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Commentary on Feteris

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Commentary on Eveline Feteris' "Strategic Manoeuvring with Linguistic Arguments in the Justification of Legal Decisions"

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Dr. Feteris proposes two accounts of linguistic argumentation. The first is in the abstract: "with a linguistic argument it is shown that the proposed interpretation of a rule is based on the meaning of the words used in the rule in ordinary or technical language." And so, on this account, the scope of a linguistic argument ranges from the words used to state a rule, the conventional meanings of those words, and the aggregated interpretation of those meanings. Consequently, the frame for linguistic argumentation may be rendered:

Linguistic Argument 1 (LA1)

- P1: Stated rule R is composed of words w_1-w_n .
- P2: Words w_1-w_n have conventional meanings m_1-m_n , which aggregate to Interpretation I .
- C: Therefore, I is the preferred/prima facie justified interpretation of R .

Alternately, Dr. Feteris holds that the *strategic* element of linguistic argumentation extends beyond posing a plausible interpretation of R but to developing an application to a case, and so they must live up to further demands of critical legal audiences. "I consider strategic manoeuvring with linguistic arguments as an attempt to convince a legal audience that a legal standpoint is in accord with legal starting points without violating openly the dialectical norms of reasonableness." The strategic objective, of course, is to yield a decision in favour of one's preferred legal standpoint by the rules of acceptable exchange. Given that the strategic account of linguistic arguments focus on legal standpoints which are decisions about cases, the scope of the arguments change. And so, this wider scope of argument can be schematized:

Linguistic Argument 2 (LA2)

- P1: Stated rule R is composed of words w_1-w_n .

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- P2: Words w_1 - w_n have conventional meanings m_1 - m_n , which aggregate to Interpretation I .
P3: Interpretation I accords with (or does not run afoul of) legal starting points.
C1: Therefore, I is the preferred interpretation of R .
P4: Case x has facts f_1 - f_n that, according to I , are allowable or not allowable.
C2: Decision D is the preferred legal standpoint for case x as an application of R .

I hold that it is very difficult to talk about interpretations of rules without also talking about their applications, and Dr. Feteris' account here matches this duality of interpretation and application. However, in making explicit the ways in which linguistic argumentation may be defeated (or where she holds it is *fallacious*, which I take exception to, but is another issue), Dr. Feteris gives me some pause regarding the identification between interpretation and application.

Developing the crucial content of the legal starting points I've listed here as P3 of LA2, Dr. Feteris argues that according to Dutch Law, the intentions of legislators are determinative of interpretations of laws, even to the point where we have a positive burden of having to determine the intentions from external sources when they are not clear in the statement of a rule. Consequently, interpretations that run afoul of the law's author's motivations fail. With the homomarrriage case, because the law was written (presumably) expressly to outlaw homosexual marriage there something perverse in interpretations of the law that would, by its wording *allow* such marriages. But there is some room for some thought on the difference between interpretation of intent and application here. That is, the interpretation of the rule that 'a man' can only marry 'a woman' to be a prohibition of *polygamy* itself *would* fit well with the general intentions of the law's authors. Prohibitions of polygamy are not inconsistent with prohibitions of homosexual marriage, in fact, it seems plausible that the authors would likely be positively happy with such a strategy in different circumstances of application—it addresses an even wider set of cases of non-traditional marriage. That is, if the issue were whether a man could marry two women, it does seem plausible that *the law could be interpreted and applied in this fashion*. The problem, as I see it here, is not with the *interpretation*, but with the *application* of the rule in the cases at issue, because the interpretation on offer in the homomarrriage case no longer outlaws specific cases the law was supposed to outlaw. And so, it is not in articulating *interpretations* of rules that we reveal the problems with linguistic arguments, but in their *applications to cases*. Again, it seems we have room to wiggle with our interpretations, and we may even have, in circumstances where the application to cases is different, two different standards for interpreting a rule.

This distance is worth attending to, as there may be no *overtly expressed* or even *clearly intended* meanings to be interpreted and applied legitimately from legal documents. A famous example in the United States is rights to privacy. Privacy rights are nowhere explicitly guaranteed in the Constitution, the Bill of Rights, or in subsequent amendments. However there are interpretations of our first (protecting freedom of speech, press, religion, assembly, and redressing grievances), fifth (guaranteeing equal protection and due process), and fourteenth (protecting the rights of life, property, and liberty) amendments taken to support such a right, and because they do not *contradict* (but

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nevertheless were not explicitly part of) the framers' intentions, they are not defeated or fallacious.

This is an issue of no small import—there is no *explicit* guarantee of privacy rights in the U.S. Constitution, and there have been many (for example, Robert Bork in his failed Supreme Court appointment hearings in 1987) who have reasoned that since there is no mention of privacy rights in the constitution, there was no intention of such guarantees. And consequently, the constitution supports no such rights to privacy.

My closing question for Dr. Feteris is how demanding the rule of fitting with or not contravening the intentions of legislators must be. Clearly, the intentions are not to be *contradicted*, but how faithful to legislative intention must our interpretation be? Must we strive to recapitulate them (as many who call themselves “Originalists” in the United States hold), or is there a range of allowable interpretations that may be put into play with linguistic arguments and then adjudicated by our further standing legal reasons or pragmatic considerations (as those who hold the laws are “living documents”)?

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