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Author(s): Matthias Klatt

Source: *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, Vol. 90, No. 1 (2004), pp. 51-65

Published by: [Franz Steiner Verlag](#)

Stable URL: <http://www.jstor.org/stable/23681628>

Accessed: 27-05-2015 00:39 UTC

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Matthias Klatt, Düsseldorf

Semantic Normativity and the Objectivity of Legal Argumentation*

ABSTRACT: With regard to its importance, Jürgen Habermas compared Robert Brandom's *Making It Explicit* with *A Theory of Justice*. This paper investigates the significance of Brandom's philosophy of meaning to legal interpretation. The focus of attention is whether the meaning of a norm can constrain legal interpretation.

The questions of the determinacy and the objectivity of law are at issue. Both debates are dealt with by arguments from the philosophy of meaning. Because of the open texture of law and because of the vagueness of language, which is one of the burdens of judgment, judges have discretion in the application of law. The topic here is, whether and to what extent the meaning of the norm can serve to reduce this discretion. Both the legitimacy and the objectivity of judicial decisions depend on this.

I. Introduction

1. The objectivity of legal argumentation

Whether there is objectivity of law is one of the most fundamental questions in legal theory.¹ That the text of a statute can determine the content of the norm and thereby its application is not a sufficient, but rather a necessary condition of legal objectivity. The function ascribed to the text to fix the content of the norm in a universal way which makes it understandable to everyone cannot be achieved unless meaning itself is objective.

Positions sceptical towards claims of objectivity, like Legal Realism and Critical Legal Studies, refer to semantic indeterminism.² The deconstructive challenge of meaning scepticism³ unsettles the assumption that legal argumentation is objective. Meaning-scepticism claims that statements on the meaning of a statute dissolve into a multitude of language games and relativistic interpretations that stand opposed to each other uncomprehendingly. The aim of this paper is to show on the basis of Brandom's normative concept of meaning that this sceptical description of legal reasoning is mistaken.

* This paper was awarded the IVR Young Scholar Prize 2003. A short version was published in *Associations* 2003, 115-127.

1 The relevance of this question is contested by Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford 1996, 3-12. Sunstein's argumentation is refuted correctly by David Brink, Legal Interpretation, objectivity, and morality, in: Brian Leiter (ed.), *Objectivity in Law and Morals*, Cambridge 1997, 50-54.

2 Joseph Singer, The Player and the cards: Nihilism and Legal Theory, *Yale Law Review* 1984, 6. Cf. David Brink (n. 1), 14 f., 17; Jules Coleman/Brian Leiter, Determinacy, objectivity, and authority, in: Andrei Marmor (ed.), *Law and Interpretation*, Oxford 1995, 203-205

3 Willard Van Orman Quine, Two dogmas of empiricism, in: Willard Van Orman Quine (ed.), *From a Logical Point of View*, Cambridge, Mass. 1999, 36 f.; Saul Kripke, *Wittgenstein on Rules and Language*, Oxford 1982, 7-11; Crispin Wright, Rule following, meaning and constructivism, in: Charles Travis (ed.), *Meaning and Interpretation*, Oxford 1986, 290-292; Crispin Wright, Rule-following, objectivity and the theory of meaning, in: Steven Holtzman/Christopher Leich (ed.), *Wittgenstein: To follow a rule*, London 1981, 100

2. The normativity of meaning

The debate on the normativity of meaning deals especially with two questions: First, how is the idea of a context-transcendental objectivity to be harmonized with the existing plurality of language games and conceptions of the world? And second, how can the widely shared opinion that meaning originates in a conventional practice of a language community be taken into account, without reducing meaning to Quine's "common-sense platitudes"⁴ at the same time?

There are two main positions in contemporary analytic philosophy, *i.e.* naturalism and normativism.⁵ They are discussed in semantics as well as with respect to the concept of law.⁶ Meaning-scepticists like Quine argue that there is no distinction between empirical and non-empirical and between analytic and non-analytic sentences. Normativism has been strongly supported in Robert Brandom's *Making It Explicit*. In general, one can speak of a renaissance of normative theories in contemporary analytical philosophy.

One central claim of this paper is that the practice of attributing meaning entails that the meanings of concepts bind their usage. The concept of semantic limits is a *normative* concept. Therefore, a concept of meaning has to be normative, and its analysis has to spell out the conditions of correct usage of words or sentences.⁷

3. Survey of content

First, the normativity thesis of meaning is defended against meaning-sceptical criticism. This is done with the help of Robert Brandom's philosophy of meaning, the main concepts of which are presented (II). Second, consequences of semantic normativity to questions of the objectivity of legal argumentation are drawn (III). Third, the distinctions between easy and hard cases and between the empirical establishment and the fixing of meaning are discussed as well as the question of the objectivity of the meaning of norms. As an example for this complex of problems, the German theory of the limits of the wording is introduced and defended. Finally, the results are summarised (IV).

II. A defence of semantic normativity

1. The concept of semantic normativity

The discussion on the normativity of meaning is controversial even in the latest philosophy of meaning.⁸ The concept of normativity is based on the assumption that it is

4 Willard Van Orman Quine, *The Pursuit of Truth*, Cambridge, Mass. 1990, 13

5 Willard Van Orman Quine, *Word and Object*, Cambridge, Mass. 1960, 161, 228-229, 275-276

6 Cf. Jules Coleman, Normativity and Naturalism, in: Jules Coleman, *The practice of principle*, Oxford 2001, 175.

7 See Jules Coleman/Brian Leiter (n. 2), 208.

8 Critical to the thesis of the normativity of meaning: Akeel Bilgrami, Norms and Meaning, in: Ralf Stoecker (ed.), *Reflecting Davidson*, Berlin 1993, 144; Kathrin Glüer/Peter Pagin, Rules of meaning and practical reasoning, *Synthese* 118 (1999), 224 f.; Asa Wikforss, Semantic Normativity, *Philosophical Studies* 102 (2001), 220; Paul Horwich, Meaning, use and truth, *Mind* 104 (1995), 357; Paul Coates, Kripke's Sceptical Paradox: Normativeness and Meaning, *Mind* 95 (1986), 78. In

impossible to say anything meaningful unless it is impossible to use words incorrectly. This is called the condition of semantic errors. Based on this rather broad concept of normativity, we can formulate a *general thesis of semantic normativity*.⁹

There is an intersubjectively valid way of distinguishing between correct and incorrect usage of concepts.

This proposition would allow us to label any real or potential use of a concept as either "correct" or "incorrect".¹⁰ This minimal consensus has two significant characteristics: First, it declares as normative the relation between the meaning of a concept and its use. Second, as a great variety of conditions for correctness exist, the simple declaration of there being such conditions is insufficient. We have to distinguish between multiple theses of semantic normativity.

In this multitude of theories, we can distinguish four separate approaches in support of semantic normativity. The first approach focuses on a close relation between normativity and truth. All theories of meaning concentrating on reference belong in this category. Here, the conditions for correctness are derived from the nature of the objects to which the concepts refer.¹¹

The second approach justifies the normativity of meaning using the concept of internal relations. According to this theory, there are internal relations between the concepts of a language. They function as Wittgensteinian *grammatical sentences* and define which lines of words are meaningful.¹²

The third approach anchors semantic normativity in general rationality. As indicated by Joseph Raz, rationality is the ability to recognize the normative significance of facts in the world and to act accordingly.¹³ According to this strategy, rules of meaning function as basic standards of rationality.

The last approach is the best-known. It is based on the middle and late Wittgenstein and his thoughts on the regularity of meaning. Searle states:

"[S]peaking a language is engaging in a rule-guided form of behaviour. To put it more briskly, talking is performing acts according to rules."¹⁴

Each of these strategies could be discussed in detail. However, any debate of their respective merits would be outside the purpose of this paper. Only an *integrative theory of normativity*, which incorporates all four approaches, does justice to the structure of meaning. Remarkably, this integrative theory would be the strongest possible

favour of the normativity thesis: Paul Boghossian, *The rule-following considerations*, *Mind* 98 (1989), 532, 548; Simon Blackburn, *The individual strikes back*, *Synthese* 58 (1984), 291; John McDowell, *Wittgenstein on following a rule*, *Synthese* 58 (1984), 329; Crispin Wright, *Kripke's account of the argument against private language*, *Journal of Philosophy* 81 (1984), 771 f.; Mark Lance/John O'Leary-Hawthorne, *The grammar of meaning. Normativity and semantic discourse*, Cambridge 1997, 13.

9 Paul Boghossian (n. 8), 513; John McDowell (n. 8), 359 n. 3. See also Kathrin Glüer, *Sense and Prescriptivity*, *Acta Analytica* 14 (1999), 121.

10 Colin McGinn, *Mental Content*, Oxford 1989, 160

11 Paul Boghossian (n. 8), 513

12 Ludwig Wittgenstein, *Philosophische Bemerkungen*, Frankfurt am Main 1964, § 21; Ludwig Wittgenstein, *Philosophische Untersuchungen*, Frankfurt am Main 1997, §§ 420, 440 f.; Saul Kripke (n. 3), 37; Crispin Wright (n.8), 771 f.; John McDowell, *Intentionality and interiority in Wittgenstein*, in: Klaus Puhl (ed.), *Meaning and scepticism*, Berlin 1991, 152

13 Joseph Raz, *Explaining Normativity*, in: Joseph Raz (ed.), *Engaging Reason*, Oxford 1999, 68; cf. Kathrin Glüer (n. 9), 114.

14 John Searle, *Speech Acts*, Cambridge 1974, 22

defence of the normativity of meaning. As argued here, normativity of meaning is founded on essential conventionality of language as well as on the relation between meaning and truth and on regularity in the sense of constitutive, internal relations.

2. Semantic normativity post Robert Brandom

Making It Explicit by Robert Brandom¹⁵ is an epoch-making work that spreads out “the most elaborated and systematically richest philosophy of language, world and mind that has been developed in analytical philosophy so far”.¹⁶ Brandom’s theory is *the* pre-eminent justification of semantic normativity. His philosophy of meaning is a variation of conventionalism. However, it goes far beyond this. The regularity of the language-behaviour in a community is overarched by a discourse-theoretical claim of correctness. Thus, Brandom reconciles Frege with Habermas and Kant with the Logical Positivism.

As the programmatic title of Brandom’s work indicates, the central issue of his philosophy is to make explicit the implicit conditions of our practices. His central claim is: Our discursive practice has an implicit normative structure. The essential quality of this practice is the possibility of assessing speech acts to be right or wrong, appropriate or inappropriate.¹⁷

Making It Explicit is the first attempt to work out thoroughly a theory that explicates linguistic meaning in terms of use, *i.e.* to explain how semantic content can be conferred on expressions that are suitably caught up in social practices.¹⁸ Brandom develops his theory of semantic normativity in three steps. His theory combines normative pragmatics (a) and inferential semantics (b) through the leading concept of being made explicit.¹⁹ This leads to the model of deontic scorekeeping (c).

a) Normative Pragmatics

In a pragmatic analysis of the usage of concepts, Brandom clarifies what has to be done by the members of a language community in order to characterize their practices as specific practices of language. The starting point for this is an anthropological, action-theoretical point of view in the tradition of Kant in the line of which humans are characterized by their ability to assess and their ability to act. Both human assessments and human actions are based on reasons, and they are acts of conceptual content.²⁰

As stated by Brandom, norms are instituted implicitly in social practice. This argument can be labelled the *principle of socio-impractical institution of the normative*. The defining characteristic of this practice are normative attitudes of the persons involved. The attitudes are made up of conceptions of norms which, in turn, lead to the assessment of actions by sanctions. These normative attitudes have a social structure. Therefore, the practices in which norms are implicit are to be seen as social practices. Any description of these norms would have to be based on an existing regularity of behav-

15 Robert Brandom, *Making It Explicit*, Cambridge, Mass. 1994

16 Wolfgang Kersting, *Frankfurter Allgemeine Zeitung*, 07.08.2000, 49 (translated by M.K.).

17 Robert Brandom (n. 15), XIII.

18 Robert Brandom (n. 15), XII f.

19 Robert Brandom (n. 15), XIII, XVIII

20 Robert Brandom (n. 15), 8

our and of dispositions. However, while regularity is a necessary condition of normative vocabulary, it alone is inadequate.²¹ The status of correctness must not be identified with the brute fact of agreement.

b) Inferential Semantics

In line with Frege and Sellars, Brandom elucidates how semantic content is developed in such normative practices. Thereby, linguistic meaning is anchored in normative practice. His inferential semantics deals with the structure of the specific *discursive practice*.

Brandom holds an inferential concept of semantic content.²² The basis of meaning is seen to be inferential relations between propositions. This view rests on the claim of conceptual action rooting in the game of giving and asking for reasons that justify an attitude or a statement. Thus, a proposition is understood if its inferential role in the net of the propositions that give reciprocal definitions and justifications is comprehended.

Remarkably, Brandom does not take the inferences to be formal-logical relations, the correctness of which is constituted by their logical validity alone. Rather, he takes a view argued for by Frege²³ and Sellars²⁴ according to which linguistic meaning consists in *material inferences*. Inferences are material if their correctness depends on the non-logical conceptual content of the premises and the conclusions.²⁵ For example, the conclusion from "Hamburg is north to Munich" to "Munich is south to Hamburg" is valid because of the meaning of "north" and "south". Therefore, the distinction between valid and invalid inferences primarily follows content.

The explicative priority of logical vocabulary argued for by formalism is turned. Fundamental are material inferences that are implicit in semantic practices. Logical vocabulary can be used to make conceptual contents explicit.²⁶ Consequently modal-logical propositions of the form " $\Box (A \rightarrow B)$ " are inference licences which formulate the correctness of the inferential transitions as the content of a claim. Their function is

"[to make] explicit, in the form of assertible rules, commitments that had hitherto remained implicit in inferential practices".²⁷

Here, the best example is the conditional. We can use it to make explicit the material inferential relations between the premises and the conclusion.²⁸ Thus, the inferential commitments of the speakers are made explicit as contents of propositions. The most significant advantage of such explications and the fundamental characteristic role of logical vocabulary are to make it possible to talk explicitly about the semantic content. Explicating the contents of concepts with the help of the conditional allows for the rectification and justification of concepts.²⁹

21 Robert Brandom (n. 15), 46

22 Robert Brandom (n. 15), 89

23 Cf. Gottlob Frege, *Begriffsschrift und andere Aufsätze*, Darmstadt 1977, § 3.

24 Wilfrid Sellars, Inference and Meaning, *Mind* 62 (1953), 317

25 On the concept of material inferences see Robert Brandom (n. 15), 97, 102.

26 Robert Brandom (n. 15), 102

27 Robert Brandom (n. 15), 106

28 Robert Brandom (n. 15), 108

29 Robert Brandom, *Making It Explicit* (n. 15), 117

Based on a model developed by Dummett³⁰ Brandom makes the inferential structure of speech acts more concrete. The use of every linguistic term has two aspects, namely the circumstances of the appropriate employment and the appropriate consequences of such employment. Therefore, the semantic content to which a speaker is committed by the use of a proposition consists in the material inference that the speaker endorses implicitly by such use: the inference from the circumstances of employment to the appropriate consequences of such employment.³¹ According to this *principle of the normative significance of conceptual content*, every speech act has the intrinsic quality of a twofold normative significance, which can be designated as *conditional* and *consequential* normative significance. Linguistic meaning explains when it is correct to use a concept and what follows correctly from such use.³²

c) The model of deontic score-keeping

Since inferential semantics refers to a concept of *materially correct* inferences, it is anchored directly in normative pragmatics. The norms implicit in the use of a proposition determine which inferences are materially correct, i.e. not just logically valid, but rather appropriate with regard to their contents. These norms are explicated by the normative pragmatics.³³ The core idea of an internal connection between normative pragmatics and inferential semantics requires a model of the discursive practice showing how linguistic meaning is connected to the use of implicit norms in practice.³⁴ The central contention of this philosophy of meaning is that propositional content is to be understood by practices of giving and asking for reasons. The most elementary move in the game of giving and asking for reasons is to make an assertion.³⁵

In linguistic practice, two deontic statuses are used to assess the correctness of an assertion, namely *commitment* and *entitlement*. By putting forward an assertion, a speaker commits himself to certain contents. In addition, he can thereby entitle himself or other speakers to other assertions. If one adds the distinction between circumstances and consequences of a speech act to these statuses, one gets a four-dimensional model of the practice of making assertions. One can ask for the commitments and for the entitlements of a speech act, both with regard to the appropriate circumstances of that speech act as well as with regard to the appropriate consequences.³⁶

According to this four-dimensional model, a great number of inferential relations exists between the propositions of a language. Commitments and entitlements, circumstances and consequences of assertions share mutual internal connections. It is exactly this inferential structure of meaning which establishes propositional content. Brandom uses a model of deontic scorekeeping to illuminate the specific relationship between the pragmatic significances of speech acts on the one hand and the deontic statuses and their semantic content on the other. The basic idea of this approach is that competent linguistic practitioners keep track of their own and each other's commitments and entitlements, they are deontic scorekeepers. Speech acts alter deontic scores. Thus, one gets a picture of which speech acts a language community accepts

30 Michael Dummett, *Frege*, London 1973, 453

31 Robert Brandom (n. 15), 117

32 Robert Brandom (n. 15), 18

33 Robert Brandom (n. 15), 91

34 Cf. Robert Brandom (n. 15), 133.

35 Cf. Robert Brandom (n. 15), 141.

36 Robert Brandom (n. 15), 159

as correct or disapproves of as incorrect. The implicit norms can be made explicit as score functions.

With the help of this model, complex dynamic situations of the deontic statuses and its substructures can be analysed.³⁷ As a result, Brandom's model of discursive practice allows us to analyse propositional content using a purely normative terminology.

3. Criticism of the semantic normativity thesis

Kripke and Quine have brought forward the most severe criticism against any normative theory of linguistic meaning. Both argue that the meaning of a concept cannot determine the conditions of its correct or incorrect use.

Kripke's indeterminacy thesis rests on a radically sceptical view on Wittgenstein's considerations on rule-following.³⁸ Kripke's unsuccessful search for a meaning-fact can be refuted by an anti-naturalistic strategy. Each naturalistic attempt to reduce the normativity of meaning to brute facts must fail because any such attempt can only establish different kinds of the use of language but by no means correct and incorrect kinds of use. Kripke's central argument is that the use of each linguistic sign has to be justified by another linguistic sign that again has to be justified, and so on. Consequently, the attempt to establish rules of meaning ends necessarily in an infinite regress of justification. Kripke ignores the fact that the practice of argumentation rests on *prima facie*-entitlements. Although these can be challenged, until such challenge they justify certain kinds of the use of a concept while excluding others as incorrect. Brandom has labelled this phenomenon the *default and challenge structure of entitlement*.³⁹ For this reason the regress of justification of the use of a linguistic sign comes to a provisional end. Thus, Kripke's objection that the use of language has to be measured on external objective criteria is refuted. Meaning determinism can be relative to the practice of a language community.

Quine's semantic holism is based substantially on his reversibility argument. According to this, any sentence of a language is liable to changes on the ground of experience. If this argument is valid, then indeed a model of Brandom's provenience that argues for normative inferential relations between propositions is untenable. According to Dummett, Quine's reversibility thesis disputes the notion of inferential relations for the following reason:

"The principles governing deductive connections themselves form part of the total theory, which, as a whole, confronts experience. [...] But, in that case, there is nothing for the inferential links between sentences to consist in. They cannot be replaced by superinferential links, compelling us, if we accept certain logical principles, to accept the consequences under those principles of other sentences we accept: for any such superlogical laws could in turn be formulated and considered as sentences no more immune to revision than any other."⁴⁰

The Quinean radical holism shall be answered here by a *moderate holism*. Moderate holism is the view that not all sentences of a language are reversible to exactly the

37 Robert Brandom (n. 15), 175

38 Cf. Jules Coleman/Brian Leiter (n. 2), 219-223.

39 Robert Brandom (n. 15), 177

40 Michael Dummett (n. 30), 596

same degree. Instead, in each language practice some sentences are *prima facie* immune to revision, e.g. the rules of logic. They cannot be altered without giving the whole language and argumentation behaviour of the community a completely new structure. Brandom's analysis shows that the practice of each speech community develops necessarily an explicative instrumentarium that allows for a normative assessment of the correctness of certain inferences. Quine ignores the important difference that is made by speakers and their normative attitudes between propositions that are reversible without hesitation and propositions that are *prima facie* immune to revision. If not all sentences of a language are reversible to the same degree, then it is justified to speak of the existence of inferential relations. As a result, moderate holism does not lead to the far-reaching meaning-sceptical consequences that result from a radical Quinean holism.

III. The objectivity of legal argumentation

Based on the concept of linguistic meaning that has been argued for here, important consequences for different matters regarding the objectivity of legal argumentation can be drawn (1). As an example for this complex, the theory of the limits of the wording is discussed in more detail (2). With support of the Brandomian normativity, a new system of semantic limits can be developed (3).

1. Semantic normativity in law

Semantic normativity significantly affects three general issues in legal philosophy, namely the distinction between easy and hard cases (a), the distinction between establishment and fixing of meaning (b) and the objectivity of the meaning of norms (c).

a) Easy and hard cases

Since H.L.A. Hart's *Concept of Law*, the distinction of easy and hard cases in the application of law is vehemently discussed.⁴¹ The concept of an easy case has not yet been clarified sufficiently. It is important to distinguish between semantically clear cases and legally clear cases. Owing to the plurality of kinds of legal arguments, semantically clear cases can be legally unclear and semantically unclear cases can be legally clear.⁴² In this paper, the possibility of semantical clarity is at issue. Further, one has to distinguish constitutive clarity and epistemic clarity. The simple fact that the members of the interpretative community agree on the use of a concept does *not* make a clear case. It is one question, whether a case is semantically clear, and a different question, whether and how this is to be epistemically established. This paper discusses constitutive clarity.

The normativity of meaning is of central relevance to the project of making the concept of semantic constitutive clarity more precise. According to the normative concept of meaning as defended here, meaning exists in material inferences, the correct-

41 Cf. Herbert Hart, *The concept of law*, 2nd ed. Oxford 1997, 124-154; Ken Kress, Legal indeterminacy, *California Law Review* 77 (1989), 296; Brian Bix, *Law, Language, and Legal Determinacy*, Oxford 1993, 63-76.

42 Cf. Brian Bix (n. 41), 67.

ness of which is assessed by implicit, socially instituted norms. This can be utilized for a more precise concept of semantic constitutive clarity.

The concept of clear cases can be reconstructed in Brandom's model of deontic score-keeping. In a very general way, one can assume that a case is semantically constitutively clear, if the correctness of the material inferences is made clear in the normative practice. The concept of clear inferences can be explicated by the inferential structure as analysed by Brandom. The combination⁴³ of the four relevant criteria, namely commitment and entitlement on the one hand and circumstances and consequences on the other, leads to a list of four questions. The assertion P of a speaker S is semantically clear, if all four questions are answered in normative practice:

1. To what circumstances is S committed by P?
2. Based on what circumstances is S entitled to P?
3. To what consequences is S committed by P?
4. To what consequences is S entitled by P?

If there are doubts about at least one of these questions, semantic unclarity results. In this case, the inferential relations between assertions are instable in linguistic practice. Consequently, it becomes impossible to assess the semantic appropriateness of a speech act. Furthermore, it is made clear that according to how many of the different inferential aspects are unclear, different *degrees of semantic clarity* can be separated. As a result, it is possible to specify the differences of easy and hard cases using an inferential terminology developed by Brandom.

b) The establishment and the fixing of meaning

The question of the concepts of clear and of unclear cases has to be distinguished from the question of how to establish the dividing line between them epistemically. This leads to the general problem of the cognition of meaning. The language-game argument denies any chance of such cognition, because it maintains that meaning is open and context-dependent. Every speaker lays down his own semantic norms in a hermeneutic cycle. This makes establishing and fixing of meaning indistinguishable. Whenever someone claims to establish meaning, he is in fact laying down meaning.

This sceptical view is unwarranted for two reasons. First, the concentration on individual speakers is inadequate if meaning arises from discursive practice. This practice sets a limit to the creation of semantic norms by individual speakers. Second, the epistemic access to meaning consists in making implicit rules explicit. Robert Alexy has called this process of making explicit the linguistic-analytical discourse.⁴⁴ The epistemic access to meaning consists in making explicit the implicit rules, i.e. the word usage rules in Alexy's terminology. The process of making explicit is identical with Alexy's semantic-analytical discourse. Brandom's analysis allows for an extraordinarily rich description of the structures and rules of this discourse.

The semantic-analytical discourse itself is a discourse on the correctness of assertions, namely assertions on meaning. In this sense, the semantic-analytical discourse is a special form of normative discourses in general. The former is distinguished from the latter by the fact that the type of argument is restricted to specific semantical arguments. The topic of this special discourse is the semantic structures of meaning that can be analysed using Brandom's terminology. It is part of the func-

43 Cf. p. 6 above.

44 Robert Alexy, *Theorie der juristischen Argumentation*, 3rd ed. Frankfurt am Main 1996, 288

tion of this discourse to change and to improve those semantical structures and thereby the meanings of concepts. However, this future-directed task, which can result in the fixing of a new meaning, is to be carefully distinguished from the past-directed establishment of existing inferential and normative structures qua making them explicit. The establishment and the fixing of meaning remain two distinguishable forms of the semantic-analytical discourse.

c) The objectivity of the meaning of norms

The third question disputes the objectivity, i.e. the intersubjective validity of the meaning of norms. The language-game argument denies objectivity due to the openness, the context-relativity and the circular formation of meaning in language-games. On the contrary, the concept of meaning as defended here argues in favour of the intersubjective validity of the meaning of norms. This validity is guaranteed by basic intersubjective assumptions and by the common feature of a universal practice of assertions. Brandom has proved that any speech act is necessarily rooted in the game of giving and asking for reasons, i.e. the game of making assertions. The perspectival relativity of conceptual content stressed by the language-game argument does not challenge the intersubjective validity of linguistic norms. On the contrary, it is conditional to this validity.

The inferential relations and, therefore, the objectivity of the meaning of norms exist *ex ante*, i.e. before and independently of semantic-analytical discourse. This discourse makes *existing* structures explicit. The inferential relations are not produced *en passant* in the practice of language. Rather, they are assumed to be fixed in order to enter into a discussion *on* them. The concept of proceduralization that is connected with the concept of the semantic-analytical discourse does not refer to the *object* of the epistemic access, but rather to its *form*. The inferences originate in practice, but they are the objects of epistemic access. Thus, we are justified in answering the question of the objectivity of the meaning of norms in the affirmative.

2. The theory of the limit of the wording

To illustrate the consequences of semantic normativity for legal argumentation, the theory of the limits of the wording is discussed now. This theory is a traditional matter of debate in German legal methodology. However, the basic principles of this theory are relevant to the Anglo-American system as well.

According to the theory of the limit of the wording of a statute, semantic limits enable the separation of two forms of the application of law, *i.e.* the interpretation and the further development of the law.⁴⁵ Every application of a statute within the scope of possible meaning of its wording is interpretation. Every application beyond this is a further development of the law. Subdivisions of the further development of the law are analogies, which extend application beyond the scope of the possible meaning, and teleological reductions, which narrow the application to a smaller scope in spite of the meaning.

45 See Hans-Joachim Koch/Helmut Rübmann, *Juristische Begründungslehre*, München 1982, 182; Karl Larenz/Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed. Berlin 1995, 143; Karl Engisch, *Einführung in das juristische Denken*, 9th ed. Stuttgart 1997, 100 n. 47.

Several reasons make it crucial to separate between interpretation and further development of the law. First, a further development of the law is allowed only for specific reasons, in contrast to purely interpretative arguments. For an analogy, *e.g.*, judges have to prove that there is a gap in the law and that the *ratio legis* of the norm that is to be extended covers their case as well.⁴⁶ The assessment of the reasons given in a judicial decision therefore requires that the application of law is qualified as interpretation or further development of the law. The limit of the wording is essential for this qualification.

Furthermore, the constitutional importance of the theory of the limit of the wording cannot be overestimated. The realization of fundamental constitutional principles is contingent on the existence of semantic limits, *i.e.* the principle of democracy (Art. 20 I GG) and the rule of law (Art. 20 III GG). The doctrine of separation of powers (Art. 20 II 2 GG) and the doctrine of the commitment of judges to the statutes are part of the principle of democracy. The ban on analogy in criminal law (Art. 103 II GG) relies on semantic limits as well. The same is true of the principle of legal certainty und the protection of legitimate expectations. The theory of the limit of the wording is one of the most important interfaces between fundamental principles of the constitution and legal methodology.

During the last few years, the theory of the limit of the wording has been severely criticized. The "Structural Theory of Law", developed by Friedrich Müller, has brought forward serious objections. Their central claim is that the meaning of a norm is not a pre-interpretive standard, and it therefore cannot restrict interpretation.⁴⁷

This deconstruction of the theory of wording limits has significant consequences. If you consider the meaning of a norm not only to be not fixed, but also incapable of determining the application of the norm to some degree, then the constitutional principles mentioned above are not realizable. We could answer this with the obvious assertion⁴⁸ that the rules implemented in interpretive communities effectively restrict legal interpretation. But the critics reject this claim. They maintain that mere conventions cannot guarantee normative correctness because conventions are suspected of being ideologically motivated, projectionist enforcements of individual interests.

There is no such theory of the limit of the wording in Anglo-American legal theory. Nevertheless, the issue of how to distinguish interpretation from gap-filling and interpretation from invention of law is relevant here as well. The significance of this topic is controversial. As Hart says in his *Postscript*,

"It will not matter for any practical purpose whether in so deciding cases [i.e. by making the best moral judgement, M.K.] the judge is making law in accordance with morality [...] or alternatively is guided by his moral judgements as to what already existing law is revealed by a moral test for law."⁴⁹

Contrary to this estimation, there is a new development in Anglo-American legal theory in which the distinction between the interpretation and the invention of law gains importance. Marmor and Stavropoulos say:

46 Hans-Joachim Koch/Helmut Rübmann (n. 45), 260

47 Friedrich Müller, *Juristische Methodik*, 7th ed. Berlin 1997, n. 533-535. See Lawrence Solan, *The Language of Judges*, Chicago 1993.

48 Owen Fiss, Objectivity and Interpretation, (1982) 34 *Stanford Law Review*, 762

49 Herbert Hart (n. 41), 254. Dworkin rejects this distinction as well: "So law as integrity rejects as unhelpful the ancient question whether judges find or invent law." Ronald Dworkin, *Law's Empire*, London 1991, 225

"When judges interpret the law, they often have to rely on considerations about that which the law is there to settle, yet – within certain limits – they can still be said to be following the law, not inventing it."⁵⁰

"The question whether there is scope for substantive disagreement in law runs parallel to the question of the limits of law, once put in terms of fidelity (to the law) versus repair (of it), and more recently in terms of interpretation versus invention."⁵¹

The problem of the limits of legal interpretation is discussed here, and even the terminology is the same as in the German theory of the limits of the wording.

3. A new system of semantic limits

A main thesis of this paper is that the theory of semantic limits is valid in spite of the openness of meaning. The possibility of semantic errors is founded *par excellence* in the normativity of meaning. According to the model of deontic score-keeping, this possibility is due to the complex structures of inferential relations and normative statuses. As soon as a score-keeper classifies these relations incorrectly or records commitments or entitlements wrongly, he is in error about deontic status and therefore about the meaning of an expression.

The starting point of the new system of semantic limits is Alexy's concept of word usage rules. Word usage rules are used as semantic arguments in the internal justification of legal decisions. They indicate the properties (P) an object (x) has to satisfy in order to fulfil a concept of the law (C). The basic structure of the word usage rules is:

$$(x) (Px \rightarrow Cx)^{52}$$

According to the leading argument of this paper, word usage rules are one form of the implicit norms that constitute meaning as indicated by Brandom.⁵³ This is based on two considerations. First, the word usage rules make the inferential relations of a concept explicit. They indicate those properties an object has to comply with in order to use a concept *correctly*. Second, word usage rules take an inferential form themselves. The conclusion runs from the appropriate circumstances for the use of the concept that are indicated by the catalogue of properties P to the consequence that consists in the application of the concept of law C to a certain object. In the practice of deontic score-keeping, the word usage rules function as licences of inference that formulate the correctness of inferential transitions as the content of an assertion on meaning. Both, the word usage rules and the linguistic meaning, have the same formal structure.

Word usage rules represent the Brandomian connection between inferential semantics and normative pragmatics. Its *validity* can be explained using the Brandomian normative pragmatics. The rules are implicit in the practice of language. They are socio-impractically instituted, i.e. they are produced by the normative attitudes and assessments of the members of the language game.

With regard to their *content*, word usage rules are constitutive norms. They make the meaning of concepts explicit by indicating conditions sufficient for the inferential

50 Andrei Marmor, *Interpretation and Legal Theory*, Oxford 1992, 122; italics by M.K.

51 Nicos Stavropoulos, *Objectivity in Law*, Oxford 1996, 127; italics by M.K.

52 For all x it is valid that if x has the property P, then x is a C.

53 Cf. p. 9 above.

transition to the application of the concept with the help of the catalogue of properties P. Thereby, they determine the semantic correctness of those applications.

The *empirical establishment* of word usage rules has already been discussed.⁵⁴ Word usage rules are epistemically accessible by making them explicit. This is the task of the internal justification of legal judgements, and it is fulfilled by stating explicitly the word usage rules that has been argued with in the judgement. Thus, a semantic-analytical discourse becomes possible clarifying the validity of the word usage rules.

Turning now to the theory of the limits of the wording, it can be said that the main category for the transgression of semantic limits is the assumption of wrong inferential relations of a concept. According to the four-dimensional model⁵⁵ of inferential relations, four variants of semantic limits are to be distinguished. As analysed by Brandom, each assertion consists of conditional commitments, consequential commitments, conditional entitlements and consequential entitlements. Semantic errors can relate to each of these aspects.

In this paper, only the first kind of semantic errors shall be looked at in detail. A speaker transgresses the *semantic limit of conditional commitments* if his speech act commits him to circumstances that are contradictory to the circumstances of the appropriate use of the concepts. Word usage rules represent conditional commitments using the catalogue of properties P that indicates the appropriate circumstances of the use of the concept. There are two circumstances under which a speaker S might transgress the semantic limit of conditional commitments: First: S commits himself – by the use of a concept in a certain situation – to a specific catalogue of properties P₂. Second: His catalogue P₂ is incompatible with the catalogue P₁, which is the appropriate one for the concept S used. S formulates the word usage rule for the concept incorrectly. He links a false catalogue of properties P₂ with the concept C₁ instead of the correct P₁. His semantic error *consists in* an incorrect word usage rule for the concept C₁, namely (x) (P₂x → C₁x).

A good example for the transgression of the semantic limit of conditional commitments is the concept of a gang in § 244 I No. 2 German Criminal Code.

This legal norm entails higher penalties for theft committed by gangs rather than individual delinquents. The concept of gangs is contentious. According to the previous jurisdiction of the German Federal Supreme Court, sufficient for the committing of a gang-offence was the earnest agreement of two people to commit a number of offences in future.⁵⁶ In contrast, the critical opinion maintains: A gang cannot be assumed unless there are at least three persons.⁵⁷ The central argument of the critical opinion is the semantic limits of the concept of gangs:

“The view that even a criminal combination of only two persons is agreeable with the wording of the concept gang (...) meets with disapproval (...). It is argued correctly against such opinion that this interpretation does not respect the semantic limits. Rather, according to the social practice of language a gang requires more than two members (...).”⁵⁸

54 Cf. p. 9 above.

55 Cf. p. 6 above.

56 Cf. BGHSt 23, 239f.; 31, 202 (205); 38, 26 (27f.); 39, 216 (217); 42, 255 (257f.); BGH NStZ 1998, 255 f.; StV 2000, 259.

57 Cf. Eduard Dreher, Aus zwei Mitgliedern bestehende Bande, *Neue Juristische Wochenschrift* 1970, 1803; Armin Engländer, Anmerkung, *Juristenzeitung* 2000, 631; Roland Schmitz, Begriff der Bande, *Neue Zeitschrift für Strafrecht* 2000, 477.

58 BGH, 26th October 2000, 4 StR 284/99 (translated by M.K.).

With the background of our analysis, we can easily identify the principal matter of dispute between this critical opinion and the Federal High Court. It is the formulation of the word usage rule for the concept gang. While the former connects the property P_2 (two persons are sufficient) conditionally with the concept of gang G , the latter assumes the property P_1 (at least three persons). The different word usage rules are: $(x) (P_2x \rightarrow Gx)$ ⁵⁹ and $(x) (P_1x \rightarrow Gx)$.

It is assumed here that the better arguments are in favour of the opinion that the implicit norms of the practice of making assertions assess the use of the concept gang as correct only if at least three persons committed the offence. Therefore, the former jurisdiction of the German Federal High Court transgresses the semantic limit of conditional commitments by assuming an incorrect property-catalogue P_2 in the word usage rule. For an individual a (criminal combination of two persons), this semantic error leads to an incorrect affirmation of the property and therefore to a semantically erroneous application of the concept gang to a .

IV. Results

The results can be summarized in four theses: (1) Semantic limits exist because meaning exists. The different kinds of semantic limits can be summarized in a system. (2) It is possible to separate semantic argumentation from the balance of legal argumentation. Thus one can speak of the independence of the semantic-analytic discourse or, in other words, of the externality of language to law. (3) In opposition to meaning scepticism, the results of this paper argue for a rehabilitation of semantic interpretation in law. (4) The rehabilitation of the semantic interpretation supports the claim that legal argumentation can be objective. In detail:

(1) This new theory of the limits of the wording does not give the exact course of semantic borderlines in every single case. It is impossible to make generally valid statements about specific concepts, because meaning is relative to the background commitments of individual speakers and entire language-communities. The necessity for linguistic-analytical discourse remains. The main form of argument of this discourse is the reference to word usage rules. The benefit in this new theory is that for the first time it allows for the distinction between different types of semantic limits. In addition, the semantic-analytic discourse on the validity of word usage rules and on the structure of the meaning of legal terms can be made more precise. Brandom announces this important point as follows:

“[...] The payoff from expressing explicitly (in the form of judgements) the content-constitutive commitments that were implicit in prior inferential practice is the clarification and rectification of those conceptual contents.”⁶⁰

As a result, a theory of semantic limits is elaborated that is adequate to the enormous significance of the limit of the wording, in both constitutional law and legal theory. It answers to the deconstructive tendencies in both the philosophy of language and legal theory.

(2) Interpretations of statutes have a discursive character. They are assertions on the meaning of a concept of a statute. Interpreters make these assertions with a claim

59 For all objects x it is valid that if x has the property P_1 , then x is a gang.

60 Robert Brandom (n. 15), 110

for correctness, and they state reasons for their assertions. In the categories of these reasons, semantic normativity enjoys an independent status. Thus, one can speak of the externality of language to law. Semantic normativity is shown to advantage in legal argumentation in an independent semantic-analytic discourse that can be distinguished from other types of legal arguments. The externality of language to law means that there is a limit to the number and quality of arguments in the semantic-analytic discourse. Only reasons referring to semantics are allowed. According to a main idea of this paper, the making-explicit-discourse, which, post Brandom, is possible owing to the expressive role of logic vocabulary, is identical with Alexy's semantic-analytical discourse. This discourse functions as a means of establishing the meaning of concepts by making existing linguistic norms explicit. It is a discourse about the entitlement of single speakers to certain commitments, about the deontic status of certain speech acts and about the inferential relations of propositional and subsentential content.

(3) The structures of meaning as presented in this paper can be seen as the foundation of a new theory of semantic interpretation. Thus, one can speak overall of a rehabilitation of semantic argumentation in law that is of relevance for the debate about the hierarchy of legal arguments as well. Linguistic practice is not a detached *façon de parler*, which is based on unlimited semantically arbitrary speech acts, as has been argued for by deconstructive positions. On the contrary, implicit norms exist in practice, and their structures can be analysed and reconstructed. Thus, the structures of the growth of conceptual content in a linguistic community become accessible.

(4) Scepticism of the objectivity of law can only be justified if one demands a causal determinacy of the verdict from the text and qualifies all other relations between text and verdict as not objective. Such a position poses overly strict conditions on the thesis of the objectivity of law.⁶¹ Stavropoulos has shown that Raz's objection of indeterminacy to Dworkin is based on a false dilemma. There are not only the two alternatives, either to give an evident and unquestionable interpretation of a statute or to qualify everything as interpretable in any way. Stavropoulos objects correctly that this dilemma overlooks the fact that the practice limits the meaning in a way that supports the thesis that legal interpretation is objective. The theory of meaning, which is based on implicit norms that are intersubjective, can be understood as an *objective conception of practice* that has been argued with by Stavropoulos against Raz as a third option.⁶² According to the theory of meaning defended in this paper, only a weak legal indeterminacy thesis is possible. The normativity of meaning is a robust fundament for the objectivity of law.

Anschrift des Autors: Dr. Matthias Klatt, Philipp-Reis-Straße 28, 40215 Düsseldorf, klatt@law.uni-kiel.de

61 Cf. Jules Coleman/Brian Leiter (n. 2), 240-241.

62 Nicos Stavropoulos (n. 51), 159