptation to give up after the first two minutes or the first two hours may well be overwhelming. *Id.* at 241. A good example of the process required to establish a sound definition is provided by Paul Ziff in his attempt to define “good” in English. In doing so Ziff examined one hundred and sixty distinct uses of the word to insure that his definition adequately accounted for each. See Ziff, *supra* note 22. For examples of definitions worked out systematically by a leading lexical semanticist, see Anna Wierzbicka, Lexicography and Conceptual Analysis (1985).

august justices and judges arguing over which unreliable dictionary and which unreliable dictionary definition should be deemed authoritative.<sup>25</sup>

But there is a second and even greater mistake that these justices, judges, and legal scholars make. As Part IV makes clear, often the problem with words and phrases used in statutes is that the human lexicon does not at the time a statute is being formulated contain any word or phrase with a pre-existing meaning that is fully appropriate to the purposes of the statute at issue. When faced with that situation, the task of the court is not to pick any pre-existing meaning out of any dictionary, or even out of the aggregate existing mental lexicons of all English and non-English speakers, but rather for the first time in human history to construct a meaning that is sensible in light of the purposes of the statute at issue and other purposes simultaneously operating in the law. When that is in fact the task before the courts, resort to dictionaries for ultimate answers is doubly absurd. Without knowing it, justices and judges are looking in dictionaries for the supposedly correct non-existent meaning.

On still other occasions judges attempt to resolve lexical problems by resort to supposedly grammatical or syntactical canons of construction.<sup>26</sup> Legal scholars have rightly in significant part discredited this procedure.<sup>27</sup> In addition, resort to the supposedly grammatical or syntactical canons can also often be rejected on the grounds

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<sup>25</sup> Since lawyers and judges are unquestionably far more sophisticated about linguistic meaning than the typical layman, there is a tendency to believe we know more than we, in fact, do. It turns out that linguistic meaning is an extremely complex phenomenon. The author, through research in linguistics and reflection on that research, has identified over twenty distinct linguistic phenomena that pass under the name “meaning.” Jurists are neophytes compared with linguists, and it is time jurisprudence caught up with and incorporated the insights that linguistics has produced in over a century of scientific inquiry.

<sup>26</sup> Justice Scalia is one who sings the praises of the grammatical, or textual, canons. See Scalia, *supra* note 4, at 25-27 (1997). Wilson Huhn asserts that: “Textual canons . . . operate like rules of syntax in that they are used to infer the meaning of a rule from its textual structure.” *The Five Types of Legal Argument* 23 (2002).

<sup>27</sup> See, e.g., Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand. L. Rev. 579 (1992); Kent Greenwalt, *Statutory Interpretation: 20 Questions* 211 (1999).

that contemporary linguistics and cognitive science have made it clear that in many instances the linguistic assumptions underlying those canons are positively false or hold only in special circumstances that cannot blindly be presumed to prevail in every legal setting.<sup>28</sup> For example, the canon that clear and unambiguous language requires no interpretation is scientifically wrong. Contemporary linguistics has established that, with the possible exception of some purely formal mathematical or logical statements,<sup>29</sup> all communicative language requires interpretation, often at several levels.<sup>30</sup>

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<sup>28</sup> Neither have jurists provided unquestioned grounding for the substantive canons. As the article that is a companion to this article makes clear, with a little support from contemporary linguistics some of the substantive canons that are much maligned by textualists can be solidly grounded linguistically, epistemologically, and jurisprudentially (including constitutionally).

<sup>29</sup> Such statements are sometimes referred to as “eternal sentences.” See Robyn Carston, Thoughts and Utterances 29-32, 38-39, 65, 74-83 (2002). Jon Barwise and John Perry refer to such sentences as “nonefficient” in that they can convey only a single, timeless meaning:

One can imagine nonefficient sentences, sentences that make the same claim about the world no matter who says them and when. These are (roughly) what Quine calls *eternal sentences*. They contain no words like I, no demonstratives like THIS, no tense. One can imagine such sentences, but with the possible exception of sentences from mathematics it is not easy to produce examples. . . . [T]he efficient unit of meaning (whether expressions or something else) is the norm.

Situations and Attitudes 6 (1983). Some argue that all sentences are efficient, i.e., require interpretation. See Carston, *supra*, at 30-42.

<sup>30</sup> See, e.g., Dan Sperber & Deidre Wilson, Relevance: Communication & Cognition (2<sup>nd</sup> ed. 1995); Stephen C. Levinson, Presumptive Meanings: The Theory of Generalized Conversational Implicature (2000); Carston, *supra* note 29; A. J. Sanford & S. C. Garrod, Understanding Written Language: Explorations of Comprehension Beyond the Sentence (1981); Phillip N. Johnson-Laird, The Mental Representation of the Meaning of Words, 25 *Cognition* 189 (1987). Even a sentence as simple as “the cat is on the mat” requires significant interpretation. If the sentence is uttered as an actual communication, it will mean, depending on exactly who says it, when, and where, something like: “The cat<sub>(that this speaker is referring to)</sub> is<sub>(at 10:46a.m., on November 18, 2005, Central Time, U.S.A.)</sub> [elided—in (the speaker’s dining room)] on the mat<sub>(that the speaker is referring to and that is on the speaker’s dining room table).</sub>” A great deal of information, such as the specific cat, the actual time, and the actual place of reference (all the matter subscripted), that is “not said” would be understood not through decoding but through inferences from the totality of all available information.

Concerning the claim that words that are clear and unambiguous require no interpretation, there is the story related by Dan Sperber and Deidre Wilson. In 1930 two friends were discussing the Soviet Union. One, an optimist believed that Lenin and his successor, Stalin, had created the workers’ paradise. The other, a pessimist, claimed it was all a fraud. The optimist realized that the only way to settle the dispute was to visit the Soviet Union. He said: “I will go to the Soviet Union, see how things are, and write you and tell you. Now, although I am an optimist, I realize things are not always as they seem. If the Soviet Union is a police state and I cannot report truthfully, I will write what they want me to write, but I will write in purple ink.” The optimist left for his visit, and in due course a letter arrived. The letter was written in black ink. In it the optimist said that the Soviet Union was, indeed, the workers’ paradise. All workers lived in castles and dined on caviar. His final sentences read: “Consumer goods are so plentiful and inexpensive you would not believe it. You can buy everything you want with only one exception. You

In addition to the above, most justices and judges regularly resort to a somewhat vague legislative intent to find the meaning of words and phrases that legislators may have had in mind at the time of drafting.<sup>31</sup> They also regularly resort to statutory purposes as an aid in understanding both the meanings of words and phrases and entire statutory provisions.<sup>32</sup> Both these procedures are cognitively, linguistically, epistemologically, and jurisprudentially, including constitutionally, proper and sound—as far as they can take us. The problem is that the traditional resorts to legislative intent and statutory purposes have their limitations.<sup>33</sup> Again, drawing on the insights of scholars such as Hart, Eskridge, and Posner, if the matter at issue was not even remotely contemplated by the parties formulating the statute, there will certainly be no express legislative intentions regarding it in any of the traditional sources. Likewise, the statutory purposes ascertainable by traditional means, such as text and legislative history, will also fail to shed light on the matter. Traditional jurisprudence has no way of ascertaining the intentions of legislators in such circumstances and, inevitably, comes up short.<sup>34</sup>

There is, in addition an array of interpretive alternatives, none of which fully addresses the problems encountered in statutory interpretation, has achieved general

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cannot buy purple ink.” In this context the words “you,” “cannot,” “buy,” “purple,” and “ink” are not in the least bit ambiguous. Nonetheless, in the context above “you cannot buy purple ink” means: “The Soviet proclamations of the workers’ paradise are lies.” Adapted from Sperber & Wilson, *supra* at 170.

<sup>31</sup> The author has not yet found an adequate explanation of the concept of legislative intent. Sometimes the term appears to be limited to the intention to supply a specific meaning for a word or phrase. On other occasions it seems to include the intention to pursue specific purposes. In the instant discussion, nothing turns on sorting matters out.

<sup>32</sup> This is a time honored approach evidenced in Edmund Plowden’s theory as set forth in his 1574 report of *Eyston v. Studd*, 2 Plow. 459, 467, 75 Eng. Rep 688 (1574) and the commentary in the report of the Exchequer Chamber’s opinion in *Heydon’s Case*, 76 Eng. Rep. 637, 638 (1584).

<sup>33</sup> See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 13-47 (1994).

<sup>34</sup> There are, indeed, intentions, a relatively complex set of intentions, that we can, indeed, must, attribute to the legislature in these situations. That set is introduced briefly in the Conclusion to this article and examined in detail in the companion to this article. That article is entitled: *Statutory Interpretation: The Gordian Knot Untied*. This article is intended to loosen some of the stands of that knot.

acceptance, or clearly accords with the constitutional provision for legislative supremacy.<sup>35</sup>

Without understanding exactly what is it they are confronting, and reflecting on the chaotic state of jurisprudential interpretive theory, some scholars conclude that nothing constrains interpretive outcomes when statutes are at issue.<sup>36</sup> And, as noted above, at least one obviously very intelligent and deep thinking scholar has concluded that there is no right way to interpret statutes. Nonetheless, most jurists, especially practicing lawyers, adopt a sort of “Humean” attitude<sup>37</sup> and manage to work within the system, finding that despite the chaos in interpretive theory there is sufficient predictability in the way judges in fact decide cases that competent lawyers can give generally reliable advice. Judicial behavior is sufficiently consistent that outcomes are not all random—and neither are they all determined by the political proclivities of judges. Wilson Huhn has ably explained why that is so.<sup>38</sup> Specifically, he has shown that there are identifiable types of arguments that courts consider in interpreting statutes, and sometimes all or most of the arguments lead to the same result. Accordingly, even if traditional legal reasoning does not *compel* specific outcomes, it, nonetheless, very often

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<sup>35</sup> For a masterful and balanced critique of interpretive theories see Eskridge, *supra* note 33. Professor Eskridge clearly proves that statutory interpretation is dynamic, but he does not explain in full why it must be dynamic and how to circumscribe the dynamicism in a way that fully accords with the constitutional principle of legislative supremacy.

<sup>36</sup> See, e.g., Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 1 (1984); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1152 (1985); David Kairys, *Law and Politics*, 52 Geo. Wash. L. Rev. 243, 244 (1984).

<sup>37</sup> David Hume, one of the giants in modern philosophy, argued quite persuasively that, *inter alia*, one cannot empirically prove that physical objects persist when unobserved or discover any necessary connection between causes and effects. David Hume, *A Treatise of Human Nature* Part IV (2<sup>nd</sup> ed., L. A. Selby-Bigge ed., 1978) (originally published 1739-40). That seemed to him to leave open the possibility that the world could literally dissolve into chaos. He admitted, however, that as soon as he left philosophizing behind and entered the company of good friends he promptly forgot all about the problem. “I dine, I play a game of back-gammon, I converse with my friends; and when after three or four hour’s amusement, I wou’d return to these speculations, that I cannot find in my heart to enter into them any further.” *Id.* at 269.

<sup>38</sup> Huhn, *supra* note 26, at 83-89.

has the practical effect of producing quite predictable and specific outcomes. Nevertheless, individual litigants are at mercy of a multitude of interpretive theories. The very multiplicity of theories is itself one of the primary causes of indeterminacy in the law. Since different judges adhere to different theories, the random assignment of judges, even when panels of judges are convened, on many occasions unquestionably gives rise to randomly different outcomes. There is, thus, a regrettable, residual randomness in justice delivered. Justice is also more expensive than it would be if we had a uniform theory of interpretation that increased the percentage of predictable results. As things stand, many litigants have incentive to play the costly interpretive theory lottery.

## Part II. The Real Problems in Statutory Interpretation—an Overview.

Despite the juristic lore, ambiguity, in any of its aspects, is only most rarely the cause of the problems we face in interpreting statutes. It is the practical that problems we encounter in formulating statutory rule systems that virtually always cause our problems.<sup>39</sup> There are, as noted above, three primary practical problems that together give rise to at least twenty-nine distinct sub-problems. Conceptual, lexical ambiguity is

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<sup>39</sup> This became clear to the author as a result of his practice experiences. The author entered the practice of law in 1975, just as the Employee Retirement Income Security Act (“ERISA”) was taking effect. The provisions of what was originally ERISA are currently largely found at 29 U.S.C. §§1104-1144 and 1301-1461 and 26 U.S.C. 401-415 and 4974-4975 (2000). The author spent over twenty years in practice watching ERISA’s rule system grow through regulations, administrative agency rulings and opinion and advisory letters, and case law, as is indicated *infra* in Part III, pp. 30-36, below. In 1993 the author assumed responsibility for advising a major corporation of its responsibilities under the then recently enacted Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 1999). The same phenomenon repeated itself over the next ten years, albeit on a significantly smaller scale. It then became clear to the author that all statutes undergo the same evolution, an evolution that is not all that different from the evolution of the common law. The only substantial difference is that the legislature attempts from the beginning to paint more broadly than do the courts. But, in spite of the running start, statutes almost immediately raise problems identical to those encountered in the common law.

Lawyers, in fact, run into the identical problems in the drafting of contracts in connection with complex transactions and in drafting pension plans and stock option plans. Addressing in advance all the problems that might surface is simply impossible.

only one of those problems.<sup>40</sup> The problems that we indiscriminately call “ambiguity” are virtually always secondary problems that flow from the primary, practical problems. Statutory interpretation is, in significant part, addressing these practical problems.

To expand on what was said above, the first practical problem is that the subject matters underlying statutes are too complex, our initial understanding of those subject matters often too limited, and the competing purposes of the law almost always too complex to permit the *ex ante* formulation of fully refined statutory purposes. Rather, all statutory rule systems inevitably emerge with underlying purposes that are in various degrees unrefined. Occasionally, the underlying purposes are in significant respects inchoate. The second practical problem is that the incomplete initial understanding of the underlying subject matters, the less than fully refined purposes, the potentially infinite detail that needs to be addressed by all statutes that address complex subject matters, and the interplay of every statute’s purposes with other purposes the law is simultaneously pursuing (but that are largely beyond the horizon of awareness of the parties formulating any given statute as they focus on the problems at hand) render it impossible *ex ante* to formulate anything even approaching a complete statutory rule scheme. Even if statutory purposes are relatively completely refined, the remaining obstacles mean that the statutory rule systems that are designed to achieve them inevitably emerge incomplete in greater and lesser degree. In fact, any relatively complex statutory rule system will, in some respects, forever remain incomplete.

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<sup>40</sup> There is a thirtieth problem we encounter in the interpretation of statutes. That is syntactical ambiguity. For an excellent discussion of syntactical ambiguity *see* Solan, *supra* note 16. This article does not discuss syntactical ambiguity because such ambiguity can always be eliminated by careful drafting. The problems with which this article is concerned are those that inherent to formulation of statutes and that remain after even great care is taken in drafting.

The third practical problem is that the issues we attempt to address through statutes are so varied and complex that it is *ex ante* impossible to ascertain the meanings for words and phrases that would be perfectly appropriate to the purposes of statutory rule systems and other purposes that the law is simultaneously pursuing. Accordingly, statutes inevitably emerge containing words and phrases with common meanings or even specially drafted definitions that are not in all ways appropriate to the purposes underlying that statute and other purposes the law is simultaneously pursuing.

The unfortunate fact is that only an omniscient and fully prescient mind could *ex ante* fully understand the kinds of complex subject matters that tend to underlie statutes, fully refine a statute's purposes in light of a complex underlying subject matter, take into account all the competing purposes of the law, and formulate a complete statutory rule system incorporating definitions for words and phrases that are fully appropriate to all those purposes. And if the mind of such a being worked at the speed of a typical human mind, it would still be a lengthy process—one that on some occasions might not be possible to complete in a politically acceptable amount of time. The consequence is that when we encounter situations that the parties drafting a statute overlooked or failed to anticipate and in these situations apply statutory rule systems literally, that is, give effect to their presumptive semantic content, the results are not only often unintended, accidental, random, and, accordingly, arbitrary, but also, often, in varying degrees, irrational, unfair, or unjust.<sup>41</sup> The latter outcomes conflict with either or both the purposes underlying the statute or other purposes simultaneously operating in the law. We label such conflicts “ambiguity” without specifying the type of ambiguity at issue. In fact the ambiguity is fundamentally an ambiguity of purpose, the primary type of

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<sup>41</sup> That does not mean that they are *always* unacceptable, only that they are highly likely to be.

ambiguity we encounter with respect to statutes. These conflicts arise, or slip through, because the parties formulating a statute are not aware they potentially exist and, therefore, both cannot not and do not address them.

Part III of this article identifies four types of ways in which the purposes underlying statutory rule systems can emerge unrefined and twelve types of ways in which statutory rule systems inevitably emerge incomplete.<sup>42</sup> Each of these types can occur many times with respect to a single statute. To put the matter in terms familiar in linguistics, there are in total at least sixteen types of ways that statutory purposes and rule systems emerge unrefined and incomplete, and each of those types may surface in numerous tokens. The result is that the number of actual instances of incompleteness can run into the hundreds and thousands.<sup>43</sup>

Part IV identifies thirteen ways in which statutory rule systems inevitably begin life with key words and phrases that are partially inappropriate to the purposes underlying the statutes and other purposes simultaneously operative in the law. As is the case with statutory purposes and rule systems, in the absence of an omniscient and fully prescient mind, the partial impropriety of the meanings of words and phrases is not practically recognizable, or at least not fully recognizable, *ex ante* and cannot be rectified before a statute is enacted. Again, each type of partial impropriety may surface numerous times,

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<sup>42</sup> The author makes no claim that any of the lists set forth in this article is exhaustive.

<sup>43</sup> If this assertion, or at least the “thousands” part, strikes the reader as exaggerated, the author suggests that the reader turn to the discussion of the Employee Retirement Income Security Act of 1974 (the provisions of what was originally ERISA are currently largely found at 29 U.S.C. §§1104—1144 and 1301—1461 and 26 U.S.C. 401—415 and 4974—4975 (2000)) *infra* text at pp. 30-36, and after reading that discussion, count the United States Code Annotated annotations following each of the provisions of the act.

giving rise to tokens that in number are many multiples of twelve, occasionally hundreds or thousands of tokens.<sup>44</sup>

The foregoing practical problems give rise to two linguistic problems, only one of which is lexical. Given the complexity of the subject matters and purposes underlying a statutory rule scheme and other purposes simultaneously operative in the law (which, to repeat, are in large part beyond the horizon of awareness of the parties formulating the statutory rule system at issue), parties formulating statutory rule systems cannot uncover and anticipate all necessary and/or appropriate rules (including exceptions to rules and resolutions of conflicts between rules and purposes) and will inevitably fail to include some, often many. They will also incorporate words and phrases with common meanings and even express statutory definitions that are not fully appropriate to the purposes underlying the rule scheme and other purposes simultaneously operative in the law. Even if they become aware of the need to formulate special statutory definitions, seldom will those definitions be adequate in all respects. The linguistic consequences, rather obviously, are that the texts of statutes do not contain all the sentences they would if they were complete—sentences that would set forth additional substantive and remedial rules. And, to reiterate, the sentences that do appear in the text will contain words and phrases with apparent meanings, i.e, their common meanings or specially drafted definitions, that are not fully appropriate to the statutes in which these words and phrases appear.

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<sup>44</sup> The terms “management” and “administrative” under the Fair Labor Standards Act regulations (29 C.F.R. §§ 541.1, 541.2, 541.102—541.115, 541.200—541.210 (2005)) were so vague that the courts treated their application as one for the fact finder. In literally thousands of instances one could not tell whether specific jobs fell within or without the categories. Had the courts bitten the bullet and undertaken to eliminate the vagueness, the resulting definitions would have been exceedingly complex, indeed.

Part III. The Inherent Incompleteness of Statutory Rule Schemes.

Cognitive science, with assistance from the philosophy of mind and general principles of epistemology, has over the last twenty or so years made clear the central role that our knowledge of intentions and purposes plays in the comprehension of all human behavior, including linguistic behavior.<sup>45</sup> Building on these insights, the linguistic discipline of pragmatics<sup>46</sup> has focused intensively on the central role that inferential processes that make use of communicators' intentions and purposes play in language, the creation linguistic meaning(s), and the formulation and comprehension of linguistic communications.<sup>47</sup> Pragmatics has made it clear that, with the possible exception of certain statements in pure logic or mathematics, understanding any linguistic communication requires taking the communicator's intentions and purposes into account.<sup>48</sup> As noted above, contrary to the judicially declared canon that proclaims that unambiguous language precludes the need for interpretation, scientific linguistics has made it clear that plain and unambiguous language never precludes the need for interpretation. Words, phrases, and sentences spoken or written are always only evidence, along with other evidence, especially of communicators' intentions and

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<sup>45</sup> See, e.g., Sperber & Wilson, *supra* note 30; Robyn Carston, *supra* note 29; Simon Baron-Cohen, Mindblindness: An Essay on Autism and Theory of Mind (1995); Robert Audi, Action, Intention, and Reason (1993); Daniel Dennet, The Intentional Stance (1989); Charles Taylor, The Explanation of Behavior (1964). See also Noam Chomsky's devastating 1957 attack on behaviorism. *Review of Skinner*, 35 *Language* 26 (1957). For an introduction to the interrelations between linguistics, philosophy, and cognitive science see, e.g., Howard Gardner, The Mind's New Science: A History of the Cognitive Revolution (1985) (a cognitive scientist's perspective); Owen Flanagan, The Science of the Mind (1984) (a philosopher's perspective).

<sup>46</sup> The contemporary linguistic discipline of pragmatics, not to be confused with the philosophical school of pragmatism, derives originally from the writings of the linguistic philosopher H. Paul Grice.

<sup>47</sup> See *supra* note 30.

<sup>48</sup> See *supra* note 30.

purposes, of what a speaker or writer means, in the sense of “intends the recipient of his or her linguistic communication to comprehend.”<sup>49</sup>

The fact is that the human cognitive system is as much wed to intentions and purposes in the explanation and comprehension of human behavior, including linguistic behavior, as it is to mathematics in the explanation and comprehension of physical phenomena. Intentions and purposes are cognitive, explanatory vehicles that operate in our understanding and explanation of human behavior in a way that that is analogous to the way forces operate in our understanding of physical phenomena.<sup>50</sup> It has become clear that, whether or not intentions, purposes, causes, numbers, and mathematical relations exist as phenomena distinct and apart from the human cognitive faculty, they are the tools with which we must operate in their distinctive spheres. It would make as much sense to demand that we understand human behavior, including linguistic behavior (which includes statutes), without the explanatory vehicles of intentions and purposes as it would to demand that we understand the world of physics without resort to mathematics and mathematical relations.<sup>51</sup>

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<sup>49</sup> This is, indeed, the central of the many meanings of “meaning.”

<sup>50</sup> For an explanation of intentions (which have related purposes) as causes *see, e.g.*, John Searle, *Intentionality* 112-40 (1983). Steven Pinker explains the role of intentions and purposes in terms of “feedback loops.” *The Blank Slate: The Modern Denial of Human Nature* 32 (2002). *See also* Audi, *supra* note 45, at 110-144, for a discussion of the nomological, even if not causal, nature of intentions.

<sup>51</sup> Some argue that we cannot sensibly ascribe intentions and purposes to the legislature. There are so many minds. How can they all have the identical intentions or be set on the identical purposes? One answer is that collective action in large groups is never the result of absolutely identical states of mind of all group members. Of necessity, some small group out of the whole, often a single individual, has to be designated to provide the intentions and purposes whereby the group acts. So the legislative intentions and purposes with which we are concerned of necessity must, in part, be those of the key actors in crafting and moving legislation forward. The key actors propose and the remainder disposes, whether the remainder understands, or even cares about, what has been proposed. Their knowledge and concern is not constitutionally required. But there is an even more fundamental reason we must ascribe intentions to the legislature. As noted above in the text, intentions and any accompanying purposes are the only vehicles the human cognitive system provides us for understanding and explaining human behavior. We must use, and cannot operate without, that which nature has given us, even if what nature has given us is not, in the setting of the law, in every respect ideal. Whether it is conceptually neat to do so, we have no choice but to analyze legislative actions in terms of intentions and purposes. We find ourselves in the same bind with

All that said, to repeat what was noted above, one of the three primary practical, and therefore communicative, problems relating to statutes flows from the fact that it is *ex ante* virtually impossible fully to formulate the purposes of a statutory rule scheme with an even modestly complex underlying subject matter. No wonder we are sometimes stymied in attempting to understand in full the purposes of a statute. The parties who formulated it did not themselves fully understand them!

But even if we were *ex ante* able fully to understand and formulate the purposes of a statute with all proper refinements, we still could not *ex ante* formulate in full a corresponding rule system to address even a minimally complex underlying subject matter. The problem is compounded to the extent the purposes are unrefined. Reality and the cross currents of the purposes of the law are too varied. This becomes clear on considering what would be required *ex ante* to produce a complete statutory rule system. The significance of what follows will be obvious to anyone who has drafted a document such as a complex real estate construction contract or corporate merger agreement. The number of issues that could be addressed is endless. In that light, the legislature could produce a complete statutory rule system only if it were capable of, *inter alia*:

- (1) thoroughly mastering the underlying subject matter,
- (2) thoroughly refining the purposes to be achieved through the statute, and
- (3) (a) identifying every rule that is necessary or that would be beneficial in furthering or achieving the statute's purposes (or ends) in all possible situations, without regard to the rarity, remoteness, or uniqueness of any of such situations, (b) identifying every rule that would interfere or conflict with the furthering or achieving of the statute's

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mathematics. We might prefer more powerful tools in addressing relations between physical phenomena, especially in particle physics and cosmology, but our cognitive faculties provide us only with mathematics.

purposes, including, in particular, all such rules found in United States Code or state laws or derivable from our traditions and customs, and (c) identifying, with respect to the set of rules in (3)(b), each rule that, in the legislature's view, should be subservient to and every rule and purpose that should override the ends of the statute at issue, and

(4), taking all the above into account, (a) except as provided in (b), immediately following, incorporating into the statute rules, both substantive and remedial, relating to all possible clusters of factual occurrences, without regard to the rarity, remoteness, or uniqueness of such clusters, necessary or beneficial in furthering or achieving the statute's ends, (b) expressly excluding from those rules "merely" beneficial rules that the legislature deemed to be (i) too harsh in their consequences given their small or virtually inconsequential contribution to the ends sought, (ii) too inconsequential or peripheral to be worth devoting judicial resources to, or (iii) to conflict with more important, overriding ends, and the like, (c) including, if not covered above, all subsidiary rules required in applying the primary rules,<sup>52</sup> (d) providing exceptions for all rules that, if literally applied, would on rare occasions inhibit the furthering or achieving of the statute's ends, with the exception of those necessary to protect ends deemed to override those of the statute, which rules would, of course, be included, (e) including all exceptions to the general rules necessary to prevent what the legislature deemed to be irrational, unfair and unjust results in light of unique circumstances, (f) expressly resolving all internal conflicts between statutory provisions and all conflicts between the statute and, if not addressed above, all other statutes and the Constitution, (g) expressly sanctioning or denying effect to all results flowing from the simultaneous or successive application of separate rules, wherein results can be achieved that could not be achieved

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<sup>52</sup> See text *infra* pp. 31-32 and 36-38 and *infra* note 105.

through application of the rules singly,<sup>53</sup> and (h) making it clear exactly who is entitled to seek the remedies provided by the statute, i.e., whether the statute permits private causes of action.<sup>54</sup> Further, to render a statute truly complete, the legislature would have to assign all words and phrases used in the statute meanings perfectly appropriate to the statute's ends and all other purposes the law is simultaneously pursuing, neither covering facts that should not be covered nor excluding facts that should be covered. Thus, either the historical meanings of words and phrases would have to be perfectly suited to the needs of the statute or the legislature would have to recognize any inadequacies in those meanings and address them with special, nonce, statutory definitions. In the case of words and phrases that have more than one meaning, including prototypical and non-typical meanings, if one meaning perfectly suited the needs of the statute, it would be necessary to specify which. These issues relating to words and phrases are addressed in Part IV.

Although to an individual who has never undertaken anything comparable, the tasks above might, in the abstract, seem difficult but hardly overwhelming, experience proves conclusively that they are overwhelming. Statutes always and inevitably emerge from the drafting and enactment processes varying in incompleteness from the extremes of the “common law” statute to what the Supreme Court, confusing complexity with completeness, has called the “comprehensive and reticulated” statute. Assuming that such extremes are accurate and meaningful categories, given the massive incompleteness

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<sup>53</sup> For example, through seriatim transactions that each comply with the requirements of the “tax free” reorganization provisions of the Internal Revenue Code, parties can effect the distribution of earnings and profits taxable as dividends in the form of capital gains. See Boris I. Bitker & James Eustice, Federal Income Taxation of Corporation and Shareholders, ¶¶ 1.05[2][d]. 12.61 [3] (6<sup>th</sup> ed. 1994; Marvin A. Chirelstein & Benjamin B. Lapata, *Recent Developments in the Step-Transaction Doctrine*, 60 *Taxes* 970 (1982)); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 *U. Chi. L. Rev.* 859 (1982)).

<sup>54</sup> See e.g., the principles discussed in *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Jackson v. Birmingham Bd. of Education*, 309 F.3d 1333 (11<sup>th</sup> Cir. 2002).

of the paradigm so-called “comprehensive and reticulated” statute, discussed below, a statute that emerged lacking literally thousands of pages of rules and no telling how many specific rules, there are in between what may be called “typically incomplete” statutes. Obviously, the degree to which a statute is substantively or remedially incomplete is a function of the difference between the rule system that would truly be complete and the rule system actually provided by the text of the statute as well as any differences between the historical meanings of the words and phrases used in the statute or their statutory definitions and the meanings actually required in light of the statute’s purposes.

Again, it is crucial to recognize that the incompleteness of statutes is almost always not intended by the legislature.<sup>55</sup> Consequently, virtually all of the omissions relating to any given statute are random and accidental. When that is the case, giving effect to the literal content of the statute cannot but yield purely arbitrary and accidental results.

The following illustrates concretely, and hopefully with a high degree of thoroughness, the endemic nature of the problems in the cases of “common law” statutes, so-called “comprehensive and reticulated states,” and typical statutes.

#### 1. “Common Law” Statutes.

The paradigmatic “common law” statute is, of course, the Sherman Act,<sup>56</sup> a legislative attempt to deal, at the very least, with socially harmful, anticompetitive business conduct.<sup>57</sup> The rule scheme envisioned by the Sherman Act was initially highly

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<sup>55</sup> It is obvious that the legislature occasionally ducks politically sensitive issues and leaves resolution to the courts.

<sup>56</sup> 15 U.S.C.A. §§ 1—11(West 1997).

<sup>57</sup> Some contemporary scholars claim that the Sherman Act was not concerned with the dangers posed to democracy by massive aggregations of wealth (that, in spite of the fact that with enough wealth and one can buy the repeal of the Sherman Act, which may well have effectively occurred during the Regan Administration), that unrestrained competition is somehow “perfect” (a claim that would probably have

incomplete for the most obvious of reasons. Congress did not and could not, under the circumstances, begin fully to understand the nature of the problems it faced, was not certain about all the problems it wanted to address, and accordingly could not give the courts more than general directions to deal with certain aspects of the untoward fall-out of the industrial, commercial, and financial developments of the Second Industrial Revolution in America. The purposes of the act were, therefore, in significant ways inchoate.

Congress knew that there were potential problems. The post-Civil War technological advances in industrial and agricultural production, combined with the rail connection of the East and West Coasts and the resulting opening up of the Great Plains, and significant advances in transoceanic transportation, made possible mass markets that, in turn, gave rise to potential economies of scale in financing, production, marketing, and distribution not previously possible. Economies of scale produced economic blessings in the form of reduced costs. To take advantage of those economies of scale required aggregations of capital on an unprecedented scale. The new capital markets, together with the legislatively created limited liability business corporation, the creative use of that antique device, the trust, to effect combinations of previously independent

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convulsed Adam Smith in paroxysms of laughter), and that efficiency and efficiency alone was the concern of Congress in passing the Sherman Act. The author finds those claims incredible. The agricultural interests of the United States in 1890 clearly saw the dangers of aggregations of wealth. Not that they were disinterested observers. Their once dominant powers were being severely eroded. To think that they were not concerned about political power when they were both losing it and exercising it to secure passage of the act is absurd. Further, to legislators raised on classical history, the lessons of the effects on Roman society of the destruction of the independent, citizen farmer (the Roman equivalent of the small, independent businessman) that formed the backbone of the Roman Republic would have been clearly before their minds. The author, accordingly, believes that concern with excessive financial and political power was almost certainly a concern underlying the Sherman Act. The author believes that Robert Bork and others who focus solely on efficiency may be unwittingly willing to trade American freedom for a mess of pottage in the form of a little short-term economic efficiency. It may well be that we cannot have both maximum economic efficiency and political freedom, but rather that political freedom is not free and part of its price is an occasional and *moderate* reduction in efficiency.

production units, and finally the general business corporation act with provisions for merger and consolidation effectively at will<sup>58</sup> resulted in financial and market power, labor market effects, and other consequences previously unknown.

Many recognized that these developments were not all necessarily for the good. Massive financial power meant massive political power. There was no guarantee that either would be exercised for the general welfare. It was also clear that smaller, less efficient, producers were being driven out of the market. Individuals who had been educated in the Classics and knew that the demise of the independent Roman farming class had doomed the Republic could not but worry that the reduction in the number of independent producers would be inimical to American democracy.<sup>59</sup>

In addition to all the foregoing, no one fully understood the new economy that was developing. In fact, the analytical tools for understanding it were only in their infancy. Alfred Marshall's Principles of Economics, the first mathematically oriented and comprehensive treatment of what is now known as micro-economics, appeared in

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<sup>58</sup> New Jersey enacted the first "modern" general business corporation act in 1875. Adolf A. Berle, Jr., *Historical Inheritance of American Corporations*, Social Meaning of Legal Concepts, 3 The Powers and Duties of Corporate Management 189 (1950). Under that act the restrictions on the business activities that could be conducted through a single corporation and on the ability to merge enterprises and bring disparate businesses under common control were effectively removed. Until that act the most effective way to combine separate corporate enterprises, whose purposes were limited under special charters, under unified control was through the common law trust. After the New Jersey act came on the scene, the trust was rendered relatively obsolete.

<sup>59</sup> Justice Peckham voiced a similar concern in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 323-24 (1897). See also *Richardson v. Buhl*, 77 Mich. 632, 43 N.W. 1102, 1110 (1889) (Chief Justice Sherwood observing: "[I]t is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations."); 21 Cong. Rec. 2598 (1890) (remarks of Senator George regarding the potential elimination of all small capitalists). It was also obvious to labor that capital was gaining immense advantages over labor. The corporation was simply a union with another name and some special legal advantages. Capitalist could freely form unions, called corporations, but labor could not. Capitalists could join in single enterprises and the combine their single enterprises under trusts and holding companies, and finally into single enterprises through merger. The capitalists recognized their immense advantages over labor and effectively fought, with the assistance of both Congress and the courts, to maintain them until the 1930s.

1890, the year of the Sherman Act.<sup>60</sup> And until the discipline of micro-economics advanced well beyond Marshall's initial insights, it would prove impossible fully to understand the economic issues underlying the act. The common law had developed rules against unreasonable restraints on trade, and in the Seventeenth Century Parliament had also outlawed all monopolies except those it specifically authorized.<sup>61</sup> But the common law concepts of "unreasonable restraint" and "monopoly" were neither clearly sufficient nor clearly insufficient to deal with the new phenomena, and if, insufficient, it was not clear exactly how. After a short period of intense confusion,<sup>62</sup> the judicial response was to treat many kinds of business conduct as *per se* violative of the act. More recently, that is around eighty years after the act became law, as the discipline of micro-economics had advanced and judges have become better educated in economic matters, much conduct that was proscribed in the era of the broad *per se* rules has been found to pass muster under a much more flexible and sophisticated "rule of reason." Today it is even recognized, if only tacitly, that in the rarest circumstances reasonable price fixing is unavoidable, in fact, preferable to free market competition, and, therefore, lawful.<sup>63</sup>

The resulting economic, social, and political phenomena that for the first time emerged after the Civil War ultimately had to be recognized, understood, and addressed

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<sup>60</sup> Alfred Marshall, Principles Economics (1890).

<sup>61</sup> Statute of Monopolies (1623)

<sup>62</sup> The United States Supreme Court, in its first decision under the act, held that the Sugar Trust, which had acquired control of ninety-percent of the sugar manufacturing in the United States, although a virtual monopoly, was not covered by the act because the act addressed attempts to monopolize commerce, and manufacturing is distinct from commerce! *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895). In *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), the court held that the Sherman Act renders illegal *all* restraints on trade. Of course, any one who contracts with another in part restrains his ability to contract with others and, thereby, somewhat restrains trade. That would render all contracts illegal restraints on trade. The court rather quickly backed off and held that the act proscribes only "unreasonable restraints" on trade. *U.S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898) (the opinion of Judge Taft, later Chief Justice Taft, was effectively adopted by the United States Supreme Court).

<sup>63</sup> At least that is the way the author reads *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

over a period of seventy to eighty years through legislation such as the Sherman Act, the Interstate Commerce Act,<sup>64</sup> the Clayton Act,<sup>65</sup> the Federal Trade Commission Act,<sup>66</sup> Robinson-Patman Price Discrimination Act,<sup>67</sup> state public utilities acts, the Securities Act of 1933,<sup>68</sup> the Securities Exchange Act of 1934,<sup>69</sup> the Public Utilities Holding Company Act,<sup>70</sup> the National Labor Relations Act,<sup>71</sup> the Labor-Management Relations Act,<sup>72</sup> the Fair Labor Standards Act,<sup>73</sup> a host of other laws, and thousands of cases. Knowledge and understanding increased with time and so did the complexity, completeness, and, occasionally, the sophistication and effectiveness of the rule schemes provided by statutes.

At the moment of its enactment, the Sherman Act, accordingly, could not practically be more than a command to the federal courts to develop a federal common law of permissible and impermissible competitive and anti-competitive business behaviors as the courts, and the academy for that matter, *might in time come to understand them*. The statute in many respects could not be more than that because neither Congress nor the academy yet had the economic and financial understanding necessary for formulating anything but the barest directions for the construction of a rule system governing competitive and anti-competitive behaviors in the setting of the Second Industrial Revolution and its accompanying financial, marketing, and distribution revolutions. The courts had to create by far the largest portion of the rule system that

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<sup>64</sup> 24 Stat. 379 (ch. 104) (Feb. 4, 1887) (as amended on over one hundred occasions).

<sup>65</sup> 15 U.S.C. §§ 12-17 (1914).

<sup>66</sup> 15 U.S.C. §§ 41-59 (1914).

<sup>67</sup> 15 U.S.C. §§ 13-13b, 21a (West 1997).

<sup>68</sup> 15 U.S.C.A. §§ 77a-77z, 77aa (1997).

<sup>69</sup> 15 U.S.C.A. §§ 77b-78ll (1997).

<sup>70</sup> 15 U.S.C.A. §§ 79-79z, 79z1-79z6 (1997).

<sup>71</sup> 29 U.S.C.A. §§ 151-169 (1998).

<sup>72</sup> 29 U.S.C.A. §§ 141-144, 151-167, 171-187 (1998).

<sup>73</sup> 29 U.S.C.A. §§ 201-219 (1998).

now comprises the law of the Sherman Act, and the process has not reached completion today.

## 2. “Comprehensive and Reticulated” Statutes.

Virtually everyone recognizes that the relatively rare “common law” statute is highly incomplete. What does not seem to be generally recognized is that all statutes addressing complex matters are incomplete, often highly incomplete. This fact can be readily illustrated in the case of the Employee Retirement Income Security Act of 1974 (“ERISA”).<sup>74</sup> The Supreme Court, confusing complexity with completeness, has on several occasions erroneously called ERISA a “comprehensive and reticulated” statute.<sup>75</sup> But, as the following discussion explains, ERISA emerged lacking literally thousands of pages of necessary and appropriate rules and no telling how many specific rules per “missing” page. Given the complexity of the subject matters ERISA addresses, the rule system embodied in the statutory text *per se* is neither comprehensive nor highly reticulated, although it is complex. ERISA’s rule scheme, as textually stated, is, in fact, highly skeletal.<sup>76</sup>

For example, many rules necessary for ensuring that one of ERISA’s paramount purposes, i.e., protecting and providing for the sound management of financial resources

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<sup>74</sup> The provisions of what was originally ERISA are currently largely found at 29 U.S.C. §§1104—1144 and 1301—1461 and 26 U.S.C. 401—415 and 4974—4975 (2000).

<sup>75</sup> *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989); *Mertens v. Hewett & Assocs.*, 508 U.S. 248, 251 (1993).

<sup>76</sup> To truly understand the subject matters that ERISA addresses, especially employer sponsored pension and health plans, requires a degree in actuarial science, mathematics, or physics. The best pension/health plan consultants the employer worked with in private practice had at least a master’s degree in mathematics, and one held a doctorate in mathematics while another held a doctorate in physics. All of these individuals admitted that the mathematical relations they worked with in plan design are so complex that they could not intuit answers but, rather, actually had to “crunch” the numbers. That being the case, Congress was certainly not going to provide all the rules necessary for governing pension and health plans.

set aside to provide benefits to pension<sup>77</sup> and welfare plan<sup>78</sup> participants, are missing. ERISA refers to such financial resources as “plan assets.” However, the term, “plan assets,” given the historical meaning of the term “assets,” was not fully appropriate to ERISA’s purposes. Twelve years after ERISA’s enactment, the Department of Labor had to supply a more appropriate meaning through a modestly complex regulation.<sup>79</sup> Further, to secure the safety of plan financial resources, ERISA subjects parties who control and manage the financial resources of employee benefit plans to fiduciary duties.<sup>80</sup> These duties are stated in three or four relatively short statutory provisions. In comparison, the standard treatises devote dozens of pages to explaining fiduciary duties.<sup>81</sup> There are, in addition, thousands of cases decided at common law and under state trust codes explicating and refining fiduciary duties. And, of course, it is not always possible to harmonize these cases. Regarding fiduciary duties and the nuances those duties entail,

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<sup>77</sup> For purposes of ERISA, a pension plan is any plan, whether traditional defined benefit plan or not, that defers compensation to the termination of employment or retirement. 29 U.S.C.A. § 1002(2)(A)(1990).

<sup>78</sup> Welfare plans provide non-pension benefits, most importantly health, accident, disability, and life insurance benefits. 29 U.S.C.A. § 1002(1) (1990).

<sup>79</sup> 29 C.F.R. § 2510.3-101(2004). One of ERISA’s purposes is to protect the assets of employee benefit plans, especially from mismanagement and self-dealing by fiduciaries. However when the phrase “plan assets” is understood in terms of the common law meaning of “asset,” the act contains a substantial gap in protection. Plan assets can be converted into non-plan assets, under the common law definition, and yet be the economic equivalent of plan assets. For example, the assets of a corporation are not the assets of the shareholders. Manipulative parties can readily convert plan assets into interests in entities, the assets which are not assets of the plans in traditional parlance. Yet, the assets of the entities can economically and practically be the equivalent of assets of the plans that invest in them. It was, therefore, necessary to refine, by expansion, ERISA’s purpose of protecting plan assets by redefining the term “plan assets” to include the underlying assets in certain entities in which employee plans invest. Another way of stating the result is to say that one of ERISA’s purposes was not simply to protect financial resources contributed to plans while such resources remained in the form of common law assets, but rather to provide protection even when such resources are converted into other forms as long as it makes sense to view them economically and practically as substantially equivalent to common law assets.

<sup>80</sup> For purposes of ERISA a party is a fiduciary with respect to an employee benefit plan, *inter alia*, to the extent the party “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . .” 29 U.S.C.A. § 1002(21)(A) (West 1999).

<sup>81</sup> *Compare, e.g.*, the scope of the treatment of fiduciary duties in 29 U.S.C.A. §§ 1104, 1105, 1106, and 1109 (West 1999), with the treatments of fiduciary duties in George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, The Law of Trusts and Trustees (rev. 2<sup>nd</sup> ed. 1984); Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts (4<sup>th</sup> ed. 1987).

ERISA is textually highly abbreviated and incomplete. Accordingly, to create a body of fiduciary law that is not set out in the text of this “comprehensive and reticulated statute,” the federal courts have been required to develop what is in fact a potentially substantial “federal common law of trusts.”<sup>82</sup>

ERISA also requires that all plan assets be held either in trust or in insured arrangements.<sup>83</sup> Many employers elect to have the plans that they sponsor hold all or part of their assets in trust. However, through a provision that was added to the act at the last minute and without any time for deep—or even shallow, for that matter—reflection on its ultimate consequences, ERISA preempts all state laws that relate to employee benefit plans.<sup>84</sup> The purpose of the preemption provision is not only to protect the federal statutory scheme from state infringement but also to ease plan administration by insuring uniformity of the law applicable to employee benefit plans.<sup>85</sup> State trust laws are clearly among the state laws that relate to employee benefit plans that hold plan assets in trust. Since state trust laws may prohibit conduct that ERISA permits and may permit conduct that ERISA prohibits, state trust laws are clearly one of the types of state law that ERISA was intended to preempt. However, in spite of the fact that ERISA requires plan assets to be held in trust and simultaneously preempts all state trust laws, ERISA does not contain a federal trust code. Rather, it contains little more than one line requiring that plan assets be held in trust. That is a substantial gap, or omission, in the substantive scheme of the law. That also has been one of the impelling motives behind the development of a federal common law of trusts.

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<sup>82</sup> *See, e.g.,* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

<sup>83</sup> 29 U.S.C.A. §1103 (West 1999).

<sup>84</sup> 29 U.S.C.A. § 1144 (West 1999).

<sup>85</sup> *See, e.g.,* *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987); *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335 (6<sup>th</sup> Cir. 1993).

Further, although one of the paramount purposes underlying ERISA's fiduciary duties was the protection of plan financial resources, ERISA's does not contain any general substantive rules governing the conduct of non-fiduciaries who may act in concert with plan fiduciaries to cause losses of plan assets. Neither does ERISA's text contain any general rules governing the conduct of those who provide services to plans but are not fiduciaries.<sup>86</sup> Since ERISA preempts all state laws that relate to employee benefit plans, it would appear, in light of ERISA's text alone, that those who aid and abet plan fiduciaries in breaches of duty and non-fiduciary professionals, such as lawyers, accountants, and actuaries, who engage in malpractice are at liberty to do so.<sup>87</sup> Courts, not surprisingly, have on occasion intervened and effectively created substantive rules and remedies in spite of the absence of statutory text.<sup>88</sup>

Of course, since ERISA contains no general substantive rules addressing the conduct of non-fiduciaries, it also contains no remedial provisions regarding the conduct of such persons. So in the case of non-fiduciaries, ERISA lacks both substantive and remedial provisions.<sup>89</sup>

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<sup>86</sup> Certain parties, called "disqualified persons" in I.R.C. § 4975(e)(2) (2002) and "parties in interest" under § 3(14) of ERISA, 29 U.S.C.A. § 1002 (14) (West 1999), who may not be fiduciaries, are subject to excise taxes for engaging in various categories of what are called "prohibited transactions." I.R.C. §4975(a), (b), and (c) (West 2002). There is, however, no provision in ERISA that subjects non-fiduciaries to liability to employee benefit plans.

<sup>87</sup> The failure to provide substantive rules prohibiting the actions of aiders and abettors of fiduciary breaches and providing for malpractice liability for non-fiduciary professional service providers to employee benefit plans might appear to be an odd omission until one reflects on the fact that one of the driving forces impelling the enactment of ERISA was a series of serious breaches of fiduciary duty by both union and corporate sponsors of plans. The problems posed by aiders and abettors and professionals engaging in malpractice were simply nowhere on the radar screen either when the substantive provisions of ERISA were being crafted or when ERISA's preemption clause was added at the last moment before passage.

<sup>88</sup> See *infra* note 154.

<sup>89</sup> In contrast, the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a—78mm (West 2003), contained clear prohibitions on fraud in connection with the sales and purchases of securities, but it contained no remedies for fraud. The courts, not surprisingly, found an implied remedy. *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947).

The above are only a miniscule fraction of the issues for which the text of ERISA fails to provide a rule.<sup>90</sup> The degree to which even a supposedly “comprehensive and reticulated” statute is incomplete is evidenced in the difference between ERISA’s approximately 220 pages of none too compact initial text<sup>91</sup> and the rules in that text and the thousands of pages of text and even greater number of rules contained in the aggregate of the Treasury Department Regulations (877 pages of small, double column print that dwarf the original statutory provisions) relating to the act<sup>92</sup> (not all of which have been promulgated even after thirty-one years) and useful substantive information in the preambles to those regulations; Treasury Department Revenue Rulings, private letter rulings, Revenue Procedures, General Counsel Memoranda, Technical Advice Memoranda, and the like; Department of Labor and Pension Benefit Guarantee

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<sup>90</sup> Congress recognized with respect to ERISA that it was producing an incomplete rule scheme. The statute, accordingly called for many regulations. In such cases there was a conscious recognition by Congress of specific gaps in the statutory rule system. When it is highly obvious that this is so, Congress often expressly delegates authority to a regulatory agency to promulgate regulations designed to render the law more complete. Of course, Congress does not always recognize the gaps, or does not always expressly recognize them, and the need to deal with these matters lands in the lap of the courts. The task facing the courts and the regulatory agencies is essentially the same. Since even the regulatory agencies cannot thoroughly complete the law, the courts always end up with the residual cases for which no one else, Congress or the regulatory agencies, has provided a result.

Some of the regulations under ERISA were required to address questions of commencement of participation in employer sponsored pension and welfare plans, the counting of service under plans, accrual of plan benefits, actuarial requirements for pension plan funding, vesting in benefits under pension plans, calculation of employer liabilities for withdrawal from multi-employer pension plans, the calculation of payments to the benefit insurance program to be established by the Pension Benefit Guaranty Corporation, and, under the Internal Revenue Code’s qualification provisions, guidelines designed to prevent discrimination in either contributions or benefits under pension plans in favor of highly compensated employees. The regulations regarding pension plan benefit accrual and funding, multi-employer plan withdrawal liabilities, and the discrimination of benefits in favor of highly compensated employees had to include complex actuarial guidelines, matters far beyond the expertise of the average member of Congress. And the authorized regulations were not the end of the story. The regulatory agencies have had to establish many additional rules through interpretive regulations that the agencies hoped the courts would uphold as valid interpretations of the statute.

<sup>91</sup> The original text of ERISA, P.L. 93-406; 86 Stat. 829, required 252 pages in 1974 U.S.C.C.A.N., beginning at page 935. A number of pages of text are duplicitous in that a number of labor law and tax rules in Titles I and II are mirror image provisions. Eleven pages of the statute concern agency administrative matters, and some additional material does not state rules but specifies where in existing laws amendments should be inserted. Altogether, the actual, non-duplicitous rules probably constitute around 220 pages.

<sup>92</sup> The overly curious can find the majority of these regulations in 26 C.F.R. §§ 1.401—1.420-1 (2004).

Corporation Regulations (656 pages of small, double column print that dwarf the original statutory provisions) relating to the act<sup>93</sup> (not all of which have been promulgated even after thirty-one years) and useful substantive information in the preambles to those regulations, Department of Labor and Pension Benefit Guaranty Corporation Advisory Opinions and Opinion Letters; over twenty volumes of trial and appellate court opinions;<sup>94</sup> and scholarly commentary addressing matters not resolved by all of the foregoing, even when all duplicative and unnecessary text in those various sources is disregarded. And the resulting aggregate thousands of pages of text and even more numerous rules contained therein still do not come close to addressing all questions that arise in the course of practice in the employee benefits arena. That is, in part, because regulations, rulings, opinions letters, and cases always raise questions as well as provide answers. There are thousands of issues relating to this “comprehensive and reticulated” statute arising out an unlimited number of unanticipated, sometimes unique, circumstances that have not yet been authoritatively addressed.

It is obvious that even approaching a truly complete Employee Retirement Income Security Act, given the driving purposes underlying the act, would—in fact, does—require many thousands of pages of highly compact text. If society had been required to wait for the statute’s protections until the statute had been rendered textually complete, there would never have been an ERISA.<sup>95</sup> Indeed, the best that Congress could do, given the constraints of time under which it operated, was to provide many essentials

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<sup>93</sup> The overly curious can find the majority of these regulations in 29 C.F.R. §§ 2509.75-2—4907.170 (2003).

<sup>94</sup> See the Employee Benefit Cases volumes published in connection with the BNA Pension & Benefits Reporter. Even that collection of ERISA cases is not exhaustive, as the author has learned on running Lexis and WestLaw searches.

<sup>95</sup> That would fulfill with a vengeance Thomas Jefferson’s belief that the government that governs best governs least. Were Congress to wait until it could provide complete statutory schemes covering all possible contingencies, it would, in fact, govern not at all.

and rely on the regulatory agencies, practitioners, and courts to navigate to many desired results that could not be addressed *ex ante*. That is the case, in greater or lesser degree, with every statute. As things stand, ERISA, rather ironically, stands for the proposition that the more “comprehensive and reticulated” a statute is, the more the work that will fall on administrative agencies and courts in rendering it substantially complete.

### 3. “Typical” Statutes.

In between the statutes above are those statutes that no one has ever viewed as either “common law” or “comprehensive and reticulated” statutes. As rule systems, these statutes are all in significant ways incomplete. Consider, for example, Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>96</sup>

The purposes of Title VII are to discourage discrimination against individuals in hiring or with respect to any term or condition of employment on the basis of race, color, religion, sex, or national origin and to compensate individuals who have suffered discrimination.<sup>97</sup> While it may be conceptually mandatory that employers be parties liable for discrimination, once that decision has been made it is necessary to decide, *inter alia*, who is an employer, who is an employee or potential employee,<sup>98</sup> and whether one

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<sup>96</sup> 42 U.S.C.A. §§ 2000e—2000e-17 (1994).

<sup>97</sup> 42 U.S.C.A. § 2000e-2(a)(1) (1994).

<sup>98</sup> The determination of who is to be treated as an employee is not a simple matter. Because of the different purposes underlying various labor and employment related legislation courts have had to tailor the definition of “employee” to render it appropriate to various acts in which it appears. These definitions are in large part pragmatically justified judicial contributions to the American English lexicon. *See, e.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111 (1943) and *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1946) (the court held that the word “employee” for purposes of National Labor Relations Act (29 U.S.C.A. § 152) and the Fair Labor Standards Act (29 U.S.C.A. § 203(e)) means, generally, “common law employees and certain individuals who satisfy criteria (in part different under each act) that would generally render individuals independent contractors.”) Justice Jackson pointed out that the common law test for employees was devised for the primary purpose of “deciding whether one who hires another is responsible in tort for his wrongdoing.” *Hearst Publications*, 322 U.S. at 125. That purpose was significantly different from the purposes underlying the acts at issue, and the court made modifications in the concept of “employee” to bring it into line with the purposes of the acts. *A priori* there is nothing to

employer is to be held liable for causing another to discriminate.<sup>99</sup> The act contains no rules addressing these issues. A complete rule system would also either exhaustively define or catalogue all the acts that constitute discrimination.<sup>100</sup> Congress made no attempt to do that. In addition, although it was decided to limit liability to employers as entities, the act did not specify all the circumstances in which an employer is deemed to act. Since a corporation, for example, always acts through agents, a complete rule system would necessarily specify when a corporation is to be liable for which acts of which of its agents.<sup>101</sup> There was no attempt to specify whether all employees are agents of their employers for purposes of Title VII, or whether only limited classes of employees are deemed to be agents.<sup>102</sup> Further, the act did not specify whether failures by employees and other agents to act are to be treated as acting.<sup>103</sup> Nor did the act specify whether all employees and agents are deemed the same for all purposes of the foregoing determinations.<sup>104</sup> A complete rule system addressing those matters would have required supplying agency and vicarious liability rules consonant with the answers. One might

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lead one to believe that a classification appropriate to the allocation of enterprise liability would be perfectly suited to other legal objectives.

<sup>99</sup> *See, e.g.*, the case annotations to 42 U.S.C.A. § 2000(e) (1994) nos. 107-166 and the cases addressing, *e.g.*, whether and when two employers are to be deemed a single employer and who is deemed to have actual control over employment.

<sup>100</sup> The courts were required to determine, *e.g.*, whether facially neutral employment criteria having adverse impact on a protected class, managerial inactivity in the face of harassment of a protected class, and same sex harassment constituted “discrimination.” *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that facially neutral employment criteria that have an adverse impact on a protected class are actionable unless job related and consistent with business necessity, terms hardly paragons of precision); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (harassment of a protected class that an employer allows can constitute discrimination); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (harassment is to be judged from the perspective of a “reasonable person”); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (same sex harassment is actionable).

<sup>101</sup> *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1986).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

expect that the answers and rules would vary depending on the type of discriminatory conduct at issue and who is engaging in it.<sup>105</sup> No such rules were supplied.

One of the more perplexing problems regarding Title VII simultaneously involved the substance of the act, the law of evidence, and the rules of procedure. It turned out that Title VII required its own special rules of evidence and procedure, which, in turn, highlighted a need for a substantive addition. The problem was how to prove discrimination when an employer employed facially neutral employment criteria that excluded members of a protected class from employment. That is, suppose an employer requires all successful job applicants to hold a high school diploma. Suppose, further, that many of the jobs the employer holds out, such as sweeping and cleaning, do not require the level of education associated with a high school diploma. And, then, suppose finally it turns out that a smaller proportion of a protected minority than of the majority in the relevant job market holds high school diplomas.<sup>106</sup> Proving discrimination in such situations required resort to statistical methods, in no wise even hinted at in Title VII, whereby a sufficient disparity between the qualified members of a protected class employed by a given employer and the available pool of qualified members of the protected class in the relevant labor market was deemed sufficient evidence of discrimination to establish a *prima facie* case.<sup>107</sup> The courts decided that when such a case was established, the employer should be permitted to rebut it by showing that the employment criteria were “job related and consistent with business necessity.”<sup>108</sup> The

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<sup>105</sup> As Lance Liebman, Director of the American Law Institute observes in the forward to the Restatement (Third) of Agency, Tentative Draft No. 1, special rules of agency have evolved in employment law.

<sup>106</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>107</sup> See *Griggs*, *supra* note 106; *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). 42 U.S.C.A § 2000(e)-2(k)(1)(A)(i) (1994), codifies the “disparate impact” theory of discrimination.

<sup>108</sup> *Griggs*, *supra* note 106.

substantive fall out was that what might be truly unintended discrimination, negligent discrimination, if you will, was declared illegal along with intentional discrimination.<sup>109</sup>

Many of the matters above that were not addressed by the textual rule system of Title VII have, of necessity, been filled in by the courts. There are, of course, hundreds of additional matters that have had to be judicially decided to further the process of completing Title VII's rule system. A run through the annotations to Title VII in the United States Code Annotated will give a nice sample, although those cases do not begin to be exhaustive, and there are state laws with language identical or similar to that in Title VII that address matters not yet addressed under Title VII. Admittedly, not every case annotated truly provides a missing rule. Some are duplicitous. Still, the number is not trivial.

In addition to the cases, of course, there are the Title VII regulations, many being interpretive, addressing a variety of matters that the text of the statute omitted.<sup>110</sup> And after nearly forty years the need for additional rules continues to surface. We apparently have not yet encountered in reported cases every single behavior and combination of facts for which a rule must be established if the purposes of Title VII are to be effected. There is no reason to believe we ever will.<sup>111</sup>

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<sup>109</sup> *Griggs*, *supra* note 106, at 424.

<sup>110</sup> See 29 C.F.R. 1601.1—1604.11, 1605.1—1605.3, 1606.1—1606.8, 1607.1—1607.8, 1608.1—1608.12 (2005).

<sup>111</sup> Regarding inherent incompleteness, statutory rule systems and common law rule systems are quite similar. The primary differences are, *inter alia*: (1) the relevant intentions and purposes in statutory rule systems are those of the legislature and in the common law rule systems those of the courts, which hopefully reflect community values, (2) it more often takes courts an extended period of time to determine and refine the purposes they want to pursue, and (3) common law rule systems begin life more incomplete than do statutory rule systems. Courts have traditionally been loathe to formulate on their own complex, detailed rule systems, with manifold exceptions and special modifications to the meanings of words, absent issues in actual controversy. Courts are also reluctant to address matters in anticipation of future litigation. Common law courts use the principle of holding to limit the scope of their opinions so that they retain freedom to deal with overlooked and unanticipated matters in light of the policies giving rise to their rule systems. Legislators, in contrast, attempt to anticipate and address *ex ante* a myriad of matters in a statute

If we move from illustrative anecdotes to system, we find there are at least sixteen types of ways in which statutes can emerge from the enactment process incomplete. The first four relate to the purposes of statutes.

First, although, as noted above, cognitive science, pragmatics, epistemology, and the philosophy of mind make it clear that the purpose or purposes of a statute are among the most essential elements in understanding the human behavior evidenced in a statute and the behavior it is supposed to induce, statutes occasionally emerge with little or no articulation of purposes.<sup>112</sup> Further, no individual or group of individuals, whether legislators or legislative staffs, has the intelligence, prescience, creative imagination, or time, *ex ante* to uncover or anticipate all the possible clusters of actions, behaviors, events, circumstances, relations, consequences, and the like “facts” that reality can present over time. As a result, the purposes of a statute, i.e., the results it has been designed to achieve, not only occasionally emerge with little or no articulation, or only vague articulation, they occasionally emerge in part inchoate,<sup>113</sup> almost always, if not always, without full specification of scope, and almost always without fully refined lexical statements. The issues presented by the last three items are not self-identifying. Rather, the issues become apparent only when overlooked or unanticipated facts surface and reveal that the reasonably ascertainable purposes of a law, as initially formulated, are in need of significant completion, clarification of scope, or lexical refinement.

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that they believe will or are likely to arise. But the differences between statutory and common law rule systems are matters of degree. And, as long as courts pursue consistent purposes in connection with the development of common law rule systems, anticipation of future developments in the common law and the interpretation of statutes are virtually identical processes.

<sup>112</sup> Both the Sherman Act, 15 U.S.C.A. §§ 1—11 (West 1997), and the Clayton Act, 15 U.S.C. §§ 12—17 (1914), omit recitations of purposes. Why that is so is explained *supra* text at pp. 25-30.

<sup>113</sup> See, e.g., the Sherman Act, 15 U.S.C.A. §§ 1—11 (West 1997).

As a practical matter, a statute's purposes must be initially formulated on the basis of a limited set of potential behaviors, occurrences, and the like. These behaviors, occurrences, and the like are what bring a problem requiring legislative action to the attention of interested parties. These behaviors, occurrences, and the like can be called "paradigmatic facts." The purposes of the statute will, inevitably, be conceptualized and stated in terms of the paradigmatic facts. In the case of some statutes the paradigmatic facts are an exceptionally small subset of the entire set of facts that need to be addressed through the statute. That was the case with the Sherman Act. With micro-economics in its infancy, in fact, a mere new born on the date of enactment, and the full implications of the second industrial and accompanying financial and institutional revolutions only dimly perceived, no one could fully understand the problems that the act would need to address. Accordingly, the purposes of the Sherman Act emerged in part inchoate.

The Sherman Act represents a somewhat rare extreme. Much more commonly, a statute covers a significantly complete set of paradigmatic facts.<sup>114</sup> In virtually all such instances, it is, nonetheless, necessary over time to refine the scopes of a statute's purposes.

When a statutory purpose is initially formulated, its scope is likely to be textually either or both too narrow or too expansive. Suppose, for example, a statute is designed, *inter alia*, to prevent the behaviors evidenced in a given set of paradigmatic facts because those behaviors cause injury that public policy demands be curtailed. The behaviors present in the paradigmatic facts may not, however, be the entire set of behaviors that can give rise to the injury in question. There may be overlooked and unanticipated behaviors

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<sup>114</sup> That is because a great deal more is known about the underlying subject matter to which the law is to apply than was the case with the Sherman Act.

that can be called “non-conceptual equivalents” of the behaviors present in the paradigmatic facts,<sup>115</sup> behaviors that, although not conceptually identical to the paradigmatic behaviors, possibly conceptually quite distinct,<sup>116</sup> can, nonetheless, give rise to the injury of concern. Such non-conceptual equivalents may not be surfaced at any point during the formulation of the statute’s rule system. In fact, non-conceptual equivalents may not even exist when a statute is enacted but, rather, may be concocted long after the statute is enacted as parties, with the assistance of counsel, creatively seek ways to evade its strictures. Lawyers are often highly rewarded for concocting schemes for accomplishing results that statutes are designed to prevent. They do so by finding alternative ways of accomplishing those results that are not conceptually captured by the words and phrases used in statutory rules.<sup>117</sup> To the extent non-conceptual equivalents are not recognized or anticipated and included within a statute’s coverage, the scope of the statutory purposes relating to those non-conceptual equivalents will be too narrow and the statute will not textually reach as far as it should.

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<sup>115</sup> We often encounter non-conceptual equivalents in the law. For example, a corporate merger can be the equivalent of a simple amendment to the articles of incorporation; a common law trust can be designed as the equivalent of a holding company; a trust certificate can be the equivalent of a stock certificate; a corporate leveraged buyout can be the equivalent of an illegal dividend distribution creating an illegal, fraudulent preference or asset distribution in favor of stockholders over unsecured creditors (*see In re Bay Plastics, Inc.*, 187 B.R. 315 (Bankr. C.D. Cal. 1995)); a Chapter 13 bankruptcy proceeding can produce results equivalent to a Chapter 7 proceeding that cannot be instituted because the debtor has secured a Chapter 7 discharge within the prior six years (*see, e.g., In the Matter of Strauss*, 184 B.R. 349 (Bankr. D. Neb. 1995)); and a series of tax free reorganizations can be equivalent to a dividend distribution (*see, e.g.,* the discussion of the step-transaction doctrine, Boris I. Bitker & James Eustice, Federal Income Taxation of Corporation and Shareholders, ¶¶ 1.05[2][d]. 12.61 [3] (6<sup>th</sup> ed. 1994; Marvin A. Chirelstein & Benjamin B. Lapata, *Recent Developments in the Step-Transaction Doctrine*, 60 *Taxes* 970 (1982)); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 *U. Chi. L. Rev.* 859 (1982)); and it is possible through contractual arrangements to create an economic entity that is equivalent to what can be achieved through merger. *Rotherby Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).

<sup>116</sup> To take one example from the immediately preceding footnote, a corporate merger and an amendment to the articles of incorporation are conceptually distinct, although the former can be a vehicle for the latter.

<sup>117</sup> Occasionally, a particular way of achieving a given result, not the result, is what creates a concern. In such instances, the results may be quite socially useful. When that is true, lawyers who assist in the creation of alternative ways of achieving the results that do not give rise to the original concerns are true problem solvers rather than simple manipulators.

For example, clever tax lawyers discovered that by properly sequencing a series of “tax free” corporate reorganizations and following up with a corporate liquidation, one could effectively distribute corporate earnings and profits, taxable as ordinary income, in what was in form a sale or exchange of a capital asset, thereby miraculously converting ordinary income into capital gains.<sup>118</sup> Although a series of corporate reorganizations followed by a corporate liquidation is conceptually distinct from a dividend declaration and payment, the economic effect can be identical. Avoidance of ordinary income tax through legal manipulations that have no economic substance was never what the tax free reorganization provisions were intended to allow. That was implicit, albeit not express, in the in totality of the scheme for corporate taxation.

But there is an additional problem. Assuming again that the statute at issue is concerned to prevent or discourage an injurious form of behavior, there may be injuries that are so similar to—even if not in every respect identical to—those evidenced in connection with the paradigmatic facts and non-conceptual equivalents that no rational actors would act to prevent the latter without also acting to prevent the former.<sup>119</sup> The behaviors that give rise to these injuries may be called “substantial equivalents.”<sup>120</sup> Some

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<sup>118</sup> Bitker & Eustice, *supra* note 115; Chirelstein & Lapata, *supra* note 115; Isenbergh, *supra* note 115.

<sup>119</sup> Thus, although the Fair Labor Standards Act’s provisions for minimum wages was based on a paradigmatic concern with the wages of common law employees, individuals over whom an employer exercises the power to hire and fire, usually at will, and with respect to whom an employer dictates not only the job to be performed, but how, when, and where to perform it (and usually supplies the place and equipment for work), it soon became clear that independent contractors required the same protections even though the relations between independent contractors and the employers with whom the contract are significantly different from the relationship between employer and employee. Also, to preclude employers from converting employees to independent contractors on every occasion on which it might be feasible to do so, it became necessary to treat all persons who render services to an employer or are suffered to render services as in the same class or purposes of the minimum wage protections. *See* 29 U.S.C.A. § 203(d), (e), and (g).

<sup>120</sup> Antitrust law is replete with substantial equivalents. Price fixing and territorial division, for example, are effective ways to achieve the benefits of monopoly without actually achieving true monopoly status. Further, there are several substantial equivalents to direct price fixing, one being the sharing of otherwise

or all of the substantial equivalents may also be overlooked or not anticipated during the formulation of the statute. Further, as is the case with non-conceptual equivalents, parties may devise substantial equivalents well after the statute is enacted.

Since, absent highly unusual circumstances, the intention of the parties formulating a statute, were they to uncover or anticipate them, would virtually always be to address the aggregate of paradigmatic facts and non-conceptual and substantial equivalents, an intention to cover non-conceptual and substantial equivalents along with the paradigmatic facts must rationally be presumed. No rational, honest actor would intentionally cover the paradigmatic facts but omit coverage of non-conceptual and substantial equivalents. When non-conceptual and substantial equivalents are omitted due to oversight or the failure to or inability to anticipate them, the statute's purposes, as ascertainable from text alone, will be too narrow, and the statute will not reach as far as it should and would but for oversight and the failure or inability to anticipate. The scope of its purposes ascertainable from text alone will be too narrow.

Of course, the scope of statutory purposes can also be textually too expansive. Even if all behaviors giving rise to paradigmatic facts and non-conceptual and substantial equivalents were identified and covered by the statute's strictures, those facts could occur with other facts in light of which it would be irrational, pointless, or unfair to impose the statute's strictures. These facts may be called "exceptional fact aggregates." For example, imposing the strictures of a statute in the face of the additional facts could on occasion produce results contrary to the very purposes of the statute.<sup>121</sup> It is also possible

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proprietary cost, production, and pricing information so that producers can engage in "conscious parallelism" and tacit agreements in their pricing.

<sup>121</sup> Thus, the owners or managers of an enterprise competing in a market without significant barriers to entry and purely on the merits through continuous innovation and superior service, and in no wise abusing

that imposing statutory strictures, although not yielding a result contrary to the purposes of the statute, would, nonetheless, not only fail to advance the purposes of the statute but would serve no sound purpose at all.<sup>122</sup> In these instances, if the law were, for example, punitive, application of the law would impose a penalty that senselessly harms.<sup>123</sup> Or, the

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its financial, marketing, or other power, and refraining from anti-competitive mergers and acquisitions, may intend to drive all the competitors of the business out of the market and become the sole supplier in that market, and in fact do so. Such conduct would not generally be viewed as subject to the anti-monopolization strictures of the anti-trust laws because to so class it would dampen what the anti-trust laws are designed to do—foster and protect competition on the merits. If successful, such a competitor, although in one sense a monopolist, *i.e.*, sole economic actor in a given market, would also be the perfect competitor, operating so efficiently, keeping costs and prices so low, innovating so effectively, and commanding such customer loyalty through superior products and services that, in spite of the absence of significant barriers to entry, no one would want to attempt to enter the market. The enterprise also would not earn monopoly profits.

<sup>122</sup> This appears to be one of the rationales that gave rise to the decision in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Congress had made it illegal to “in any way assist . . . the importation . . . of any alien . . . into the United States, . . . under contract or agreement . . . made previous to the importation . . . of such alien, . . . to perform labor or service of any kind in the United States . . .” Act of February 26, 1885, 23 Stat. 332, c. 164. The Episcopal Church of the Holy Trinity entered into an agreement with an Anglican minister residing in England pursuant to which the minister would immigrate to the United States and become the minister of the church. The statute in question literally covered the transaction. However, the statute was clearly designed to protect the American working class from the wage competition and wage depression resulting from the massive importation of cheap foreign labor. “All the supporters of the bill who spoke during the floor debates saw its purpose to be preventing the importation of “laborers” who would undermine the wage position of American wage earners, the precise purpose articulated in the committee reports and in the Supreme Court opinion.” William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1538-39 (1998). There was, however, no such problem presented in the case before the court. Anglican ministers were not in excess supply. As the court noted: “It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition.” *Church of the Holy Trinity*, 143 U.S. at 464. The court, accordingly, held that the importation of the minister was not covered by the statute’s prohibition. This logic is recognized in the current H1B visa program pursuant to which employers can petition to employ foreign nationals who have unique qualifications that cannot be satisfied out of the available pool of talent in the United States. For opposing viewpoints regarding the decision in *Church of the Holy Trinity*, see, e.g., Scalia, *supra* note 4, at 18-23; William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509 (1998). In the author’s view, the statute in question represents a case of what may be called “protectively overly broad drafting,” drafting that is not viewed literally without close regard to underlying purposes. This technique is used when the parties drafting cannot identify the precise category or categories they want to cover and are concerned that due to the tendency toward literalness displayed by some judges some “fact types” they want to cover but cannot *ex ante* identify may escape coverage. They, therefore, select words or phrases that sweep so broadly that all matters that should be covered, given the purposes of the law, will virtually certainly be encompassed. It is the responsibility of intelligent interpreters to determine when the statute’s purposes do not require coverage. For possibly the most famous, or infamous, example of protectively overly broad drafting, see *infra* text at pp. 62-64 and note 154.

<sup>123</sup> Thus, the Occupational Safety and Health Act of 1973, 29 U.S.C.A. §§ 651-700 (1999), the purpose of which is to provide workers with safe and healthful work places (29 U.S.C.A. § 651(b) (1999)), requires employers, *inter alia*, to comply with all occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C.A. § 654(b) (West 1999). The act provides that those who fail to comply are

benefits of imposing the strictures could be *de minimis* yet grossly unfair and unjust. Further, imposing the strictures could further the statute's purposes in a significant way but, nonetheless, run counter to an overriding purpose or set of purposes, including those evidenced in other statutes or the Constitution.<sup>124</sup>

The practical matter is that if exceptional fact aggregates are overlooked or not anticipated while a statute is being formulated, there will be no textual exceptions provided for them. When exceptional fact aggregates are not textually excluded, the statute will be purposively incomplete in that it will reach further than actually intended. And, of course, there can be facts that should be treated as exceptions to these exceptions, facts that may be called "extra-exceptional fact aggregates." If these are not addressed, but exceptional fact aggregates are, the statute will fail to extend as far as it should.<sup>125</sup>

While addressing non-conceptual and substantial equivalents, exceptional fact aggregates, and extra-exceptional fact aggregates often requires additions to text (on

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subject to monetary penalties and must abate non-conforming conditions. 29 U.S.C.A. § 666 (West 1999). The act, itself, however, also provides that "[t]he Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations [of promulgated safety and health standards] which have no direct or immediate relationship to safety or health." 29 U.S.C.A. 658(a) (West 1999). The Occupational Safety and Health Administration has provided standards for notices of de minimis violations in the Field Inspection Manual, Chapter III—Inspection Documentation C.2.g (issued by OSHA Instruction CPL 2.103, Sept. 26, 1994). Such notices are to be issued, *inter alia*, when:

- (1) . . . An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health.
- (2) An employer complies with a proposed standard or amendment . . . rather than the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater protection . . .
- (3) An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

De minimis violations do not give rise to either monetary penalties or an obligation to abate. The logic was that in such circumstances penalties and abatement i.e., compliance with specific safety and health standards, would not advance the purposes of the law and would, therefore, be pointless.

<sup>124</sup> To lean on common law for an analogy, the privilege of self-defense in battery overrides the general prohibition on intentionally striking others in harmful ways. This principle is also obviously operating in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), in that the statutory prohibition of murder precludes allowing murderers to benefit from their illegal conduct, since doing so would tend to encourage murder by rewarding it.

<sup>125</sup> See *infra* note 161.

many occasions these matters can be addressed by definitional modifications), other gaps in legal rule systems can also require effective additions to text. As noted above with respect to both ERISA and Title VII, statutes sometimes emerge lacking entire subsidiary rule systems. In addition, given the presumptive semantic content of statutory rules, observant, skillful, and creative lawyers often find applications for rules that were almost certainly not anticipated and contemplated by the parties formulating the rules.<sup>126</sup> Or, they may discover ways to achieve results through the sequential application of rules that the party formulating the rules never contemplated.<sup>127</sup> Since these uses were not anticipated, there are no rules prohibiting them. Nonetheless, those uses may run counter to the statute's purposes or overriding purposes—purposes that should prevail because the applications in question were not contemplated, foreseen, or intended but result from the mere happenstance or accident that the rules can literally be so used.

The fact is that, except in the rarest circumstances, if any, it is not humanly possible in devising a legal rule system to be aware of or anticipate every possible simultaneous occurrence of facts and provide a rule for every eventuality. There are potentially an infinite number of real world situations, many only exceptionally rarely occurring, that are not dealt with by any statutory rule system as it first emerges from the legislative processes. Were all potential situations addressed, many laws would be

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<sup>126</sup> Examples include directors' control over corporate distributions to squeeze out minority shareholders at a loss; the use of mergers to effect amendments to the articles of incorporation that are otherwise blocked by the existing articles of incorporation, or to expel a minority interest; using a dividend to avoid a charge to the income statement (*Kamin v. American Express*, 86 Misc.2d 809, 383 N.Y.S.2d 807 (1976)); the use in the late 19<sup>th</sup> Century of trusts as vehicles for business combinations not possible under then existing corporate law absent special legislative grace, which was not always forthcoming or too costly in bribes; trust certificates as substitutes for stock certificates; LLC's, the formation of which is not limited to "for profit" activities, as asset protection devices; and LBOs as vehicles for preferential distributions to owners in relation to unsecured creditors. Tax law and corporate law practices, in particular, involve many creative—never before tried/never before ruled on—applications of rules.

<sup>127</sup> See *supra* note 115.

infinitely long sets of rules, with an unlimited number of special situation additions and exceptions. Accordingly, the initial formulation of a statute, even if the purposes are in theory fully clarified in the minds of the parties formulating them, can never be more than a partial statement of the rule system for achieving the purposes of the statute and all simultaneously existing purposes that impinge on the statute. The partial statement may be quite good, addressing most of the situations that actually occur in the world, but it will require judicial completion both consistent with the purposes and directed at fulfilling and furthering those purposes as rarely occurring situations arise.<sup>128</sup>

To recapitulate and complete the observations above in this Part III, statutory purposes emerge incomplete, or unrefined, in several, if not all, of the following four ways:

1. Although the purposes of the statute may be well understood by the parties bringing it into existence, those purposes may not be stated or clearly or fully articulated in text.
2. In some instances, the purposes of the statute are, in part, highly inchoate because those who bring it into existence have not fully formulated and do not themselves fully understand them.
3. In virtually every instance, the scopes of the statute's purposes are not fully specified.
4. Because of 1-3, the statements or working formulations of the statute's purposes require lexical refinements.

In addition, every statutory rule system emerges incomplete in most or all of the following twelve types of ways:

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<sup>128</sup> A statute can be quite complete in the sense that it covers the great majority of real world occurrences but, nonetheless, fail to address an unlimited number of less frequently or rarely occurring matters.

1. The rule system has gaps resulting in the need for additional positive, substantive rules, additions that given the statute's purposes ideally would have been included but were not due, or on the evidence more likely than not due, only to oversight or failure to anticipate the need,
2. The rule system has gaps resulting in the need for remedial additions to the rule system, additions that for the same reasons should and would have been included,
3. The rule system requires exceptions to substantive rules that, given the statute's purposes and the factors that virtually universally limit the scope of legal rules, should have been provided and most likely, on the evidence, would have been, but were not due to oversight or the failure to anticipate the need,
4. The rule system requires exceptions to remedial rules that, for the same reasons, should and would have been included,
5. The rule system requires exceptions to exceptions that, for the same reasons, should and would have been provided, and
6. The rule system may be missing one or more subsidiary rule schemes necessary for implementation of primary rule schemes.

In addition, as noted above there may be unaddressed (*i.e.*, nothing in the text of the statute resolves the questions that ensue as a result of):

7. internal conflicts within a statute,
8. conflicts or apparent conflicts between the statute at issue and the Constitution, other statutes in United States Code, or state law, with the latter possibly being pre-empted

under the Supremacy Clause, and conflicts with other purposes operating in the law that may not appear in any statute,<sup>129</sup>

9. non-contemplated uses of a single statutory rule that produce seemingly unwanted results,<sup>130</sup>

10. non-contemplated simultaneous uses of multiple statutory rules that produce seemingly untoward results,

11. non-contemplated sequential applications of two or more rules that produce seemingly untoward results, and

12. failures to make it clear whether the statute entitles parties to private causes of action.

To reiterate, primarily for the benefit of parties of textualist leanings, on the vast majority of occasions, the statutory failings above are not only unintended but unwanted. They are not consciously intended limitations. They are not the result of political consensus and conscious exclusions from the law but are almost always attributable to oversight and the inability to anticipate potentially infinite variations in fact situations. As is explained below, when that is so, lack of statutory text does not *per se* evidence an intention that such matters remain un-provided for. While the legislature may, almost certainly does, mean exactly what it says with respect to matters well within its conscious

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<sup>129</sup> The author believes that the avoidance of irrational, unfair, and unjust results in situations the legislature did not contemplate, especially when the purposes of a statute are not served or sufficiently served through its application in these situations, is an aim or purpose of the legislature, indeed, of society, even though there is no statute to that effect. We do not have statutes embodying every value that the legislature and society expect to operate in the law.

<sup>130</sup> One of the more amusing of such uses may be apocryphal. The story is that during World War II a woman residing in a Southern state wanted to divorce her husband who was in Europe serving in the United States Army. Her attorney found a Civil War statute that had not been repealed which provided that any woman resident in the state could secure a divorce if it were proved that her husband was serving in the army of the United States of America. Divorce was granted on the basis of the statute, and the legislature hastily met to repeal it. Clearly such a statute was intended to be effective only at such time as there was a “war between the states.” Not apocryphal at all is the use of a merger to affect an amendment of the articles of incorporation that is blocked by the articles of incorporation of the corporation that will disappear.

contemplation, we cannot entertain a presumption to that effect with respect to matters overlooked or not anticipated.<sup>131</sup> And there are thousands of such matters that ultimately surface in the wake of any statute that addresses even a moderately complex subject matter. The legislature, and society for that matter, must be viewed as intending that courts, the only parties in position to do so rationally, address these matters and address them in quite specific ways. Constitutionally, of course, if the evidence supports the proposition that, for example, what appear to be substantive and remedial gaps and omissions were intended, or more likely than not intended, by the law makers, then there is, of course, a binding political decision that should be honored if it is constitutionally acceptable. But, in such instances, statutory purposes, ends sought, have for various reasons been limited through the political process rather than mere happenstance.

Part IV. The Inherent Deficiencies in the Common, Ordinary, or Usual Meanings of Key Statutory Words and Phrases.

Due to recent advances in lexical semantics,<sup>132</sup> we are now in position to understand the numerous problems that we encounter in the law with respect to words and phrases. Although an ambiguous ambiguity is almost universally cited as the *sole cause* of interpretive problems with respect to statutes, it should be obvious from the discussion above that neither lexical nor syntactical ambiguity is the cause of any of the

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<sup>131</sup> Obviously, the following much cited statement needs to be modified: “Congress ‘says in a statute what it means and means in a statute what it says there.’” *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)). When a party selects a particular dish from a specific, limited restaurant menu, one cannot conclude, on that basis alone, that the party would not have preferred a different dish that did not appear on the menu. Knowledge, external to the text of the menu, of the party’s gustatory preferences might well permit one to assert with confidence that had Beef Wellington appeared on the menu, the party would doubtless have chosen it over all alternatives. Likewise, when a matter is not dealt with in a statute because it was overlooked or not anticipated, that does not mean that it would not have been dealt with had it been recognized. Further, the fact that it was not dealt with under such circumstances does not mean that one cannot say how it would have been dealt with, or likely been dealt with, had it been recognized.

<sup>132</sup> See, e.g., Aitchison, *supra* note 21; Wierzbicka, *supra* 23; George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind (1987).

sixteen types of problems identified in Part III. And, although each of the sixteen types of problems identified in Part III can give rise to ambiguity viewed as a conflict between, on the one hand, the purposes of statutory rule systems and other purposes simultaneously operative in the law and, on the other hand, the results of the application of the presumptive semantic content of statutory rules, i.e., an ambiguity of purpose, such conflicts are the result, not the cause of the problems we encounter. Of equal importance, ambiguity is not even the primary lexical source of interpretive problems.

The meanings of words and phrases with which we are most often concerned in the law may be viewed in terms of both their extensions and intensions. The extension of a word or phrase that denotes a category we associate with either a noun or a verb consists of all instances of the denotata of the word or phrase. Thus, the extension of “cup” is all cups. The extension of “touch,” as a verb, is all states and acts of touching. A word can be defined ostensively through examples of its extension. That is, one way to define “cup” is “objects like this one here and that one over there,” where the words spoken are tied to specific objects in the environment, each being a cup, by the gesture of pointing. One way to define “touch” is “states or acts like this one here and that one there,” where the words spoken are tied to specific states or acts in the environment, each being a state or act of touching, by the gesture of pointing.

The intension of a word is a theoretically sound definition that is adequate to describe the category, or extension, the word is used to denote. As Anna Wierzbicka, one of the world’s leading experts in lexical semantics, and others make clear, dictionary definitions are seldom intensions because dictionary definitions seldom are theoretically

adequate.<sup>133</sup> For example, the primary definition of “cup” in the Webster’s Third New International Dictionary of the English Language Unabridged (1986), i.e., that relating to a type of drinking vessel,<sup>134</sup> is approximately thirty five words. In contrast, Anna Wierzbicka’s definition for “cup” requires two pages of text and addresses, at two levels, purpose, material, appearance, size, and use.<sup>135</sup> A definition for “touch” is not quite so lengthy. The non-metaphorical intension for “touch,” as a non-active verb (as in “X is touching Y”), is something like: “to be in a spatial relation with another physical object whereby the subject is contiguous to and in direct contact with the other physical object.” The non-metaphorical intension for “touch,” as a transitive verb (as in “X is in the process of touching Y”), is something like: “an act whereby one physical object is brought into direct contact with another.” Statutes involve encounters with at least twelve problems with the extensions and intensions—or meanings—of words and phrases. They also regularly involve a thirteenth set of problems with the quantifiers, whether express or implied, “all” and “none.”

Words and phrases used in a statute are often drawn from every day speech, other non-legal settings (including technical settings), or other legal settings in which linguistic categories have been established in light of purposes significantly different from those giving rise to the statute in which they appear. Since the scientific discipline of lexical semantics does not recognize the concept of “plain meanings,” we shall continue to call these meanings “common meanings.” Not surprisingly, the common meanings of key words and phrases used in a statute, being drawn from non-legal or significantly different legal settings, generally do not encompass categories of behaviors/actions, mental states,

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<sup>133</sup> See *supra* notes 21 and 24.

<sup>134</sup> There are also cups on golf courses into which golfers attempt to place golf balls.

<sup>135</sup> Lexicography and Conceptual Analysis 26-27 (1985).

events, circumstances, situations, and the like, and combinations of the like, that are perfectly suited to the purposes of the statute into which they are introduced.<sup>136</sup> Time and again we discover, after the fact, that the classifications we need to fulfill the purposes of a given statute are generally not perfectly identical to the categories that

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<sup>136</sup> There is a tendency to believe that we have lexically and conceptually divided and categorized the phenomena of the world in all possible ways. That is erroneous. The linguistic categories associated with words and phrases of the English language do not even begin to divide and classify the phenomena of the world into all possible categories. That would require an infinite vocabulary, a matter far beyond the capacity of a finite mind. Rather, as Derek Bickerton notes: “[W]e [lexically] distinguish only what we (as a species or as a cultural group sharing common values) need to interact with in significant ways.” *Language and Species* 35 (1990). For example: “It has often been noted that no language has words with meanings like ‘a left leg and left arm’ or ‘every other Friday’.” *Id.* at 44. Of course, if there were a sport that regularly caused simultaneous injuries to the left arm and left leg, we might develop a special term.

As Alvin Goldman observes:

The creation of categories, kinds, or ‘versions’ is an activity of the mind or language. The world itself does not come precategorized, presorted, or presliced. Rather, it is the mind’s ‘noetic’ activity, or the establishment of linguistic convention, that produces categories and categorial systems.

Goldman suggests viewing the relation between language and the world in terms not of a correspondence between words and pre-existing, external “facts,” but in terms of “*fittingness*: the sense in which clothes fit a body.”

The chief advantage of this metaphor is its possession of an ingredient analogous to the categorizing and statement-creating activity of the cognizer-speaker. At the same time it captures the basic realist intuition that what makes a proposition, or statement, true is the way the world is.

There are indefinitely many sorts of apparel that might be designed for the human body, just as there are indefinitely many categories, principles of classification, and propositional forms that might be used to describe the world. Although the body has parts, it is not presorted into units that must each be covered by a distinct garment. It is up to human custom and sartorial inventiveness to decide not only what parts to cover, but what types of garments should cover which expanses of body, and whether the garments should be snug or loose. . . .

Despite all this variety—humanly invented variety—there is still the question, for any specified type of apparel, whether a specific token of that type fits a particular customer’s body. This question of fittingness is not just a question of style of garment. It depends specifically on *that* customer’s body. Similarly, although the forms of mental and linguistic representation are human products, not products of the world *per se*, whether any given sentence, thought sign, or proposition is true depends on something extra-human, namely, the actual world itself.

Goldman, *supra* note 11, at 152-53.

The fact is that we create the categories we find useful, when, as, and to the extent the need arises and is recognized. We find different categories useful at different times and for different purposes and create new categories, often by appropriating and adapting existing categories by metaphor, as new needs arise. See Lakoff, *supra* note 132, George Lakoff & Mark Johnson, *Metaphors We Live By* (1980). That is, we linguistically and conceptually categorize and re-categorize the phenomena of the world as we find it useful to do so. There may be an infinite number of ways external reality could be divided and categorized, but we find only a finite number of such ways useful or interesting and most, therefore, are ignored. When we seek categories to suit our legal purposes, our legal purposes may not entail categories that have perfectly “fitted” other needs.

satisfy everyday or non-legal needs or the needs of other statutes. The common meanings of the words and phrases that represent these categories have been established by societal usage conventions or legal concerns in some respects removed from the concerns of the statute in question. There is, accordingly, no reason to expect the categories, or extensions, these words and phrases have historically denoted in non-legal contexts or even in other statutes, and, therefore, their meanings, to be perfectly suited to the purposes of a given statute. That is quite common in science. The category denoted by the every day folk biological term “animal” does not suffice for scientific biology. The concept of “force” in every day discourse does not suffice for physics.<sup>137</sup> Similar problems are encountered in the law.

The difficulty is that the ways in which the historical meanings of words and phrases are partially inappropriate to a statute’s purposes, like the incompleteness of legal rules and rule systems, are generally not self-identifying or not fully self-identifying. It is generally impossible, *ex ante*, to recognize or ascertain the full, potential congruence or lack of congruence between the historical lexical categories and the lexical categories appropriate to a given statute in light of its purposes, although it is easy to do so *ex post* as the overlooked and unanticipated present themselves.<sup>138</sup> The following are twelve types of ways in which the meanings of nouns and verbs, and noun and verb phrases, from settings other than the statute at issue can be inadequate in light of the purposes of a given law.

1. To begin with the all too obvious, words and phrases used in statutes can be conceptually ambiguous. The primary form of ambiguity arises when a word denotes

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<sup>137</sup> When was the last time that it really hit you that force equals mass times acceleration?

<sup>138</sup> Item 6, *infra* p. 61, and Item 8, *infra* p. 64, fully illustrate this point.

two or more relatively distinct extensions that are at least in part conceptually distinct. Although this form of ambiguity is often treated as *the* essential source of the need for statutory interpretation, it is, in fact the least of the lexical problems in the law because context resolves most ambiguities so effectively that they are never even noticed.<sup>139</sup> As noted, the term is all too often used when any problem relating to statutes arises.

2. Words and phrases used in statutes can evidence non-conceptual ambiguity due to prototypes, or prototypical extensions, and non-typical category members, or non-typical extensions.<sup>140</sup> Prototypes result when a category has one extension comprised of typical members that are generally the subject of reference in a linguistic community but also conceptually includes an extension of non-typical members that are not generally the subject of reference.<sup>141</sup> That is, there is a prototypical extension and a non-typical extension, even though both extensions are covered by the same general concept. The existence of prototypes gives rise to a form of ambiguity that is more subtle than conceptual ambiguity. For example, in America, the typical bird is a robin or sparrow. Thus, if someone says that he has a number of birds on his lawn, one will assume that the party has typical birds on his lawn, not a flock of ostriches or condors, even though, conceptually, ostriches and condors are unquestionably birds. The typical is viewed as

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<sup>139</sup> For example, if one says of a known alcoholic, “He’s drinking again,” even though there are many things a person can drink and the elided direct object is, accordingly ambiguous, almost no one will ever notice the ambiguity. Rather, hearers will automatically understand “alcoholic beverages,” and the ambiguity will pass unnoticed. The example derives from Levinson, *supra* note 30, at 176. In a torts class, the statement “The defendant was responsible for the battery” would almost certainly be immediately understood to mean that defendant was liable for the tort of battery. It would occur to few that the battery in question might be a flashlight battery or an assemblage of artillery.

<sup>140</sup> We can add non-lexical, syntactical ambiguity to the list of problems encountered in the drafting of statutes. For a thorough discussion of the problem *see* Solan, *supra* note 16, at 28-92.

<sup>141</sup> On prototypes, *see, e.g.*, Lakoff, *supra* note 132.

intended in use—i.e., is the default—unless further clues are provided. In the law, issues deriving from prototypes occasionally surface.<sup>142</sup>

3. The common meanings of words and phrases used in statutes can be vague in varying degrees. Vagueness is distinct from ambiguity. Ambiguity exists when there are two (or more) distinct meanings (extensions and corresponding intensions) in actual use and it is not clear from context which is intended. Vagueness exists when and to the extent a word fails to denote with certainty.<sup>143</sup> Vagueness occurs when and to the extent a word's extension is unsettled because there is no established usage convention in a linguistic community over a portion of its potential range of use.<sup>144</sup> To the extent there is no

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<sup>142</sup> *Smith v. United States*, 508 U.S. 223 (1993) addressed the meaning of the phrase “use a firearm” in 18 U.S.C.A. § 924(c)(1)(West 2000), which enhances the prison term for drug crimes when a party uses a firearm in connection with a drug crime. The phrase has both prototypical and non-typical meanings. In *Smith* a party, the purchaser of drugs, used an automatic weapon as payment for drugs, and the government sought to enhance the penalty on the grounds that the party “used a firearm” in connection with the crime. The majority of the justices on the Supreme Court agreed that the defendant had used a firearm within the meaning of the statute. Justice Scalia dissented on the grounds that the phrase typically is used to mean such things as to threaten or to inflict injury with a gun. Justice Scalia was certainly correct in one sense. Although on abstract conceptual grounds, the phrase can include use of a firearm as a hammer, door-stop, medium of exchange, or fishing line sinker, those are not the prototypical uses. Of course, the mere fact that the court majority opted for a non-typical meaning is hardly proof of error. See also *In re Pizzi*, 153 B.R. 357 (Bankr. Fla. 1993) (holding that what is conceptually clearly an annuity, although not a typical annuity, is not an annuity); *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1978) (holding, on the basis of several patently flawed economic and financial arguments, that what is clearly conceptually an investment contract under *S.E.C. v. W. J. Howey*, 328 U.S. 293 (1946), albeit not a typical investment contract, is not an investment contract).

<sup>143</sup> Creating a phrase often fails to eliminate vagueness. The phrase “major life activity” used in the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12117 (2005) (relating to employment), is not rendered precise by inclusion of the word “major.” That word, itself, is vague. It is what Anna Wierzbicka calls an “approximative.” Anna Wierzbicka, *Precision in Vagueness: The Semantics of English Approximatives*, 10 J. of Pragmatics 597 (1986). As for “major life activities,” we have no exhaustive list of major life activities that is conventionalized in the lexicon.

<sup>144</sup> That is, the word's or phrase's extension, or the category members it denotes, is not denoted precisely and does not constitute a conventionally established, exhaustive, and discrete set, i.e., the set is potentially open—although some members of the set are unequivocally designated by convention. In terms Paul Ziff employs, there is no established regularity of usage with respect to some possible members of the extension. Ziff, *supra* note 22. For example, Ray Jackendoff examines the meaning of the verb “defrost” and finds that that there are instances of behavior that are clearly instances of defrosting, instances in which one is unsure, and other instances where one is clear that the behavior cannot be called defrosting. *Patterns in the Mind* 198-99 (1994). He observes:

The point is that everyone agrees on their judgment of the ideal situation. As we move away from the ideal, there is a broad gray area or penumbra of cases that “sort of” fall under the concept, and about which people may disagree somewhat. Then, as we move

established convention of inclusion in or exclusion from a word's or phrase's extension, one obviously cannot establish by convention what the word denotes and, therefore, cannot say what it means, i.e., stands for or represents.<sup>145</sup>

Almost all words that denote become vague at the peripheries of their usage. Some are vague at their cores. As a practical matter, vagueness results from the fact that in many practical and communicative settings we do not need extremely fine denotational, or extensional, precision and, being economical of our time and efforts, we, accordingly, do not bother to establish denotational, or extensional, conventions with precision beyond our needs.<sup>146</sup> In the non-legal settings in which the meanings of words

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still further away from the ideal, everyone is in agreement again that the situation does not fall under the concept.

*Id.* at 199. Professor Jackendoff then points out that “[i]n the case of the concept of defrosting, the existence of a gray area is harmless enough. Why bother worrying about it?” *Id.* That provides the explanation for the gray areas. There are no needs for societal conventions in the gray areas, at the peripheries of the uses of words, because the need for a convention at the peripheries arises too rarely either to require or to occasion a societal convention. Were there needs for societal conventions at the peripheries, i.e., greater specificity or precision, they would exist. Nonce determinations, whether arbitrary or not, can generally be made to take care of the rare occasions when a convention is required.

For example, there is no word or phrase in common usage that captures with precision what the phrase “major life activity” in the Americans with Disabilities Act, 42 U.S.C.A. §12102(2) (West 1995), purports to denote. Being precise in that specific way is not a matter of societal concern outside the law. As a result, merely slapping together the words “major,” “life,” and “activity” does not create the precise category needed in the law because the concept constituted by the phrase “major life activity” is not conventionalized in the American-English lexicon. In particular, the term “major” is an approximative. *See* Wierzbicka, *supra* note 143. The meaning of an approximative, *qua* definition, may, as Anna Wierzbicka has demonstrated, be precise enough (*see id.*), but the application of the term, as is true of all vague terms, cannot be precise in all instances. This, of course, means that fact finders asked to apply such words are being asked to “find” conventions when none exist; that is to establish a convention where none existed and to make law. Further, different fact finders can make contradictory law on identical facts. In the case of the Americans with Disabilities Act, not only is there no word or phrase in the American-English lexicon that provides the precise conceptual distinctions for the category the statute needs, the parties drafting the statute were obviously not themselves clear regarding which “life activities” were to be considered as within the scope of the statute’s concern, much less all that were to be considered “major.” Since they did not know in all instances what they intended, they chose a phrase that is clearly vague at the margins.

<sup>145</sup> With words that have prototypical and non-typical meanings, one encounters both ambiguity and vagueness. At some point even the conventions regarding the non-typical run out. Is a cliff dwelling that was used by primitive people, and now occasionally by campers, a dwelling for purposes of burglary? There is simply no preexisting convention that says one way or the other.

<sup>146</sup> When the available, historical conventions do not provide the needed precision, we create the precision through special definitions. That is the reason that we create technical definitions for special fields of

and phrases evolve and are established through usage conventions, the lack of thoroughness or precision in conventional usage poses no problems for linguistic communicators. The words, though vague, suit our needs. When, however, by statute we create entitlements, rights, and obligations that turn on the classifications in question, there finally emerges for the first time in human history a need and a reason for persons to seek thoroughness and precision. Someone stands to win or lose a damages award, tax deduction, or contingent fee. Unfortunately, in many instances there is no pre-existing convention, no thoroughness, and no precision, and no amount of judicial linguistic analysis or resort to canons of construction will uncover any.<sup>147</sup>

4. The common meanings of words and phrases used in statutes can exhibit vagueness in the form of binary contrasts. When the concepts associated with two words putatively split phenomena into two mutually exclusive groups but, due to vagueness, i.e., the lack of a convention that covers all possible combinations of “facts,” fail to do so, one is often faced with phenomena, often behaviors and relations between persons and institutions, that do not clearly fall under either concept. Thus, we encounter such traditionally contrasting poles such as: “hot” and “cold,” “large” and “small,” and “tall” and “short.”<sup>148</sup> In the law we encounter poles such as “dwelling” and “non-dwelling,” “material” and “immaterial,” “substantial” and “insubstantial,” “employee” and “independent contractor,” and “debt” and “equity.” The extremes of the polar contrasts

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study. Previously, the precise definition that constitutes a technical definition was not needed. When the need is encountered and prior definitions are recognized as inadequate, the technical definition is created.

<sup>147</sup> Anyone who has had to classify jobs as “management,” “administrative,” and the like under the Fair Labor Standards Act Regulations (29 C.F.R. §§ 541.1, 541.2, 541.102—541.115, 541.200—541.210 (2005)) has encountered vast gray areas. There are no conventions that dictate precisely for each business, regardless of its size, where jobs begin and cease to be management or administrative jobs. What may be viewed as a management function in a small business may be viewed as ministerial in a large business.

<sup>148</sup> The meanings of these words are also highly context sensitive. “Large” in “large elephant” obviously signifies something different than “large” in “large microbe.”

are clearly enough established by convention, but the middle ground between them has not by convention been classed under either pole. There has been no reason to because nothing particularly useful or important to anyone has ever turned on precisely classifying the middle between the extremes. But all that changes when the law enters the picture. The law requires precise, exhaustive classification, but there is none.<sup>149</sup>

5. The common meanings of words and phrases used in statutes can evidence a form of vagueness that gives rise to the difference between rules and standards. A rule is a specific and focused convention. A standard is an unavoidably vague and diffuse convention that purports to be complete and exhaustive but, in fact, has substantial gaps not covered by convention. The extensions of the key words and phrases in a rule are very specific. In the case of rules, we make sure there is little vagueness. For example, most states mandate that when a school bus driver approaches rail road tracks, the driver is to stop the bus before reaching the tracks, open the door, look both ways, ensure that no train is approaching, and close the doors before proceeding. Thus, the actions that constitute “due care” in that setting are precisely specified, i.e., defined. We do not want to leave the matter to individual judgment. Accordingly, the rule itself precisely prescribes the conduct that satisfies it.

Standards arise from a need to distinguish between permissible and non-permissible behaviors in a vast number of arenas of action or activity regarding which there are in many instances no precise conventions as to what is proper or not, and, equally important, cannot be because of the vastness of the number of potential fact

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<sup>149</sup> What investor, *qua* investor, cares whether an instrument that has both debt and equity characteristics, such as “bond” that pays both fixed interest and additional interest measured as a percentage of profits, or preferred stock with a mandatory fixed rate of return, is “really” debt or equity—it simply what it is—unless, for example an income deduction turns on it.

situations. That is, no one has the time or ability *ex ante* to identify each situation in which the concerns underlying the standard might prevail and to prescribe a rule of conduct specifically for each such situation. We resort to standards, and rationally so, in an attempt to accomplish what otherwise could not be accomplished. Thus, in torts we use a standard of due care, even though we have no precise societal conventions that categorize all potentially harmful behaviors in all conceivable circumstances as the exercise *vel non* of due care. Malpractice, in contrast, establishes precise rules based on professional conventions where standards would otherwise prevail.<sup>150</sup>

6. The common meanings of words and phrases used in statutes can conceptually misclassify. In doing so, they can include or exclude facts that *ex post* should clearly or clearly not be within their extensions in light of the purposes of a given statute. The problem of conceptual misclassification can be illustrated by the term “public offering” in the transaction exemption (itself, literally, a securities exemption) of subsection 2 of § 4 of the Securities Act of 1933.<sup>151</sup> The traditional meaning of “public offering” was conceptually inappropriate, i.e., misclassified, in that it would have in some instances denied the act’s protection to parties clearly in need of same. The Supreme Court provided a conceptually distinct and appropriate definition that correctly classified by

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<sup>150</sup> Although in one sense all vagueness is vagueness, that is the absence of a convention regarding the extension of a word or phrase that clearly places certain phenomena within or without the extension of the term at issue, vagueness creates several distinct types of logical and practical problems. For example, the vagueness in 3, above, prevents parties from saying unequivocally that a given phenomena is either A or not-A. The vagueness in 4, above, prevents parties from saying unequivocally that a given phenomenon is an A or a B. For the problems those types of vagueness entail for philosophy, especially logic, see Timothy Williamson, *Vagueness* (1996). The type of vagueness in 5, above, in effect requires juries to make law, that is to decide when a party has or has not breached a duty when, but only when, there is absolutely no pre-existing societal convention (remember, reasonable persons can disagree!) regarding the propriety of the conduct at issue. That is, we ask juries to establish particular, case specific, after the fact, conventions when, but only when, there is no pre-existing convention to guide the conduct of the party charged with wrong doing! Does that really comport with due process or principles of fundamental fairness?

<sup>151</sup> 15 U.S.C.A. §§ 77a—77aa, 77(d)(2) (West 2002).

looking specifically to the need for the statute's protections.<sup>152</sup> The definition was also new to the lexicon. Indeed, the definition could not have been in the lexicon at any time prior to the date the President signed the Securities Act of 1933 into law.

7. The common meanings, viewed primarily as extensions and secondarily as intensions, of words and phrases used in statutes can be over-inclusive in light of a statute's purposes

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<sup>152</sup> Subsection 2 of § 4 of the Securities Act of 1933, 15 U.S.C.A. § 77(d) (West 1997), exempts from the registration requirements of the act "transactions by an issuer not involving a public offering." The term "public offering" was not a technical, legal term, but rather one deriving from the securities industry. The securities industry uses the term "public offering" to designate and mean something like "securities offerings made broadly through the underwriting process, with the capital of all comers sought and welcome." A non-public, or private, offering could, accordingly, be defined as "any offering of securities that the offering group limits to a few individuals or institutions that they approve or a class of individuals or institutions that they approve." The securities industry's classification of "public offering" was not, however, fully appropriate to the purposes of the Securities Act of 1933. For the purposes of the act an offering not involving a public offering, that is, a non-public offering, is not one wherein the offerors restrict the offering to a small group, but rather one in which the offering group makes its offer to those individuals and institutions that do not need the protections of the mandatory disclosure requirements of the act because they have access to the information that such requirements mandate be disclosed. There was no reason for the securities industry to classify in the same manner that the law classifies. The purposes were different. In particular, the securities industry was not concerned with protecting persons who needed the protections of the act. If anything, the industry for years aimed at the efficient fleecing such persons. That was one of the very reasons for the enactment of the Securities Act of 1933. Consider, for example, the market manipulations of Jay Gould and Commodore Vanderbilt. Therefore, there was no reason why the category the securities industry designated by the term "public offering" should be based on the need for the protections of the act. This illustrates the fact that categories relate to purposes in classification, and differences in those purposes will lead to different categories.

The need to redefine the term "public" and its correlate, "non-public," became obvious once the misclassification was revealed by consideration of the statute's purposes. Given the purpose of protecting individuals who do not have access to the information securities registration will disclose, the public, for purposes of the Securities Act of 1933, is comprised of all persons who need the protections of the act, i.e., mandatory disclosure of material information regarding the issuer; and, accordingly, a public offering under the act is an offering of securities made to members of that class. As the Supreme Court, in a pragmatically (in the linguistic sense) correct, indeed, in a pragmatically mandated, opinion, held in *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953), a non-public offering, then, is "an offering made to parties who do not need the protections of the act," while a public offering is "an offering made to parties who need the protections of the act."

Conceptually, the definitions of "public offering" and "non-public offering" as operative in the securities industry and the act were radically different. The categories that each concept denoted or described, however, coincidentally substantially overlapped. The historical meaning of the term as originally appropriated to the act was highly useful in that it covered a very large portion of the individuals who would need the protection of the act, but, as *Ralston Purina* made clear, it did not cover all. Radical conceptual reclassification was necessary to include a small, additional group needing the protections of the act. The historically established meanings of "public offering" and "non-public offering," not only initially partially misclassified for purposes of the statute, the corrected, statutory meaning constituted a classification that was not previously encoded in the lexicon of the American-English language. Rather obviously, it was a classification that, in fact, could not have existed prior to the passage of the Securities Act of 1933.

and overriding considerations. Possibly the most famous, or infamous, example is the phrase “relates to” used in the preemption clause of ERISA, a clause that has generated numerous interpretive decisions and a good many scholarly articles.<sup>153</sup> ERISA’s preemption provision purports to preempt all state laws that “relate to” an employee benefit plan subject to ERISA. Everything, of course, relates to everything else in some way or ways. Some of the many ways that state laws can relate to employee benefit plans is by legally empowering them, subjecting them to legal obligations, and affecting their costs. Taken literally, ERISA’s “relates to” clause would have, *inter alia*, eliminated malpractice claims against plan medical providers by participants in employer sponsored medical plans, freed employee plans subject to ERISA from contract obligations as well as shielded those who deal with plans from contractual obligations to the plans, and shielded service providers to plans, such as lawyers, accountants, and actuaries, from malpractice claims by plans. Applied literally, the preemption provision would have rendered plan operation impossible. Needless to say, courts have not allowed the reach of ERISA’s “relates to” clause to reach so far and have narrowed its extension and corresponding intension.<sup>154</sup> The resulting meaning, both extension and intension, is unique to the both the lexicon and the United States Code and still developing.

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<sup>153</sup> 29 U.S.C.A. § 1144 (1999), referred to by practitioners as ERISA § 514, provides *inter alia*:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)

<sup>154</sup> “Relate to” may be rephrased (not defined as) “stand in some relation to.” Phenomena can stand in, e.g., temporal, causal, affective, magnitudinal, directional, proximity, containment, genetic, familial, functional, and conceptual relations to other phenomena. Justice Souter has observed: “If ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for “[r]eally, universally, relations stop nowhere,” H. James, Roderick Hudson xli (New York ed., World’s Classics 1980).” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). “[I]nfinite relations cannot be the measure of pre-emption.” *Id.* at 656. As Judge Karen J. Williams has even more pointedly observed: “Taken at its face, the term ‘relates to’ has no logical boundary . . . . In one way or another, everything relates to everything else.”

8. The common meanings, viewed primarily as extensions and secondarily as intensions, of words and phrases used in statutes can be too restricted, or under-inclusive. For example, the historical meaning of the word “discriminate” as used in Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>155</sup> the paramount purpose of which was to ensure equality of employment opportunity without regard to race, color, sex, religion, or

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Metropolitan Life Ins. Co. v. Pettit, 164 F.3d 857 (4<sup>th</sup> Cir. 1998). That is, everything stands in *some* relation to everything else. If in no other way, everything exists either before, after, or at the same time as everything else and relates to everything else by existing either before, after, or simultaneously with everything else. One could not employ a more comprehensive term. One significant way state laws can relate to employee benefit plans is by having an effect on their administration, their costs, and the like. In spite of the breadth of the phrase courts have over the years pared back, as not counting for purposes of ERISA’s preemption provision, the number of ways that state laws can relate to plans subject to ERISA and be preempted. Thus, although state malpractice laws clearly affect employer sponsored health plan costs, ERISA does not, with respect to health plans, preempt state malpractice laws. It would hardly seem consonant with a law designed to protect employees to allow physicians providing services through employer sponsored health plans to commit malpractice at will, even though the reduction in risk exposure to physicians would likely lower plan costs. *See, e.g.*, *Moreno v. Health Partners Health Plan*, 4 F.Supp.2d 888 (D. Arizona 1998); *Prihoda v. Shpritz*, 914 F.Supp. 113 (D. Md. 1996); *Chaghervand v. CareFirst*, 909 F.Supp. 304 (D. Md. 1995); *Haas v. Group Health Plan, Inc.*, 875 F.Supp. 544 (S.D. Ill. 1994); *Independence HMO, Inc. v. Smith*, 733 F.Supp. 983 (E. Pa. 1990). On the other hand, if a claim relates to a plan denial of medical coverage, even if based on a medical judgment, it is deemed related to plan administration and is pre-empted. *See, e.g.*, *Thompson v. GenCare Health Systems*, 49 F.Supp.2d 1145 (E.D. Mo. 1999), *aff’d* 202 F.3d 1072 (8<sup>th</sup> Cir. 2000); *Brock v. Primedica, Inc.*, 904 F.2d 295 (5<sup>th</sup> Cir. 1990); *Clark v. Humana Kansas City, Inc.*, 975 F.Supp. 1283 (D. Kan. 1997)). *Contra Cicio v. Does*, 2003 U.S.App. Lexis 2925 (2003).

In addition, as a practical necessity it was recognized that employee benefit plans must be allowed to engage in transactions in pursuit of their business and that such transactions must be subject to, e.g., state commercial laws, even though of course such state laws clearly relate to the employee benefit plans that engage in commercial transactions. *Smith v. Provident Bank*, 170 F.3d 609 (6<sup>th</sup> Cir. 1999). Accordingly, claims against employer sponsored employee medical plans by third-party providers for negligently affirming insurance coverage for parties who in fact are not covered are not pre-empted. *Meadows v. Employers Health Ins.* 47 F.3d 1006 (9<sup>th</sup> Cir. 1995). Likewise, claims by employers or trustees against consultants for negligence, malpractice, and common law fraud are not preempted. *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402 (11 Cir. 1994), *cert. denied* 513 U.S. 1113 (1995); *Airports Co., Inc. v. Custom Benefits Services of Austin*, 28 F.3d 1962 (10<sup>th</sup> Cir. 1994); *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters and Employers Pension Fund*, 785 F.Supp. 536 (W.D. Pa. 1992). Because courts have rightly judged that a provision put into the law at the last minute without much forethought was not intended to lead to the preemption of numerous areas of state regulation just because in some remote way they relate to employee benefit plans subject to ERISA, they time and time again decide that given ways of relating to ERISA governed plans do not fall within the extension of “relate to” for purposes of ERISA’s preemption clause. For extended discussions of ERISA’s preemption clause, *see, e.g.*, Jeffrey A. Brauch, *ERISA at 25—and Its Most Persistent Problem*, 48 Kan. L. Rev. 285 (2000); Howard Shapiro, René E. Thorne, Edward F. Harold, *ERISA Preemption: To Infinity ad Beyond and Back Again? A Historical Review of Supreme Court Jurisprudence*, 58 La. L. Rev. 997 (1998); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 Vand. L. Rev. 1149 (1998); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study in the Failure of Textualism*, 33 Harv. J. on Legis. 35 (1996).

<sup>155</sup> 42 U.S.C.A. §§2000e—2000e-17 (West 1994).

national origin, proved to be too restricted. “Discriminate” is a term that traditionally denoted intentional conduct. To serve the purposes of Title VII, the meaning had to be expanded to include forms of non-intentional conduct.<sup>156</sup>

9. The common meanings of words and phrases used in statutes can denote excessively general categories, extensions, given a statute’s purposes. That is, the common conventions underlying the uses of words and phrases may not accommodate distinctions required in light of a statute’s purposes. If the facts in question were not surfaced or anticipated at the time a statute was drafted, the fact that the categories associated with a statute’s words or phrases fail to accommodate distinctions needed in light of the statute’s purposes will have been noticed by no one. Accordingly, the lack of necessary distinctions will not have been addressed at that time.

To take an example from the criminal law, there are no words in common usage, ethics, or theology that reflect the distinctions required in criminal law relating to

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<sup>156</sup> Title VII contains a substantive rule that prohibits discrimination in employment based on the fact that an individual falls into any of its protected categories. Until the enactment of Title VII, the term “discriminate” had always meant “to distinguish and sometimes also to treat differently on the basis of some consciously and intentionally applied standard or recognized differences in characteristics.” One discriminates, for example, between the bouquets of a Burgundy and a Cote du Rhone, between true and false friends, between the highly talented and less talented in sports tryouts and musical auditions, and between the standard harmonic progressions of J. S. Bach and Gustav Mahler. An examination of the contexts of the uses of “discriminate” outside of Title VII indicates that the term had always denoted conscious and intentional conduct. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the question was presented: can an employer be liable under Title VII for discriminating if it unintentionally excludes a protected class from employment. Specifically, can an employer be deemed to discriminate if, without an intention to discriminate, i.e., treat differently, it employs a facially neutral hiring criterion that is not related to the ability to perform the job in question but that has an adverse impact on the employment opportunities of a group protected by the act? The Supreme Court held, in a pragmatically correct, indeed, in a pragmatically mandated opinion, that an employer can, indeed, be liable under such circumstances. After the court’s decision in *Griggs* it could be said that “discriminate” means “(a) to distinguish and sometimes also to treat differently on the basis of some consciously applied standard or recognized differences in characteristics and (b) *under Title VII, in addition to the conduct in (a), unintentionally to treat differently by the use of a facially neutral criterion that is unrelated to the performance of the job if the result adversely affects the employment opportunities and other employment related rights of a class protected by Title VII,*” with the material in italics being both an expansion of the historical meaning and a new meaning introduced into the American-English lexicon. Accordingly, the historical meaning, the meaning to be found in the American-English lexicon prior the enactment of Title VII, was too restricted, or under-inclusive, in light of the statute’s purposes. That fact was not apparent at the time the statute was enacted and did not surface until almost seven years enactment.

wrongful killing. The technical word “homicide” is too broad, as a killing in self-defense is a homicide although it is not a wrongful killing. The phrase “wrongful killing” is also too broad as it does not accommodate the multiple distinctions exhibited in first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter, negligent homicide, and the like, distinctions deemed appropriate in light of levels of punishment deemed appropriate in light of differences in mental state. Those categories had to be created in light of the needs of the law.<sup>157</sup>

10. The common meanings of words and phrases used in statutes that capture paradigmatic facts can fail to encompass what were above called non-conceptual and substantial equivalents.<sup>158</sup> When that is so, the extensions, and, therefore, the intensions, of the words and phrases will be too restricted. As noted above, the parties who draft statutes may identify what they believe to be all the sets of elemental facts that, given the statute’s purposes, should bring the statute’s substantive and remedial schemes into play. But the reality is that it is often not possible *ex ante* to ensure that one has identified all such facts. Some such facts may not even exist until devised through the machinations of skilled lawyers reflecting in leisure after the frantic rush that led to the enactment of a statute. Because non-conceptual and substantial equivalents are often extremely difficult to uncover, the legislature cannot take the time to dream up all the possible non-conceptual and substantial equivalents, and accordingly they are often overlooked, not anticipated, and not lexically provided for in a legal rule’s coverage.<sup>159</sup>

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<sup>157</sup> In the statutory arena, the term “income” proved too general for the tax laws which have found it necessary to distinguish ordinary income from capital gains.

<sup>158</sup> See *supra* at pp. 41-43.

<sup>159</sup> Any time the legislature expressly or by implication purports to establish an exclusive list of conduct that is, e.g., prohibited because it leads to an unwanted end, one can be certain that parties who want to achieve that end will attempt to concoct non-conceptual or substantial equivalents to the proscribed conduct in an attempt to evade the strictures of the law. Should a statute read: “Thou shalt not beat thy neighbor

11. The common meanings, viewed primarily as extensions and secondarily as intensions, of words and phrases used in statutes can fail to exclude exceptional fact aggregates. As noted above, facts that have been identified and captured by words or phrases used in a legal rule can occur in conjunction with additional facts that were not initially contemplated, and it may not be proper, given the purposes of the rule or overriding considerations,<sup>160</sup> to include within the rule's coverage the aggregate of the facts identified and the additional facts, i.e., exceptional fact aggregates. To the extent exceptional fact aggregates are not identified *ex ante*, they will not be expressly excluded from a legal rule's coverage by exclusion from the extensions of the rule's words and phrases.

12. The common meanings, viewed primarily as extensions and secondarily as intensions, of words and phrases that denote exceptional fact aggregates may not exclude extra-exceptional fact aggregates that constitute exceptions to exceptions that reinstate the application of a rule.<sup>161</sup>

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with stick or stone," one can be assured it would not be long before crow-bars would become popular items with the rough crowd. That is an obvious case, but often functional equivalents are often concocted by counsel in leisure during the months and years following the enactment of a statute.

<sup>160</sup> This situation is aptly illustrated with the common law concept of battery, which was pared back in the case of conduct that would otherwise constitute battery to take account additional facts that have given rise to privileges such as self-defense, law enforcement, and consent.

In the statutory arena, the Sherman Act, 15 U.S.C.A. §§ 1—11 (West 1997), textually fails to exclude from its strictures numerous exceptional fact aggregates, specifically those known as "reasonable restraints of trade." Rather, the act literally prohibits all restraints of trade, and the Supreme Court originally so interpreted it. *See* U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). It was not long before the courts began to recognize that reasonable restraints should be excepted. *See* U.S. v. Addyston Pipe & Steel Co., 85 Fed. 271 (1898).

<sup>161</sup> To again lean on the common law, the privilege of self-defense in battery, an exceptional fact aggregate of a battery plus justifying circumstances, is subject to the requirement that one exercising the privilege not exceed reasonable force. By analogy, the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101—12213 (West 1995), permits an employer to refuse to employ a disabled person who cannot perform the essential functions of the job. However, an employer that asserts that a disabled individual cannot perform the essential function of the job can, nonetheless, be held liable if the disabled person could perform the job if provided reasonable accommodation.

The thirteenth problem with words arises whenever a statute expressly or implicitly covers all conduct, occurrences, situations, and the like, or excludes from its coverage all conduct, occurrences, situations, and the like. Whenever there are overlooked or unanticipated exceptions, rather obviously the word “all,” or the implicit quantifier “all,” means “some.” Thus, although § 514(a) of ERISA provides that the provisions of titles II and IV of ERISA “shall supersede *any* and *all* State laws insofar as they may now or hereafter relate to any employee benefit plan,”<sup>162</sup> courts have held on many occasions that given state laws that clearly relate to employee benefit plans are not preempted by ERISA.<sup>163</sup> Courts have determined that full scale preemption would be absurd. Accordingly, the precise and unambiguous terms, “any” and “all,” terms that by canon supposedly require no interpretation, as used in §514(a) of ERISA, in fact, mean a quite indefinite “some.” So it is with respect to many statutes.

Due to the thirteen factors, above, the presumptive lexical meanings of words and phrases used in statutes may not be what is fully appropriate or required in light of the statute’s purposes and other purposes operating in the law. The meanings of the words and phrases used generally clearly cover the paradigmatic facts a statute is designed to address. Those facts are recognized *ex ante*. If the common, usual, or standard meanings of words and phrases do not capture the paradigmatic facts, that fact will be recognized and the words and phrases will be supplied with special definitions sufficient to capture them. But the drafters of statutes cannot generally *ex ante* recognize these lexical inadequacies or cannot recognize all of them, and, therefore, cannot address them or all of them *ex ante*. Therefore, courts are often forced *ex post* to redefine words—*not simply*

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<sup>162</sup> 29 U.S.C.A. § 1144(a)(1999) (emphasis added).

<sup>163</sup> See *supra* note 154.

*resolve lexical ambiguities*—to bring their meanings into line with the purposes of a given statute, often creating meanings that are new to the human lexicon.<sup>164</sup>

### Conclusion

With the fundamental problems that we face in formulating statutory rule systems identified in significant detail, it is clear that the fundamental objective in statutory interpretation must be to accomplish *ex post* what has unintentionally and unavoidably been left undone in the formulation process. That is the only way to avoid unintended, random, accidental, arbitrary, and often irrational, unfair, or unjust results when overlooked and unanticipated situations surface—results that, even with the utmost diligence, often could not *ex ante* be avoided by express statutory provisions or express definitions and that run counter to the purposes of the statute at issue and other purposes simultaneously operating in the law. Avoiding such results requires: (1) ascertaining the purposes underlying statutory rule systems and, when, and to the extent that, the purposes are inchoate or unrefined, properly clarifying or refining them, (2) using the purposes underlying statutory rule systems and other purposes simultaneously in operation in the law to complete inevitably incomplete statutory rule systems in consonance with those purposes when and as often as any of the twelve types of incompleteness identified in Part III surface, and (3) using the purposes in (2) to modify the meanings of words and

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<sup>164</sup> It may be worthwhile to note that some matters can be addressed by either the addition of rules to a statute or by the equivalent modification of the meanings of words and phrases. These alternatives arise whenever it is appropriate either to expand or contract a category of covered, or elemental, facts. Such expansions or contractions can be accomplished either by special rules expressly including or excluding appropriate category members or by redefining words and phrases to include or exclude the appropriate category members. Thus, if it is appropriate, in connection with a given labor or employment law, to include independent contractors among the protected group along with common law employees, the courts can either hold (a) that in addition to common law employees, an expressly protected category, the purposes of the law demand that independent contractors also be covered or (b) that for purposes of the statute in question the word “employee” includes independent contractors. The substantive result is the same. Courts appear often to prefer covertly to redefine to avoid the appearance “making” law.

phrases used in statutory rule systems to bring those meanings into line with the purposes when any of the thirteen types of deficiencies in lexical meaning identified in Part IV surface. Accomplishing those three tasks simultaneously resolves ambiguities.

Ideally, we would like a process that enables us to accomplish the three tasks in a manner (1) that is fully consonant with the constitutional principle of legislative supremacy and that is, therefore, entirely objective and politically and ideologically neutral, (2) yields predictable results in all cases, (3) is epistemologically unassailable, and (4) operates in accordance with the cognitive processes whereby we comprehend language—which processes, not surprisingly, generally operate in accordance with the principles of epistemology. While identifying the problems we encounter in formulating statutory rule systems reveals the process for addressing them, we cannot achieve the ideal. Nonetheless, we can, fortunately, approach the ideal.

Reflection reveals that the problems we encounter with respect to statutes are common in human experience, and the process for addressing them is readily identifiable and amazingly uniform and constant across a broad array of human activities. The adaptations of this process to accommodate the occasional special needs of the law are minor and obvious. In general terms, formulating statutes requires us to establish schemas, plans or designs if you will, for accomplishing given purposes in the face of eventualities a number of which have inevitably been overlooked and others of which have not been, in many instances, could not be, anticipated. That is common in human experience. There are thousands of other settings in which we face the identical problems, in which we must formulate plans or designs for accomplishing given purposes

in the face of overlooked and unanticipated occurrences or events.<sup>165</sup> These settings range from the primitive activities of hunting, battle, and exploration to more recent additions to the human behavioral repertoire such as nautical navigation, mergers and acquisitions, recreational mountain climbing, mining operations, vacation traveling, architectural design and construction projects, and even the calling of plays in football. In all these settings we employ virtually identical criteria in responding to the overlooked and unanticipated as they present themselves. The criteria are in large part those of means rationality—criteria for effectively accomplishing purposes in accordance with their relative priorities—with occasional reference to ends rationality in connection with the scopes of ends. The result is that there is associated with these settings a virtually universal and uniform set of intentions about addressing overlooked and unanticipated situations as they are encountered. Further, because we all address such situations in virtually the same ways with virtually identical intentions, it is often obvious how to do so and, in any event, generally feasible for us to do so on behalf of others in ways that either in fact comport with their purposes or can reasonably be regarded as comporting with their purposes. That is why agents and subordinates can successfully act for their principals and implement directives and carry out orders in the face of overlooked and unanticipated situations when the principals are not available for further direction.

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<sup>165</sup> This fact and its implications have been explored in significant depth in Michael E. Bratman, Intentions, Plans, and Practical Reasoning (1987). As Professor Bratman observes:

We do not [act on the basis of] plans that specify, once and for all, everything we are to do in the future. Such total plans are obviously beyond our limits. Rather, we typically settle on plans that are *partial* and then fill them in as need be and as time goes by. This characteristic of *incompleteness* of our plans is of the first importance. It creates the need for a kind of reasoning [practical reasoning] characteristic of planning agents; reasoning that takes initial, partial plans as given and aims at filling them in with specifications of appropriate means, preliminary steps, or just relatively more specific courses of action.

*Id.* at 3 (emphasis in the original). See also Michael E. Bratman, Faces of Intention: Selected Essays on Intention and Agency (1999).

It would appear that legislators do not fully appreciate the practical problems they face in formulating statutory rule systems or, presumably, they would explain in legislative history, the text of the statute being formulated, or in a special statute governing the interpretation of statutes generally, the intentions they have regarding the manner in which overlooked and unanticipated situations are to be addressed when they ultimately surface. Nonetheless, there are ascertainable intentions with quite specific content that can be, rationally must be, attributed to the legislature and that dictate how to address such situations. Since these intentions are implicit in human behavior, although not expressly declared by the legislature, they may in the legislative setting be called “implicit legislative intentions.” They enable courts to carry out the tasks that constitute the interpretation of statutes in ways that either are or may most reasonably be viewed as intended by the legislature. They enable courts to address overlooked and unanticipated situations in consonance with the constitutional provision for legislative supremacy even when the results are not *ex ante* provided for by statutory text.

The set of implicit legislative intentions is both sophisticated and moderately numerous. It encompasses, for example, the intentions to include within a statute’s coverage overlooked and unanticipated non-conceptual and substantial equivalents of paradigmatic statutory facts, to add to statutory rule systems missing substantive and remedial rules that are necessary or beneficial in giving effect to a statute’s purposes, to deny effect to the presumptive semantic content of statutes when giving the presumptive semantic content effect would yield results counter to the purposes underlying the statute, to deny effect to overlooked and unanticipated successive applications of rules that produce results at variance with the underlying purposes of the statute or other higher

priority purposes the law is simultaneously pursuing, to give effect to higher priority purposes when purposes of the law conflict, and to modify the meanings of words and phrases to bring their meanings into line with the purposes underlying the statute in which they appear and other purposes simultaneously operative in the law. Each of these examples reflects principles of rationality in the completion of purposive plans and designs as overlooked and unanticipated matters arise. They are, therefore, in large part objective and politically and ideologically neutral. They apply to both liberal and conservative as well as consensus legislation. They operate not to slant results politically or ideologically but appropriately to complete statutory rule schemes and appropriately to modify meanings of words and phrases used in statutory rule schemes in light of the purposes underlying a statute and other purposes the law is simultaneously pursuing.

Not surprisingly, courts regularly and instinctively resort to these implicit legislative intentions in the interpretive process. They account for, and justify, numerous judicial decisions, many of which textualists condemn. They also account for Justice Scalia's observation that on some occasions in interpreting statutes we resort to what appear to be "objectified intentions."<sup>166</sup> They are objectified in the sense that they are so inter-subjectively universal that we can virtually always count on them prevailing. It takes special evidence to convince us that they are not operative on a given occasion.

Because jurists have focused on the obvious but superficial problem of resolving an ambiguous ambiguity and not on the fundamental problems of clarifying and refining statutory purposes, completing statutory rule schemes in light of their underlying purposes and other purposes simultaneously operating in the law, and modifying the meanings of words and phrases to bring them into line with those purposes as the

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<sup>166</sup> Scalia, *supra* note 4, at 17.

overlooked and unanticipated present themselves, jurists have, in the traditional theories of legislative intent and statutory purpose, overlooked the set of intentions we virtually universally employ in dealing with problems of the types we encounter in formulating statutes. Some scholars have correctly pointed out the deficiencies in the traditional notions of legislative intent and statutory purpose when we encounter situations that the legislature overlooked or failed to anticipate.<sup>167</sup> In such situations there are, of course, no express legislative intentions. The set of implicit legislative intentions remedies those deficiencies by picking up at exactly the point at which traditional approaches to legislative intent and statutory purpose cease to be effective. By looking beyond legislative history and statutory text and taking the set of implicit legislative intentions into account, we can construct a far more realistic and complete picture of legislative intentions and purposes than jurists have traditionally recognized and employed in statutory interpretation. We can thereby address those situations that the traditional views of legislative intent and statutory purpose cannot reach.

The insights in Parts III and IV of this article alone should come close permanently to putting textualism to rest. When, in the article that is the companion to this one, we add to the mix insights from epistemology and the linguistic discipline of pragmatics, there is no doubt that textualism can be philosophically, scientifically, and linguistically eliminated as an intellectual force in the law.<sup>168</sup> Further, the set of implicit legislative intentions, together with the linguistic discipline of pragmatics, will also allow

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<sup>167</sup> See, e.g., William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 312 (1990).

<sup>168</sup> Textualism operates on the assumption that language is simply a code. Note 17, *supra*, indicates why that is wrong. The discussion above also makes it clear why textualism creates such a drag on remedial legislation. It prevents courts from acting in overlooked and unanticipated situations to rationally complete such legislation in accordance with its purposes.

us permanently to set aside many of the canons of construction and appropriately to revise and justify those that have some continuing validity. They will also provide a much needed answer to the excessive claims of nihilistic skeptics. As an added bonus, when we employ them the results we achieve are epistemologically unassailable. And, somewhat surprisingly, the linguistic discipline of pragmatics makes clear that employing them in the interpretive process accords with the cognitive processes whereby we comprehend language generally.

When the implicit legislative intentions are identified in full and applied in statutory interpretation, the problems we encounter in interpreting statutes shrink to quite manageable proportions, although they do not vanish entirely. We cannot achieve the ideal. Nonetheless, this set of intentions allows for a much higher percentage of determinate, albeit, not always certain, outcomes than does the usable but theoretically inadequate and partially conflicting mishmash of traditional legal reasoning.<sup>169</sup> We see that many decisions in the reporters were inevitable in light of these intentions. There are, however, residual situations, generally at the periphery of statutory rule systems, in which even the set of implicit legislative intentions does not mandate entirely objective, politically and ideologically neutral, determinate outcomes. There are situations in which the set of implicit legislative intentions can do no more than mandate that judges, parties who ideally have no personal stake in the outcome, attempt to provide a rational, fair, and just outcome as best they can conceive one. That, however, is an imperfection that we can live with. Some might rationally conclude that it is not even an imperfection.

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<sup>169</sup> Outcomes that on the available evidence are favored by the probabilities, for example, that the legislature intended them, cannot be rejected and are, therefore, determinate. Whether the legislature actually intended them can, nonetheless, be uncertain. The same holds in gambling. Once one knows the odds, the proper bet is fixed. The outcome on a specific occasion may, however, render a proper bet a losing bet. Nonetheless, we rationally act in all settings on the basis of the probabilities.