makers' (actual or subjective) intention over the semantic meaning *and* if those intentions often diverged significantly from that meaning, then the ability of citizens to act according to the rules (that is, to predict how they would be later interpreted by the judges) would be undermined.

One can approach the question of language and clear cases in an entirely different way, a way which allows one to accept Harris's conclusions without incurring the disaggregation problem (discussed earlier) that comes with relying on legislative intention. The argument would be that there are conventions within language not only regarding the meanings of words and phrases, but also regarding the amount of leeway in interpretation (and application) delegated to the listener. For example, our conventions seem to hold that general descriptive terms (for instance, 'a mature person') delegate a great deal of discretion, while numerical descriptions (for instance, 'a person at least thirty-five years old') greatly curtail that discretion. 'Buy me an inexpensive chess book' leaves a greater role to my listener's judgement than 'buy me a chess book that costs less than ten pounds'. Such conventions are understood by all competent users of the language, and knowledge of such conventions is a criterion of that competence. Assuming such a convention is present in the case of numerical limitations, we need no recourse to purpose. It would be no more necessary in that case to ponder whether legislators wanted us to use our discretion when they used a numerical limitation than it would be to ponder whether they meant 'horse' when they wrote 'cow' (though in both types of cases, one can still imagine a speaker intending to use words contrary to the language's conventional rules).

LANGUAGE AND DISCOURSE

Sometimes a proposition that would seem clear in meaning and application in a descriptive context seems to become uncertain, fuzzy at the edges, when used in a normative context; in such situations, one might say that the meaning of a term changes when we move from descriptive to normative discourse. One (Fregean) approach would be to claim that there is and could be no such change. According to that approach, sentences can be analyzed

into content and force, and a change of force should not be confused with a change in content.[28] For example, under this approach there is only a change of force between 'there are no vehicles in the park' ('no vehicles in the park' plus declarative force) and 'no vehicles in the park!' ('no vehicles in the park' plus imperative force).

Under a different (arguably Wittgensteinian) approach, the fact that words occur within a rule changes their meaning.[29] In particular, absolutes—'no', 'all', 'every', and so on—seem to have different meanings in rules compared to what they have in descriptions. One should note how differently—perhaps, how much more clearly—one thinks about the 'open texture' (in Hart's sense) of 'vehicle' in a descriptive sentence. If someone says 'there are no vehicles in the park' despite the existence of a skateboard, it might either be that the person did not see the skateboard or that the person did not consider skateboards to be 'vehicles'. However, if an emergency vehicle were present, we would surely correct the speaker if he continued to insist that no vehicles were present. It is only when we move from the descriptive to the normative that we are tempted to say that 'vehicle' might not include emergency vehicles, and that, I suggest, is because we are being led by our judgement to consider that applying the (otherwise reasonable) rule in a way that excluded emergency vehicles would be 'absurd' or 'wrong'. The description 'there are no vehicles in the park' means that there are zero vehicles in the park. However, the rule 'no vehicles in the park' is taken by many commentators to mean something slightly different: that there shall be zero vehicles in the park, *except under special circumstances*.[30]

The point may be more general. In different 'language games', the extent to which terms are understood literally rather than metaphorically, 'rigidly' rather than 'flexibly', varies along a

[28] See e.g. M. Dummett, 'Can Analytic Philosophy be Systematic, and Ought it to be?', in *Truth and Other Enigmas*, 449–50 (London: Duckworth 1978); 'Frege's Distinction between Sense and Reference', ibid. 117–18.

[29] For opposing evaluations of how well the Fregean sense/force distinction survives a Wittgensteinian critique, see J. Katz, *The Metaphysics of Meaning*, 86–101 (Cambridge, Mass.: MIT Press, 1990), and Baker and Hacker, *Language, Sense and Nonsense*, 47–120 (Oxford: Basil Blackwell, 1984).

[30] See Harris, *Law and Legal Science*, 5–6; A. M. Honoré, *Making Law Bind*, 80–1 (Oxford: Clarendon Press, 1987): 'the prima-facie universal character of rules'.

spectrum. In exaggerations, '*no one* in class is ever prepared!' probably means that very few students are; in moral discourse, '*always* do what you promise' is understood to mean that one should do so unless one has a very good reason not to; and so on. Universals in rules may be just another example of a language game in which such terms are used 'flexibly'.

Of course, it remains possible to maintain the Fregean line even if one accepts the 'prima facie' approach to absolutes in rules. Frederick Schauer would argue that the second (non-Fregean) approach confuses a theory about language (what sentences mean) with a theory about how rules should be applied. For Schauer, if we decide that 'no vehicles in the park' does not justify excluding emergency vehicles, this is not because we think 'no' or 'vehicle' have a slightly different meaning in the normative context. We decide this way because we believe that rules should not be strictly applied if to do so in a particular instance would lead either to an 'absurd' result or to a result contrary to the rule's underlying purpose.[31] According to Schauer, it remains open to us to have a strict approach to rule application, one that would never diverge from the meaning of the words in the rule formulation, one that would warrant excluding the emergency vehicle in that case. However, Schauer did not give any examples where that approach to rule application actually prevails.[32] In the end, the data seem to be indeterminate in choosing between a Fregean and a non-Fregean approach to analyzing (the meaning of absolutes in) normative discourse. (Given that judicial decisions involve both semantic analysis and policies regarding rule-application, it is not clear that anything of importance turns on the choice between the two characterizations of the same phenomenon.)

LANGUAGE AND DIALECT

The non-Fregean approach is based in part on an analogy with other specialized or deviant forms of normal speech: dialect and jargon. The literal meaning of a word is the meaning that participants from the relevant community would unreflectively assign to it, and the same word or phrase might have different

[31] See Schauer, *Playing by the Rules*, 53–62; 'Formalism', 524–5.
[32] Schauer, 'Formalism', 520.

literal meanings in different contexts. The notion of literal meaning (or, in the terms of American judicial rhetoric, 'plain meaning') can be understood in terms used in Chapter 2, when discussing Wittgenstein's rule-following considerations: we apply a term we know in an unreflective way; on such occasions, we are not 'interpreting' the term (that is, interpreting the rule for the term's application), we simply grasp its meaning.[33] It is instructive to notice the contrast here between Wittgenstein's approach to understanding and that of Donald Davidson: in contrast to Wittgenstein's idea of simply grasping meaning, Davidson believed that in understanding even simple sentences (correctly used and in our native language), we are interpreting, applying a theory of meaning.[34]

A word can be described as having a 'literal' or 'plain' meaning only relative to competent speakers of a particular language or dialect. When I am listening to someone describing an ice-hockey match, the 'plain meaning' of 'check' is different for me than it would be if I were listening to a description of a chess game: slightly different contexts (the jargon of the two different games), different meanings for the same word, yet the same immediate, unreflective grasp of meaning. The ability of words to carry different 'plain meanings' even for the same interpreter when the context is altered is exemplified by some situations in (American) contract law. Consider the following exchange between Richard Posner and Stanley Fish.

Richard Posner discussed the example of a contract which had clauses stating that the written text was the final and complete expression of the parties' agreement and that the price agreed would be $100 per pound. He argued that the parol evidence rule would foreclose a party from claiming that the parties had in fact agreed that the price would be $120 per pound after the first ten pounds, adding emphatically: 'The document is not ambiguous . . . [I]t is silly to think that every document is unclear.'[35] Stanley

[33] See Wittgenstein, *Philosophical Investigations*, secs. 201 ('there is a way of grasping a rule which is *not* an *interpretation*'), 228–32.

[34] See Dummett, 'A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking', 464–8; S. Mulhall, 'Davidson on Interpretation and Understanding', 37 *Philosophical Quarterly* 319 (1987), and *On Being in the World*, 91–106 (London: Routledge, 1990).

[35] R. Posner, 'Law and Literature: A Relation Reargued', 72 *Virginia Law Review* 1351, 1371 (1986).

Fish criticized Posner's ascription of ambiguity or clarity to the contract itself: 'The document is neither ambiguous nor unambiguous in and of itself. The document is not *anything* in and of itself, but acquires a shape and significance only within the assumed background of circumstances of its possible use.'[36] If the context of Posner's contract had been an industry where it was the usual practice and the general understanding that a set price is only for the first ten pounds, and thereafter a 20 per cent escalation applies, Fish argued, Posner's contract 'would have, and have obviously and without dispute, the meaning Posner scoffs at'.[37]

Contrary to the misleading characterizations used by both Posner and Fish, the problems of interpreting the contract come not from the strange quasi-metaphysical task of trying to locate meaning either 'in' the physical document or 'outside' it. The choice of interpretations here turns instead on which language the contract is read against. The 'plain meaning' of a particular phrase might be quite different in a particular industry sub-community than it is in normal everyday speech. If both parties to a contract are part of a particular sub-community, it is not clear why the 'plain meaning' doctrine should not be applied in terms of that sub-community's understandings.

It is important to see why this example is different from Balkin's example discussed earlier, where two contracting partners chose to mean horse by the word 'cow'. In the Balkin example, the speakers are imposing a meaning on a word that does not otherwise carry that meaning. In the business contract example, the speakers are merely following the meaning they unreflectively associate with the term, the meaning that the sub-community has collectively given to the term. That is, it is the difference, not a trivial one, between the idiolect of one or two people, and the dialect of sub-community.

Continuing with examples from contract law, prior to the development of the Uniform Commercial Code in America, normal business practices could not be introduced to contradict the apparent meaning (or clarify the true meaning) of the written terms of an agreement, unless it could be shown that the parties had intended those practices to have that priority. However, that

[36] S. Fish, 'Don't Know Much about the Middle Ages: Posner on Law and Literature', 97 *Yale Law Journal* 777, 784 (1988).
[37] Ibid.

business practices were *not* intended as the starting-point or the reference point for interpreting the written terms was assumed rather than argued for by the courts at that time.[38] That approach was fatally circular. When speakers treat a dialect as normal or natural, they see no need to tell one another or anyone else that they have chosen to use this dialect rather than 'conventional language'. Also, one cannot simply argue that since the contractual language did not explicitly mention background practices, no reference to such practices is necessary in interpreting the contractual language. The judges in the cases prior to the Uniform Commercial Code saw themselves as privileging the linguistic meaning over the authors' intentions, when in fact what they were doing was privileging everyday speech over the dialects spoken in particular business sub-communities.

CONCLUSION

Many theorists discuss 'clear cases' as though the nature and basis of such cases were themselves clear and obvious. However, a close analysis discloses a variety of issues and factors. Among the things that can make an apparently clear case unclear, or an apparently hard case easy, are issues of speakers' intention, dialects and idiolects, context, community practices and assumptions, views about justice, and ideas about rule-application, as well as the issues of vagueness and 'open texture' that were raised in earlier chapters.[39]

[38] See D. Patterson, 'Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code', 68 *Texas Law Review* 169, 186–99 (1989).

[39] I return briefly to the question of 'clear cases' in Chap. 6.

4
Ronald Dworkin's Right Answer Thesis

> I myself am often accused of thinking that there is almost always a right answer to a legal question; the accusation suggests that if I were to confess to that opinion anything else I said about legal reasoning could be safely ignored.[1]

INTRODUCTION

Unlike the earlier chapters on Hart's concept of 'open texture' and on the application of Wittgenstein's rule-following considerations to legal theory, the focus of this chapter and the following one will be broader: an entire legal theory (for this chapter, the legal theory of Ronald Dworkin, for the next, that of Michael Moore). I want to discuss a viewpoint rather than a question, a whole way of looking at law rather than a single debate. However, the advantage of a broader scope brings corresponding disadvantages; trying to discuss so much material in so limited a space means that the resulting exegesis and critique may be only an outline, and that my discussions may be in risk of becoming either conclusory or superficial. I will do my best to treat the ideas with the seriousness and the respect they deserve despite the limited space within which I work.

The opening sections of this chapter will be about ideas from Dworkin's earlier writings regarding whether there are unique right answers to legal questions. Part of my discussion will go beyond the range of the main debate in the literature to consider questions of the possible scope of a right answer theory and the problem of incommensurability. The remaining sections in the chapter will deal with Dworkin's later work on an interpretative approach to law. After briefly summarizing his approach, I will consider a series of challenges to it, moving from more surface objections to objections that go to the heart of Dworkin's ideas.

[1] Dworkin, 'No Right Answer?', 58.