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### RESURRECTING THE AUTHOR: A RESPONSE TO GENIUSAS

#### 1. Two Principal Claims

In his interesting and provocative paper Saul Geniusas sets out to undermine an assumption that he finds present in a recent debate between Jeremy Waldron and Andrei Marmor concerning the role of legislative intentions in the interpretation of legal enactments.<sup>1</sup> Though they differ on the practical usefulness of appealing to such intentions when the law in question has been created by a multi-member legislative body, both Waldron and Marmor assume that the exercise is, at the very least, conceptually possible. In other words, both authors assume that it makes sense to distinguish between the meaning of a law, on the one hand, and the intentions of its creators on the other. They assume further that under certain social conditions – e.g. the law in question has been enacted by a single legislator – the latter’s intent might prove very useful as a guide to legal interpretation.

Geniusas rejects these shared assumptions. Against Waldron and Marmor, he pits Ricoeur’s “double eclipse,” the “*autonomy* of the text’s meaning,” (8) and the assertion that it “is *conceptually impossible* to question [or discern] the intentions of the legislator.” (2)<sup>2</sup> “The writer, *as an author*, does not precede the textual space, but rather the latter is the very place where the author appears. Hence the impossi-

bility to find out the authorial intentions when the text presents itself in an ambiguous manner.” (7) Having, he thinks, undermined the conceptual basis of Marmor’s debate with Waldron, Geniusas turns to Marmor’s further claim that appeal to legislative intent is not only possible but often warranted. Given the very nature of a legal enactment, as the expression of a purportedly authoritative view about what should be done, appeal to legislative intent is, Marmor thinks, morally and politically justifiable whenever it helps to uncover that view. Against this additional claim, Geniusas argues that Marmor must in fact reject appeals to legislative intent because such appeals are necessarily **inconsistent** with the “service conception” of legal authority developed by Joseph Raz and endorsed by Marmor.<sup>3</sup> According to Raz (and Marmor) the role of an authoritative directive is to pre-empt and replace, in the practical reasoning of those over whom it has authority, other reasons for action (Raz calls these “dependent reasons”) which would otherwise bear on the circumstances to which the directive applies and in which the agent is required to act. According to Geniusas, were an interpreter of such a directive to appeal to the intentions of the legislating authority, he would end up considering some of those excluded, dependent

<sup>1</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001).

<sup>2</sup> All pages references contained in the main text within parentheses are references to Geniusas’ paper.

<sup>3</sup> For Raz’s service conception of authority, see *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chapters 2-4; and *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), chapter 10. For a critique of Raz’s view, see my *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994).

reasons for action. This is presumably because the intentions of the authority typically make reference to those very excluded reasons. But if so, the argument goes, the very point of having an authoritative enactment would be lost: the enactment could no longer provide the "service" for which it was intended – that is, it could no longer replace, in our practical deliberations, the dependent reasons it was designed to exclude.

In this response, I shall restrict myself to commenting briefly on the two principal claims highlighted above: that it is conceptually impossible to distinguish the meaning of a text from the intentions of its author, and the claim that an appeal to legislative intent vitiates the authority of legislation by requiring reference to excluded reasons.

## 2. Meaning and Intentions

Is it really conceptually **impossible** to distinguish between the intentions of an author, on the one hand, and the meaning of the words with which he/she attempts to express those intentions, on the other? Perhaps authorial intentions cannot be distinguished from their textual expression – i.e. from textual meaning – when the relevant text is a novel or poem.<sup>4</sup> But this seems highly implausible when the relevant text is a purportedly authoritative directive, such as a law or a parental instruction. Consider a case of the latter. Suppose that, before leaving for work, I write a note to my daughter instructing her to spend the day reading the book lying on the desk in my study. Suppose further that the only item lying on my desk is an issue of the scholarly journal, *Ethics*, and that I had, in fact, intended that she read **that** text when I hastily wrote my note. Can we not here distinguish between the meaning of my instruction and what

I had intended to convey? I intended that she read the *Ethics* journal even though my instruction clearly said that she should read the (non-existent) book. This example illustrates a simple but crucial point: we **can**, at least sometimes, in some contexts, and with certain kinds of "texts," distinguish between the meaning of a text and what its author(s) intended to convey by choosing the words she used to express those intentions. Of course in my simple example, the two came apart, but normally they converge. And this is why we can normally succeed in using language to convey what we mean. It is also why the overwhelmingly best evidence of authorial intent almost always lies in the standard meaning of words chosen for their expression. Were this not true, most forms of communication would be next to impossible.

Of equal importance, for our purposes, is the consequence that the rule of law would be all but impossible if meaning did not usually reveal intentions. This is because a law could not serve as the expression of the relevant authority's view about what should be done, and hence guide our conduct, were it not true that, in all but exceptional cases, the publicly accessible meaning of the law successfully expresses the authority's view. But sometimes, and despite all best efforts to bring intention and meaning together, legislators are unsuccessful in expressing their intentions. Perhaps they fail to use the right words, or the words they correctly use fail to anticipate future, unforeseen cases in which the meaning of the directive requires applications which war with the objectives behind the directive – i.e. war with the legislators' intentions in drafting the law that they did. In the former case, the words chosen fail to capture intended **meaning**. In the latter, the

<sup>4</sup> This is a question which I will refrain from pursuing, except to say this. I fail to see why we cannot distinguish between the meaning of a text and the author's intentions in writing what he did. (Indeed, interviews with authors are often geared toward revealing the latter.) This is true even if an author's intentions in no way determine or even influence the meaning that a text bears. In other words, this is true even if, as Nietzsche suggests, "in bringing the text into the public domain, the author relinquishes all authority over what it is to mean: 'When his work opens its mouth, the author must shut his.'" (19) Geniuses quoting Nietzsche, *Daybreak* (Cambridge UP, 1982), 140.

right words with the right meanings are chosen, but their use fails to achieve intended **objectives or purpose(s)**. When meaning and intention do come apart in these (and other) ways, it seems quite appropriate, as Marmor suggests, to consult any and all additional evidence of the legislators' intentions. And this would remain true even if, in the end, those intentions did not determine the meaning, or proper interpretation, of the directive. Appealing to legislative intentions seems no less appropriate here than when my daughter considers, as evidence of my actual intent, the following considerations: 1. There is no book on my desk. 2. There is, on the other hand, the latest issue of the journal *Ethics* to be found there. 3. I had discussed with her, that very morning, why it would be a good idea for her to read this particular issue of *Ethics*, in preparation for her upcoming philosophy examination. 4. I was, characteristically, distracted and in a hurry when I wrote my note. All of this evidence of actual intention is relevant and should be sufficient to lead my daughter to the following conclusion: "What Dad really intended (i.e., meant) to say was that I should read the issue of *Ethics* on his desk. So that is what I should do." This, despite the fact that the strict meaning of the text suggests otherwise. Of course, in modern democracies it is not always possible to answer questions of legislative intent with the same degree of confidence with which my daughter was able to answer hers. As Waldron and many other have stressed, modern legislatures are large and heterogeneous, containing members of vastly different moral and political stripes, whose agreement on a piece of legislation often belies a staggering range of different hopes, ambitions, expectations, understandings – **and intentions**. It may well be foolish, in such a context, to pursue the illusive quest for something called "**the intentions of the legislature**."<sup>5</sup>

Of course, even if we could somehow discover legislative intentions, there remains a

serious question of political morality. **Should** we in fact allow legislators' intentions a decisive role in interpreting (and applying) legal enactments whose meaning proves indeterminate or otherwise problematic? Or should the interpretation (and application) of a legal enactment remain completely independent of authorial intent, as Geniusas argues it conceptually **must**? Perhaps it's true, as Geniusas and Nietzsche suggest, that „in bringing the text into the public domain, the author relinquishes all authority over what it is to mean. (19) And perhaps we should always repair to considerations other than legislative intentions when interpreting legislation, considerations such as what seems a sensible and just way to "read" the law in the circumstances in which indeterminacy of meaning has arisen. But again, all this assumes that it possible to **distinguish conceptually** between the meaning of a text and the intentions of its authors. And I see no compelling reason to think that this is, for some reason, beyond the realm of possibility. Hence I am led to question whether, despite his interesting and provocative arguments, Geniusas has succeeded in undermining the very basis of the debate between Waldron and Marmor.

### 3. Intentions and Authority

According to Geniusas, Marmor's „intentional thesis“ – i.e. the thesis that interpreters of an authoritative directive such as a law are justified in consulting the intentions of the author – „undermines“ the theory of authority upon which he relies, namely, Raz's service conception of authority. (18) A central tenet of the latter is what Raz calls „the normal justification thesis,“ that the normal way for an individual to justify following an authoritative directive (e.g. a law) is to show that, in so doing, she is more likely to act in accordance with the good reasons (i.e. dependent reasons) that apply to her directly than if she were to try to follow those reasons herself. In rendering it more likely

<sup>5</sup> Waldron's thoughts on this subject are best expressed in his book *Law and Disagreement*. For an equally instructive discussion of the difficulties surrounding attempts to discern the intentions of the legislature, see Ronald Dworkin *Law's Empire* (Cambridge: Harvard University Press, 1986).

that she will act in accordance with right reason, the authority and its directive provide the individual with a valuable service; it is for this reason that the individual is (normally) justified in following the directive – in allowing it to replace the relevant dependent reasons. But, Geniusas argues, “Marmor’s search for the legislative intent undermines the normal justification thesis.” (18) Why? Because “(1) intentional interpretation can only be based on those reasons which apply to the subject of law directly, i.e. on those reasons which authority is supposed to replace; (2) intentional interpretation replaces the authoritatively binding directives...Therefore Marmor’s intentional thesis is self-defeating.” (18)

But is it self-defeating? Is it necessarily the case that we must consult excluded dependent reasons whenever we attempt to discern the intentions of the legislators? I fail to see why this must be so. Consider again the simple case of my daughter and my misguided attempt to instruct her about what she should read. What are the relevant dependent reasons, i.e., the reasons for action which led me to write the note which I mistakenly thought expressed my intention that she read the issue of *Ethics* on my desk?. The reasons had to do with her desire to get into a good graduate school, her need to prepare for her upcoming philosophy exam, and the fact that reading the journal in question would be a excellent way to prepare for that exam. Now consider the factors which led my daughter to conclude that I had meant for her to read the journal instead of the non-existent book. 1. There is no book on my desk. 2. There is, on the other hand, the latest issue of *Ethics* to be found there 3. I had discussed with her, that very morning, why it would be a good idea for her to read this particular issue of *Ethics*, in preparation for her upcoming philosophy exam; 4. I was, characteristically, distracted and in a hurry when I wrote my note. Now none of these reasons for belief (i.e., reasons for believing that I had the intention I did) is identical with the reasons for action which supported my view

that she should read the journal on my desk. The only exception might be thought to be reason 3. But even here we fail to see an identity: the reason behind my directive is the fact that reading the journal in question would be a excellent way for my daughter to prepare for her exam. In attempting to determine the intention behind my instruction, my daughter does not rely on this reason for action. What she relies on is the reason for belief consisting in the **empirical** fact that, earlier in the day, I had expressed my view that this was a good reason for her to read the latest issue of *Ethics*. What was relevant wasn’t the reason for action (a dependent reason) but my expressed view that that reason is a good one. In general, we need to distinguish between: (a) reasons for action; and (b) reasons for believing that the relevant authority had a particular view about the relevant reasons for action – reasons which, presumably, lie behind the authority’s choice to issue the directive he does. That it will prepare her well for an upcoming exam is not my daughter’s reason for believing that I had the intention that she read the journal she found on my desk. On the contrary, the reason lies in my earlier expressed view about this reason for action. And this is a reason which can be discovered independently of the instruction I (mistakenly) issued to her – and importantly, the dependent reasons for action which, in my mind at least, justified that misguided directive. So appealing to evidence concerning the intentions of legislators – i.e. their views about the good reasons behind the laws they enact – does not necessarily bring us back to a fresh consideration of dependent reasons for action. Hence, I conclude that Geniusas has failed in his attempt to demonstrate that „Marmor’s intentional thesis is self-defeating.“ (18)

#### 4. Concluding Remarks

There is much in Saul Geniusas’s paper upon which I have been unable to comment. This is not because the remaining arguments are for some reason unworthy of consideration. On the contrary, the paper is rich in insight and

provocative in its claims and conclusions. And even if its do not always convince, Geniusas's analysis is always interesting and probative. He is to be applauded for bringing to bear, upon an otherwise insulated debate in analytic legal theory, insights gathered from another philo-

sophical tradition. I am grateful to Geniusas and the editors of this journal for the opportunity to contribute, in a very small way, to this commendable attempt to build bridges between traditions.

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