

Frame Semantics and the ‘Internal Point of View’

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I. *The Fundamental Problem*

The fundamental problem of ‘law and language’ is what we might characterize as ‘the illusion of transparency’. We use language continuously and, except when there is a misunderstanding, are unaware of the complexities that lurk beneath the surface of our comprehension. The illusion of transparency is particularly acute in legal language both because the stakes are so high and because law is precisely that practice where the ambiguities and uncertainties that arise from language’s complexity are constantly tested.

The illusion’s power is conspicuous in formalist and textualist approaches to law. An extreme example is the way in which some United States Supreme Court Justices use the dictionary to interpret complex federal statutes. In his plurality opinion in *Rapanos v. United States* (2006), Justice Scalia sought to determine the scope of federal regulatory power over wetlands under the Clean Water Act (1972) not by reference to the statute’s stated goal of maintaining ‘the chemical, physical, and biological integrity of the Nation’s waters’, (§1251(a)) but rather by reference to the definition of ‘waters’ found in the version of Webster’s New International Dictionary published in 1954. Instead of considering whether conditions in the relevant wetlands could affect the Great Lakes system just one mile away, the plurality opinion offered an exegesis of such common hydrological terms as ‘streams’, ‘oceans’, ‘rivers’, ‘lakes’, ‘bodies of water’, ‘ditches’, ‘channels’, and ‘moats’—the latter of obvious concern to a twentieth century statute seeking to prevent water pollution. (pp. 732-36)

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But the fundamental problem of mistaken linguistic transparency afflicts the work of ostensibly more sophisticated legal theorists. This is apparent in H.L.A. Hart's 'core and periphery' distinction, which merely hypostatizes the phenomenon of prototype effects. Thus, Hart (p. 123) claims that 'in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases'. These 'plain' cases which 'seem to need no interpretation'—that is, where comprehension 'seems unproblematic' or 'automatic'—are, for him, 'just the familiar ones, constantly recurring in similar contexts'. (p. 126) Yet, as I have documented elsewhere, the prototype effects that Hart mistakes for the 'plain cases' are the product of complex processes of cognition and categorization—that is, of neural architecture and category structure. (Winter, pp. 76-85) The prototypical instances may 'seem' plain, but both the 'core of certainty' and 'penumbra of doubt' are constructed by the same purpose- and context-based cognitive models. (pp. 197-206)

So, too, with Hart's 'internal point of view' and Dworkin's 'internal perspective'—each of which takes a certain discourse as epitomizing what law really 'is'. The 'internal point of view' was first introduced by Hart (pp. 56-57, 88-91) as an analytic precondition for legal rules. The internal aspect of rules is, for Hart, a prerequisite for the intelligibility and semantics of legal statements understood as obligations. It is 'the way in which rules function as rules in the lives of those who . . . use them as the basis for claims, demands, admissions, criticism, or punishment'. (p. 90) The internal point of view thus supports his positivist account of law in terms of socially established rules of recognition (pp. 102-03); but, it also serves as the lynch pin of his refutation of sanction- and prediction-based accounts of law. (pp. 88-91)* Ronald Dworkin (pp. 13-15), in contrast, invokes the 'internal perspective' to sustain his account of law as an interpretive

* As Shapiro (pp. 1168-70) explains, the internal point of view also serves to naturalize rule following to human behaviour without any assumptions of metaphysical validity.

practice centering on substantive moral and political values that derive from but nevertheless stand outside and transcend that practice. For Dworkin, the key to understanding the nature of law is to recognize the ‘argumentative character of our legal practice’ (p. 14) in which disagreements are not semantic, but theoretical and interpretive ones over the ‘rightness’ of the principles to be derived from the authoritative legal materials.

One might marvel that the internal point of view thus supports two diametrically opposed accounts of law. The principal flaw of both views is that each invokes an unvarnished, matter-of-fact approach to linguistic behaviour to sustain an otherwise mistaken view of legal practices. For Hart, it is the linguistic behaviour that accompanies the practice of rule following that matters; for Dworkin, it is the linguistic behaviour that comprises legal argument that is exemplary. The common error is that both indulge a one-dimensional understanding of language: It is what the people in each domain *say* that matters, and what they say is taken transparently—that is, as Dworkin says (p. 20), ‘at face value’.

If we take J.L. Austin’s distinction between constative and performative utterances together with Jürgen Habermas’s distinction between communicative and strategic action, we could say that Hart and Dworkin both take language as constative and communicative. Yet, experience and common sense both tell us that legal language is often performative and highly strategic. One of the salient rituals of the trial courts in the United States, for example, is the exaggerated deference with which the judges are treated. It is not just all the ‘Your Honor’s’ etc., but the entire gamut of language and body language and the practically fawning way in which lawyers interact with the judge: ‘You’re so right, Your Honor. Couldn’t have said it better myself’, etc. No one seriously thinks that we should take *those* statements at face value; no one

thinks that the ‘internal perspective’ of the practice of law is one in which lawyers actually feel that way about the judges before whom they appear.

Once one understands the complex ways in which language works, it is absurd to think that one could take a one-dimensional view of *any* aspect of legal discourse and infer from that an entire theory of law. The result is likely to be much like the fable of the five blind men and the elephant in which each grabs a different part of the animal and proclaims that an elephant is like a pillar, a rope, a tree branch, a hand fan, and a wall, respectively. To make sense of the phenomenon of law, one must bring to bear sophisticated understandings of language, meaning, history, and culture. This paper focusses on the first two of those concerns. It uses the frame semantics of Charles Fillmore and Gilles Fauconnier and Mark Turner’s more recent work on conceptual blending to illuminate the complexities and sophistication of the cognitive mechanisms that simultaneously explain and transcend the ‘internal point of view’. The upshot is an understanding of law that goes beyond the sterile positivist/natural law debate to reveal the richly human nature of legal practice.

II. A Matter of Mind, not Words

The one-dimensional view of language parallels (or, perhaps, merely duplicates) the fundamental and conventional tendency to hypostatize and fetishize meaning—that is, to assume that meaning is ‘in’ the words we use and, then, to endow those words with causal efficacy. But meaning is not ‘in’ the words; meaning is in the mind. Words are at best tokens or stimuli that activate the mental processes that constitute and create meaning.

Consider what happens when, as a member of the audience, you watch a speaker pause in his or her delivery, pick up a cup of water, and bring it to his or her lips. Your visual cortices respond to the color, shape, and position of the cup. The mirror neurons in your arm fire to

simulate the movement of the speaker's hand and arm, though at a level below that needed to stimulate your muscles to action.* Your somatosensory cortices use these kinesthetic sensations to register the shape the hand assumes as it grasps the cup and the movement of the hand and arm as they bring the cup to the lips. All these neural, perceptual, and mental processes will be integrated and appear in consciousness as a unitary and 'simple' perception: 'The speaker just took a sip of water'. But the underlying processes are both complex and distributed across anatomically different portions of the neural system.

One might object that this account of meaning as embodied in an individual's neural system elides the important modern insight that meaning is a social phenomenon—that is, that meaning is something that can occur only within a linguistic community. This modern insight is thoroughly, though not entirely correct. For, on one hand, the brain is a highly social organ. But, on the other, even a purely social meaning must still be processed by and instantiated in the axons, dendrites, mirror neurons, topological mappings, and reentrant pathways of actual human brains. We might say, more precisely, that meaning lies in patterns of neural firings and these patterns of neural firings are themselves largely forged in social experiences and interactions.

The social dimension of these mental processes of meaning-making is nicely captured by Charles Fillmore's concept of frame semantics. Without going into the neural architecture, the basic idea is that words are understood only in terms of meaningful experiential gestalts. For example, the words 'buy', 'sell', 'cost', 'goods', 'advertise', 'credit', etc. make sense only in terms of a frame (also referred to as a script, schema, or cognitive model) of a commercial transaction that relates them together as a meaningful, social activity. Any one of these words

* 'In the real world, . . . neither the monkey nor the human can observe someone else picking up the apple without also invoking in the brain the motor plans necessary to snatch that apple themselves (mirror neuron activation). Likewise, neither the monkey nor the human can even look at an apple without also invoking the motor plans necessary to grab it (canonical neuron activation)'. (Iacobini, p. 14)

activates the entire network of buyer, seller, goods, medium of exchange, etc. As Fillmore (1982a: 112) says ‘words represent categorizations of experience, and each of these categories is underlain by a motivating situation occurring against a background of knowledge and experience’.

Frames explain not only how we understand and communicate but, as noted earlier, they constitute what we experience as both the ‘core’ and ‘periphery’ of any word-category. Take the concept ‘bachelor’. Because he takes for granted that concepts can be specified in necessary and sufficient conditions, Dworkin (p. 72) observes that ‘bachelorhood holds of unmarried men’. But natural language does not, in fact, observe this all-or-nothing rule. Rather, it displays unmistakable prototype effects: George Clooney is clearly a bachelor. But is the Pope? On one hand, the Pope is unmarried; on the other, the Pope—having taken a vow of celibacy—is not *supposed* to get married. These intuitions are expressed by the following statements, either of which would be deemed correct by an ordinary English speaker.

(1) ‘*Technically*, the Pope is a bachelor’.

(2) ‘The Pope may not be married, but he isn’t *really* a bachelor’.

In the first statement, ‘technically’ signals that we are speaking not with respect to the conventional conception of ‘bachelor’ but, instead, in some specialized domain—in this case the domain of formalized meaning or analytic philosophy. In the second statement, ‘really’ signals that the Pope stands outside the social expectations regarding marriage and sexuality that characterize the conventional conception of ‘bachelor’.* As Fillmore (1982b:34) explains, the category ‘bachelor’ makes sense ‘only in the context of a human society in which certain expectations about marriage and marriageable age obtain’.

* Lakoff (pp. 122-24) identifies several other hedges such as ‘strictly speaking’, ‘loosely speaking’, and ‘regular’ that similarly signal shifts in framing.

Note, moreover, that meaning is a matter of the framing and not the specific words used. Thus, one can flip the expressions in a way that reverses the meaning of ‘technically’ but preserves the point about framing. Suppose a friend is organizing a dinner party and she asks me if I could bring along an unmarried male friend to balance out the table. Recognizing her intention, I say ‘I could bring Father Mike, but he’s not technically a bachelor’. Here, ‘technically’ signals—but no better than ‘really’ or ‘strictly speaking’—that, though unmarried, Father Mike is not ‘an unmarried friend’ with respect to the *dinner-party* frame. Yet another alternative would be the statement ‘The Pope is technically *not* a bachelor’.* In this example, the hedge signals that, with respect to the alternative frame of Catholic doctrine, the Pope is not a bachelor because he is married to the Church.

Even so, frames under-specify meaning. To function as categorizations of experience, the frame’s constituent elements must be relatively abstract. Fauconnier and Turner (pp. 25-26) give the example of a child on a beach playing in the sand with a shovel. One might ask, variously: ‘Is the shovel safe?’ ‘Is the child safe?’ ‘Is the beach safe?’ Each of these statements inquires after the safety of the child. But, there is no fixed, one-dimensional property that the term ‘safe’ assigns or applies to the shovel, the child, and the beach. Each question inquires into a different potential danger. The first question asks whether the child might be harmed by the shovel, the second whether the child requires supervision, and the third whether the beach is one marked by sudden, dramatic tides. In all of these statements, the word ‘safe’ prompts the addressee to invoke a *danger* frame with abstract roles and relations such as agent, instrument, patient, and consequent harm. But in each case, the addressee fills out those abstract elements with different contextual components.

* This example was suggested to me by Gary Watts.

In the context of the first question, the sharp edge of the shovel is the agent or instrument capable of inflicting harm on the child (the patient) by cutting it. Even this could be reversed, however, in a different context. Suppose I own an archeological relic similar to the Bethsaida incense shovel (a first century, 8-inch bronze shovel discovered in 1996 on the site of an ancient Roman temple). My nephew has gotten a hold of it and I turn to my brother and ask, ‘is the shovel safe’? In this case, the *danger* frame is exactly the same. But it is the child who is the potential agent of harm and the fragile, antique shovel that is the patient at risk of injury. In this scenario, we see once again that the meaning is not in the words. Rather, meaning can only be in the minds of interpreters who understand those words in light of mental frames activated in particular contexts.

A significant part of human communication involves the telegraphing of frames so that the audience is able to reconstruct the speaker’s intended meaning. Consider the text of the Second Amendment to the U.S. Constitution, which provides: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed’.* In *District of Columbia v. Heller* (2008), Justice Scalia (pp. 577-78) first parsed the amendment into an ‘operative clause’ (prohibiting the infringement of ‘the right of the people to keep and bear Arms’) and a prefatory clause (asserting that a well-regulated militia is ‘necessary to the security of a free State’); read the operative clause to refer to the right to own and carry firearms for the purpose of self defense; and, then, concluded that—because ‘a prefatory clause does not limit or expand the scope of the operative clause’—the Court need only check ‘the prefatory clause to ensure that our reading of the operative clause is consistent with

* As Pocock (p. 528) notes, ‘the Second Amendment to the Constitution, apparently drafted to reassure men’s minds against the fact that the federal government would maintain something in the nature of a professional army, affirms the relation between a popular militia and popular freedom in language directly descended from that of Machiavelli’.

...

the announced purpose'. The intended result, of course, was to disassociate the former from the latter in order to extend the right to bear arms beyond the historical context of citizen-manned militias to the modern context of private gun ownership in the home.

This convoluted rhetorical strategy depends both on the illusion of transparency (that 'the right to bear arms' has a literal meaning of 'carry weapons' and not a technical meaning of 'serving in the armed forces') and a studied ignorance of modern semantics.* To see the latter point, suppose I said to you 'we're having some people over tonight and we would appreciate if you could bring an extra chair'. You have rocking chair, a beanbag chair, and a particularly decrepit-looking, but still functional folding chair. Which do you bring? The answer is that you do not know; it depends on the purpose of the gathering. If we are hosting a dinner party, the rocking and beanbag chairs will not do. But, if we are having a discussion group such as a book club, you would definitely choose the rocking or beanbag chair over the folding chair. Suppose, instead, that I said to you 'a comfortable audience being necessary to success of a good book club, please bring a chair tonight'. In that event, awkward syntax aside, you would know precisely what kind of chair to bring because the prefatory clause had told you exactly which frame to invoke. In other words, the meaning of a clause such as 'the right to keep and bear arms' is not a transparent, context-independent statement deducible from the bare words of the text. The words alone do not tell us what kind of guns for what kind of purposes under what kind of conditions are meant to be included. Rather, the meaning of the clause is frame-dependent and

* Thus, Scalia (p. 584) observed not only that 'At the time of the founding, as now, to "bear" meant to "carry"', but also that this is its 'natural meaning'. Of course, the opinion did go on to discuss the historical background of the provision. But its tendentious account of the history is built on the platform of its belligerent literalism: 'A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics).' (p. 589) A frame semantics approach, in contrast, brings the language and the history together in a way that confirms the historical evidence detailed by the dissent. (pp. 652-70)

can be inferred only through a more complex process of imaginative reconstruction (albeit one that, here, is telegraphed by the opening clause of the constitutional provision).

So far, we have considered only relatively simple statements understood in light of a single frame that provides the semantics of a given speech act. Human reasoning, however, encompasses the sophisticated manipulation of several frames simultaneously. Fauconnier and Turner (p. 18) call this process ‘conceptual blending’. They illustrate the process with two particularly interesting examples: the riddle of the Buddhist monk and the disturbing cultural phenomenon of the ‘image club’. (pp. 27-50)

The riddle of the Buddhist monk: A Buddhist monk decides to hike up the mountain to meditate. There is a single trail up the mountain. He sets out at dawn and reaches the summit at sunset. After a night’s rest, he meditates for three days. At dawn on the next day, he hikes back down the mountain arriving home at sunset. Without making any assumptions about the monk’s speed on either trip—indeed, one can assume that he travels at different rates in each direction (for example, taking more breaks to admire the scenery on the way down)—is there any place along the trail at which he will be at exactly the same point at exactly the same time of day on each trip?

This riddle cannot be solved with the sort of algebraic equation one once computed in grade school. We do not know his rate of ascent or descent and, so, cannot calculate distance-divided-by-speed for each trip to compute the precise point of intersection. Nevertheless, the answer to the riddle is an obvious ‘yes’. We can demonstrate this with a simple mental exercise. Picture the monk making both trips on the same day. At some point along the trail, the ascending monk will necessarily encounter the descending monk. That is the point at which he is at exactly the same point at exactly the same time of day on each trip.

The proof depends on a counterfactual. The monk cannot actually ascend and descend the mountain at the same time, so he cannot in real-life ‘meet himself’. Yet, it is a counterfactual that we have no problem imagining. In one mental space or frame, we can see the monk hiking up the mountain. In a second mental space, we can picture him walking down the same mountain. We can (without even thinking about it) map the two mental spaces onto each other such that we can see the monk hiking in both directions at the same time and ‘meeting himself’. (One can conceive of this as a ‘third’ mental space binding together the ascending and descending frames. Presumably, what is occurring in the brain is that the ascending and descending frames are being coordinated via dynamic topographic mappings across the two mental spaces. But not much turns on whether the particular neural mechanisms of integration are topographic mappings, neural bindings, or some other as-yet unspecified neurochemical process of integration.)

This imaginative capacity to simultaneously ‘run’ two frames in a conceptual blend is a common and familiar experience. We use it in everyday counterfactual statements of the type ‘If I were you, I wouldn’t wear the double-breasted suit’. Of course, I am not you (and double-breasted jackets actually suit me). In a conceptual blending of this sort, the speaker is projecting himself into an alternate mental frame in which he takes the place of the addressee, assumes the addressee’s circumstances and physical attributes, but retains his own sense of taste. Logically impossible, of course. But we do it all the time.

The Image Club: When the New York Times columnist Nicholas Kristof (1997) was in the Times Tokyo bureau in the 1990s, he filed a troubling report on the growing Japanese obsession with schoolgirls as sexual objects. Part of that trend included a proliferation of ‘image clubs’—brothels with specialized rooms designed to cater to the clients’ sexual fantasies about schoolgirls. The rooms included a fully-equipped classroom, a changing room of a school gym,

and a room designed to duplicate a commuter train car—complete with a roaring sound track—in which men could molest straphangers dressed in school uniforms. For \$150 an hour, for example, a Japanese man could play ‘teacher’ and act out his sexual fantasy with a youthful-looking, adult prostitute dressed up as a schoolgirl.

Fauconnier and Turner explore the predictable, but nonetheless fascinating construction of meaning in this scenario. ‘Why’, they ask (p. 28), ‘should this make-believe have any power or attraction at all?’ The customer undeniably knows that, however skillful her acting, the prostitute isn’t really a schoolgirl. In order to maintain the erotic charge that he seeks, the ‘John’ (in U.S. slang) or ‘punter’ must inhabit multiple mental spaces simultaneously. In one frame, he is an ordinary customer engaged in a sordid commercial transaction with a professional sex worker. In a second mental frame, he is an adult man with a fantasy that centers on an unattainable, innocent teenage girl. In a third mental space—the ‘blend’—he is a teacher having sex with that unattainable schoolgirl. In order to work, the blend requires systematic, but selective mappings from the other mental spaces: The high-school student is projected from the fantasy frame into the blend, ‘while the actual sex act . . . is imported from the material reality linked to the mental space with the prostitute’. (p. 29) The result is that the blend retains the erotic charge carried over from the fantasy mental space (notwithstanding the emotional neutrality of the *commercial transaction* frame that is also a part of the blend). At the same time, the process of projection selectively leaves out those elements of the fantasy frame that would interfere with the desired result. Thus, although the ‘teacher’ is also a projection from the fantasy frame, it carries over none of the structure of that role: As Fauconnier and Turner (p. 29) wryly note, ‘The customer is not supposed to demand that the prostitute learn how to factor polynomials’.

We are now nearly in position to see why the concept of the ‘internal point of view’ is too one-dimensional to be of much use in understanding law. Consider Hart’s paradigmatic expressions of the internal and external points of view: ‘It is the law that X’ is the quintessential idiom of the internal point of view, while ‘In England, they recognize as law whatever the Queen in Parliament enacts’ is the archetypal expression of the external perspective. But what would Hart make of the statement that ‘In England, *it is the law* that X’? Perhaps he would take it as a poorly-framed articulation of the external point of view. Perhaps he would consider it a misstatement that confuses two mutually exclusive points of view. Thus, Hart (p. 90) insists that ‘What the external point of view cannot reproduce . . . is the way in which the rules function as rules in the lives of those who normally are the majority of society. . . . For them the violation of a rule is not merely the basis for a prediction that a hostile reaction will follow but a *reason* for hostility.’

We, however, can recognize this sentence as representing a blend that comfortably combines two analytically inconsistent points of view. The purpose of the blend is, precisely, to convey the insider’s sense of the obligatory quality of the rule (that is, as a reason for claims, demands, or condemnation)—but as observed from the external point of view. Consider how this blend works.

First, unlike the Buddhist monk who cannot walk up and down the mountain at the same time, a person ‘running’ the blend *can* take the internal and external perspective simultaneously. It is not just a matter of being able to go back and forth between the two points of view. Rather, the blend expresses the observer’s understanding that for those who live by it the rule has a

normative quality that one violates at one's peril. ('If I were you, I wouldn't go to court without my powdered wig.')

Second, just as the blend helps us solve the puzzle of the Buddhist monk case, this legal blend has functional value in matters of practical reason. As a tourist, I am quite aware that in the United Kingdom, it is the rule that one drives on the left side of the road. It seems strange to me as an outsider; I noticed while walking along the Thames on a Sunday afternoon that, though the English drive on the left, they mostly walk on the right. Nevertheless, when I pick up my rental car I will need to observe the rule as if I were an insider. I may do so primarily for safety's sake or simply as a Holmesian 'bad man' (Holmes, p. 459). But, even when the road is clear and no police are nearby, I am not going to drive on the right in the same way that I would not at home run a red light at 4 AM. In much the same way, an advocate or a lower court judge deciding a case may invoke a precedent even though she believes that precedent profoundly wrong in some way (say, unconstitutional or in plain conflict with a governing statute). Thus, one can argue that 'in this jurisdiction, it is the rule that X'—expressing a dual understanding in which the rule is obligatory but not necessarily one that the speaker approves of, thinks correct, or would follow anywhere else.

* It was a sport among senior civil rights lawyers in the early nineteen-sixties that, when a new Justice Department lawyer went down to Alabama to appear before the great Frank Johnson, they would not tell him that the judge had a rule in his courtroom that lawyers had to wear a white shirt. These young lawyers would eagerly appear before the great man wearing their conservative, Brooks Brothers suits with their blue, button-down Oxford shirts. Judge Johnson would excoriate them—'How dare you appear in this court not properly dressed!'—and send them to the local haberdasher on Main Street to 'come back in one hour in proper attire.'

What the veterans should have told the new lawyers was: 'In Judge Johnson's court, it is the rule that you must wear a white shirt'. Consider the extra information that this formulation conveys. If I told you just that 'In Frank Johnson's court, there is a rule that you must wear a white shirt' you would as a pragmatic Holmesian actor comply with this idiosyncratic rule. But, if I warn you in the language of the blend, you would know something more: that for Frank Johnson, this rule has an emotional, normative dimension above and beyond what one would expect of ordinary rules about courtroom decorum—i.e., that he will take it as both a personal affront and a moral failing of some sort. You would still choose the white shirt—and might do so for purely pragmatic reasons—but, if you were contemplating an outlandish tie or an odd footwear choice in addition, you would probably reassess your entire wardrobe choice to make sure you did not spark his ire.

Third, just as in the case of the ‘image club’ where the blend imbues an otherwise sordid commercial interaction with sexually charged meaning, an external/internal blend of this sort conveys the intensity of the normative imperative. When, for example, the judge says ‘In this jurisdiction, it is the rule that X,’ she is conveying that—though you may not like or accept it—here the rule is sacrosanct. Thus, an observer would say that ‘In the Episcopal Church, they have a rule that men must remove their hats’. But if one of my colleagues were about to attend his first Orthodox Jewish bar mitzvah, I would tell him ‘In synagogue, it is the rule that men must cover their heads at all times’. My point would be that, however much he may think himself outside the rule, in synagogue he *will* be expected to wear a skullcap and that the people there will make sure he knows there are no exceptions.

III. Six Frames for Law

We can now consider the complexities that the internal perspective—like the five blind men who mistake the nature of the elephant—so conspicuously obscures. We can describe at least six different semantic frames that characterize our conventional understanding of ‘law’. Each of these frames is always available to legal actors as they negotiate or participate in the system, and each of these frames can be blended with the others in various ways. These frames, moreover, are evident both in ordinary language and in more sophisticated academic treatments of law. They are:

- 1) *Law as Authority*: The first and, in many ways, most basic frame is an authoritarian one in which ‘law’ is the command of a sovereign backed-up by some sort of social sanction. The prototype is criminal law. In jurisprudence, it is John Austin’s command theory of law. The *law-as-authority* frame, however, is commonly held not just by lay people, but also by sophisticated professionals. In the 1980s, I attended a

- conference on prison reform litigation. One of the panelists was a well-respected appellate judge on a federal court of appeals. When pressed why, given his comments, his rulings were not more sympathetic to prisoner cases, he replied ‘I might be, but I feel the hot breath of the Supreme Court on the back of my neck’.
- 2) *Law as Social Obligation*: The second frame need not detain us because it is the familiar positivistic concept of law elucidated by Hart. It is what we employ whenever we invoke a rule (whether legal, institutional, or bureaucratic) as the ground for an action or demand—e.g., ‘I am sorry I cannot fulfill your request, but it is prohibited by the rules’.
 - 3) *Law as Moral Imperative*: This third, normative frame conceives of law in moral terms such as justice and fairness. It is reflected in the natural law tradition. In its more sophisticated jurisprudential form, it is Dworkin’s conception of law as an interpretive practice of argument over the meaning of values (concepts) and what they require in particular circumstances (conceptions). But it is also the frame of every litigant who argues ‘It’s only fair, Your Honor’.*
 - 4) *Law as Social Mechanism*: This fourth frame is instrumentalist. It understands law as a device of conscious social management to achieve particular societal goals or values. In its prototypical form, it assumes there is a direct, linear relation between legal demand and social response. This frame is what is invoked by the popular view that we should ‘get tough on crime’. In its sophisticated form, this is the view of Holmes and the Legal Realists. It is also the dominant view of late modernity—in which law is seen as an autonomous set of practices that functions ‘as instrument or

* The first three frames share a common metaphorical structure of a projected ‘other’ to whom one owes obedience. (Winter, pp. 333-40)

strategy within a field of social power’—that Constable critiques under the rubric of ‘sociolegal positivism’. (pp. 10-11)

- 5) *Law as Strategic Tool*: In this frame, law is merely a tool to accomplish particular concrete ends or realize certain values—whether the client’s, the advocate’s, or judicial ideologue’s. It is close to the view of the Holmesian ‘bad man, who cares only for the material consequences which such knowledge enables him to predict’. (Holmes, p. 459) It is reflected in the popular—and quite sensible—view that, when one is in trouble, one wants a lawyer who knows how to ‘work the system’. It is, ironically, also the popular view of the law as corrupt and of lawyers as ‘liars’ or ‘manipulators’ of the system. It is, too, the cynical view that sees law as nothing more than the manipulation of the powerful.
- 6) *Law as Social Identity*: This last frame conceives of law in cultural terms—though it can also be characterized as historical, anthropological, or sociological—as that which constitutes the group. In legal theory, this view is most closely associated with James Boyd White’s account of law as an ongoing social and literary practice of common constitution and coordination.

Each of these different frames can be viewed from a participant’s (internal) or observer’s (external) perspective. Consider two of the more counterintuitive variants. While the second, *law-as-social-obligation* frame is synonymous with Hart’s ‘internal point of view’, Hart’s legal theory is itself an external, theoretical description or account of what law ‘is’. Conversely, while the sixth, *law-as-social-identity* frame seems inherently descriptive and ‘external’, it can be held ‘internally’ by participants even if they do not themselves accept the law as obligatory. The internal aspect of law-as-social-identity is generally true of common law systems, which take the

‘rule of law’ value as constitutive of who they are. (Although in the context of the so-called ‘War on Terror’, this sense of ourselves seems to have been substantially undermined.) The more dramatic examples are the cases of the professional baseball players Hank Greenberg in the 1934 American League pennant race and Sandy Koufax in the 1965 World Series, who refused to play on the High Holy Days—not because they were themselves observant, but rather because each felt simply that it was not something he could do ‘as a Jew’.

The distinction between the internal and external points of view fails to capture the rich semantics of our orientations to ‘law’. It is not that Hart’s account of the internal point of view is wrong; to the contrary, it perfectly encapsulates the second, *law-as-obligation* frame. But it is—as suggested at the outset—hopelessly partial, missing the breadth of our attitudes and behaviour toward law. (Or, to put it more pointedly, it fails to provide a truly *general* theory of law.) Few people take the internal point of view all of the time about every law: Some laws we internalize as obligatory; others we hold more firmly as constitutive of who we are. Some laws—the right to due process, free speech, or equal treatment—we view as moral imperatives. Some we merely tolerate; others we condemn as intolerable. We orient ourselves to some laws, such as the speed limit, as a proverbial Holmesian ‘bad man’. Still others—say, the drug laws in my country—many people honor consistently only in the breach.

True, for Hart (pp. 114-16) it does not matter if lay people take any or all of these attitudes toward law as long as they generally obey it. But, Hart’s account is nonetheless incomplete in two significant ways. With respect to lay people, he recognizes only obedience (frame 1) and fear of consequences (frame 5) as reasons for compliance. (p. 114) With respect to officials, he recognizes *only* the internal point of view accepting the rules as standards for official action—insisting that it is a necessary condition that must be satisfied (pp. 116-17) by officials.

Yet, as we have seen (and shall explore further in a moment), lawyers and judges routinely operate in terms of each of the frames that characterize our conventional understanding of ‘law’.

Thus, an argument such as Dworkin’s that attempts to discover the nature of law on the basis of a one-dimensional, face-value approach to how lawyers and judges talk about it is bound to be—in Dworkin’s own words—‘impoverished and defective’. (p. 14) Consider the very limited role that Dworkin accords historical argument. It is sometimes essential, he says, for the participant’s point of view to take in the external, historical point of view—as when a question of constitutional law turns on the intent of the Framers. (pp. 13-14) Now imagine an advocate (or, for that matter, a judge) who thinks she has a good historical theory of the causal relation between social circumstances and the substantive content of the law. (Llewellyn 1934) Does anyone think she would fail to use it in crafting a persuasive argument? When she does so, does she cease to act from the internal perspective as a participant? Is she acting in ‘bad faith’, or in any way failing to make the law ‘the best that it can be’? Dworkin’s understanding of the role of history is as narrowly one-dimensional (and rigidly propositional) as the rest of his theoretical tool-kit.

Just as the six frames offer a broader account of our attitudes and behaviour as subjects of law, they also provide a more extensive set of tools with which to unpack judicial behaviour. Imagine the case of a judge imposing ‘rule of law’ values on an Administration engaged in extra-legal detention of suspected terrorists. She can decide to do so for any (or all) of the reasons suggested above. She can do so because she believes the precedents command it or the social compact requires it. She can do so because she thinks the Administration’s policy does not accord with the principle of equal dignity and respect for all persons. She can do so because she is convinced that it is bad social policy. Or she can do so because she thinks it violates the ‘rule

of law' values that make us who we are. Once she has reached her decision, she can justify it in terms of any (or all) of the frames considered above. Indeed, a persuasive judicial opinion will often invoke multiple frames in support of the outcome because doing so conveys the impression that the result is not just objective, but over-determined.

More importantly, the judge can decide the case for any of these reasons and justify her decision in terms of any of the other frames. We needn't work through all the permutations. But consider one of the more extreme possibilities. Suppose the judge is a member of the opposition party and decides the case in order to embarrass the Administration before the next election. She would never say so, of course, but might instead justify the decision by reference to the requirement of the rule of law or as making the law 'the best it can be' in light of our commitment to the principle of equal dignity and respect for all persons.

Much the same is true for forensic argument more generally. When the lawyer says 'Your Honor, the Court's holding in *Miranda v. Arizona* requires that . . .' we cannot simply take that at face value.* The lawyer may mean that he or she thinks the judge is required—in some sense of duty—to do what *Miranda* says. But it may be that the lawyer is acting strategically just as much as when he or she fawns over the judge. Perhaps the internal perspective really is not 'Your Honor is bound by precedent to . . .', but rather 'Smarter, more powerful judges than Your Honor have said that . . .' or just 'Your Honor risks reversal and embarrassment if . . .' In short, the discourse of the judicial system is like the discourse of the 'image club'. The participants are playing a part, and they speak the language of the blend that suits their purpose. Except that, in

* Dworkin could rightfully object that none of the arguments suggested in the text aptly characterize *our* 'argumentative social practice' (p. 14) because none concern a substantive moral and political value. The problem, however, is that the arguments in the text reflect the 'face value' arguments that lawyers and judges actually *do* make in such cases. Thus, while *Miranda* refers to the values of human dignity and respect for the inviolability of the individual personality a dozen times, Chief Justice Rehnquist's opinion affirming *Miranda* in *Dickerson v. United States* refers to these concerns *not once*.

the actual legal practice of the courtroom, who is the prostitute and who the ‘punter’ or ‘John’ is never quite clear.

Dworkin would object that we have no justification for taking judicial opinions at anything less than face value. ‘In fact’, he says, ‘there is no positive evidence of any kind that when lawyers and judges seem to be disagreeing about the law they are really keeping their fingers crossed’. (p. 39) He argues, moreover, that such a pretense would never work because it would be easily exposed by the losing side. (pp. 37-38)

Perhaps there was no such evidence when Dworkin wrote those words. But his bold claim has since been contradicted by no less than the Supreme Court of the United States. In *Planned Parenthood v. Casey* (1992), the plurality opinion offers a paean to decision according to principle. ‘Our contemporary understanding is such that a decision without principled justification would be no judicial act at all’. (p. 865) But, rather than demonstrating that its decision is ‘grounded truly in principle’, the plurality explains that it ‘must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them’. Thus, the plurality concludes, ‘the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently *plausible* to be accepted by the Nation.’ (pp. 865-66; emphasis added)

If the plurality so explicitly admits that it has its fingers crossed, one would think that the dissent would surely call them out on it as Dworkin suggested. And Justice Scalia *does* charge that the plurality’s ‘reasoned judgment’ is ‘nothing but philosophical predilection and moral intuition’. (p. 1000) Yet he reveals in the very next paragraph that he, too, plays the same finger-crossing game. ‘As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here’, he laments, ‘the public pretty much left us alone’. And

what is that lawyers' work according to Justice Scalia? Nothing more than 'reading text and discerning our society's traditional understanding of that text'. 'Texts and traditions', he disingenuously declares, are merely 'facts to study'. (Ibid)

Both sides in the judicial debate over abortion struggle with the recognition that, in the mind of the public, 'law' is synonymous with the objective determination of disputed cases. The two sides disagree only in offering a different sleight-of-hand to distract the public from what is actually going on.* For the plurality, it is a claim of 'principle' artfully articulated so as to be sufficiently plausible to be accepted as such. For Justice Scalia, it is the disclaimer that, in reading text and discerning tradition, he engages in no interpretive work whatsoever. Like Sergeant Joe Friday in the 1950s TV series *Dragnet*, it's 'just the facts, ma'am'.

Once we have outgrown the naïve illusion of transparency, we can begin to grapple with elephant in the room. Instead of talking about how language functions in law, we can talk instead about how law functions *as* language. It may enlighten; but it can also deceive. It can persuade; but it may also mislead. With the right framing, a legal proposition can be made to say several different things. The question is not what *language* does, but what *we* do with language.

Twining (p. 116) reports that Llewellyn was fond of saying that: 'Doctrine brittle and neat is the tool of tender minds in pursuit of policy that can be embraced without using one's intellect'. Llewellyn, of course, was skewering doctrinal formalists and legal positivists, such as Hart, who think that when the judge is applying the rule's 'core' he or she is somehow avoiding making a judgment of policy. Llewellyn was right; this, indeed, was the point I made earlier about the core and periphery being structured by the same processes. But the converse of Llewellyn's dictum is also true: One can do policy—or normative argument, strategic

* For a comprehensive theory and explanation of the predicament facing the Court in *Casey* that produced this revealing exchange, see Winter (pp. 317-29).

manipulation, social integration, or any other thing—by speaking doctrine that, because meaning is in the mind, is like any other bit of language not brittle and neat but supple and multivalent.

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