

From the Bottom Up

Kent Greenawalt

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FROM THE BOTTOM UP

Kent Greenawalt†

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INTRODUCTION

This Article is about carrying out informal instructions given by people in authority. Although many scholars have written about how

† University Professor, Columbia University. I have benefitted greatly from discussions and criticisms in 1995 and 1996 Seminars in Legal Interpretation, Faculty Workshops at Columbia Law School and the University of Utah Department of Philosophy, and at the *Cornell Law Review* Symposium from which this issue of the *Law Review* derives. Among the individuals who gave me very helpful comments are Akeel Bilgrami, Edward Blatnik, Anthony Dillof, Alfred Hill, Paul Horwitz, Mark Hulbert, Joseph Raz, Carol Sanger, Adrienne Stone, Stephen Sugarman, Robert Summers, and William Young. Stephen Carvey's written response raises difficult questions and illuminates important problems.

legal interpretation resembles interpretation in fields such as literature and religion, few have compared informal instructions and legal rules.¹ My most basic assumption in this Article is that focus on informal situations can illumine the standards people use in performing instructions and the kinds of meaning they attribute to instructions. As my title implies, if we reflect on what amounts to faithful or desirable performance of informal directives and the more conceptual question of what these prescriptive standards "mean," we can learn something about how to understand ordinary language in law, about the possible legal relevance of the intent of those who issue directions, and about how people should respond to legal directives.

Because legislation, executive orders, and wills may be conceived as directives about what people should do, informal illustrations may have a bearing on understanding these parts of the law. Aspects of the illustrations may also have relevance for contracts, constitutional interpretation, and common law adjudication. Of course, no move from simple, personal examples to most legal ones will be easy. One critical obstacle involves the complexities of multi-member bodies. Another concerns the characteristics of legal systems, including what Robert Summers calls its formal aspects² and the tripartite relations between people who formulate legal norms, those directly subject to the norms, and the agencies responsible for enforcing the norms.

In subsequent work, I plan to concentrate on the transition from simple nonlegal to complicated legal instructions. Because a legal system differs in fundamental ways from informal relationships, we should not expect conclusions about simple instructions to emerge miraculously intact after ingenious analysis. For example, even if intent matters a great deal for performing informal instructions, it may have no appropriate role in judicial interpretation of legislation. Although I leave all such arguments for another day, I nonetheless claim that examination of simple instructions sheds significant light on issues about law. Most fundamentally, it helps us to distinguish between problems about interpretation of language that are generic to authoritative prescriptions and problems that are particular to all or some legal systems. Further, once we see how difficult it is to

¹ For perceptive, modern treatments of rules in general, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). I use a different sense of "instruction" than the kind of nonmandatory recipes or advice discussed by Schauer. *Id.* at 3-4. In some respects, my discussion resembles Wittgenstein's sustained, if not systematic, examination of informal rules in LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 138-242 (G.E.M. Anscombe trans., Macmillan Publishing Co. 1958). On the nature of imperatives, see C.L. HUMBLIN, *IMPERATIVES* (1975).

² Robert S. Summers, *How Law Is Formal and Why It Matters*, 82 *CORNELL L. REV.* 1165 (1997).

choose any single standard to measure the desirable performance of instructions, how difficult it is to adopt a standpoint to determine meaning, and how difficult it is to perceive a complete fit between meaning and desirable performance, we will doubt that matters will be more straightforward when we turn to law. It is conceivable that the relative formality of law will allow more definite conclusions for some matters than may be reached for informal instructions, but we should expect many of the problematic aspects of desirable performance and meaning to carry over to a consideration of law.

Insofar as further analysis suggests that aspects of law are similar to informal instructions, study of such instructions allows us some degree of detachment from hotly contested issues in legal philosophy, from favored political positions, and from our approval or disapproval of particular judges. Insofar as further analysis indicates that aspects of law are crucially dissimilar from informal instructions, this study can help reveal what is special about law. I do not develop the comparisons with law here, but I hope that what I present, even standing alone, is suggestive in that respect.

It may clarify what follows if I say a few words about my methodology. For various kinds of circumstances, I inquire about the performance and meaning of instructions. About most questions of performance and how people understand instructions, I adopt the perspectives of people involved and ask how they would see things after some reflection. In my theoretical analysis, I do not begin with any overarching view about performance or meaning, or about the relation between performance and meaning. One could approach things differently, beginning with a systematic theory about performance or meaning, or both, and then seeing how the "data" fit. Alternatively, one could move from reflective intuitions to build some systematic theory. My discussion here does not provide any conclusive arguments against systematic theories about performance or meaning, but it reflects my skepticism about such theories for informal instructions.

With regard to performance, I urge that one cannot reduce the ideal performance of instructions to any single criterion, such as the intent of the person issuing them, a reasonable person's understanding of what the instructions convey, or the best judgment of the recipient about what to do. I discuss various kinds of situations, which I can summarize as (1) instructions whose import is clear in context; (2) instructions that are unclear in context because of incompleteness, vagueness, ambiguity, or a possible slip; (3) instructions whose application is affected by changing conditions. These changing conditions may lead a recipient to continue to carry out instructions (though not each of their terms), or to fulfill the spirit of the instructions (though

not their terms), or to regard the instructions as losing force. As I develop my examples, I attempt to indicate the variables that may figure in decisions about performance. My conclusion is that a number of standards affect desirable performance, and only by examination and argument about specific contexts, can one decide how much these factors should count. If this amounts to a general theory at all, it is so vague as to be vacuous.

A proposal that, at least for informal instructions, *meaning* can be summed up in some straightforward formula, such as literal meaning, or ordinary meaning, or speaker's intent, has more plausibility than a parallel approach to performance. According to such proposals, meaning is meaning, everything else that figures in proper performance is something other than meaning. Proposals of this kind cannot be defeated by conclusions that various factors affect proper performance, but they run up against intuitions about the heterodoxy of meaning. For example, when a speaker's intent is crucial for performance, one's tendency is to tie meaning more closely to speaker's intent than when that intent matters less for desirable performance. One could generally tie meaning very closely to desirable performance—to say that what instructions mean in context depends on how they should best be carried out. Indeed, that is the tendency in law; courts may say that statutes really mean what is determined to be their best application. Yet, tying meaning too closely to performance is awkward. As we shall see, proper performance often turns on issues of authority that are not well captured as debates about meaning.³ My tentative conclusion is that we should perhaps not try to settle on any single sense of meaning, whether that sense is stated as a standard separate from performance or linked tightly to proper performance.

After some clarifying remarks about the characteristics of my examples, my crucial terms, and my general approach, I discuss instructions whose application is specific and clear. I then examine, in turn, instructions that are incomplete, vague, or ambiguous and instructions that guide behavior in changing conditions.

³ However, one can say that the meaning of a specific instruction in context depends on wider interpretations of the respective authority of the speaker and recipient. Thus, the specific instruction's meaning could depend on more general instructions or deeper understandings about authority.

I

NONLEGAL INSTRUCTIONS—THE BASIC SETTINGS,
POSSIBILITIES CONCERNING COMPLIANCE,
FAITHFUL PERFORMANCE, AND
MEANING

The examples I discuss have the following general characteristics: instructions are issued to a definite person or class of persons. The person issuing the instructions has authority to prescribe what the person following the instructions should do.⁴ Correlatively, the person receiving the instructions has some duty or obligation to follow them. Usually the recipient is subordinate to the person giving the instructions, but I include (as recipients) professionals with duties to carry out instructions of clients. The recipient not only understands the instructions, but also is capable of perceiving their objectives to some degree and of exercising some judgment about their subject.⁵ Among the situations that fit this pattern are instructions given by: parents to nannies, employers to employees, officers to soldiers, directors to dancers and actors, coaches to athletes, and clients to lawyers. Another typical (though not universal) feature of these instructions is that the recipient's response may be reviewed. As with coaches or theater directors, the instructors directly oversee performance, or they assess performance after the fact.

A recipient can either follow instructions or disobey them. Sometimes she can depart from instructions without disobeying them. Suppose a coach tells her basketball team: "You are three points ahead, and there are twenty-four seconds left in the game. Don't shoot; run out the clock." If the players pass and dribble the ball without shooting, they have obeyed instructions. If a player takes a shot of ordinary difficulty, she has disobeyed the coach.⁶ What if Cheryl, unguarded, receives the ball under the basket with the opportunity to take a shot that she nearly always makes, and she shoots, believing that the nearly certain basket will help assure the team's victory? If Cheryl understands that the coach really meant that no one should take any shot, however easy, she has disobeyed the instructions; but if Cheryl reasonably and correctly perceives that the coach was not referring to such easy shots, we may say she has departed from the instructions (in the sense of no longer carrying them out) without disobeying them.

⁴ I assume that the person in authority is exercising his authority in a proper range. For example, the director of a play is not deliberately trying to stage an unsuccessful production in order to take revenge on its main financial backer.

⁵ Thus, I do not include a very small child who may understand that he has been told never to cross the road, or talk to strangers, without comprehending why that is so.

⁶ Or, she may have forgotten the instructions in the heat of the moment.

Could we say that the instructions were actually carried out? I do not think so. Cheryl did what any player would ordinarily do—she took a very easy shot. The coach's instructions to avoid shooting do not *add* to her reasons to do that. It is as if, at most, the coach had not addressed this particular situation.⁷

Beyond the question of whether a recipient has complied with an instruction, lies the further question of whether compliance, or non-compliance, is justified. The answer to this question of justification calls for an evaluation that reaches outside the import of the instruction. Thus, Cheryl might say, "I knew you meant we should not take any shots at all, but I was sure I would make this one and that it would help the team win. So I went ahead." Cheryl's attempt to justify disobedience rests on the same basic objective underlying the instruction.⁸ On other occasions, a person relies on some external objective or value to support her disobedience.⁹

My initial examination of instructions concerns what would constitute "faithful" performance. Among the important variables are: (1) the specificity of the language as applied to the choice involved; (2) the extent to which the conditions have changed since the instructions were issued; and (3) the relationship between the issuer of the instructions and the recipient. Even for simple instructions, common and desirable strategies of performance do not reduce to a single consideration.¹⁰

The words "faithful performance" are not meant to imply by their terms that the recipient of the instructions should necessarily carry out "the will" of the speaker. Indeed, this is *not always* what the recipient should do. Phrases such as "desirable performance" or "best performance" might better avoid any implication that everything reduces to the wishes of the person in authority, but those terms present other

⁷ It is possible that on past occasions the coach had made clear that whenever she says, "Don't shoot," she means "Don't shoot, except when you have a very easy shot, which you should take." In that event, the coach has spoken to the situation, and taking the shot does carry out the instructions.

In the Appendix, I attempt to classify with more precision the situations in which a person self-consciously does not follow instructions.

⁸ The "objective" may be put at different levels. If the objective is "winning the game" or "making sure we don't lose the ball without scoring," Cheryl tried to achieve the objective. If the objective is "keeping the ball from the other team as long as possible," she has not tried to achieve it.

⁹ Exactly which values will count as external will often depend on how narrowly or broadly one puts the objective of the instructions. See, e.g., SCHAUER, *supra* note I, at 49 n.13 (discussing problems inherent in even as simple a rule as a restaurant's "No dogs allowed"); see also M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 388-89 (1985) (noting the existence of a hierarchy of ever-widening purposes).

¹⁰ Perhaps more precisely, they do not reduce to a single consideration narrow enough to be meaningful.

difficulties. One can render a performance that happens to be desirable, though one's motives have nothing to do with carrying out the instructions or fulfilling one's role. I want to signal the idea that the recipient of instructions does respect the authority of the speaker and is trying to be faithful to his own role as the recipient of authoritative instructions.

In this Article, I offer suggestions about what constitutes faithful performance in various settings. My aim is to capture elements of situations that readers will find significant; but I do not offer systematic defenses of why doing one thing *is* faithful performance and doing something else is not. My main objectives will hardly be affected if readers disagree substantially with me over what recipients should do in particular instances. My crucial point is that figuring out what recipients should do is often complicated and debatable. Readers need not agree with my specific opinions about performance to grasp that point.

Lest the term "faithful performance" imply a single action that complies with instructions, I note that more than one action may be "faithful." Instructions may leave a range of possibilities available. Moreover, the standard that a recipient of instructions uses to guide his actions may be different from the standard someone else uses to evaluate the recipient's actions.

Inquiries about performance reveal perplexing questions about "meaning." The precise relation between the "meaning" of an instruction and the best efforts to carry out the instruction turns out to be anything but obvious. Perhaps we should recognize that "meaning" is essentially a practical concept. Meaning may vary depending on the kind of activity that is involved, and the same instruction may be conceived as having different meanings at different stages. Whether we can speak usefully about "the meaning" of even one instruction at a single point in time is doubtful. I do not suggest that one cannot answer specific questions about what the speaker meant, or about how most people would understand the instruction, or about how the instruction would best be understood. The doubt is whether any of these, or anything else, may comfortably be called "*the meaning.*"

In my consideration of "meaning," I write, "we would say," "we might say," or "we would probably say." I do not begin with any rigorous scheme of categorization that generates how we should speak of various situations. Rather, I attempt to depict how an ordinary speaker of the language would speak when he or she is being very careful (and perhaps after being presented with various alternatives). One reason why reaching conclusions is difficult is that English (and other natural languages) lack precise forms to mark many subtle dis-

tinctions.¹¹ The efforts to decide between conceptual possibilities help to reveal those distinctions.

My choice to proceed from performance to meaning, rather than in the opposite direction, needs some explanation. One might begin with an account of "meaning"—for example, that meaning is determined by the intent of the speaker—and see how well that accords with what is appropriate performance. One would learn fairly quickly that no single straightforward account of "meaning" could cover everything that a recipient of instructions should take into account. One might, nonetheless, stick to a single version of meaning, conclude that meaning is only one component of practical choice by those subject to instructions, and comment on what besides meaning is involved. Nothing in this Article indicates that this is an impossible way to proceed.

For those whose primary concern is practical choice, however, the order proceeding from performance to meaning seems more promising. Lawyers, at least, are inclined to suppose that legal norms should be observed and applied according to their meaning. They see the significance of "meaning" as largely practical. What I do, is to test the sense that "meaning" should accord with "faithful performance" with respect to informal illustrations. In a systematic account, one would need to compare all plausible candidates for "meaning" against all plausible versions of "faithful performance," before one tried to reach any final conclusions about the "meaning" of instructions (or legal norms). One would need to decide how great a gap was acceptable between "meaning" and "faithful performance" in various settings, and whether one should strive for a single sense of "meaning." In my less-than-systematic account, I have employed the order of presentation that seems most fruitful, but I do not claim that there is any necessary logical priority of performance over meaning.¹²

¹¹ As Michael Moore notes, J.L. Austin talked of fact being "richer than diction." Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 292 (1981) (quoting J.L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1, 21 (1957)). Under Moore's "realist" approach to language, the meaning of words and phrases embraces the best understanding of concepts. However, it is still true that at any point in time, our language does not clearly mark many subtle distinctions.

¹² One criticism that might be mounted against my observations about both "faithful performance" and "meaning" is that a full account of either requires reference to an interpretive methodology. Yet, I have not provided one. The critic would be right that recipients of instructions often employ (at least implicitly) strategies of interpretation; and that a final assessment of these matters involves measuring tentative judgments about performance and meaning against possible approaches to interpretation. My discussion proceeds on the assumption that much can be said about the performance and meaning of informal instructions without either conceptualizing common practice in terms of a theory of interpretation or recommending a particular interpretive theory for use. Indeed, illustrations of the sort I consider can help provide the building blocks for descriptive and normative theories of interpretation.

II

HOW TO INTERPRET INSTRUCTIONS

I attended a conference of linguists and legal scholars, at which William Eskridge presented an embellished version of an old illustration that raised fascinating issues of interpretation. We can learn a good deal by teasing out its implications. Professor Eskridge said:

Here's the hypothetical I want to set forth. It's based upon Francis Lieber's book. . . . Georgia is the head of a household. Kent is her housekeeper, basically. Georgia . . . has several children. Among the many directives she says to Kent is this: "Kent, I'm going away for a while. Here is a laundry list of things you have to do. First and foremost, I want you to fetch soupmeat every Monday from Store X."

The directive to Kent might require some degree of interpretation. But perhaps very little, because there might have been much fetching of soupmeat before Georgia's departure. Kent knows from earlier interactions with Georgia that this soupmeat has a fairly narrow range of connotations. Store X is a store that's about five or six blocks down the street So for the first several Mondays, what Kent does is precisely what Georgia expect[s] him to do. Kent trots on down . . . into Store X, and there is a counter that says "Soupmeat." It's where he's always bought it, and he buys the soupmeat. Some kind of beef, let's say. . . . The longer Georgia is gone away, the more likely it is that the directive's interpretation will change. Several weeks later, Kent trots down to the area, and Store X has burned down. So, he goes to Store Y. Now he in some ways has violated the literal terms of the directive, because he is fetching soupmeat from Store Y. But he can not get ahold of Georgia right in the middle of his errand, and it's not cost beneficial for him to do so. He almost reflexively goes to Store Y. . . .

Several months later, Kent . . . received another directive from Georgia in a letter saying Georgia has read that children with high cholesterol rates have health difficulties later in life. She says, "I'm very worried about this. From now on I want you to buy lots of apples, bran and oranges, things that this article says are low in cholesterol because I think this will be good for the children."

Kent goes to Store Y. In casual conversation with Judith, the butcher of Store Y, he learns . . . that soupmeat is extremely high in cholesterol. "Indeed," Judith says, "my Lord, this is the highest cholesterol rate in the entire store. You might just as well be mainlining cholesterol into these children by feeding them soupmeat!" Kent decides that he will now buy chicken for soup rather than cholesterol-filled soupmeat.

Some months later Kent trots down to Store Y intending to buy chicken. Posted on the door of Store Y is a new rationing system that the city has adopted because of exigent circumstances entailed by war or famine or something like that. Under the rationing sys-

tem, each family (and Kent is now the surrogate head of Georgia's family), gets only so many rationing tickets, only so many economic units to buy food. Based upon this rationing system, Kent decides to forego buying meat at all, because he believes that meat is an extravagance under this system and decides to buy other things that will fill up the children's little stomachs.¹³

In this example, Kent is Georgia's housekeeper. Georgia definitely has the authority to tell him what to do. Some aspects of her instructions are clear and precise, so long as ordinary conditions prevail. Kent is supposed to shop for *soupmeat* on *Monday* and he is to go to *Store X*. The word "soupmeat" itself seems to leave more latitude for a range of choice than the other terms, but that range may have been narrowed. If *Store X* sells only one kind of meat as "soupmeat," or if Georgia and Kent had previously agreed that they will use a certain kind of meat, Georgia's reference to soupmeat may indicate that specific kind of meat.¹⁴

A. Instructions That Are Specific in Context

When the language of instructions is straightforward in context and the instructions are capable of being performed, the intentions of the person giving the instructions will coincide with a recipient's reasonable understanding of the force of the instructions. The "meaning" of the instructions will fit the behavior of someone who faithfully fulfills them. On many occasions, these conditions are satisfied, and there is little doubt about proper performance or meaning.

Even when instructions are specific, however, complexities can generate difficulty in determining what is the housekeeper's controlling guide, and these difficulties can sow seeds of uncertainty about the equivalence of "meaning" with what constitutes "faithful performance."

1. *Faithful Performance*

Should Kent be guided by what a reasonable listener might conclude about the instructions, or by the subjective (mental state) intentions of Georgia? One point is obvious. Kent's faithful performance of the instructions *does not depend* on how they would be understood by a reasonable listener unaware of past dealings between Georgia and Kent. If those past dealings yielded an understanding of "soupmeat"

¹³ Northwestern University/Washington University Law and Linguistics Conference, *Proceedings*, 73 WASH. U. L.Q. 800, 940-42 (1995) [hereinafter *Proceedings*] (footnotes omitted) (using story from FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 28-29 (enlarged ed. 1839).

¹⁴ I assume for the time being that neither external conditions nor relevant knowledge has changed.

narrower than the general concept of "soupmeat," faithful performance would include buying the meat Georgia had in mind. Were a "reasonable listener" to be at all relevant for faithful performance, he would be aware of any relations between Georgia and Kent that bear on the instruction.

In these circumstances, one can hardly draw a line between performance that adopts the perspective of a fully informed listener and performance that aims to follow Georgia's intentions. A reasonable listener of this type will be confident he has assessed Georgia's intentions, and he will believe that Georgia has precisely framed her instructions to express her mental state about a highly specific matter. She wants Kent to buy soupmeat on Monday at Store X, she has given her instructions to achieve that objective, and she intends her instructions to communicate to Kent that she wants him to behave in that way and to understand that she has instructed him to do so. The reasonable listener will conclude that carrying out the instructions involves doing what Georgia wants (in a mental state sense). Kent's attempt to comply with Georgia's mental state intentions will fit what a reasonable listener would conclude about the instructions.¹⁵

If Georgia's explicit applicable language differs from her intentions, analysis becomes more complicated. Other aspects of her instructions, their objectives, or their conditions of performance may clearly signal that she has made a mistake. For example, unless the household has an odd schedule, Kent will assume that when Georgia writes "shop at 3:00 a.m.," she intends 3:00 *p.m.* (or conceivably, a later morning hour). In such circumstances, faithful performance and reasonable understanding deviate from the literal import of some term.

More serious difficulties arise when the instructions themselves do not signal that the writer has slipped. Suppose Kent must perform Georgia's written instructions before he can communicate with her; the instructions tell him to shop on Monday, but Kent has usually shopped on Tuesday and is aware that Georgia frequently slips about days of the week, naming one day, but subjectively intending another.

¹⁵ The instructions are not merely evidence of Georgia's mental state. Subordinates often do not have a responsibility to do what a superior wants (if, for example, they think an alternative is preferable) until they have been instructed to do so. Because Kent's awareness of what Georgia wants is not the equivalent of his being instructed, the instruction has an independent significance. The instruction is "performative," see MAX BLACK, *MODELS AND METAPHORS* 118 (1962), in that it alters Kent's responsibilities. Even if subordinates do have a responsibility to carry out unexpressed desires, their duty to do a particular act will have greater weight if it is the subject of an instruction.

If Kent is confident that Georgia has slipped, he will probably try to fulfill her subjective intentions¹⁶ by shopping on Tuesday.¹⁷

Uncertainty about probable intentions raises a more interesting conundrum. Suppose that Kent reasonably concludes that Georgia, having written Monday, probably (55% likelihood) meant Tuesday, but may (45% likelihood) have meant Monday. If Kent takes Georgia's immediate subjective intentions as his exclusive guide, he will shop on Tuesday. Is that what he should do? Two related factors, what we might call the responsibility to communicate effectively and the psychology of review, come into play. The basic responsibility to state the day correctly is Georgia's. When in genuine doubt, the recipient should perhaps take what Georgia says at face value. Further, Georgia may subsequently review what Kent does. If Kent has acted in accordance with what Georgia wanted, there should be no problem. However, what if his action does not fit Georgia's mental state purpose?

Suppose Kent explains to Georgia why he shopped on Tuesday, although she actually wanted Monday, as she wrote. People often underestimate their incidence of mistakes, and are not fond of hearing that they make lots of mistakes. Georgia may not appreciate Kent's second-guessing her when she has expressed her wishes in clear language.¹⁸ Georgia may say, "Please do what I tell you, if that is clear, unless you are *sure* I've misstated my purposes."

If, instead, Kent shops on Monday, although he thinks Georgia *probably* wanted Tuesday, he can explain to her that he thought it best to stick with what she actually wrote. Georgia will probably respond: "The mistake was mine; I can understand why you went on Monday." Given this second order of evaluation, a reasonable recipient might well conclude that when the probabilities are close, he should do what

¹⁶ It is conceivable that a person will be so embarrassed by having a slip corrected that it is better for the recipient to act as if there hadn't been a slip and carry out the person's literal instructions, despite being sure a slip has occurred.

¹⁷ If we think of the reasonable listener as having all of Kent's knowledge about Georgia, he will reach the same conclusion as Kent. If the reasonable listener is restricted to all past dealings of Georgia and Kent with respect to soupmeat, he may conclude that Monday really means Monday. Another possibility is that the reasonable listener may have more knowledge than Kent, perhaps because Kent has just started to work for Georgia (and the reasonable listener is allowed information about Georgia's past behavior that Kent lacks) or because Kent, being none too bright, has failed to draw inferences from Georgia's prior slips that a reasonable person would make. When we turn to "meaning," these discrepancies raise puzzles. However, they are not of great importance for Kent's attempt to perform faithfully. Any actual recipient of instructions can only do the best he can with the information he has (in addition to any further information quickly available at reasonable "cost").

¹⁸ One may be inclined to say she has *perfectly* expressed her wishes, but she could have forestalled the problem by adding: "Although we have usually shopped on Tuesday, now I really mean Monday."

is written, not what he thinks Georgia's immediate mental state intention probably was.¹⁹

When Kent thinks that Georgia probably misstated her wishes, it is *possible* that the best performance of his responsibilities as a servant will not be the course that is the most prudent in terms of Georgia's satisfaction (taking into account the likelihood of her satisfaction or dissatisfaction and the intensity of her feelings). Because Kent and Georgia have a common interest in continuing good relations, his taking the safer course of following her literal direction achieves some overall benefit; but, if the instruction was very important, Kent might think he would best serve Georgia by taking a course of action that risked incurring her anger.

Reference to a speaker's *broader* intent can partly account for the complexities that possible slips introduce. Recognizing the principle of speaker's responsibility, and her likely reaction to reasonable mistaken guesses, Georgia may want Kent and other servants to follow the literal meaning of her expressed language, unless she has clearly slipped. In that event, Georgia has an overarching intent that recipients of her instructions not always follow what they regard as her probable narrow intent. Kent may comply with her dominant intention by deviating from his best estimate of the day of the week she had in mind. In this manner, an approach claiming that faithful performance is always doing one's best to fulfill a superior's intentions might address uncertainty about slips. But such an approach cannot deal with the problem fully. Georgia's broader intentions will not reflect everything that Kent legitimately takes into account.²⁰ Georgia may not realize that she underestimates her slips, or is disturbed at having possible slips "corrected." Her idea of a good approach to possible slips may differ from responses that will actually lead to the best relations between her and Kent. Is the subordinate's job to fulfill the superior's intentions, no matter what? On subjects as complex as this, subordinates are left with some independent judgment of what will work best, if they think that differs from what a superior attempting to state broad principles might say.²¹ A speaker's intent approach does not adequately address Kent's performance as a housekeeper in the

¹⁹ Or, the reasonable recipient might conclude that in conditions of substantial uncertainty about what the writer of instructions meant, he should use his best judgment, treating the instructions as if they were incomplete or ambiguous, leaving him an implicit choice between the two (or more) options. In this case, it would entail deciding between Monday and Tuesday on the basis of other factors, such as which day has fresher meat. The recipient may be more inclined to treat the instructions in this way, if he thinks that the day he picks makes a substantial difference.

²⁰ But see Moore, *supra* note II, at 257 (suggesting that servants act according to their perception of their masters' wants).

²¹ Indeed, this is one example of the subordinate not being bound to follow all unexpressed wishes of the superior.

face of possible slips, even if Kent considers Georgia's intentions on that subject.

More generally, the aspiration to follow instructions well is not always reducible either to what the language signifies *or* to one's best estimate of the speaker's intentions about the instruction. The sensitive subordinate will be guided by a subtle combination of these, and perhaps other factors as well, in which estimates of probabilities will figure.

My discussion of slips has introduced continuing relations between Georgia and Kent as a significant factor. I have already emphasized that continuing past relations between a superior and subordinate will affect how a communication is understood. Such relations will also affect how specific the formulations of the superior will be; less need be said when more can be assumed about past mutual understanding. The prospect of future relations can influence what is the best performance of an instruction. Thus, two recipients might conceivably reach exactly the same estimate of writer "slips" in otherwise identical instructions; a recipient who is in a continuing relationship might best choose expressed language over likely intended language, even though the recipient of an instruction in a one-time encounter might best make the opposite choice.

2. *Meaning*

What do instructions *mean*? Does meaning always coincide with what we would regard as the best job of fulfilling the instructions? Relatedly, should meaning be tied to a speaker's intentions, to a reasonable listener's understanding, to literal language, to some combination of these, or to something else?

When we consider straightforward, specific instructions, with no "slips," that unambiguously require particular behavior, speaker's intent, reasonable listener appraisal, and literal expressed language fit comfortably together, and the "meaning" of an instruction coheres with the behavior that fulfills it. Thus, choosing between alternatives appears pointless.

The alternatives begin to appear when there is an obvious slip, such as "3:00 a.m." Faithful performance follows the intended, sensible time; that time is, both what the writer meant and what a reasonable reader would assume. But the literal language is different.²² We

²² Professor Akeel Bilgrami has suggested to me that if I say "I am going to downtown," the literal meaning obviously is "I am going downtown." (Conversation in winter, 1996-1997). Bilgrami's position seems undoubtedly right if the term actually expressed is meaningless and the intended meaningful term is evident. Matters become more debatable when the term actually expressed does have a coherent meaning in that context. One might wonder whether the "literal language" can demand something that is impossible.

might say, "The instruction means 3:00 p.m., because that is what Georgia wanted and what every reader would conclude." We might say, "The instruction means 3:00 a.m., but Georgia meant 3:00 p.m." If this stark choice makes us uncomfortable, we might equivocate, "The language of the instruction means 3:00 a.m., but the writer obviously meant 3:00 p.m. and that is how a reader should understand the instruction." When a slip is obvious, I prefer equivocation, since any bare statement that the instruction means 3:00 p.m. or means 3:00 a.m. is misleading.

Analysis is further complicated when a slip is possible but not evident, as with the possible mistake of "Monday" for "Tuesday." Here we are tempted to say, "The instruction means that Kent is to shop on Monday."²³ That is certainly what the literal expressed language indicates; nothing in the language or standard circumstances (like ordinary shopping hours) suggests a slip, and a reasonable reader unaware of Georgia's tendency to slip would conclude that Monday is intended. If one takes this approach to meaning, there will sometimes be a wedge between the best performance of an instruction and its meaning. The best performance might be on Tuesday, although the instruction's meaning would designate Monday. If, on the other hand, one says that the meaning of the instruction follows what Georgia specifically intended, and she actually happened to intend Tuesday, meaning might also not follow what would be the best performance (according to the analysis that might give priority to the literal language when the probability of a different intent is slightly higher). If "meaning" followed best performance, the meaning would encompass all the subtle calculations that would resolve what action is best. Yet, it seems counterintuitive to think that the "meaning" of an instruction shifts, depending on whether the issuer is likely to be upset by a wrong guess that his intent differs from his expressed language. In light of these various alternatives, an option which does not try to attribute any single approach to the meaning of an instruction offers considerable appeal.

However, a person could be instructed to fly, even if that is physically impossible, and a person could be instructed to shop at 3:00 a.m., even if it happens that no stores are then open. See Donald Davidson, *A Nice Derangement of Epitaphs*, in *PHILOSOPHICAL GROUNDS OF RATIONALITY: INTENTIONS, CATEGORIES, ENDS* 157, 158 (Richard E. Grandy & Richard Warner eds., 1986) ("The absurdity or inappropriateness of what the speaker would have meant had his words been taken in the 'standard' way alerts the hearer to trickery or error; the similarity in sound tips him off to the right interpretation").

²³ See Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 *TEX. L. REV.* 1, 14 n.72 (1993) (giving an example of someone who wants chicken noodle soup but says, "I would like to order minestrone soup."). Paul Campos takes issue with Patterson's assertion that actual intention is irrelevant to the meaning of the statement. Paul F. Campos, *This Is Not a Sentence*, 73 *WASH. U. L.Q.* 971, 980-81 (1995).

B. Instructions That Are Vague, Ambiguous, or Incomplete in Context

We face further problems when (despite the absence of any "slip") the application of instructions is uncertain in context. Because Eskridge's story involves either clear applications or changed circumstances,²⁴ I shall return to the basketball illustration. The coach says, "Don't shoot." In such circumstances, coaches and players realize that a player *might* have a chance to take an extremely easy shot, but they do not expect that to happen. The coach who says, "Don't shoot," might want to convey: (1) "Do not take any shots, however easy," or (2) "Do not take any shots, except extremely easy shots that you make almost every time."²⁵ Or, the coach may neither have considered extremely easy shots nor resolved what a player able to take one should do. We can illustrate these alternatives by imagining that a player had asked the coach at the time, "Do you mean we shouldn't take even the easiest lay-up under the basket?" The coach might have said (1) "Yes, don't take *any* shot"; (2) "No, if you are sure you can make an easy lay-up, go ahead"; or (3) "I wasn't thinking of those. Now that you have raised that question, you should . . . [either (1) or (2)]." In the basketball illustration, no player did ask, and Cheryl has a chance to take an unguarded shot she nearly always makes.

1. *Faithful Performance*

Cheryl must choose quickly. She might believe that she should be guided by the coach's intent or that she should exercise her own judgment, if the coach has not decisively foreclosed her from doing so, or that she should act according to some mix of the coach's wishes and her judgment. One conceivable standard for Cheryl is what most coaches would want if they said the same thing in similar circumstances, but she will certainly not take that standard as her final guide. What most coaches would want might be *evidence* of what her coach wants or of the best strategy, but it would not be directly determinative. Cheryl is interested in her coach and her own judgment.

Unless the coach has decisively foreclosed that choice, the question whether Cheryl should exercise her own judgment about strategy is a difficult one that I will address in the next section. Here, I assume that Cheryl thinks she should be guided by the coach's wishes in issu-

²⁴ These include changed external conditions, new knowledge, and supplementary instructions.

²⁵ The coach's aspirations could be more complex. She might want the players to focus exclusively on avoiding shots (and keeping the ball from the other team), and not attempt to get into position for any easy shots; yet, she might also hope that if a player fortuitously found herself in position for a very easy shot, she would have the good sense to take it. In tense conditions, good coaches do not want to give players too much to think about.

ing the instructions, and she is sure that the coach had definite wishes about easy shots. Cheryl will bring to bear all the relevant knowledge she has about the coach's wishes (insofar as she can do that in one second) to decide what to do. The reason I assume Cheryl's guide is her coach's wishes (to the exclusion of her own judgment about what is really most desirable) is not because that is usually the right attitude for subordinates acting under instructions. Rather, the objective is to clarify analysis by an initial focus on a recipient of instructions who is single-minded in this way.

Cheryl's best efforts to fulfill the instruction would be straightforward, were it not for a complication we have already surveyed—the consequences of a mistaken choice if the probabilities seem close.²⁶ People who are knowledgeable about basketball would understand that the coach's instruction does not clearly settle the question of very easy shots; but the literal language of the instruction fits better with Cheryl's declining the shot than taking it. If she declines the shot, she can explain to the coach that she was trying to do what the coach said. The coach's anger may be less if Cheryl does that, despite the coach's wish that Cheryl take very easy shots, than if Cheryl shoots, despite the coach's wish that she not take any shot.²⁷ If Cheryl values continuing good relations with the coach *and* regards the probabilities as close, she may regard it as desirable not to take the shot, even though she thinks it is slightly more probable than not that the coach wishes her to shoot.

2. *Meaning*

If we assume that Cheryl's practical task reduces to trying to carry out the coach's wishes, how should we conceive the meaning of the instruction itself? I shall mention six possibilities. The meaning of the instruction might be (1) according to its literal language, (2) according to general use, (3) according to the coach's intentions, (4) according to a reasonable person's understanding, (5) according to the most perceptive person's understanding, or (6) not dispositive for the choice Cheryl faces.

A quick examination reveals that alternatives (1), (2), and (6) leave a large gap between Cheryl's efforts to perform faithfully and what one would say about meaning. I shall begin by examining these alternatives.

It is tempting to associate meaning with literal meaning. If the coach says "don't shoot," doesn't that mean "don't shoot, period," cov-

²⁶ The analysis here is closely similar to that of Georgia's possible slip.

²⁷ Here it is hard to say which response is riskier; a coach may say, "*Of course* I didn't mean you should pass up an easy lay-up."

ering all possible shots?²⁸ The problem with this approach is that, in ordinary discourse, it is very common to prescribe without qualification. The parent who tells a child "go to your room and stay there for fifteen minutes," does not want the child to remain in the room if a bear has pushed in the window. It is awkward to say that the instructions mean that one should not behave in a way—for example, leaving the room if a bear enters—that anyone would want and expect. If "literal meaning" requires taking words and phrases without implicit qualifications or ellipsis, it often deviates from ordinary meaning or generally understood meaning.²⁹

A defender of the literal meaning approach might retreat to this position: "Literal meaning is not *the meaning* when that would obviously be inapt; but in cases of doubt we should understand meaning as literal meaning." One problem with this position is that it equates "meaning" with the *literal* meaning of the expressed language whenever literal meaning is one possible construction, even though the speaker did not so intend his instruction and no listener would understand it that way. There is no neat place to draw the line at which the most likely understanding (if it is nonliteral) should yield to literal meaning. That is, if literal meaning is *not* the meaning when that would *obviously* be inapt, there is no sensible way to say how certain the bad fit must be between literal meaning and intended, understood meaning for literal meaning to be displaced as *the meaning*.

The second possibility is that meaning would be according to general use and understanding of this sort of utterance. "Meaning" would then not cover circumstances in which no one would expect or want the prescription to be followed. This position has greater attraction, because it allows for a more natural rendering of what remarks mean. But, this position faces what we can call "the pressure towards specific context."

If one asks about general use and understanding, how is one to describe what count as similar situations? As a starter, one will limit the focus to "don't shoot," spoken by coaches at the final stages of basketball games when the coaches' teams are ahead. To someone who understands basketball, two variables now become critical. One

²⁸ For a defense of this basic approach, see SCHAUER, *supra* note 1.

²⁹ See the discussion of restricted quantifiers in *Proceedings*, *supra* note 13, at 825-99. Saying what words mean literally is often hard. A typical strategy for the defensive team in the basketball situation I have described is to foul, forcing the team with the ball to shoot foul shots. Cheryl's coach certainly does not mean that the team should not shoot its awarded foul shots (though many years ago, that was an option). Does the *literal meaning* of "don't shoot" cover foul shots or only field goal attempts? I'd say the implicit limitation to field goals is so self-evident, that the literal meaning covers only them. One attempt to draw the line between general background assumptions that figure in literal meaning and matters of particular context that do not is found in JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* (1979).

is the skill level of the team. If a coach were dealing with a young, inexperienced team, she would probably want to convey the message that players should take no shots at all. However, a professional coach would realize that her players are much more certain to make "easy shots," and that the players' judgments about which shots are easy are much more trustworthy. That coach would *probably* not mean to forbid extremely easy shots.

A second variable concerns score. For a team that is five points ahead with twenty-four seconds to go, another two points will help considerably, and will not leave the team vulnerable to a quick tie. But suppose the coach's team is only one point ahead? It happens that easy shots count for two points, and some longer shots count for three points. The opponents may be ready to give up even a *certain* two points in order to have the chance to score three. A coach who says, "don't shoot," with a one point lead, is more likely to want no shots taken.

In summary, giving any *general* answer to what those words are likely to communicate from coaches to players about very easy shots may be impossible. If one tries to narrow the question to teams of similar abilities involved in games with comparable situations regarding score, why not focus on a particular coach and her team? As with any plausible reliance on literal meaning, we come up against an arbitrary line. How does one delimit matters of context that can figure in a general inquiry from matters of particular context that are excluded?³⁰

As noted earlier, the sixth possibility is that the meaning simply does not resolve whether Cheryl should regard herself as free to shoot. That approach would provide little help for Cheryl, who is seeking guidance from the coach's instruction. Perhaps one would nevertheless reach this conclusion if the considerations on each side seemed totally indecisive. But if the instruction seems, on balance, to exclude easy shots or to allow them, one would strongly hesitate to say that its meaning simply doesn't bear on the problem at hand.

Perhaps the other three possibilities are more promising. At the very least, each connects much more closely to the practical choice that Cheryl must make. The simplest approach, number (3), would be to say that meaning depends on the speaker's actual intent.³¹ Under this approach, all anyone can do is to estimate or guess about the meaning of instructions. People often infer the intentions of others with a high degree of reliability, but they do not have direct

³⁰ See generally William D. Popkin, *Law and Linguistics: Is There Common Ground?*, 73 WASH. U. L.Q. 1043 (1995) (questioning the amount of context needed to determine meaning).

³¹ See, e.g., Campos, *supra* note 23, at 982.

access to someone else's mind; they must rely on the person's speech and other behavior. Even when the coach says after the fact what she meant, that does not give complete certainty. She may be lying, having a lapse of memory, or shading the truth in subtle ways she may not recognize. A coach who did not advert to very easy shots when instructing her players, may well say after an easy shot is missed, "I *told you* not to shoot!"

Is the idea that meaning depends completely on actual intent troubling or even incoherent? Some people believe so, and suggest that Wittgenstein's comments about the impossibility of private language support the idea that meaning cannot depend on (ultimately) undiscoverable mental states.³² This argument is unconvincing. In our simple case, the coach had one of two mental states, each of which is comprehensible and fits her language moderately well. The intent was publicly discoverable, even if it had not been confidently discovered. The only difficulty is knowing, or assessing, which of the two mental states the coach had. There is no incoherence in making meaning depend on that; it is analogous to asserting that something may be a matter of historical fact, even though we lack a solid basis for determining it. Still, it is a bit disconcerting to suppose that the meaning of an instruction depends on something that is not only arguable, but is a matter of fact beyond certain determination. It is yet more troublesome to conclude that the real meaning (according to actual intent) might fail to correspond with a reasonable, or the best possible, assessment of what the instruction conveys.

Each of our other alternatives focuses on a listener's assessment of what the coach meant to convey. We might say that the meaning of the instruction tracks what a reasonable listener (number 4) or the most perceptive listener (number 5) would decide about the coach's intent. Insofar as meaning depends on the use of language *in context*, a highly perceptive listener may grasp more of the relevant background than an ordinary reasonable listener, allowing him to gauge the speaker's wishes more accurately.³³ Plainly, the more perceptive listener should respond in accord with his superior insight. Now, it

³² See, e.g., Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1088 (1995).

³³ If we ask about the significance of language itself, detached from the special circumstances in which it is used, the relation of an ordinary and highly perceptive listener looks somewhat different. What much or all language means, depends on general use (or general expert use in a field). With many simple terms taken by themselves, there may be no "most perceptive observer," unless it is someone who has studied the uses of others. Ordinary understandings determine meaning. However, with complicated instructions (as in I.R.S. regulations) and even sentences of ordinary complexity, a gifted reader may be better than a common reader at sorting out the implications of the language. See Robert S. Summers & Geoffrey Marshall, *The Argument from Ordinary Meaning in Statutory Interpretation*, 43 N. IR. LEGAL Q. 213, 220-24 (1992).

would be possible to say that "meaning" is determined by ordinary reasonable listeners, and that the more receptive listener properly acts contrary to the instruction's meaning (but in accord with his superior insight about intent), or properly acts in accord with a special meaning; but these circumlocutions are confusing. If faithful performance depends on an assessment of the intent of the speaker, then, subject to a qualification I will mention, it makes sense to tie meaning to the best possible human assessment of that intent.

How should we conceive the best possible assessment of the coach's intent?³⁴ From what perspective is the assessment to be made, at what time, and with what available information? Although one might adopt the perspective of an outsider who is familiar with the situation, it is preferable to ask what a recipient of the instruction might understand. Because the communication is from the coach to the players, the relevant assessment should be one which a player could conceivably make.³⁵ This has consequences for both content of information and time.

The assessment could employ the speaker's own explanations. An explanation given at the time of the instruction, probably counts as part of the instruction. If the coach follows, "don't shoot," with "I mean any shot," that amounts to "don't take any kind of shot." An explanation between the instruction and the player's decision how to act would similarly count as part of the instruction.³⁶ Information that some outsider (say, the coach's husband) has that is not accessible to players should not count for what the *instruction means*.

If one limits information about an instruction to what is accessible to the recipients, the relevant information for any recipient must probably be what is available up to the time of choice. It follows that an instruction that extends through time could mean one thing for one recipient and another for a recipient who fulfills the instruction later (with additional available information, but without change in surrounding circumstances).³⁷ At any time prior to the recipient's de-

³⁴ It will, of course, not do to say that the best assessment is usually made inside the speaker's mind. Allowing that to count as the best assessment brings us extremely close to saying that actual intent determines meaning. For the assessment approach to be different, we must imagine the perspective of an outsider who does not have omniscient access to the internal workings of the speaker's mind.

³⁵ From this standpoint, it may matter whether the recipients of the instructions are competent adults or children (though one might say the most perceptive child, say a ten-year old, could perceive what a very perceptive adult could perceive). More generally, this problem raises the question of whether one thinks in terms of very perceptive real people, or superperceptive people, who are more perceptive than any actual human beings.

³⁶ Cheryl will not care if the coach clarifies her wishes in the original time-out or a subsequent time-out. I assume the explanation reliably reflects the coach's original wishes. An *unreliable and inaccurate* explanation may supplement and alter the original instruction.

³⁷ Indeed, if a single actor had to act on the instruction more than once, the instruction could have different meaning for him at different times.

cision, the instruction would “mean” whatever accords with the best assessment of intent possible at that time. Thus, the best assessment approach incorporates the possibility of changes of meaning as new information becomes available—most particularly, reliable explanations by the speaker of what she meant.³⁸

If we focus exclusively on circumstances in which the recipient’s practical task is to follow the speaker’s intent and not to make her own judgment about desirable action, conceiving meaning as directly tied to a speaker’s intent is simpler than conceptualizing meaning in terms of the assessment of recipients. (We might, however, still choose the option of recipient understanding if it is much better for other situations, and we aspire to a uniform approach to meaning.) Each of these approaches ties the meaning of an instruction fairly closely to what would be the best performance of an instruction. Both of these approaches to meaning, however, fail to account for an aspect of situations of uncertainty, namely, that the wisest performance may be to act upon the less probable of two intentions, if the language of a formulation makes acting on the other possible intention a riskier course of action.³⁹ The answer to “what an instruction (probably) means,” may not be the same as the answer to “what is the best performance for a recipient under the instruction.”

C. Instructions to a Group That Must Coordinate Immediately

The question of whether, in order to discern meaning, one should focus on reasonable listeners, rather than on the most perceptive listeners or on the speaker’s actual intent, looks different if the communication requires immediate *coordination* without discussion, or if *review* is the crucial stage. For these situations, an ordinary, reasonable apprehension may be critical. The very perceptive listener cannot expect others to see all that he does; he will realize that coordination will take place on the basis of what others understand. And when someone’s (an ordinary person’s) actions are reviewed, it may make more sense to conceive meaning according to what an ordinary person could grasp, rather than in line with what someone of extraordinary insight might understand. These possibilities suggest that, other things being equal, the *meaning* of instructions could depend on whether immediate coordination is essential, or whether one

³⁸ A further development of reasons behind the instruction, though not focused on the particular problem the actor faces, could have a similar effect.

³⁹ I refer here to the risk of generating a more hostile response if one guesses wrong. I have already mentioned that one *could* try to accommodate this risk under a speaker’s intent approach, but that the accommodation is not fully satisfactory. One might conceive “meaning” as tracking the efforts of the perceptive listener to take this into account. In that event, we would have the odd conclusion that meaning could vary from what the perceptive listener (uncertainly) thinks the speaker tried to convey.

is at the review stage. The specter of such variations suggest further that the meaning of "meaning" may depend on practical considerations *and* may vary even as to the same instructions.

I will comment briefly on the coordination issue. Instructions are given to a group, and its members must act together before seeking further clarification or discussing the instructions among themselves. Suppose at a vital point in our basketball game, one play seems very likely to succeed. The new coach shouts a number for a less promising play, a number that is close to that for the better play. Only Cheryl, who has played for this coach before, is aware that the coach makes "play number" mistakes in stressful situations. Cheryl is sure the coach wants the "better" play. But knowing that everyone else will follow the announced play, Cheryl should do the same.⁴⁰ Even if Cheryl's degree of certainty that the coach has slipped is so great that it would definitely have led Kent to follow his sense of Georgia's mental intent in preference to her literal language, Cheryl should be guided by the literal language.⁴¹

This problem affects the issue of whether we want to conceive meaning as tracking what the most astute observer would understand, rather than what the ordinary observer would understand. If meaning matches the ideal performance of instructions, this example may suggest that meaning for coordinated-group instructions follows the understanding of most members of the group.⁴² Of course, if the most astute observer takes into account the need for coordinated action, she may interpret the instructions accordingly, thus bringing her final judgment into line with that of ordinary recipients. If meaning is so understood, the meaning of otherwise similar instructions could depend on the number of listeners and their relationships to each other, on the nature of the task to be performed, and on the overall institutional system in which the instruction is embedded. Coordination, of

⁴⁰ I assume the team has taken all of its "time-outs," so stopping the game for clarification is not an option.

⁴¹ One might speak of the coach's overriding intent that everyone perform the same play, which here, in application, conflicts with her intent that the "logical" play be performed.

⁴² A further perplexity appears if ten players realize that the eleventh will misinterpret in a particular way, and therefore act in a way that fits his probable actions. In that event, we would certainly not say that the instruction's "meaning" is in line with the eleventh player's misunderstanding, nor would we even say that the best performance follows his misunderstanding. Rather, we would say that the players departed from the terms of the instruction to achieve the overarching aim of coordinated action. (We might run this conclusion backwards to say that the superior listener departs from the instructions whenever he tailors his behavior to ordinary understanding, but that large extension of our conclusion about one player's *mis*understanding seems unwarranted.)

course, is crucial for legal systems, but in a way that differs from my example.⁴³

The review stage, also of vast importance for the law, introduces similar complexities to the understanding of instructions. Even if the recipient should be guided by actual intent (or the most perceptive assessment of that, which amounts in practice to the same effort), someone who assesses whether the recipient's performance was satisfactory or not will give overarching significance to how a reasonable person would have interpreted the instructions. If "meaning" connects closely to faithful performance, "meaning" may shift from recipient choice to review.

A different approach to these complexities is to seek one steady account of "meaning," and to say that the differences in the best way to carry out instructions, and differences between performance and review, introduce elements beyond meaning. Another possible approach is one that is mixed. Meaning would be somewhat, but not entirely, responsive to what is the best performance.

Neither general usage nor philosophical clarity dictates one of these approaches. Each form of conceptualization can yield adequate understanding, so long as we recognize that the best understanding of instructions depends on variable factors related to situations. We need to recognize that "the meaning of an instruction" is ambiguous and may be answered in different ways. Anyone who talks about such meaning in a theoretical way should make clear just how he is using the term. It may be that some particular approach to "meaning" will work best for practical affairs, or practical affairs of a certain kind; but the case for any such approach will depend on sustained and complex argument.

D. Changing Conditions

I turn now to situations in which the circumstances have changed from the time the instructions were issued. In our main example, the first changed condition is that Store X has burned down.

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Kent is now forced to go to a different store. If the nonexistence of Store X is the only change in conditions, *and* Store Y is similar in all

⁴³ The legal instructions contained in statutes lie someplace between the directive to an individual and the one to a group that must instantly coordinate its actions. These instructions affect many people, and there is no realistic opportunity to seek quick clarification. However, someone who is confident that words are not meant literally usually has an opportunity to explain why to others. Moreover, different responses to a statute ordinarily are not self-defeating in the way that it is self-defeating for players to carry out different plays.

important respects to Store *X*, we do not doubt that Kent is as faithful as he can be to Georgia's instruction when he buys the meat at Store *Y*. One may be faithful to an instruction without adhering to every detail, if adhering to every detail is impossible.

Exactly how to describe the situation is not quite so simple. The concern is whether we should say that Kent continues to *perform* Georgia's *instruction*, or whether we should use some weaker phrase, such as Kent carries out the spirit or purpose of Georgia's instruction, or Kent carries out what Georgia's instruction would be, given the change. Many terms carry their own flexibility and invite minor deviations. If Georgia said, "Shop at 5:30," she would not usually mean that shopping at 5:29 is too early or 5:31 is too late. Suppose Kent shops somewhat later than 5:30 (say 5:50) because a household crisis precludes leaving earlier. At least if the precise time is not a central element, I would say he is still performing the instruction.⁴⁴

How would we regard Kent's choice to go to Store *Y*? Georgia has specified three major elements, and one cannot be performed according to her terms. The choice of Store *Y* may be obvious. It may be like Store *X* and in much closer geographical proximity than other similar stores. If Georgia had previously suggested to Kent that he go to Store *Y* when Store *X* was closed for a holiday, we might even say that her instruction implicitly told Kent to use Store *Y* if Store *X* was unavailable. If Georgia had never thought about Store *Y*, we might say, "Choosing Store *Y* best fulfilled Georgia's instruction," or "Kent best carried out his instructions by going to Store *Y*."

If Store *Z* is a reasonable alternative to Store *Y*, where should Kent shop? Let us suppose that Kent is reasonably sure that Georgia prefers Store *Y*, but Kent believes Store *Z* is better. His assessment is this: Store *Y* is a much more pleasant place to shop, and that gives Georgia confidence in the quality of its meat; but the meat is actually better at Store *Z*. How relevant is Kent's judgment? For Kent, this depends on at least four variables: the specificity of Georgia's expressions; Kent's confidence in his judgment as compared with Georgia's; Kent's and Georgia's understandings about comparative competence; and Kent's belief about the degree of difference in light of Georgia's fundamental aims.

Kent is clear that Georgia has the authority to pick whatever store she wants. Georgia has chosen Store *X*. Suppose on past occasions, Georgia had always told Kent to go to Store *Y* rather than Store *Z* when Store *X* was closed. Kent might reach one of two conclusions about this. First, he might decide that "Shop at Store *X*" is a kind of shorthand for the ordering Georgia prefers. In other words, Kent as-

⁴⁴ Others who have discussed this problem with me disagree.

sumes that Georgia had her preference for Store *Y* in mind, and meant for Kent to adhere to that preference; that Georgia believed her communication would be so understood by him; that she formulated it to produce that understanding; and that she expects him to realize that she has done so. In that event, the force of the instruction itself is almost as strong in favor of Store *Y* over Store *Z*, as it is in favor of Store *X*.

Second, Kent might decide, instead, that Georgia had not thought about any stores other than Store *X* when she gave the instruction. Still, on past occasions, she had expressed to him a preference for Store *Y* over Store *Z*; and he knows that nothing has altered that preference. Because Georgia has authority over him, her past expressions, plainly relevant to this situation, carry great weight. Nevertheless, if Kent goes to Store *Z*, he will be able to say, "I didn't disobey you because you didn't tell me which store to use if Store *X* was closed."

Are matters different if Georgia had never indicated a preference for Store *Y* or Store *Z*? In ordinary circumstances, Kent will be much less sure what Georgia would want if she had not addressed the point. However, he may well enough understand her reasons for preferring Store *X* to be virtually certain that she would prefer Store *Y* to Store *Z*, and perhaps she had silently preferred Store *Y*. Still, she has not explicitly said so, now or previously. He is not disobeying her by going to Store *Z*, he is only failing to carry out her unexpressed or hypothetical wishes.⁴⁵ This example shows, among other things, that for ordinary instructions, wishes the speaker has implicitly expressed in the instruction usually carry more weight than previously expressed wishes that are not implicitly included, and expressed wishes of any sort usually carry more weight than similar unexpressed or hypothetical wishes.

Why would Kent do anything *other* than Georgia's actual or hypothetical wish? Georgia is interested in the quality of meat; she draws an inference about that from a store's appearance. Kent thinks Store *Z* has better meat, so he disagrees with Georgia about which store better satisfies Georgia's own objectives. The more confident Kent is that he is right, the more he will be inclined to do what he thinks best. He will also be influenced by the degree of difference he perceives. On trivial matters, he may aim only to carry out Georgia's immediate

⁴⁵ An unexpressed wish is a preference felt by Georgia, but not conveyed to Kent. A hypothetical wish is one that would be felt if Georgia had addressed the circumstance. If Georgia had never expressed a wish to anyone, Kent will often not know whether he is guessing about her unexpressed or hypothetical feelings. However, because I am treating expressions to third parties not intended to be conveyed to Kent as (relevantly) unexpressed, Kent may find out about feelings not expressed to him.

wishes; if he perceives a substantial difference, he will have a stronger reason to follow his own judgment (though this may be counterbalanced if he thinks Georgia perceives a substantial difference in the other direction).

One critical factor does not depend on either person's opinion alone. Imagine two kinds of relations of authority. In one such relation, both the person with authority and the subordinate recognize that the former not only has a right to dictate what will happen, but is also undoubtedly more competent than the subordinate. The subordinate does the task because the person in authority lacks the time or inclination to do it. I experienced such relations firsthand when I worked one summer on clay tennis courts under the supervision of a professional, and one weekend when I did some menial tasks in a greenhouse owned by the family of a close friend. In neither instance did I have any basis to trust my opinion instead of the judgment of the person instructing me. We both understood this.

In other contexts, both parties realize that the subordinate is more of an expert in most respects, although the person in authority may make crucial choices if she wishes. In the old days, wealthy parents may have regarded tutors and governesses like this; many modern suburbanites so regard people that care for the grounds around their homes. A housekeeper might well fall into this category and might be viewed as an expert in many respects. Yet another possibility is that subordinates and those in authority regard themselves as about equally expert.⁴⁶

These understandings affect expectations about instructions. The more the subordinate is recognized as "the expert," the more he is regarded as free to exercise his own judgment, so long as the choice is not foreclosed by specific instructions to the contrary. In our example, if Georgia and Kent regard choice of store as usually within Kent's domain, Kent would give relatively little weight to his assumption about Georgia's unexpressed or hypothetical preference if she had never expressed a preference for Store X or Store Y. Even a past expression by Georgia of a preference for Store Y will not seem controlling if both understand that Kent has discretion to choose the store *unless* Georgia directs otherwise.

The problem of relations of authority is not limited to choices in situations of fundamentally changed conditions; it reaches many other circumstances as well. It arises when a situation comes up that

⁴⁶ Needless to say, in-between possibilities are infinite. The subordinate may have more or less expertise than his superior, with both having considerable competence (or incompetence); or, there may be significant variations in subdomains.

the speaker may not have foreseen when giving the instructions,⁴⁷ and when the speaker used language that is vague, ambiguous, or incomplete for the situation at hand.

Thus far, I have assumed that the speaker and listener have a common view about relations of authority. In that event, if the two also share other understandings about the instructions, they will agree on how much latitude the instructions leave to the judgment of the listener-subordinate. But speaker and listener may not agree on the subordinate's precise role. If their disagreement is radical and obvious, conflict will ensue and their relations are likely to be severed. However, subtle, modest disagreements about role can survive for a very long time. When these do exist, the subordinate's sense of how he best performs under the terms of an instruction may be different from the superior's.

One might suppose that disagreements about role reduce to a misunderstanding by the subordinate of the superior's conception of proper relations. If instructions come from God, this supposition would hold true. Human beings should exercise the degree of judgment that God intends. One may think that some purely human relations are similar, that everything is finally up to the superior. But if one conceives of doctors, lawyers, nannies, actors, dancers, and others, one cannot generalize that conclusion. Part of the subordinate's idea of role may include a sense that even on matters as to which he must follow specific directives, he may use his own judgment in the absence of a specific directive that clearly applies. He may think that the client or director may not alter the general range of discretion by a vague instruction, "Do whatever you think I probably want, even if I do not clearly say so."

A further complexity about some relations of authority concerns what we may call "independent objectives." Either the speaker or the recipient has objectives that are not shared by the other, and are outside the range of purposes for which the relations of authority exist. Store Z, unknown to Georgia, is owned by a cousin of Kent's. Kent would like to help his cousin by shopping there, but he realizes that Georgia would not regard such help as a reason for him to spend her money there. In a more complex example suggested orally at the Symposium by Deborah DeMott, Cheryl, standing under the basket, realizes that if she scores two more points in her final college game, she will break a scoring record and be able to command a higher

⁴⁷ That category may cover the very easy shot under the basket. It covers the question of whether to stick to literal terms if those can be satisfied, but the result is highly unpalatable; for example, whether in *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), the grandson who murdered his grandfather should inherit under the grandfather's will according to the simple statutory rule.

professional salary.⁴⁸ Thus, she has a reason to shoot that does not relate to efforts to win the game. Conversely, as Stephen Garvey points out, the person giving the instruction may be motivated by considerations that are outside the range of objectives he could reasonably expect his subordinates to accept.⁴⁹ To take a stark example suggested at the Symposium, the coach in our basketball game may be aware that a close friend has bet on the opposing team with a point spread of five points. The optimal outcome for the coach may then become to win by less than five points.

When the objective of the subordinate is wholly inappropriate, we can simply say that it should not affect how he understands instructions. When the authority's objective is similarly inappropriate, subordinates may be justified in disobeying instructions. The complexities arise when the unshared objectives fall within an acceptable range. Georgia may not mind if Kent directs some business to relatives if the household does not suffer. The presence of an accepted independent objective might tip the balance of how instructions would be performed. Perhaps if Kent considered only Georgia's instructions and objectives, he would interpret the instructions as directing him to shop at Store Y if Store X has burned down. But, given the lack of specificity of the instructions and his independent objective, he does not take the instructions as foreclosing a choice to shop at Store Z.

We notice here a point obliquely illustrated by the example of a possible slip. The best performance of the instructions from the point of view of the shared objectives of the speaker and listener may not necessarily be best in terms of all the (acceptable) objectives of the listener. As Robert Cooter pointed out in the Symposium, one might ask what is best overall, as well as what is best for Georgia or best for Kent.⁵⁰ One way to conceive the general welfare is as a possible set of acceptable objectives that either the speaker or listener may not share. Perhaps Kent wants to use Store Z to help its poor, hard-working owner, but Georgia is indifferent to the economic hardship of others.

One final point remains to be made about relations of authority. It is easy to conceive of an authority's expressed or probable opinion as lying at either of two poles: either the opinion is "advisory," not binding the subordinate who is free to use his own judgment, or it is

⁴⁸ Videotape of the *Cornell Law Review Symposium, The Nature and Sources, Formal and Informal, of Law* (Mar. 1-2, 1997) [hereinafter Videotape] (on file with the *Cornell Law Review*).

⁴⁹ Stephen P. Garvey, *Are Housekeepers Like Judges?*, 82 CORNELL L. REV. 1039, 1041-42 (1997) (discussing the "Not-Entirely Faithful Head-of-Household"). One may suppose that people in Georgia's circumstances can pursue whatever objectives they want, short of harming their children. But often, people in authority have their own roles circumscribed by a limited range of purposes.

⁵⁰ See Videotape, *supra* note 48.

what Joseph Raz has called “exclusionary,”⁵¹ purporting to supplant the subordinate’s own judgment. But we need to recognize that between the poles is an entire spectrum.⁵² On matters that it covers, the opinion may carry weight, having independent force on its own, but leaving some room for judgment. The subordinate may disregard the opinion if, in his judgment, the countervailing reasons are extremely strong, but he should follow it, if he thinks the balance of reasons is only moderately on the other side. This reduces to: “Give some weight to the opinions of the authority just because those are her opinions.”

2. *Meaning*

How does one speak of the “meaning” of an instruction in light of changed circumstances? This is a bit awkward, even when Kent’s obvious responsibility in our example is to go to Store *Y* after Store *X* has burned down. If Georgia had previously indicated that Kent should go to Store *Y* if Store *X* was unavailable, we might understand the original instruction implicitly to include Store *Y* as the desired alternative if Store *X* is not available.⁵³ We could then conclude that the instruction’s meaning covers Store *Y* and has not changed. It continues to be, “Buy meat at Store *X*, or if Store *X* is not available, at Store *Y*.” Only the proper fulfillment of the instruction will have shifted.

Suppose we cannot make out any indication from Georgia that Kent should shop at Store *Y* under the circumstances. In that event, the original instruction did not implicitly include a preference for Store *Y*. We might reason that most instructions implicitly include a direction to carry out the project as well as possible if compliance with the original terms is no longer feasible. In that event, perhaps this instruction implicitly included a direction to choose an alternative store if necessary, and envisioned or authorized the choice of Store *Y*. But the idea of an implicit direction to choose Store *Y* seems artificial if neither Georgia nor Kent had in mind any alternative when she spoke, and if previous communications between them did not establish Store *Y* as the preferred back-up to Store *X*.

We might, then, better say that the meaning of the instruction, which continues in force, has changed in the sense that an addition has been made. We can still understand the instruction to direct shopping at Store *X* if it is open, but we now take the instruction to

⁵¹ Raz, *supra* note 1, at 39.

⁵² Frederick Schauer emphasizes this point and responds directly to Raz in SCHAUER, *supra* note 1, at 88-93.

⁵³ This understanding of the instruction is possible only if we focus on Georgia and Kent, or upon a reasonable listener who knows enough about past relations between Georgia and Kent to add this to the words Georgia has spoken.

include the possibility of going to Store *Y* if Store *X* is unavailable. This conceptualization requires us to conceive of Kent as having the power or authority to change the meaning of the instruction, in order to carry it out as best he can when performance according to the original terms of the instruction has become impossible.⁵⁴

Variations in which Store *Z* is a reasonable alternative to Store *Y*, and in which role conceptions are crucial, present a much greater difficulty for "meaning." Suppose that Georgia has in the past expressed to Kent a preference for Store *Y* over Store *Z*, but both Georgia and Kent understand that Kent can choose the store for shopping unless explicitly directed otherwise. In that event, the instructions definitely do not implicitly direct him to use Store *Y* if Store *X* is unavailable. Nor do they implicitly direct him to use Store *Z*. Perhaps they implicitly direct him to use his best judgment if Store *X* is unavailable; but even that is doubtful. Very likely, Georgia would *not mind* if he went to Store *Y* (her preference); and Kent is aware of that. Perhaps we should say that the meaning of the instructions has changed to allow shopping at another store, leaving Kent free to adhere to Georgia's preferences or to use his own judgment about the best store.

Role conceptions that leave Kent latitude to disregard some of Georgia's preferences raise even deeper problems about meaning, ones that may be sharpest when two people disagree about their respective roles. A crucial question Kent must ask himself is whether Georgia has successfully circumscribed his latitude of choice. We know that Georgia cannot do so merely by *wishing* Kent to do something—even if Kent happens to guess her wishes. She can only do so by expressing a direction that Kent do something. Georgia has directed Kent, but has she limited his choice? On this *question*, Kent will not concede that Georgia has successfully circumscribed his choice simply because she wished and intended to do so by her utterance.⁵⁵ He may conclude that the instruction implicitly includes his going to Store *Y*, but that he may disregard this aspect of the instruction. Or he may conclude that if her utterance did not adequately convey the limitation to him, he is not circumscribed at all. Kent will not take

⁵⁴ Notice that, under this conceptualization, Kent can add meaning to the instruction of which Georgia may be unaware. An approach that makes a speaker's intent, or a perceptive listener's understanding of the speaker's intent, crucial would require some emendation to incorporate this. The suggestion of William N. Eskridge, Jr. and Judith N. Levi that some legal phrases or terms be understood as "regulatory variables" is one way to accommodate this notion of changing "meaning" for altered circumstances. William N. Eskridge, Jr. & Judith N. Levi, *On Regulatory Variables: Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995); *Proceedings, supra* note 13, at 841-43, 945-52.

⁵⁵ For example, Kent might find out indirectly what Georgia aimed to do with her communication to him, and still conclude that she had failed.

Georgia's probable intentions as his exclusive guide for understanding her utterance, especially if he has acceptable independent objectives. What she directly communicated to Kent, the listener, in words he would understand, may be his guide.

If the idea that speaker's intent might determine meaning was attractive when we looked at it previously,⁵⁶ that was largely because we assumed that the listener was trying to act upon that intent. Once we drop that assumption, speaker's intent seems less crucial. The listener's apprehension of what is conveyed seems equally important. But this creates yet another barrier to talking about "the meaning" of the instruction. Suppose Georgia and Kent take opposing views as to whether she constrained Kent's choice of store. There may be no basis to privilege intent over Kent's understanding, and there is no evident way to "average" the idiosyncrasies of the two in order to arrive at a "real" meaning. Rather, if we are going to talk about "the meaning" as something different from what either Georgia or Kent may conclude, we are pushed toward some idea of how most people (or a reasonable or perceptive person, situated like Kent) would understand what Georgia said. Once speaker and listener perspectives are given equal significance, the move toward some sort of objective meaning is a natural one.

A further complication concerns how we should describe disagreements about role that yield different understandings of how far listeners should be constrained by an instruction. If two players have precisely the same view about what the coach intended and wanted when she said, "Don't shoot," and the players further agree on what the phrase means in some more general sense, they still may disagree about what they should do, because they differ about the coach's authority. One may regard herself as constrained, the other not. Similarly, a player and coach might disagree, as Georgia and Kent might disagree, when the only ground of difference concerns the subordinate's underlying role. If "meaning" were conceived as following assessment of how the instruction should be taken, these disagreements would be about meaning. This is certainly one possible conceptualization.⁵⁷ But we might instead say, "Because Kent perfectly understands Georgia's state of mind and the general meaning of the terms she uses, he and Georgia do not disagree about the 'meaning' of the instruction; they disagree only about how far he should carry out her previously expressed wishes or probable desires." This comparison re-emphasizes a point made earlier—that the phrase,

⁵⁶ See *supra* Part II.B.2.

⁵⁷ This is similar to how "realists" understand the meaning of natural, moral, and theory-laden terms, with "meaning" in accord with scientific reality or ideal choice. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

“the meaning of an instruction,” may reasonably be keyed more or less closely to the question of its appropriate fulfillment in the circumstances.

Our discussion of possible “independent objectives” has revealed yet another difficulty with tying meaning closely to faithful performance. If we can imagine that the performance that is “best” may vary depending on whether we take all the objectives of the speaker, or all the objectives of the listener, or some other standard, we may conclude that we cannot speak of a “best performance” without further explication. We could obviously not arrive at a single meaning tied to performance until we settled on what “best performance” counted. Perhaps appropriate objectives that are mutually accepted⁵⁸ would be the best guide, if one were to try to settle on one standard of best performance that would determine meaning, but I shall not work out that complication here.

E. Supplementary Directives

Professor Eskridge suggested another variation on the original scenario. In it, Georgia, worried about the effect of cholesterol on her children’s health, instructs Kent to buy foods that an article says are low in cholesterol.⁵⁹

1. *Faithful Performance*

The precise impact of Georgia’s new instruction on her soupmeat instruction is somewhat complex. Kent could continue to buy soupmeat *and* buy the articles Georgia now wants. The significance of the new instruction lies not in its terms, but in its underlying reason. If soupmeat has a lot of cholesterol and Georgia doesn’t want her children getting too much cholesterol, that is a reason not to buy soupmeat.

Two barriers exist to Kent’s concluding that he should cease buying soupmeat. First, Georgia has not said that he should stop; she could have included that in her new instruction. Maybe her failure to mention anything of the sort shows that she wants her initial instruction to continue. Kent gathers, instead, that she did not mention soupmeat because she was not aware just how much cholesterol (beef) soupmeat contains, or perhaps because, in focusing on good things for the children to eat, she failed to review whether any staples in their diet posed a serious risk. If Kent is an agent with a substantial compe-

⁵⁸ For this purpose, one should probably count objectives as to which one person (say, the speaker) is indifferent, but accepts as guiding the other to some extent. For example, Georgia might accept Kent’s shopping at his relative’s store, if she has not directed otherwise.

⁵⁹ See *Proceedings*, *supra* note 13, at 941.

tence of his own, he properly matches his own reliable information—that beef soupmeat is high in cholesterol—with Georgia’s expressed preference against cholesterol for the children.

But that judgment alone is not sufficient for him to stop buying soupmeat. Soup made with soupmeat may have substantial nutritional value that offsets the danger of cholesterol. Kent can feel confident he is doing what Georgia really wants, or what she would want if she had his reliable information, only if he assures himself that his proposed substitute will not sacrifice the values of soup made with soupmeat. If he assures himself that chicken soup does have roughly the same value *and* he concludes that Georgia’s failure to mention soupmeat in her instruction does not reflect a wish that he continue buying soupmeat despite its high cholesterol content, then he will perceive his switch to buying chicken as not at odds with the aims of Georgia’s initial instruction.

2. *Meaning*

Just how should we conceptualize Kent’s purchase of chicken meat for soup at Store Y? Here, a good bit turns on the word “soupmeat.”⁶⁰ If Georgia and Kent have taken the word literally as meaning any meat for soup, then chicken qualifies as meat under that interpretation. Because Georgia originally wanted Kent to buy beef and Kent understood and accepted this, the original instruction implicitly included a preference for beef. Kent continues to buy meat for soup, the meat he is confident Georgia would prefer if she knew the facts about the cholesterol content of beef. Because his job is largely to carry out Georgia’s most recently expressed wishes, he now buys the soupmeat that does so. His interpretation of how to perform the first directive is colored by the reasons for the later directive. We might say that one of the implicit understandings concerning the first directive has been canceled. Following this view, the meaning of the first instruction has changed if we include implicit understandings, but otherwise it has not changed.⁶¹

The initial instruction looks different if we suppose that “soupmeat” has always meant, and continues to mean, “beef meat” for soup. We can put this alternative most starkly if we assume that Georgia originally instructed Kent to buy beef for soup. In any literal or ordinary sense, chicken is not beef. We would hesitate to say that buying chicken is “complying with” or “carrying out” Georgia’s instruction to buy beef. The “meaning” of that instruction does not include buying chicken for the soup. We might rather say, “Kent is doing the

⁶⁰ See *id.* at 943.

⁶¹ Alternatively, one might speak of the second directive as trumping an aspect of the first directive, whose meaning remains constant.

best he can to follow the spirit of Georgia's instruction, in light of the facts of which Georgia (the danger of cholesterol) and Kent (the high cholesterol content of beef) have now become aware." Kent is not disobeying Georgia's initial instruction, because Kent is assuming that the changed conditions eliminate its force in one particular. However, Kent is not complying with the original directive either. Nor is Kent's purchase of chicken based on an interpretation of the original directive (taken by itself); although his action is based on an interpretation of all relevant directives (or, perhaps more precisely, on an interpretation of the import of all relevant directives). If Georgia and Kent assume that all instructions that continue in force are to be interpreted in light of all later instructions and their reasons,⁶² then we might say Kent is interpreting the original directive (though self-consciously disregarding one of its terms) and is complying with it. According to this view, if interpretation is equated with discerning meaning,⁶³ then the meaning of an instruction will shift as later instructions are forthcoming.

Why have I regarded the shift from beef to chicken (assuming that soupmeat has always meant beef) as different from the shift from Store X to Store Y? Kent cannot shop at Store X if it has burned down. We can think of the original instruction as implicitly including (or at least not excluding) use of an alternative store if Store X is unavailable. Here, beef remains available, and many people continue to buy it for soup. Kent buys chicken instead of the available beef. Georgia meant beef and Kent understood that. Thus, it is harder to say that Kent is complying with the original instruction alone when he switches from beef to chicken than when he uses Store Y.⁶⁴

Can we say that Kent is complying with the more abstract idea of purchasing the best meat for soup, and with the abstract idea that Georgia's instructions should be interpreted to fit together?⁶⁵ Perhaps, but Georgia's instructions were specific, not abstract. However, this comparison tends to show that there is no sharp line between

⁶² People might also want instructions to be interpreted in light of earlier instructions, or earlier instructions that evidently remain in force.

⁶³ Perhaps a more plausible view is that the inquiry about meaning is narrower than all relevant steps in interpretation. (Or, if interpretation is taken narrowly, that interpretation is to discern meaning, but that other steps need be taken to decide how to apply instructions.)

⁶⁴ As this Article makes evident, the answer to the question of whether the recipient is "complying with" an instruction is close to, but not identical with, a judgment of whether his action is covered by the meaning of the instruction. (I have suggested implicitly that one might comply with an instruction even though its meaning does not cover one's behavior.)

⁶⁵ See generally David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 121-29 (1988) (discussing the role of abstract intent in determining meaning and purpose).

when Kent complies with the original instruction though he no longer fulfills each of its specific terms, and when Kent no longer complies with the instruction itself, though he fulfills its broad spirit.⁶⁶ There is also no sharp line between appropriate responses to changed conditions that rest on “an interpretation” of a directive, and those that amount to a “justified departure” from the terms of the directive. We can imagine clear instances at either end of the spectrum—the difficulties lie in the middle.

I have so far considered the possibilities that the term “soupmeat” includes chicken or definitely excludes chicken. Matters might be less clear. The word “soupmeat” does not literally exclude chicken. Suppose, because of tastes, beliefs about health, and prices, it has long been thought that the most desirable meat for soup is beef, and that “soupmeat” has come loosely to mean “beef.” Of course, people do occasionally buy chicken and other meats for soup, but general usage has not included meats other than beef as “soupmeat.” New information has made beef seem much less desirable. Over time, the shifting sense of desirability may shift the understanding of the term “soupmeat.” If “soupmeat” has meant something like “the best meat for soup” (and that has happened to be beef), the term may quickly become more vague as to the specific meat to which it refers. Kent’s purchase of chicken could, in part, be conceived as a kind of proposal that chicken should now count as “soupmeat.” On this account, Kent makes a new interpretation of the meaning of Georgia’s original directive, one he thinks she will endorse, and he sees himself as complying with the directive as so interpreted.

F. Radically Changed Conditions

The next changed circumstance in our example is the rationing system. If all meat is very expensive, it may be best not to buy meat. Kent does not take Georgia’s directive about the soupmeat as foreclosing that choice. He properly buys other items of food. How are we to conceptualize that choice?

We can no longer talk of Kent carrying out Georgia’s first directive. The meaning of that directive does not cover what he now does. Might we say, as we could with the purchase of chicken, that Kent is fulfilling the spirit of the directive, if not its terms? Yes and no. Kent’s behavior is in accord with the spirit of the directive—to buy healthy food for children. But Kent would take it for granted that Georgia

⁶⁶ An intermediate example would be if Store *X* remains open, but has changed management and deteriorated. Shopping at Store *X* is not impossible—in that respect the example resembles the beef-chicken problem. However, Store *X* has changed and is no longer the same Store *X* Georgia meant—in that respect the example resembles the burning down of Store *X*.

wants him to buy healthy food for her children.⁶⁷ When he bought chicken, he was still regularly buying meat for soup; it is quite possible that absent the directive, he would rarely have given the children soup with meat in it. Georgia's directive still had a significant bearing on his choice. That is no longer true. Had she never uttered a word about soupmeat, he would still be buying the same non-meat items.⁶⁸ The significance of the directive now is as a possible obstacle to choice, an obstacle that Kent reasonably disregards. Although it is not inaccurate to say that Kent still acts in the spirit of the directive, it is more illuminating to conceive the directive as losing force because of changed conditions than to suppose Kent is somehow still carrying it out.

This situation further reinforces how blurry the line is between the carrying out of a directive in changed circumstances and the loss of a directive's force in changed circumstances.⁶⁹ Similarly blurry is the line between interpretation of the spirit of the directive and disregard of the instruction. If the aim of the directive had been something less obvious than healthy food for children, its rationale could continue to influence choice, even if none of its specific terms were followed. Indeed, this could be the situation here if the first directive continued to influence Kent to buy ingredients for soup. Then, we could not speak simply of the directive as losing force.

G. Lapse of Time and the Comparative Force of Judgments

Esckridge's story contemplates a substantial lapse of time during which Georgia is neither with her children nor communicating with Kent about the circumstances of their lives.⁷⁰ We might imagine an earlier era when parents went to India, leaving their children with a housekeeper and other staff. In the most extreme and painful version, the parent dies after leaving instructions relating to the children. Let us suppose that the subordinate continues to believe he should follow instructions directly on point for conditions that have not significantly changed. But as time goes by and as the parent is further removed, the housekeeper will rely more and more on his own appraisals. We have already seen one reason for this development. When it becomes impossible or evidently unwise to continue doing

⁶⁷ Parents might have objectives that are not nearly so obvious. For these, a directive might continue to exercise influence, although performance of its main terms is no longer feasible.

⁶⁸ Here, I disregard the possibility that the directive leads him to continue to buy items for soup.

⁶⁹ Some directives may lose force permanently, because the conditions they envision will never re-emerge. The soupmeat directive loses force only temporarily. When rationing ends, Kent should go back to buying chicken for soup.

⁷⁰ See *Proceedings, supra* note 13, at 941.

what the specific directives indicate, the housekeeper will need to exercise his own judgment to carry out the broad objectives that are reflected in the specific instructions. In theory, he might do this by continuing to give overarching weight to what he thought the parent would want in the circumstances.

But two much more subtle changes also operate. For many matters (although perhaps not diet), parents re-shift objectives for children as they interact with them and see them grow. Only in the broadest sense of "wanting what is best for them" do most parents maintain consistent objectives for children over time. An optimistic assessment would be that parents learn more about what is good for their children as they learn more about their children. If Georgia is away for a long time, she is not on hand to do the learning; Kent is on the scene. Not only will his estimates about what Georgia would want become more unreliable, he will have increasing confidence in his own views, and declining confidence in Georgia's expressed or probable views. He might conceive a construct of what Georgia would want if she had been around and learned what he has about the children. But, his assessments of her actual mental state wishes at an earlier time, or her probable wishes in the present (given her actual assumptions about the children), will carry less weight than they once did.

A related change will commonly occur. If Georgia is away for a long time, those who are present are likely to see raising the children as more and more their responsibility and less and less Georgia's. Similarly, people in Georgia's position are likely to feel that they have less right to dictate to those closer at hand; and sometimes the strength of their parental feeling dilutes with time. These patterns reinforce the tendency of the present housekeeper to give increasing weight to his judgment, and for that to be accepted by an absent parent.

These comments further illuminate the question of role. Someone in Kent's position will not have a standard conception of role that rigidly applies to all superiors. His notion of role will shift subtly as parents absent themselves, or return to involve themselves more closely with their children.⁷¹

H. Abstract and Specific Purposes

With most directives, we can identify specific as well as more abstract objectives. Typically, one could talk about a range of objectives, going from the most specific to the most abstract. In our example, to what extent does the faithful housekeeper pay attention to abstract

⁷¹ Georgia may undergo parallel changes in attitude.

rather than specific objectives? Roughly, we can think of directives formulated at very specific, middle-range, and highly-abstract levels.

The soupmeat directive is very specific. Georgia made it specific because she expected it to be carried out in a precise way, and she had authority to do that. So long as conditions (and knowledge) do not change, Kent should do what Georgia has specifically requested. Even then, his behavior will also be restrained by implicit specific understandings and general objectives; for example, he will not buy meat that has spoiled. Abstract objectives will also inform him how to take the directive in changed circumstances and will signal when the directive's force has lapsed.

As the terms of the directive become more abstract, analysis becomes more complicated. Suppose Georgia tells Kent to buy meat that is "reasonably priced." We can imagine two extremes. One is that Georgia doesn't wish to waste money, but she leaves it to Kent to decide what is "reasonable," and Kent understands this. The other extreme is that Georgia has often shopped with Kent and she has let him know exactly what she considers to be unreasonable pricing. Both she and Kent may understand that "reasonably priced" is a shorthand for the specific prices for particular cuts of meat that Georgia thinks are reasonable. Until conditions change, Kent need not exercise his own judgment. As prices in general rise, he will have to exercise some judgment, but perhaps little more than if Georgia had set out an exact list of acceptable prices in the first place. (I say *little* more, because if Georgia had set out the list, that might have reflected less confidence in Kent's judgments about rising prices than if she used the term "reasonably priced.")

Typically, Georgia and Kent understand an instruction about "reasonably priced" not to embody either extreme. Kent is to be guided substantially by Georgia's opinions about reasonable prices, insofar as these have been clearly expressed to him. However, because Georgia's expressed opinions don't cover every contingency, Kent is also expected to exercise some judgment. This (probably) does not mean that Georgia's opinions are merely guides that Kent is free to reject. If Kent thinks a particular meat is so good it is worth paying twice the price Georgia has said is reasonable, Kent is not free to buy it, telling Georgia that he exercised his own best judgment about what was reasonable.

Of course, these matters are relation-specific and context-specific. Suppose Georgia and Kent both recognize that Kent knows much more about meat prices than Georgia. Georgia was once very rich, and often instructed Kent to buy the best meat available, regardless of price. After suffering big losses in the stock market, Georgia has decided to economize. She tells Kent to buy meat that is "reasonably

priced." Although she has expressed opinions to Kent about reasonable pricing, she has always followed such comments with the remarks, "Of course, you know best here. I trust your sense of when better quality warrants a higher price." In these circumstances, Kent may take Georgia's opinions as only that, regarding himself as free to judge on his own, so long as he avoids wild extravagance. And, as I have mentioned, Georgia and Kent may understand that her opinions carry independent weight, even if they are not exclusionary.

Among these various alternatives, how would we decide what "reasonably priced" means in a directive from Georgia to Kent? Unless Kent's task is to follow Georgia's wishes (even if not clearly expressed), there is no reason to privilege her sense of what "reasonably priced" entails for him over his own.⁷² Does "meaning" include their past relations, as they bear on what this phrase means *for them*, or is meaning to be assessed according to some general understanding, in which event it is vague in context?⁷³ I am inclined to say, if one resolution is necessary, that the meaning here depends on what a reasonable understanding of the term would be for this directive, on the part of someone aware of previous exchanges between Georgia and Kent.

CONCLUSION

What general lessons may be drawn from this examination of performance and meaning of informal instructions, and what relevance do these conclusions have for law?

I have focused on what can go wrong with authoritative informal instructions; situations when the speaker may have made a mistake, or the instructions do not clearly cover the action that should be taken, or conditions have changed, calling for different behavior from what the instructor envisioned. These situations raise questions about faithful performance and about what the instructions "mean."

A central issue about performance is to what extent the person subject to the instructions should do what the person who gives the instructions wants; how far he should follow the apparent import of the language of the instructions (if this diverges from likely intent); and how far he should use his own judgment. We have seen that when someone tries to follow informal instructions, the mental state intent of the person who gave them is very important, but it is often not the only guide to judgment. If an easy transposition to law were

⁷² I am talking here about how the phrase "reasonably priced" is to be understood if it is not clear, not about specific choices that Kent makes (which, of course, would be relatively unconstrained under one understanding of "reasonably priced").

⁷³ That is, the phrase is vague not only about what prices are reasonable, but about the range of choice envisioned.

possible, we might suppose that this subjective intent would matter greatly, but would often not be the only guide to action.

One thing about which we can be sure is that no easy transposition from informal contexts to law is possible, as the brief comments at the beginning of the Article indicate. Our law contains very different kinds of norms. A common law rule is not the same as a disposition prescribed by an individual's will, and a rule that indicates how much of one's marginal income one must pay in federal income taxes is not the same as the highly general "compelling interest test" in constitutional law. No one has ever suggested that interpreting common law rules comes down ultimately to discerning some individual's or group's subjective intent; we should be surprised to learn that intent plays as great a role there as it does for informal instructions. Yet, some applicable legal rules seem at first glance not so different from instructions. These are the wills of individuals and orders or rules issued by single individuals who have the authority to dictate (within limits) what is legally proper behavior by their subordinates. Conceivably, a full theory about our system's legal norms would conclude that actual subjective intent plays no role in determining performance, even for wills and individual orders; but that conclusion would, at the very least, be counterintuitive. Because of the difficulties of the concept of intent for multi-member bodies, because the officials who apply statutes must typically concern themselves with how the statutes are understood by other people subject to them, and because of the length of time between statutes and performance, the claim that subjective intent should not be central in constitutional and statutory interpretation seems more immediately appealing. In this respect, I think the commentary of Stephen Garvey is tremendously helpful.⁷⁴ By complicating my examples in ways that bring them closer to many legal problems, he shows how difficult it may be to fix on any intent that should be controlling.⁷⁵

My Article indicates a point that is obvious upon slight reflection. The problem about how to determine relevant subjective intent exists *not only* when that intent is the governing standard for action, but also when that intent is one relevant criterion for what should be done. All the complexities I have explored about how to determine the intent that counts, as well as some additional problems, will be present if we conclude that subjective intent matters for performance in law.

In informal contexts, how the recipient thinks he can best perform instructions will depend partly on his sense of role, and that sense may vary from how the issuer of the instructions sees the respective responsibilities of authority and subordinate. Perceptions of role

⁷⁴ Garvey, *supra* note 49.

⁷⁵ *Id. passim*.

may shift as time lapses from when the instruction is given. As conditions change and fulfillment of the literal terms of the instruction becomes impossible or unwise, exactly what the subordinate should do may shift. The opinion of the person giving an instruction may be more than "advisory" and less than "exclusionary." Although we can talk of "carrying out the instructions but not each detail," of "carrying out the spirit of the instructions but not its terms," and of "the instructions losing force," the lines between these categories are not precise at the edges. These aspects of our analysis undoubtedly have some relevance for understanding legal interpretation; but *how* they apply may differ widely among branches of law and varieties of legal norms.

I have made five central points about the meaning of instructions: (1) In the absence of some overall theoretical structure that would yield more rigorous conclusions than reflective intuitions, we have no straightforward conception of meaning that applies comfortably in all instances; (2) What amounts to literal meaning is often debatable, because the degree of contextualization is far from self-evident; (3) Ordinary understanding of instructions depends significantly on context, and particularly on shared assumptions of speaker and listener. As Neil MacCormick pointed out in the Symposium, we might think of the "locutionary" meaning of instructions (the behavior to which they refer) as depending in part on their "illocutionary" force (their function);⁷⁶ (4) Meaning does not seem always to follow best performance, though one could, of course, stipulate that it does; and (5) The meaning of an instruction will, on many accounts, change depending on the context of decision that is involved. The meaning, for example, may be different for someone who carries out instructions than for someone who reviews her performance.

We know that the subject of meaning in law will be no simpler than it has been for our discussion. This lesson may already have been obvious from writings about literary interpretation and related fields; but part of the rationale of my exercise is that informal instructions are in most ways more like law than are works of art. For this reason, what this study shows us about the perplexities of meaning for imperative language, and about the way meaning may diverge from best performance, has particularly pointed relevance for law.

A possible strategy to deal with these difficulties is to adopt some relatively simple approach to meaning and say that all else that performers of instructions and courts take into consideration is "application" or something else, not an inquiry about meaning.⁷⁷ Although this strategy might produce a clarified sense of meaning, it faces, for

⁷⁶ See Videotape, *supra* note 48.

⁷⁷ See, e.g., Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1461-76 (1997) (summarizing Schauer's claim that rule application

law, the difficulty that people usually talk of the whole enterprise of interpretation as discerning or elaborating the meaning of the legal norm involved. Another strategy is to acknowledge that "meaning" has many meanings; that a choice of one standard for what counts as "the meaning" comes down to a question of what will lead to desirable practical choices.

A final caution is warranted. I have continually talked about instances that raise problems. As I have noted, the performance and meaning of instructions are often straightforward in context, leaving no important choice to the person who wishes to fulfill the instructions. Unless we find otherwise, we should assume the same may be true of law, that there will be many instances in which appropriate performance and meaning (though perhaps not the precise criteria for determining meaning) will be clear and congruent.

APPENDIX

ON DEPARTING AND FAILING TO COMPLY

Choosing the precise language when someone does not follow instructions is difficult. Here, I explore certain possibilities in more detail than in the main text. The issue is how one would describe an action in relation to the instructions. As we have seen, a subordinate may *follow* a directive, though he no longer fulfills each particular of it. I am assuming here that the deviation between the subordinate's action and the language of the directive is great enough so that he is definitely not following the directive.

If *S*, the subordinate, correctly believes that faithfully taking the directive as a guide would require him to do one thing and he does something quite different, he is disobeying the directive.⁷⁸ (He may or may not believe he has a moral justification.) If he correctly perceives that his action is at odds with the directive, it does not matter whether his conclusion on this score is reasonable, or is unreasonable but fortuitously right.

If *S* correctly believes that not following the directive is warranted in light of the directive itself and its underlying objectives (this was the situation when Kent stopped buying meat under the rationing system), then *S* has justifiably departed from the directive.⁷⁹

Suppose the actual circumstances warranted not following the directive, but *S* failed to perceive any circumstances of that sort. Here the characterization is more difficult. *S* thought he was disobeying—that is, he thought he lacked a warrant to deviate in the way that he did. But the warrant was there. We might say: “*S* intended to disobey, but the circumstances were such that he only departed,” or “*S* disobeyed, although grounds unknown to him existed for his departure.” I am inclined to favor the first alternative because I don't think one usually disobeys (in ordinary usage) unless he fails to do what is called for.⁸⁰ Yet, I might tell a child that she disobeyed me if she meant to do so, but had misunderstood my instructions. In context, “disobey” can take either an objective or subjective twist. Still, in this context, the objective twist seems preferable.

⁷⁸ I assume that the force of the directive is strong enough so that one would speak of disobedience. One might not speak of disobeying directives with very weak force.

⁷⁹ If he unreasonably concluded that he should not follow the directive but was fortuitously correct, he was objectively justified in departing from the directive (the circumstances gave rise to a justified action of that sort), but he was subjectively unjustified (no reasons *he* accurately perceived warranted a departure).

⁸⁰ Suppose *S* thought he was disobeying, but he actually carried out the instructions to the letter. We would probably not say then that he disobeyed. The same should be true if he has engaged in an objectively justified departure.

This leaves us with the situation in which *S* believes he has a good reason not to be guided by the directive; but *S* is wrong. He should be guided by the directive. Disobeying is not the right term, because that term imparts a conscious refusal that is lacking here. Departure is also not quite right, because that term suggests that not following the directive was warranted.⁸¹ Perhaps the best phrase is something like “*S* failed to carry out” or “failed to comply.”⁸²

This discussion reveals just how difficult it is to come up with an apt characterization, how arguable the most apt characterization may be, and how subtle shifts in circumstances can alter that.

⁸¹ Or, it may leave open the question of whether the departure was warranted.

⁸² If *S*'s conclusion was reasonable, we might say that he “innocently” or “justifiably” (in light of information available to him) failed to comply. If his conclusion was not reasonable, we could say that he “mistakenly” failed to comply.