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Does Justice Have a Syntax?

Steven L. Winter

I.

What would it mean to say that justice has a syntax? No doubt, proper syntax and jargon-free English would enhance the clarity and comprehensibility of legal statements and improve the administration of justice. But there is no necessary relation between clarity and justice. True, a syntactical error in a canonical legal command such as a statute can cause vagueness, create ambiguity, or unjustly enlarge that law's scope.¹ So, too, a deliberate disregard of syntax can lead to misinterpretation of a constitutional provision, as in *District of Columbia v. Heller*,² discussed below. But no one thinks that a syntactically correct legal pronouncement is more likely to be just. Proper syntax does not save "separate but equal."³ *Brown's* rejoinder that "[s]eparate educational facilities are inherently unequal" is ethically, but not syntactically, superior.⁴ Only if proper syntax had some valence (whether political or conceptual), if

Steven L. Winter is Walter S. Gibbs Distinguished Professor of Constitutional Law, Wayne State University Law School. Copyright 2017; all rights reserved. Portions of this paper are adapted from STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001) and Steven L. Winter, *Frame Semantics and the 'Internal Point of View,'* in 15 *CURRENT LEGAL ISSUES; LAW AND LANGUAGE* 115 (Michael Freeman & Fiona Smith eds., 2013).

This essay was originally delivered at a conference titled "The Syntax of Justice" supported by the Journal of Legal Education and held at Northeastern University School of Law on March 30 and 31, 2017. The conference focused on contributions that the study of linguistics could make to an understanding of law. Topics included plain language jury instructions and the oppressive role that an official language plays in multi-lingual societies; the editors of the Journal of Legal Education requested permission to include it here, even though plans to publish the other papers from that conference eventually fell through.

1. See, e.g., *United States v. Bass*, 404 U.S. 336 (1971) (interpreting "receive[], possess[], or transport[] in commerce or affecting commerce . . . any firearm" to mean that in commerce or affecting commerce applies to receive, possess and transport and not just transport); *Smith v. United States*, 508 U.S. 223 (1993) (interpreting "use a firearm" broadly to include not the only clear use of shooting a firearm but other uses such as trading a firearm for drugs).
2. 554 U.S. 570 (2008).
3. *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy*, of course, did not actually use that phrase. But see *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("in the field of public education the doctrine of 'separate but equal' has no place.").
4. *Brown*, 347 U.S. at 495.

it had some practical implication for how one makes law, would a statement about the syntax of justice make sense.

The question of justice's syntax might, then, be figurative. If we take syntax as the set of rules, principles, and processes that govern the structure of sentences in a given language, then to say that justice has a syntax would be to say that justice is a product of the correct application of rules, principles, and processes to legal questions. But this is what Cardozo in *The Nature of the Judicial Process* derides as “the demon of formalism” that “tempts the intellect with the lure of scientific order.”⁵ Formalism can contribute to justice only if the legal rules, principles, and processes fit the world in a comprehensive and objective way. Otherwise, the law's aspiration to treat like cases alike will fail. In fact, this approach to law often produces injustice, as in the case of formal equality. “[L]a majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts...”⁶ (“In its majestic equality, the law forbids rich and poor alike to sleep under the bridges”). To reduce justice to “a form of words” is, as Holmes implies, to render it meaningless.⁷

“Syntax” is from the post-classical Latin *syntaxis* and the Greek ΣΥΝΤΑΞΙΣ (*súntaksis*) meaning arrangement.⁸ Perhaps to say that justice has a syntax is to claim that there is some organization of legal concepts that is more likely to produce justice. This would be an interesting and ambitious claim. But what would such an arrangement look like? Would it be hierarchical (as in legal formalism), linear and binary (as is most standard legal reasoning), or would it take some other, unspecified structure? It doesn't matter in the end, because a structure of concepts cannot assure justice any more than a syntactically correct sentence can guarantee meaning.

It is, of course, easy to construct syntactically impeccable but semantically anomalous sentences. (E.g., “The overweight newspaper ran thoughtfully.”) But more importantly, a syntactically correct sentence can have more than one meaning depending on its semantic frame of reference. Gilles Fauconnier and Mark Turner give the example of a child on a beach playing in the sand with a shovel.⁹ One might ask, variously: “Is the shovel safe?” “Is the child safe?” “Is the beach safe?” Each of these statements inquires after the safety of the child. But there is no fixed, one-dimensional property that the term “safe” assigns or applies to the shovel, the child, and the beach. Each question inquires into a different potential danger: The first question asks whether the child might be

5. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).
6. ANATOLE FRANCE, *LE LYS ROUGE* 118 (1894). The exact page and quotation is available here: https://fr.wikisource.org/wiki/Page:Anatole_France_-_Le_Lys_rouge.djvu/118. The English translation is *THE RED LILY, COMPLETE*, available here: <https://www.gutenberg.org/files/3922/3922-h/3922-h.htm> (released 2006).
7. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).
8. *OXFORD ENGLISH DICTIONARY* (3d ed. 2014).
9. GILLES FAUCCONNIER & MARK TURNER, *THE WAY WE THINK: CONCEPTUAL BLENDING AND THE MIND'S HIDDEN COMPLEXITIES* 25-26 (2002).

harmful by the shovel; the second whether the child requires supervision; and the third whether the beach is one marked by sudden, dramatic tides. In all of these statements, the word “safe” prompts the addressee to invoke a *danger* frame with abstract roles and relations such as agent, instrument, patient, and consequent harm. But in each case, the addressee fills out those abstract elements with different contextual components.

In the context of the first question, the sharp edge of the shovel is the agent or instrument capable of inflicting harm on the child (the patient) by cutting it. Even this could be reversed, however, in a different context. Thus, if the child has gotten hold of an antique or ornamental shovel, one might turn to his or her caretaker and ask, “Is the shovel safe?” One would also be invoking the *danger* frame in this case. But it would be the child who is the potential agent of harm and the fragile shovel the patient at risk of injury. In all these cases, we see that the meaning is not in the words but in the minds of interpreters who understand those words in light of the mental frames that are activated in the particular situation.

II.

A significant part of human communication involves the telegraphing of frames so that the audience is able to reconstruct the speaker’s intended meaning. Consider the text of the Second Amendment to the U.S. Constitution, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁰ Writing for the majority in *Heller*, Justice Scalia read the amendment as protecting “an individual right unconnected with militia service” to possess firearms for the purpose of self-defense.¹¹ To reach this conclusion, he used a two-part rhetorical strategy. First, he parsed the amendment into an operative clause protecting “the right of the people to keep and bear Arms” and a prefatory clause explaining that a well-regulated militia is “necessary to the security of a free State.”¹² The latter, he declared, was merely a preamble with no legal force; “a prefatory clause,” he explained, “does not limit or expand the scope of the operative clause.”¹³ The point of this linguistic legerdemain was to render the opening clause inert so the Court would be free to extend the right to bear arms beyond its historical (and textually declared) context of citizen militias to the modern context of private gun ownership in the home.¹⁴

10. U.S. CONST., amend. II.

11. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

12. *Id.* at 577.

13. *Id.* at 577-78. The argument followed Judge Silberman’s in *Parker v. District of Columbia*, 478 F.3d 370 (2007), and was suggested by previous scholarship. See Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GEORGIA L. REV. 1, 2, 22-26 (1996); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 802-04, 807 (1998). See also Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 237 (2008).

14. Thus, although Justice Scalia conceded “that self-defense had little to do with the right’s

Second, Justice Scalia insisted that the natural import of the “operative clause” was plain: Thus, “to keep and bear arms” means, simply, “to have and carry weapons.”¹⁵ The problem with this wooden literalism is that “to bear arms” is a familiar idiom connoting service in the military.¹⁶ An amicus brief before the Court argued:

In every instance we have found where the term “bear arms” (or “bearing arms” or “bear arms against”) is employed, without any additional modifying language attached, the term unquestionably is used in its idiomatic military sense. It is only where additional language is tacked on, either to bend the idiom by specifying a particular type of fighting or to break the idiom by adding incompatible language, that the meaning of “bear arms” deviates.¹⁷

Although there is (as we shall see) some truth to the point about modifiers, the claim about “every instance” is overstated.¹⁸ Not content to dispute the claim with evidence, however, Justice Scalia responded with a categorical overstatement of his own. The phrase “to bear arms,” he insisted, “*unequivocally* bore that idiomatic meaning only when followed by the preposition ‘against.’”¹⁹

This assertion is simply false. Indeed, just two weeks earlier in his dissent in *Boumediene v. Bush*, Justice Scalia had decried the Court’s “disastrous” decision with the observation that in the prior week “13 of our countrymen *in arms* were killed” in Afghanistan and Iraq.²⁰ Moreover, the use of “arms” to connote military service—with or without “to bear” and with or without “against”—is systematic in ordinary English (and other related languages). Consider the phrases: “To arms!” (Civil War recruitment poster); “A call to arms” (same); “to take up arms”; “to lay down one’s arms”; “A Farewell to Arms” (Hemingway novel); “brothers in arms”; General Patton’s statement that “the highest obligation and privilege of citizenship is that of bearing arms for one’s

codification,” he nevertheless insisted that self-defense “was the *central component* of the right itself.” *Heller*, 554 U.S. at 599 (emphasis in original).

15. *Id.* at 581–93.

16. An idiom, by definition, is “a group of words established by usage as having a meaning not deducible from those of the individual words.” OXFORD ENGLISH DICTIONARY (3d ed. 2010) (definition 3).

17. Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners at 4, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (hereinafter *Linguists’ Brief*).

18. The claim is disputed with counterexamples both by Justice Scalia in *Heller*, 554 U.S. at 584–92, and by other scholars. See Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms Mean” in the Second Amendment?* 6 GEO. J.L. & PUB. POL’Y 511 (2008). Although many of the nonmilitary usages documented by Cramer and Olson and referred to by the Court are subject to modifiers such as “bear arms for their own defense,” not all are.

19. *Heller*, 554 U.S. at 586 (emphasis in original).

20. 553 U.S. 723, 827 (2008) (Scalia, J., dissenting) (emphasis added).

country”;²¹ and the iconic crescendo of *La Marseillaise*, “*Aux armes, citoyens! / Formez vos bataillons / Marchons, marchons!*” (“To arms, citizens! / Form your battalions / Let’s march, let’s march!”). Replacing the word “arms” with “weapons” in any of these phrases would either render them unintelligible (e.g., “brothers in weapons”) or awkward (e.g., “a call to weapons”). The sole exception is the phrase “to lay down one’s arms,” which works equally well whether we substitute the word “weapons” or “guns.” But even in that case, the obvious meaning is the idiomatic one of ceasing armed conflict, as in the antiwar novel that won its author the Nobel Peace Prize in 1905, *Lay Down Your Arms!*²²

The linguists’ point about the effect of modifiers as bending or “breaking” the idiom is almost correct.²³ It is a familiar aspect of ordinary language that modifiers mark off the edges of or extensions from the default assumptions that define the central case. Thus, there is “dry ice,” but there is no such idiom as “wet ice.” Perhaps the example best known to lawyers is Chief Justice Marshall’s discussion in *McCulloch* of the ordinary-language meaning of the word “necessary.”

The word “necessary” . . . has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.²⁴

Marshall used the existence of such modifiers denoting strict necessity to corroborate his conclusion that, in its ordinary usage, the word necessary “frequently imports no more than that one thing is convenient, or useful, or essential to another.”²⁵ Other examples would be the various modifiers we use to identify parents as “working mothers,” “stay-at-home dads,” “surrogate mothers,” “biological fathers,” “gestational mothers,” etc. Each assumes some divergence from the stereotypical case of a natural parent who is also a primary caretaker and nurturer.²⁶ In the same way, the use of a modifier such as

21. GENERAL GEORGE S. PATTON, JR., WAR AS I KNEW IT 335 (1947).
22. BERTHA VON SUTTER, LAY DOWN YOUR ARMS (2015) (originally published in German in 1889 as DIE WAFFEN NIEDER!).
23. Linguists’ Brief, *supra* note 17, at 21 (“It is only in usages where additional specifying language is added, such as ‘bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game,’ that any intent to bend, even change (in the case of killing game), the idiom is apparent.”).
24. *McCulloch v. Maryland*, 17 U.S. 316, 414 (1819).
25. *Id.* at 413. For a parallel analysis for the term “rule,” see STEVEN L. WINTER, CLEARING IN THE FOREST: LAW, LIFE, AND MIND 206-07 (2001).
26. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 76-83 (1987); WINTER, CLEARING IN THE FOREST, *supra* note 25, at 89-92. Now that most women work outside the home the term “stay-at-home mom” has replaced “working mother” as the marker of divergence from the expected norm. *Bureau of Labor Statistics, Employment Characteristics of Families—2019* (April 21, 2020), <https://www.bls.gov/news.release/>

“bear arms . . . for the purpose of killing game” corroborates that the military meaning is the default sense of “bear arms.” Thus, one can “bear arms for self-defense” or “for the purpose of killing game,” but it would be awkward (because redundant) to say that someone had been called upon “to bear arms for the purpose of serving in the military.”

Because Justice Scalia’s literalism committed him to a single, distinctive, “plain” meaning for each word,²⁷ he rejected the argument about modifiers: “A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics).”²⁸ But, this statement, too, is simply false. Consider such familiar idioms as:

- rolling stop
- open secret
- deafening silence
- grim joke
- black humor
- restless sleep
- silent scream

In each of these cases, the modifier identifies a variant of the central case connoted by the noun. Thus, an open secret is something that would ordinarily be kept private, is widely known, but is either not spoken of or spoken about only confidentially and off the record. Similarly, the term “deafening silence” connotes that the absence of an expected response forcefully signifies rejection or disapproval (as in “the boss’s suggestion was met with a deafening silence”). Consider, too, some literary examples (the first two of which long predate the Second Amendment).

- “sweet sorrow”²⁹
- “modest pride”³⁰
- “warm, scalding coolness”³¹
- “terrible beauty”³²

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27. For a particularly amusing example, see footnote 7 in Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 732–36 (2006) (distinguishing among a ditch, a moat, a canal, a channel, and a stream).
28. *Heller*, 554 U.S. at 589.
29. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, Sc. 2.
30. JOHN MILTON, *PARADISE LOST* 4.320.
31. ERNEST HEMINGWAY, *FOR WHOM THE BELL TOLLS* 73 (1940).
32. William Butler Yeats, *Easter, 1916* in W.B. YEATS, *MICHAEL ROBARTES AND THE DANCER: MANUSCRIPT MATERIALS* 69 (Thomas Parkinson & Anne Brannen eds. 1994) (originally published in 1921).

In all these examples, the author juxtaposes otherwise contradictory concepts to convey a nuanced or layered emotional response. Thus, the horrific events of the Irish republican rebellion of 1916 are “changed, changed utterly” by Yeats into a heroic martyrdom—i.e., a terrible beauty—recognized “Wherever green is worn.”³³ Similarly, Milton presents Eve’s coy submission to Adam as reflecting both an outer show of virtue and an inner thrill at being desired.³⁴ But each of these literary examples—like each of the idioms in the first group—trades on the default sense of the underlying terms to convey its particular meaning. Indeed, these turns of phrase would not work unless the reader shared those default understandings.

To say that the default sense of “to bear arms” refers to military service is not to say the term cannot be used to signify “carry weapons.” (On this point, it was the linguists who were simply wrong.) Which meaning it bears depends on historical and linguistic context.³⁵ But that only raises the question: What is the historical and linguistic context of the Second Amendment?

On its face, the amendment focuses on the connection between a citizen militia and the success of popular self-government—a relation that, as J.G.A. Pocock points out, is expressed “in language directly descended” from Machiavelli.³⁶ In *Heller*, Justice Scalia relied heavily on the history of the seventeenth-century English Bill of Rights, which repudiated the practice of the Stuarts who, having disarmed the Protestant militias, used select

33. *Id.* at 75. The poem commemorates the failed Irish uprising of April 24–30, 1916, in which 485 people were killed, 2600 wounded, 3500 taken prisoner, and fifteen of the leaders executed after conviction in secret courts martial.
34. In a different context, “modest pride” might connote—as with “rolling stop”—a graduated amount of pride. Thus, an amateur carpenter might point to his or her project with “modest pride.” In contrast, an expert carpenter who said “that came out tolerably well” would be speaking with modest pride in the same coy sense as Milton’s Eve.
35. An 1807 letter from William Hull, governor of the Michigan Territory, to British authorities in Canada concerning the first official company of African American militia uses the term “Arms” in both senses. When African American militiamen were seen in military drill by British officers across the river, Governor Hull wrote:

The permission which I have given to a small number of Negroes, occasionally to exercise in Arms...I am informed has excited some sensibility among the Inhabitants of the British shore. Be assured Sir, it is without any foundation, for they only have the use of their Arms, while exercising, and at all other times they are deposited in a situation out of their control.

Letter of Gov. William Hull to Lt. Colonel Jaspas Grant, September 3, 1807, quoted in TIYA MILES, *THE DAWN OF DETROIT: A CHRONICLE OF SLAVERY AND FREEDOM IN THE CITY OF THE STRAITS* 192–96 (2017). The reference to “exercise in Arms” is to formal military drill as militiamen; in the second reference, “Arms” connotes simply weapons (though, to be sure, the weapons they used as militiamen).

36. J.G.A. POCOCC, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 528 (1975). Interestingly, but unsurprisingly, none of the articles or opinions supporting a broad reading of the Second Amendment even mentions Machiavelli or the militia tradition in civic republican thought that he originated.

Catholic militias to suppress their enemies.³⁷ On this view, an armed citizenry presumably acts as a check on central power and, thus, preserves liberty.³⁸ But this understanding presents three difficulties. First, it is at odds with the text of the amendment, which emphasizes “the security of a free State” and not the liberty of its individual citizens. Second, an interpretation of the amendment that is premised on the particular events in England following the Restoration obviously owes little to Machiavelli, who lived more than a century and a half earlier. Third, this understanding fails to explain the specific connection between “the security of a free State” and a “*well regulated Militia*.”³⁹

In *The Prince*, Machiavelli argued for the pragmatic superiority of a militia of native troops over either mercenaries (known, in his day, as *condottieri*) or the troops of allies (whom he refers to as auxiliaries).⁴⁰ In *The Art of War*, Machiavelli argued that a militia of citizen soldiers can “be used in times of peace for training and in times of war for necessity and for glory, . . . and any city governed otherwise is not well ordered.”⁴¹ Machiavelli’s key innovation was his insistence on the relation between the training of the militia and a well-ordered city. The argument, Pocock explains, was that military virtue produces political virtue because the republic is in both cases the common good and, conversely, that it is “through military discipline that one learned to be a citizen and to display civic virtue.”⁴² Far from precatory, the opening clause of the amendment draws an explicit connection between “the security of a free State” and a “*well regulated Militia*.” It is not just that a militia must be well trained to be effective in battle, but that a well-regulated militia will produce self-disciplined citizens. In the words of Machiavelli’s seventeenth-century successor, James Harrington: “Give us good men and they will make us good laws’ is the maxim of a demagogue But ‘give us good orders, and they will make us good men’ is the maxim of a legislator and the most infallible

37. *Heller*, 554 U.S. at 593.

38. There were, certainly, those who argued that an armed militia would serve as a check on tyranny. Patrick Henry’s “great objection to this Government” was “that it does not leave us the means of defending our rights; or, of waging war against tyrants” HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPOSITIONERS OF THE CONSTITUTION* 35 (1981). See also Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L. J.* 637, 648 (1989) (suggesting that “the ultimate ‘checking value’ in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny”).

39. Scalia’s majority opinion gave scant attention to this clause, noting (tautologically) that “the adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.” *Heller*, 554 U.S. at 597.

40. NICCOLÒ MACHIAVELLI, *THE PRINCE* 47-49 (Luigi Ricci trans. 1903). Modern professional armies emerged in Europe in the eighteenth century. By the close of the War of 1812, the efficacy of the militia was largely discredited—though not necessarily the myth. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 164 (2005).

41. NICCOLÒ MACHIAVELLI, *ART OF WAR I*: 75-76, at 16 (Christopher Lynch trans. & ed., 2003).

42. POCOCK, *supra* note 36, at 201.

in the politics.”⁴³ The object was not liberty as in independence from a strong central power, but security in the Machiavellian sense that “the foundation of all states is a good... [militia], and that where this does not exist there can be neither good laws nor any other good thing...”⁴⁴

Machiavelli’s republican conception of a citizen militia was the source of the Whig opposition to a standing army—a controversy that raged in England in the so-called “paper war” of 1697-1699 and which, though unnoted in *Heller*, directly influenced the adoption of the Second Amendment.⁴⁵ This civic republican militia tradition is reflected as well in several European constitutions; in particular, the Swiss Constitution provides: “In principle, the armed forces shall be organised as a militia.”⁴⁶

43. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 64 (J.G.A. Pocock ed. 1992). As he later notes: “Good orders make evil men good, and bad orders make good men evil.” *Id.* at 274. Harrington was an important influence on the Framers of the U.S. Constitution, especially Adams. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34, 45 (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 48-49 (2d ed. 1998). Harrington is the source of the familiar phrase “a government of laws and not of men.” HARRINGTON, *supra*, at 35. See also Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 n.2 (1986).
44. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* bk. III, ch. 31, ¶ 4, at 283 (Harvey C. Mansfield & Nathan Tarcov eds., 2009); see also *THE PRINCE*, *supra* note 40, at 47 (“The chief foundations of all states . . . are good laws and good arms. And as there cannot be good laws where there are not good arms, and where there are good arms there should be good laws . . .”). The term used in Mansfield’s translation of the passage from the *Discourses* quoted in the text is “military,” but in the original Italian the word used is *milizia* and not *militari*. TUTTE LE OPERE DI NICCOLÒ MACHIAVELLI 413 (Francesco Flora & Carlo Cordie eds., 1949). Philip Bobbitt reads Machiavelli to argue that good arms make good laws because the state has the power to enforce order on inherently recalcitrant subjects. PHILLIP BOBBITT, *GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE* 69-70 (2013) (quoting *DISCOURSES*, *supra*, at bk. I, ch. 3, ¶ 1, at 15). But Machiavelli’s argument is, rather, that: (1) good arms make good laws because good arms (that is, effective military forces) require good discipline; (2) good discipline yields good character because in the military citizens learn both the discipline of self-restraint and the capacity or disposition to sacrifice themselves for the greater good; and (3) citizens of good character will make good laws in the sense that, as Bobbitt himself says, “good laws are those that effectively serve the common good.” *Id.* at 69.
45. See POCOCK, *supra* note 35, at 426-32, 528; Lois G. Schwoerer, *The Literature of the Standing Army Controversy, 1697-1699*, 28 HUNTINGTON LIB. Q. 187 (1965). This literature was widely available and influential in the colonies during the Revolution and the framing period. *Id.* at 210-11; BAILYN, *supra* note 42, at 43-45, 61-63, 112-16. Cf. POCOCK, *supra* note 36, at 597 (“The Whig canon and the neo-Harringtonians . . . formed the authoritative literature of this [colonial] culture . . . and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation.”).
46. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 58, para. 1 (Switz.), translated in *101 Federal Constitution of the Swiss Confederation*, FED. COUNCIL, <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html#a58> (Jan. 1, 2020). Universal military service is also required by the constitutions of Austria, Denmark, Finland, and The Netherlands. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by BUNDESVERFASSUNGSGESETZ [BVG] BGBl I No. 102/2014, art. 9a, ¶ 3, https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf (Austria) (translation

All of this history, of course, is lost in the *Heller* majority's deliberately wooden reading of the Second Amendment.

A frame semantics approach, in contrast, brings the language and the history together. To see the point, suppose I said to you, "We're having some people over tonight and we would appreciate if you could bring an extra chair." You have rocking chair, a beanbag chair, and a particularly decrepit-looking but still functional folding chair. Which do you bring? The answer is that you do not know; it depends on the purpose of the gathering. If we are hosting a dinner party, the rocking and beanbag chairs will not do. But if we are having a discussion group such as a book club, you would definitely choose the rocking or beanbag chair over the folding chair. Suppose, instead, that I said to you, "A comfortable audience being necessary to success of a good book club, please bring a chair tonight." In that event, awkward sentence structure aside, you would know precisely what kind of chair to bring because the prefatory clause had told you exactly which frame to invoke. In other words, the meaning of a clause such as "the right to keep and bear arms" is not a transparent, context-independent statement deducible from the bare words of the text. The words alone do not tell us what kind of guns for what kind of purposes under what kind of conditions are meant to be included. Rather, the meaning of the clause is frame-dependent and can be inferred only through a more complex process of reconstruction—albeit one that, here, is telegraphed by the opening clause of the constitutional provision.

Meaning is not mechanical: It does not follow from the literal denotation of a word nor from the proper ordering of concepts. Syntax can be an aid to meaning, but it cannot substitute for it. Meaning is a function of the frames of reference that provide substance to the words we use. Or, to put it more precisely, meaning is not in the words but in the mind.

III.

In *The Nature of the Judicial Process*, Cardozo juxtaposes logic or "the method of philosophy" with "a mere sentiment of justice."⁴⁷ But justice is not an emotion; it is a *sense* that arises from our everyday processes of meaning-making. Semantic meaning, as we have seen in the cases of "safe" and "bear arms," involves complex processes of intelligibility that draw on tacit knowledge of the relevant domain, including context, purpose, social understandings and

included); CONSTITUTIONAL ACT (Den.), Sec. 81 (June 5, 1953), translated in *My Constitutional Act*, FOLKTINGET, https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx; SUOMEN PERUSTUSLAKI, 12 Luku, § 127 (Fin.), translated in *The Constitution of Finland*, Ministry of JUSTICE, <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>; STATUUT NED [Charter] art. 98, translated at *Netherlands's Constitution of 1814 with Amendments through 2008*, CONSTITUTE, https://www.constituteproject.org/constitution/Netherlands_2008.pdf?lang=en. Second Amendment enthusiasts often point out that Swiss recruits keep their rifles at home. Since 2007, however, Swiss recruits are issued rifles but not ammunition. S.R. 514.101, Art. 1 & 7.

47. CARDOZO, *supra* note 5, at 44.

assumptions, models of behavior, etc. These cognitive and cultural models embody norms of behavior that form our sense of justice in the situation.⁴⁸

The law of perjury provides an instructive context in which to examine the relationship between justice and semantics. The federal statute, § 1621, provides: “Whoever...having taken an oath before a competent tribunal, officer, or person . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. . . is guilty of perjury.”⁴⁹ In *Bronston v. United States*,⁵⁰ the Supreme Court held that the statute is not violated “so long as the witness speaks the literal truth.”⁵¹

Bronston was the sole proprietor of a business seeking relief from its creditors under Chapter XI of the Bankruptcy Act. During that proceeding, counsel for one of the creditors asked Bronston whether he had any accounts in Swiss banks. Bronston responded that he did not. The lawyer then asked if he had ever had any such accounts, to which Bronston replied: “The company had an account there for about six months, in Zurich.”⁵² In fact, Bronston also had a personal bank account in Geneva for five years during which he deposited and withdrew more than \$180,000. At Bronston’s subsequent perjury trial, the judge instructed the jury that the issue was whether Bronston “spoke his true belief,” that he could not be convicted if he merely failed to understand the question, and that his answer should be “considered in the context in which it was given.”⁵³ The court of appeals affirmed the conviction, reasoning that Bronston had committed perjury because he had intentionally given “an answer containing half of the truth . . . in place of the responsive answer called for by a proper question” and that this “constitutes a lie by negative implication.”⁵⁴

A unanimous Supreme Court reversed. The Court acknowledged that there “is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn.”⁵⁵ It nevertheless concluded that Bronston had not violated the statute because his statement was literally true—that is, the company had had a Swiss account. The Court rejected the jury’s finding that Bronston had intended to mislead, arguing that the witness’s state of mind is

48. On the close conceptual connection between the frame semantic or cognitive model view adumbrated here and Karl Llewellyn’s notion of “situation sense,” see WINTER, *CLEARING IN THE FOREST*, *supra* note 25, at 216–22.

49. 18 U.S.C. § 1621 (2018).

50. 409 U.S. 352 (1973).

51. *Id.* at 360. For an explanation of the Court’s conclusion in terms of prototype effects, see WINTER, *CLEARING*, *supra* note 25, at 303–08.

52. *Bronston*, 409 U.S. at 354.

53. *Id.* at 355.

54. *Id.* at 356 (quoting 453 F.2d 555, 559 (2d Cir. 1972)).

55. *Id.* at 357.

“relevant only to the extent that it bears on whether ‘he does not believe (his answer) to be true.’”⁵⁶

Bronston is, in many ways, a curious decision.⁵⁷ First, the Court purported to read the statute “literally,” insisting that “the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.”⁵⁸ Yet the Court’s own conclusion—that the statute does not apply “so long as the witness speaks the literal truth”—is no less a departure from the statutory language.⁵⁹ In plain terms, § 1621 makes falsity of belief, not factual falsity, the gravamen of the offense.

Perhaps the Court thought that, when one states an insufficient but “literal” truth, one believes one’s own ruse. Neither the jury nor the courts below thought so; indeed, an ordinary person might be forgiven for assuming that testimony intended to deceive the tribunal fell within the prohibition of saying something one “does not believe to be true.” To put the point differently, an ordinary person might reasonably have thought that § 1621 prohibits lying to a court.

Perhaps the Court thought that, in insisting on factual falsity, it *was* reading the statute to prohibit lying. But, in making factual falsity the *sine qua non* of the offense, the Court got it exactly backward. In empirical work, Linda Coleman and Paul Kay found that, although people typically define a lie as a false statement, factual falsity is the least important of the three criteria that people actually use to identify statements as lies.⁶⁰ Rather, a “consistent pattern was found: falsity of belief is the most important element in the prototype of *lie*, intended deception the next most important element, and factual falsity the least important.”⁶¹ The perjury statute reflects exactly this shared social

56. *Id.* at 359.

57. The Court put the burden on trial counsel to guard against deception by proper cross-examination: “If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark.” *Id.* at 358-59. When the perjury charge arises from a criminal case or grand jury testimony where the government is a party, that argument makes some sense. But *Bronston* was a bankruptcy proceeding; the government was not a party and could act only after the fact to punish a fraud on its courts.

58. *Id.* at 357-58 (emphasis in original).

59. *Id.* at 360.

60. Linda Coleman & Paul Kay, *Prototype Semantics: The English Verb Lie*, 57 *LANGUAGE* 26, 43 (1981). Cole replicated the Coleman and Kay study for Makkan Arabic, finding only minor religious and cultural differences. Shirley A.N. Cole, *Semantic Prototypes and the Pragmatics of Lie Across Cultures*, 23 *LACUS FORUM* 475 (1996). Hardin confirmed the Coleman and Kay findings for Ecuadorian Spanish, though she found that different cultural norms of friendliness supported a somewhat broader scope for social lies. Karol J. Hardin, *The Spanish Notion of Lie: Revisiting Coleman and Kay*, 42 *J. PRAGMATICS* 3199 (2010). See also Jörg Meibauer, *Lying and Falsely Implicating*, 37 *J. PRAGMATICS* 1373, 1396 (2005) (arguing that falsely implicating should be included within a general definition of lying, and that this would correspond with ordinary usage as found by Coleman and Kay).

61. Coleman & Kay, *Prototype Semantics*, *supra* note 60, at 43 (emphasis in original).

understandings of what constitutes a “lie.” It focuses on falsity of belief—just as ordinary people do.

Second, the Court was curiously inconsistent in its reasoning. The trial court had instructed the jury that an answer could be deliberately misleading even if technically true; it gave the example of a person who testifies that he entered a store five times when he actually entered it fifty times. The Court rejected that analysis: “[I]t is doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even ‘technically true.’”⁶² But it is difficult to see how the Court could square this statement with its reasoning in *Bronston*. On one hand, an answer that deliberately understates an amount is still literally true: The witness *did* go into the store five times. If it seems otherwise, it is only because *in context* the smaller number (five instead of fifty) is deliberately misleading. On the other hand, one could just as well say that Bronston understated a numerical fact: He was asked whether he ever had any Swiss accounts; he replied that the company had one when, in fact, he had two Swiss accounts—one for the company and one for himself.

Third, *Bronston* is deliberately tone-deaf to how actual humans communicate.⁶³ In ordinary conversation, people make statements by implication and are readily understood as having done so. Consider the exchange: “How did you two manage to get away for an entire weekend?” “My Mom’s in town.” If we took the answer at face value, it would be a non sequitur. We don’t apprehend it that way because we automatically infer the contextual information that gives sense to the reply—that the addressee has children (or some similar responsibility); that his or her mom has agreed to serve as babysitter (or caretaker); and that, because Mom was available to fill in, the couple were able to have a weekend to themselves.

In a famous paper,⁶⁴ H.P. Grice identified the general features of discourse that enable such inferences. The basic idea he called the *cooperative principle*: “Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.”⁶⁵ From this he specified four subcategories or corollaries, the maxims of: (1) *quantity*—make your contribution as informative as is required for current purposes, but not more informative than required; (2) *quality*—do not say something you believe to be false or for which you lack adequate evidence; (3) *relation*—be relevant; and (4) *manner*—be clear, brief, and orderly.⁶⁶ Thus, in our hypothetical exchange, the questioner understands

62. *Bronston*, 409 U.S. at 355 n.3.

63. *Id.* at 357 and *supra* text accompanying note 51.

64. H.P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 3: SPEECH ACTS 41 (P. Cole & J. Morgan eds. 1975). This paper was originally given as part of the William James Lectures at Harvard in 1967.

65. *Id.* at 45.

66. *Id.* at 45-46. Note the conversational pathologies that typify violation of one or more of these

the interlocutor to be responding to the question (maxim of relation) in the simplest, most straightforward way (maxim of manner) by answering in the most parsimonious fashion (maxim of quantity)—i.e., “we have a babysitter.” Grice calls this a “conversational implicature.”⁶⁷

In a case such as *Bronston*, the reply to the question “have you ever had any Swiss bank accounts?” is expected to be responsive (maxim of relation), honest (maxim of quality), and sufficient (maxim of quantity). When Bronston says “the company had one,” he knows that the listener will be misled into concluding that he maintained no other Swiss account. As Eve Sweetser explains, the “overt statement and the false statement are linked by Gricean conversational implicature; the utterance is irrelevant or insufficient in context, unless the hearer also assumes the unspoken falsehood.”⁶⁸ As the Court in *Bronston* conceded, “only this unspoken denial would provide a logical nexus between inquiry directed to petitioner’s personal account and petitioner’s advertizing, in response, to the company account in Zurich.”⁶⁹ Thus, the verbal part of the statement might be true, but the intended meaning of the statement is false. The implicature is not “in” the words, but is carried “by the saying of what is said, or by ‘putting it that way.’”⁷⁰

The statute defines perjury as a willful statement on a material matter that the witness does not believe to be true. The Court treated the term “statement” reductively as referring to the literal words spoken. But the intended statement—which Bronston did not believe—was the combination of the words spoken and the meaning (that is, the implicature) that they carried. In other areas, the law is more realistic in identifying statements. Rule 801(a) of the Federal Rules of Evidence defines “statement” to include “nonverbal conduct, if the person intended it as an assertion.”⁷¹ The Fifth Amendment privilege against compelled self-incrimination extends to the act of producing documents in response to a subpoena when that act of production has “communicative” or “testimonial aspects”—e.g., when it would constitute an admission that the documents exist, that they are in the person’s possession, or that he or she

maxims. If you say too much (maxim of quantity), I may grow impatient, think you careless of my time, or infer that you think me stupid. If I say something I don’t believe (maxim of quality), you will conclude that I am lying or trying to deceive you. If you respond with an irrelevance or at great length (maxims of relation and manner), I may think that you don’t respect me. You will conclude the same if I ignore you altogether (cooperative principle).

67. *Id.* at 45. By this Grice means that the implicature is not a conventional one, but arises from the context of the conversation.

68. Eve E. Sweetser, *The Definition of Lie: An Examination of the Folk Models Underlying a Semantic Prototype*, in *CULTURAL MODELS IN LANGUAGE AND THOUGHT* 43, 60 (Dorothy Holland & Naomi Quinn eds. 1987).

69. *Bronston*, 409 U.S. at 361 n.5.

70. Grice, *supra* note 64, at 58.

71. See Peter Meijes Tiersma, *The Language of Perjury “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 409-19 (1990).

was aware of their contents.⁷² Under the False Statements Act governing the submission of information to the government, the failure to fill in a blank space on a form requiring disclosure of information (such as income or employment) has been held to constitute a “false statement.”⁷³ So, too, the answer “N/A” (not applicable) on an immigration form has been held to violate federal law.⁷⁴

If it seems odd to characterize an implied falsehood or an act such as leaving a question blank as a “statement,” consider the idiom “deafening silence.” In such a case, there is no statement at all; yet, we take the lack of a statement when one is called for (maxim of relation) as speaking volumes (maxim of quantity). So, too, an implicature is a silent statement carried by the overt statement. In fact, the Court characterized Bronston’s testimony in just this way: It specifically noted that it would be reasonable for the questioner to conclude “that the unresponsive answer is given only because it is *intended to make a statement*—a negative statement—relevant to the question asked.”⁷⁵ Thus, a better reading of the statute would simply incorporate our everyday understanding of what it means to state something (in this case, something one does not believe to be true). Witnesses and jurors, after all, are people too; they do not leave their ordinary linguistic competence behind when they enter the courtroom.

And that competence is surprisingly sophisticated and robust. “Lie” has a complex semantics that provides ordinary-language users with a highly nuanced set of tools for assessing the ethics of a wide range of speech acts. Eve Sweetser used a version of frame semantics and Gricean pragmatics to elaborate on the Coleman and Kay findings.⁷⁶ The concept “lie,” she explained, is understood relative to two models that reflect our default expectations concerning conversation and knowledge. The first assumes that conversation normally involves an intention to be helpful—i.e., Grice’s cooperative principle. The second recognizes that most of what we “know” is a matter of having adequate reasons for belief rather than firsthand knowledge.

A “lie” is a statement that violates the social expectations and understandings reflected in these models. Ordinarily, one is helpful if one conveys truthful information. Because most of our knowledge is based on adequate reasons for belief, the central criterion that identifies a statement as a “lie” is that the speaker

72. *United States v. Doe*, 465 U.S. 605, 612 (1984).

73. The False Statements Act is codified at 18 U.S.C. §§ 1001 *et seq.* (2018). For judicial interpretations *see, e.g.*, *United States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir. 1987); *United States v. Mattox*, 689 F.2d 531 (5th Cir. 1982); Tiersma, *supra* note 71, at 409-12.

74. *United States v. Mensah*, 737 F.3d 789, 804-05 (1st Cir. 2013) (answering N/A to question whether the applicant had submitted an immigration application under any other name constituted a material false statements in violation of 18 U.S.C. § 1015(a) (2012)).

75. *Bronston*, 409 U.S. at 361 n.5 (emphasis added).

76. Sweetser, *supra* note 68, at 43. Sweetser’s account is further developed in LAKOFF, *supra* note 26, at 71-74, and WINTER, CLEARING IN THE FOREST, *supra* note 25, at 297-300 (mapping the concept as a radial category).

did not believe his or her own statement. Falsity of belief, moreover, entails a breach of the fundamental normative assumption of intention to be helpful. Coleman and Kay's finding that intention to deceive was more important than factual falsity in identifying a statement as a "lie" follows for the same reason: It is intention to deceive that entails a breach of the fundamental normative assumption of intention to be helpful.⁷⁷ Factual falsity is adventitious; it may be entailed in falsity of belief or intent to deceive, or it may not. Thus, if I mistakenly insist that President Obama is right-handed, I will have given you false information. But I will not have lied to you. Conversely, if I feed you a stock tip I know to be false and you nevertheless profit on the investment, you would be right to consider me a liar and not solicit my advice in the future.

Because our everyday concept of a "lie" is understood in relation to our default social assumptions about conversation, it is context-sensitive in a way that the Court's truth-conditional definition—in which a "lie" is simply a false statement—could never be. In fact, ordinary spoken English has a detailed vocabulary that distinguishes among a broad array of false statements: There are "social lies," "white lies," "fibs," "fantasies," "fiction," "jokes," "tall tales," "exaggerations," "oversimplifications," and "mistakes." Each of these expressions reflects a different social frame of reference for the evaluation of a false statement.

Terms such as "joke," "tall tale," and "fiction" indicate that the informational condition of the model of conversation is not operative. In these cases, the speaker and listener are operating within a frame that assumes other purposes for the communication such as humor or entertainment. Similarly, the term "social lie"—e.g., telling the host it was a lovely party when, in fact, it was a not—assumes a frame of communication in which politeness is more helpful than information. "White lie" and "fib" assume a frame in which the informational condition is generally applicable, but where the information being conveyed is of no particular importance. Terms such as "fantasy," "exaggeration," and "mistake" (as well as the hedge "for all I know") assume that the model of knowledge has been suspended. The speaker's belief may be deluded, overblown, or simply mistaken; in any event, the listener does not depend on it for "truth." A term like "oversimplification," or a hedge like "to the best of my knowledge," assumes that the model of knowledge is operative but that the acceptable "truth" conditions have been altered as specified.

In contrast to the Court's wooden approach to perjury, our everyday social understanding of what constitutes a "lie" represents a highly nuanced set of widely shared normative judgments. Thus, Coleman and Kay found that "subjects fairly easily and reliably assign the word lie to reported speech acts in a more-or-less, rather than an all-or-none fashion" and that they "agree fairly generally on the relative weights of the elements."⁷⁸ The complex

77. Cf. William Blake, *Auguries of Innocence*, Lines 53–54: "A Truth that's told with bad intent/
Beats all the Lies you can invent." *THE COMPLETE POETRY AND PROSE OF WILLIAM BLAKE* 491
(David V. Erdman, ed. 1982).

78. Coleman & Kay, *supra* note 60, at 43.

semantics of “lie” enables ordinary-language users to make context-sensitive discriminations between merely false and deceptive (even if literally true) statements. The Court’s technical line of factual falsity not only bleaches out these subtle judgments, but leaves far too much room for the Holmesian “bad man” to mislead judges and juries.⁷⁹

Which is to say that justice may not have a syntax, but it does have a semantics. It arises from the everyday processes of meaning-making that depend on our situated, cultural knowledge of the norms of behavior that underlie any particular area of social life. Ordinary linguistic competence *already* embodies a semantics of justice. It is just that, sometimes, the law honors it in the breach.

79. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”). For a particularly egregious example, see *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987).