

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

1999

No Vehicles in the Park

Pierre Schlag

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Judges Commons](#), [Jurisprudence Commons](#), [Legal Education Commons](#), and the [Legislation Commons](#)

Citation Information

Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381 (1999), available at <https://scholar.law.colorado.edu/faculty-articles/619>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

HEINONLINE

Citation: 23 Seattle U. L. Rev. 381 1999-2000

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Mon Jun 5 15:46:14 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

No Vehicles in the Park

Pierre Schlag*

In 1958 H.L.A. Hart posed a hypothetical. Here it is:

A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not?¹

Over the years, this has become a nearly irresistible hypothetical. Generations of Anglo-American legal thinkers have cut their interpretive teeth on this hypothetical—striving to advance or defend all sorts of insights about law, interpretation, and adjudication.

You can easily imagine how this might happen. It builds on itself. There are the myriad factual variations on the hypothetical. Hart thought that an automobile was plainly covered.² In a reply to Hart, Lon Fuller asked him about a World War II military truck set on a pedestal as a memorial.³ Is that a vehicle?⁴ O.K., then what about an ambulance?⁵ A stroller?⁶ A wheel chair? A . . . and so on and so forth.

* Byron White Professor of Constitutional Law, University of Colorado School of Law. My thanks to Lawrence Solan and Brent Beecher, my research assistant, for criticisms on a prior draft. I wish to thank as well the Seattle University School of Law students and faculty for their helpful discussion of this essay.

1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

2. *See id.*

3. Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

4. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 526 (1988) (“The ‘no vehicles in the park’ rule clearly points to the exclusion of the statue.”). *Accord* J.E. Penner, *The ‘Bundle of Rights’ Picture of Property*, 43 UCLA L. REV. 711, 790 (1996) (“[T]rucks are vehicles.”).

5. *See* Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 79 (1998) (“[W]e know perfectly well that ambulances, for example, are vehicles.”); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 537 (1994) (“An ambulance is not a borderline case of a vehicle; if anything it is a paradigm case of vehicle.”).

6. *See* Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUBLIC L. 231, 251 (1998) (“Surely in this context a baby carriage would not be a

These hypothetical vehicles were all sent out on various missions—namely, to support or wreck some preferred interpretive strategy (of which there was no shortage):

The Plain Meaning of the Text: A vehicle is a vehicle is a vehicle.⁷

Policy Analysis: The meaning of the term “vehicle” depends upon the plausible purposes of the ordinance.⁸

Framers’ Intent: The meaning of the term depends upon what the framers of the ordinance intended.⁹

Cultural Contextualism: The meaning of the term “vehicle” ultimately depends on shared cultural understandings; for instance, on the nature of the park (*e.g.*, rest, relaxation, amusement).¹⁰

Clintonian Parsing: A vehicle is what I say it is.

Additional interpretive approaches could be included here. And a number of adjudicatory considerations, such as certainty, predictability, and prudence, could be added to each of the interpretive strategies.

The debates that have followed in the wake of the hypothetical have been excruciatingly intricate, involving numerous distinctions and multiple acts of analytical subdivision.¹¹ These debates need not be repeated here. I mention them only to show that an abundance of plausible interpretive techniques and adjudicatory considerations can be brought to bear upon the interpretation of the ordinance. It is likely that these techniques and considerations might in some cases produce different results.

So now here’s the question I would like to pose. It’s a question that we might expect a judge to pose: What does the ordinance *really* mean? And, of course, we would expect a judge to ask such a question

prohibited vehicle.”).

7. Certainly at the core. See Hart, *supra* note 1.

8. See Fuller, *supra* note 3, at 662-63.

9. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535-36 (1947).

10. See, *e.g.*, Steven Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEXAS L. REV. 1881, 1885-1905 (1991); Marc R. Poirier, *On Whose Authority?: Linguists’ Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025, 1040 (1995).

11. As an example, see the dialogue among linguists and law teachers in the *Proceedings of the Northwestern University/Washington University Law and Linguistic Conference*, 73 WASH. U. L.Q. 800, 839-74 (1995).

in the context of a specific law¹² and a specific factual situation. So the judge would very likely ask something like: "Does the ordinance, or the term 'vehicle,' cover, reach, include, apply to an ambulance, a motorized toy boat, a . . . (and so on)?"

Maybe you don't care a whole lot about this kind of question. There are good reasons not to care—not too many people do.¹³ But, for the time being, try to care. Pretend that you really do want to know what the rule really means. You want to know this as much as you want to know anything.

Trying to find out what the ordinance really means requires something that I will call "interpretation as retrieval."¹⁴ By this phrase, "interpretation as retrieval," I mean nothing terribly fancy. Interpretation as retrieval is the attempt to retrieve the meaning of an artifact or text—a meaning that is found in the artifact or text and that you, the interpreter, do not already have. I am not saying that interpretation as retrieval is easy (quite the contrary).

To illustrate the difficulties of interpretation as retrieval, consider the movie "Basic Instinct."¹⁵ This suspense movie begins as the

12. The Municipal Code of the City of Seattle addresses this matter. There is a general provision that prohibits vehicles in the park:

It is unlawful to drive or ride in or on any motor vehicle or animal, other than a city-owned service or emergency vehicle . . . in any park when the park is not open to the public, or when the park, roadway, or parking lot is, by order of the Superintendent, closed to entry or use by motor vehicles, except on a street serving as necessary access through such park to a residential or commercial area.

SEATTLE MUN. CODE § 18.12.235 (1997). Interestingly, the Seattle City Council has sought to resolve some of the variations on Hart's hypothetical:

It is unlawful to operate any motorized model aircraft or motorized model watercraft in any park except at places set apart by the Superintendent for such purposes or as authorized by a permit from the Superintendent.

SEATTLE MUN. CODE § 18.12.265 (1997).

13. In fact, outside the precincts of the legal academy, it is hard to find anybody who cares much about the meaning of an ordinance that reads "No vehicles in the park." Trust me. I looked. I checked LEXIS. Jane Thompson, a law librarian at the University of Colorado, did find a reported case in Shepard's Ordinance Law Annotations (a comprehensive digest of American cases that interpret or apply city and county ordinances). The case pertained to the constitutionality of a St. Louis municipal ordinance prohibiting motorcycles in the park. The American Motorcycle Association brought suit for injunctive relief claiming the ordinance violated the due process and equal protection clauses of the Constitution. The Association argued that strict scrutiny applied because the ordinance violated the fundamental rights of free speech and assembly. (The argument was rejected.) See *American Motorcyclist Ass'n v. City of St. Louis*, 622 S.W.2d 267 (Mo. Ct. App. 1981).

So, apparently, the American Motorcyclist Association cared. But let's face it—you probably don't. Why not? Simple. There doesn't seem to be much at stake. That will often, though not invariably, be true.

14. See generally Pierre Schlag, *Authorizing Interpretation*, 30 U. CONN. L. REV. 1065, 1071 (1998).

15. BASIC INSTINCT (TriStar Pictures 1992).

police arrive at a murder scene. A rock star has been killed. Amidst an absence of knowledge, the one thing that is known (almost for sure) is that the murderer used a sharp instrument like an ice pick. The detective, played by Michael Douglas, investigates two female suspects, one played by Sharon Stone and the other played by Jeanne Tripplehorn. He becomes sexually involved with the suspect played by Sharon Stone. By the end of the movie, in the *dénouement*, the tension is broken in classic Hollywood style: it is Jeanne Tripplehorn (not Sharon Stone) who appears to be the guilty one. And in an equally classic display of Hollywood justice, Tripplehorn is killed. But the movie does not end there. Instead, we get one more sexual encounter involving Michael Douglas and Sharon Stone, who is apparently no longer a suspect. The camera zooms back from the bed to offer a wide angle. It pans down slowly from the edge of the bed, past the bedding, past the mattress until it reaches the floor. The camera zooms in and there it is—an ice pick.

The ice pick, the sure thing around which the characters, the action, and the tension are all organized, is back. And so is the uncertainty: Who was really the murderer? Now, as you leave the theater you might ask, "Well, who did it?" You might even get into a heated argument with a friend about the issue. People often do this. Evidence is adduced. Arguments are advanced. Probabilities and improbabilities are assessed. "It couldn't have been Sharon Stone because earlier, she said that . . ." "Yeah, sure, but Tripplehorn would also say that . . ." And so on and so forth.

You could ask some well-situated people: "Who really did the murder?" You could try to contact the author, the director, the publicist, or Sharon Stone or Michael Douglas to find out. But they won't help. Suppose they all tell you, five people in all, face to face, "Oh yeah, it was the Sharon Stone character who did it. Really—we know for sure." Does this help you? At all? Suppose there are four extras, who tell you, with what seem to be much more cogent arguments, "No, no, those five have got it all wrong. We four really know what happened. It was Jeanne Tripplehorn." Does any of this help?

No.¹⁶

And if the author tells you, "Look, you've missed the point. The whole point of the movie is to leave the question ambiguous—to leave

16. Would it help if the author said, "Oh, I didn't really have any intent. Actually, I never thought about it." Or even, "Well, my intent was to leave movie-goers and movie critics in a quandary." Does this help? Well, it might help you give up on your question. That would not be a bad thing, but it does not answer your question. To the extent the question remained live, you would still need to figure out what bearing the author's testimony has on the question you have asked.

you in a state of uncertainty. So the one thing that is for sure is that no one can tell you who did it.”

Does any of this help? No. Why not? Because they are not answering your question. You are not taking a poll. You are not asking to follow the best expertise. This is not a debate round: you are not judging who has the best argument. You are not evaluating track records for literary trustworthiness. And you probably don't even care about the author's intent. These are at most accessory considerations. What you want to know is, “Who really did it?”

But this question you ask, you cannot answer. You can cogently ask about all sorts of things, including other people's opinions as to who did it; what the author intended; what the conventions of the genre would reveal, if anything, about who did it; and so forth. But notice two things. First, these are not the same questions as the one you want answered: “Who really did it?” And second, you can't have the answer to this last question. And that's because there is none. It's a movie.

Now, this is somewhat frustrating. You've just sat through one-hundred twenty-three minutes of a suspense movie. And in the last scene, there is finally the last piece of the puzzle, an ice pick, plain as day, evidence as sharp as can be and the damned thing is hermeneutically dysfunctional. There it is—pointing in all sorts of directions:

It was Sharon Stone who did it.

They both did it.

One of them did it, but we haven't figured out who.

At least one of them did it, but something (in the nature of hermeneutic ambiguity, ambivalence, vagueness, incompleteness) prevents us from figuring out who did it.

None of the usually accepted determinants of meaning are capable of forcing a conclusion—not the artifact, not author's intent, not conventions of the genre, not expertise, and certainly not us.

There is nothing to be known about who did it.

No one did it.

Nothing was done.

We don't know what we're asking about.¹⁷

Now, of all these answers, the last is almost surely the most interesting. We have been looking to figure out who really did it. The ice pick at the end throws us into a quandary. At first this is a simple quandary; the problem seems to be one of deciphering the narrative meaning of an ambivalent or ambiguous sign, a piece of evidence, the ice pick.

But, at some point, as the list of questions above suggests, the quandary becomes more difficult. It becomes more difficult as we recognize that the meaning of the ice pick does not relate simply to the guilt or innocence of the suspects, but rather to a dizzying array of possibilities. The ice pick is a clue, a red herring, a tease, a provocation, a fetish, a taunt, an image, a distraction, a gentle reproach, a gimmick, an afterthought. Its meaning registers in the frames of author intentionality, audience desire, conventions of the genre, expectations of the film crowd, narratives of the story, forensic folklore, narratives within the narratives, dissonance reduction strategies . . . and so on. The problem is that what seems so straightforward, the ice pick, resonates in meaning all over the place. And when we ask, "Well, what does the ice pick really mean?" or when we ask, "Well, who really did it?", it is not at all clear what we are asking.

Is a "vehicle" in a rule about a park like an "ice pick" in a movie about a murder?¹⁸

Well, yes—in some ways.

Watch. Suppose you are a judge. And suppose in that capacity you are asking, "What does the term 'vehicle' really mean?" Now again, you can ask what the word means to most people. (But you are not taking a poll.) You can ask what expert linguists believe the word means. (But you are not asking to follow the best expertise.) You can ask who among the litigants has the best argument about what the word means. (But you are not judging a debate round.) You can ask the city council members what they meant by the term "vehicle." (But they are not deities and you are not an oracle.)

You can, of course, ask these questions, and you can even get answers.¹⁹ But notice that these are not the same as the question you want answered. What you want to know is what does "vehicle" mean in the legal rule about the park. And that is not just a question of

17. "We'll find out in the sequel" is obviously not a satisfactory answer either.

18. On the fictional character of legal authority, see Steven Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348 (1995).

19. And what's more, the answers can even be helpful. See Lawrence M. Solan, *Can the Legal System Use Experts in Meaning?*, 66 TENN. L. REV. (forthcoming Dec. 1999).

polls, linguistic expertise, rhetorical acuity, or framers' intent. It is a question about the meaning of "vehicle" in the legal rule and in the law.

And the problem is that within the context of law, the term "vehicle" can be as engagingly accommodating as the ice pick in the movie. That is because, as a general word in a legal rule, the term draws its meaning from the interweavings of all manner of webs—webs that are often described as linguistic, cognitive, moral, political, institutional, or cultural. In the rule, the meaning of the term "vehicle" is inscribed in tacit understandings of parks; legal rules; the effects of legal rules; the roles and possibilities of legal rules within the hierarchies of sources of law; the "public" meaning of legal rules for citizens and public officials; and the meaning of legal rules in light of juridical concepts of excuse, justification, prosecutorial discretion, and much more.²⁰

We are not just talking about parks and vehicles here; we are talking about parks and vehicles in a legal rule in a legal system in a particular culture. It is possible to say (and some commentators have) that the term vehicle does have a hard core of settled linguistic meaning and that this meaning should be honored as a matter of law. This was Hart's argument.²¹ For him, an automobile was plainly a vehicle. But this move—this claim that the term "vehicle" has a core meaning separate from and independent of the rest of the sentence—is just that—a legal move. And even if Hart were correct (a highly debatable point) that there is such a core meaning, he still has to make the point that this core meaning is or should be determinative of the meaning of the ordinance. To put it another way, he still has to make the point that his linguistic views (right as they may be) are or should be definitive of what counts as law. And in fact he does try to make the point. The settled core of meaning must be honored, according to Hart, because it is a "central element" (notice the tautology) of actual law, and he wishes to protect the integrity of this central element from the influence of policy analysis.²² Hart's brief for the protection of the hard core of settled meaning is not informed by linguistic scruple, but by his wish to preserve the hard core of settled meaning from the effects of reconsideration in light of social policy.

Hart's legal move is a possible move, but it is just that—a legal move. And the move that Lon Fuller made in response to Hart—the effort to reintegrate the term "vehicle" within the context of the rest of

20. See generally Winter, *supra* note 10.

21. Hart, *supra* note 1, at 607.

22. *Id.* at 615.

the rule—is also just that—a legal move. Fuller pointed out that Hart's atomistic approach to interpretation, the presumption that the term "vehicle" has meaning in and of itself, would lead to nonsense. It would lead to absurd or impossible interpretations of the rule. But, again, this linguistic point was in the service of a legal concern. Fuller, who favored a purposive analysis of the legal rule, attacked Hart not simply on linguistic grounds, but rather on the grounds that Hart's atomistic word parsing would harm a purposive "structural integrity" (notice the tautology) of the law.²³

Hart, and Fuller, and everyone after argue about the meaning of the rule or the term "vehicle" on the basis of legal moves. That is, all of these theorists use rhetorical strategies that rest on some overt or covert claim that their affirmation of meaning of the ordinance is itself required or authorized by a proper understanding of what law is. They all claim, and quite plausibly so, to get their proper understanding of the law from the law itself. And they all claim that the understanding they get is the one that is right—the one that overrides all the others.

Judges do this, too. In fact, it's more understandable that judges should do this than legal academics. With judges, it's part of the job description. After all, unlike legal academics, judges actually have to decide cases and, thus, arrive at some declaration of what the law is. Their strategy will always be reductive. They will affirm that there is a law of law—a law that governs the law and makes the law mean just this one thing and not the others.²⁴

Notice what happens when you've reached this point. You now understand that law exceeds what a judge will call law in the end. A judge will substitute for law one of its possibilities. Moreover, he will claim, and not wrongly, that it is law itself that authorizes him to do this. And because law is organized in this way, a later judge will also be able to claim, again not wrongly, that the prior judge got the law wrong.

At first, this account might seem to imply that law is or ought to appear disorganized, chaotic, or unsettled. But that does not follow. The reason that law does not always (or even often) seem as vertiginous, dizzy, or disarrayed as its possibilities imply is that at least one of its possibilities is always to be reduced to just one of its possibilities. That is what Hart did with his "core of settled meaning."

23. See Fuller, *supra* note 3.

24. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

Should we call this game off? Frankly, it's not our call. And it's likely that, for some time, judges will continue to play this game. They have to decide cases, and it is understandable that they should strive to ascribe their legal interpretations to something they call law. And it is even understandable that in this endeavor they should try to fake it (and even fake it to themselves). What is more, given the reflexive nature of the game, it's not even clear that they are faking it.

So much for judges. What about legal academics? They are still pursuing the game, indeed vigorously so. Recently, the effort has been to deploy ever more powerful and intricate academic arsenals to bear on the meaning of this little ordinance, as if intensive disciplinary care could resolve the question or improve the answers.

It is an odd, or at least an interesting thing, that so much effort is devoted to work out elaborate rational schemes to answer impossible questions in cases that almost never come up and generally have no significant stakes whatsoever. There is a jurisprudence implied in that kind of effort. But I stop here.

