Perspectives in Pragmatics, Philosophy & Psychology 7

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Pragmatics and Law

Philosophical Perspectives

Springer

Perspectives in Pragmatics, Philosophy & Psychology

Volume 7

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Pragmatics and Law

Philosophical Perspectives

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ISSN 2214-3807 ISSN 2214-3815 (electronic)
Perspectives in Pragmatics, Philosophy & Psychology
ISBN 978-3-319-30383-3 ISBN 978-3-319-30385-7 (eBook)
DOI 10.1007/978-3-319-30385-7

Library of Congress Control Number: 2016939589

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Printed on acid-free paper

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Preface

This volume is the first part of a project that aims to highlight important aspects of the complex relationship between common language and legal practice.

In legal philosophy there is a well-established tradition, widespread in English-speaking countries (the UK, the US, and, more recently, Australia) as well as on the European continent and in Latin-American countries, that has always paid special attention to (that composite branch of knowledge that can be labelled as) the philosophy of language. Within this tradition we can identify at least two main trends.

The first trend, which began some time ago in continental Europe and Argentina, showed a keen interest in neo-positivism, and especially in the philosophical thought developed by Frege, Carnap, Hempel and Waissman: legal philosophers tried to import the neopositivistic theory of knowledge, and also to shape legal science as an empirical enterprise. Although the neopositivistic paradigm was revealed to be unsuitable and was dismissed (even by some of its proponents), this trend has not entirely dried up: it has partially continued in weaker forms (which, for normative language, can mainly be traced back to R.M. Hare: see Hare 1952). It has a successor in the legal logical tradition, that is, in the works of those legal scholars who employ (various types of) formal logic (and theories of possible words) in order to explain the properties of real legal systems or to develop ideal legal systems. Finally, and above all, its fundamental theses, such as the analytical–synthetic distinction, still impregnate many legal theorists' works – *pace* Quine.

The second trend – which is not completely separate from the first, but is mixed in with it, at least by some important authors – was probably born in the United Kingdom: one of its first exponents was Jeremy Bentham (who was followed in this by his disciple, John Austin), and it received an ultimate consecration by H.L.A. Hart's book, *The Concept of Law* (Hart 1961). This trend is certainly the one that is now most in vogue: the legal philosophers who consider it sometimes see law as a mainly linguistic phenomenon, or more often simply recognize the crucial role of language within any legal system, and in both cases look to the philosophy of language in order to find tools to solve their problems. In particular, as stressed by Endicott (2014a), there are two areas in which legal philosophy turns to the philosophy of language: the first concerns the problems connected with the use of language

in law, and the second is connected to inquiries into the nature of law. Perhaps a trait of the legal philosophy of the present century is that, in order to address various questions within the two areas above, it appeals especially to pragmatics, to all the different pragmatic traditions, and, mainly, to speech act theory, (various forms of) contextualism and Gricean approaches.

However, for a long time the legal philosophers' interest in the philosophy of language, and particularly in pragmatics, was a one-way dialogue. In fact, apart from a few isolated cases, this interest was only recently reciprocated: it was only few years ago that most legal philosophers discovered law as a new field of interest.

In order for this new and stimulating intellectual exchange to be successful, it is necessary to overcome some preliminary (connected) difficulties.

First, there is a problem of compatibility between the languages of two different fields of expertise that are both very technical.

Second, there is a related gap in the interests the two disciplines aim to satisfy: in fact, the divergence in vocabularies often reflects a difference in goals – in the purposes of an investigation, even if not in its object. So, for example, while linguistics seems more interested in describing phenomena, in finding their salient properties, and in showing their connections with other related phenomena, jurists are more interested in solving problems, finding criteria for correctness and allocating responsibilities.

Finally, there is a problem of coherence between these two areas of experience, these two 'linguistic games', these two contexts, that do not necessarily share the same characteristics. We cannot take it for granted, even pragmatically, that theories developed for ordinary language can simply be applied to a field of life that could be different. In other words, we have to ascertain whether behind the difference in vocabularies there is also a difference in encyclopaedia.

The present book aims to face all these problems either directly, by focusing on general aspects of legal practice and/or human communication (see especially chapters "Law and the Primacy of Pragmatics", "Legal Pragmatics", "The Rational Law-Maker", "What Did You (Legally) Say? Cooperative and Strategic Interactions", "Grice, the Law, and the Linguistic Special Case Thesis" and "Materialization in Legal Communication in the Transferring Process") or indirectly, by inquiring into a single legal problem through pragmatic theses (see especially chapters "Defeasibility and Pragmatic Indeterminacy in Law", "The Semantics and Pragmatics of *According to the Law*", "Legal Disagreements and Theories of Reference" and "Widening the Gricean Picture to Strategic Exchanges") and/or testing the validity of different pragmatic approaches for solving a precise legal problem (see especially chapters "Deep Interpretive Disagreements and Theory of Legal Interpretation" and "The Pragmatics of Meaning and Morality in the Common Law: Parallels and Divergences"). In this volume, using the most sophisticated tools available to pragmatics, sociolinguistics, cognitive sciences and legal theory, an interdisciplinary, international group of authors addresses questions like: 'Does legal interpretation differ from ordinary understanding?' 'Is the common pragmatic apparatus appropriate to legal practice, and, if it is not, is the study

of legal practice useful to refine our pragmatic instruments?' Moreover, pragmatic theories and instruments are employed in a thorough debate of some central issues of legal practice, such as defeasibility, pragmatic indeterminacy, legal judgments, and legal disagreements. Every essay houses a dense interface between pragmatics and legal theory, with the aim of offering the reader a deep understanding of the most recent advances in both. In particular, the volume contains the chapters described below.

In chapter "Law and the Primacy of Pragmatics", Brian Butler addresses the problem of the relationship between semantics and pragmatics within the law. He challenges the traditional, and still mainstream, picture of the primacy of semantics (and syntax) – the understanding that there is an identifiable semantic meaning that sometimes needs 'pragmatic enrichment' in order to be applied to a particular context. Using the work of Charles Morris and Willard van Orman Quine, Butler reverses this traditional assumption and constructs an analysis of law and jurisprudence that begins from the contrary thesis of the primacy of pragmatics. In particular, as he clearly explains in the text, any reference to semantic meaning is seen, from this stance, as offering a hypothesis about behavioural meaning in linguistic practice in terms of a potentially useful and adoptable paraphrase, and not as an a priori to-be-applied starting point. This paradigm shift is important because it makes us pay greater attention to aspects of legal practice that are traditionally ignored: in particular, the change is from an understanding of judges applying a given semantic content, identified in some determinable, yet to be determined, manner, to a specific case, to an understanding of judicial decision-making in which judges must sift through the behavioural evidence of language use in context in order to offer a hypothesis as to what set of linguistic and broader behaviours is best practised given the options, the actual and the potential habits, available.

In chapter "Defeasibility and Pragmatic Indeterminacy in Law", Andrei Marmor engages a traditional, highly controversial, topic, which is central in legal philosophy as well as in pragmatics and logic: the analysis of defeasible inferences. As is well known, pragmatic inferences are typically defeasible: the inference from the content of a conversational implicature or utterance presupposition may be cancelled by the addition of further premises to the practical argument. This kind of defeasibility also applies to legal inferences from rules to legal verdicts: a legal rule that putatively applies to a given case can be superseded by the addition of further legal premises. After a discussion of the concept of defeasibility, Marmor identifies a new type of defeat, which he labels a *conflicting* defeat: a case in which the superseding premise renders the initial inference genuinely *indeterminate*. A conflicting defeat neither negates the conclusion nor undercuts the initial evidence for it. The defeasibility in such cases consists in the fact that it becomes indeterminate whether or not the putative conclusion follows – namely, it is a conclusion that one would neither be unreasonable to deny, nor unreasonable to affirm. The upshot of this discussion is that defeasibility in law sometimes generates a genuine kind of legal indeterminacy. From a legal point of view, the conclusion would be inconsequential. In such cases, decision-makers must make their judgments on the basis of considerations not dictated by the relevant law.

In chapter "Legal Pragmatics", Mario Jori develops his own, original theory of legal pragmatics: starting from the problem of the relationship between legal language(s) and natural language(s), he gives a full explanation of the pragmatic features of legal practice. In particular, after discussing the differences, similarities and interactions between natural and common languages, on the one hand, and technical and artificial languages, on the other, Jori proposes a pragmatic criterion to distinguish between natural languages and instrumental/artificial ones, arguing that the key distinguishing feature is the different overall function of the language. These different functions are pragmatic aspects of languages, which generate, as secondary aspects, those features at the semantic and syntactical levels that make artificial/instrumental languages difficult for the layman to understand, and make and keep natural languages easy for all their native speakers to understand. According to this criterion legal languages are neither natural (in this sense) nor artificial, but have features of both, belonging to the intermediate category of administered languages. They are instrumental to dealing with the law: that is, they are used with organized force administered by authorities. There is a sub-group of people, experts, who are proficient in the intricacies of the law and of the language of law.

In chapter "The Semantics and Pragmatics of *According to the Law*", José Juan Moreso and Samuele Chilovi offer an analysis of the truth conditions of a type of legal statement that is very regularly discussed: a statement to the effect that according to the law, such-and-such is the case, where the operator 'according to the law' takes within its scope a stipulative or fictional sentence. In order to carry out this analysis, these authors employ a rich philosophical discussion about the truth-conditions of fictional statements (statements of the form 'in fiction x, φ'), trying to investigate to what extent legal statements of a fictional or stipulative type and fictional statements resemble each other, and what can be drawn from one context to provide answers to questions that emerge in the other. They introduce the notions of law-making and fiction-making, and provide an account of how each of these two acts exemplifies a distinct illocutionary type; they dive into the topic of truth in fiction, outlining Lewis's proposal on the semantics and pragmatics of the fictive operator (and pointing out some critical aspects); they characterize legal fictions and stipulations in general terms and highlight the differences and similarities between them and fiction *tout court*; and, finally, they reach an original proposal on the truth-conditions of legal statements in which the law operator takes under its scope a stipulative or fictional sentence, and outline a general principle to determine the implicit content that is expressed by utterances of provisions of this sort.

Chapters "Deep Interpretive Disagreements and Theory of Legal Interpretation" and "Legal Disagreements and Theories of Reference" deal with the same topic: the analysis of legal disagreements. This is a crucial topic within the modern philosophy of law, and, especially, for the legal positivists. In fact, according to Dworkin, the existence of legal disagreements creates serious problems for legal positivism, especially for the sophisticated version proposed by H.L.A. Hart, which emphasizes the relevance of convergence regarding the identification of the law. If the existence of law relies on some kind of agreement, how can participants in a particular legal

practice disagree about what the law establishes? This question is addressed by Vittorio Villa, on the one hand, and by Genoveva Martí and Lorena Ramírez-Ludeña, on the other, using different pragmatic tools and reaching different conclusions.

In particular, in chapter "Deep Interpretive Disagreements and Theory of Legal Interpretation" Vittorio Villa deals with deep interpretive disagreements (DID): very profound divergences that may occur in legal interpretation (for single cases, or for similar cases) among judges and jurists. The main thesis, throughout the paper, is that DID represent genuine, faultless and unsolvable disagreements, and share many important features with other kinds of disagreement much discussed today in the contemporary philosophy of language. A very important point that is stressed in the chapter is that these disagreements are faultless: so far as contrasting interpretations go beyond the threshold represented by their cultural and semantic tolerances, they cannot be considered as the result of mistakes or misunderstandings by legal interpreters, but rather as the outcome of divergent but equally legitimate interpretations of those expressions and of the sentences incorporating them, and these divergences depend on more basic differences between ethico-political comprehensive conceptions that stay in the background of the constitutions of systems of rules of law.

By contrast, in chapter "Legal Disagreements and Theories of Reference" Genoveva Martí and Lorena Ramírez-Ludeña address the problem of legal disagreements by taking into account the theories of direct reference: they claim that a correct reconstruction of the way in which some legal terms actually work in practice leads to a comprehensive response to the Dworkinian challenge to legal positivism. In particular, they critically reconstruct the two basic approaches to reference, descriptivism and a new theory of reference: they argue in favour of the latter and propose that its relevance to the law depends on how our semantic practices are contingently developed. Hence, developing original and very strong arguments, they defend the position that the incidence of direct reference depends on semantic considerations, and not pragmatic ones.

In chapter "The Rational Law-Maker", Alessandro Capone answers an aspect of the basic question of what pragmatics can do for legal theory. Starting from general considerations on pragmatics, intentionality in ordinary conversation and intentionality in the context of judicial proceedings and legal texts, he argues that rationality is an essential prerequisite for understanding the law, and he examines the ideal of the rational law-maker, as originally drawn up by Dascal and Wróblewski (1991). Capone claims that contextualism (of the moderate kind) is the best way to carry out the programme proposed by Dascal and Wróblewski on interpretation and the rational law-maker. He argues that if the rational law-maker postulated by Dascal and Wróblewski is borne in mind, this can guide the interpretation of statutes whose texts create interpretative difficulties. In particular, he shows that considerations of the rational law-maker constitute a compromise between textualism and contextualism.

In chapter "The Pragmatics of Meaning and Morality in the Common Law: Parallels and Divergences" Ross Charnock addresses a fundamental topic of the

philosophy of law: the separability thesis, or the fundamental axiom of legal positivism according to which what the law is and what the law should be are two different questions. According to Charnock, the separability thesis gives rise to at least two obvious objections. First, the two questions are inextricably intertwined. What the law is not purely a matter of interpretation: judicial interpretation is necessarily justified by extra-linguistic considerations, and where the judge departs from the letter of the law for reasons of justice, his decision is usually justified by reference to an alternative interpretation of the text. Similarly, the second question, that of what the law should be, depends not merely on justice and morality, but also on public policy, on political power and influence or on business efficiency (an approach often abusively referred to as 'law and economics'). For this reason, legal interpretation often amounts to no more than a search for plausible alternative meanings, justified by judicial convictions as to what is right (or at least 'convenient'). Second, if recently developed theories of semantics and ethics are valid, there can be no definitive, generally applicable, answer to either question. This excludes the most extreme versions of legal positivism, in favour of a more flexible approach. Charnock argues that the claims made in contextualist semantics and in particularist ethics are based on similar assumptions and follow from closely parallel arguments, and that both semantic interpretation and ethics are directly relevant to legal theory.

Chapters "What Did You (Legally) Say? Cooperative and Strategic Interactions", "Widening the Gricean Picture to Strategic Exchanges" and (partially) "Grice, the Law, and the Linguistic Special Case Thesis" face the same question: is Grice's theory of conversational implicatures applicable to legal interpretation? It is worth noting that this query has a larger scope than is first apparent: in fact, its answer involves complex issues about both the nature of law and the structure of ordinary conversation.

So Claudia Bianchi (chapter "What Did You (Legally) Say? Cooperative and Strategic Interactions") challenges Andrei Marmor's thesis that legal interpretation is a strategic, and sometimes even conflictual, type of interaction, and that it does not follow the same principles as those underlying ordinary conversations. She blurs the distinction between cooperative and strategic interactions, showing that they merely call for different interpretative strategies. Following the Relevance Theory, Claudia Bianchi assumes that the expectations of relevance created in the course of the comprehension process may be more or less sophisticated. She discusses three increasingly sophisticated strategies (Naive Optimism, Cautious Optimism and Sophisticated Understanding), and applies them to the legal domain.

Lucia Morra (chapter "Widening the Gricean Picture to Strategic Exchanges") also challenges Andrei Marmor's thesis that Grice's theory does not always apply to legal interpretation: she claims that that thesis depends on a deviant reading of the adjective 'cooperative' as essentially helpful and sincere, and that instead Grice meant his principle to cover both collaborative and strategic communicative exchanges, an established interpretation confirmed by evidence suggesting that Grice's elaboration of the principle was partly inspired by the Hart-Rawls Principle of Fair Play, and so was meant to cover expectations arising in both cooperative and strategic interactions. Finally, the essay discusses the general form of a cooperative

principle governing the textual exchange between the legislature and the courts, provided that the concretion of the cooperative principle in each legal community is modulated by its legal and social history.

In chapter "Grice, the Law, and the Linguistic Special Case Thesis", I try to challenge the previous positions (by showing that, as a matter of fact, Grice's conversational maxims do not hold in legal interpretation) and to argue that this inapplicability, which derives from the very nature of the cooperative principles and the maxims, fits other peculiarities of legal practice. Moreover, I criticize the thesis – which I label the 'linguistic special case thesis' – according to which legislation is just a special case of ordinary conversation, and that therefore the same conventions, maxims, notions, and so on that govern everyday linguistic interactions should be applied to it.

Finally, in the last chapter ("Materialization in Legal Communication in the Transferring Process") Anne Wagner addresses the stimulating topic of the translatability and change of legal language, fielding a sophisticated theoretical apparatus and an extraordinary wealth of examples. More exactly, she deals with 'materialization': a materialization takes place when adjustments and deterritorialization have found a way, a 'third space', to fit the target language in the translatability process, even though the full conceptual, societal and/or historical loads are not explicitly retained from their original source and may traverse linguistic barriers. Anne Wagner carefully and thoroughly explains this process, and its conditions, results and implications.

Celle, Italy
August 2015

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Law and the Primacy of Pragmatics

Brian E. Butler

Abstract Many standard pictures of pragmatics and legal jurisprudence reflect a common set of largely unquestioned assumptions. One recurring and central assumption is that of a separate and discretely identifiable linguistic system with concomitantly identifiable semantic meaning that then often needs "pragmatic enrichment" in order to be applied to context. In the legal realm this then raises the question of when is it acceptable to enrich semantic context in the context of rule application. This picture of rule and language application rests upon an analysis that takes as given the primacy of semantics to pragmatics. In this paper I will reverse this standard picture and construct an analysis of law and jurisprudence that begins from the assumption of the primacy of pragmatics in linguistic practice. Semantic meaning is seen from this stance as a hypothesis about behavioral meaning in linguistic practice and not as a to-be-applied starting point. Instead of starting from a presumed meaning, seeing pragmatics as primary rests identification of linguistic meaning, or the meaning of an institutional practice such as law, on a more central investigation of legal practices and habit, ostensibly linguistic or not. Using the work of George Herbert Mead, Charles Morris, Willard van Orman Quine and Donald Davidson, all theorists that emphasized behavior broader than that focused upon by more intellectualist theories of language, I will argue that greater attention to the primacy of pragmatics challenges standard theories of jurisprudence thereby forcing greater attention to traditionally ignored aspects of legal practice. This result, in turn, renders a more inclusive analysis necessary in order to construct a proper analysis of the pragmatics of legal practice.

Keywords Law • Pragmatics • Pragmatic enrichment • Semantics • Meaning

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A. Capone, F. Poggi (eds.), *Pragmatics and Law*, Perspectives in Pragmatics, Philosophy & Psychology 7, DOI 10.1007/978-3-319-30385-7_1

1 Introduction

Many conceptions of language, pragmatics and legal jurisprudence reflect a common set of largely unquestioned assumptions. One recurring and central assumption is that of a separate and discretely identifiable linguistic system with concomitantly identifiable semantic meaning and syntactical structure that then often needs "pragmatic enrichment" in order to be applied to the specific demands of diverse contexts. This is an image of previously existing symbol and rule being applied to changing context. In the legal realm this then raises the question of when is it acceptable to enrich semantic content in the context of rule application. If accepted, a theory such as this then helps reinforce a picture of judicial review as at best mechanical application of semantic content, unfortunate but sometimes necessary use of pragmatic enrichment (presumably legitimate if done under necessity and within justifiable limits) and a further and much larger area of judicial discretion, legitimate or otherwise. Once again a primacy of symbol and rule to application is assumed. This picture of rule and language application is reinforced by the parallel analysis that takes as given the primacy of semantics and syntax to pragmatics. In this paper I will argue for a reversal of this standard picture and construct an analysis of law and jurisprudence that begins from the assumption of the primacy of pragmatics in linguistic practice. Any reference to semantic meaning is seen from this stance as offered as a hypothesis about behavioral meaning in linguistic practice in terms of a potentially useful and adoptable paraphrase and not as an a priori to-be-applied starting point. Instead of starting from a presumed meaning, seeing pragmatics as primary rests identification of linguistic meaning, or the meaning of an institutional practice such as law, on a more central investigation of legal practices and habits, ostensibly linguistic or not.

Using the work of Charles Morris and Willard van Orman Quine, two theorists that emphasize the central place of the behavioral aspects of language use, and then a description of concept use in law offered by Karl Llewellyn, I will argue that a greater attention to the primacy of pragmatics as it is characterized by Morris challenges standard theories of pragmatics and jurisprudence. This challenge is important in that it forces a greater attention to traditionally ignored aspects of legal practice. As part of this it necessitates a different and more constructive description of the judicial process. Most basically, the change is from a conception of judges applying a given semantic content identified in some determinant yet to be determined manner to a specific case, to a conception of judicial decision-making wherein judges must sift through the behavioral evidence of language use in context in order to offer a hypothesis as to what set of linguistic and broader behaviors are best practiced given the options, the actual and potential habits, available. This paper will construct an admittedly austere version of behavioral pragmatics in order to make the contrast as clear as possible. It is offered both in the spirit of a real possibility and as a thought experiment that through constructing an alternate theory shows some of the implicit assumptions of those it differs from. As Quine puts it, "It is one of the consolations of philosophy that the benefit of showing how to

dispense with a concept does not hinge on dispensing with it" (Quine 1960: 190). I assume the same is true in the case of alternate conceptual constructions of pragmatics. That being said, I believe that a behavioral conception of pragmatics offers a quite helpful tool for analyzing legal practice.

2 Two Rival Conceptions of Pragmatics

In order to develop a jurisprudence of behavioral pragmatics the conception of pragmatics resisted in this chapter must be made explicit so its assumptions can be guarded against, lest they be imported into the version of pragmatics being constructed. This is not to claim that the conception of pragmatics avoided in this chapter is not helpful or even true to certain aspects of language use in law (though I think both of these claims are plausible). But it is to claim that in order to develop an alternate account it is important to be clear on what is to be dispensed with from the other theory. The strategy in this chapter represents once again, at the very least, the construction of an alternate possible pragmatics of law.

3 Conception One: The Primacy of Semantics and Syntax

In this paper, Andrei Marmor's portrayal of pragmatics in *The Pragmatics of Legal Language* will function as an example of the type of pragmatics, and the resulting analysis of pragmatics in relationship to law, that I aim to resist and replace. Marmor starts by describing the matter of language in law as predominantly that of legislative activity. That is, language in law is described as predominantly made up of commands constructed by legislatures. Courts, then, apply the law through interpretive practices. He then notes that Gricean analysis might be useful given this conception of law because interpretation of such legislative commands could possibly need to add pragmatic aspects in order to fit them to a specific context. Marmor's whole analysis results from this combination of Gricean pragmatics theory with a positivist idea of law as command from authority. Acceptance of Grice's analysis and conception of pragmatics, at least in the form Marmor offers, assumes the priority of the domains of syntax and semantics to any analysis of pragmatics. This priority of syntax and semantics is combined with an unstated and unquestioned belief (because necessary to the argument) that in many cases at least the semantic meaning of the command can be identified prior to and in spite of its need for "pragmatic enrichment." As Marmor puts it "the content of linguistic communication is not always fully determined by the meaning of the words and sentences uttered. Semantics and syntax are essential vehicles for conveying communicative intent, but the content conveyed is very often pragmatically enriched by other factors" (Marmor 2008: 423).

From Marmor's article it is not clear how this semantic content is to be identified, but the priority of the areas of syntax and semantics is so much taken for granted in his analysis that he can write "let us stipulate here that what a speaker says on the occasion of speech is the content which is determined by the syntax and semantics of the expression uttered" (Marmor 2008: 525). That is, the priority of a separate and identifiable realm of syntax and semantics in a natural language is not something that needs to be argued for but is in some manner or other so self-evident that it can rather be agreed upon as a matter beyond reasonable dispute. Given this framework, he goes on to claim that law offers a frustrating area for pragmatic enrichment because it is often adversarial rather than collaborative, and the presence of a collaborative context is central to Grice's schema. The resulting conclusion from this appears to focus legal interpretation on a literalist use of the stipulated semantic and syntactical meaning. In other words, if the requisite collaboration is not available, any attempt at identifying pragmatic enrichment founders because of a lack of agreement between the parties using the language. Because pragmatic enrichment requires such collaboration and agreement it is thereby ruled out of the legal realm. Therefore a legal formalism seems to be the result of application of Gricean pragmatics to the legal realm.

There is much to disagree with in even this extremely brief outline of Marmor's analysis. First, the assumption of a legal positivist framework is controversial. Actual legal systems seem much more complicated than this simplified philosophical conception of law. Second, and following from the first, it is hardly a given that language use in law can be largely reduced to legislative acts. This is particularly true in common-law jurisdictions where legal decisions often have the effect of becoming law. Third, conceiving legal practice, even legislative acts, as dominantly adversarial ignores the overarching collaborative norms that legal and, more narrowly, legislative practice relies upon. Simply put, if there was not more collaboration than disagreement in law the appeal to a legal system (or indeed to a government) would be patently absurd.

But most important for this paper is another problem. This is that Marmor uncritically accepts the ability to identify an already existing semantic and syntactical content of each legal command, indeed he finds it unproblematic just to stipulate this content, and his analysis of pragmatics is grounded upon this unquestioned priority of semantics and syntax to pragmatics.

I find this view of pragmatics, as does Roman Kopytko, as much too "rationalistic," indeed as exemplifying many of the questionable Cartesian traits that Peirce and the pragmatists (and we could also include here the work of the later Wittgenstein) were trying to root out of philosophical analysis (Kopytko 1995: 475). For instance why should a stipulated semantic content be allowed as even plausible? First there is the assumption that given a word, sentence or other selection of legislative language, there will be at least often enough to be exemplary of interpretive practice in the law a discrete semantic content. But more importantly, there is the treatment of semantics as if it is an unquestioned natural type in natural language, and not rather a hypothesis about meaning and language. No doubt the distinction can be made in artificial or ideal language constructs such as that found

in Carnap's work, but why is this so easily accepted of natural languages? Only the uncritical acceptance of these unfortunate rationalist moves allows Marmor to stipulate exactly what actually needs to be substantiated with argument and evidence, I want to challenge this and offer a drastically different analysis of language use in law with a different prioritization between the categories of pragmatics, syntax and semantics wherein pragmatics takes up the primary place. This will require an alternate conception of pragmatics.

4 Conception Two: The Primacy of Pragmatics

In "Pragmatics in the Late Twentieth Century: Countering Recent Historiographic Neglect," Jon F. Pressman argues that the work of the Chicago School on pragmatics has been neglected to the detriment of the field (Pressman 1994: 461). This paper follows him in this assessment and offers a pragmatist conception of pragmatics as can be developed from ideas within philosophical pragmatism and that can be found most explicitly aimed at in the work of Charles Morris. Further, this version of pragmatics, it will be argued, offers a fertile perspective from which a legal pragmatics can be constructed.

Morris specifically sought to construct a pragmatic theory of signs with a behavioral conception of pragmatics following from the work of Charles Sander Peirce, George Herbert Mead, and John Dewey. It also was seen by Morris as related to Otto Neurath's conception of "behavioristics" (Morris 1946: 2, 346). As opposed to the Gricean version of pragmatics offered above where meaning is a stipulated category, Morris starts out his project by noting that the term "meaning" is to be avoided if possible because it is imprecise and too mentalist. Therefore Peirce's strategy, the analysis of language and ideas in terms of activity and habit, is adopted. The clearest statement of this strategy made by Peirce himself is probably found in his 1878 article, "How to Make Our Ideas Clear." Therein, he claims that "the whole function of thought is to produce habits," so when exploring a belief or a term, "to develop its meaning, we have, therefore, simply to determine what habits it produces, for what a thing means is simply what habits it involves" (Peirce 1992: 131). Morris' analysis is so closely attached to Charles Sanders Peirce's theory that in his semiotic analysis he often adopts Peirce's own unwieldy terminology, sometimes verbatim. But for all his debt to Peirce, Morris follows John Dewey in a focus upon a more flexible functionalism as influentially found in Dewey's article "The Reflect Arc Concept in Psychology" (Dewey 1896: 357), and Mead who also conceived of meaning as habit founded upon gesture (Mead 1964: 129).

In addition to avoiding appeals to meaning, Morris, in initially developing his theory of semiotics, also avoids using the terms "pragmatics" or "semantics" because he thinks that they would encourage the creation of pseudo-problems. But Morris ultimately does use both of the latter terms, though somewhat reluctantly, and defines pragmatics as "that portion of semiotic which deals with the origin, uses, and effects of signs within the behavior in which they occur" (Morris 1946:

219). Pragmatics is, despite his own misgivings, somewhat central to his semiotics. Indeed it seems ubiquitous to it, so much so that Thomas Uebel is led to ask whether there is anything not included under the term in Morris' semiotic theory (Uebel 2013: 529–330). In this Uebel seems correct, because as Morris emphasizes, "It is important to stress the embeddedness of signs in behavior situations; it is doubtful whether it is necessary or desirable to introduce the term 'belief' in describing such situations" (Morris 1946: 299). And Morris echoes and reinforces the insights of his pragmatist influences by stating that "significance" means nothing beyond the operation of the sign in behavior, and that the same is true of the meaning of "meaning" (Morris 1964: 9, 15).

In pragmatics as offered by Charles Morris, the philosophy of pragmatism was important in making explicit the instrumental significance of ideas. That is, within his theory there is a central emphasis upon relational and functional. Therefore Morris' conception of pragmatics sees language as to be investigated as human behavior first, before investigating the hypothetical or inferred from behavioral evidence realms of semantics and syntax. Meanings are, under this conception of pragmatics, always explicitly constructed out of and referred back to behavior. Indeed, "Rules for the use of sign vehicles are not ordinarily formulated by the users of a language, or are only partially formulated; they exist rather as habits of behavior, so that only certain sign combinations in fact occur, only certain sign combinations are derived from others, and only certain signs are applied to certain situations" (Morris 1955: 101). Once again, from within behavioral pragmatics, the semantical and syntactical dimensions are understood by noting the conditions of application and hypothesizing meanings and structures. The realm of semantics, therefore, is properly described as linguistic behavior about linguistic behavior. This behaviorist attitude towards language about language is shown quite clearly in Morris' memorable description of the philosopher as "an engine of symbolic synthesis" (Morris 1946: 234). Within this theory, language use is just a particular type of sign behavior.

Another striking and particularly helpful example of such a behaviorist picture of language of the same period as Morris' is found in Willard Van Orman Quine's *Word and Object*. Therein, language is described as a "social art" where meanings are best understood in terms of "dispositions to respond overtly to socially observable stimulations" (Quine 1960: ix). That is, "The uniformity that unites us in communication and belief is a uniformity of resultant patterns overlying a chaotic subjective diversity of connections between words and experience." Further, for Quine this uniformity of linguistic behavior "comes where it matters socially" (Quine 1960: 8). Therefore meanings other than behavior are not primary, but are often idiosyncratic and even "chaotic." Quine offers a striking image for this socializing process; "Different persons growing up in the same language are like different bushes trimmed and trained to take the shape of identical elephants. The anatomical details of twigs and branches will fulfill the elephantine form differently from bush to bush, but the overall outward results are alike" (Quine 1960: 8). But, though our linguistic behavior is often as regular as a set of elephant-shaped bushes, especially in contexts where it is socially important, "Beneath the uniformity that unites us in communication there is a chaotic personal diversity of connections, and, for each of

us, the connections continue to evolve. No two of us learn our language alike, nor, in a sense, does any finish learning it while he lives" (Quine 1960: 13). Therefore, though language behavior is usually quite similar between persons, the area where semantic meaning presumably would reside in a rationalist pragmatics is chaotic and diverse. Quine takes this to show how synonymy with natural language use can be explained sufficiently without use of the word "meaning."

But here it is important to ask the question what if there is disagreement even after all the social training? That is, what are the tolerances allowed between the various elephantine outlines on the bushes, and when does a bush cease to be properly elephant-shaped? In other words, how to we clarify language use when terms seems to be resulting in inconsistent or unpredictable behavior? Quine quite simply offers that in this case of alternative language-behavior we paraphrase to clarify. And in the use of paraphrase, "what we seek is not a synonymous sentence, but one that is more informative by dint of resisting some alternative interpretations" (Quine 1960: 159). Given this possibility, it is argued by Quine that hypothesizing that there is a fixed, explicable, and definable semantic meaning is gratuitous. Further, none of this behaviorist critique loses its force if semantic meaning is not presumed in a "mind" but is rather to be found externally. There is no need of a separate realm from which to import a meaning. This description of natural language as habitual behavior highlights, as does Morris', the "unexamined ontology" of meaning and rationalistic pragmatics as is so clearly seen in Marmor's analysis. Quine concludes from this that it is a mistake to think that analysis is uncovering hidden meanings. It seems that would be like diagramming the chaotic internal structure of the twigs and leaves of the bushes in order to understand what it was to be shaped like an elephant.

5 Behavioral Pragmatics and Law

So how would a behavioral pragmatics constructed along pragmatist lines inform the understanding of law? In *Signs*, *Language and Behavior*, Morris devotes a couple of pages to a perfunctory and not very illuminating analysis of this matter (Morris 1946: 130–132). But I believe that by using his version of pragmatics, as supplemented by Quine's analysis of language above, to analyze law helps bring aspects of language use in legal practices to light that other approaches tend to miss. In addition, Karl Llewellyn's discussion of situational concepts is useful in filling the picture out. To show this, one can start to construct this analysis with Morris' statement that "In terms of pragmatics, a linguistic sign is used in combination with other signs by the members of a social group; a language is a social system of signs mediating the responses of members of a community to one another and to their environment" (Morris 1955: 114). A system of law is usefully described as a systemic attempt at social mediation largely achieved through the use of language as well. Even if we do not solely focus upon the enacted results of legislative activity as Marmor does, language is still a central and ubiquitous tool in legal practices. Of

course in behavioral pragmatics legal language is conceived of as a specific type of language usage. That is, it is the use of language for the control of social behavior. Further, for Morris, "The systematic use of signs is the use of signs to systematize (organize) behavior which other signs tend to provoke" (Morris 1946: 104). Law can be, once again, seen as a social subsystem focusing upon the systematic use of signs to influence social behavior in its specific domain. Putting this together brings out the implications of Morris' conclusion that, "Since sign-behavior is itself a phase of behavior, to control the sign-behavior of other persons is a powerful means of controlling their total behavior" (Morris 1946: 119). That law is largely a system of language-based decision-making and social control attached to various means of enforcement only adds another dimension to the control exercised by linguistic means.

So far so good. On the other hand, as noted by both Morris and Quine, a full systematization of language-behavior is an ideal aim, and not an observable or even possible result of any natural language in use. This is because, among other causes, "even where a common core of signification is obtained, the signs may have to different individuals of the community different additional significations" (Morris 1946: 120). Indeed, "Not merely do signs have a certain signification at a given moment, but they have this signification only within the particular life history of their interpreters" (Morris 1946: 187). Furthermore, and important for an analysis of law, "their appearance affects for good or ill the further life history of these interpreters" (Morris 1946: 187). And all of this presumably would also be true of various sub-groups. Therefore, language is a social habit. It is a living habit, socially shared and yet also specific to each individual. This combination of specificity and generality is also true of specific groups. In addition, language in every case is a living habit that grows and changes all those that share it. As noted by Morris above, to control language as a type of sign behavior is therefore a powerful tool for the protection and formation of social habits.

This all may seem somewhat commonplace. To see the further implications of this behavioral pragmatics analysis recall Marmor's version of rationalist pragmatics and the picture it offered of law. Most simply put, it was a picture of fully identified semantic content being applied in contexts where "pragmatic enrichment" might seem warranted. But, because he sees legislative activity as largely adversarial, the necessary cooperation for pragmatic enrichment is not available, therefore a literalist version of interpretation appears to be necessary. The question of when is it acceptable to enrich semantic content in the context of rule application is therefore answered with an "almost never." If accepted, a theory such as this helps reinforce a picture of judicial review as at best mechanical application of semantic content, unfortunate but sometimes though rarely necessary use of pragmatic enrichment (presumably legitimate if done under necessity and within justifiable limits) and a further and much larger area of judicial discretion, legitimate or otherwise (for positivists usually use of discretion is illegitimate). This picture of rule and language application rests upon an analysis that takes as given the primacy of semantics and syntax to pragmatics. This just accepts something like a symbol and rule framework for both language meaning and legal interpretation. Further, the

picture is unambiguously top-down with the semantic content being applied to various specific circumstances.

Once this is accepted there follows something of a specific set of jurisprudential theories such as textualism, originalism, etc., that then can find application. These all rely upon the idea that linguistic meanings are relatively easy to identify, or at least can be identified, apart from careful observation of behavior and, further, that the meanings can be applied literally. The process of identification can, also, somehow identify the essential semantic content apart from the contextual residue. Further, if there is such a specific identifiable semantic meaning then also easily follows some of the constantly repeated questions and stances of standard jurisprudential theory noted above such as legitimate discretion and proper conceptual application versus improper judicial activism. But this whole constellation of moves is parasitic upon assumptions that though very rarely faced, are quite questionable. Here one just needs to point to Donald Davidson's skepticism about even being able to identify the edges of language (Davidson 1986: 89). Or Wittgenstein's later work can be highlighted for its skepticism of such a priori constructions of what language and linguistic use must be. Both of these influential theories question the foundational assumptions necessary to the get the rationalist semantics theory of law off the ground.

When analyzing law from the stance of behavioral pragmatics the analysis looks drastically different. Most importantly, the assumption of the availability of a completely identifiable semantic content to then be applied to a given context is not available. There is, instead, only linguistic behavior in context. And the contexts are various. Not only is there the context of legal practices such as legislative activity – which though admittedly sometimes adversarial only makes sense within a larger context of agreed areas of cooperative behavior. There are also other areas of linguistic behavior with various overlaps and also some relatively isolated practices. So to understand the meaning of any language, especially language that will have coercive force behind it, one must start from linguistic behavior on the ground. While this refocuses the analysis to a bottom-up process, of course in this conceptual stance the linguistic behavior about linguistic behavior must be included as well. But nowhere to be found is an easy identification of previously existing semantic meaning. This is because linguistic habits, while often quite uniform, are often, in Quine's words, chaotic at the edges and just as often growing and evolving organically in various contexts. Therefore, if a court is applying the language of a legislative act, the example central to Marmor's analysis, the court cannot assume that the language has a meaning separate from the behavioral complexes it is used within. Rather than finding "the" meaning and then applying it, the court actually must construct, or as Quine puts it, paraphrase out of the various uses it is presented with. That is, what the court must seek is not an interpretation "true" to the act's semantic content, but rather an interpretation that is more informative by "dint of resisting some alternative interpretations." When two possibilities plausibly conflict the question is which habit is to be adopted as correct behavior and which is to be excluded by the constructed paraphrase? The court faced with this problem responds by offering one constellation of linguistic behavior as more determinant than

another while conserving the habits deemed most important, therefore reinforcing one set of habits and discouraging the other.

Karl Llewellyn in Chapter VI of *The Theory of Rules*, titled "Our Situational Concepts," offers a suggestive way to fill in the details of such a behavioral pragmatics of law. He starts with identifying the ideal "propositional form" for a rule of law – and that is, "If *x*, then *y*." (Llewellyn 2011: 103). Immediately he then also identifies a central problem with using this formulation in law. As he puts it, "*any* variation in *x* means a variation in the rule" (Llewellyn 2011: 104). So only if a complete and finished concept can be placed in the position of "*x*", the law will vary constantly. Of course the content of the concept could be stipulated and then applied inflexibly, but this assumes a lot. It also makes treats the judge as, Llewellyn puts is as a "supramoron" in the sense that it tries to eliminate all necessary judgment from the role (Llewellyn 2011: 80). Indeed, he sees this hope as being attached also to a ridiculous picture of law as a type of "science of pure words" (Llewellyn 2011: 78). This conception is characterized by him as an idealization that rests upon an antiquated conception of formal logic that includes necessary concepts which can be correctly worked out and defined in advance and that, further, reflect a static ontology essentially true of the world. But, he responds, the world as it confronts the legal practitioner does not stay still long enough for this to be possible – especially in a world of rapid technological change. Law, therefore, transacts its business in a world that does exemplify stability. But the world also exemplifies change, sometimes unpredictable or unforeseen change. Further, law is a system created in a context of case-by-case decisions and human trial and error. Therefore, law is not accurately described as "a systematic and ordered body of law-stuff" but is rather "an unsystematic going system built by accretion plus *occasional* effort at conscious organization" (Llewellyn 2011: 105). What is law cannot, therefore, be reduced to the question of "Is it law, yes or no?" Additionally, legal rulemaking cannot be reduced to clearly identified linguistic content being offered in explicit propositional form. Indeed, Llewellyn claims ultimately that the various exceptions and corrective devices created to work around the ideology of clear rules of law and fixation upon propositional form of command is a set of data which gives a more accurate picture of what law and legal practice really amounts to.

Because law is an ongoing project built by accretion, Llewellyn claims that it "therefore contains concepts which stand with one foot in fact and one foot in legal consequence" (Llewellyn 2011: 105). An example he gives is that of "public utility" – which he sees as a central concept in law but has no definite boundary. Indeed, it is, according to him, best seen as an evolving concept where "no logical formulation can catch the going essence without qualification" (Llewellyn 2011: 105). He argues that concepts such as this are ubiquitous and as the "amphibians of our legal system" are always "living in two worlds of law and fact" (Llewellyn 2011: 105). He calls such concepts "situational concepts." Llewellyn states, "By a 'situational concept' I mean a concept indicated by a word or phrase which a layman would recognize without definition, and whose application a layman would undertake, out of the experience of his own life and without feeling an anticipatory need for definition or for technical instruction. When such a word or phrase is used to indicate and describe the area of application of a rule of law, we have a situational legal concept"

(Llewellyn 2011: 107). For Llewellyn, a situational concept is clearly different from a definitional concept in that definition "is a conscious effort, in advance, to fix sharp edges of the concept with finality." As opposed to this, "a situational concept begins with a core and not with a boundary, begins with common sense obviousness which does not seem to need definition, begins with what anybody of sense can *recognize*, and lets it go at that." Furthermore, such a concept is the result of an "osmotic feeding from the social order" (Llewellyn 2011: 107). This description clearly highlights his belief that the situated concept is a living and organic concept as opposed to the rigid and stultifying attempt to define.

Llewellyn claims that all legal categories began as situational concepts rather than logical, ideal or natural types. The concepts originated, grew and changed in respect to and because of the demands of the time. They were only developed and complete as far as necessary for the needs at hand. In the process sometimes concepts harden. At other times concepts become so fuzzy that the core becomes questionable. This is due to various reasons. But partially it is because parties to the law seek to use it for their own specific purposes. As he explains, "men and groupings of men who are straining to get or use or to gouge out or to expand into or defend *all* that the going legal system will yield them as against their competitors or their adversaries or the general elbow-room of the vicinity. Bad men, greedy men, exuberant men, ambitious men, excited men, men in combat, seek to turn leeway their way. So that in close cases, even in a relatively stable culture, have a habit of turning up; and in a mobile culture they pop up frequently" (Llewellyn 2011: 109). Because of this an attempt to fix the boundaries of the concept when too rigid or too fuzzy becomes necessary. Disputants appealing to law then run to the various specialist techniques offered across the institutions involved in the legal process. But, according to Llewellyn, this attempt to fix boundaries is never complete. Nor should it be. Both stability and flexibility are legal virtues. Further, the appeal to definition or some other method of finding a completed semantic content is impossible because of the lack of system in both our concepts and our law. In addition, even specific and explicit rules formulated in the style of the legal proposition run on implicit implications such as what he calls the "negative twin rule," wherein, according to the example he offers, if the use of a sample explicitly sets off some legal results the implicit side is that by not using the sample the results are not set off. But this implicit content is nowhere seen in the rule. Further, courts can actually identify content enough in order to utilize situational concepts, therefore alleviating the need for the quixotic search for definition. Llewellyn gives an example from the US Supreme Court-*Nix v. Hedden*, 149 US 304 (1893)-where the Court uses "tomato" as vegetable to reflect ordinary understanding rather than as a fruit as the botanist would have categorized it, and another example where Oliver Wendell Holmes in *Commonwealth v. Wright*, 137 Mass 250 (1884) gave to the jury the question of what definition of lottery should be used in context of the case at hand.

Ultimately Llewellyn describes the place of language in law in terms strikingly similar to those of Morris; "rules use words as their primary machinery" and therefore, "can effect such results only by passing through *men* trained and shaped into teamplay and institutional patterns." And for Llewellyn as for Morris, the rules not