
An Informal Opening

What is a 'vehicle'? and *What is a 'park'?* These seemingly prosaic queries beg simple and straightforward answers. They hardly seem to be the stuff of deep-seated disagreement or invite confounding analysis. People manage to go about their daily lives without too much trouble and consternation when they arrange to 'meet at the park' or 'buy a new vehicle'. Yet if we push a little further and seek more general answers or explore how particular meanings might be arrived at, we soon run into more perplexing and demanding problems. Indeed, efforts to address these and similar banal questions oblige us to confront a whole range of difficult issues and theoretical challenges about how people go about finding and fixing meaning in their lives and interactions.

In particular, when the questions *What is a park?* or *What is a vehicle?* are asked and sought to be answered in a legal setting, a sizable raft of puzzling topics about both the nature of language and the workings of law is soon brought to the surface. Like the proverbial iceberg, the seemingly small and visible part in view is dwarfed in comparison to the size and heft of what lies underneath the surface. In determining what it means to ask and answer *What is a park?* or *What is a vehicle?* lawyers of all kinds – students, practitioners, judges, academics, and others – are inevitably and inescapably drawn into some of the most recalcitrant problems on the jurisprudential agenda. Whether they choose to acknowledge or finesse these perennial puzzles, they remain pertinent and pressing – how is law different from (or the same as) other modes of inquiry in dealing with such problems? What is the relation between law and other modes of interpretation (e.g., politics, literature, or morality)? What tools are available to lawyers in handling such challenges? and What is involved in 'following the law'? Accordingly, as simple as the questions *What is a vehicle?* and *What is a park?* are, their resolution depends upon assuming or developing, often more implicitly than explicitly, some answers about or responses to these more profound and unsettling questions.

In this book, I want to get at some of these deeper issues on the jurisprudential agenda by exploring them in the context of such apparently routine enquiries as *What is a vehicle?* or *What is a park?* Indeed, I will concentrate on an old chestnut that is relied on by many jurists to explore and illuminate some of these larger and broader problems – how do and should lawyers go about interpreting and applying the rule of ‘no vehicles in the park’?¹ To some, this may seem to be an unappealing and unedifying way of proceeding. However, I maintain (as do others) that it has much to recommend it. I will canvass some of the leading jurisprudential accounts on offer: they can all be understood and classified under the rubric of formalism. However, my task is not simply to demonstrate how these traditional approaches are found wanting as a way of thinking about and addressing both the bigger and smaller matters involved in confronting ‘no vehicles in the park’. Instead, I will propose and present a more nuanced explanatory account of law and interpretation that can profitably be understood as an ‘informal’ intervention, neither formalist nor anti-formalist.

Looking for a Park

I will get the ball rolling by looking at two recent Canadian appellate decisions that had to deal with the very query of *What is a park?* The

¹ Apart from those theorists whose work I will directly deal with in this monograph, some of the more significant theorists who have tangled with this problem are Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991); Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (2001); Anthony D’Amato, Can Legislatures Constrain Judicial Interpretation of Statutes, 75 *Va. L. Rev.* 561 (1999); William N. Eskridge, Jr., The Circumstances of Politics and the Application of Statutes, 100 *Colum. L. Rev.* 558 (2000); Robert E. Keeton, Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park, 52 *Md. L. Rev.* 1192 (1993); Andrei Marmor, No Easy Cases?, 3 *Can. J.L. & Jur.* 61 at 65–8 (1990); Pierre Schlag, No Vehicles in the Park, 3 *Seattle U.L. Rev.* 381 (1999); Frederick Schauer, A Critical Guide to Vehicles in the Park, 83 *N.Y.U.L. Rev.* 1109 (2008); Peter M. Tiersma, A Message in a Bottle: Text, Autonomy, and Statutory Interpretation, 76 *Tulane L. Rev.* 431 (2001); Paul Brest, The Misconceived Quest for the Original Understanding, 60 *B.U. L. Rev.* 204, 209–13 (1980); Kent Greenawalt, The Nature of Rules and the Meaning of Meaning, 72 *Notre Dame L. Rev.* 1449, 1460, 1463, 1474 (1997); Heidi M. Hurd, Sovereignty in Silence, 99 *Yale L.J.* 945, 984, 989–99 (1990); Michael S. Moore, A Natural Law Theory of Interpretation, 58 *S. Cal. L. Rev.* 277, 338–46 (1985); Samuel C. Rickless, A Synthetic Approach to Legal Adjudication, 42 *San Diego L. Rev.* 519, 520–3 (2005); and William N. Eskridge, Jr., No Frills Textualism, 119 *Harv. L. Rev.* 2041, 2041–3 (2006).

objective of my introductory discussion is to reveal how even the most prosaic business of legal activity draws upon and speaks to some basic and weightier jurisprudential queries. That said, it needs to be remembered that, no matter what some of its more imperialist practitioners claim, jurisprudential inquiry cannot offer any tried-and-true formula to arrive at a correct resolution, let alone provide a definitive set of answers to specific cases. What it does do is cultivate a working knowledge of theoretical debates that underlie and support lawyers' regular activities. In particular, it can unearth those common assumptions and controversial conventions that are taken for granted by lawyers in the act of ascertaining the law. Moreover, by grappling more seriously with the day-to-day workings of law and lawyering, jurisprudential study can reinvigorate itself and cast off its rather aloof and abstract posture. As such, my broader ambition throughout is to offer, by way of a primer, a rudimentary bridge between the worlds of legal practice and legal theory.

Under section 161(1)(a) of the *Canadian Criminal Code*,² a convicted pedophile can be prohibited from attending a variety of places where persons under the age of fourteen are or might be present. These places include a public park or public swimming area, a daycare centre, a school ground, a playground, or a community centre. The main purpose of this prohibition is obviously to protect young children and to put them out of a pedophile's way. However, this prohibition must be balanced against a person's freedom of movement because even pedophiles are entitled to lead a certain public life as long as they do not commit further crimes. In resolving this tension, it is important to be as clear as possible in determining to what places the prohibition does and does not apply. In a number of cases, the courts have been required to decide the meaning of 'public park' under section 161.

In *R. v. Lachapelle*,³ a convicted pedophile who was subject to a prohibition order was apprehended at a carnival by two Royal Canadian Mounted Police officers who were aware of the order. He had attended the carnival with a ninety-two-year-old woman, Margaret Brown, who employed him as her daily help. They were there to have a hamburger and fries for dinner. The travelling carnival was set up on a vacant piece of private land in a large field. The carnival was busy and there were, as expected, many young children in attendance. At trial, Judge Milne held that the field in which the carnival was located was not a 'public park'

² R.S.C. 1985, c. C-5, s. 161(1)(a). 3. ³ [2008] B.C.J. No. 728 (S.C.).

and acquitted the accused. On the Crown's appeal, the British Columbia Supreme Court agreed and upheld the acquittal. In reaching his decision, Justice Butler preferred a limited view of what constituted a 'public park'. He decided that it did not include private land that was being used for recreational use, whether permanently or temporarily, and to which the public had access. Instead, he emphasized that, for property to constitute a 'public park' for the purposes of section 161 prohibition orders, it had to be set aside by some authority for use by the public. This meant more than simply being accessible to the public. Emphasizing the need for clarity and predictability, Justice Butler concluded:

Prohibition orders issued under s. 161 are a significant limitation on the fundamental liberty of movement of convicted pedophiles. If the words of the section are given their ordinary meaning, the geographical ambit of the prohibition is clear and the offender will know with a high degree of certainty what locations must be avoided. The trial judge gave the words 'Public Park' . . . their ordinary meaning and read them appropriately in context. It was not the intention of Parliament to prevent a pedophile from attending at all events involving some element of recreation or play where children may be present. It is the specific location that determines whether or not the offence has been committed, not the nature of the activity occurring at the time. The fact that a travelling carnival with amusement rides is being held on a vacant, private field does not turn that field into a 'public park'.⁴

In the recent Ontario case of *R. v. Perron*,⁵ another pedophile who was subject to a similar section 161 prohibition was arrested while working in a game booth at the Super Ex, a fair being held on the grounds of Lansdowne Park in Ottawa. The fair comprised the usual midway rides, game booths, concert areas, food courts, and a petting zoo. It was accessible to the public for a fee and attracted many young children. Lansdowne Park contains a football stadium, a civic centre with a hockey arena, and several other buildings. While there are trees and grassy areas around the fenced perimeter of the property, there is also an extensive paved area that serves as a parking lot for events. The fair was held on the paved area. At trial, Justice Lise Maisonneuve held that the fair was a 'public park' and convicted the accused.

On appeal, the issue was framed in terms of whether a 'public park' was exclusively a green space (e.g., lawns, trees, etc.) set aside for recreational use by the public or was primarily to be defined by its use alone

⁴ *Ibid.* at para. 31. ⁵ (2010), 97 O.R. (3d) 538.

rather than by any of its landscaping features. In his judgment on behalf of the Court of Appeal for Ontario, Justice Stephen Goudge was again mindful of the need for care and clarity in circumscribing the accused person's freedom of movement. Nevertheless, he needed little persuading that the major identifying characteristic of a 'public park' was its recreational purpose, not the particular attributes of its physical geography. Accordingly, noting that the primary use of Lansdowne Park was recreational and that there was at least some greenery, albeit "peripheral," the fair was considered to be a 'public park' and the conviction was upheld. He concluded by noting:

The appellant places significant reliance on *Lachapelle*, where the British Columbia Supreme Court determined that a prohibition order . . . did not extend to a vacant private field where a travelling carnival with amusement rides was being held. As I read the decision, the determining factor seems to be that the location was a vacant private field. If so, I agree with the result. If, however, the decision stands for the proposition that the nature of the activities taking place at the location is irrelevant, then respectfully, I disagree with it.⁶

In both of these cases, the judges said little about the more general interpretive method or jurisprudential route that they had relied upon to reach their decisions. There were small hints and casual asides, but there was nothing substantial or anything that suggested that they found their task to be particularly difficult or challenging. Indeed, it might well have been that the exploration of what a 'public park' means was a cover or consequence of incorporating a more purposive and substantive issue – the reason why the two pedophiles were there. It would seem that *Lachapelle* had a more deserving and compelling reason for why he was in a park (e.g., he did not go there of his own choice, but because it was an incidental aspect of his employment), whereas *Perron* could not offer such a justification (e.g., he chose to work there instead of elsewhere). In sum, what goes on offstage may be as important as what goes on onstage.

For the most part, however, the judges seemed to proceed on the understandable basis that *Lachapelle* and *Perron* were both rather run-of-the-mill exercises in adjudicative decision-making and legal interpretation that implied or raised no pressing jurisprudential concerns that made it stand out from any other case. Yet there is much to be found in

⁶ Ibid. at para. 21.

and between the lines of these judgments that merits a much keener jurisprudential scrutiny and reflection. While this inquiry would likely not change the judges' decisions, it might give them, lawyers, and observers of the judicial process a more nuanced appreciation of how the most apparently prosaic of issues touches upon and resonates with more profound questions of law, language, politics, and interpretation. In determining *What is a park?* there is no escape from their unsettling terrain.

Finding Vehicles

Of course, in the same way that efforts to determine the answers to questions like *What is a park?* crop up throughout the law, there are also instances in which it has proved important to decide *What is a vehicle?* A leading example of such an occasion is the older American case of *McBoyle*.⁷ While the judgments delivered offer a range of different arguments and come to a set of differing conclusions, the judges each go about the performance of their professional role in a plausible and legitimate way. Indeed, the judgments neatly illustrate how justification and disagreement go hand-in-hand in the world of judicial decision-making and legal interpretation. Indeed, cases like *McBoyle* tend to confirm, not do away with, the baffling indeterminacy of legal interpretation and judicial decision-making.

In *McBoyle*, the U.S. Supreme Court was tasked with deciding whether someone who had transported a stolen Waco aircraft across state lines from Illinois to Oklahoma was guilty of an offence under section 2 of the National Motor Vehicle Theft Act of 1919. That section of the Act provided that a motor vehicle included “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails”. William McBoyle had been convicted at trial and given a prison sentence. This decision was affirmed by the Court of Appeals. Writing for the majority, Judge Phillips surveyed a number of general and legal dictionaries on the meaning of ‘vehicle’. He came to the conclusion that:

Both the derivation and the definition of the word ‘vehicle’ indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities

⁷ *McBoyle v. United States*, 283 U.S. 25 (1931).

used for traveling on land, although the latter may be the limited or special meaning of the word . . . An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means for transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term, 'any other self propelled vehicle', does not offend against the maxim of *eiusdem generis*.⁸

However, Judge Cotteral could not agree and dissented. He was prepared to concede that 'vehicle' might well include aircraft in some contexts. However, he did not believe that such an expansive reading of the term was warranted or intended in the National Motor Vehicle Theft Act; it was a penal statute and, as such, should be strictly construed. The force of the *eiusdem generis* rule of statutory interpretation (i.e., that general words following a particular designation are presumed to be restricted to things or persons of the same kind, class, or nature) recommended that 'vehicles' be limited to those that are of the automobile kind. Moreover, according to Judge Cotteral, the rationale for the Act was to address the proliferating incidence of automobile thefts across the United States in the late 1920s. Consequently, he came to the decision that:

We may assume an airplane is a vehicle, in being a means of transportation. And it has its own motive power. But is an airplane classified generally with 'an automobile, automobile truck, automobile wagon, or motor cycle?' Are airplanes regarded as other types of automobiles and the like? A moment's reflection demonstrates the contrary. The discussions of the proposed measure are enlightening . . . in showing that the theft of automobiles was so prevalent over the land as to call for punitive restraint, but airplanes were never even mentioned. It is familiar knowledge that the theft of automobiles had then become a public menace, but that airplanes had been rarely stolen if at all, and it is a most uncommon thing even at this date. The prevailing mischief sought to be corrected is an aid in the construction of a statute. I am constrained to hold that airplanes were not meant by the Act to be embraced in the designation of motor vehicles.⁹

On appeal, the Supreme Court was unanimous in allowing the appeal and acquitting McBoyle. Writing for the Court, Justice Holmes began by

⁸ *McBoyle v. U.S.*, 43 F.2d 273 at 274 (1930). ⁹ *Ibid.* at 276.

conceding that he was equally open to the etymological notion that ‘vehicle’ might reasonably be used to signify a conveyance working on land, water or air. However, noting that other statutes had specifically referred to aircraft as being capable of inclusion in the class of ‘vehicles’, he insisted that its omission from the National Motor Vehicle Theft Act was significant. Accordingly, he held that ‘vehicle’ on this occasion did not include aircraft and that, therefore, McBoyle did not commit a criminal offence:

in everyday speech, ‘vehicle’ calls up the picture of a thing moving on land. For, after including automobile truck, automobile wagon, and motor cycle, the words ‘any other self-propelled vehicle not designed for running on rails’ still indicate that a vehicle in the popular sense – that is, a vehicle running on land – is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies . . . It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class . . . When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon speculation that, if the legislature had thought of it, very likely broader words would have been used.¹⁰

As with the judicial efforts in *Lachapelle* and *Perron* to answer the query *What is a park?* the judges’ opinions in *McBoyle* about *What is a vehicle?* leave as much unsaid as said. The major challenge is less about the actual decision made but more about the justifications offered for that decision. Each of the three judges works to convince their audience by a variety of interpretive strategies – legislative intention, ordinary meaning, purposive interpretation, and so on – that the outcome offered is more persuasive. None of them offers an excessively literalist response or denies that meaning might be contextually dependent. But each defends their chosen outcome and supporting rationale by reference to the substantive justness of the outcome. However, all judges come together in their efforts to demonstrate that the decision arrived at is not simply a function of each judge’s individual political or moral sensibilities: the law has a real and objective meaning that stands outside and above the personal predilections of judges, even if those judges disagree about what that real or objective meaning is.

¹⁰ *Supra*, note 7 at 26–7.

Nevertheless, the central challenge for judges and jurists is to persuade others that the law's meaning is stable and objective at the same time that it is also flexible and contextual. This task is difficult at the best of times, but it becomes doubly so when inquiries into *What is a park?* and *What is a vehicle?* are combined – 'no vehicles in the park'. The permutations and possibilities develop exponentially over and across time. Moreover, the seemingly workaday nature of the interpretive task belies the deeper and unsettling issues about finding and fixing meaning that underpin it. Behind the confident façade of the judicial opinions, there is a more anxious concern to hit upon an interpretive method that will do the heavy lifting. Mindful that judges are not supposed to be there to act without more on their own substantive opinions (whether they are commonplace or idiosyncratic) about formal meaning or substantive justice, they go to considerable lengths to demonstrate that their decisions are not only the expressions of individual judges' quirks and eccentricities. Instead, they strive to demonstrate that their decisions are the genuine product of a shared and distinctly legal technique. Without such a reliable and grounded mode of interpretation, the worry is that the performance of judicial decision-making will be dangerously open-ended and politically charged.

Of Judges and Jurists

Contemporary jurisprudence, especially its American brand, tends to be dominated by a certain pre-occupation with adjudication. The challenge of jurists has been to provide a convincing account of how judges judge and how they should judge in a constitutional democracy. This has led to a bewildering mix of offerings.¹¹ The basic division is between those 'formalists' who give priority to internal legal considerations in explaining and underwriting judicial decision-making and those 'anti-formalists' who look to external political factors as the motivating sources of judicial decision-making. There are almost no contemporary explanations that take an entirely extreme stance one way or the other. As much as no one any longer maintains that law can speak entirely for itself without judicial modulation or supplementation, so no one recommends that law has no role at all to play in moderating or constraining the ideological agendas of judicial decision-makers. Accordingly,

¹¹ See Brian Bix, *Legal Philosophy in America*, in *The Oxford Handbook of American Philosophy* 551 (Cheryl Misak ed. 2009), and Liam Murphy, *What Makes Law* (2014).

jurists join theoretical issue over the extent to which internal and external influences can and should combine to produce decisions and legal doctrine.

Accordingly, at the jurisprudential heart of both the formalist and anti-formalist accounts of adjudication is the juxtaposing of law and ideology. Each is characterized as a separate category that might influence but not fully be part of the other. On one side, there is 'law' as a substantive entity and professional activity. This is a collection of rules, principles, and doctrines that can be developed and applied in a technical manner to resolve a variety of disputes. The task of judges is to identify the appropriate legal norm and apply it to the facts of a case. On the other side, there is ideology. This is a set of ideas and beliefs that allow people to understand and evaluate social life and their own place in it. While broader than politics, an ideology comprises values (e.g., religion, ethics, etc.) that are partisan and in need of justification.¹² Whereas the strict formalist maintains that law should and can be applied by a judge without resort to his or her ideological preferences, the anti-formalist insists that any appreciation of adjudication begins and ends with the judge's ideological commitments.

So, in the context of *Lachapelle*, *Perron*, and *McBoyle*, the judges might be considered to go about their task by following a formalist or anti-formalist approach. Although each account has different nuances and important differences, they can be categorized into one of the two competing camps. The formalist will supposedly set aside his or her personal ideological leanings and decide by consulting what he or she considers to be the available and appropriate legal resources. Relying on a series of reasoning techniques that comprise the legal craft, the judge will arrive at a result that is in important ways the law's and not his or her own. On the other hand, the anti-formalist will consult his or her own ideological compass, choose a desired outcome, and rationalize it in terms of the existing legal doctrines and decisions. Of course, what counts as the best or least worst ideological outcome might well be obscure or elusive on the facts of cases like *Lachapelle*, *Perron*, and *McBoyle*. Nevertheless, although these cases do not involve large or controversial issues of political or moral significance, they are no less ideological for that. None of the judges can navigate the interpretive and legal maze without resort to some set of competing values and orientations.

¹² For a more sophisticated and critical account of ideology, see *infra*, Chapter 9.