

# Why Judicial Formalism is Incompatible with the Rule of Law

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## 1. Introduction

When judges follow the letter of the law, their judgment may be considered blinkered by the man in the street. Legal professionals, however, would classify the judgment as formalistic. Formalism encompasses several theories of interpretation, including textualism and some types of originalism.<sup>1</sup> The defining feature of the formalistic approach to legal interpretation is the belief that by limiting the number of available interpretive premises, the number of interpretative choices for lawyers will be similarly restricted. In the case of textualism, this restriction equates to acknowledging that out of many possible readings of the legal text only the “plain” one is correct.<sup>2</sup> Formalism does not take into consideration the purpose of legislation, nor does it accept application of general principles to the case at hand.<sup>3</sup> Rather, it promotes the application of so-called “bright-line” and “most locally applicable”<sup>4</sup> rules, even if the result of their application cannot be reconciled with those general principles or common sense.

Formalism as an art of limiting judicial choices is perceived by many as fully consistent with the rule of law.<sup>5</sup> It seems to both allow the curtailment of interpretive discretion and to ensure fidelity to the will of the lawmaker. This contrasts with an all-things-considered approach, where the premises for judicial decision-making seem unlimited, discretion encouraged, and the will of the lawmaker ignored.

Judicial formalism is not a purely theoretical construct but one constantly intertwined with our daily lives. We encounter it while pursuing actions in courts or authorities and experiencing disappointment when faced by the formalistic rationality of bureaucratic *modus operandi*. This disappointment is fuelled by frustration when our case is seemingly decided contrary to common sense. Such decisions, we are told, are dictated by the so-called letter of the law, an approach

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1. Brian Bix, in *A Dictionary of Legal Theory* (Oxford University Press, 2004) at 69-70, defines ‘formalism’ as a group of opinions about legal interpretation that includes both textualism and other opinions accepting as correct interpretation consistent with the original legislative intentions.
2. Textualism supports a so called “plain meaning” understood as an acontextual meaning resulting from the semantic autonomy of language, i.e., the capacity of language to convey meanings independently from the speaker’s intent. See Anthony D’Amato, “Counterintuitive Consequences of ‘Plain Meaning’” (1991) 33:3 *Ariz L Rev* 529.
3. See Frederick Schauer, “Formalism” (1988) 97:4 *Yale LJ* 509.
4. *Ibid* at 522.
5. “Of all the criticisms leveled against textualism, the most mindless is that it is “formalistic.” The answer to that is, *of course it’s formalistic!* The rule of law is *about* form,” see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, edited by Amy Gutmann (Princeton University Press, 1997) at 25.

which disenchants those people dealing with courts or authorities who expect their decisions to be dictated by justice. Disenchantment with formalism has a long lineage; indeed, as far back as 1BC Cicero occasioned the legal maxim *Summum ius, summa iniuria*, “The highest law, the highest injustice”:<sup>6</sup> rulings rigidly sticking to the letter of the law often have little to do with justice.

What is the origin of this disconnect between the letter of the law and justice? It is not necessarily error or malice on the part of the decision-maker: serious arguments support the application of formalism in the resolution of points of law. These arguments include the need for the predictability of law, its stability, and the curtailment of judicial discretion. As those three values are inherent to the rule of law, formalism is also apparently in sync with it, despite being out of sync with what common sense would prescribe. The compatibility between the values underlying the rule of law and formalism also leads its exponents to claim that a judge’s role is not to implement justice but to let the law speak for itself, without further adjustment. The departure of formalists’ sub-optimal judicial outcomes from what common sense would prescribe is seen as a price worth paying for the standardisation of judicial decisions.

In this paper I show that the apparent compatibility between formalism and the rule of law is based on an unspoken assumption as to the nature of legal language: that this language is criterial in the sense that in order to understand it, one needs to rely on meaning understood as a set of criteria. This criterial approach is derived from a philosophy of language which is referred to as “semantic internalism”. A characteristic of this approach as applied in legal interpretation is reliance on dictionary definitions when interpreting legal texts. The assumption championed by semantic internalism (and by extension—by judicial formalism), that using language means applying a set of criteria to items in reality, is misguided, and its flaws are revealed by theoretical advances in the contemporary philosophy of language, namely in semantic externalism. Semantic externalism as a general theory of language provides lawyers with a better explanatory tool for understanding how language works. The theory demonstrates that the meaning of language cannot be discovered merely by reading dictionaries; rather, based on the assumption that “meaning is use”, it requires the investigation of the linguistic practices of a particular community, and insight into the history and function of individual legal terms.

The main assumption of this paper is that normative theories of legal interpretation must, of necessity, rely on descriptively sound theories of language: if the purpose of interpretation is to understand the lawmaker, this purpose cannot be achieved if the model of how language works is distorted. Because formalism relies on a descriptively misguided theory of language (namely semantic internalism), it cannot serve as a normative theory of legal interpretation. What I propose instead is to use semantic externalism, which has been developed by the philosophy of language in opposition to semantic internalism, to construct a non-formalist normative theory of interpretation. This, I argue, better fits the real nature of language in general and legal language in particular.

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6. Marcus Tullius Cicero, *On Obligations (De Officiis)*, translated by PG Walsh (Oxford University Press, 2008) at 33.

Because the nature of legal language is different from that assumed by the formalists, the compatibility between formalism and the rule of law collapses. With a distorted perspective of the characteristics of legal language, formalism cannot ensure fidelity to it. This paper shows that judicial decisions based on applying definitions are very often surprising to the law's addressees, which contradicts one of the main tenets of the rule of law: the predictability of court verdicts.<sup>7</sup> As a consequence, the rule of law requires a different approach to legal interpretation. Within this approach, judges can make decisions based on a broader scope of interpretive premises, and by doing so ensure a better level of predictability.

In what follows I first outline the main feature of formalism and describe the argument underpinning the compatibility between formalism and the rule of law. In the second part of the paper I draw on semantic externalism to challenge the internalist and formalist view of the nature of legal language. I conclude that fidelity to legal language and the realisation of the rule of law ideal require a moderately non-formalistic, non-reductionist approach to legal interpretation, based on the assumption of semantic externalism.

## 2. What is Judicial Formalism?

Traditionally, a group of lawyer-academics active at the end of the 19th century, mainly from the Harvard Law School, are considered the representatives of classic formalism.<sup>8</sup> Classic formalists advised judges to avoid the role of a political actor and expected courts to adopt a “deductive” approach to adjudicating.<sup>9</sup> The latter consists in mechanically or automatically moving from general categories or concepts to conclusions, without taking into account political, moral or practical aspects.<sup>10</sup> Classic formalists believed that law should fulfil three requirements: first, it must be determinate, its judgments following from the application of norms to facts; second, it must be systematic, creating a coherent structure of relatively abstract concepts and principles; and thirdly, it must be autonomous, deriving its norms only from legal sources rather than from the contestable claims of religion, philosophy, or political economy.<sup>11</sup>

Early critiques identified “geometrisation”<sup>12</sup> as a crucial property of classic formalism. Geometrisation consists of a belief that the outcome of law's application is an internally consistent, systematic and rationalised law, and the legal system similar to Euclidian's geometric system, with theorems and axioms, in which an answer to a legal question may be given by referring to the logic of the system

7. “Predictability ranks fairly high among the legal virtues. It is part of what people mean by the Rule of Law. When the law is uncertain, human autonomy itself suffers, since without knowing what is permitted and what is forbidden it is less safe to act at all”. Maimon Schwarzschild, “Keeping It Private” (2007) 44 San Diego L Rev 677 at 686.

8. Paul N Cox, “An Interpretation and (Partial) Defence of Legal Formalism” (2003) 36 Ind L Rev 57 at 58.

9. Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) at 9.

10. See Bix, *supra* note 1.

11. See Thomas Grey, “The New Formalism” (1999) Stanford Law School Public Law and Legal Series Working Paper No 4.

12. Cox, *supra* note 8 at 61.

and that answer is therefore perfectly deductive and always certain; this element of classic formalism was also referred to as “mechanical jurisprudence”.<sup>13</sup>

One prevailing feature seems to emerge from different accounts of formalism: the *reductionism* of interpretive premises<sup>14</sup>. This consists in a focus on a particular factor in the interpretive process, e.g., on the plain meaning of “the most locally applicable legal norm”,<sup>15</sup> to the exclusion of all other factors, such as the purpose or function of the interpreted provision, principles or policies.<sup>16</sup> In this way, formalists attempt to close so-called “escape routes”:<sup>17</sup> *ad hoc* applied interpretative manoeuvres that aim at avoiding undesirable effects of the application of law resulting from the mechanical application of a literal rule to a given case.<sup>18</sup> Typical examples of escape routes are relying on legislative history or relying on the intended meaning of the legal text. Using escape routes would increase the scope of judicial discretion to make choices motivated by individual preferences rather than the law itself.<sup>19</sup> Reducing the interpretive premises reduces the judge’s ability to engage in judicial law-making and thus constitutes a primary factor in securing formalism’s compatibility with the rule of law. This compatibility is questioned in the next section.

### 3. Judicial Formalism and the Rule of Law

One of the primary reasons for the popularity of formalism is its apparent consistency with the rule of law. It is a popular belief among lawyers that relying exclusively on the legal text and omitting other interpretative premises ensures the implementation of the rule of law and not the rule of people.<sup>20</sup> The rationale for this position is that a legal text is the most transparent interpretative premise whereas referring to extratextual premises involves a possibility of selective choice (because they are so numerous) and misunderstanding (because they are vague).

Both formalism and the principle of the rule of law aim to limit the impact of the individual human factor on the application of law and to give priority to an autonomously understood legal text that incarnates the law. The sources of this ideology go back to “Montesquieu’s contentions that in a republican political system an act of law is the act of sovereign public will, restraining arbitrary judgement of every person, including a judge. Democracy must create clear and precise laws to limit the judge’s arbitrariness”.<sup>21</sup>

13. See Roscoe Pound, “Mechanical Jurisprudence” (1908) 8:8 Colum L Rev 605.

14. See Mark Tushnet, “Anti-Formalism in Recent Constitutional Theory” (1985) 83:6 Mich L Rev 1502 who perceives formalism as an artificial narrowing of available interpretative choices.

15. Schauer, *supra* note 3 at 522.

16. *Ibid* at 512; Cass Sunstein, “Must Formalism Be Defended Empirically?” (1999) 66:3 Chicago L Rev 636; Richard H Pildes, “Forms of Formalism” (1999) 66:3 Chicago L Rev 607 at 612.

17. Schauer, *supra* note 3 at 519.

18. *Ibid*.

19. William N Eskridge, “The New Textualism” (1990) 37:4 UCLA L Rev 621 at 648.

20. Steven J Burton, *Judging in Good Faith* (Cambridge University Press, 2004) at 141.

21. Artur Kozak, *Granice prawniczej władzy dyskrecjonalnej* (Kolonia Limited, 2002) at 78.

The compatibility between formalism and the rule of law is further corroborated by various attributes of formalist adjudication: the effective limitation of interpretative freedom (discretion) of lawyers,<sup>22</sup> and the shielding of law from the impact of judges' political, moral and other individual preferences.<sup>23</sup> By that, formalism deals with lawyers' concerns regarding political choices being made by judges, which may differ from the choices of a democratic majority.<sup>24</sup>

Formalism also seems to promote the predictability of the process of law's application, and hence legal certainty—primary elements of the rule of law.<sup>25</sup> Through its focus on the plain meaning of a legal text, formalism appeals to the intuition that when interpreting we must reach out to the most tangible evidence of legislators' expectations and to a legal material that is most available to the general public. Only a text accepted in a legislative process is a law, and the conviction of members of parliament as to the purpose or function of the law is not. Since a text is the source of knowledge of a law, it would be unfair to rely in interpretative decisions on other bases, e.g., on legislative history as an indicator of the lawmaker's intention (*non quod voluit sed quod dixit*), premises such as the lawmakers' intention or the purpose of rules are not readily accessible to the general public, and they are subject to differing interpretations. Basing legal interpretation on sources other than the legal text leads to the imposition of obligations on citizens of which they have not had a chance to know before taking their actions. Such a decision will clearly be surprising to the public.<sup>26</sup> It may even be considered as the creation of obligations *ex post facto*, which clearly contradicts the rule of law.

Formalists argue that *rule-based decision-making* rather than *all-things-considered reasoning* should constitute the process of applying laws. The former equates to deferring to the person who created the rule, the latter is an independent decision by the interpreter. The reduction of interpretive premises promotes rule-based decision-making and is more compliant with the rule of law. In contrast to this, a decision based on extra-textual premises makes it possible for the interpreter to engage their personal preferences and prejudices in the decision-making, and as such is more akin to the rule of men than the rule of law.

Ultimately, formalists propose a normative theory of interpretation by following a descriptive theory of language: semantic internalism. According to semantic internalism, the meaning of a particular word can be described as a set of criteria known by a speaker, which in turn is applied to reality: the things in the world are covered by the meaning, if they fulfil the criteria. This approach to meaning supports judicial formalism, as it features the geometrisation of judicial thinking: to apply the letter of the law means to apply an acontextual, stable and

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22. Frederick Schauer, "Formalism: Legal, Constitutional, Judicial" in Gregory A Caldeira, R Daniel Kelemen & Keith E Whittington, eds, *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 428 at 433-34.

23. Richard Hodder-Williams, *Judges and Politics in the Contemporary Age* (Bowerdean, 1996) at 2.

24. Eskridge, *supra* note 19 at 667.

25. Schauer, *supra* note 3 at 548.

26. Sunstein, *supra* note 16 at 654.

general set of criteria to the case at hand. With their criterial approach to meaning, formalists believe they are faithful to the language of law, and by extension, to the lawmaker

If, however, the underlying theory of language is descriptively unsound, the related theory of interpretation is unsound. This is the case with formalism. To show how formalism fails to understand language, I propose an alternative semantic theory, namely semantic externalism.<sup>27</sup> According to it, meaning does not consist in abstract, acontextual and permanent criteria known by the speaker and applied to the reality. Following Wittgenstein's aphorism, "meaning is use", externalists perceive meaning as function fulfilled by words in particular linguistic situations. In their model, the use of a particular linguistic device in a particular context depends on the similarity of this context to the previous contexts in which that linguistic device (e.g., sentence, intonation or tense) has been used. I argue that this externalist model of language is more natural and closer to how laypeople use language; therefore, it is better suited than its counterpart, semantic internalism, to the analysis of legal language.

Formalism's failure to do justice to the nature of language in general, and to legal language in particular, has significant consequences for its compatibility with the rule of law. No normative theory of interpretation can claim it supports the rule of law if its model of legal language is distorted and its outcomes are not predictable.

As philosophers of the rule of law stress, the law must be knowable in the sense that its addressees should be able to gain a clear understanding of it and must be confident that the officials who interpret and enforce the law will do so in a way which is faithful to how the language in which it is expressed is publicly understood.<sup>28</sup> This requirement has been included by Lon Fuller in his list of eight features of the internal morality of law, universally treated as the main tenets of the rule of law: the requirement of congruence between official action and the law on the books.<sup>29</sup> The congruence is a prerequisite for another tenet of the rule of law, namely predictability, which applies to the lives and businesses of the law's addressees, and ensures that "power cannot catch us unawares".<sup>30</sup> The significance of predictability has also been stressed by Hayek, for whom it is "indispensable for liberty".<sup>31</sup>

Formalism's distorted model of language impedes such predictability by preventing its practitioners from understanding the lawmaker's language. This distorted model makes the interpretations of those who apply it surprising to laypeople, who rely on the ordinary meaning of legal text, not the formalists' artificial one. Formalism's failure to secure fidelity to the language of law undermines its compatibility with the rule of law.

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27. See Jesper Kallestrup, *Semantic Externalism* (Routledge, 2012).

28. Martin Krygier, "Ethical Positivism and the Liberalism of Fear" in T Campbell & J Goldsworthy, eds, *Judicial Power, Democracy and Legal Positivism* (Routledge, 2000) at 63.

29. Lon L Fuller, *The Morality of Law* (Yale University Press, 1969) at 39, 81-89; Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in JE Fleming, ed, *Getting to the Rule of Law* (New York University Press, 2011) 3 at 8.

30. Krygier, *supra* note 28 at 63.

31. Waldron, *supra* note 29 at 4.

The outcome of my analysis is that the reduction of interpretive premises favoured by formalists is misguided if one wishes to be faithful to legal text, and by extension to the rule of law. The nature of language elucidated by semantic externalism shows the need for a different normative theory of interpretation, one which involves a moderate extension of the interpretive premises. The theory of interpretation I propose is one which avoids the worst sin of formalism, namely the generation of surprising interpretative results, which undermines one of the pillars of the rule of law: the predictability of judicial decisions.

#### 4. Judicial Formalism and the Language of Law

##### *Two visions of language*

The question of meaning in general, and the question of the meaning of legal text in particular, can be approached in two ways. The first, based on the descriptionist theory of meaning, assumes that the meaning and reference of terms are contingent upon both a set of criteria a speaker has in mind and a fit between an object in reality and that set of criteria.<sup>32</sup> In this approach (called *semantic internalism*), when speakers use a certain term, they have in mind certain criteria that constitute its meaning; to determine what the speakers refer to, the receiver must identify an object that satisfies those criteria. This approach can be seen in the use of definitions as the main vehicles of conveying meaning.<sup>33</sup> As definitions are sets of criteria an object must fulfil to be covered by the definition, interpretation within this approach consists in matching extra-linguistic objects (e.g., things, human beings and circumstances) with the criteria specified in the definitions.

The second approach to meaning, called *semantic externalism*, departs from the descriptionist, criterial theory towards one which declares that “‘meanings’ just ain’t in the head”.<sup>34</sup> In its quest for meaning, semantic externalism abandons the criterial approach and turns to the usage of specific words in social practice,

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32. Saul A Kripke, *Naming and Necessity* (Basil Blackwell, 1980) at 25-29. One important feature of semantic internalism is its reliance on the speaker’s internal states of mind, in particular his or her intention, when identifying meaning. This reliance could suggest that semantic internalism rather than legal formalism underpins another normative theory of interpretation, namely intentionalism. In this paper, I leave aside the issue of whether semantic internalism may serve as a theoretical basis for other normative theories of legal interpretation to focus on the criterial characteristic of meaning (rather than on its intentional aspect). This is not to say that an insurmountable dichotomy exists between the criterial and the intentional aspects of semantic internalism. To the contrary, within the semantic internalism the object of the speaker’s intention, what the speaker’s intention is about, is a set of criteria and their application to the reality.
33. The criticism concerning the use of definitions in legal interpretation can itself be questioned on the basis that varieties of formalism exist which make use of corpus linguistics instead of definitions when interpreting legal texts. In response, I would argue that making use of corpus linguistics to analyse the real meaning of the words does not rule out a criterial approach. Corpus analysis may lead to the formation of a set of criteria to be applied to a new case (a formalist, criteria-based approach), or can be paradigm-based. Consider whether a kung-fu master’s use of his hands during a robbery qualifies as the use of a dangerous tool. A corpus-based analysis of this case may lead to the identification of criteria that a dangerous tool must fulfil, and that analysis will be formalistic even if it does not make use of dictionary definitions.
34. Hilary Putnam, “The Meaning of ‘Meaning’” in *Mind, Language and Reality*. *Philosophical Papers*, vol 2 (Cambridge University Press, 1975) 215 at 227.

which—owing to an enduring tradition of standard usage of terms—determines which objects and situations occurring in the extra-linguistic reality are referenced. The meaning of a word is identified based on the nature of reality to which that word refers, i.e., on the basis of the features of external reality systematically indicated by that word.

Semantic externalism differs from its internalist counterpart in many ways, and some of those differences are particularly relevant for legal theorists. *First*, per semantic externalism, it is not the speaker's internal state of mind that determines which elements of reality the speaker's words refer to. The reference is rather determined by the tradition of those terms' usage. A word or sentence refers to a state of affairs to which a particular group of people traditionally (i.e., for a relatively long time and in a typical way) have referred. Hence, semantic externalism shifts the focus away from the author and focuses instead on one's words and the linguistic practice of the communicative community that created and interprets the text, as well as the reality referenced within. What counts for interpretive purposes is the relationship between words and reality at the particular instances of this word's usage in the past.

*Second*, in semantic externalism, meaning is no longer understood as a description (Mill, Russell) or a cluster of descriptions (Searle). To determine the meaning of a word one does not need a definition, understood as a set of criteria which must be fulfilled by the referent. What must be determined is the set of properties to which this word referred in the past. The ability to refer to them constitutes "the proper function"<sup>35</sup> of terms and sentences, i.e., their meaning (within the externalist framework).

*Third*, semantic externalism is focused on the particular instances of language usage. The language is perceived as a living practice, and not as an atemporal, static structure. In other words, the externalist approach assumes that pragmatics prevails over semantics: it is the use that influences the meaning, and not the other way around.

To sum up, by referring to historical, functional and purposive considerations in using language, semantic externalism requires a moderate extension of interpretative premises, contrary to the formalists' proposal for their reduction. This broader frame of reference allows semantic externalism to generate more predictable interpretative outcomes than semantic internalism. It does so by avoiding the artificiality of definitions, instead mirroring the way language is used in our day-to-day practice.

### ***The definition-based approach versus the paradigm-based one***

Formalism draws on semantic internalism, not semantic externalism. As a consequence, it perceives legal concepts as criteria-based concepts. Ultimately, formalism considers the interpretation and application of law to be a process

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35. Ruth Garrett Millikan, *Language, Thought and Other Biological Categories: New Foundations for Realism* (MIT Press, 1984) at 28.

of subsumption, the outcome of which is that facts are qualified according to whether or not they fulfil criteria established in definitions. This approach neglects the fact that in using language we do not apply definitions to objects and situations, but rather seek analogies between previous uses of a word or phrase and the current use.

Semantic externalism rejects a criteria-driven analysis and instead examines the history of linguistic practice of a particular community in order to find meaning; by doing so it steers clear of mechanistic, subsumption-based reasoning. As Stavropoulos points out, it is precisely the point of the externalist framework “that determining the content of a concept is not a mechanical exercise, but is a complex-theoretical-procedure shot through with evaluative judgments.”<sup>36</sup>

The externalist critique of formalism targets its internalistic conceptualisation of meaning. Semantic externalism rejects the notion of meaning defined as a set of characteristic features attributed to extra-linguistic objects allowing one to either classify the given object as a designator of the term or disqualify it if some features are missing. Kripke argues that meaning is not constituted by the compliance of the properties of the object that the speaker refers to and those making up the content of the term (so-called cluster-of-properties or -descriptions, making up a definition). It is false to believe that for one object to be a designator of a certain term it must satisfy the majority or even all conditions prescribed in the definition.<sup>37</sup>

According to semantic externalism, when identifying objects to which the speaker refers, one must establish not the object the speaker had in mind,<sup>38</sup> but the object to which the term refers, on the basis of “the most coherent explanation of name or term-using practice.”<sup>39</sup> This term-using practice<sup>40</sup> starts with a so-called “christening ceremony”,<sup>41</sup> the first naming of the object, and continues with subsequent uses. This first naming consists of description or simple indication (as in the baptism of a child). Subsequent individuals refer to the object in the causal chain by invoking its name, thus, as it were, grounding its reference.<sup>42</sup> A similar conviction that subsequent uses of a term influence its meaning is present in Millikan’s idea of historical chains of language usages—“lineages”.<sup>43</sup> In Millikan’s theory, linguistic meaning has been shaped in the process of repeatable co-occurrence of words (sentences) 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).

36. Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press, 1996) at 10.

37. Kripke, *supra* note 32 at 91-92.

38. Christopher Hughes, *Kripke: Names, Necessity, and Identity* (Clarendon Press, 2006) at 36.

39. Stavropoulos, *supra* note 36 at 8.

40. Kripke, *supra* note 32 at 106.

41. Michael Devitt, *Designation* (Columbia University Press, 1981) at 26.

42. *Ibid* at 138.

43. Ruth Garrett Millikan, *Language: A Biological Model* (Oxford University Press, 2005) at 38. Lineages can be understood as historically perceived Wittgensteinian language games.

Lineages reflect how the tradition of linguistic uses influence meaning. Because meaning is the “proper function” of words and sentences, shaped by the historical practice of their use, tracing back the instances of the previous uses of these words and sentences reveals their meaning. The more instances of a particular linguistic behaviour one observes, the better one knows the practice, and the better one is equipped to repeat the behaviour in the future, i.e., to correctly link the words with the world.

When applied to legal language, the concept of lineages changes the traditional perception of how the meaning of legal terms is shaped. Upon completing an utterance in the language of law (e.g., provision or norm), the lawmaker applies the terms of ordinary language, which, according to semantic externalism, already have lineages by virtue of being used in linguistic practice of the given communicative community.<sup>44</sup> Contrary to a common belief amongst legal philosophers,<sup>45</sup> the lawmaker is not the original reference-fixer, the baptiser. In enacting a new law, the lawmaker includes into the legal language words that have been used before, along with their histories (their lineages). If this were not the case, communication via legal text would be impossible: no lawmaker can effectively communicate with newly coined words alone. Naturally, in the language of law some terms acquire specific legal meaning right at the moment they are incorporated into it, for example by passing specific legal definitions that modify the ordinary meaning of the word. But mostly, terms used in legal text are adopted from ordinary language as they are, unchanged. With time, terms used to express the law gain an increasing number of groundings both in the domain of ordinary language and the domain of legal language. This is so because the communicative community uses those terms while referring to the reality in which it functions. In legal discourse, court rulings and administrative decisions are components of lineages. Opinions expressed in legal doctrine also belong here, as lawyers employ legal terms and refer them to reality.

Within this picture of how legal language operates, the task of the interpreter differs significantly from the one proposed by semantic internalism and judicial formalism. In those approaches, interpretation is a deductive process which involves forming a definition and applying it to the external world. Instead of such a “definition-based” application of general terms, semantic externalism proposes a “paradigm-based” application of the terms.<sup>46</sup> In this model, interpretation

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44. In this paper I assume that the original area of application of semantic externalism, namely proper names and natural kind terms, may be extended to include fields of social practice where one uses theoretical concepts, and law is undeniably such a field. The scope of this paper prevents me from proving the validity of the assumption made. However, the viability of extending semantic externalism to cover concepts other than proper names or natural terms has been demonstrated in Stavropoulos, *supra* note 36 at 67-68, where he treats at length semantic externalism’s relevance for the language of law, and Devitt, *supra* note 41 at 199, who suggests that the causal theory of reference can be applied to terms other than proper names and natural terms, for example to theoretical concepts. See also Tyler Burge, “Individualism and the Mental” (1979) 4:1 *Midwest Studies in Philosophy* 73 and David O Brink, “Semantics and Legal Interpretation (Further Thoughts)” (1989) 2:2 *Can JL & Jur* 181.

45. Stavropoulos, *supra* note 36 at 46.

46. “Howard Wettstein distinguishes ‘definition-based’ from ‘paradigm-based’ stories about the application of general terms. On the paradigm-based story, one is ‘exposed to a certain number

is an inductive process of tracing previous instances of using a particular term or phrase and forming a theory of what is the proper function of the term or phrase. To form this theory, the interpreter must identify typical properties that are picked out by the term when it is used. This cannot be done by simply reading a definition. Instead, it requires immersion in the contexts of particular uses from the past and finding a common denominator among them.

### *A new approach to plain meaning*

Semantic externalism requires lawyers to change their approach to the plain or ordinary meaning: from one based on definitions to one based on lineages. A useful example of a lineage-based approach has been provided by Recanati in the form of “semantic potential”, understood as an ability to refer to some set of features in the world.<sup>47</sup> Recanati distinguishes between “source” and “target” situations: the “source situations” are all the situations in which a term has been used in the past;<sup>48</sup> the “target situation” is the current situation in which a term is to be used. The task of the speaker is to assess whether the use of the word in the target situation is appropriate as compared to its use in the source situations. The set of source situations provides the speaker with some comparative material to perform this task. To assess whether the term should be applied in the target situation, the speaker first needs to assess if and to what extent the features of that situation resemble the features of the source situations. The speaker’s second task is to find out which similarities between the source and target situations are relevant and which are not.

Take the term “dangerous tool” used in some criminal law regulations. The previous applications of that term allow one to form a definition deriving from shared features of all source situations in which that term has been used—a definition which would inevitably involve a criterion of being an implement. If one faces a situation in which a criminal uses a knife or a gun to threaten a victim, the definition criterion is sufficient: both a knife and a gun are clearly implements, so the decision on whether to apply the term “dangerous tool” in such a situation is an easy one.

If, however, one is presented with a target situation in which a robbery has been committed by a kung-fu master who used only his bare hands to threaten his victim,<sup>49</sup> a more difficult question arises: is the target situation similar to the source situations in which “dangerous tool” has been used? As any definition is only a selection of features present in source situations, no available definition may allow for the inclusion of bare hands within the term. In fact, the feature

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of cases, and ... perhaps corrected on a number of occasions on the application of the term, one [then] gets the feel for what is to count as a genuine application of the term, somewhat like the way one gets the feel for how to serve in tennis.” Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford University Press, 1998) at 65.

47. François Recanati, *Literal Meaning* (Cambridge University Press, 2004) at 141.

48. *Ibid* at 143. Although Recanati does not use her terminology, the chains of the source situations resemble Millikan’s lineages.

49. This is an actual case heard by the Polish Supreme Court.

of being an implement is not present in the target situation: human hands are not implements in the literal sense. Nonetheless, the target situation is similar to the source situations in some relevant sense: the bare hands of the kung-fu master fulfil the same role as a knife or a gun insofar as they are wielded to generate fear and encourage someone to give their belongings to a robber. The definition itself is inadequate but our knowledge of source situations can be used to decide whether the application of the term to the target situation is appropriate.

Recanati recognizes the inadequacy of definitions and rejects their use as intermediaries between the source situations and the target situation.<sup>50</sup> Instead, he proposes that the target situation should be compared with a raw set of source situations, and the language user should decide on the resemblance between the target situation and the source situations on the basis of all features to which the term earlier referred, i.e., on the basis of the full semantic potential of the term.<sup>51</sup> After comparing the situations to select those features which are relevant, the language user eliminates those features which are not. The set of features selected depends on the proper function of the term to be applied to the target situation.

Returning to the kung-fu-master case, although the target situation does not fall under the definition of “dangerous tool”, judges deciding that case found the hands of the kung-fu master to be dangerous tools. They did so because they compared the target situation with all relevant features of the source situations, irrespective of whether they were included in the definition. One of the features was the ability of the “tool” to harm or the fact that the perception of the “tool” can generate fear in a robbery victim. As those features are manifest in the target situation and picking them out is the proper function of the term “dangerous tool”, this term should be applied to the target situation.

Recanati’s approach to literal meaning is paradigm-based, not definition-based. It assumes the definition-based approach is too reductive: any definition may provide speakers with only a small number of relevant features of the source situations, and there is no guarantee that the selected features will be relevant for a novel target situation, as in the example of the dangerous tool. Therefore, Recanati proposes to expand the number of features to take into consideration instead of reducing them.

This expansion contrasts diametrically with the reduction proposed by formalism. Reduction petrifies the language and makes it unable to react to new situations. The application of a word to a situation may be justifiable but is excluded if it doesn’t fall within the features selected by a particular definition. When a term should be applied to a situation but it is not, the result is inconsistency. By contrast with the formalistic approach, Recanati’s expansion of the number of interpretive premises allows interpreters to be more consistent and precise in applying terms to reality.

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50. Recanati, *supra* note 47 at 143.

51. *Ibid* at 147.

## 5. Criticism of Reductionism of Interpretative Premises

Traditionally, the criticism of reductionism of interpretative premises has been undertaken from two positions: a utilitarian and a contextual one. Utilitarians oppose the reduction of interpretive premises because such reduction brings about an inferior result in the process of applying the law when compared to an all-things-considered approach.<sup>52</sup> An all-things-considered approach would include, for instance, the legislative purpose and intention, a change in the social environment since the time of enactment, the individual situation of the person to whom law is to be applied, and finally, the consequences of interpretative decisions. Utilitarians emphasise that all-things-considered legal thinking is closer to practical reasoning, the principle of which is to maximise the amount of data in the decision-making process rather than to reduce it,<sup>53</sup> thereby increasing the chances for reaching an optimal decision.

The utilitarian argument doesn't undermine the main formalist line of argument, namely, the need to be faithful to the language of the law, because it simply doesn't address it. Formalists do not treat the outcome or utility of the outcome as the main criterion to assess the appropriacy of judicial decisions. They are ready to accept a sub-optimal outcome, one inferior to that which would be achieved in a particular case by taking all aspects relevant for a given matter into consideration. This inferiority is a price they are willing to pay for a standardisation which ensures the similarity of all decisions undertaken in similar cases. Therefore, formalists argue that being faithful to a rule means that the person making an interpretation should not have any scope to alter sub-optimal outcomes where they arise.<sup>54</sup> In other words, the individual attempt to optimise a decision may endanger a rule's standardisation function.

A better argument is provided by the contextualists, who criticise the reduction of interpretive premises not from a utilitarian but from a linguistic point of view. Contextualists (e.g., Barak<sup>55</sup> and Fish<sup>56</sup>) claim that understanding a legal text is not possible without taking into consideration interpretative premises derived from the context in which that text was developed or in which it is interpreted. Consequently, they argue that context-based interpretative premises (e.g., legislative history or a change of circumstances) should be treated as fully legitimate interpretive premises.

Formalists are acontextualists. Their main argument for reducing interpretive premises derives from the nature of linguistic meaning; they believe that meanings are acontextual sets of criteria, abstracted from particular situations of language use. This is not to say that all formalists are literalists. The authors

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52. Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991) at 113.

53. William N Eskridge & Philip P Frickey, "Statutory Interpretation as Practical Reasoning" (1990) 42:2 Stan L Rev 321 at 348.

54. Schauer, *supra* note 52 at 100.

55. Aharon Barak, *Purposive Interpretation in Law*, translated by Sari Bashi (Princeton University Press, 2005) at 26.

56. See Stanley Fish, "There Is No Textualist Position" (2005) 42:2 San Diego L Rev 629.

supporting formalism acknowledge that “the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language”<sup>57</sup> and observe that “no mainstream judge is interested solely in the literal definitions of a statute’s words”.<sup>58</sup> The criticism of the definition-based approach discussed here is not directed against literalism. It rather targets an assumption that one is able to identify the ordinary meaning of a word by analysing criteria set forth in its definition. As Hutton writes: “One way in which courts feel they can access the ordinary language user’s point of view is through dictionary definitions.”<sup>59</sup> What I argue is that definitions cannot give access to the ordinary meaning.

Without doubt, each rule set down in the legal text is a form of generalisation.<sup>60</sup> This generalisation consists of criteria which a fragment of reality must fulfil to be covered by the definitions of the words used to express the rule. Those definitions, however, are artificial.<sup>61</sup> Hutton argues that a convincing response to the accusation of the generalisation can be that rules are abstract in the sense that they have generalised focus.<sup>62</sup> However, I argue that this response is not convincing at all—the generalisations we make must always be understood as rooted in particular contexts from which they have been derived. The formalist’s problem is that they believe the criteria set forth by the generalisation are immutable in the sense that they are independent from the particular state of affairs to which they are applied. This is well-intentioned: the main task of generalisations is to confine the risk of individual error in applying the law to a particular case. Without such generalisations, the individual would be forced to decide the case on an *ad hoc* basis, using the rationale for which a legal rule has been set, but not applying the rule itself.

But where do generalisations come from? Legal provisions contain general terms that are abstractions from experience: we experience particular situations and abstract some set of features common to those situations. The term “tool” encapsulates all experiences of tools, the term “dangerous” summarises all experiences of situations in which a risk or threat is involved. Any set of features we extract from such situations is usually expressed as a definition. Within this approach to generalisations, interpretation consists of applying the definition to new situations, events and features. Consequently, to use language is to make deductions: i.e., to apply a general set of uniform criteria to particular cases.

Within the paradigm-based approach, however, using language is not a question of applying definitions, but rather of comparing a situation to which the language is to be applied with previous situations to which it did apply. As such, the paradigm-based approach is a kind of analogy-based reasoning.

57. John F Manning, “The Absurdity Doctrine” (2003) 116:8 Harv L Rev 2387 at 2393.

58. Celeb Nelson, “What is Textualism?” (2005) 91:2 Va L Rev 347 at 376.

59. Christopher Hutton, *Word Meaning and Legal Interpretation: An Introductory Guide* (Palgrave Macmillan, 2014) at 44.

60. Schauer, *supra* note 52 at 17.

61. Roy Harris & Christopher Hutton, *Definition in Theory and Practice: Language, Lexicography and the Law* (Bloomsbury, 2007) at 212.

62. Hutton, *supra* note 59 at 45-46.

The problem with the definition-based approach is that its interpretation of language detaches itself from experience, and thereby detaches itself from the real world. The approach focuses on the criteria selected as a result of experience. Those criteria become autonomous from the experience, they live their own lives: the definition of a “dangerous tool”, focusing on the feature of “being an implement” neglects the full context of the previous uses of the term “dangerous tool”, i.e., how using the dangerous tool forced the victim to succumb to violence.

Combining Recanati’s concept of ordinary meaning with Millikan’s idea of lineages provides a robust externalist theory of language that can be used to criticise the reductionism of interpretative premises. By eliminating the use of definitions as intermediaries to interpretation, as proposed by Recanati, the paradigm-based approach avoids the reductionism of its competitor. While the latter relies on a limited number of features selected by the definition, the former makes use of the full set of features covered by past uses of a term. Instead of limiting the number of interpretive premises, the paradigm-based approach expands their number significantly.

The paradigm-based approach also underlies Millikan’s theory of linguistic lineages. As we recall from the previous parts of the article, it is exactly the existence of a feature that leads users of a language to apply a term again and again to particular situations, thus creating a lineage of a term’s uses. The recurrence of this feature has induced community of speakers to reuse the same term to signal that feature’s existence, and this reuse of the term has endowed the term with a proper function of signalling that feature’s occurrence. Millikan’s approach makes inevitable to consider the functional element in linguistic interpretation, contrary to reductionism.

Because the theoretical analysis of language may seem too abstract for lawyers involved in practical, day-to-day cases, in the next section two real cases are analysed to show the explanatory power of the theoretical framework presented above.

## 6. How the Paradigm-Based Approach Works in Practice: Two Cases

The purpose of discussing these cases is twofold. First, I aim to show the advantage of the paradigm-based, historical analysis of language practice over the definition-based analysis in real-life cases. Second, I argue that cases solved with the formalistic, definition-based approach result in incongruity: a feeling on the part of the law’s addressee that the solutions are strange and surprising. Lawyers’ reaction to such incongruity is very often to quote a Latin proverb “*Dura lex sed lex*”: “The law is harsh but it is the law”. My conclusion is that the “harshness” of the law arising from the formalistic rule is an adverse effect of taking a non-natural, definition-based approach to language, not a genuine feature of the law *per se*. When that interpretative approach is replaced with a paradigm-based, externalist one, the incongruity disappears, and with it the sense of harshness. If one analyses language as a historically developed, context-sensitive practice,

the judicial decision to apply statutory terms according to their ordinary meaning does not have to result in surprise. To the contrary, the decision can be at once commonsensical and legally justified.

### *Nix v. Hedden*<sup>63</sup>

The first case illustrating how the lineages work is *Nix v. Hedden*. In this “tomato-as-fruit case”, as it is known, the US Supreme Court faced the quandary of how to qualify tomatoes in the light of tax tariffs that differ with regard to fruit and vegetables. If tomatoes were qualified as fruit (as they are from a botanical perspective) they would be subject to lower tax than when qualified as vegetable (which they are from a culinary perspective). When taken from the externalist perspective, *Nix v. Hedden* nicely depicts the usefulness of the paradigm-based approach and the concept of lineages.

The issue at the heart of *Nix v. Hedden* can be best observed through the prism of lineages. The dilemma the judges faced was based on the existence of two lineages of using the word “fruit”. The first one, “culinary”, is a tradition of using “fruit” within culinary contexts. The instances within the culinary lineages include situations in which previous users applied “fruit” with a proper function which has been to cover the properties of things like cherries, strawberries or apples. These properties include typically (but not exclusively): the property of being sweet or the property of being elements of desserts. Tomatoes, which from this perspective are rather similar to cucumbers, onions and pumpkins, have not been covered by the word “fruit” in this lineage.

The other lineage, the “botanical” one, is a tradition of using the word “fruit” in a different, specialised context of botany, in which technically fruit is a part of a plant that forms itself from a flower and contains seeds. Within this context, the proper function of “fruit” has been to cover the property of being a particular stage in the development of plants. The crucial legal question in *Nix v. Hedden* was within which lineage the term “fruit” had been used in the relevant tax legislation, and, consequently, if tomato should be covered by this term. It is quite clear that tomato had been covered by the word “fruit” within the “botanical” lineage (a tomato is technically a fruit because it develops from a flower and contains seeds), and not covered by the word “fruit” within the “culinary” lineage (within the latter it has been covered by the term “vegetable”).

The Court rightly decided that the use of “fruit” in the tax legislation was an instance of the culinary lineage, as it is a more general one and there no indications that the term “fruit” was used in the narrow, botanical lineage. After all, one taxes objects with an eye how they are used in regular life, not how they develop biologically.<sup>64</sup> In terms of semantic externalism the two lineages allow for two

63. 149 US 304.

64. Excise tax, for instance, is widely used to burden the sale of luxury products, like perfumes, or products (like tobacco and alcohol) whose use the government discourages. On the other hand, sometimes lower rates of VAT are introduced for products whose use is supported by the government (e.g., books or newspapers).

theories explaining on how the word “fruit” has been used. Each theory presents an explanation by finding a common denominator for a particular practice of using the word. The co-existence of the two lineages and two theories caused the ambiguity the Court faced in *Nix v. Hedden*. As the case shows, the task of interpretation is to trace the lineages and to decide in which one the interpreted term has been used.

Approaching the *Nix v. Hedden* case via Recanati’s terminology, the court’s application of the word “fruit” to tomatoes is a target situation. To assess the appropriateness of this application, one needs to trace back the source situations in which the word “fruit” has been previously used. The semantic potential, shaped by the history of using the word “fruit” includes the source situations in which the feature of sweetness and the feature of “being-developed-from-the flower” occurred. As the features have different functions for us, however, two functional lineages of using the word “fruit” exist: a culinary and a botanical one. Those lineages are sets of source situations in which different features with different functions have been chosen by speakers.

As we have seen, legal interpretation within the externalist paradigm consists in deciding whether the target situation (in the *Nix v. Hedden* case, exporting tomatoes) sufficiently and in relevant aspects resembles the source situation, which was the use of the term in the legal text (“exporting fruit” in the tax legislation). The court decided that the lawmaker used the word “fruit” in the tax legislation to invoke the series of the previous source situations in which the proper function of the word “fruit” was to signal the occurrence of the features connected to taste (like sweetness) and culinary use (“dessertness”). As the target situation (tomato) does not have those features of sweetness and dessertness, the tomato cannot be named “fruit”.

The judges in *Nix v. Hedden* had to then make two decisions: which set of source situations to choose and whether the target situation resembles the source situations within the chosen set. The former decision was crucial: the judges decided that the original use of the word “fruit” in the tax tariff was an instance of a “culinary” use, not a “botanical” one. By doing so, they determined that the right set of source situations with which to compare the target situation is the culinary one, not the botanical one. Once chosen, the culinary set of source situations provided the judges with a clear set of features, like sweetness and “dessert-ness” that cannot be found in the target situation (tomato), so the application of “fruit” to “tomato” was found to be incorrect.

Interpretive controversies like that in *Nix v. Hedden* cannot be resolved with the use of definitions alone, and the Court was well aware of that.<sup>65</sup> Like “fruit”, other legal and non-legal terms acquire their meaning not from dictionaries but from the practice of using them in particular contexts. Therefore, every legal interpretation has to look into the past to discover the proper function of terms and phrases. The “normal” or “typical” meaning is not a “plain meaning” but the

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65. Hence, in *Nix v Hedden*, *supra* note 63 at 307, the Court openly diminished the role of definitions in understanding legal text: “dictionaries are admitted not as evidence, but only as aids to the memory and understanding of the court.”

typical, proper function the terms and phrases acquired by being used in particular contexts in the past.

The plaintiff's argumentation in the tomato-as-fruit case provides an example of overlooking the distinctions between lineages—or ignoring the very existence of those lineages. A more common name for such practices is “dictionary shopping”, where definitions are chosen for the sake of expediency. It is easier to cherry-pick a definition favouring one's preferred outcome than to analyse whether that definition is aligned with previous uses of the word in question.

### *Smith v. United States*<sup>66</sup>

As the analysis of *Nix v. Hedden* has shown, the source of incongruity in judicial interpretation can be an insensitivity as to which lineage the interpreted term belongs. It is, in other words, an insensitivity to the context in which words and phrases are used in linguistic practice. Definitions are generalisations and as such they may be applied in detachment from the contexts in which the defined words have been formed. This phenomenon is conspicuous in another court case, *Smith v. United States*, in which the judges interpreted the phrase “to use a firearm” and considered applying it to the situation in which the perpetrator exchanges a bag containing a gun for drugs. An interpretive decision that exchanging the bag with a gun constituted an instance of “using a firearm” would make it possible to impose a harsher punishment on the perpetrator.

Unlike *Nix v. Hedden*, the Court in *Smith* intuitively reached for a dictionary definition of the verb “use”, instead of focusing on typical applications of the phrase.<sup>67</sup> The problem is that, within the theory of lineages, it is not words but phrases and sentences that refer to the world. The reason for this is the nature of language as applied to reality: sentences correlate with situations, and particular words, which correlate with elements of situations, can be the building blocks of many sentences and thus appear in many lineages. Situation A, in which “a firearm” is used, and situation B, in which anything else is used, can be contextually completely different, yet the verb “to use” appears in both. Therefore, understanding “to use” according to its dictionary definition, i.e., as abstracted from those completely different situations, is not justified within the theory of lineages. In the case, however, the judges applied a general definition of “to use”, detaching it completely from the typical situations within which the phrase “to use a firearm” is generally employed.

The dictionary definition of “to use” is a distillation of all the lineages including this word, and as such is multifarious. The theory of lineages requires a focus on particular instances of using language, and there exist no particular instances of using “to use”. In other words, with one exception, there are no particular

66. 508 US 223.

67. *Ibid* at 229, the Court explicitly cited the definitions of “to use” from *Webster's New International Dictionary* (“to convert to one's service” or “to employ”) and from *Black's Law Dictionary* (“to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of”).

situations in which one simply “is using”.<sup>68</sup> However, there are particular instances of “using a firearm” that form lineages entirely distinct from others such as “using a bag” or “using a car”.

If we analyse the lineages of the word “use” taken separately, not as a part of the phrase, the number of its meanings is enormous:<sup>69</sup> the semantic potential of ‘to use’ encompasses all the source situations in which it occurred, with all the possible nouns it can occur with. As in its transitive form, “use” is always accompanied by a noun, its source situations must be analysed with their accompanying noun, contrary to what the Court did in the case. As nouns modify the meaning of verbs with which they occur,<sup>70</sup> each use of the verb “to use” with a different noun creates a different lineage.

The whole phrase “to use a firearm” has a history of being uttered in the typical situations in which a person has used a gun to shoot or to threaten. Naturally, there must have been situations in the past in which one used a gun for a strange, atypical purpose: to hammer a nail or to open a beer. It seems unlikely, however, to assume that in those atypical situations merely the phrase “to use a firearm” was sufficient to indicate the possibility of using it in that atypical way. No one expects a person to shoot a nail or a bottle in those situations, so additional linguistic information must have been provided, either explicitly or implicitly, for allowing the hearer to deduce that a non-typical use is being proposed. It could have happened by adding a phrase (“use a firearm AS A HAMMER”, “use a firearm AS AN OPENER”) or by a behaviour which was communicatively obvious in a given context (e.g., by handing over an unloaded gun to a person struggling to open a bottle). In those atypical cases it is not the phrase “using a firearm” that has been used but another phrase (e.g., “using a firearm AS AN OPENER”). As a consequence, those atypical situations constituted a different lineage of different linguistic expressions. Finally, it can be stated that the lineage of the phrase “using a firearm as a firearm” is stable and clearly refers to using a firearm in a typical way. Interpreting it in a context-insensitive way, as the Court in *Smith v. United States* did, is an interpretative mistake.

It is strange to claim, as formalists do, that a plain or ordinary meaning of a particular phrase consists not in how this phrase is typically used, but in the sum of all possible uses of all phrases in which the interpreted word has been used (e.g., understand “to use” as it has been used in any phrase including “use”, and not as it has been used in the phrase “to use a firearm”). The

68. This one exception is a colloquial and intransitive use of the verb and represents a separate lineage; e.g., “My brother is using.” *Oxford Living Dictionaries, sub verbo* “use” (definition 2.1), online: <https://en.oxforddictionaries.com/definition/use>.

69. That the definition-based approach of the court is too broad is the main topic in Justice Scalia’s dissent to *Smith v. United States*. As he points out in *supra* note 66 at 241-42, the word “to use” is “elastic” as its meaning can “range all the way from ‘to partake of’ (as in ‘he uses tobacco’) to ‘to be wont or accustomed’ (as in ‘he used to smoke tobacco’).”

70. Recanati, *supra* note 47 at 91 and 133 points out that “the word ‘get’ takes on different senses—denotes different relations—depending on what fills the second argument-place of the relation”. The examples he gives include ‘to get the virus’ (‘to contract’) and ‘to get some eggs’ (to acquire). Another example is “to cut” (‘John cut the grass’ and ‘John cut the cake’). A similar remark is made by Justice Scalia, *supra* note 66 at 245, in his dissent: “Just as adding the direct object ‘a firearm’ to the verb ‘use’ narrows the meaning of that verb”.

definition of “to use” is too broad to be meaningful—it is a generalisation that is simply too general.

### *Incongruity of the definition-based approach*

Both cases discussed above demonstrate how easily a judge may assume an interpretation that is completely surprising and incongruous. In *Nix v. Hedden*, the decision to decrease the tax rate for tomatoes because they are technically fruit (i.e., according to the definition) would appear incongruous, given that the practice had been to treat tomatoes as vegetables for tax purposes. The decision in *Smith v. United States* is surprising, as rightly stressed in Justice Scalia’s dissent. The reason is that the Court interpreted the phrase “to use the firearm” in an unnatural way, i.e., in a way which was insensitive to the natural context of this phrase. In the discussed cases, the incongruous and unpredictable interpretative outcome would result (in *Nix v. Hedden*) or actually results (in *Smith v. United States*) from an acontextual approach to the ordinary meaning and arises from a definition-based approach to language, not a paradigm-based one.

The incongruity results from a simple fact that the application of a word or phrase to a new situation (the target situation) seems unjustified, as the target situation is not similar in a relevant aspect to previous situations to which the word or phrase at hand has been applied. Applying the word “fruit” to tomatoes is incongruous, because tomatoes, as they are used for culinary purposes, do not resemble the typical objects we call fruit: cherries or pears. Claiming that handing over a bag with a gun in it is using a firearm seems strange, as this situation does not resemble a typical situation we have been calling “using a firearm” in the past (like shooting or threatening with a gun).

The incongruity of the formalist approach is a fatal flaw because it excludes the congruence Fuller’s internal morality of law requires, thereby putting the predictability the rule of law requires out of reach.<sup>71</sup> Legal language is a branch of common language and as such should be used and interpreted in a way consistent with common language—i.e., in a contextualised, lineage-based way. If it is not, those who are governed by the law will be surprised how their understanding of language differs from that of judges. To minimise the divergence between legal and common language, legal interpretation needs to abandon the artificial definition-based approach to meaning, which can give rise to incongruity in judicial decisions and unpredictability in the application of law. Unpredictable judicial decisions cannot promote the rule of law.

If one is to treat seriously the formalists’ argument on the importance of sticking to language and language alone in legal interpretation, one must ask what concept of language they are talking about. Should we stick to the artificial language of definitions, as with semantic internalism, or to the real language of everyday use, as with semantic externalism? If legal interpretation is to be predictable, as the rule of law requires, it must be sensitive to the history and function of

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71. Fuller, *supra* note 29 at 39, 81-89.

the terms we use, just as everyday use is. An outline of such an approach to legal interpretation is proposed in the final part of this paper.

## 7. A Non-Formalistic Approach to Legal Interpretation

As we have seen, semantic externalism posits an anti-criterial and therefore an anti-dictionary thesis: the definitions we encounter in dictionaries are sets of criteria and as such are to help us to imagine typical contexts in which a word is used, but they cannot substitute for those contexts. According to semantic externalism, a plain meaning is not a dictionary meaning, but rather one resulting from the “normal” use of a phrase or a sentence, not a particular word. Normal use consists of using a phrase or a sentence in a typical context, i.e., in the presence of particular facts, things and people. To identify this meaning, one needs to trace a lineage of this phrase or sentence use, and this requires looking beyond dictionaries, into the past. This process is inductive, not deductive. It is not definition-based, but paradigm-based.

As such, the process of identifying meaning of an utterance according to semantic externalism is more entrenched in the day-to-day linguistic practice we are all familiar with. Our use of language is always contextual and always has a particular purpose. The criteria-based approach, proposed by semantic internalism, is out of touch with this day-to-day contextual practice, as it removes language from its natural environment. Therefore, the model of language supported by semantic internalism, and by extension, judicial formalism as a normative theory of interpretation, leads to artificial and surprising results.

The competing normative theory of legal interpretation defended in this paper is based on an externalist model of language, i.e., a non-internalist and non-criterial one. According to this theory, language works in a paradigm-based manner, not in a criteria-based one. This theory provides more natural interpretative results: results which are more entrenched in the ordinary use of language and therefore less surprising. As a consequence of the results being less surprising and therefore more predictable, the theory is more in line with the requirements of the rule of law.

According to the theory of interpretation based on semantic externalism, the proper application of a legal term to a new situation requires two decisions to be made: (1) deciding in which lineage the term at hand has been used in the legal text, and (2) deciding whether the target situation resembles the source situations which form the lineage. Let me take each decision in turn, as they are usually taken in legal interpretation.

The identification of the correct lineage requires first an analysis of how the subject term was used by the lawmaker. How do we establish to which lineage the lawmaker’s use belonged? One of the best tools to do so is to analyse the context of that use, namely the legislative history. This is comprised of utterances referring to the legal act contained in legislative texts, reports of parliamentary committees, protocols of plenary sessions, etc. All these utterances constitute concurrent uses of terms that are the same as or similar to terms occurring in the

text of law. All these utterances concern the scope of matters regulated in the act, social issues to be remedied by the legal act, and so on. By analysing these utterances, an interpreter can establish what the problem was that the lawmaker attempted to solve by enacting the law, and what were the specific topics the lawmaker addressed in the parliamentary discussions. In other words, the analysis of the legislative history helps the interpreter to identify the elements of reality to which the lawmaker referred to in the legal text, and by doing so establish the possible lineages within which the interpreted term was used.

Judicial formalism, especially its textualist branch, generally refuses to use legislative history in legal interpretation.<sup>72</sup> It claims that analysis such as that described above would go beyond the language of the statutory text, which it perceives as complete and inviolable. This claim is misguided: if the analysis of legislative history goes beyond anything, it goes beyond the semantics of the text, but only to arrive at its pragmatics, i.e., to the real context in which the language is used. Semantic externalism perceives this pragmatics as a fully legitimate part of linguistic analysis of the statutory text. In other words, if meaning is perceived as having a close relation to the reality to which it refers, analysing that reality cannot be treated as non-linguistic. Legislative history is the real context in which the lawmaker used the term the interpreter is to apply; formalism's proposal to remove legislative history from the set of legitimate sources of knowledge about language use seems to be an unjustified reductionism of interpretative premises.

Once one is sure that both the instance of using the legal term by the lawmaker and the planned use of that term by the interpreter (i.e., its application to the case at hand) can be instances of the same lineage, the second interpretative decision can be taken. It resides in finding similarity between the target situation and the source situations. Traditionally, the key source situation to which the target situation is compared is the lawmaker's use of the subject term. However, as Recanati pointed out, the semantic potential of a term is shaped by all the source situations in which the term has been used. Thus the theory of lineages encourages interpreters to expand the number of source situations and to include other instances of using the term, including those precedent, contemporaneous and subsequent to that of the lawmaker. Those instances include, for example, other court verdicts in which the term was applied to similar facts, and the uses of the term which took place in legal literature, both before and after the lawmaker's use. The lineage is a chain of all public uses of a term and, as I indicated earlier, the lawmaker's use is by no means definitive for the purposes of legal interpretation.

The argumentation for expanding the number of interpretive premises by including other court verdicts and the opinions expressed in the legal literature seems convincing within the theoretical framework of semantic externalism. Yet it is not accepted by the formalists.<sup>73</sup> From the formalist perspective, such expansion may be criticised in those jurisdictions in which court decisions are not

72. Nelson, *supra* note 58 at 361.

73. See Frederick Schauer & Virginia Wise, "Nonlegal Information and the Delegalization of Law" (2000) *J Legal Stud* 495.

formal sources of law (for example in the continental legal systems). As to the opinions expressed in legal literature, despite their wide use in legal argumentation, the last formal recognition of the *communis opinio doctorum* within the legal system took place in ancient Rome and the first German Reich. The intention of this paper is not to argue for a return to those days but to admit that the analysis of legal language cannot exclude other and related uses of legal terms. These latter constitute legitimate comparative material for legal interpretation if we agree that the meaning of the language is produced by living linguistic practice rather than fossilised dictionary definitions.

As we have seen, the dispute between judicial formalism and a non-formalistic approach to language again revolves around the issue of reductionism of interpretive premises: where formalism wants to minimise the number of these premises, the counter-proposal wants to increase it, by embracing legislative history, similar court verdicts and doctrinal opinions as sources of linguistic information. The formalist, definition-based approach tends to limit the number of features that enter the definition and, as a result, are considered while applying that definition to a new case. In opposition to that, the paradigm-based approach, by resigning from the intermediary function of the definition, allows the interpreter to assess the similarity between the target and the source situations on the basis of the whole set of features present in the source situations, i.e., on the basis of the whole semantic potential of the term. The increase of features present in the source situations that are considered by the interpreter is another anti-reductionist characteristic of the approach to language proposed in this paper.

The non-reductionist thesis that I am defending concerns not only the quantity of the interpretative premises but also their quality. The paradigm-based approach to interpretation allows the interpreter to consider both the formal and the functional similarities between previous and current instances of language use. As the “dangerous tool” example shows, the hands of a kung-fu master are dangerous tools within the meaning of the Criminal Code, because they are dangerous in a functional sense, even if they lack some physical features present in the previous source situations (like being an implement). This functional approach to interpretation is absent in judicial formalism; indeed, functional and purposive interpretations are methods formalists criticise as non-linguistic and prone to advancing judicial discretion.<sup>74</sup> Switching the perspective from semantic internalism to semantic externalism reveals that judicial formalism’s reluctance to use functional and purposive considerations is entirely unjustified. Linguistic terms have a function, which is to pick up relevant features from reality. We use linguistic terms for the purpose of signalling that those features occur. No approach to interpretation that aspires to be an effective tool of decoding ordinary meaning can neglect those functional and purposive aspects of language.<sup>75</sup>

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74. According to MJ Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977) at 254 formalism equates to a refusal to admit that law has instrumental functions. Pildes, *supra* note 16 at 612, defines formalism as an adherence to the rules without consideration of their purpose.

75. Barak’s theory of interpretation, mentioned in footnote 49 above, intuitively relies on that purposive and functional approach to language. Although Barak does not explicitly support

To summarise, legislative history, other judicial rulings, views expressed in legal literature, as well as the functional and purposive aspects of legal language can all be treated as elements that are crucial in identifying the meaning of legal terms. As a corollary, an interpretation guided by historical, comparative, or legal literature perspectives goes hand in glove with the rule of law, which requires fidelity to the language of the lawmaker. In light of this, judicial formalism, which neglects the functional, purposive and historical aspects of legal interpretation, cannot be treated as compatible with the rule of law.

Critics of non-formalism who fear excessive discretionary powers being handed to lawyers or judges have nothing to fear. Paradoxically, the non-formalist approach to legal interpretation can ensure a better predictability of judicial decisions and a stricter curtailment of judicial discretion by broadening the scope of interpretive premises judges base their decisions on. Although it is not reductive, the theory presented here curtails interpretative discretion and secures predictability thanks to its reliance on lineages. To claim that a word has a particular meaning is to reason that it acquired that meaning as a result of past uses. Thus, an important element of the theory of lineages is deference to past uses that makes idiosyncratic uses unlikely.<sup>76</sup> In this sense, enrooting a typical meaning of a legal term in the tradition of its use has binding power, like the one depicted by Dworkin in his chain novel metaphor: our current uses of language are at the same time inspired and bound by previous uses.<sup>77</sup>

The non-formalist approach to interpretation, derived from the externalist positions in the philosophy of language, sees language in a natural way: as a historically determined practical tool for co-ordinating human behaviour, not as a set of abstract, criterial definitions, artificially separated from the real world. The latter approach, i.e., that championed by legal formalists, can result in surprising interpretive results because it departs too far from the way people use their language. As such, it undermines the rule of law instead of promoting it. Surprisingly, the non-formalist method of interpretation is, therefore, a better candidate than its formalist counterpart to fulfil Scalia's expectation: "[There is]...another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."<sup>78</sup>

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semantic externalism, his conviction that legal language is always used for a purpose, and that the goal of interpretation is to discover this purpose, is in line with the externalists' conviction that every linguistic tool has a proper function. Cf Millikan, *supra* note 35 at 17. In other words, Barak's purposivism is a normative theory of legal interpretation that gets support from the descriptive model of language proposed by semantic externalism.

76. Antonio Rauti, "Multiple Groundings and Deference" (2012) 62:247 *Philosophical Quarterly* 317 at 317-18.

77. See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

78. Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 *U Chicago L Rev* 1175 at 1179.

## 8. Conclusion

The American Realists' critique mentioned at the start of this paper did not dispatch judicial formalism, nor did later ones; in fact, as one might say, formalism has been killed many times within the last two hundred years but still refuses to remain dead.<sup>79</sup> One reason that criticism proved unsuccessful is that it rarely attempted to cut formalism from its main life-support system: its purported compatibility with the rule of law. Formalists believe that theirs is the only theory of interpretation that secures the rule of law, a corollary of which is that any criticism of formalism endangers this founding ideal of Western legal systems. In order to be effective, any criticism of judicial formalism must start by decoupling formalism from the rule of law, as I have attempted to do in this paper.

What was missing in the criticism of formalism was the argument that competing approaches to the application of law better pursue the principle of the rule of law than formalism itself because they are more faithful to legal language. In order to see this, one needs to analyse legal language from the position of semantic externalism, and to build a normative theory of interpretation based on externalist assumptions. By revealing a more sophisticated nature of legal language, this new position makes clear that the interpretation of legal texts cannot be reductionist. To the contrary, legal interpretation must make use of the richness of our linguistic history and practice if it is to do justice to the language used by the lawmaker. To be interpreted faithfully, legal language does not actually require a fully all-things-considered approach, but it cannot be restricted to a merely formalistic one. A moderately non-formalistic, non-reductionist approach to legal interpretation seems more justified.

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79. As remarked in a 1988 article, Ernest Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 *Yale LJ* 949.