

## *Cetacean semantics: A reply to Sainsbury*

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In ‘Fishy business’ Sainsbury finds paradox in the early nineteenth century case of *Maurice v. Judd* – a paradox, Sainsbury claims, whose ‘resolution will require carefully formulated metasemantic principles’ (2014: 5). The complex tale is brilliantly brought to life by Burnett (2007), but in broad strokes: Judd, an oil merchant, stands accused by Maurice, an oil inspector, of buying three uninspected kegs of sperm whale oil. Judd does not deny the facts, only that the New York State statute requiring the inspection of ‘fish oils’ applies to his barrels of whale oil. Despite expert testimony from the great naturalist of the day, one Samuel Latham Mitchill, who avers ‘that a whale is no more a fish than a man’ (Sampson 1819: 26), the jury of ordinary Manhattanites swiftly finds against Judd.

As Sainsbury presents it, the jury’s obdurate view is that whales are fish, and so whale oil, fish oil. This spawns a dilemma. On the first horn, the jury and their fellow Manhattanites are simply wrong to declare, ‘Whales are fish’. To take this horn, Sainsbury argues, would clash with ‘the fact that the meaning of a word in a community is determined by how it is used in that community’ (3–4). Suppose we agree. We then confront Sainsbury’s second horn on which our disagreement with the Manhattanites is merely verbal, arising from ‘fish’ being used with two different meanings: theirs ‘ancient’ and cetacean-including, ours ‘modern’ and cetacean-excluding. Sainsbury argues that taking this horn would make a nonsense of the court room drama which unfolded in 1818. ‘Substantive disagreement,’ he writes, requires agreement in meaning. There needs to be some proposition that one party affirms and the other denies. If the ancient meaning differed from the modern one, no proposition expressed by ‘Whales are fish’, or its negation, meets this condition. That is certainly not how things seemed to the protagonists in *Maurice v. Judd*, and nor is it how it strikes us today: we think the jury gave the wrong verdict.’ (4–5).

The second-horn of Sainsbury’s dilemma rests on a misconception, however. The substantive disagreement (and so verdict) of *Maurice v. Judd* does not concern whether whales are fish. It concerns the intended meaning (and so scope) of the phrase ‘fish oil’ as employed in a statute authorizing the appointment of ‘fish oil’ inspectors. So conceived, *Maurice v. Judd* contains no paradox.

The problematic statute is drafted following fraudulent trading in what would now be called ‘fish (liver) oil’. To the merchants’ outrage, inspectors invoke the statute to inspect whale oil. Judd’s calculated refusal to pay his inspection fees brings the case to court. In deciding on the statute’s intended

meaning, the jury are instructed to consider first the use of the term ‘fish oil’ in commercial transactions and second the general use of the term ‘fish’.

The first approach is advocated by Judd’s lawyers: after all, it is the merchants whom the statute directly affects, and fraud amongst whom had prompted its drafting. So conceived, the issue clearly has ‘nothing to do with whether whales were fish’ (Burnett 2007: 149). As Judd’s attorney argues in closing:

Should you [the jury] decide that a whale is, in common acceptance of the community, considered to be a fish, there remains still a very important question, on the just decision of which the defendant will, I think, be entitled to your verdict. Is whale oil bought and sold and consumed under the appellation of fish oil? (Sampson 1819: 53)

The answer appears to be straight-forwardly, ‘No’. According to the ‘taxonomy of the market’ (Burnett 2007: 150), whale oil would never be labelled ‘fish oil’ – the two, according to one merchant, being as different as molasses and sugar (147f.). From this perspective, the jury does get things wrong. But their verdict – most likely motivated by local political prejudice (174ff.) – raises no philosophical difficulties. They simply fail to appreciate which community matters in ascertaining the statute’s intended meaning.

The second approach to the statute’s intended meaning looks to the general use of ‘fish’. According to common usage at the time, whales count as ‘fish’ (Burnett 2007: especially Ch. 2). According to nascent zoological usage, they do not. The issue for the jury is not then to say whether whales are fish, but to ascertain which usage of ‘fish’ is germane to the statute’s intended meaning. Maurice’s lawyer ridicules naturalism (2007: 9, 192). But his more basic contention is that the zoological sense of ‘fish’ (even if innocuous) is not that intended by the statute: ‘Statutes being enacted to regulate the conduct of the whole community, the words of the statute are to be interpreted *according to their common usage and acceptance*’ (Sampson 1819: 60, my emphasis).

Philosophical discussions of the period echo these points. (See further Burnett 2007: 215ff, Dupré 1999 and Khalidi 2014.) Mill in his important discussion of classification writes, ‘Whales are or are not fish, according to the purpose for which we are considering them’ (1843: vol. II, 305). He approvingly cites Whewell whose view is so pertinent that Burnett (216) conjectures he has *Maurice v. Judd* in mind.

If we are speaking of the internal structure and physiology of the [whale], we must not call them *fish*; for in these respects they deviate widely from the fishes. . . . But this would not prevent our speaking of the *whale-fishery*, and calling such animals fish on all occasion connected with this employment; for the relations thus arising depend upon the animal’s living in the water, and being caught in a manner similar to other fishes. A plea that human laws which mention fish do

not apply to whales, would be rejected at once by an intelligent judge. (1840: vol. I, lxxv)

Whewell thus echoes the sentiment of Maurice's lawyer. If we agree, we should endorse the jury's verdict.

*Maurice v. Judd* is far from unique in having such issues at its heart. Consider *Nix v. Hedden* 149 U.S. 304 (1893) which concerns the action of tomato merchants (Nix et al.) seeking to recover back duties from a duty-collector (Hedden) on the grounds that tomatoes are not duty-incurring vegetables but duty-free fruit. The Supreme Court finds in favour of Hedden. It does not thereby reveal its ignorance of the true nature of tomatoes. As Justice Gray makes clear in his opinion:

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables, which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery and lettuce, usually served at dinner in, with or after the soup, fish or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.<sup>1</sup>

The court's determination thus reflects its view that the relevant tariff act intended 'vegetable' in its common language or culinary sense.<sup>2</sup> The issue is not whether tomatoes are fruit or vegetables.

Analogously, *Maurice v. Judd* does not concern whether whales are fish. The substantive disagreement concerns the intended meaning of 'fish oil' in statute. Given the financial stakes for traders and duty-collectors, this 'merely verbal' dispute has considerable substance. Moreover, as Burnett wonderfully brings out, the courtroom drama is an uncommonly fishy business. However, its resolution requires carefully drafted statutes, not carefully crafted metasemantic principles.<sup>3,4</sup>

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1 Full-text available online at: <http://supreme.justia.com/cases/federal/us/149/304/case.html> (last accessed 27.ii.14).

2 Since we retain a functional, culinary use of 'vegetable', it is easy to sympathize. Wouldn't you be a little impatient with a supermarket manager who refused to apply his store's 'half-price on all vegetables' deal to any of the tomatoes, cucumbers, avocados, aubergines, squash, pumpkin, okra, and peppers in your basket?

3 Indeed, a clarified statute is swiftly enacted, effectively overturning the jury's verdict and making clear that, at least for the purposes of the law, whale oil does not count as 'fish oil'.

4 For advice and encouragement thanks to Hanna Pickard and an anonymous referee.

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## *The dogmatist, Moore's proof and transmission failure*

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According to Pryor (2000, 2004)'s *dogmatism*,

(DOGMA) If one has an experience as if *P*, one acquires *immediate* prima facie justification for believing *P*.

Immediate prima facie justification for believing a proposition *P* is defeasible justification for *P* that is not *based on* – not even partly – independent justification for anything else (cf. 2000: 533). (DOGMA) is about *propositional*, rather than doxastic, justification (cf. 2000: 521).<sup>1</sup> Hence, 'justification' in (DOGMA), and everywhere in this article, means propositional justification. According to (DOGMA), if you have an experience as if, say, there is a plump crimson tomato here, you acquire prima facie justification for believing that there is a plump crimson tomato here that is not based on independent justification for anything else – for example on justification for believing that your perceptions are reliable. I present some of Pryor's reasons in support of (DOGMA) below. Note meanwhile that (DOGMA) looks natural and intuitive. (DOGMA) is also philosophically appealing because it seems capable of forming the grounds of (fallible) foundationalism, as it puts an end to the regress of justified beliefs in the search for a basis for our beliefs' justification.

1 A subject has propositional justification for a proposition *P* just in case *P* is epistemically worthy of being believed by her whether or not she believes *P* for the right reason or at all.