**Marcin Matczak**

**A Theory that Beats the Theory?**

**Lineages, the Growth of Signs, and Dynamic Legal Interpretation**

**ABSTRACT**

*Legal philosophers distinguish between a static and a dynamic interpretation of law. The former assumes that the meaning of the words used in a legal text is set at the moment of its enactment and does not change with time. The latter allows the interpreters to update the meaning and apply a contemporary understanding to the text. The dispute between these competing theories has significant ramifications for social and political life. To take an example, depending on the approach, the term “cruel punishment” used in the US Constitution will be given an 18th century meaning or a contemporary one.*

*The philosophy of language seems to provide greater support to the static approach to legal interpretation. Within this approach the lawmaker is perceived as a speaker and legal texts are interpreted as utterances. As a consequence, interpretation is a quest for the speaker/lawmaker’s intention or the public meaning that prevailed at the time of enactment. Neither the intention nor the public meaning are considered to have changed in time.*

*In this paper I argue that the philosophy of language provides the dynamic approach with an equally robust support as the static one. This support comes from an externalist perspective in semantics, rooted in philosophical pragmatism and supported by Ruth Millikan’s concept of meaning as proper function. Grounding the dynamic approach in a well-founded linguistic philosophy rises to the challenge presented by the originalists’ declaration that “it takes a theory to beat a theory”*.

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**LINEAGES, THE GROWTH OF SIGNS, AND DYNAMIC LEGAL INTERPRETATION**

1. **Introduction**

Who decides on the meaning of legal text[[1]](#footnote-1)? The traditional approach in jurisprudence endows the lawmaker with this privilege. The theoretical basis for this approach is intentionalism: the intention of the speaker gives the meaning to their words; without intention there is no meaning (Fish 2008).

Even those who criticize the intentionalist approach locate the source of a text’s meaning at the moment when it was created. For instance, the versions of originalism based on the original public meaning claim the meaning of a legal text is defined by the linguistic conventions prevailing at the time of its enactment.

Any proposals to treat subsequent linguistic practice as having any decisive influence on the meaning of the legal text are considered suspect for at least two reasons. First, such proposals seem to lack support from the philosophy of language and as such are theoretically weak. An expression of these suspicions is the originalists’ bon-mot “it takes a theory to beat a theory”[[2]](#footnote-2). Second, admitting that the meaning of the legal text changes over time is felt to undermine the stability of the law, increase the interpreters’ discretionary powers or even lead to judicial lawmaking. The corollary is a perceived threat to the rule of law by the rule of men.

In this paper I provide a counter-argument to these reservations and a theoretical basis for the claim that linguistic practice subsequent to a legal text’s enactment can and should influence its meaning.  First I prove that there exists a convincing linguistic theory which explains how the meaning of the language evolves over time. Secondly, I argue that the evolution of meaning is entirely independent from any individual language user. This evolution is a traceable, relatively transparent and verifiable process: the individual interpreter’s discretionary authority over meaning is thus strictly curtailed.

In the first part of this paper I briefly present the current debate on optimal approach to interpreting legal texts, focusing on the dispute between static and dynamic theories of interpretation. Originalism and living constitutionalism respectively represent each theory. I go on to examine theoretical and philosophical backgrounds for static and dynamic theories, showing how opposite semantic frameworks justify opposing approaches: internalism for static theories and externalism for dynamic ones. I conclude that the philosophical justification for semantic externalism is robust enough to provide a theory that can beat the theory.

1. **Static and Dynamic Legal Interpretation – Two Approaches in Legal Philosophy**

Lay people may perceive legal interpretation as an automatic, algorithmic process that is carried out in a similar way by all judges and lawyers, no matter where or when it takes place. In fact, lawyers disagree profoundly as to the optimal way legal texts should be interpreted and propose entirely different interpretive strategies. A key dispute is whether legal text can change its meaning over time, and two competing theories propose opposing answers. Static theories hold that the meaning of a legal text is set at the moment of the text’s enactment and does not change subsequently. Accordingly, the only way to change the meaning of the text is to amend the text itself. By contrast, dynamic theories hold that the meaning of the legal text can evolve over time. Consequently, lawyers are entitled to update the meaning of the legal text according to the linguistic conventions prevailing at the moment of its interpretation.

The resolution of the dispute between the static and the dynamic theories has significant practical ramifications. Legal texts provide patterns of behavior for individuals and corporations, and refusal to follow those patterns may result in serious sanctions. The patterns are encoded in the text and decoded through legal interpretation. Consequently, the way the interpretation is carried out has a crucial impact on the final shape of the encoded patterns. The 8th amendment to the US Constitution provides a clear exemplification of this relationship. The linguistic content of the crucial phrase “cruel and unusual punishment…..” depends on the interpretative approach one takes. A static approach will result in endowing the term with the meaning prevailing at the end of the 18th Century. A dynamic approach will lead to interpreting the phrase in accordance with the most contemporary understanding of what is cruel[[3]](#footnote-3).

A prominent example of a static theory of legal interpretation is originalism, a theory of constitutional interpretation especially popular in the US. This theory comes in two versions: the originalism of original intentions and the originalism of original public meaning (Calabresi, 2007, p. 154). The first presents “*the view that the original intentions of the Framers should guide constitutional interpretation”* (Solum 2011). The second argues that “*constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context”* (Solum 2008, p. 2).

A crucial semantic thesis defended by originalists of all stripes is the so-called fixation thesis. As Solum claims “*almost all originalists agree, explicitly or implicitly, that the meaning (or “semantic content”) of a given Constitutional provision was fixed at the time the provision was framed and ratified. We can call this idea the fixation thesis”.* (Solum 2008, p. 2).

Dynamic theories of legal interpretation can be exemplified by the theory presented by Eskridge (1987) and a group of theories collectively known as ‘living constitutionalism’ (Strauss 2010). Contrary to originalists, dynamic theories assumed that interpreters should update the meaning of the legal text, adjusting it to the linguistic conventions prevailing at the moment of interpretation, rather than to those that were in force at the moment of the text’s enactment. Eskridge distinguishes between three perspectives in legal interpretation. The first, a *textual perspective*, is taken by an interpreter who focuses on the text as a formal factor limiting the number of available interpretive options. The second, a *historical perspective*, primarily takes into consideration the expectations of the historical lawgiver. The third, *an* *evolutive perspective,* allows the interpreter to account for the change in the context in which legal text operates, in particular change in the social and legal environment since its enactment. The main thesis of Eskridge’s work is that the evolutive perspective should prevail over the textual and historical ones (Eskridge 1987, p. 1484).

The proposal to substitute the textual perspective with the evolutive one is a weakness of Eskridge’s theory in particular, and traditional dynamic theories in general, because it is based on a false dichotomy. In this paper I demonstrate that the textual perspective in fact encompasses the evolutive one. A different theory of language than that assumed by the static theories of interpretation is required to show how the meaning of legal texts evolve. To this end, in the next section I outline first the theory of language assumed under the static approach and then compare it with one that can support the dynamic approach.

1. **Static Theories of Interpretation and the Philosophy of Language**

Originalism, the paragon of static theory, comes in two forms: the originalism of original intentions and the originalism of original public meaning. Let us evaluate the respective philosophical justifications of these two forms, extract their essence, and present an alternative theoretical framework – one within which the dynamic theory of interpretation appears equally viable.

* 1. ***Originalism of original intentions – a theoretical background***

The intention-based static theories of legal interpretation can be justified by a group of linguistic and philosophical theories called ‘semantic internalism’. These theories hold that internal mental processes, in particular a speaker’s intention, are the crucial factors influencing meaning. According to Barwise and Perry, those theories

 *stress the power of language to classify minds, the mental significance of language, and treat the classification of events as derivative.* *Thus John Locke held that words, in their primary signification, stand for ideas. They stand for objects in the world derivatively, since the ideas stand for those object*s (Barwise, Perry 1983, p. 3-4)*.*

According to this approach, the meaning of an utterance is constituted by the internal mental state of a speaker (writer) who consciously chooses the linguistic conventions he or she intends to use at a particular instance of communication. As such, meaning happens inside the speakers’ heads, and words and sentences reflect the ideas in their minds, not the external world.

 Below I take issue with the main assumption of the intention-based originalism, namely that historical intention is a factor constituting the meaning of a legal text. To this purpose I apply the theory of meaning called ‘semantic externalism’, in particular Ruth. G. Millikan’s concept of lineages and her theory of meaning as proper function (Millikan 1984, 2005). My aim is to prove that the meaning is constituted independently from an individual intention and is a product of evolution that starts before the moment of the enactment of the legal text and does not end at that point.

* 1. ***Originalism of original intentions – an alternative framework***

Semantic internalism does not enjoy a monopoly over the philosophy of language. One can describe an alternative approach thus:

*A second approach is to focus on the external significance of language, on its connection with the described world rather than the describing mind. Sentences are classified not by the ideas they express, but how they describe things to be* (Barwise, Perry, 1983, p. 4)*.*

A useful umbrella term for a group of theories that oppose semantic internalism is semantic externalism. Those theories can be generally described by Putnam’s famous phrase “Meaning just ain’t in the head” (Putnam 1975). The idea that meaning resides outside the mind, in the relations in the external world has been also proposed by Barwise and Perry:

*Meaning’s natural home is the world, for meaning arises out of the regular relations that hold among situations – bits of reality.* (Barwise, Perry 1983, p. 16)

and D. Brink:

*Language users interact with their natural and social environment in certain ways; in particular they introduce terms (e.g. names and general terms) to pick out interesting features of their environment.* (Brink 1989, p. 182)

Semantic externalism advocates the idea of meaning autonomous of individual users of a language, be they speaker or recipient. Meaning evolves in the process of repeatable co-occurrence of words (sentences)[[4]](#footnote-4) and states of affairs. A name co-occurs with a person, a noun co-occurs with a thing, a predicate co-occurs with a given attribute. The co-occurrence can be physical (words and things or qualities are present at the same time and place), or of a historical-causal nature (as in Kripke-Putnam semantics, in which our current reference extends back to the first use of the word). As a result of this co-occurrence, historical chains of usages come into existence – Millikan calls them ‘lineages’[[5]](#footnote-5). In this conception, linguistic signs behave similarly to natural signs – they co-occur with states of affairs in the world. Smoke co-occurs with fire, dark clouds with rain, etc. The specifics of linguistic signs is that they are produced by individuals, not by the laws of nature.

A lineage starts the moment a word is used in a particular way for the first time. This moment is called “*the original baptism”* by Kripke and “*the naming ceremony”* by Putnam. At this moment, the speaker for the first time points out to a particular element of reality (a state of affairs, a quality) and uses the word to refer to this element of reality. Subsequent usages of this word are anchored in this first moment. The users of language borrow the reference from the previous uses of the language. By doing so, the users take part in the chain of usages and thereby in the tradition of this word’s use[[6]](#footnote-6).

At the naming ceremony and at each subsequent instance of a word’s use, a co-occurrence takes place between an utterance of the word and the state of affairs in which a designate of this word is instantiated. The chain of co-occurrences (a lineage) leads a so- called ‘stabilizing function’ of signs to emerge (Millikan 1984). The stabilizing function means that irrespective of a particular user’s intention, a word refers to a state of affairs to which it referred in the past. What defines the reference is the link between the word and the state of affairs typical to it; the link has been constituted by a critical mass of cases in which users referred by this word to that state of affairs. In this way a public language emerges, consisting of the history of usages and a relatively stable semantic link between the words and reality that constitutes meaning. Individual intentions are far from central to this process.

The vision of language proposed by Millikan is based on the assumption that linguistic signs systematically refer to states of affairs, understood as certain configurations of elements of reality. This systematic link between a sign and a reality has been recognized by the members of a linguistic community because they benefited from doing so.

Millikan (1984) provides a good illustration of that benefit in the communication between beavers. In case of danger, those creatures splash water with their tails as a sign of warning. Millikan explains that in the evolutionary history of beavers the signal of splashing sufficiently often correlated with a state of affairs that involved danger (e.g. the approach of a predator) to produce a habitual reaction to that signal. Beavers learned to recognize the signal of splashing because they benefited from such recognition. This kind of benefit is referred to as ‘survival value’ by Millikan (1984): recognizing the sign makes one better-off than failing to recognize the sign. The beavers who failed to recognize the sign for approaching danger probably also failed to survive, and whatever individual meaning they assigned to tail-splashing disappeared with them.

Human language is a complex system of signs that as a whole helped *homo sapiens* to survive and to dominate the globe. However, a particular sign − a word or a phrase − does not need to increase our survival chance directly, but simply to be useful for some purpose: very often as an element of a bigger structure of signs. In this sense both the word ‘danger’ and the connector ‘and’ have a survival value. ‘Danger”’ has a survival value for humans, similar to that of the beavers’ splashing, but ‘and’ is almost equally useful as a sign that indicates an important relation of conjunction between two things. In a similar vein, cardinal numbers, punctuation marks and intonations have survival value. They all are copied by the members of a linguistic community because they work: they help their users in achieving their vital purposes and so are reproduced, creating a historical chain of usages. Those chains are sets of tokens of a particular sign, used many times for a similar purpose. This purpose or the reason why a sign is useful and is reproduced is this sign’s “proper function”[[7]](#footnote-7): the function the sign performs in a particular linguistic community. In the pragmatic framework, the proper function equates with the meaning of the sign.

To take a more abstract example of the survival value and proper function, one which is closer related to the real world of constitutional interpretation, let us analyse Richard Bernstein’s exemplification of the predicate “is cruel” (Bernstein 2010, p. 159). One cannot apply this phrase, for example, to a state of affairs in which a woman helps a blind man to cross the road. This results from the lineage of the predicate “is cruel” containing states of affairs whose characteristics are very different from those in which one person helps another: “is cruel” refers to states of affairs where the suffering of one person is caused by another person. Since that feature is not present in the case of woman helping the blind man, it is not possible to use the predicate “is cruel”. To put it another way, if applied to a helpful gesture, the predicate “is cruel” will not perform its proper function in relation to the state of affairs at hand, and will thereby threaten the stability of the use of that predicate. The lesson from this and similar examples is that meaning is a product of relations in the world, not the relations within someone’s mind: through a process of use, recognition and re-use, some relations become semantic relations, and others not.

In terms of an interpreter’s work, to determine the meaning of a sign is not to determine the intention of an individual user, but rather to determine the sign’s proper function. The meaning does not depend on an individual user’s intention or their mental states, but is created by a long-lasting practice of a community that keeps reproducing the signs in order to influence their environment. As a consequence, the meaning becomes not only autonomous from an individual intention, but sometimes even conflicts with it. Getting back to the example of beavers, an individual beaver could on some occasions splash water with its tail with an intention to express joy. Nevertheless, the sign the joyful creature would produce by doing so would cause other beavers to flee. The reason for the discrepancy between the beaver’s intention and its fellow beavers’ interpretation would be the historically shaped proper function of the sign which is to warn against an imminent danger[[8]](#footnote-8).

The proper function of linguistic instruments (words, sentences, punctuation marks, voice intonations etc.) constitutes what we call public language. To be stable enough to allow co-ordination of behaviors among members of a community, this language must be to some extent independent from the intention of an individual user. If the meaning of public language depended on an *ad hoc* intention of a particular user, it would differ significantly from instance to instance. Were this the case, we would find ourselves in the position of Humpty-Dumpty[[9]](#footnote-9), and not only we but also the stability of our linguistic practice would risk a great fall.

To conclude, we have seen why the lawmaker’s intention is not crucial for setting the meaning: because no individual user’s intention can define the meaning of public language. As Millikan shows, a chain of using the linguistic instruments in a public language has to be in place before the lawmaker’s first use. Otherwise, the lawmaker’s words and sentences cannot have a proper function, as no such function could have developed. Without a proper function there is no public language, and consequently no public meaning. If the sounds or marks used by the lawmaker are produced for the first time in history, they would come across as gibberish. On the other hand, if there is a history of using the words and sentences before they become elements of a legal text, the meaning of those words and sentences is defined by this history, not by the intention of the lawmaker.

* 1. ***Originalism of original public meaning – a theoretical background***

A linguistic justification for the second form of originalism, that of original public meaning, is based more on conventions than intentions. This newer version of originalism is a response to the argument that the intention-based approach is non-viable, not least because of the impossibility of identifying and aggregating the legislators’ intentions (Ekins 2013). To meet this challenge, the focus of originalists has shifted from original intentions to original public meaning. The essence of this type of originalism is nicely presented by Solum:

*[I]magine that you are reading a text written quite some time ago—a letter written in the thirteenth century, for example. If you want to know what the letter means (or more precisely, what it communicates), you will need to know what the words and phrases used in the letter meant at the time the letter was written. Some words may be archaic—no longer used in contemporary English. Other words may have changed their meaning over time—and you would want to know what their meaning was in the thirteenth century. (…) All of this seems uncontroversial when the text we are interpreting is a letter. It is hard to imagine someone saying that we should use twenty-first century linguistic practices to understand a thirteenth-century text. And it would be very odd indeed for someone to suggest that we could better understand the letter if we were to disregard the thirteenth-century context in which it was written and instead imagine that the letter had been written today under different circumstances. Ignoring the time and place at which the letter was written would seem like a strategy for misunderstanding!* (Solum 2015, p. 2)

Such a simple and powerful approach to communication *via* legal texts poses a difficulty for a critic, as it seems to require them to take a less straightforward one. The 13th century letter argument is so obvious it seems irrefutable, except by some convoluted approach. But let us take that road less travelled and see if there is a viable and non-circuitous alternative to Solum’s argument.

* 1. ***Originalism of original public meaning – an alternative framework***

When evaluating the intention-based originalism, I argued against its main thesis and showed that it is not the historical intention that constitutes meaning. Similarly, in the case of convention-based originalism I will argue that the historical convention does not set the meaning of the legal text. The father of semantic externalism, Charles S. Peirce, has provided the tool to prove this thesis, namely his theory of ‘the growth of signs’. Let me first outline the theory and then indicate how it justifies my thesis.

According to Peirce, signs operate not as two-element entities (consisting of sign and object), but as three-element entities, the third element of which he calls an ‘interpretant’:

*I define a sign as anything which is so determined by something else, called its Object, and so determines an effect upon a person, which effect I call its interpretant, that the latter is thereby mediately determined by the former*. (Peirce 1998, p. 478).

In the broadest terms, the interpretant is the way the relationship between the sign and the object is recognized by the interpreter. There are least a two types of interpretants – a dynamical interpretant and the final interpretant. The dynamical interpretant is the way the relationship between the sign and the object is perceived at a particular moment in time[[10]](#footnote-10). The ‘final interpretant’ according to Peirce, is the way a sign-object relationship is understood “at the end of the inquiry”[[11]](#footnote-11).

The inquiry Peirce refers to is a process of ‘semeiosis’: a long-lasting effort of the linguistic community to define and understand the true meaning of the signs this community uses. This process encompasses defining the signs by using other signs, to make them clearer and better understood, as well as applying signs to reality, e.g. using signs as instructions for action. The process of semeiosis is possible thanks to the ongoing and unceasing nature of linguistic practice. Both the translation of signs into signs, and the translation of signs into actions happens by using the signs in particular situations.

The process of translating signs into signs must be closed at some point. This point is called the ‘final interpretant’, and can be simultaneously understood in two ways. One way is as the final translation of the sign into the action we undertake with regard to reality (a result of interpreting the sign). For example, when one is given an order, one can translate the words used in the order into simpler terms to understand the order in an optimal way, but finally the order must be translated into a particular action – that which was ordered.

The other way of understanding the final interpretant consists of the way the community interprets the sign at the end of the process of semeiosis, understood here as a social process of gathering knowledge on the object of the sign and the relation of that object to the sign:

*the Final Interpretant is the one Interpretative result to which every Interpreter is destined to come if the Sign is sufficiently considered. . . . The Final Interpretant is that toward which the actual tends’ (Short (2007, p.190)*

In other words, translating signs into other signs and translating signs into action increase the social knowledge about the signs’ real meaning. Thanks to this, as Peirce puts it, the signs “grow” (Nöth 2014); this growth is a form of evolution that changes the meaning of those signs:

*I believe in mooring our words by certain applications and letting them change their meaning as our conceptions of the things to which we have applied them progress*[[12]](#footnote-12)

and

*Every symbol is a living thing, in a very strict sense that is no mere figure of speech. The body of the symbol changes slowly, but its meaning inevitably grows, incorporates new elements and throws off old ones” (CP 2.222, 1903).*

In Nöth’s interpretation of Peirce:

1. Signs grow with the increase of knowledge or amount of information that they have accumulated in the course of time. This knowledge grows in parallel with the growth of science: “The woof and warp of all thought and all research is symbols, and the life of thought and science is the life inherent in symbols” (Nöth 2010, p. 178, references in the original omitted);
2. Knowledge grows through interpretation, or as Peirce puts it: “in their interpretants, signs grow in information”. Knowledge is produced in a process in which a sign is interpreted in the form of a new and more informative sign, the latter being the interpretant of the former (Nöth 2010, p. 179 references in the original omitted);
3. Signs grow through both the addition and the subtraction of characteristics attributed; by doing so, signs made progress in their fitness to represent the object of the sign (Nöth 2010, p. 179).

Peirce bases the concept of the growth of signs on two ideas: ‘indexical signification’ and ‘hypostatic abstraction’[[13]](#footnote-13). The former is derived from the difference between ‘index’ and ‘icon’ as aspects of a sign. In general terms, an index is an aspect of sign that points to a feature or a phenomenon, and an icon is an aspect of a sign that represents that feature or phenomenon. The index is deprived of any content, it only indicates. The icon reflects the nature of the thing indicated. People frequently use indexes when not sure about the real nature of the thing they indicate. Indexes are particularly useful in a process Peirce calls “hypostatic abstraction” (Short 2007, p. 267-268). Having experienced a series of similar states of affairs, we abstract a feature that is common to those states of affairs and give it a name. This name is a sign and it is mainly an index, as our knowledge of the feature is limited. This hypostatic abstraction is a working hypothesis that gets tested in subsequently experienced states of affairs. If the ability to indicate the feature in next states of affairs proves useful for practical reasons, the sign is reused and copied by others. If not, the sign is abandoned. The only way to understand the real value of a sign is to put it into practice and observe how it works. The crucial element of the Peircean theory of signs is practice: signs are constantly being used in permanent semeiosis, in order to confirm the usefulness of the hypostatic abstraction that had been made.

Let us move now from the linguistic background to the legal context. In what follows I assume that legal terms are subject to permanent semeiosis both at the individual and social level and that they very often work as indexes, not icons in the process of hypostatic abstraction. That legal terms are subject to semeiosis means that they are permanently being translated into each other in the legal practice that encompasses both legal academia and judicial review. Moreover, in the work of courts the signs are translated into actions, i.e. the signs are applied to reality, to the facts of the case. That legal terms work as indexes can be seen in their indicating a feature or phenomenon without defining it fully, perhaps because such a complete definition is not possible at the moment of indication.

The term “cruel punishment” can serve as an example of both a subject of permanent semeiosis and an indexical signification. At some time it may prove useful to create the sign ‘cruel punishment’ that indicates, let us say, “that which causes suffering and is deliberately imposed by another human being”. The content of the “that” element (an index) is then discovered in a public effort of semeiosis, or, as Putnam put it, the social division of linguistic labor (Putnam 1975). The way the sign ‘cruel punishment’ was understood at the moment of its first use in the legal text is, in Peircean terms, a dynamical interpretant of this sign. Thus, the original public meaning the originalists prioritize is only a stage in the process of semeiosis that aims at reaching the final interpretant: the full understanding of the sign’s meaning, i.e. the full understanding of what is ‘cruel’. Under the spotlight of externalist semantics, the original public meaning − a dynamical interpretant from the time of the text’s enactment − loses its significance. From the perspective of an interpreter, the lawmaker’s use is one of many uses of a particular sign, and does not constitute a significant factor in defining the meaning of that sign.

Extrapolating from Peirce, legal interpretation must take into consideration the linguistic practice subsequent to the enactment within both the legal and general discourse, because alongside this practice our knowledge of real content of signs grow. Thus, the way we interpret the signs constituting the legal text today is more important that the way they were understood at the moment of the text’s enactment. To be sure, our understanding is another dynamical interpretant, not the final one. But our linguistic practice is more developed and richer, because the number of usages of the interpreted word is bigger – it has grown from the moment of the text’s enactment. The longer the chain of usages is, the better we understand the real value and the real function of a particular sign. With every instance of linguistic practice involving the sign we proceed further in the process of semeiosis, and we are closer to the final interpretant. Ultimately, when applying legal terms to the contemporary world, we endow them with the best meaning we have arrived at in the process of semeiosis – the meaning developed in the legal and linguistic practice of our community.

1. **Interpreting Legal Text Dynamically**

Apart from exceptional situations in which a lawmaker coins a new word[[14]](#footnote-14), naming ceremonies for legal terms take place in general language or in specialized, legal language, often long before the lawmaker uses this word. In enacting a new law, the lawmaker includes into the legal language the words that have been used before, with their histories – their lineages[[15]](#footnote-15). The existing lineages and the proper functions of the words used make language autonomous from the lawmaker.

As the lawmaker uses existing words with their meanings (proper functions) already in place, he or she is dependent on the previous usages. The semantic situation of the lawmaker makes her equal to other users of language as far as the power to influence public meaning is concerned. In this regard, the lawmaker’s situation does not differ much from that of the interpreter. Neither of them can impact the meaning of particular words by his or her individual understanding[[16]](#footnote-16). In order to make the lawmaker’s use a crucial factor in defining the meaning, there must be something special in this use: it must be in some sense a milestone use, which changes the way the public language is used. In the historical chain of usages, such milestone moments do not happen often, if at all. Like in the general theory of evolution, the creation and the evolution of language is a slow process that produces its outcomes over long periods of times, not by spectacular one-off changes.

Between enactment and interpretation the words of a legal text are used many times and their lineages become much longer. The language is constantly in operation: court verdicts, opinions presented in legal literature and commentaries are all instances of the words used in the legal text. Legal terms are in permanent circulation and are consistently grounded in preceding uses. Legal interpretation should therefore by necessity involve tracing how a particular term has been used in a particular linguistic community. Even originalists agree that this tracing should refer to the uses that had taken place before the utterance that is interpreted occurred (Solum 2015). If, however, legal text is to impact reality after it has been enacted, the question arises as to why neglect subsequent uses of the interpreted term? Within the theoretical framework supporting the static theories of interpretation this question seems irrational: the only factors that shape the meaning of the text – original intention or original convention – are historically located *before* the moment of enactment or *simultaneously* with it. Within externalist semantics the question is crucial: each subsequent use of the term enables the community to better understand the function of the term, and, by extension, its meaning. If the process of using the terms is the Peircean semeiosis, there is no reason to stop tracing the uses of legal terms at the moment of enactment – the process should be continued till the moment of interpretation, in order to maximize the interpreter’s chance for gaining a full understanding of the terms.

But are those subsequent uses really relevant for legal interpretation? Despite all the theories, a particularly stubborn *advocatus diaboli* could still claim that for legal interpretation only one use of language counts: the lawmaker’s one. After all, the enactment of a legal text is the lawmaker’s utterance and this utterance takes place only once, at a particular point in time.

To rebut this challenge, one needs to dissect the concept of “utterance”. Does the utterance in writing work in the same way as the utterance in speech? The latter is without doubt a one-off event; sounds of speech do not last sufficiently long to be applied in new contexts. Unlikely the speech, however, writing makes words long-lasting. A characteristic of written utterances, as opposed to spoken ones, is their capacity for multiple applications: while speech is a one-off exercise, limited to the time and place in which the speaker is located, written utterances are capable of being used in many different contexts (Goody 1986, p. 125). Using writing in law implicates that the practical consequences of legal acts extend beyond the moment of their enactment. Writing is a tool of transportation, making it possible for the tokens of words to appear in future situations and be applied to them.

The static theories of legal interpretation neglect the transportation function of writing and treat legal text as oral utterances: one-off events, located in a particular point in time. In fact, legal text can be treated as multi-utterances, according to the well-recognized adage: “law is always speaking”[[17]](#footnote-17). Semantic externalism allows us to treat this adage not just as a metaphor but as a literal statement about the pragmatic function of legal texts: they “speak” every time they are read.  Therefore, their enactment is not the only moment the conventional meaning of their signs should be analyzed. The moment of the interpretation is equally, if not better suited for that purpose.

The always-speaking nature of law can be even better understood by using J.L. Austin’s concept of illocutionary uptake (Austin 1971): the conventional effect a speech act causes. In speech, the illocutionary uptake occurs within a context when both speaker and hearer are present, and occurs only once; in writing it is otherwise[[18]](#footnote-18). The illocutionary acts performed in writing can result in multiple illocutionary uptakes. What is more, illocutionary uptake may occur in other places and in other locations than that in which the author of the act was located. The originalists assume that the illocutionary uptake occurring among the addressees that lived at the time of the enactment is privileged. This assumption is far from obvious once one adapts and applies Austin’s theory to written communication. The potential of a written speech act for illocutionary multi-uptake is a strong argument for a non-originalist approach to the concept of ‘utterance’: one should not treat it as a one-off expression, but as a lasting sign that influences our reality in a long run.

Returning to the interpretation of legal text, its interpreter faces three facts which impact that text’s meaning. First, he or she is exposed to a single utterance – one of the many of which this text is capable. Second, the way he or she understands the utterance is a function of the lineage of its terms. Third, that lineage is at a particular stage of its ongoing development on account of the process of semiosis. All three facts combined provide the interpreter with a justification to endow legal text with a new linguistic meaning: that prevailing at the moment of interpretation. In Peircean terms, the reader of a legal text forms an interpretant of it in their heads, because the text speaks to him or her in a particular context. The interpretant is constituted by the public meaning of this text resulting from the current proper function of the signs of that text.

The whole enterprise of jurisprudence aims at improving the understanding of law as a set of words that influence the reality we live in. The process of understanding is structured as Peircean semeiosis. In some aspects it is theoretical: the terms are defined and refined, translated into each other, contradictions are removed and the relations between the concepts crystallize. But there is a practical aspect to semeiosis, too. The courts apply the words of legal text to the world: they qualify states of affairs as legal or illegal, find people guilty or innocent, and authoritatively decide on the scope of statutory terms. They extend these terms to new phenomena or restrict previous application, to secure the proper function of those terms. External semantics argues that both the theoretical and practical aspect of the semeiosis must be taken into consideration. The fact that the semeiosis continues after the enactment constitutes an argument for dynamic interpretation, not against it. As long as a legal text has practical significance, its terms should be interpreted according to the current status of the semeiosis. And the practical significance of the legal text lasts as long as the text is in force. Indeed, the very idea of “being in force” entails the potentiality of causing practical consequences. Following the pragmatic maxim, those consequences cannot be neglected in the discussion on the optimal approach to legal interpretation[[19]](#footnote-19).

The analysis presented above allows us to devise a theory that can potentially compete with the static theories of legal interpretation in general, and with originalism in particular. Every static approach to legal interpretation anchors the meaning in the moment of the text’s utterance – in the legislative context, upon its promulgation or ratification. The two versions of static theories within originalism agree that the moment of utterance is of utmost importance for setting the meaning of the text. In both cases a historical fact is at play – a fact of intending a particular meaning at a particular moment in time or a fact of particular meaning being given to the words by a convention existing at the time of enactment. As we have seen, the externalist semantics, based on philosophical pragmatism, undermines the claim that any of the above-presented historical facts are crucial or decisive to the meaning of legal texts.

In light of the above, we can revisit Solum’s alluring example of a 13th century letter and reconsider the best way to interpret it. Solum presents this example to prove that it goes without saying that we should adopt 13th century linguistic conventions to understand a letter from that period, and any other approach will prove useless, in particular interpreting the letter using 21st century linguistic conventions. Solum is fully right, but his example does not demonstrate anything about how we should interpret the law. How so? We interpret the 13th century letter according to 13th century linguistic conventions because the letter refers to the 13th century world and the semeiosis of the signs constituting the letter finished in the 13th century. In other words, we interpret the letter in an originalist way, because to all intents and purposes it was read and used in that way. Its function does not exceed the timeframe of the 13th century, no pragmatic consequences of the letter arise after the 13th century. In particular, no human action is guided by the letter after the 13th century.

The legal text functions in a different way. A more appropriate historical metaphor would be to compare its words to marks on a 13th or 18th century map that is used today in treasure-hunting. The crucial mark on the map, the “X” which marks the spot where treasure lies buried has a pragmatic function. That function is its potential to be used for practical purposes that exceeds the period in which the map was produced. The way X is understood influences the behavior of contemporary readers, guiding their actions today. In Peircean terms, the final interpretant of the “X” is still to be found (unlike for the letter whose pragmatic consequences are limited to its 13th century addressees). To be successful in their treasure-hunting efforts, contemporary map-users have to locate the “X” in the contemporary environment. This is no easy task as two changes must be considered: in the world and in the knowledge of the world. But it seems obvious that one should put the “X” onto the contemporary map: using the map according to the original knowledge of the world and not considering its relation to the contemporary one will not get the treasure hunter anywhere.

Interpreting legal text is more theoretically akin to reading an old map than an old letter. When reading the old map, the X mark should be extrapolated onto a contemporary map to guide the readers’ actions; similarly, the words of the legal text must be put into a contemporary context that includes our existing knowledge of the world.

The difference between the letter and the map can be also explained in terms of J.L. Austin’s theory of speech acts, and especially his concept of the perlocutionary act (Austin 1971). Austin’s speech acts have three aspects: saying words (locutionary act), causing a conventional effect (illocutionary act) and impacting reality (perlocutionary act). In the case of the 13th century letter, no perlocutionary acts take place beyond the 13th century; in particular, no human action is guided by the letter nowadays. Contrary to that, the X sign on the map causes perlocutionary effects in the contemporary world: it impacts the behaviour of the people who read the map today and who arrange their actions according to the guidance the map provides.

To conclude, it would seem that the dynamic approach to legal interpretation enjoys at least as strong a theoretical justification as the static one. It may not satisfy the demands of the originalists to treat legal text on the basis of historical intentions or conventions prevailing in the period in which it is produced, but close examination reveals this demand to be somewhat arbitrary.

1. **Possible Counter-Arguments to Semantic Externalism**

Semantic externalism, which supports the theory outlined above, has been challenged by legal philosophers. Critics claim that it suffers from two fundamental weaknesses which preclude its application to legal language and the law in general. Such claims, though potentially destructive for the theoretical underpinnings of this paper, can be convincingly rebutted.

The first alleged weakness is an inability of semantic externalism to explain how the meaning of non-natural kind words is constituted. According to some authors (Patterson 1989), the externalist (realist) semantics that was originally applied to natural kinds terms (gold, water) and proper names is of limited application to other kinds of terms, including legal and moral terms. The reason is that the latter terms refer to a reality that is mind-dependent, and thus subjectively projected by a language user. As such, this reality lacks a tangibility which the natural kinds possess.

A convincing rebuttal of the above-outlined criticism has already been presented. Firstly, even the original versions of the externalist semantics analysed examples of non-natural kinds (e.g. artefacts like pencils – Putnam 1975), and the application of the externalist semantics to legal and moral terms has been successfully demonstrated ever since (Burge 1979, Stavropoulos 1996). Secondly, a convincing refutation of the “mind-dependence assault” has been offered by some authors, especially D. Brink (1989). Brink’s counter-arguments have not been effectively rebutted by his critics, and run along the following lines. Legal and social kinds can be explained in terms of laws and generalisations, exactly as can chemical or biological kinds. As such, legal and social kinds are institutions that are:

*“independent of particular people’s conception of those institutions, practices and relations in the following senses: (i) those social phenomena are the objects of people’s conceptions and so antedate those conceptions; (ii) people’s conceptions about those phenomena can be mistaken about the real nature of the phenomena; (iii) when people’s conceptions of those phenomena are correct it is in virtue of correctly describing the nature of those institutions, practices, and relations” (Brink 1989, p. 184).*

On this basis, we can see that there is no real obstacle to being a semantic externalist with regard to legal or social kinds.

Another counter-argument to the ‘mind-dependence’ issue is that the newer versions of externalist semantics (Barwise/Perry, Millikan) are more focused on the function the referenced elements of reality have, not on their nature. Even if the internal structure of natural kinds and legal kinds differ, their function is structurally similar insofar as they cause tangible effects in reality, such as physical changes in the world or changes in human behaviour. Legal terms are capable of forming historical lineages of usage and those lineages are no functionally different from the lineages formed by the natural kinds terms. We use the terms to qualify complex bits of reality, we have theories about their functions and we are able to tell whether the use of the non-natural kind terms is correct or not (as in the above-mentioned example of “cruelty” by Bernstein). Why should we then treat the non-natural kinds terms in a different way? Millikan’s idea of proper function can be attributed to every linguistic instrument, including abstract and theoretical terms; as such it has a much wider application than the classical Kripke-Putnam semantics that focused on proper names and natural kinds, and to which the standard criticism of semantic externalism referred

The second alleged weakness of semantic externalism is its perceived inability to take account of the phenomenon of the authority of the lawmaker (Bix 2003). The conviction concerning this alleged weakness results from a simple deduction. Since semantic externalism questions the influence of the author (speaker) on what his utterance means, proposing instead that one should focus on the autonomous meaning of the utterance, the personal authority of the legislator is undermined. As a consequence, the argument goes, semantic externalism undermines the key role of the lawmaker-sovereign as the creator of the law and as the person whose will is the source of normativity. That assertion requires comment.

First, let us make a distinction. The conviction that the essence of the law is normativity is not identical with the assertion that there exists but one possible source of that normativity. Internalist semantics, focused on the author, ascribes the source of meaning to the will of the author, and thereby upholds the traditional concept of normativity arising from the author of a legal text. Shifting to the position of semantic externalism does not mean, however, that we need resign from normativity as such. Normativity is simply no longer located in the relationship between the lawmaker and the people bound by his or her laws, but in the relationship between the people and the text whose authority they recognise. The legal text has a meaning which is autonomous of its users: that meaning results from the history of the linguistic signs of which the text is composed and their proper function, which has been formed in the historical process of the use of those signs. Independently of this, acknowledgement that a given text is a legal text is made by a decision of the lawmaker. The lawmaker chooses a given text as a binding text, and therefore accepts the fact that a certain set of linguistic signs, together with their historical baggage and their function, are to be interpreted by addressees of the law.

The lawmaker does not create the meaning of a legal text but does make a selection of a certain combination of linguistic signs and establish that combination as an artefact whose meaning is then determined by the interpreters. The solution to the normative problem, then, is to replace normativity stemming from the semantic intentions of the lawmaker with normativity resulting from the legal text and its meaning, formed in a historical process of language use, independent of the will or knowledge of the language user. Such an approach to normativity makes semantic externalism fully applicable to legal language.

1. **Conclusion**

My central thesis in this paper is that the linguistic meaning of legal texts is continuously shaped in the social dimension, not created by one-off decisions of individual lawmakers. The meaning of the legal text is influenced by legal practice – the doctrinal and the judicial one – and this practice does not end at the moment of the enactment. In other words, *law in action* influences the meaning of *law on the books*, and the interpreter should take this into consideration when interpreting legal texts. In many cases, such an approach necessitates updating the meaning of the legal text.

Contrary to a common presumption, giving legal texts contemporary meanings does not privilege the interpreter over the lawmaker. The power of these two figures over meanings is similar, in that it is almost non-existent. Rather, the power to establish the meanings of terms in a particular linguistic community lies with historically determined lineages and proper functions of the terms used. A change in meaning cannot be brought about by any one individual, therefore it does not depend on any one individual’s discretionary powers. Such a change is a slow, evolutionary process, based on rational acceptance by a linguistic community. As such, it can provide a basis for a legal interpretation that is relatively stable and controllable. Thus, the classic charges of subjectivity and destabilization raised against the dynamic theory of legal interpretation do not apply to the theory presented here.  In fact, such charges were a reflection of the under-theorized nature of previous versions of the dynamic approach, which were supported by utilitarian or moral justifications rather than linguistic ones.

The title of this paper includes a question mark, and with good reason. We have seen that there exists a theoretical position in legal interpretation that can compete with the static theories of interpretation, especially originalism. The theory, which is not fully elaborated here due to the constraints of space, enjoys a robust support in the philosophy of language. A full elaboration of the theory would dispense with the need for the question mark.

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1. The kind of meaning this paper is dedicated to is *linguistic* meaning (communicative content), not *legal* meaning. The significance of this distinction is rightly underlined by Solum (Solum 2015, p.2). [↑](#footnote-ref-1)
2. Scalia (1989): “Apart from the frailty of its theoretical underpinning, nonoriginalism confronts a practical difficulty reminiscent of the truism of elective politics that "You can't beat somebody with nobody."' It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him”. [↑](#footnote-ref-2)
3. Again, we are talking here about the linguistic meaning of ‘cruel’, not the legal one (Solum 2015, p. 2). The originalist theory is capable of justifying a change in the legal meaning of cruelty, while at the same time maintaining that the linguistic meaning of that phrase as used in the US Constitution has not changed. [↑](#footnote-ref-3)
4. The co-occurrence may be physical (the simultaneous presence of a thing and a word in the same place and time) or may constitute a causality similar to that which is present in Kripke’s causal theory of reference. [↑](#footnote-ref-4)
5. Millikan: “The phenomenon of public language emerges, I believe, not as a set of abstract objects, but as a real sort of stuff in the real world, neither abstract nor arbitrarily constructed by the theorist. It consists of actual utterances and scripts, forming crisscrossing lineages” see Millikan (2005, p. 38) [↑](#footnote-ref-5)
6. The concept of lineages is a more widely applicable version of M. Devitt’s concept of multiple groundings. As Rauti points out: “Since at least Gareth Evans’ work, proponents of anti-descriptivism have been aware of the need to account for the phenomenon of reference change. Some attempts to do so have emphasised the fact that the link between singular terms and their referents is not fixed once and for all. The link is rather established and re-established, reinforced in certain ways and weakened in other ways. Michael Devitt has introduced the apt expression ‘multiple grounding’ and claimed that proper names and natural kind terms are multiply grounded. Hilary Putnam has endorsed the idea: ‘(As Devitt rightly observes, [natural kind terms] are typically “multiply grounded”)’ (Rauti 2012, p. 1) [↑](#footnote-ref-6)
7. This is how Millikan defines the proper function: “Where *m* is a member of a reproductively established family *R* and *R* has the reproductively established or Normal character *C*, m has the function *F* as a direct proper function iff : (1) Certain ancestors of *m* performed F. (2) In part because there existed a direct causal connection between having the character *C* and performance of the function *F* in the case of these ancestors of *m*, *C* correlated positively with *F* over a certain set of items *S* which included these ancestors and other things not having *C*. (3) One among the legitimate explanations that can be given of the fact that *m* exists makes reference to the fact that *C* correlated positively with *F* over *S*, either directly causing reproduction of *m* or explaining why *R* was proliferated and hence why *m* exists.” (Millikan 1984, p. 28). [↑](#footnote-ref-7)
8. Naturally, if a sign is sufficiently enough used not in line with its proper function, this function can be changed or the sign can lose it completely. Millikan indicates that for a proper function to emerge and last, a critical mass of cases in which this particular function is performed must take place. If signalling joy is a function of tail- splashing in a sufficient number of cases, it can become the sign’s new proper function. [↑](#footnote-ref-8)
9. "When I use a word (…) it means what I choose it to mean - neither more nor less". (Carroll, 1872) [↑](#footnote-ref-9)
10. Short (2007, p. 188), quoting Peirce from his letter to Lady Welby: ‘The Dynamical Interpretant is a single actual event. (…) My Dynamical Interpretant is that which is experienced in each act of Interpretation and is different in each from that of any other’. [↑](#footnote-ref-10)
11. Short (2007, p. 190): “The picture evoked is that of scientific inquiry, conceived by Peirce as an indefinitely prolonged ‘fixation of belief ’ carried out by an indefinitely extended community of inquirers, all of whom have the same ultimate purpose. (…) interpretants, including final interpretants, may be actions, feelings, or habits, as well as representations. [↑](#footnote-ref-11)
12. Short (2007, p. 264): “This presupposes that a term’s reference can be fixed independently, or to some degree independently, of its meaning, which is assumed in this passage to be conceptual. That overturns the familiar view that a term’s reference is determined by its meaning, that is, that it refers to that of which a concept is true. The same passage entails that the meaning of a term will change or can be changed with the growth of our knowledge of the world. And that undercuts definitions of philosophy as ‘conceptual analysis’, that is, as usefully employed in explicating received meanings. The point is not to understand our meanings but to change them.” [↑](#footnote-ref-12)
13. Short (2007, p. 264-265), describing two elements of Peirce’s doctrine of signs’ growth: “One was the idea of indexical signification, as depending on causal or other existential relations rather than on thought or general precepts or habits of interpretation. Only so could the reference of a term be fixed independently, to a degree, of what it means. Another was the idea of hypostatic abstraction. By hypostatic abstraction, an entity can be introduced into discourse independently of direct characterization of it. Only so could we have some idea of what we are referring to, independently of knowing what it is. [↑](#footnote-ref-13)
14. On the face of it, some lawmaker’s attempts to define legal terms may look like naming ceremonies. In fact, legal definitions very rarely create new terms. In the majority of cases lawgivers make the terms more precise or less vague by defining them. Moreover, in the definitions lawmakers use other terms taken from the public language, rooting them in other lineages. As such, the definitions can be treated as exercises in Peircean semeiosis, translating signs into other signs, rather than as original baptisms. [↑](#footnote-ref-14)
15. This claim is not so obvious even for the legal philosophers that apply externalist (realist) semantics to legal analyses, e.g. N. Stavropoulos suggests that lawmakers are original reference-fixers, i.e. that they perform a naming ceremony by using legal terms in the legal text (Stavropoulos 1996, p. 46). As indicated above, I find this position misguided. [↑](#footnote-ref-15)
16. This is not to say that in other aspects they are the same. The lawmaker’s crucial advantage over the interpreter is that the former has the sole competence to select the words (signs) constituting legal texts. Those words, and not others, must then be interpreted by the latter. [↑](#footnote-ref-16)
17. Goldfarb (2013) attributes the origins of the principle to an English barrister, George Coode, who in his treatise on legislative drafting dated 1845 recommended the use of the present tense in legislation, claiming that “indicative language describing the case as *now* existing, or as having *now* occurred, is consistent with the supposition of *the law being always speaking*”. [↑](#footnote-ref-17)
18. True to its title, the speech act theory has been developed with speech as its main subject but is undertheorized as far as written communication is concerned. The speech-based version is the one applied by the majority of legal philosophers, including originalists, to legal language. (Stubbs 1983). [↑](#footnote-ref-18)
19. The pragmatic maxim has been formulated by Peirce: “Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object” (Peirce 1878, p. 293). [↑](#footnote-ref-19)