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## Are Housekeepers Like Judges?

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# ARE HOUSEKEEPERS LIKE JUDGES?

*Stephen P. Garvey*†

## INTRODUCTION

Professor Greenawalt proposes that we look at interpretation “from the bottom up.”<sup>1</sup> By taking a close look at informal relationships between an authority and his or her agent, and how the agent “faithfully performs” instructions within such relationships, he hopes to gain insight into the problems surrounding the interpretation of legal directives.<sup>2</sup> Professor Greenawalt’s analysis displays all the subtlety, imagination, and insight we have come to expect from him.

The analysis of “faithful performance” in informal contexts which Professor Greenawalt presents in *From the Bottom Up* is the first step in a larger project.<sup>3</sup> His next step is to see what lessons the interpretation of instructions in informal contexts has for law.<sup>4</sup> This Comment tries to contribute to that next step.

One might continue Professor Greenawalt’s project in one of at least two ways (though Professor Greenawalt may have neither in mind). First, one could try to identify the insights developed in the informal context and then transpose them more or less directly onto the legal context. Second, one could try to stay roughly within the context of informal relationships of authority, but try to make them look more like the relationships of authority that typically obtain within law. I take the second of these two approaches.

In Part I, I offer some variations on one of the stories Professor Greenawalt uses to explore “bottom-up” interpretation. These variations, inspired by the growing literature on statutory interpretation, add assorted complications to Professor Greenawalt’s basic story in an effort to move that story “toward the top” and closer to the realities of

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<sup>1</sup> Kent Greenawalt, *From the Bottom Up*, 82 CORNELL L. REV. 994 (1997).

<sup>2</sup> *Id.* at 999. In addition to the idea of “faithful performance,” Professor Greenawalt’s article focuses on the “more conceptual question of what . . . prescriptive standards ‘mean.’” *Id.* at 995. In this connection, he argues persuasively that “[w]e need to recognize that ‘the meaning of an instruction’ is ambiguous and may be answered in different ways.” *Id.* at 1017. For present purposes, I will concentrate only on the notion of “faithful performance.”

<sup>3</sup> *Id.* at 995.

<sup>4</sup> *Id.* at 995-96.

legal interpretation.<sup>5</sup> I should note that these variations are presented primarily to stimulate thought. It is well beyond the scope of this Comment to try to resolve what faithful performance would require in the face of them.

Professor Greenawalt does not directly enter the contemporary debate surrounding questions of statutory interpretation. He does not take sides with any of the schools of thought on that subject. Nonetheless, he does show how important a principal's subjective intent is to an agent's effort to faithfully perform,<sup>6</sup> and he does hope "we can learn something about . . . the possible legal relevance of the intent of those who issue directions."<sup>7</sup> Accordingly, Part II closes with some general and well-known caveats about the role of intent in statutory interpretation.

## I

### "TOWARD THE TOP"

Professor Greenawalt asks us to entertain two stories. The first is about Georgia, who directs her housekeeper Kent to "fetch soupmeat every Monday from Store X" while she is away.<sup>8</sup> Kent must decide what to do when confronted with different obstacles that leave him wondering exactly how he should proceed. The second story is about Cheryl, a basketball player whose team is ahead by three points and whose coach says in the final minutes of the game, "Don't shoot; run out the clock."<sup>9</sup> Cheryl, who finds herself beneath the basket with an easy shot, must decide whether to take it.<sup>10</sup> Professor Greenawalt's analysis of these stories, along with several permutations of them, is fine-grained, nuanced, and illuminating. He shows us that figuring

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<sup>5</sup> Professor Greenawalt is well aware of the complications involved in such a move. *E.g.*, *id.* at 1033-34. I confess at the outset that some of the variations I sketch may seem farfetched and far removed from "real" life. Yet inasmuch as one needs to introduce such "farfetchedness" in order to bring the realities of informal relationships closer to the realities of statutory interpretation, this itself may suggest something about the limits of using informal relationships to shed light on the problems of statutory interpretation.

<sup>6</sup> *Id.* at 1033-35.

<sup>7</sup> *Id.* at 995. Judge Posner and William Eskridge, among others, have also examined informal relationships of authority in the hopes of shedding some light on questions of statutory interpretation. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 124 (1994) (arguing that the platoon analogy supports an even more flexible approach to statutory interpretation than Posner suggests); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269-73 (1990) (using platoon analogy to support "pragmatic" approach).

<sup>8</sup> Greenawalt, *supra* note 1, at 1002. The story can be traced to Francis Leiber. FRANCIS LEIBER, *LEGAL AND POLITICAL HERMENEUTICS* 28-29 (enlarged ed. 1839).

<sup>9</sup> Greenawalt, *supra* note 1, at 998.

<sup>10</sup> *See id.*

out how to perform faithfully is sometimes fairly straightforward,<sup>11</sup> and sometimes quite complicated.<sup>12</sup>

Though different in some respects, these basic stories share a few common features. In each, we have one readily identifiable principal who issues instructions in an effort to faithfully serve the common good of some broader group. For Georgia, the broader group is her family; for the coach, her team. We also have in each story a single agent who wants nothing more than to perform faithfully. For the sake of simplicity, I will focus on the Georgia-Kent story and introduce variations in which one or more of these features is missing.

#### A. The Not-Entirely Faithful Head-of-Household

Suppose that Georgia's directive to Kent involves not soupmeat, but rather, an exotic and expensive variety of kiwi fruit. Kent is directed to buy this kiwi every Monday at Store X. Kent knows, however, that Georgia's decision to buy the kiwi was not based purely on her belief that kiwi is good for the children. Instead, Georgia's decision was in part the result of an "understanding" she had earlier reached with the grocer of Store X. What's the story behind this understanding? It goes something like this.

Imagine that Georgia is the children's foster parent. She professes great love and concern for them, and she is widely regarded as a good care-provider. In return for Georgia's services, the foster care agency pays her a modest sum, which she looks forward to receiving every month. Still, she serves at the agency's discretion and is anxious to remain in its good graces. As it happens, Store X's grocer plays golf with the head of the agency and is therefore in a marvelous position to say nice things about Georgia. In exchange for these nice words, Georgia reaches an "understanding" with the grocer that she will send Kent to buy kiwi from him every Monday. This arrangement benefits the grocer because, we might imagine, he makes an above-average profit on his expensive and exotic kiwi. We might further suppose that the "agreement" between Georgia and the grocer is not open and express, but is based instead on tacit understandings. Kent is nonetheless fully aware of what's going on.

Suppose also that Georgia has told Kent that she wants to provide the children with a healthy and nutritious diet, which she sincerely believes must include kiwi fruit. Kent believes that kiwi is good for the children, but he also believes that Georgia has genuinely fooled herself into thinking that kiwi is essential to the children's diet. Kent thinks she really continues to put kiwi on the weekly shopping list

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<sup>11</sup> *Id.* at 998-99.

<sup>12</sup> *Id.* at 1000, 1008-15.

because she wants the grocer to continue to say nice things about her to the head of the foster care agency. Georgia's beliefs about kiwi, Kent surmises, have conveniently adapted to fit her self-interest.

Week after week, Kent dutifully buys kiwi, even though he thinks that it's really a waste of good money that could be better spent on other things. Suppose now that on one particular Monday, the grocer runs out of kiwi. What should Kent do? It turns out that the only comparably expensive item the grocer sells, and the only item that would be in keeping with the terms of Georgia's unspoken bargain, is soupmeat, which Kent thinks cannot be healthy for the children. Kent wonders whether he should try to uphold the terms of the bargain, or go to another store in search of kiwi.

If Kent were a court, Georgia a legislature, and the children the relevant "public," some legal thinkers might suggest that Kent should buy soupmeat from the grocer in order to preserve the bargain.<sup>13</sup> Others, however, would probably urge him to go elsewhere in order to buy kiwi—which is an option not clearly foreclosed under the circumstances, and which is more in keeping with the best interests of the children.<sup>14</sup>

#### B. The Supremely-Confident, Life-Tenured Housekeeper

Another variation on the basic Georgia-Kent story that Professor Greenawalt examines involves what Kent should do if Store X burns down.<sup>15</sup> Under these circumstances, if Kent intends to buy soupmeat at all, he must go to another store, but which one? The answer is complicated, as Professor Greenawalt explains, but to encapsulate: Assuming that (1) Georgia never indicated (expressly or implicitly) an alternative store in the event Store X was unavailable; (2) Kent knew that Georgia chose Store X based on the quality of its meat; and (3) Kent thinks that Store Z has better meat than the alternative store which he thinks Georgia believes has better meat (i.e., Store Y), then Kent may go to Store Z. This conclusion is even stronger if Kent is confident that his judgment on meat quality is correct, and stronger still if he and Georgia both understand that he is the "expert" with respect to meat selection.<sup>16</sup>

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<sup>13</sup> Cf., e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (arguing that courts should enforce "decisions made by others," including interest-group bargains).

<sup>14</sup> Cf., e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250 (1986) (urging courts to employ "traditional" methods of statutory interpretation in order "to attain the lawmakers' stated objectives").

<sup>15</sup> Greenawalt, *supra* note 1, at 1017-26.

<sup>16</sup> *See id.* at 1018-20.

Now imagine that Kent is a graduate of the School of Culinary Arts. Overall, Kent was quite a good student, with one notable exception. He did rather poorly in the course entitled, "Choosing Quality Meats." He received a "D+." Despite this lapse, Kent managed to graduate with honors. He attributed the D+ to the poor quality of the instruction. In fact, he is now supremely confident in his ability to judge meat quality, and he thinks he is surely a better judge than Georgia. Georgia, however, thinks otherwise. She has not always been happy with the cuts Kent brings home and has on occasion expressed her dissatisfaction, but only in muted grumbles, which Kent simply shrugs off. He remains secure in the superiority of his judgment, although he is appropriately circumspect and falsely modest around Georgia.

Imagine further that Kent holds his job for life. We might suppose that Kent was bequeathed to Georgia in her uncle's will, which stipulates that he must be kept on "during Good Behavior,"<sup>17</sup> and that if Georgia tries to fire him, she will lose her inheritance. Despite his life tenure, Kent comes from a long line of housekeepers and firmly believes he is duty-bound to faithfully perform. Yet, from Georgia's perspective, Kent's self-confidence causes him to fail routinely in discharging this duty with respect to soupmeat selection. He overestimates his own abilities. Kent believes, but wrongly so, that his degree from the School of Culinary Arts gives him a special ability to select foodstuffs above and beyond all others.

Some legal thinkers suggest courts are much like Kent. They claim that judges too often overestimate their own expertise across too-broad a domain and, as a result, often arrive at erroneous decisions, albeit in good faith.<sup>18</sup> According to this view, courts might make fewer errors by hewing as close to the legislature's text and language as they reasonably can. Others, of course, have a different view.<sup>19</sup>

### C. Too Many Chefs Ruin the Stew

In the basic Georgia-Kent story, Kent has only Georgia to serve. Suppose now, however, that Georgia is married to Bill. Georgia and Bill are foster parents with responsibility for two children. Janet is the

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<sup>17</sup> Cf. U.S. CONST. art. III, § 1.

<sup>18</sup> Cf. Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 732 (1992) ("[D]ecisionmakers are likely to overassess their own competency as decisionmakers, or in other words, underassess the possibility that their decisions will be mistaken.").

<sup>19</sup> Cf. ESKRIDGE, *supra* note 7, at 48 ("[S]tatutory interpretation is multifaceted and evolutive rather than single-faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historical political culture.").

head of the foster care agency. All of them—Georgia, Bill, and Janet—are charged with the basic obligation of providing for the children's welfare, and each takes that obligation very seriously.

Imagine that at the time Georgia and Bill agreed to become foster parents, they sat down with Janet in order to decide what the children's diet would be. In the end, all agreed that soupmeat should be included as a staple on the weekly shopping list, though for different reasons. Georgia and Bill like soupmeat because they thought (however erroneously) that it was nutritious and good for the children's health. Janet, on the other hand, decided to include soupmeat because she thought it was inexpensive and tasted good. Indeed, for Janet, a life lived cheaply and full of good-tasting food is, all else being equal, better than a life dulled by expensive and poor-tasting health food, even if the former life may be marginally shorter than the latter. In the end, however, everyone agreed on the bottom-line directive: "Buy soupmeat." Kent was sitting at the table when soupmeat was agreed upon and overheard the entire discussion, though he took no part in it.

Suppose now that Georgia and Bill are off on a fishing trip, tucked away in the middle-of-nowhere, incommunicado. As Kent is preparing to head to Store X to buy his weekly supply of soupmeat, one of the children hands him a report from the Surgeon General conclusively showing that soupmeat clogs the arteries and can shorten one's life, though not dramatically so. In light of this information, the price of soupmeat has plummeted (though soupmeat tastes as good as ever). What should Kent do? Does faithful performance mean not buying the soupmeat, as Georgia and Bill might want? Or should Kent go ahead and buy the soupmeat despite the Surgeon General's report, as Janet might want?

Alternatively, suppose that Kent was not present in the room when the soupmeat discussions unfolded. He has no idea what was said. He does know, however, that Janet made some notes during the meeting. The notes and the original grocery list were put in a folder, which Georgia and Bill stored securely in the attic along with other important papers. Georgia and Bill never paid much attention to the notes, focusing all of their attention on the list itself. Discovering the notes after hours and hours of searching, Kent scours them thoroughly, looking for some guidance and direction. He discovers what he was looking for tucked away in the final pages of the folder. There, in Janet's neatest handwriting, is the following notation:

The children should regularly be served soupmeat. Not only is it cheap, but it tastes wonderful. Who knows whether soupmeat is the healthiest food around, but who really cares?! Health isn't everything.

Unbeknownst to Kent, however, neither Bill nor Georgia knew Janet had included that statement in the notes, nor would they have endorsed it had they known.

If Kent credits Janet's notation and buys soupmeat, has he faithfully performed? What if Bill and Georgia (both of whom, say, have lost parents to heart disease) had said during the talks, "We don't want the children to eat anything that might increase the risk of a heart attack," but Janet (who has no heart disease in her family) neglects to jot that remark down? Or, even more darkly, what if Janet routinely sneaks in notes saying good things about soupmeat because the grocer makes regular contributions to the foster care agency that Janet heads?

Some legal thinkers might believe that Kent should ignore Janet's notes altogether, just as they think courts should ignore legislative history altogether. Looking to such extraneous sources, they believe, can entail unreasonable search costs.<sup>20</sup> What's more, if the evidence of intent upon which the courts rely has been inserted strategically, it can also be misleading.<sup>21</sup> Finally, some argue that legislative history is simply illegitimate insofar as the only thing lawmakers agree upon is the text they enact, not committee reports or any other piece of legislative history.<sup>22</sup>

The problems associated with multiple principals arise not only when different principals say or think different things at the same time, but also when different principals say or think different things at different times. Suppose, for example, that Georgia and Bill are tragically eaten by alligators on their fishing trip. The children now find themselves with a new foster parent, and Kent now finds himself with a new boss. Call him Newt. It turns out that Newt hates meat (especially soupmeat) and is not particularly fond of soup either, though he naturally thinks soupmeat soup is the worst soup of all. Accordingly, Newt is thinking about putting the children on a vegetarian diet, excluding vegetable soup, of course.

Kent knows of Newt's strong aversion to soupmeat, as well as of his milder aversion to soup of any kind. He also knows that Newt is thinking seriously about substituting soupless vegetarianism for the

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<sup>20</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37 (1997) (noting the large amount of time lawyers in the Office of Legal Counsel spend "poring over . . . the incunabula of legislative history").

<sup>21</sup> See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994) ("[C]lues [in legislative history] are slanted, drafted by the staff and perhaps by private interest groups.").

<sup>22</sup> See, e.g., SCALIA, *supra* note 20, at 31 ("I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law."). *But cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 670-78 (1990) (criticizing various arguments advanced in favor of ignoring legislative history).



children's former diet. Kent believes that Georgia and Bill would have strongly disapproved of Newt's soupless vegetarianism. Both were firm believers in soupmeat and soup, especially soupmeat soup. Kent suspects, however, that if he takes it upon himself to prepare vegetable soup, rather than soupmeat soup, Newt might decide to drop his plan to completely eliminate soup from the children's diet, even if he continues to insist on eliminating meat. Moreover, Kent thinks his plan to save soup will work because the foster care agency must approve any dietary change that would eliminate soup altogether, and Newt hates dealing with bureaucrats.

Should Kent substitute vegetable soup for soupmeat soup in order to head off Newt's plan to eliminate all soup? What if Kent thinks that's what Georgia and Bill would have wanted him to do? Or, should he continue to follow the original Georgia-Bill directive (which is, after all, still "officially" in force) and continue to buy and make soupmeat soup, even if his doing so is likely to mean that Newt will eventually face off with the bureaucrats and win his regime of soupless vegetarianism?

Some legal thinkers might urge Kent to follow the extant directive and to continue to buy soupmeat for soupmeat soup no matter what the consequences. Under this view, courts should follow the law in effect at the time they decide and not worry about how their decisions will influence future legislative action.<sup>23</sup> In contrast, others might urge Kent to go ahead and make vegetable soup, on the theory that Georgia and Bill would (if they were still around) have wanted him to try to preempt Newt's soupless vegetarianism.<sup>24</sup>

Each of the foregoing variations on the basic Georgia-Kent story tries to move that story a little closer to the realities involved in statutory interpretation (though doing so seems at the same time to move away from the realities of informal relationships). Lawmakers sometimes do not act for the "public good." Indeed, some modern public choice theorists suggest that lawmaking in the public good may be more the exception than the rule.<sup>25</sup> Likewise, judges who try to act in the public interest may get it wrong more often than they get it right.<sup>26</sup> Finally, even when judges are genuinely trying to do what's best, lawmaking is a complex process involving multiple actors and

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<sup>23</sup> Cf., e.g., Easterbrook, *supra* note 21, at 69 ("[T]he right interpretive community is the one contemporaneous with the enacting Congress.").

<sup>24</sup> Cf., e.g., ESKRIDGE, *supra* note 7, at 74 ("[A] legal actor's interpretation of a statute will be guided not only by her own preferred interpretation, but also. . .by what the actor anticipates will be the interpretation of some individual or institution higher up in the hierarchy of lawmaking authority.").

<sup>25</sup> See, e.g., Macey, *supra* note 14, at 224 ("The widespread acceptance of interest group theory has led to suspicion about much of what Congress does. . .").

<sup>26</sup> See, e.g., Schauer, *supra* note 18, at 732.

institutions acting and interacting over substantial periods of time. All these things complicate the effort to determine what faithful performance means or requires in the world of legal relationships.

## II

### INTENT IN INTERPRETATION

Because *From the Bottom Up* is intended to lay the foundation for future work focusing on the transition from informal contexts to the more formal context of law, Professor Greenawalt does not enter today's heated debates over legal interpretation, which tend to get especially hot when statutory interpretation is involved. Making this transition, he notes, will not be easy.<sup>27</sup> However, because one upshot of his analysis is that intent is "very important" in informal contexts,<sup>28</sup> it may be worth rehearsing a few of the reasons why some of the participants in the current debate have concluded that intent should matter less in the context of statutory interpretation than it might in many informal contexts.<sup>29</sup>

Critics of so-called intentionalism, especially those associated with the "new textualism,"<sup>30</sup> would likely begin by highlighting a ("boringly familiar"<sup>31</sup>) nest of problems, such as identifying the individual actors whose intent counts, determining which mental states—e.g., hopes, expectations, convictions—come under the heading "intent," aggregating individual intent to arrive at a judgment of collective intent, and so on.<sup>32</sup> Indeed, while Professor Greenawalt demonstrates that subjective intent is often important to faithful performance in informal contexts, he also shows how difficult and complicated it can be

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<sup>27</sup> Greenawalt, *supra* note 1, at 1033.

<sup>28</sup> *Id.*

<sup>29</sup> Although I rehearse in the text some of the common objections to what is generally known as "intentionalism," I should hasten to add that intentionalism does not want for thoughtful and able defenders. See, e.g., ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 155-84 (1992); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 402 (Andrei Marmor ed., 1995).

<sup>30</sup> I use the term "textualism" indiscriminately to refer to various approaches or methodologies (e.g., plain meaning, ordinary meaning, textualism, and so forth) that, as a family, would place comparatively more emphasis on language and text than would other approaches, such as intentionalism and pragmatism. I realize that important differences exist between the various approaches I have lumped together under the banner of "textualism," but it seems unnecessary for present purposes to draw any clear distinctions. For a discussion of some of these differences, see, for example, Robert S. Summers & Geoffrey Marshall, *The Argument from Ordinary Meaning in Statutory Interpretation*, 43 N. IR. L.Q. 213, 215-16 (1992).

<sup>31</sup> Larry Alexander, *Fancy Theories of Interpretation Aren't*, 73 WASH. U. L.Q. 1081, 1081 (1995).

<sup>32</sup> See, e.g., RONALD DWORKIN, LAW'S EMPIRE 313-27 (1986); Gerald C. MacCallum, Jr., *Legislative Intent*, in ESSAYS IN LEGAL PHILOSOPHY 254 *passim* (Robert S. Summers ed., 1970).

even there to figure out just what the relevant intent is.<sup>33</sup> This difficulty, he recognizes, carries over into law.<sup>34</sup>

Confronted with these practical difficulties, partisans of textualism tend to believe that an approach to statutory interpretation that encourages courts to enter into an aggressive search for legislative intent may end up causing more problems than it solves. Three such problems come to mind.

First, the search for legislative intent may diminish the degree to which the law reflects the virtues traditionally associated with the rule of law, among them, stability, predictability, and fairness.<sup>35</sup> Those who urge the courts to pay greater attention to statutory text place heavy emphasis on these virtues and worry about the damage done to them when the courts too quickly abandon text and language in favor of legislative intent and history.<sup>36</sup>

Second, to the extent that reasonable minds can disagree over what legislative intent is and what it requires, the search for intent may provide greater scope for strategic and opportunistic behavior from the willful judge than perhaps would an approach that counseled closer attention to legislative text and language. Approaches to statutory interpretation that emphasize text may stand a better chance of limiting the willful judge than do approaches that encourage courts to set out too early in search of intent.<sup>37</sup> In addition, closer attention to text and language might also reduce the temptation for willful lawmakers to manufacture evidence of "intent," evidence which may often reflect little more than the wishes of a particularly important or powerful constituent.<sup>38</sup>

Finally, even if statutory interpretation ideally should be about discovering and following legislative intent, and even if courts could be counted on to act as faithful servants in the search for intent, sometimes they will make honest mistakes about what the legislature did in fact intend. Perhaps they would make fewer of these mistakes if, rather than searching for intent directly, they instead follow the statutory text and language as far as they legitimately can. If so, then perhaps we should entertain the idea that, under certain circumstances at

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<sup>33</sup> Greenawalt, *supra* note 1, at 1033-34.

<sup>34</sup> *Id.*

<sup>35</sup> For an account of these virtues, see, for example, Summers & Marshall, *supra* note 30, at 226-27.

<sup>36</sup> See, e.g., *id.* at 232 ("[T]he argument from ultimate purpose generally does not serve what might be called 'rule of law' values as well as the argument from ordinary meaning.").

<sup>37</sup> See, e.g., *id.* at 231 (arguing that purposive interpretation "invites strong-willed judges, in effect, to substitute their own views for the views of the legislature").

<sup>38</sup> Cf. SCALIA, *supra* note 20, at 34 ("One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate'—or, even better, insert into a committee report.").

least, an agent may be more likely to hit upon faithful performance if he doesn't aim at intent directly, and just concentrates on what his principal instructed. This text-and-language-focused approach will naturally yield its own fair share of errors, but perhaps it will yield fewer errors over the long run than would a more direct intention-seeking approach.<sup>39</sup> It is, of course, hard to tell in the abstract which approach would actually minimize the total number of errors.

Having extolled the virtues of textualism, let me note that textualism is not without its own problems, as its able critics have emphasized.<sup>40</sup> These critics point out, for example, that text can be unclear, especially in the hard cases that typically come before appellate courts.<sup>41</sup> Likewise, the clever and willful judge might be able to manipulate text just as credibly and readily as she can manipulate legislative history.<sup>42</sup> According to these critics, therefore, any claim that textualism imposes greater constraints on willful judges may be illusory.

However the debate between the partisans of textualism and its detractors is resolved, those drawn to textualism are likely to view the world of informal relationships very differently than they do the world of legal relationships, including the relationship between courts and legislatures. At their best, informal relationships in the world of daily life are characterized by bonds of mutual respect, trust, cooperation, and immediacy, whereas the same bonds are far less characteristic of relationships in the world of law. The textualist may wholeheartedly endorse the centrality of intent in the informal context, but as she moves toward the world of law, she is apt to feel more comfortable with an approach that places less emphasis on intent—even if that means the courts will sometimes be guilty of unfaithful performance.

## CONCLUSION

Housekeepers are not judges, nor are judges housekeepers. Both, however, labor under an obligation to interpret and faithfully perform the directives given to them by those in authority. Professor Greenawalt has shown that we can learn much about interpretation and faithful performance by looking at it “from the bottom up,” and

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<sup>39</sup> See, e.g., Schauer, *supra* note 18, at 729-30.

<sup>40</sup> See, e.g., ESKRIDGE, *supra* note 7, at 34-47; Eskridge, *supra* note 22, *passim*; Daniel Farber, *The Ages of American Formalism*, 90 Nw. U. L. REV. 89 *passim* (1995).

<sup>41</sup> See, e.g., ESKRIDGE, *supra* note 7, at 38-47.

<sup>42</sup> Cf., e.g., Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (“[T]he Court has shown a remarkable willingness to attribute a ‘plain meaning’ to statutory language that was nearly universally believed to have a contrary meaning for many decades.”).

we can expect to learn much more as he directs his attention to the practice of interpretation closer to the top.