

Lecture given by Richard Ekins* to the Statute Law Society

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“*Yemshaw* and the constitutionality of updating statutes”

My question is whether judges may or should update the meaning of statutes. I approach the question by outlining the recent case of *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, in which the Supreme Court updated a statute. I then trace the argument that this practice is constitutionally licit. I argue that there is no good rationale for updating. The appeal of updating (the apparent need for it) rests on confusion about meaning. And the idea that this is constitutional rests on confusion about what a statute is. These truths are recognised, I think, in some recent case law, to which I will make reference. I will then briefly outline the constitutional problems with updating and conclude by returning to the merits of the *Yemshaw* decision.

I. *Yemshaw*

The question in *Yemshaw* was the meaning of ‘violence’ in s 177(1) of the Housing Act 1996. The precursor to s 177 was s 1(2)(b) of the Housing (Homeless Persons) Act 1977, which said a person is deemed to be homeless if ‘it is probable that occupation of [his residence] will lead to violence from some other person residing in it or to threats of violence from some other person residing in it and likely to carry out the threats’. There was no use of the term ‘domestic violence’ in this section, although the term does feature in s 5(1)(iii). The 1977 Act was consolidated in 1985 and this in turn was recast in the 1996 Act, s 177(1), which used the term ‘domestic violence’ but defined it, just as in the 1977 precursor, to mean ‘violence from a person with whom he is associated, or threats of violence from such a person which are likely to be carried out.’ The section was amended by the Homelessness Act 2002, which inserted a new s 177(1A):

(1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him, or against – (a) a person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him.

(1A) For this purpose ‘violence’ means – (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is ‘domestic violence’ if it is from a person who is associated with the victim.

The new formulation in 1996 made clear it extends to violence against one’s family members. The 2002 amendment includes ‘other violence’, extending protection to those at risk of ‘violence’ from non-associated persons; but the definition of violence is the same.

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Lady Hale gave the lead judgment, arguing that s 177(1) now extends to harmful or abusive action at large. She said physical violence is only one of the natural meanings of ‘violence’ (another is intensity of feeling and passion). By 1996, when the term ‘domestic violence’ is used, Lady Hale notes, there is a consensus amongst national and international governing bodies that ‘domestic violence’ is more than just ‘physical violence’. She argues that:

...whatever may have been the original meaning in 1977 ... by the time of the 1996 Act the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact. But if I am wrong about that, there is no doubt that it has moved on now. [24]

Her main support for this claim is a major Home Office report in 2005. This change in understanding, Lady Hale says, is relevant because ‘the courts recognise that, where Parliament uses a word such as ‘violence’, the factual circumstances to which it applies can develop and change over the years.’ She relies on Lord Steyn’s opinion in *R v Ireland* [1998] AC 147 for this proposition. She then refers to Lord Clyde and Lord Slynn’s opinions in *Fitzpatrick v. Sterling Housing Association Ltd* [1999] 3 WLR 1113, the latter citing Bennion in support. Lady Hale notes that the *Fitzpatrick* decision involved changes in relation to the word ‘family’. She then argues that ‘violence’ is similar to family: it is not technical and its meaning may change over time. The essential question, Lady Hale says, is whether an updated meaning is consistent with the statute’s purpose. She concludes:

...that, whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term ‘domestic violence’ were interpreted [to include] ‘physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.’ [28]

Lady Hale recognises some problems with this interpretation, which I note below. Interestingly, Lord Brown too, in his quasi-dissent, refers to the ‘always speaking’ approach or the *Fitzpatrick* principle and says the question is whether the court should apply it here. He suggests various reasons why ‘violence’ means ‘physical violence’ yet does not dissent.

II. *Ireland* and *Fitzpatrick* (and *Royal College*)

Lady Hale relies on *Ireland* and on *Fitzpatrick* to ground the updating approach, hence I consider each in turn. I also consider *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, to which both cases refer.

R v Ireland

The case involved, inter alia, interpretation of s 47 of the Offences against the Person Act 1861, which provides:

Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to imprisonment for not more than five years].

The relevant questions were the meaning of ‘actual bodily harm’ and ‘assault’.

In relation to actual bodily harm, Lord Steyn notes that the 1861 legislator would doubtless not have considered psychiatric harm. But, he says, ‘the correct approach is simply to consider whether the words of the Act of 1861 considered in the light of contemporary knowledge cover a recognisable psychiatric injury.’ True, he says, some statutes should be interpreted as if day after enactment (he cites Lord Esher in *The Longford* (1889) 14 P.D. 34). But as most statutes are intended to operate for many years, he continues, it would be very inconvenient if courts could not rely on current meaning. Recognising this problem, Lord Steyn says, the great Victorian drafter Lord Thring enjoined draftsmen to write so that statute would be deemed always speaking. Lord Steyn also cites Cross’ work on statutory interpretation in support (on which more below). It is a matter of interpretation, Lord Steyn says, whether courts should take historical/original meaning or are free to apply current meaning. It is not immediately clear to me what it is that settles this question of interpretation. He says statutes focused on particular grievance/problem may require historical interpretation. But otherwise it seems statutes will be found to be ‘always speaking’. He then refers to the *Royal College* case for an example of an always speaking construction.

What does all this mean for ‘actual bodily harm’? He says the statute is ‘always speaking’ and ‘must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.’ Hence it extends to psychiatric injury. This conclusion that actual bodily harm includes psychiatric injury is plausible, because what is understood to constitute bodily harm may change with scientific progress. (Still, this is a tricky question, because arguably all mental states supervene in some way on physical states (which is not to say that they are determined by those states or that the relevant physical states make impossible the exercise of free will), yet it would be absurd to take bodily harm to include any mental state. And there is a causal difference between psychiatric and physical harm in that the victim’s response may determine if there is harm at all.

The court also had to consider whether a silent telephone call may constitute an ‘assault’. Lord Hope and Lord Steyn both reason from their conclusion about the scope of bodily injury, arguing that this renders unsound an earlier precedent requiring there be a ‘battery’. Lord Hope notes that the word ‘assault’ is not defined in Act. He says instead that the words of the Act ‘can be given their ordinary meaning in the usage of the present day. They can take account of changing circumstances both as regards medical knowledge and the means by which one person can cause bodily harm to another’. I think this is less plausible. Assault may mean battery or assault or just battery. The legislature may have intended assault to mean battery. That bodily harm is later thought to include psychiatric injury is irrelevant to the question of which meaning of assault the legislature intended. Interpreting ‘assault’ to mean ‘assault or battery’ might then be to depart from the intended meaning in a way that is tantamount to amendment.

The case does not make out a sound foundation for updating. The distinction between original and current meaning is not elaborated and the grounds for preferring the current are not made out, apart from the assertion of inconvenience, and the references to Thring, Cross, and the *Royal College* case.

Fitzpatrick v Sterling Housing Association

Recall that this is the precursor to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; the facts are identical. The question was whether a same-sex partner is a statutory tenant's surviving spouse (which the statute extends to include one living with the tenant as his or her wife or husband) or a member of his family? The court unanimously says no, not spouse, but a majority (3:2) say yes he is a member of the statutory tenant's family. Most of the judges refer (approvingly) to Lord Wilberforce's statement in *Royal College*. Lord Slynn infers that Parliament intended spouse to mean married or de facto married. But 'family' is different, he says, for it is readily used in different senses and has been in law. He says, in the passage Lady Hale quotes in *Yemshaw*, that one should not ask what would be considered a family in 1920, say, but rather what were the characteristics then thought to mark out a family, which fall to be applied to the present world. Alternatively, he says, referring to Lord Steyn's opinion in *R v Ireland* and to Bennion, one may have to update it to include whoever is now thought family. Interestingly, he concludes that there is no need to consider updating here for the same-sex partner falls within the term as used in 1920 – 'I prefer to say that it is not the meaning which has changed but that those who are capable of falling within the words have changed.' If this is right, which is quite plausible, how or why would one ever update? It implies that updating is not applying an old term to new cases but rather substituting for the chosen term an alternative term which is now preferred.

Lord Clyde notes the general presumption is that an updating construction is to be applied. And he cites Bennion in support and notes *R v Ireland* as an example of such. However, he also does not update the statute, substituting current for original meaning. He says instead that the essential meaning remains constant – it is just that that meaning is now applied to a new set of social practices. So the judges cite Bennion, *Ireland*, but do not clearly affirm the updating doctrine. That the affirmation of updating is hesitant is confirmed by the court's unwillingness to even entertain the question of updating the word 'spouse'? Set aside the Human Rights Act 1998 (not relevant in *Fitzpatrick*) and say, plausibly, that many speak of same-sex partners as spouses. Why not then adopt the current meaning? The implication is that this would be unsound because inconsistent with legislative intent.

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800

The case involved interpretation of the phrase 'termination by a registered medical practitioner' in the Abortion Act 1967. The question was whether a procedure carried out by nurses, under doctor's orders but not personally by him, fell within the phrase, when this procedure was not known at time of enactment. Lord Wilberforce says, inter alia:

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. ... when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.

He and another in the minority argue that the term cannot include the relevant procedure, reasoning in part that similar legislation says ‘acting on direction of medical practitioner’. But the argument really is about what it is to say something is done *by* a doctor. That is, it is a mistake to think the case involves, or stands as authority for, updating (that is, changing) the meaning statutory term to include some new development.

III. Academic commentary

Writing extra-judicially, and in *R v Ireland*, Lord Steyn repeatedly refers to *Cross on Statutory Interpretation*. What does Cross have to say? Lord Steyn’s references are to the 3rd edition, published in 1995 and edited by John Bell and Sir George Engle; this is significant for on this point they take the opposite view to that held by the late Sir Rupert Cross. Still, I follow convention and refer just to ‘Cross’. Cross notes the importance of Lord Esher’s remarks in *Longford* to the effect that the statute is to be interpreted as if it were the day after enactment. However, those remarks are now often doubted and the general rule, per Bennion, is that statutes are to be updated over time. This updating doctrine is often said to mean that the statute is ‘always speaking. Cross notes that the origin of this phrase was simply Lord Thring directing drafters to use ‘shall’ as an imperative not a future. But the phrase is used to very different effect now, Cross says:

But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required.

This is a strong claim, which has influenced Lord Steyn among others. However, the subsequent discussion in Cross provide little support for the claim.

Cross says we apply provisions to new developments which come within wording and purpose: see *Royal College of Nursing*. We may include telephone in ‘telegraph’ or microfilm in ‘bankers books’. Likewise, terms like ‘reasonably practicable’ imply judicial power to adjust application. I question whether this is really updating. A term like ‘reasonably practicable’ or ‘sound medical practice’ obviously calls for the person applying it to determine what at the time of action or application is reasonable, sound.

However, Cross’ discussion of the *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 case is interesting. The case suggests that whether one adopts a historical or updating approach helps determine absurdity. The appeal court, reversing the first instance judgment, argued that absurdity was to be determined at enactment. Cross argues that like *Longford* this was remedying a problem peculiar to a certain time. However, on the appellate court’s view it created a general, ongoing rule rather than one fixed in time (that is, extending only to the issue of Princess Sophia of Hanover in her lifetime). The court of first instance seems to determine that the statute is limited in this way by arguing, subsequent to enactment, that it

would be absurd for the statute not to be so limited. If absurdity is determined at application not at (that is, by reference to conditions known at the time of) enactment this would be significant. Yet Cross does not squarely embrace this position, simply saying the *Hanover* decision was like *Longford*; in any case, the appellate court rejects this proposition.

Interestingly, Cross doubts one may reformulate the purpose per current state of law, doubting the result in *R v Brittain* [1972] 1 QB 357. This proposition was affirmed recently by the Court of Appeal in *Yarl's Wood Immigration Ltd. v. Bedfordshire Police Authority* [2010] 2 WLR 1322. This is sound but is a sharp limit on updating, and seems to me inconsistent with the strong claim set out in the block quote above.

The courts also very often refer to Bennion to support updating, especially to s 288 of his Code, *Bennion on Statutory Interpretation* (5th edition, 2008), which is entitled 'Presumption that updating construction to be given'. He says the presumption is that the Act is to be treated as 'always speaking', which means it is to be construed per the need to treat it as current law. He defines an updating construction in this way:

...a construction which takes account of relevant changes which have occurred since the enactment was originally framed but does not alter the meaning of its wording in ways which do not fall within the principles originally envisaged by that wording.

That quote ends with citation to several passages in *R v Secretary of State for Health, ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2003] 2 AC 687, on which more below. Bennion says his updating presumption just is Thring's always speaking principle. The relevant changes include changes in technology, in the rest of the law, in social practices, and in the meaning of words – his very detailed discussion covers similar ground to Cross.

However, his discussion of changes in meaning of words is worth noting. Where words or expressions have changed over time, he says one should substitute for original terms some modern term that corresponds to the original meaning. His example is the interpretation of 'any spring gun, mantrap, or other engine' where the standard meaning of 'engine' in 1861 is very wide and just means product of human ingenuity, whereas by time of interpretation it is mechanical contrivance. Bennion notes that it would be wrong to adopt the latter. This is wholly sensible, I say, but is not updating; it confuses formulation and proposition.

IV. Legislative intent and the 'always speaking' statute

It is said that the legislature intends its statutes to be updated, to be 'always speaking'. However, the legislature cannot intend the statute it is enacting to be updated unless it makes (and promulgates) a decision to authorise some person to update it. It may make a decision that calls for variable application over time, such as directing persons to take 'reasonably practicable' steps. But it does not, in addition to whatever is its particular decision, intend to authorise updating. It could authorise updating if it created a Henry VIII clause, but this is obviously not standard. Parliament in choosing what the law should be intends to make some choice known to us. It doesn't also choose a rule for how its choice should be interpreted. The 'interpretation' sections in statutes are just definitions or directions that aim to make it clear to interpreters how they should understand Parliament's choice. That is, the statute does not contain (Henry VIII apart) a rule for interpreting it; it just makes known choices (rules)

that are to be found and applied. The logic of legislative action rules out the conclusion that Parliament intends updating.

In any case, what is the argument that Parliament intends to authorise updating? One might say that drafters follow Thring and aim to deem the statute ‘always speaking’. But in fact he was directing drafters to frame the law so that it reads as a standing directive. Thus, the statute always speaks because it says at enactment ‘local authorities shall maintain highways’ and it continues to say this until repeal or amendment. This does not mean that Parliament intends the courts to change the statute over time.

One might also say Parliament’s purposes could not be satisfied unless it authorised updating. But when Parliament legislates, it does not just choose an end and authorise its pursuit. Statutes have complex purposes, which are relevant to inferring intended meaning. But the fact that changes in the world might frustrate Parliament’s decisions does not ground legislative authorisation to change/update those decisions to avoid frustration. Further, as I explain later, it would be irrational and unreasonable for Parliament to license such updating at large or even with a view to the legislative purpose.

Still, one might think that we simply have to update statutes, otherwise the law will ossify. The thought here is that if we bar updating the law will be confined to the applications considered or known at the time of enactment. And surely legislators would not have wanted the law to stand still in this way. They would have wanted the law to be applied in light of relevant changes. I agree; but none of this grounds the updating doctrine as I now explain.

V. The nature of meaning; the nature of statutes

The line of thought I have just outlined assumes that what a term means is just the set of applications of that term which the language user has in mind. Hence, when circumstances change and new cases arise, one has to decide whether to update the term to include those new cases. But this is quite wrong. When one uses an open class, the class applies to those cases that fall within it. One may imagine one or some particular cases that qualify, but unless the term is being used as shorthand to refer to a closed set of particulars, this will not be exhaustive. We intend to refer to types, to universals. If a thief intends to steal some car, he may have a particular car in mind when he forms that intention, but the object of his intention, what he plans to steal is ‘a car’. The fact that the first car he finds, the one he steals, is not identical to the car he had in mind, being blue rather than red, a Honda rather than a Ford, does not change his object. The terms we use, the open classes or types to which we refer, always go beyond the particulars (if any) we have in mind. But we do not update the language user’s words when we conclude (like the thief) that this particular case is an instance of the relevant type. In the early 20th century, the legal realists often argued that statutes quickly became out-dated because new cases arose which were not specifically foreseen by legislators. But as Lon Fuller decisively argued, the scope of a rule one enacts is not limited to the particular applications of that rule one imagines or expects. Hence, a rule proscribing possession of dangerous weapons applies to weapons yet to be invented, such as firearms, if enacted in 12th century, or death-rays, if enacted now. Why? Because what is chosen is a rule that applies to an open class. It is of course often difficult to determine whether a particular falls within the relevant class. And some types of case, not imagined or foreseen at enactment, may be an awkward fit, being similar in some ways to clear applications, but different in others.

The other main rationale for updating is that statutes are current law, such that they should be treated as if just enacted, so that the interpreter can rely on what they mean now. Cross says, Steyn agrees, that the statute has a legal existence independent of promulgation. What does this mean? Well, the statute is accepted now as a legal norm because we have an ongoing rule that Parliament's past decisions remain good law now, until amended or repealed. And it is true that changes in other related legal rules may change this rule. If the statute assumes or turns on some other legal rule, which is changed in some way, then this will of course change the scope and application of the statute. A code for contractual remedies may turn on the common law rules about contract formation, such that when they change the range of cases to which the code applies also changes. However, this doesn't mean one infers the statute's meaning as if it had been enacted against the current legal order and state of the world, ignoring when it was in fact enacted.

A statute is the legislature's promulgated decision about what should be done. It is not a set of words to which interpreters are free to assign meanings. Hence one cannot just substitute 'current word meanings' for what it is plausible to infer the legislature intended to convey by uttering those words at the time of enactment. To make this substitution is to amend the statute. The focus on 'current law' is in effect a reliance argument. But every person is on notice by virtue of details of when statutes were enacted. And in any case, expectations of this kind cannot support amendment.

VI. The other cases

I have said that I do not think *Ireland* and *Fitzpatrick* justify the updating doctrine: indeed arguably neither case really involves the application of that doctrine. The cases do of course contain remarks that encourage updating. However, some other recent cases are more careful in stating/applying the relevant principles.

Environmental Protection Act 1990, s 79(1)(a) refers to 'any premises in such a state as to be prejudicial to health'. In *R v Bristol City Council, ex p Everett* [1999] EWCA Civ 869, [1999] 1 WLR 1170, the court held that 'prejudicial to health' means disease not physical injury. The Court declined to follow *R v Ireland* to read 'health' to mean physical injury. It was clear from the relevant history and context that this was intended to be confined to disease, which is of course itself an open class. In *Birmingham City Council v Oakley* [2000] UKHL 59; [2000] 3 WLR 1936, the court held that 'any premises in such a state as to be prejudicial to health or a nuisance' means the condition of the premises not layout or absence of facilities. Again, the court reasoned from the legislative history (not Hansard), the context and structure to a conclusion about the type of 'state' to which the legislature referred.

Highways Act 1980, s 41(1) requires a Highway Authority 'to maintain the highway'. In *Goodes v East Sussex County Council* [2000] UKHL 34; [2000] 1 WLR 1356, the court held 'maintain' meant keep physical condition in good repair, not keep free from snow and ice. Lord Hoffmann explained that history of the legislation made clear, notwithstanding the openness of the ordinary language (that is, it is not semantically awkward to take 'maintain' to include keeping free from snow and ice), that the former was intended – the latter, he said, was a different type of duty, which the legislature plainly did not intend to create.

In *Quintavalle*, the court had to consider whether a live human embryo created by cell nuclear replacement, a technique not known at the time of enactment, fell within the Human Fertilisation and Embryology Act 1990, which said at s 1(1):

In this Act, except where otherwise stated –

- (a) embryo means a live human embryo where fertilisation is complete, and
- (b) references to an embryo include an egg in the process of fertilisation

What the court says about updating is important, per Lord Bingham:

There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of ‘cruel and unusual punishments’ has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.

He affirms as authoritative Wilberforce’s statement in *Royal College*. The quoted passage, to my mind, provides no support for the general updating doctrine.

The case itself is difficult, for it is quite arguable that the definition in s 1(1) trades on, affirms, and so does not exhaustively stipulate an alternative to, the natural kind ‘live human embryo’. Alternatively, the case might warrant a corrective extension to capture a type of case plainly within the judgment of the legislature but falling outside the intended meaning of its formulation. A similar argument should have been considered to take the proscription on cloning using a live human embryo to extend to cloning that creates an embryo. The argument for a corrective extension, as for a corrective or outweighing exception, is an application of the doctrine of equitable interpretation about which I say nothing else in this paper, but which is of great importance. For some discussion, see J Evans, ‘A Brief History of Equitable Interpretation in the Common Law Systems’ in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate, Aldershot 2002) 67.

VII. Constitutional problems

The problem with updating is that it is inconsistent with legislative authority. The statute has been chosen by the legislature and may not be amended by any other. Updating the meaning of the statute, in the sense I have discussed, is to amend it. It is irrelevant that some legislators prefer updating, for it is inconsistent with authority. The updating doctrine is an illicit Henry VIII clause of uncertain application. This means the content of the law changes when word meaning changes, which is arbitrary. This is a very poor way to decide when or if to change the law for there is no careful consideration, by relevant authority, of whether this change is warranted. Instead, changes turn on (are mediated through) arbitrary word manipulation and then are applied retrospectively. It is uncertain when or if the content of the law is liable to updating or will be changed. And it is very difficult for the legislature to avoid its decisions being amended in this way.

VIII. *Yemshaw* revisited

I take it the legislature's intended meaning in defining 'violence' as it did was to convey the type or class 'physical violence', the deliberate infliction of force. The legislature's choice of language in 1977, 1996 and 2002 make this the obvious inference. If 'violence' includes psychological abuse, the term should include threats whether likely to be carried out or not. Yet the statute limits threats to those likely to be carried out. Further, it is awkward to speak of threats to carry out psychological abuse. Moreover, 'violence' is constant whether the violent person is associated or not, yet it seems implausible for Parliament to proscribe other harmful action from non-associated. Also, as Lord Brown says, that this is an emergency/deeming provision supports this reading. Updating the meaning by reference to understandings of 'domestic violence' at large and post-enactment is to amend this statute to make it conform to those understandings. That is, it ignores the choice the legislature made and instead takes advantage of word choice.

The court says that the statutory purpose constrains. However, the problem here is that the statutory purpose is being picked out quite arbitrarily. The court says the purpose is to protect people from harm. And this is true to the extent that violent action is a subset of harmful action. But one might think the purpose was to protect people who are at risk of physical violence. Lord Rodger says that to fail to extend this would be to downplay psychological abuse, but this is an argument for extension to harm at large (say, drug use, criminal associates). And indeed, it looks very much like extending the statute by analogy. I note also that Lady Hale answers the argument that her reading extends to abusive conduct from non-associated persons by saying there is a threshold of seriousness. This introduces into the provision an otherwise absent, qualitative standard. This confirms, I think, that the interpretation in this case was illicit judicial amendment. There is no good reason to update statutes in the sense I've discussed. Indeed, updating statutes is unconstitutional and the courts should stop doing it.