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# On the Use of Cognitive Linguistics to Explore Legal Concepts:

JUDICIAL INTERPRETATION OF PRIVACY LAW IN THE  
EUROPEAN UNION

JAKE SLOSSER



On the Use of Cognitive Linguistics to Explore Legal Concepts:  
Judicial Interpretation of Privacy Law in the European Union

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in submission for the requirements of the degree of PhD in Law  
Kent Law School, University of Kent-Brussels School of International Studies

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## Abstract:

The quest for how legal concepts generate and reproduce themselves and how those concepts are applied to specific cases is one of the most intractable and difficult to answer. This is even more true when old concepts are used to understand new realities. Traditional legal methods used to trace the power of precedent on courts still struggle to capture intricate, if not more subtle, conceptual change. This paper investigates the conceptual links throughout the precedent chain using the guiding hand of cognitive linguistics; namely, conceptual metaphor. Using computer-aided coding methodology to explore the use of metaphor to build conceptual structure concerning data control in EU law as a case study, this work analyses the recent 'Safe Harbor' case in the European Court of Justice and its chain of case citations to provide a *proof of method* to show the viability of using cognitive linguistics to explain notions of coherence, interpretation, conceptual change, and the power of precedent. The goal is to lead to a larger forecasting model of legal scholarship. It addresses the questions: how can metaphor analysis help clarify the transfer and interpretation of legal concepts throughout a chain of precedent and understand the concepts through which data privacy via traditional privacy are built as a case study? The scaffolding on which the law's abstract concepts are built is taken apart to reveal the underlying, non-abstract components of how ideas link together and affect conceptual transformation. This paper argues for a supplement to the traditional method of legal category building and holds out an extended arm from the world of cognitive linguists to the conceptual mores that is law.



## Table of Contents

<b>CASE LAW AND LEGISLATION</b>	<b>VII</b>
<b>FIGURES AND TABLES</b>	<b>XI</b>
<b>ACKNOWLEDGEMENTS</b>	<b>XIII</b>
<b>INTRODUCTION:</b>	<b>I</b>
<b>THE NEED FOR A METHOD</b>	<b>I</b>
1. LAW, IN THE WILD:	4
2. THE STATE OF PRIVACY LAW	6
DIFFERING PATHS:	8
TECHNOLOGICAL CHANGE:	11
JURISDICTION AND ADEQUATE PROTECTION:	11
DNA, GENES, AND THE 'PERSONAL' OF PERSONAL DATA:	14
SURVEILLANCE, POSSESSION AND DATA RETENTION:	16
3. RESEARCH QUESTIONS	20
4. THE LAYOUT OF THE THESIS:	22
<b>CHAPTER 2:</b>	<b>25</b>
<b>SITUATING THE STUDY IN THE LITERATURE:</b>	<b>25</b>
<b>INTERPRETATION, PRECEDENT, AND PRIVACY LAW</b>	<b>25</b>
1. ETHICS AND OBJECTIVITY IN LAW:	26
2. THE UNIVERSAL, PARTICULAR AND INTERPRETATION	29
3. PRECEDENT AS A TOOL OF CONCEPTUAL FRAMING:	31
4. PRECEDENT AS A SCALE	34
5. BALANCE AND WEIGHT IN LEGAL REASONING	37
6. INTERPRETATION AND COGNITIVE THEORY	42
<b>CHAPTER 3:</b>	<b>48</b>



---

**LITERATURE REVIEW: CONCEPTUAL METAPHOR THEORY** **48**

1. CONCEPTUAL METAPHOR THEORY, THE BASICS:	50
2. THE VOCABULARY OF COGNITIVE LINGUISTICS	52
IMAGE SCHEMA:	52
FRAME SEMANTICS:	54
MENTAL SPACES:	56
IDEALISED COGNITIVE MODELS:	59
3. SOME CRITICISMS OF CMT:	60
4. METAPHOR AND LAW:	62
CASE STUDIES:	64
THE LAW'S CONCEPTION OF DIGITAL INFORMATION:	65
METAPHOR AND LEGAL REASONING:	67
THE NEXT STEP:	68

---

**CHAPTER 4:** **70**

---

**METHODOLOGY** **70**

1. THE APPROACH TO CODING:	72
THE METAPHOR IDENTIFICATION PROCEDURE VU UNIVERSITY AMSTERDAM (MIPVU):	72
COMPUTER-AIDED CODING	74
2. ISSUES WITH CODING	77
CONVENTIONAL METAPHORS/LITERALNESS	77
SUBJECTIVITY	78
3. NETWORK ANALYSIS:	79
PREVIOUS APPROACHES TO CITATION NETWORKS	79
A DIFFERENT APPROACH	80
PRECEDENT PROCESS ATLAS.TI	82
EXCEPTIONS	83
4. GEPHI AND NETWORK METRICS	85
5. ISSUES WITH NETWORK ANALYSIS	86
HYBRID METRICS	86
BREADTH OF COVERAGE	86
6. PROTOTYPE ANALYSIS	87
UNDERSTANDING PROTOTYPES:	87
SELECTING FOR THE RELEVANT DATA	90
NETWORK METRICS AND CLUSTERS	96

---

**CHAPTER 5: 100**

---

**MAX SCHREMS V THE DATA PROTECTION COMMISSIONER: SPATIAL METAPHORS OF ADEQUATE PROTECTION 100**

---

1. <i>MAX SCHREMS V THE DATA PROTECTION COMMISSIONER</i>	103
BACKGROUND AND FRAMEWORK	103
BUILDING THE LEGAL CONCEPTS: ADEQUATE PROTECTION	105
CONDITION 1.1: THE NATURE OF THE DATA	106
CONDITION 1.2: PROPORTIONALITY	107
CONDITION 1.3: ESSENTIAL EQUIVALENCE	108
CONDITION 1.4: EFFECTIVE COMPLIANCE	109
LEGAL CATEGORIES	111
2. NETWORKS OF PRECEDENT	115
PROTOTYPE THEORY, A REMINDER:	120
3. SPATIAL METAPHOR IN <i>SCHREMS</i>	121

---

**CHAPTER 6: 129**

---

**PROTOTYPES THROUGH PRECEDENT §78 129**

---

1. THE CENTRAL CASES:	132
2. WIDE MARGINS FROM <i>EVANS</i>	145
3. NARROW MARGINS STEMMING FROM <i>CONNORS</i>	148
4. MIXED CASES	151
5. CONCEPTUAL BLENDING	154

---

**CHAPTER 7: 162**

---

**EVALUATIVE JUDGEMENT §91 162**

---

1. CHARACTERISTICS OF SUFFICIENCY:	165
2. THE CIRCUMSTANCES OF FACT IN THE CENTRAL CASES:	168
ASSOCIATION FOR EUROPEAN INTEGRATION AND HUMAN RIGHTS AND <i>EKIMDZHIEV V. BULGARIA</i> :	168
WEBER AND SARAVIA V. GERMANY:	170
VALENZUELA CONTRERAS V. SPAIN:	171
HALFORD V. THE UNITED KINGDOM:	172
LEANDER V. SWEDEN:	173
MALONE V. THE UNITED KINGDOM:	175

KOPP V. SWITZERLAND:	176
NIEMIETZ V. GERMANY:	177
KLASS AND OTHERS V. GERMANY:	177
ROTARU V. ROMANIA:	179
3. EVALUATIVE JUDGMENT AND METAPHORIC FIT	180
4. APPLYING THE METAPHORIC FIT HYPOTHESIS TO THE <i>QUALITY</i> OF A LAW IN THE §91 CASES:	183
<b>CHAPTER 8:</b>	<b>192</b>
<b>ALTERNATIVE FRAMINGS &amp; THE PERSONAL OF PRIVATE LIFE</b>	<b>192</b>
1. DISSENTING OPINIONS IN <i>ROTARU V ROMANIA</i>	193
2. DISSENTING OPINION IN <i>DUDGEON V THE UNITED KINGDOM</i>	197
3. "BOUND" BY LAW:	203
4. FROM PRIVATE TO PERSONAL	210
<b>CHAPTER NINE:</b>	<b>214</b>
<b>TOWARDS THE FUTURE</b>	<b>214</b>
1. REFLECTIONS & RESPONSES	215
CROSS-LINGUAL CHALLENGES	215
COLLEGIAL VS INDIVIDUAL WRITING OF JUDGEMENTS	216
LEXICAL UNIT (LENGTH) CHOICE AND DIFFERENT TYPES OF METAPHOR USE	217
2. EXTENSIONS & AVENUES FOR FURTHER STUDY	219
AUTOMATIC PROCESSING	219
CORPUS LINGUISTICS	221
NEW DATA SOURCES	223
3. A FINAL NOTE	227
<b>BIBLIOGRAPHY</b>	<b>230</b>

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## Figures and Tables

Fig. 3.1 Basic mental space model	58
Fig. 4.1 Nodes to section ratio in <i>Schrems</i>	91
Fig. 4.2 Network pruning	92
Fig. 4.3. <i>Schrems</i> §78	94
Fig. 4.4. <i>Schrems</i> §91	95
Fig. 5.1 Initial network splits	117
Fig. 5.2 Network building progression	118
Fig. 5.3 Network building progression II	118
Fig. 5.4: <i>Schrems</i> , §78, chain of citations.	119
Table 5.1: Target domains $n > 10$	123
Table 5.2: Source domains $n < 10$	123
Table 5.3: Source-Target Domain Co-occurrences for {Authority is..., Complaints are...}	124
Table 5.4: Source-Target Domain Co-occurrences for {Law is..., Opinion is...}	124
Table 5.5: Source-Target Domain Co-occurrences for {Protection is..., Rights are...}	124
Table 5.6: Source-Target Domain Co-occurrences for {Safe Harbour is..., Surveillance is...}	125
Fig. 6.1 - <i>Schrems</i> §78 network mapped by centrality and communities	131
Fig. 6.2 - Relative Eigenvector centrality of §78 descendent cases	132
Fig. 6.4 The basic conceptual blending diagram from Fauconnier and Turner	158
Fig. 7.1 §91 mapped for Eigenvector centrality.	163
Fig. 7.2 Group distribution and their nodes' respective eigenvector centrality	164
Fig. 7.3 Basic path structure between the main hubs of the five groups	168
Fig. 7.4 Metaphoric fit	185
Fig. 9.1 - Fundamental Deictic Space Model	226





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“Just before I doze off, I counsel myself grandiosely: F\*\*\* concepts.  
Don't be afraid to be confused. Try to remain permanently confused.  
Anything is possible. Stay open, forever, so open it hurts, and then  
open up some more, until the day you die, world without end,  
amen.”

-George Saunders

---

<sup>1</sup> Saunders, George; 2012. *The Brain-Dead Megaphone*. A & C Black. at 55. Censorship added.



## Introduction: The Need for a Method

“If the word ‘clear’ is imprecise, it is mercifully so. And not necessarily to the detriment of meaning. ‘It is clear that...’ carries with it a bit of transparent glass, the bright ring of a bell, a sunny day, a candid conversation, an uncluttered table. *Bebuhw* has left these senses separately imprisoned in their own categories, and it seems the poorer for it.”

- Arika Okrent<sup>1</sup>

*Bebuhw*.

Meaning: ‘manifest’; a synonym of ‘evident’ or ‘obvious’.

Clear.

At least, that is what it would have meant had John Wilkins’ universal language ever gained any traction.<sup>2</sup> ‘Clear’ was classified in his taxonomic system of language under “TA.I.9...transcendental relations of action > belonging to single things > pertaining to the knowledge of things, as regards the causing to be known.”<sup>3</sup> Wilkins - polymath, clergyman, associate of scientists like Boyle, Hooke, and Christopher Wren - was pursuing a language that would categorise all human knowledge into a universal system. It would be “a man-made language free from the ambiguity and imprecision that afflicted natural languages. It would directly represent concepts; it would reveal the truth.”<sup>4</sup>

Unfortunately for Wilkins, that plan would never come to fruition. The Great London Fire didn’t

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<sup>1</sup> Okrent, Arika; 2009. *In the Land of Invented Languages: Esperanto Rock Stars, Klingon Poets, Loglan Lovers, and the Mad Dreamers Who Tried to Build a Perfect Language*. Random House. at 717 (digital edition).

<sup>2</sup> Wilkins, John; 1668. *An Essay Towards a Real Character and a Philosophical Language*. Printed for the Council of the Royal Society, London.

<sup>3</sup> Okrent, Arika; 2009 at 656-657 (digital edition)

<sup>4</sup> *id* at 271-272 (digital edition)

help much with the effort, destroying half of his work that would take him the next decade to replicate. His goal was to make his taxonomy of all concepts his language's syntactical and phonetic organising principle,

He divided the universe into forty *categories or classes*, which were then subdivided into *differences*, and subdivided in turn into *species*. To each class he assigned a monosyllable of two letters; to each difference, a consonant; to each species, a vowel.<sup>5</sup>

It seems the fatal error in the approach (aside from the difficulty of using the language practically) was the proposition that language or even knowledge itself, could maintain clear boundaries, bridle itself with categories, or be subject to the caprice of the human want for control and specificity. This was not the first error of its kind, nor the last.

The familiar idiom of something being 'lost in translation', is not a concept exclusively reserved for those who interpret foreign texts, who travel to a different culture, or those who create their own language. The phrase suggests that as one idea is converted from one language to another, something is lost: be it a subtlety, a nuance, or a whole family of associations that beg for explanation. It could simply be a symptom of language itself - that, if we had full fluency, we could boil down the idea to an essence in the first language and then find a suitable replacement in the second. However, this is not the case. The problem is not one of perfect fluency or perfect language, and it is not one that just sits on the borders between languages, or among the most noble attempts at circumventing the multiplicity of language by creating a universal one. Even within the same language, we often have a hard time finding the words that might express the cavalcade of concepts in our minds as we translate from thought to speech; from reasoning to explanation. We face this problem due to the intrinsic structure of concepts and the incessant vagaries in languages' ability to concretely represent them.

How do we decipher what someone else may mean by invoking a concept that is characterised more by ambiguity than it is by explicit language? This is not simply a matter of semantic interpretation (if one would even attempt to call that *simple*). It is one individual's structure of

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<sup>5</sup> Borges, Jorge Luis; 1999. 'The Analytical Language of John Wilkins' in *Selected Non-Fictions*. Eliot Weinberger (Ed.). Viking. 229, at 230. Emphasis added.

concepts attempting to reconcile itself with another's. It is a *translation* problem. Though it may be humorous when these misinterpretations occur in day to day life, in the law, it is a persistent and weighty issue. Given the consequences of interpreting ambiguity one way or the other, sorting out how to conceptually translate indistinct and often fluid terms and tie them down, is of the utmost importance. Not only do we face this problem when trying to derive meaning from ambiguity (of which there is plenty in existing legal theory<sup>6</sup>), a far more complex challenge is posed by the obligation to find concrete meaning in these theories and apply them - somehow uniformly - while the world changes around us, often at exponential speed. In short: to translate the universal principles in law to fit the ever-changing socio-cultural milieus. And the reverse.

As technology and society change, law is left to catch up. Its only recourse in the judicial setting is to try to interpret existing frameworks and apply them to a novel situation. It attempts to translate from one notion to another. Judges in differing forums and traditions have attempted this in a multitude of ways. It is usually the same type of approach anyone might use if pressed to give a full explanation of their own reasoning, in that it relies on boiling down a concept to its barest and most abstract sense to use it in a different context. Replacing ambiguity with ambiguity; the exact problem Wilkins was trying to solve. While this may settle a particular debate temporarily, or attempt to reconcile a person's view with situations arising in a rapidly changing society, this approach cannot provide consistent and adequate answers to inevitable future problems.

In today's world, the notion of privacy (as it has been pushed to the brink conceptually) presents an exceptional subset of this kind of dilemma. Finding a method to understand the *translation problem* is not just about explaining how we conceptualise privacy, but, more importantly, it must allow us to look at *how* courts interpret when using or reading ambiguous terms. Rather than relying on finding some common essence between a novel circumstance and a principle that is more established in the law, this work searches for a method that is based on the way concepts are structured and not on what we hope them to be. It is not mere translation, but a structure; an architecture of concepts that would offer a chance for us to keep pace with the ever-changing technological world. It is anti-Wilkins. Instead of presenting a fleshed-out way to prescribe legal interpretations' best form, it searches instead to study how law interprets, in the wild.

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<sup>6</sup> See for instance, Gibbons, John; 2014. *Language and the Law*. Routledge; Sunstein, Cass R.; 1995. 'Incompletely Theorized Agreements,' 108 *Harvard Law Review* 1733;



This goal in this chapter is to distance ourselves from the law for a moment. To recognise the lens we choose when we talk about interpretation. Then, with that acknowledgment in mind, give an overview of the history of trying to conceptualize privacy in its barest sense; to create its taxonomy, noting that privacy's *essential character* is best understood as something that is impossible to pin down to a fundamental essence. That, if one is to make sense of the notion of privacy, one must take into account the structure of concepts in language. The chapter will then lay out the main questions of the research and state how each chapter contributes to building a proof of concept for a method that aims to understand legal ambiguity, legal categories, and the structure of judicial interpretation.

## **I. Law, in the Wild:**

Robert Sapolsky is a behavioural biologist. His aim is to look at the underlying biological functions that can *help* to comprehend human aggression (among other things). However, he doesn't for a moment take that word 'help' for granted. In his most recent book,<sup>7</sup> he perfectly explains the general approach that is taken in the present work: "We tend to use a certain cognitive strategy when dealing with complex, multifaceted phenomena, in that we break down those separate facets into categories, into buckets of explanation."<sup>8</sup> Different disciplines, different points of view, different starting assumptions change the way we decide where those boundaries lie, what 'buckets' we use; we have inevitably made a choice of the kinds of explanations we are going to give. In Sapolsky's words, "when you think categorically, you have trouble seeing how similar or different two things are. If you pay lots of attention to where boundaries are, you pay less attention to complete pictures."<sup>9</sup> This is no less true when thinking about the law than it is about biology. One of the ways he explains his approach is to note the difference between the differing schools of psychologists in the early to mid-twentieth century: behaviourism in the US, and the ethologists in Europe. The behaviourists were content for their lab experiments and conclusions to apply universally. Ethologists on the other hand, chose **to** practice of "the science of interviewing an

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<sup>7</sup> Sapolsky, Robert; 2017. *Behave: The Biology of Humans at our Best and Worst*. Penguin.

<sup>8</sup> *id* at 18 (digital edition).

<sup>9</sup> *id* at 20 (digital edition).

animal in its own language.”<sup>10</sup> Their effort was to study animals in the wild, incorporating variety and context to draw up generalisable conclusions rather than universal laws being produced solely in the lab.

This project adopts a similar approach with that premise in mind. However, this is not an exercise in putting judges on the couch, or an attempt to read their minds. It is a research project that aims to see if among differing conditions, time frames, factual circumstances, etc, there may be something in common, some pattern of legal interpretation, or way for dealing with ambiguity that this study can tease out. It is an ethology of the law, interviewing it in its own language: judicial decisions.

Legal theorists tend to start from a unique bucket.<sup>11</sup> Entrenched from the beginning in a swirl of normative commitments and predetermined puzzles, they search for the correct kind of law, and what it *should* do. This type of legal theory looks at ‘correct’ interpretation as a normative goal, rather than as a practice to be explored. Judicial interpretation is in a separate bucket from biology, neuroscience, economics, politics, or, in the case of the bucket chosen for this study, cognitive linguistics. As such, the questions asked about things like interpretation as a whole concept, or ambiguity, or coherence, come from within the legal theory vocabulary and its boundaries, at the expense of the wider angled lens of judicial practice incorporating other points of view. Pardo and Patterson make a similar point,

As an account of correct and incorrect action in a practice (whether in ethics, law, arithmetic, or measurement), interpretation is a non-starter because interpretation draws our attention away from the techniques that make understanding possible. Correct and incorrect forms of action are immanent in practices. Correct forms of action cannot be imposed on a practice, by interpretation or otherwise. It is only when we master the techniques employed by participants in a practice that we can grasp the distinction between correct and incorrect action (e.g., in ethics or law)... As Wittgenstein says, “It is not the interpretation which builds the bridge between the sign and what is signified/ meant/ /. Only the practice does that.”<sup>12</sup>

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<sup>10</sup> *id* at 156 (digital edition).

<sup>11</sup> Not all, of course, but the type this study is trying to distance itself from, if that is possible.

<sup>12</sup> Pardo, Michael S & Patterson, Denis; 2013. *Mind, Brains, and Law: The Conceptual Foundations of Law and Neuroscience*. Oxford University Press, at 16. Quoting, Baker, Gordon P., and Hacker, Peter Michael Stephan; 2009. *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations, Essays and Exegesis*. John Wiley. at 136.

Practice and a wider lens is where this study finds its locus. Its focus is on the judicial use of conceptual language; its varying commitments and frameworks to understand law in its own language. A language that is not purely legal, but human. In short, to inspect law in the wild. This study focuses in on a small subset that represents all of the above-mentioned features exemplifying problems in investigating judicial (or any) interpretation: legal ambiguity, technological change, and the traditional legal approach to solving it. To do this it delineates judicial interpretation in the sub-category of privacy law in the EU Courts. It takes as a case study the recent case from the Court of Justice of the European Union (hereafter, CJEU) that epitomises adjusting old principles to new realities and the struggle to clearly interpret the notion of privacy in the light of new technology: *Maximillian Schrems v the Data Protection Commissioner* (hereafter *Schrems*).<sup>13</sup>

## **2. The State of Privacy Law**

There does not exist a more robust or prolific contemporary author on privacy law than Daniel Solove. In his multiple books and articles, he has traced the concept of privacy in its many guises through case law and legal theory. Though his work is commendable, and certainly methodical, the concept of privacy has been breached but not conquered; dissected but not with a derived essence. This, according to Solove, is a not only distinct facet of the ways in which privacy has been approached, but an essential feature of privacy itself. I agree, but would add that it is also the problem of the legal lens, our inevitable bucket.

Privacy, “might not have a single common characteristic; rather [it] draw[s] from a common pool of similar elements.”<sup>14</sup> Paradoxically, privacy’s ambiguity, its non-generalisable character, and fluid nature, are the only things generalisable about it; at least in so much as it exists as a legal term. As Solove has traced<sup>15</sup>, the essential ingredient of privacy constantly escapes thorough and strict

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<sup>13</sup> *Maximillian Schrems v the Data Protection Commissioner*, Judgement of the Court of 6 October 2015. EU:C:2015:650 (hereafter, *Schrems*).

<sup>14</sup> Solove, Daniel J.; 2002. 'Conceptualizing Privacy,' 90 *California law review* 1087.

<sup>15</sup> Solove, Daniel J.; 2006. 'A Taxonomy of Privacy,' 154 *University of Pennsylvania law review* 477; Richards, Neil M. & Solove, Daniel J.; 2007. 'Privacy's Other Path: Recovering the Law of Confidentiality,' 96 *Geo. LJ* 123; Solove, Daniel J.; 2004. *The Digital Person: Technology and Privacy in the Information Age*. NYU Press.

review.<sup>16</sup> His rectifying endeavour is to look at privacy not as an assemblage of differing meanings that share a core element, but as a concept that is tied together through the tangents that associate it with similar and familial concepts. He presents privacy as a conceptual web spun from notions that incorporate such diverse claims as, “freedom of thought, control over one’s body, solitude in one’s home, control over information about oneself, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations.”<sup>17</sup> His is a pragmatic account of privacy that aims to focus on its contexts, values, and goals, rather than its adherence to some objective existence that would ground it as a concept.

Privacy, as he notes, has been taken through multiple conceptual frames. Following its history in *A Taxonomy of Privacy* and *Conceptualizing Privacy*, he considers that the traditional attempts to outline privacy are almost always set in the terms of Warren and Brandeis’ “right to be let alone”<sup>18</sup>. Many commentators and theorists use this understanding of privacy to lay the groundwork and build the concept in order to describe salient features that may be essentialised to try to understand privacy as a concept that involves “necessary and sufficient conditions”<sup>19</sup>. Whether it is William Prosser’s ‘torts’<sup>20</sup>, Judith DeCew’s ‘three categories’<sup>21</sup>, Ken Gormley’s ‘areas of law’<sup>22</sup>, Jerry Kang’s ‘overlapping clusters’<sup>23</sup>, or Alan Westin’s ‘basic states’<sup>24</sup>, among others, privacy’s conception has defied a singular definition that can pull them all together to find whether it is properly placed within a frame of autonomy, dignity, property, control, intimacy, or elsewhere.<sup>25</sup> One can see the many ways in which privacy is translated into another term in the hope of understanding it.

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<sup>16</sup> “[p]rivacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.” Post, Robert C.; 2000. ‘Three Concepts of Privacy,’ 89 *Geo. Lj* 2087, at 2087; “[L]egal privacy consists of four or five different species of legal rights which are quite distinct from each other and thus incapable of a single definition.” Gormley, Ken; 1992. ‘One Hundred Years of Privacy,’ 5 *Wis. L. Rev.* 1335, at 1339.

<sup>17</sup> Solove; 2002 at 1088.

<sup>18</sup> Turkington, Richard C.; 1989. ‘Legacy of The Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy,’ 10 *N. Ill. U. L. Rev* 479, at 481.

<sup>19</sup> Solove; 2002 at 1090.

<sup>20</sup> Prosser, William L.; 1960. ‘Privacy,’ 48 *Cal. L. Rev.* 383, at 389.

<sup>21</sup> DeCew, Judith Wagner; 1997. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*. Cornell University Press, at 75-77.

<sup>22</sup> Gormley, Ken; 1992.

<sup>23</sup> Kang, Jerry; 1998. ‘Information Privacy in Cyberspace Transactions,’ 50 *Stanford law review* 1193, at 1202-3.

<sup>24</sup> Westin, Alan F.; 1968. ‘Privacy and Freedom,’ 25 *Washington and Lee Law Review* 166.

<sup>25</sup> See generally, Solove, Daniel J.; 2006.

Rather than continuing the Sisyphean project of locating privacy's essential character, Solove's effort is an,

'approach' to understanding privacy rather than a definition or formula for privacy. It is an approach because it does not describe the sum and substance of privacy but provides guidance in identifying, analyzing, and ascribing value to a set of related dimensions of practices.<sup>26</sup>

His approach is an attempt to look at "understanding privacy in specific contextual situations."<sup>27</sup> It is a bottom up approach, informed by the pragmatism of Ludwig Wittgenstein and John Dewey, which differs from the traditional essential features approach typically taken by legal and social scholars. This approach seems to bear fruit. He shows, through an analysis of US case law, how misconstruing privacy as secrecy, disclosure, or a spatial consideration of the boundaries of public vs. private, misses a conception of privacy that would be reasonably deemed important or typical of how we, the public, may imagine it. This is a flaw in the 'privacy as a set of conditions' approach; that,

[t]he conceptions are often too narrow because they fail to include the aspects of life that we typically view as private, and are often too broad because they fail to exclude matters that we do not deem private.<sup>28</sup>

Solove's pragmatism intends to form a method by which the contextual and the historical notions of privacy can be taken into account without allowing the abstract to further muddy already opaque waters. He shows through an examination of just three aspects of the traditional realms of privacy (the family, the home, and the body), how the history of these notions informs how cultural standards and expectations of privacy vary greatly over space and time.

#### *Differing Paths:*

These differing standards are seen even more clearly in the legal context when looking at the development of the idea in a comparative sense. The development of the notion of privacy takes

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<sup>26</sup> Solove, Daniel J.; 2002 at 1129. Original emphasis.

<sup>27</sup> *id* at 1128.

<sup>28</sup> *id* at 1094.

two very distinct conceptual paths when one compares legal histories in the US and the UK.<sup>29</sup> Though Warren and Brandies' landmark paper is often considered to be the beginning of the right to privacy in its contemporary sense, Solove and Richards argue that it is a "fork in the path of privacy"<sup>30</sup> stemming from *Prince Albert v Strange*,<sup>31</sup> where two quite distinct notions of privacy become apparent. The US conception, stemming from a reading of the *Albert v Strange* by Warren and Brandies (and later, others), regards privacy as a function of the "inviolable personality".<sup>32</sup> The UK version of privacy differs. It relies more fundamentally on the breach of confidence, a sorting out of the expectations of various types of relationships. This raises a question; as the right to privacy puts itself up against more ingrained and established fundamental rights, are we to base privacy in the individual herself or in her relationship(s) with others? More aptly, how does privacy law envision the *personal* of personal information? As part of the inviolable personality or as a negotiated set of relationships? Solove and Richards track two distinct paths through the differing histories.

They go beyond seeing the disparate traditions of UK and US privacy law as simple generalisable oppositions, such as James Whitman's separation "between liberty and dignity".<sup>33</sup> Their main focus is on the evolution from an older law of confidentiality established in the common law before the Warren and Brandies paper to a notion developed in the US that focused less on the law of confidentiality and more on the notion of a privacy tort that relies on disclosure of information. As they explain it,

The public disclosure tort focuses on the nature of the information being made public. By contrast, the focus of the tort of breach of confidentiality is on the nature of the relationship. As one scholar has put it, "while the private-facts tort focuses on the nature of the information published, the breach of confidence action focuses on the parties' obligations to each other."<sup>34</sup>

These conceptual frameworks are radically different and there are many consequences which could stem from these distinctions. For instance, William Prosser's privacy torts (and much of the US

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<sup>29</sup> Richards, Neil M. & Solove, Daniel J.; 2007.

<sup>30</sup> *id* at 126.

<sup>31</sup> *Prince Albert v Strange* (1848) 41 Eng. Rep. 1171.

<sup>32</sup> Solove, Daniel J.; 2006 at 125.

<sup>33</sup> Whitman, James Q.; 2004. 'The Two Western Cultures of Privacy: Dignity Versus Liberty,' 113 *Yale Law Journal* 1151.

<sup>34</sup> Richards, Neil M. & Solove, Daniel J.; 2007 at 174 quoting Gilles, Susan M.; 1995. 'Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy,' 43 *Buff. L. Rev.* 1 at 20-25.

conception of privacy) require a level of scrutiny into the nature of the information involved, whether the information disclosed can be understood to be, for example, “highly offensive to a reasonable person.”<sup>35</sup> The breach of confidentiality on the other hand,

does not contain a “highly offensive” requirement, as it views the injury not exclusively in terms of the humiliation caused by the revelation of information but also in terms of the violation of trust between the parties.<sup>36</sup>

In addition, these differing conceptions require fundamentally different ideas of how one is to draw the line between private and public. In the case of the US, these are distinct “binary opposites”, unlike the UK system which sees privacy more in line with a continuum.<sup>37</sup> These distinctions are extremely relevant when considered in conjunction with the speed of technological change. Rather than debating which approach may work better, it is crucial to understand how these distinctions are translated into new and ever developing situations that are born from technological change.

While we can applaud Solove’s effort of tracking the conceptualisation of privacy, we have yet to find a robust enough interpretation that not only takes into account Wittgenstein’s initial insight into the nature of categories, but also considers everything we have learned about the structure of concepts since Wittgenstein. We have learned much about the limits and mechanisms of how we form concepts and have developed methods outside of philosophy and law that are much more complete. Cognitive science (particularly the strand which deals with conceptual semantics) has developed one such branch of inquiry. If we are concerned not with the essence of privacy but with the relationships which link both the flow of information between people and the meanings on which the concept is built, then we must not cherry pick those ties or we risk proliferating the essentialism we are hoping to escape. Using an alternate lens grounds us in the world of cognitive science rather than that of pure legal theory. And, there are many pressing issues that involve privacy law that bear down on its definition: technological change, jurisdiction, cross border data flows, developments in DNA sequencing and storage, and surveillance, to name a few.

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<sup>35</sup> Solove, Daniel J.; 2001. ‘Privacy and Power: Computer Databases and Metaphors for Information Privacy,’ 53 *Stanford law review* 1393 at 1432.

<sup>36</sup> Richards, Neil M. & Solove, Daniel J.; 2007 at 175.

<sup>37</sup> *id* at 182.

### *Technological Change:*

When technological change (and here technological can be meant in its broadest sense) forces variations between traditional notions of privacy and the practices one might expect to be private, the law must deal with analogising an old law to a new circumstance. Often, this analogising is reliant upon concepts that have no hope of having any concrete meaning outside of the ones given to them on a case by case basis. Moreover, the speed at which these changes occur leaves the law in the dust, staring gritty-eyed at what escapes it. If there is any hope of keeping pace, we must understand not what these concepts mean, but the process of how they have been defined and if a way forward exists. We can introduce three technological changes that have not only started to push the boundaries of definition of legal privacy but will continually do so as technology moves forward: the jurisdictional issues of transborder data flows, the use of biomedical data in research, and the technologies of surveillance. These three technological changes highlight aspects of privacy that rely on our traditional conceptions of territory, personal property, dignity, autonomy, and ultimately our relation to the state. Not only are these interesting legal contexts in their own right, they provide concrete examples of what we mean by 'the abstract structuring of concepts'. They highlight notions of legal space, temporality, agency and causality when it comes to the depiction of information and relationships surrounding information in privacy law.

### *Jurisdiction and Adequate Protection:*

Borders have long played a fundamental role in jurisdiction. Territory, sovereignty, boundaries, fragmentation; these are all stalwarts of international law. Migration, international criminals, responsibility to protect; these have all played their parts in calling into question the feasibility of law's reliance on territorial sovereignty in questions of jurisdiction. Yet, no change has done more to usurp this conception than the development of a worldwide network of data. Data not only hangs on the edges of the traditional concept of jurisdiction, it calls into question the ability of the jurisdiction as a force to regulate it.<sup>38</sup>

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<sup>38</sup> Ryngaert, Cedric & Zoetekouw, Mark; 2014. 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era,' Available at SSRN: <https://ssrn.com/abstract=2523354> or <http://dx.doi.org/10.2139/ssrn.2523354> .



Lawmakers are struggling to keep up and even categorise how data flows and jurisdiction interplay, and face difficulties in how to conceptualise the movement of data across borders. The question for the future is: how can the law regulate and protect data if it does not fit into the ready-made categories we have for jurisdiction? Christopher Kuner, puts it this way,

Since the Internet is structured to transit data based not on geography but on technical parameters, it can be assumed that a large amount of the personal data transmitted on it must cross national borders, so that the actual route they take is unpredictable. Indeed, technological complexity and the effort required to track data sent over the Internet means that it may no longer be feasible to differentiate between transborder data flows and those that do not cross national borders. Thus, the regulatory framework for transborder data flows is in effect the same as that for data transfers on the Internet, and for the Internet itself.<sup>39</sup>

The opacity of frameworks gives rise to numerous legal issues including the 'roles and obligations of parties, particularly when there exist numerous legal regimes to deal with a given situation.<sup>40</sup> How is a country supposed to use its local or regional framework for the protection of data if it is unclear where the data exists or who controls it? Even more pressing is the ambiguity in data protection laws regarding the definition of what counts as data and what counts as the 'flow' or the 'transfer' of data.<sup>41</sup> This ambiguity arises due to the concept of transfer being embedded in a larger concept of causality and agency. "The law tends to conceive of transborder data flows as if they were the result of a discrete act, such as someone pushing a button and causing data to be transferred. In fact, nowadays data transfers often take place as part of a process."<sup>42</sup> This process is framed not only in the obvious notions of flow or transfer, but also in the ways in which those metaphors conceptualise space, and therefore contribute to different perceptions of causality. That, "the

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<sup>39</sup> Kuner, Christopher Barth; 2013. *Transborder Data Flows and Data Privacy Law*. Oxford University Press at 6.

<sup>40</sup> *id* at 8-9.

<sup>41</sup> "The EU Directive refers to 'transfer to a third country of personal data' (Article 25(1)), without defining 'data transfer'; the Commission's 2012 proposal to amend the EU data protection framework also fails to do so. The APEC Privacy Framework variously uses the terms 'international transfer', 'information flows across borders', 'cross-border information flow', and 'cross-border data transfer' interchangeably to refer to the movement of personal data across national borders. The Canadian Personal Information Protection and Electronic Documents Act (PIPEDA) does not distinguish between domestic and international flows of data, and a 'data transfer' is considered to mean 'use' of the data by an organization. The OECD Privacy Guidelines refer to 'transborder data flows', defining the term as 'movements of personal data across national borders' (§1(c)), while Council of Europe Convention 108 refers to 'transborder flows of personal data', defined as 'the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to their being automatically processed' (Article 12(1))". *id* at 11.

<sup>42</sup> *id* at 12.

geometry of spatial language divides up space into regions with different causal consequences."<sup>43</sup> As noted by Daniel Solove, if data protection is a process rather than an act of agency, the clichéd metaphor of data privacy as a fight against an Orwellian Big Brother, is rather more akin to Kafka's absurd bureaucratic nightmare in *The Trial*.<sup>44</sup>

This is not just a question of changing the term. The ambiguity of the definition of the flow of data across borders means it is reliant on the meanings given to it found in case law and the interpretations of the relevant definitions change conspicuously from case to case, from country to country. This is also true when the law employs an agency framework that looks at a "data controller" vs. a "data processor."<sup>45</sup> Any international framework can only hope to provide broad definitions of these terms and must rely on the conceptions that are made, in the wild, if they are to have any meaning at all. As noted before, the importance of finding a new method is to avoid essentialising what one may mean by a transfer of data which spans all contexts. The aim is to identify the ways in which its interpretation works so as to keep up with (and ideally anticipate) a continually changing landscape. One particularly interesting approach is to look at the metaphors of data transfer and how they help to conceptualise this process.

We have noted one obvious distinction already: the conceptual difference between 'flow' and 'transfer' when it comes to notions of process vs. agency. However, it is important not to make the mistake of choosing just the most obvious, glaring metaphors. As will be shown shortly in Chapter 3, the embedded metaphors are often not as apparent as these examples. This is quite clear in the literature about (but not exclusively about) data flows. There have been quite a few studies that look at overarching metaphors, such as Solove cited above. But there are also those that look at somewhat more subtle ones,<sup>46</sup> or even look to use a metaphor for solving the problem.<sup>47</sup> What all these inquiries have in common is an assumption that the obvious metaphor is the relevant one. What is needed is a means to look at the construction of abstract concepts through a detailed

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<sup>43</sup> Pinker, Steven; 2007. *The Stuff of Thought: Language as a Window Into Human Nature*. Penguin.

<sup>44</sup> Solove, Daniel J.; 2001.

<sup>45</sup> See Article 29 Working Party, 'Opinion 1/2010, on the concepts of "controller" and "processor"'

<sup>46</sup> See, Larsson, Stefan; 2013. 'Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case,' 21 *International Journal of Law and Information Technology* 354; Hunter, Dan; 2003. 'Cyberspace as Place and the Tragedy of the Digital Anticommons,' 91 *California law review* 439.

<sup>47</sup> Jimenez, William Guillermo & Lodder, Arno R.; 2015. 'Analyzing Approaches to Internet Jurisdiction Based on a Model of Harbors and the High Seas,' 29 *International Review of Law, Computers & Technology* 266.

study of metaphors, so as to begin to decide on the relevant ones for study. In this instance, the case study of *Maximilian Schrems v the Data Protection Commissioner* and its chain of cited precedent will be used to examine how this process works, not only because of its relevance for transborder data flows, but for the other categories of privacy relied upon to inform its judgement, to measure notions like *essential equivalence*, or *adequate protection*.

#### *DNA, Genes, and the 'Personal' of Personal Data:*

Imagine for a moment that we have made a very minor advance in our ability to map individual genomes. You go online to fill in those extended branches in your family tree. You go to a site like 23andme.com to procure a DNA swab to uncover and identify your more distant relatives. The website lists your results and you find you have relatives (3rd, 4th, 5th cousins etc.) who you never knew existed. It linked your genetic markers with that of a distant cousin who had also taken the test, let's call her Ms. X. Ms. X has also consented to use her genetic data to make all of this possible. She now shares her results with you, which show even more relationships than even 23andme.com could find. By sharing information that her family members (your new relatives) unknowingly provided, has she breached the privacy of her own family? Let's take this a little further. You contact one of these further relations that you would have otherwise never known about. Let's call them Mr. Y and his daughter, Ms. Y. Ms. Y is excited to find out that she potentially has other close relations. So, she agrees to a mouth swab to see how closely related you are. It turns out that there is enough information to suggest that Mr. Y could be your mutual biological father. Ms. Y is astounded because there has never been any mention of a previous marriage or any infidelity in her family. Has Mr. Y's privacy here been breached? It would seem that through no fault of his own, with no consent, something quite revelatory and possibly damaging has been disclosed to someone who, up until now, had been a complete stranger. This example is not pure fiction<sup>48</sup> and its implications are increasingly important as the technology of genetic information speeds up and costs less.

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<sup>48</sup> See Hughes, Virginia' 2013. '23 and You', *Medium*. 04 Dec. Available at: <https://medium.com/matter/23-and-you-66e87553d22c>

The idea of privacy is, if anything, rooted in the idea of something quite personal. The idea that it should be protected as such, though intuitive, may be quite erroneous. Genetic data provides the perfect avenue to investigate such a claim. As Mark Taylor notes,

I am especially keen to encourage a critical evaluation of the weight placed upon the idea of 'personal data' ... it is a concept that has been forced to shoulder a disproportionate burden of work and it has made a rather convenient vehicle to transport us from some difficult questions.<sup>49</sup>

The legal framework which protects genetic privacy is based on the idea of data being personal, singular, and related to the autonomy of the individual. Take for instance, the importance that consent plays in directing privacy claims. But genetic research and the ways in which it is used, stored, and analysed, make this a very treacherous definition, particularly given the importance of what can be achieved through genetic research.<sup>50</sup> Consent, for Taylor is built on the law's understanding of data as a concept not wholly related a singular individual, and on the inherent distinction to be made between data and information. That information is, "a composite concept: the generation of information relies upon a particular interpretive framework being applied to data."<sup>51</sup> He understands the importance of securing this distinction,

Understanding the significance of fluid interpretive frameworks to the relationship between data and information is key to understanding the limitations associated with the law's current protection of privacy.<sup>52</sup>

Taylor's critique of the 'personal' of privacy is quite compelling, as is his use of genetic privacy to explore it. It is as compelling as the rationalisation of privacy as a notion of control<sup>53</sup> or of exclusivity.<sup>54</sup> There is a penchant for privacy theorists to quote the rhetoric of the overarching

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<sup>49</sup> Taylor, Mark; 2012. *Genetic Data and the Law*. Cambridge University Press at xii.

<sup>50</sup> "One of the problems associated with the concept of personal data is that it tends to assume that there will be a single identifiable individual to whom personal data will 'relate' and that this individual's privacy is only at risk for as long as they are identifiably associated with that data. These are both assumptions that can be readily challenged within the context of research use of genetic data. They are, however, also assumptions that sit comfortably with the widely adopted mechanisms of 'consent' and 'anonymisation' as ways to protect fundamental rights and freedoms, including the right to privacy. The Data Protection Directive 95/46/EC has effectively consolidated the mechanisms of 'ask' or 'anonymise' as key routes towards lawful processing of personal data. The emphasis placed upon these two mechanisms is unfortunate for privacy protection." *id* at 7.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> Laurie, G.; 2002. *Genetic Privacy: A Challenge to Medico-Legal Norms*. Cambridge University Press, at 53.

<sup>54</sup> Nissenbaum, Helen; 2004. 'Privacy as Contextual Integrity,' 79 *Wash. L. Rev.* 119.

metaphor. But as we saw earlier, privacy is a constantly fluctuating concept, one that defies essential characteristics. It is commendable to attempt to use metaphor to describe aspects of it, but we are no closer to understanding what grounds the dynamics of that fluctuation from metaphor to metaphor, from category to category. To take the same tract as jurisdiction; if we are trying to understand “fluid interpretive frameworks”, the work should not be directed by pure reason alone. By developing a method to look at how genetic privacy law conceptualises information, we can inch closer to understanding the present and the future of the protection of privacy information. Mr. Y should be pleased.

### *Surveillance, Possession and Data Retention:*

There are a few different things we can take from the previous two conceptions of privacy. One, that the way in which we imagine space and geography, and their links to communication, change the way in which the law imagines privacy claims. Second, the ways in which we envisage autonomy or exclusive ownership of information impact the ways in which privacy is or isn't protected. The next task is to look at how these two dimensions interplay as technology allows governments and private entities to make decisions on how surveillance can be conducted. The aggregation of data and the availability of technology to store information to mine at a future point, allow information to last in perpetuity.<sup>55</sup> This temporal aspect brings what was once private (due to the limitations of human memory) into view of the digital network. It forces us to ask a number of questions.

Let's imagine for a moment that we had a good working definition of what would define a space as being public or private. This would require a knowledge of the spatial and agency related aspects of the possession of, and in fact pure concept of, information. Even then, we would still have to ask questions like: what remains private in a public space? Our body? What parts? Our location? Our behaviour? What is it one retains as their own? Can we, should we really frame these concerns in

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<sup>55</sup> “Surveillance is a sweeping form of investigatory power. It extends beyond a search, for it records behavior, social interaction, and everything that a person says and does. Rather than a targeted query for information, surveillance is often akin to a dragnet search, which can ensnare a significant amount of data beyond that which was originally sought. Moreover, unlike a typical search, which is often performed in a once-and-done fashion, electronic surveillance goes on continuously.” Solove, Daniel J.; 2011. *Nothing to Hide: The False Tradeoff Between Privacy and Security*. Yale University Press at 179.

terms of ownership or possession? Does that matter? What is the link between reasonable expectation of privacy in a public space vs. private place and secrecy? A way into these questions is through an exploration of the idea of surveillance and protection from it.

When one talks about surveillance, the image that readily comes to mind is the ever-vigilant eye, the Benthamian Panopticon, or the ear to the window underneath the eaves of a building (as invoked in the term 'eavesdropping'). There is, in all these images, an unease about the agent who is watching, what they are doing with the images and sounds they collect and the lack of reciprocity in us not knowing their identity when we are so naked in front of them. But it is not only the secrecy surrounding the identity of the surveyor that causes us to shrink to one side and shrivel down a bit in our seats. There is a temporal aspect that delineates public and private in a public space. For example; is there a difference between looking at someone and taking their picture? A glance is a momentary behaviour, it lasts perhaps in the microcosm of a few seconds. Whereas a picture, particularly if digitally stored, can potentially last forever. Is the deciding factor between a look and a photograph that a gaze from a passer-by is reasonably public where a photograph is not only contingent on the behaviour of taking a picture but also on its potential uses? Is there something to the distinction between temporary and permanent? The problem of permanence was in fact invoked by Warren and Brandies. They were concerned about the press having the ability to take instantaneous photographs and use them for the sake of gossip. Traditionally, this distinction focused on the subsequent uses of that information; whether an image is sold, disclosed, or used for libellous purposes. But this is a distinction that may miss an important feature of reasonable expectation: the data, once taken, lasts, and the proprietor of that information won't be the only one who uses it. Thus, a notion of time (that consent was *given* - in the past tense) isn't represented for the future uses of that information. Regulating data use on expectations of what an original party might do with it seems to be an inadequate way to protect data given the unknown uses in the future. This is a problem highlighted with the concepts of the harm of aggregation and secondary use.

In many data protection laws (particularly in the EU), there is a distinction between a data controller and a data subject.<sup>56</sup> At the moment a subject transfers information, responsibility is transferred along with it to whomever now controls the information.<sup>57</sup> However, that data, given willingly by a subject for a consented purpose, can then be aggregated together with other data that was collected for a wholly different reason to serve some future, third purpose. Even if totally anonymised, aggregated information can be mined to reveal a whole litany of information that (if it were made clear as the initial goal) may have led to an individual's refusal of consent as it changes the reasonable expectation of what information would be public or private.

The purview of most privacy protection is not built to handle the digital world. Consent is based on a temporal notion of information that is static in the specious present, to use the Jamesian term. Consent is based on the idea that information is like the gaze of the passerby in that it only lasts momentarily; if you consented to be in a public place, then surely the information you expose about yourself, in the least, shouldn't be considered as private. There is an ambiguity of time and of the substance of information that even the growing body of legislation struggles to address. Technological change has led information to become something quite different from a parcel or a phone call. The aggregation of and ability to mine new sources of information means that protecting against the search inside of a parcel is different to just knowing its comings and goings, it is inapplicable as an analogy to modern digital information. There is a translation problem when trying to ask whether this kind of search is in fact the same kind of search traditionally defined (in the US sense), or whether it falls under a "right to privacy" (in an EU sense). Legislation grows to try and find a new approach but it has an inevitable difficulty keeping up. This reactive approach is no way to protect something that in the Brandies sense is, "the most comprehensive of rights and the right most valued by civilized men."<sup>58</sup>

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<sup>56</sup> See e.g. *Bodil Lindqvist v Åklagarkammaren i Jönköping* on interpretation of the Data Protection Directive 95/46 *Bodil Lindqvist v Åklagarkammaren i Jönköping*, Judgement of the Court of 6 November 2003. EU:C:2003:596.

<sup>57</sup> While this may be true primarily in an EU context, this is usually not the case in the US which follows a general principle of third party doctrine. That once information is transferred with consent, unless specifically prohibited (i.e. doctor-patient privileges) the uses of that data to third parties is not implicitly protected.

<sup>58</sup> See, *Olmstead v. United States*, 277 U.S. 438, (1928) (at 478 Brandeis, J., dissenting).

If it is the relationships between these various categories of privacy we are concerned with, as Solove contends, then a method needs to be developed to investigate how those relationships are borne out in the law itself. If our language is judicial decisions, then those relationships are their precedents. Given Solove's work on the conceptions of US and UK law, this study turns to the conception of the "right to private life" as enshrined in Article 8 of the European Convention of Human Rights ('ECHR' or "the Convention"),<sup>59</sup> Article 7 and 8 of the Charter of Fundamental rights of the European Union ("the Charter"),<sup>60</sup> and the interpretations and conceptual framing used by the CJEU and the ECtHR in forming the conceptual linkages throughout a chain of precedent. To do this, it locates the study around the *Schrems* case and its antecedent cited cases.

The *Schrems* case is an interesting example for this inquiry. Though there are many cases that involve the right to privacy in the digital realm, *Schrems* contains and combines a number of unique aspects. First, unlike other cases, it involves a judgment where the substantive question of whether the infractions of Mr. Schrems' data could be considered a breach of privacy isn't examined. It only questions whether his challenge rises to the level based on the hypothetical question (or reasonable suspicion) of his data being breached in the US and whether that protection scheme could be considered as adequate based on the essence and purpose of the right to privacy. This situation is comparable to asking whether a bridge is strong enough to bear a certain load, not by driving a truck over it, but by considering the design plans of the bridge building company, comparing those to another bridge building company's calculations, and then assessing whether that means the bridge building safety commission has a duty to inspect the bridge in question based on the purpose of the right to safe bridges, rather than just testing the offending bridge in the first place. It is a use of analogical reasoning that asks for considerable reflection, the author's own use of flimsy analogy notwithstanding.

Second, it is a case that has immediate ramifications and reflects current challenges in the field of privacy. It sets a benchmark by which to test the viability of researching metaphor and to measure the power of spatial metaphor to understand the strength of precedent on future cases. It is highly likely to be cited in future cases brought before the Court that relate to the application of the new

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<sup>59</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>60</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02



data privacy mechanisms enshrined into law. Safe Harbour has been replaced by the 'Privacy Shield' and Directive 95/46 substituted with the 'General Data Protection Regulation', but questions are already arising about the efficacy or appropriateness of these policy measures, one in particular coming from Mr. Schrems himself.

To say this can be seen as a watershed case is a conservative estimate of the repercussions of this project. One could think of other cases (*Digital Rights Ireland* or *Google Spain*, for instance) that are landmark cases of this type, but neither holds the direct comparability for an immediate challenge like the *Schrems* case does (though both of the referenced cases will almost certainly be considered, but not with the same force of analogous precedent.). *Schrems* can be conceived of in the sense that it provides the closest analogous precedent for the inevitable objections or difficulties of implementation that the new privacy schemes will face. It is a consideration of the consequences of moving from privacy as the inviolability of the [physical] person to the uses of many people's data to conceptualise that right.

### **3. Research Questions**

Overall, this research is primarily focused on providing a proof of concept for a method which will help solve what we can call *the translation problem*: the translation not between languages, but over time between all of the legal contexts and concepts involved in privacy law. As we have already seen, the legal enterprise has a continual quagmire with ambiguous language. The international judicial and academic worlds have dealt with this ambiguity in different ways, often by trying to remedy the situation by devolving into discussions of originalism vs. various processes of finding contextual meaning. This ranges from the struggle typified by general theories of law to the thick and diverse approaches to understanding judicial interpretation. This discussion is evident in ideas such as the 'demarcation problem' or the 'Limited Domain Thesis' (see Chapter 2). In its entirety, this is one particular problem I am not aiming to solve. For any author to purport to have "solved" the problem of ambiguity in law would be a foolish embodiment of hubris, and therefore this project is best described as an effort to supplement traditional legal analysis with a different lens, a different bucket. It is a mystery beyond the capacity of one work to explain the complex inner

workings of all that is involved in legal interpretation. A more achievable goal for now is developing a method to take a new lens to an effort that requires multiple avenues.

However the law deals with the ambiguity of concepts, a feat all its own, it still has work to do in translating and continually reinterpreting those concepts to fit new circumstances. I have chosen privacy/digital law to highlight the process of conceptual change in order to develop a method that gets to the root of how judicial opinions make sense of a concept. This proof of concept can then be explored further (see Chapter 9) in how we might apply it in varying ways, and expand it to an even larger extent.

This can be broken down into two main activities:

1. Investigating how (by what processes) the law is *framed*, and how that framing affects interpretation; and,
2. Exploring how competing reasons and competing frames are weighed and balanced against each other.

The method I am developing here makes use of the last 40 years of research in Cognitive Linguistics, primarily the use of conceptual metaphor theory to dig out the underlying conceptual framework of legal categories as they apply to digital law using the case study of *Schrems* and the case-law cited within it. This research makes use of computer-aided coding methodology developed by Michael Kimmel (see Chapter 4) to explore the use of metaphor in building a conceptual structure concerning data control in EU law, and the conceptual reasoning behind precedent use and, for lack of a better word, its translation.

The goal is to answer the following questions:

- one, as compared to traditional legal tests, how can cognitive linguistics and metaphor analysis help understand the act of category building in law (framing) through precedent – the act of applying a universal rule to a particular case (i.e. building and applying legal principles)
- two, if/how the combination of network analysis and cognitive linguistics can help us understand the framework of legal interpretation and reasoning “in the wild”, and how this can be used to measure practices of weighing and balancing through precedent; and,

- three, how the uses of the framing and balancing of competing fundamental rights applies in the context of digital information and traditional privacy.

The scaffolding on which these concepts are built are taken apart to reveal their underlying, non-abstract components. Far from the legal method of tests of necessity and sufficiency, this research argues for a supplement to the traditional method of legal category building and extends an arm to the world of cognitive linguists from the conceptual mores of the law.

#### **4. The Layout of the Thesis:**

The study is broken up into 8 subsequent chapters:

Chapter 2: Discusses and reviews the literature on legal theory which this work takes as its foundation. This covers the theories of legal interpretation of authors such as Neil MacCormick, Karl Llewelyn, Robert Alexy, Brian Leiter, and Henrik Palmer Olson, among others. It outlines the problems stemming from the law's insistence on the use of necessary and sufficient conditions as a model for categorical framing and the weighing of reasons. Finally, it will lay out the previous work on law and metaphor studies by the scholars Steven Winter and Stefan Larsson.

Chapter 3: Similarly, this chapter gives an in-depth look at of the last 40 years of research in cognitive linguistics, assessing its usefulness in addressing the problems outlined in Chapters 1 and 2. It pays particular attention to the importance of conceptual schemas and spatial metaphors in cognitive reasoning and highlights the problems inherent to human reasoning as it is applied to law, relying on the work of cognitive linguists such as George Lakoff, Gilles Fauconnier, Len Talmy, Diedre Getner, and others, and linguist/psychologists such as Steven Pinker and Lera Boroditsky.

Chapter 4: This chapter deals with the methodological approach used for the analysis of *Schrems* and its cited case law. It goes over previous attempts to explain the force of precedent and the use of network theories of precedent in particular. It outlines an updated method for achieving more informative results by considering the linguistic aspects of the force of precedent. It will then

explain the approach taken in cognitive linguistics to code and analyse metaphor, providing a structured and tested method of analysis.

Chapter 5: This chapter begins the preliminary analysis of *Schrems*, studying the dismantling of the Safe Harbour agreement. It introduces the case and outlines the legal argument made by the European Court of Justice. It then presents and discusses the initial empirical results of the *Schrems* case in isolation, focusing on the spatial metaphors used in the judgment to ground the next two chapters of analysis.

Chapter 6: This chapter delves deeper into the precedent cases cited in *Schrems* to explore the blending of two dominant strains of framing and explains resemblances between cases to show the underlying logic of why they may have been applied. This chapter is focused on the first of the two activities mentioned above: framing. By coding and analysing the use of metaphor in specific networks of cases, concepts such as the margin of appreciation are broken down into their spatial structures to see how and when those are translated through precedent cases.

Chapter 7: This chapter focuses on the second activity: weighing and balancing. It uses the precedent network to explore how courts employ precedent to measure the importance of a competing reasons, and how terms like essence, equivalence, sufficiency, and quality, are measured and understood. It applies the metaphoric fit hypothesis to examine the results from the networks under review in this chapter.

Chapter 8: This chapter combines the analyses of the previous two chapters and considers the counter-concepts in the precedent chain made by the dissenting opinions in some of the cases, as well as other image schematic conceptions of privacy and information to evaluate how this would affect the reading of the aforementioned concepts: margin of appreciation, essence, equivalence, and sufficiency.

Chapter 9: The concluding chapter, takes the three empirical chapters to evaluate the now re-understood concepts and consider the strengths and weaknesses of the method. Perhaps more importantly, Chapter 9 looks into the future of metaphor coding with the use of automatic

processing of case law, intra-textual network analysis, and the use of the method for other means of inquiry in legal theory.

Chapter 2:  
Situating the Study in the Literature:  
Interpretation, Precedent, and Privacy Law

“Oh, if only it were possible to find understanding,” Joseph exclaimed. “If only there were a dogma to believe in. Everything is contradictory, everything tangential; there are no certainties anywhere. Everything can be interpreted one way and then again interpreted in the opposite sense. The whole of world history can be explained as development and progress and can also be seen as nothing but decadence and meaninglessness. Isn't there any truth? Is there no real and valid doctrine?”

The master had never heard him speak so fervently. He walked on in silence for a little, then said: “There is truth, my boy. But the doctrine you desire, absolute, perfect dogma that alone provides wisdom, does not exist. Nor should you long for a perfect doctrine, my friend.”  
-Hermann Hesse<sup>1</sup>

The notion of a concrete and coherent rule-delineated system of interpretation in law, a system where the meaning of ambiguous terms could be predetermined with the precision required to ubiquitously apply them in all circumstances, is as idealistic and fleeting as things get in legal theory. One could trace a history of interpretation back from Roman law through to Hart, through to modern theories of the Critical Law movement, or feminist studies of legal interpretation, and still be left without a perfected system. To say it is intractable is an understatement and misleading. To attempt to find a perfect doctrine - to qualify objective standards of fully justified interpretation - is to walk the same path as Joseph. It is a quest to quell the inherent uncertainty built into the system. This is an impulse we must suppress. Rather than writing an historical taxonomy of legal interpretation, this thesis situates itself in the middle of perhaps the most difficult of interpretation's challenges: the application of a universal principle to a particular situation. It investigates the concept of legal reasoning as a indicator of what the law does, rather than what it is or what it should be, and does not treat judges (their subject specific expertise aside) and their reasoning as a

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<sup>1</sup> Hesse, Hermann. 2002. *The Glass Bead Game (Magister Ludi) A Novel*. Henry Holt and Company at 83.

separate, impenetrable, or limited domain, as an exhaustive aporia. This project's aim is to push a little further beyond Steven Winter's pilot venture into cognitive structure and legal theory<sup>2</sup> to see if it can be operationalised into the nuts and bolts of the law; how coherence is structured, how weight is weighed, how equilibrium is achieved, are questions that lie within the realm of empirical study in cognitive science, and the law would fare well to embrace them.

The goal isn't to find that perfect dogma, but to explore law in the wild and build from interviewing the law in its own language. Though interpretation has its many issues (the 'correct' reading of a contract or statute, objective justification, intent of an author, to name a few), the divide over what constitutes the dynamic of applying general principles stands out as the most in need of systematic analysis in order to 'study law in the wild'. Given this positioning, the thesis uses Neil MacCormick's discussions of universals and particulars as a jumping off point to then discuss the various attempts at finding coherence within a system of precedent application.

## **I. Ethics and Objectivity in Law:**

Prior to publishing *Rhetoric and the Rule of Law*<sup>3</sup>, Neil MacCormick workshopped his ideas (in particular those contained in Chapter 5 of that work) at a seminar celebrating the 25<sup>th</sup> anniversary of his *Legal Reasoning and Legal Theory*<sup>4</sup> at the University of Edinburgh. The resulting publication<sup>5</sup> was presented as a collection of essays responding to the challenge of interpretation in order to make sense of the dilemma of universals and particulars in law. The contributions iterated the significance of the transparency of legal reasoning, justifying it as, "ethically important" and stating that,

legal theory must address the question of what counts as a rational and therefore transparent determination from the rules. If we were not able to do this then the whole ethical basis of legality would collapse.<sup>6</sup>

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<sup>2</sup> Winter, Steven L.; 2001. *A Clearing in the Forest: Law, Life, and Mind*. University of Chicago Press.

<sup>3</sup> MacCormick, Neil; 2005. *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. Oxford University Press.

<sup>4</sup> MacCormick, Neil; 1978. *Legal Reasoning and Legal Theory*. Oxford University Press.

<sup>5</sup> Bankowski, Zenon(ed); 2006. *The Universal and The Particular in Legal Reasoning*. Ashgate Publishing, Ltd.

<sup>6</sup> Bankowski, Zenon and James MacLean; 2006. 'Preface' in *The Universal and The Particular in Legal Reasoning*. Bankowski, Zenon(ed), Ashgate Publishing, Ltd. at xiii.

Brian Leiter describes this ethical dilemma as the search for justification of a legal ruling through its objectivity: “we expect legal decisions to be objective in the sense of reaching the result that the law *really* requires without letting bias or prejudice intervene.”<sup>7</sup> This objectivity, he stipulates, can be understood as having two forms: an ‘epistemic’ objectivity and a ‘metaphysical’ objectivity.<sup>8</sup> The metaphysically objective in Law is the claim that the law contains “right answers”.<sup>9</sup> Epistemic objectivity is the idea that “mechanisms for discovering right answers (e.g., adjudication, legal reasoning) [that] are free of distorting factors [such as bias or subjectivity]” exist.<sup>10</sup> The distinction between the mechanistic link between law and morality is not one that this work addresses in its entirety. I agree with Leiter in that law itself is an “artefact” in that, it “owes its existence to human activities intended to create [it]”,<sup>11</sup> and that the “Demarcation problem”<sup>12</sup> as he calls it - that “[L]aw and morals’ must be ‘recognized as different kinds of normative systems’”<sup>13</sup> - has not been wholly solved by the efforts of Hart<sup>14</sup>, Raz<sup>15</sup>, or Kelsen<sup>16</sup>, among others. Instead of debating the location or strength of the line between law and its moral (or amoral) justifications and in turn we should,

...abandon the Demarcation Problem in favor of arguing about what ought to be done, whether by judges confronted with novel cases, or citizens confronted with morally objectionable laws, on the grounds that human artefacts never admit of successful analysis in terms of their essential characteristics...<sup>17</sup>

Though I agree with Leiter’s rejection of attempts to solve the demarcation problem, the normative questions of what *should* be done is not as interesting (or important) as what *is* done. In the least, it can be said that the normative question is secondary to the factual one and - despite its tenuous philosophical path of inference - the *is*, should come before the *ought*. Whether or not an artefact is created in a normatively justifiable way, imbues the problem with an inherent purpose derived from an assumed premise: that there *is a proper way* to create that artefact. This is a

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<sup>7</sup> Leiter, Brian; 2007. ‘Introduction’ in *Objectivity in Law and Morals*. Leiter, Brian (ed), Cambridge University Press at 3, original emphasis.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> Leiter, Brian; 2011. ‘The Demarcation Problem In Jurisprudence: A New Case For Skepticism,’ 31 *Oxf J Leg Stud* 663. at 666.

<sup>12</sup> *id* at 666

<sup>13</sup> *id* at 663, quoting Kelsen, Hans; 1967. *Pure Theory of Law*. University of California Press.

<sup>14</sup> Hart, HLA; 1994. *The Concept of Law*. Clarendon Press.

<sup>15</sup> Raz, Joseph; 2009. *The Authority of Law*. OUP Oxford.

<sup>16</sup> Kelsen, Hans; 1967. *Pure Theory of Law*. University of California Press.

<sup>17</sup> Leiter, Brian; 2011 at 677.



question which presupposes that the normative requirement exists beforehand, as a prerequisite for law having justificatory authority. This is a bit of a non-starter for the analysis (or creation) of a theory of law. It separates law out as some sort of special domain of thought and normative action. Though we can certainly and readily admit that the law has its eccentricities and unique properties in reasoning; it is still unfounded to call it a different form of reasoning altogether. To echo Brian Tamanaha,

...the project to devise a scientific concept of law was based upon a misguided belief that law comprises a fundamental category. To the contrary, law is thoroughly a cultural construct, lacking any universal essential nature. Law is whatever we attach the label *law* to.<sup>18</sup>

Having reverence for the law's power to coerce through its application and the supposition that in its application it must justify its own practice are secondary to examining how it is, in fact, applied. The ethical nature of legality only collapses if its application is opaque, not if it conforms to a structure that is normatively predetermined. Law's ethical quality is based on the ability for any given individual to identify whether the law will (or may) turn out one way or the other, not if it *should* turn out this way or that. This is to take the "question of legal indeterminacy"<sup>19</sup> seriously. That, "[l]egal indeterminacy needs to be constrained if 'rule of law' values such as stability, predictability and certainty are to amount to more than mere words."<sup>20</sup> However, sketching out what stability, predictability or certainty means without grounding those precepts in data derived from decisions themselves, is to put the cart before the horse. If law's ethical grounding lies in its ability to be predictable and/or certain (whether stable is even desirable is an entirely different conversation), then the ethical question becomes: can one have any sense of being able to predict an outcome? A perfection of that predictability, the perfection of pattern recognition, the perfection of law's design, dismisses and divorces law from its discursive and creative project as an artefact. To attempt beforehand to say 'the law must contain *this*', is to start at the wrong end of the project. One can contend that the law *should do this or that*, or that it is more morally justified by *doing this or that* ad nauseum; without an understanding of the outcomes of law *actually doing this or that*, it is an exercise akin to Joseph's quest for an all-encompassing dogma, and his sage's advice should be well heeded: "Nor should you long for a perfect doctrine, my friend. Rather, you

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<sup>18</sup> Tamanaha, Brian Z.; 1997. *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*. Clarendon Press at 128.

<sup>19</sup> Klatt, Matthias; 2008. *Making the Law Explicit: The Normativity of Legal Argumentation*. Bloomsbury Publishing.

<sup>20</sup> *id* at 2.

should long for the perfection of yourself..."<sup>21</sup> A perfection of oneself, in our terms, is to identify the ways in which we can probe the law to find patterns and predict outcomes; not to ask the law to do that work for us.

With this introspection in mind, we ask: how *does* a decision apply justification to reasoning between competing interests and/or in novel cases? More generally: how does a decision reflect the application of a general rule to a specific case? Some strains of thought approach this question with a focus (like above) on the metaphysical content of law's moral grounding and investigate whether objective or subjective justifications of law's authority are present. Others are more concerned with the epistemic value of law's mechanisms to give *right* answers and its ability to produce predictable outcomes in terms of a *proper* interpretation. But, a *proper* interpretation is not what we are after here, only a method of discovering what interpretations *do*.

## **2. The Universal, Particular and Interpretation**

To return to Neil MacCormick, the practice of applying any general principle to a particular circumstance is an act of generalisation. This is a question for MacCormick that asks: "when is it justifiable to apply this category in our explanation of events, and how [should we] apply it?"<sup>22</sup> The problem is, of course, to justify that act in a way that escapes the subjectivity of a certain point of view,

To show that it is right is to show that upon any objective view of the matter, the act ought to have been done, or even had to be done, given the character of the act and the circumstances of the case. To say: 'it is right to do this in these circumstances because of what this is and what these are', however much one might expand on one's particular allusion by pointing and nodding, is to fail to show anything other than a purely subjective view of the matter. It is only once the 'this' and the 'these' are given some quantified value ...that anything is available for objective scrutiny at all. Only once you show me that the 'this-ness' of the act ... does an objectively discussable question arise at all.<sup>23</sup>

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<sup>21</sup> Hesse, Hermann. 2002 at 83.

<sup>22</sup> MacCormick, Neil; 2006. 'Particulars and Universals', in *The Universal and the Particular in Legal Reasoning*, Bankowski, Zenon (ed). Ashgate Publishing, Ltd. I. at 17.

<sup>23</sup> *id* at 18.

The search for an objective standard is a reach to construct law in a way which allows it to somehow exist outside of the human animal. MacCormick, and those who search for this standard do not ignore the humanity of a judge or their decision. It is precisely their human fallibility and subjectivity in decision-making they are trying to circumvent by constructing an objective notion of the law. It is an attempt to justify the law by means of its generalisability,

There is, I submit, no justification without universalization; motivation needs no universalization; but explanation requires generalization. For particular facts – or particular motives – to be justifying reasons they have to be subsumable under a relevant principle of action universally stated.<sup>24</sup>

If this premise is true, then it is incumbent on the legal theorist to understand those generalisations and their applications to particular circumstances. For MacCormick, the defeasibility (in the Popperian sense) of universal principles is the best recourse to provide justification for the outcomes of legal reasoning. A generalisation, or a principle derived from a common set of particulars, must allow itself to be tested over and over again to define its boundaries, core assumptions, and ultimately its ability to be falsified, if it hopes to be a justified generalisation. However, this is a double-edged sword. Any single case, once classified as an instance of 'x' allows (in fact even calls for) some inductive reasoning along the lines of; *if x then y*, or *x has a value of y*, *x exists in a set of premises that leads to y*, etc. The particular exists in a larger conceptualisation of the universal principle, and that universal dictates (at least in part) the inductive reasoning that follows from it. He uses the death of Cleopatra as an example of this logic:

...what enables us so to conceptualize the death of Cleopatra is that the particular fact of the biting snake belongs as minor premise in an argument of which the major premise is a hypothesis culled from the snake-venom theory and the conclusion is the death.<sup>25</sup>

The particulars in each case test our notions of the snake-venom theory of death so that the general principle can be honed to fit more and more circumstances, making us more assured of its justified content, and by extension increasing our trust that the law is just, or a decision or interpretation of a statute or precedent was, if not certainly "correct", at least reasonable or justifiable.

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<sup>24</sup> *id* at 19.

<sup>25</sup> *id* at 17.

There are two distinct notions here:

1. the choice of the framing of the particular case to fit with a principle (or set of principles), and
2. the testing of that principle by the particular case to define the boundaries of its application and to establish whether or not the particular circumstances outweigh the guiding force of the principle at hand.

The first idea requires containing the principle within a set of criteria to see where it fits within the law. It is a decision claiming that circumstance A is a case of x. The second notion addresses the remaining question of just *how* that testing occurs.

### **3. Precedent as a Tool of Conceptual Framing:**

More often than not, the framing of a case can obscure the other distinctions that may be made about the generalisation of a particular case and how it fits within existing law. To take the words of Iain Scobbie,

...the categorization of facts is dependent on the rule under which they are alleged to be subsumed, each party may stress different laws and precedents as decisive. A consequence of the concentration on adhesion is that the interpretation of a given text might not be disputed. At most this can only lead to the conclusion that possible alternative interpretations of the text did not interest either party because these offered neither any advantage.<sup>26</sup>

The ascription of circumstance A to category x is the first tool a court can use to apply a generality to a case. The motivation behind this is to feed into the legitimacy thesis of law, or otherwise stated, to appeal to the metaphysical objectivity of law: "to attempt to construct answers to legal questions through the concepts that inhere in established canons of interpretation, and in doctrinal

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<sup>26</sup> Scobbie, Iain; 2015. 'Rhetoric, Persuasion, And Interpretation in International Law' in *Interpretation in International Law*. Bianchi, Andrea, Peat, Daniel & Windsor, Matthew (Eds.). OUP Oxford. 61. at 73. See also, Bengoetxea, Joxerramon, MacCormick, Neil and Soriano, Leonor Moral; 2001. 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in *The European Court of Justice*. Gráinne De Búrca, Joseph Weiler (Eds.). Oxford University Press. 43 at 53.

analysis that seeks to establish commonalities and differences between various legal categories."<sup>27</sup> It is an appeal to 'find' that which is 'within' the law already, thus justifying its proscription to the given circumstance as reasonable and an objective finding of fact, rather than a subjective moral stance.<sup>28</sup>

However, the circumvention of subjectivity by find that which is *within the law* has been noted time and time again for its misconception that a judge, or even a panel of judges is able to do this in reality. The initial framing of a circumstance to a set of principles in itself is an act of subjective reasoning: "[t]he original context from which meaning is derived consists of the presuppositions of the rule makers. These, categorized broadly, consist of presuppositions about matters of fact, presuppositions about matters of law, and presuppositions about values."<sup>29</sup> As MacCormick noted, understanding the cause of Cleopatra's death relies on the acceptance of the snake-venom theory of death. There can be no application of a general category without a prior acceptance of some underlying premise that frames subsequent judgements. Once framed, judgments can, and do, fall prey to the over reliance on category membership or, in the least, the kinds of conclusions that are deducible from their framing. As Andrei Marmor points out,

legal inferences have to rely on a legal finding of facts, that is, facts legally established for the purposes of the relevant inference. However, this notion of an authoritative finding of fact is ambiguous between the finding that something actually happened in the world, and the finding that it conforms to the relevant legal categorization of it.<sup>30</sup>

This categorisation, this framing, is constructed through the use of analogical reasoning and an appeal to precedent.<sup>31</sup><sup>3233</sup> The literature on analogy takes on a number of issues regarding the

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<sup>27</sup> Olsen, Henrik Palmer & Toddington, Stuart; 2014. 'The End of an Era: Static and Dynamic Interpretation in International Courts,' 14 *International Criminal Law Review* 920. at 932.

<sup>28</sup> See for instance, Winter, Steven L.; 2001. *A Clearing in The Forest: Law, Life, And Mind*. University of Chicago Press at 187: "All of the perceived advantages of rules derive from their categorical quality. The clarity, certainty, and predictability for which rules are prized are (on this view) a function of the conclusive and unconditional nature of their coverage: If the posted speed limit is fifty-five, then one may drive at fifty-five miles per hour. So, too, it is the absolute character of a rule-i.e., its status as a categorical reason for decision-that enables a decision maker to absolve herself of responsibility by pointing to the rule as complete justification."

<sup>29</sup> Alexander, Larry & Sherwin, Emily; 2008. *Demystifying Legal Reasoning*. Cambridge University Press at 154.

<sup>30</sup> Marmor, Andrei; 2013. 'Truth in Law' in *Current Legal Issues: Law and Language*. Micheal Freeman & Fiona Smith (Eds.). OUP Oxford. 45 at 60 ft. 30.

<sup>31</sup> On different models of analogical reasoning and how it fits into judicial reasoning: Brewer, Scott; 1996. 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy.,' 109 *Harvard law review* 923; Klein, David E. & Mitchell, Gregory; 2010. *The Psychology of Judicial Decision Making*. Oxford University Press; Macagno, Fabrizio & Walton, Douglas; 2009. 'Argument from Analogy in Law, The Classical Tradition, And Recent Theories,' 42

application of reasoning by analogy to law. Past scholars have noted the intricate workings of how we might classify different types of analogical reasoning<sup>34</sup> and whether this is a justifiable way for a court to reason. What they do agree on is that often enough the use of analogical reasoning, whether to a precedent case or a hypothetical example, is “a form of classification under a genus, specifically, a predicate attributed to different kinds (concepts) belonging to the same semantic category (substance, quality, etc.).”<sup>35</sup> In such cases, “their relevance depends on the fact that they both belong to the common genus...It is the perspective under which they are considered in the text.”<sup>36</sup> This shared genus (or semantic categorisation) allows a court to organise disparate occurrences under the same general rule when “the conclusion is drawn deductively from the generalization [sic], that is, the predicate is attributed to the target subject.”<sup>37</sup>

Generally (but not always), this jump from predicate case to the target subject, is done by means of an appeal to precedent or a universal rule as understood by a generalisation or comparison to precedent cases. Precedents serve to inform new cases by constructing the boundaries within which the framing of a new circumstance takes place. That being said, in international law, precedent is not seen as having a ‘binding effect’.<sup>38</sup> Whether or not precedent is binding in theory, there is no getting away from the conceptually constricting nature precedents have on international law.

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*Philosophy and rhetoric* 154; Posner, Richard A.; 1993. *The Problems of Jurisprudence*. Harvard University Press; Talmon, Stefan; 2015. 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion,' 26 *European Journal of International Law* 417; Sunstein, Cass R.; 1993. 'On Analogical Reasoning,' 106 *Harvard law review* 741.

<sup>32</sup> On Comparing cognitive science's view on analogical reasoning: Ellsworth, Phoebe C.; 2011. 'Legal Reasoning and Scientific Reasoning,' 63 *Ala. L. Rev.* 895; Hunter, Dan; 2001. 'Reason Is Too Large: Analogy and Precedent in Law,' 50 *Emory LJ* 1197; Hunter, Dan; 2004. 'Teaching and Using Analogy in Law,' 2 *J. Ass'n Legal Writing Directors* 151

<sup>33</sup> On analogies role in Legal theories of interpretation: Klatt, Matthias; 2008. *Making the Law Explicit: The Normativity of Legal Argumentation*. Bloomsbury Publishing; Siltala, Raimo; 2000. *A Theory of Precedent: from Analytical Positivism to a Post-Analytical Philosophy of Law*. Hart Publishing; Teitelbaum, Joshua C.; 2014. 'Analogical Legal Reasoning: Theory and Evidence,' 17 *American Law and Economics Review* 160; Venzke, Ingo; 2011. 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation,' 34 *Loy. LA Int'l & Comp. L. Rev* 99; Venzke, Ingo; 2012. *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. OUP Oxford.

<sup>34</sup> For a review see, Macagno, Fabrizio & Walton, Douglas; 2009. 'Argument from Analogy in Law, The Classical Tradition, and Recent Theories,' 42 *Philosophy and rhetoric* 154.

<sup>35</sup> *id* at 173.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> Cohen, Harlan Grant; 2015. 'Theorizing Precedent in International Law', in *Interpretation in International Law*. Bianchi, Andrea, Peat, Daniel & Windsor, Matthew (Eds.). OUP Oxford. 267.

The universal is constructed from the framing of individual circumstances in line with the principles, genera, or analogical correlates of a given circumstance. It is a paradoxical construction which entails rereading past cases through the lens of similar (enough) characteristics in order to apply the current circumstance to a category that holds legal meaning, and, some hope, to an objective standard. Whether or not that framing is objective or not isn't the core issue; *how* that framing takes place, the intricate and often subtle dynamics of that categorisation, is where this research finds its locus.

#### 4. Precedent as a Scale

Where the first principle of the universal category is its ability to frame cases, the second is how to test the boundaries of those framings to see whether the universal or particular holds more weight than the other regarding the correct decision in a given case. As Aleksander Peczenik notes in his response to MacCormick, when considering the judge's ability to weigh the particulars of a case against the legal principle at hand, two questions still remain to be answered:

- what is the ultimate justifier – universal propositions or particular judgments? and
- what is the justificatory force of weighing?<sup>39</sup>

He, like MacCormick, situates the justificatory force of weighing reasons in their defeasibility. He states,

A given norm may be both defeasible and outweighable: it is defeasible in the sense that it can be defeated, meaning that we can set it aside in exceptional cases; it is outweighable in the sense that the justification of these exceptions requires a weighing and balancing of reasons.

From a logical point of view, a norm may be defeasible but not outweighable. That is, it may be set aside by a process other than weighing; for example, by arbitrary fiat of a sovereign lawgiver.<sup>40</sup>

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<sup>39</sup> Peczenik, Aleksander; 2006. 'Particulars and Universals in Legal Justification' in *The Universal and the Particular in Legal Reasoning*. Bankowski, Zenon (Ed.), Ashgate Publishing, Ltd 189, at 190.

<sup>40</sup> *id* at 191.

Peczenik would feel that the second circumstance would not be as justifiable as the first, in that it does not provide (or allow for the provision of) a reasoning based on a coherent system of interpretation. It is the weighing of a norm (a universal against a particular) that allows for a norm's defeasibility, giving it its justificatory power. Coherence, in this regard, does not mean that there is one correct reading, but rather that each reading affects the coherence of an overall structure: it is coherent "with the background system of acceptances, reasonings and preferences, conceived as an all-embracing theory."<sup>41</sup>

Coherence as a legal concept that aims to provide a "consistency in adjudication"<sup>42</sup>. Coherence, in this sense, is considered for its normative force. A judgment, if coherent to its larger whole and consistent with its background assumptions and precepts, provides a judge, law maker, and/or citizen a *knowability* about the law and its likely outcomes. Peczenik considers coherence to be "one of the most influential movements in recent philosophy of science."<sup>43</sup>

For Ken Kress, coherence has of seven properties: "consistency", "comprehensiveness", "completeness", "monism", "unity", "articulateness", and a requirement to be "justified". These properties are not necessary collectively but, according to Kress, "the more of that property a theory manifests, the more coherent that theory is."<sup>44</sup> Peczenik and Alexy, compile their list of coherence's properties as a measure of support given to a theory; that, "the more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory."<sup>45</sup> Those properties are:

- (1) the greatest possible number of supported statements belonging to the theory in question;
- (2) the greatest possible length of chains of reasons belonging to it;

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<sup>41</sup> Bankowski, Zenon and MacLean, James; 2006. 'Introduction' in *The Universal and the Particular in Legal Reasoning* Bankowski, Zenon (Ed.). Ashgate Publishing, Ltd. xiii at xx.

<sup>42</sup> Melissaris, Emmanuel; 2006. 'Diachronic Universalisation and the Law' in *The Universal and the Particular in Legal Reasoning* Bankowski, Zenon (Ed.). Ashgate Publishing, Ltd. 127 at 134.

<sup>43</sup> Peczenik, Aleksander; 2006 at 192. See also, Lehrer, Keith; 1990. *Theory of Knowledge*. Routledge; Kress, Ken; 2010. 'Coherence' in *A Companion to Philosophy of Law and Legal Theory*. Patterson, Dennis (Ed.). Blackwell Publishing. 521; Amaya, Amalia; 2007. 'Formal Models Of Coherence And Legal Epistemology,' 15 *Artificial Intelligence and Law* 429;

<sup>44</sup> Kress, Ken; 2010 at 521-2.

<sup>45</sup> Alexy, Robert and Peczenik, Aleksander; 1990. 'The Concept of Coherence and its Significance for Discursive Rationality,' 3 *Ratio Juris* 130 at 131.



(3)the greatest possible number of strongly supported statements belonging to the theory;

(4) the greatest possible number of connections between various supportive chains belonging to the theory;

(5)the greatest possible number of preference relations between various principles belonging to it; (6)the greatest possible number and complexity of reciprocal supportive relations between various statements belonging to the theory;

(7)the greatest possible number of universal statements belonging to the theory; the greatest possible number of general concepts belonging to it; the highest possible degree of generality of concepts implemented within it; the greatest possible number of resemblances between concepts used within it;

(8) the greatest possible number of conceptual cross-connections between various theories;

(9)the greatest possible number of cases covered by the theory; and

(10)the greatest possible number of fields of life covered by the theory.<sup>46</sup>

Whether or not either of these examples offer the best concept of coherence is up to the philosophers of morality and science to decide. What neither of these theories do is help us to see how this plays out *in* a judgement, or how this relates to applying a universal to a particular. Although they do give us an idea about how to judge whether an application holds in the retrospective light of other cases, whether or not the *greatest number thesis* – as we might call it – is indicative of how the judgement plays out is yet to be seen. It would seem that the *greatest number thesis* is an attempt to answer Peczenik's second question: 'what is the justificatory force of weighing?'. This, however, leaves his first question unanswered (although one could posit that the most justifiable theory for him would be the most coherent universal - given the *greatest number thesis*). He instead relegates the problem to a kind of epistemic aporia,

I guess that the feeling of puzzle and even mystery is the result of a modern expectation that all problems are soluble by recourse to empirical data, deductive logic and induction. Holistic weighing includes those three components but it also includes something more; namely, the insight that the system of beliefs, preferences and reasonings which has emerged from weighing is to be accepted... we feel that a reflective answer, one based on the coherence of several acts of weighing, is superior to a non-reflective, irrational

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<sup>46</sup> Ibid at 130.

hunch. Can that feeling deceive us? No logic can answer this, yet we trust the coherent system: this is the mystery. But the mystery is by no means restricted to morality and legal reasoning: it is the mystery of all knowledge.<sup>47</sup>

Peczenik's reluctance to go further than this is representative of a majority of traditional legal scholarship. He stops short of asking what the weighing entails except to say it is "spontaneous" and "resembling moral emotions: a person feels that the system hangs together in rather the same way as one feels that an action is good or evil."<sup>48</sup> It strikes me that this explanation is lacking the in-depth examination that Peczenik normally produces. Trust in "the coherent system" is a mystery; but not an impenetrable one. Scholars have not stopped searching for inroads into moral emotions, so why would one hold off on investigating the coherent system? He is not the only one. Though there are a good number of different assumptions made about what constitutes *weighing* practices, there is not an overwhelming body of empirical data to back them up.

Even in studies that aim to compare different practices in approaches to precedent, it is often left to the moral theorist to decide the best normative framework to justify the practice of weighing, and the intricacies of how that weighing takes place are omitted or overlooked.<sup>49</sup> They might separate out the different ways that precedent can act on a particular circumstance into a matter of degrees (e.g. "formal bindingness", "having force", "providing further support" and "illustrative value"<sup>50</sup>), but the mechanism(s) for arriving at this graded degree system is still relegated to a murky creative process. This reluctance to investigate that process of weighing, Peczenik's aporia, is our starting point.

## **5. Balance and Weight in Legal Reasoning**

The previous claim notwithstanding, I do not want to give the impression that no scholar has taken on the process of weighing balancing reasons. It is only to say that, with some notable exceptions, the aim of these studies has not been to *understand* the process of weighing but to proscribe a

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<sup>47</sup> Peczenik, Aleksander; 2006 at 198.

<sup>48</sup> *ibid.*

<sup>49</sup> See for instance, MacCormick, Neil, and Summers, Robert (Eds.); 1997. *Interpreting Precedents: A Comparative Study*. Ashgate Publishing, Ltd.

<sup>50</sup> *id* at 554.

model that would justify it as rational (or in other cases morally desirable) and thus acceptable, usually taking a standpoint of universal reasons. Bengoetxea *et. al.* believe that this type of reasoning, the “idea of ‘balancing reasons’ as appraising the weight of each reason according to a pre-established metric system...should be abandoned.”<sup>51</sup> This does not rule out the possibility that criteria to aid a judge in balancing could be found, but could come in the form of ‘balancing criteria’,

Unlike universal rules, which establish a systematic priority among reasons, balancing criteria do not rely on the idea of unity. Unlike universal rules, balancing criteria do not instruct a judge as to which value or set of values should be used to solve a conflict of reasons; rather, they instruct judges on how to deal with and solve the conflict. In other words, balancing criteria do not provide the answer but they provide tools to find it.<sup>52</sup>

In the minds of Bengoetxea *et. al.* the CJEU provides three criteria for this balancing to occur: the “rule of reason”, “the test of proportionality”, and the “test of non-discrimination” which collectively provide coherence within European Law.<sup>53</sup> The authors rely on an analysis of ‘structural support’ when the Court justifies its reasoning citing either “authority reasons – legal norms, precedents, and legal doctrine” or “substantive reasons – values and principles.”<sup>54</sup>

The first criterion set out in the authors’ analysis is the ‘rule of reason’. This criterion has two underlying provisions: one, that fundamental rights cannot be understood as “all-or-nothing commands,”<sup>55</sup>; and two, that ‘common interests’ are what are weighed against those fundamental rights. The criterion’s main function is to “[strike] a balance between rights and goals”<sup>56</sup> by “creating a general framework in which the balancing exercise will take place.”<sup>57</sup> These reasons must connect in such a way that the reasoning creates a coherent whole.<sup>58</sup> The second criterion is that of the

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<sup>51</sup> Bengoetxea, Joxerramon, MacCormick, Neil and Soriano, Leonor Moral; 2001. ‘Integration and Integrity in The Legal Reasoning of The European Court of Justice’ in *The European Court of Justice*. Gráinne De Búrca, Joseph Weiler (Eds.). Oxford University Press. 43 at 64, where “‘Balancing Reasons’ means to appraise the importance, force, or weight of a reason according to the other colliding reasons in the particular case.” *id* at ft. 22.

<sup>52</sup> *id* at 65.

<sup>53</sup> *id* at 65.

<sup>54</sup> *id* at 66.

<sup>55</sup> *id* at 68.

<sup>56</sup> *ibid.*

<sup>57</sup> *id* at 71.

<sup>58</sup> The authors in Bengoetxea *et al* take issue with whether or not this happens in their example case.

“criterion of proportionality.”<sup>59</sup> This is commonly stated in judgements as, *proportional to the aim* of a rule. In other words, “a measure is proportional if it is the less restrictive option among all possible means,”<sup>60</sup> and if the measure is “necessary” and “desirable”.<sup>61</sup> The proportionality is measured via its “causal link...between...a particular state of affairs which is considered as valuable...and...an action.”<sup>62</sup> The third criterion is the “criterion of non-discrimination”.<sup>63</sup> Non-discrimination here should be understood as a “test [that]...demands an appropriate justification of the violation of equality.”<sup>64</sup> Non-discrimination differs from proportionality in that,

the test of proportionality focuses on the efficient promotion of colliding values (it is a ‘more or less’ criterion), the test of non-discrimination focuses on whether or not the principle of equality is undermined (it is an all or nothing criterion).<sup>65</sup>

Although non-discrimination can be characterised as an all or nothing criterion, in practice, the Court has used a more degree-attributive model to decide hard cases, where “a certain degree of discrimination is acceptable if justified by other reasons.”<sup>66</sup> These criteria, when taken together, provide the Court with the framework to weigh competing interests from universal principles to particular circumstances. Although a number of questions remain which, for *Bengoetxea et. al.*, are left open to a judge to decide from “the perspective of *the morality of the law*,”<sup>67</sup> based upon its supporting connections to legal, moral and political theory already enshrined in the legal apparatus. This approach aims to provide “an optimal”<sup>68</sup> solution, not a simple heuristic to solve all cases, but an appropriately effective solution to create coherence.

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<sup>59</sup> *Bengoetxea et al*; 2001 at 70.

<sup>60</sup> *id* at 71.

<sup>61</sup> *id* at 72.

<sup>62</sup> *id* at 71.

<sup>63</sup> *id* at 74.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> *id* at 78.

<sup>67</sup> *id* at 79. Emphasis added.

<sup>68</sup> *id* at 81.

A similar attempt for balancing criteria that stands out is Robert Alexy's "Weight Formula".<sup>69</sup> Alexy attempts to give criteria for the balancing of competing or colliding rights through the use of mathematical maxims, such as his first and second 'Rule of Balancing'; respectively:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.<sup>70</sup>

and,

The more heavily an interference with a constitutional right weighs, the greater must be the certainty of its underlying premises.<sup>71</sup>

These maxims can be used in Alexy's 'Weight Formula' to operationalise the ascription of weight and balance:

By means of the Weight Formula, it is possible to determine the concrete weight of a principle  $P_i$ , which is expressed by  $W_{i,j}$ , relative to a competing principle  $P_j$ . Its basic form reads:

$$W_{i,j} = \frac{W_i I_i R_i}{W_j I_j R_j}$$

The variables  $W_i$  and  $W_j$  stand for the abstract weight of the two principles  $P_i$  and  $P_j$ ;  $I_i$  and  $I_j$  stand for the respective intensity of interference by non-satisfaction of the principles;  $R_i$  and  $R_j$  stand for the reliability of the respective empirical assumptions.<sup>72</sup>

In order to make this a working formula, Alexy's ascription of weight quantifies the intensity by means of a graded system in which the intensity of interference can be measured as "light ( $l$ ), moderate ( $m$ ) and serious ( $s$ ) interferences"<sup>73</sup> and where those values are quantified by " $l = 2^0, m = 2^1, s = 2^2$ ."<sup>74</sup> The reliability variable is quantified by a value that "decreases exponentially when

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<sup>69</sup> See Alexy, Robert; 2003. 'On Balancing and Subsumption: A Structural Comparison,' 16 *Ratio Juris* 443; Alexy, Robert; 2003. 'Constitutional Rights, Balancing, And Rationality,' 16 *Ratio Juris* 131; Alexy, Robert; 2007. 'The Weight Formula' in *Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law*. Jerzy Stelmach, Bartosz Brozek, & Wojciech Zaluski (Eds.). Jagiellonian University Press.

<sup>70</sup> Alexy, Robert; 2007 at 10.

<sup>71</sup> *id* at 25.

<sup>72</sup> Klatt, Matthias and Schmidt, Johannes; 2012. 'Epistemic Discretion in Constitutional Law,' 10 *I-CON* 69 at 73.

<sup>73</sup> Alexy, Robert; 2007 at 22, as quoted in Klatt, Matthias and Schmidt, Johannes; 2012 at 73. "if a finer scale is required...[n]ine different intensities of interference can then be distinguished: *ll, lm, ls, ml, mm, ms, sl, sm, ss.*"

<sup>74</sup> Alexy, Robert; 2007 at 21, as quoted in Klatt, Matthias and Schmidt, Johannes; 2012 at 73.

uncertainty increases according to the numerical series  $2^0$ ,  $2^{-1}$  and  $2^{-2}$ ,<sup>75</sup> under the criteria of “(r) reliable or certain [ $2^0$ ], (p) plausible or defensible [ $2^{-1}$ ], and (e) not evidently false [ $2^{-2}$ ].”<sup>76</sup> As for the abstract weight variable, according to Alexy, it too can be quantified using the grading of light, moderate, and serious,

The abstract weight of  $P_i$  is the weight which  $P_i$  has relative to other principles independently of the circumstances of any cases... Many constitutional principles do not differ in their abstract weight. Some, however, do. The right to life, for instance, has a higher abstract weight than the general freedom of action.<sup>77</sup>

For Alexy, the formula serves to take the relational qualities of the weights in competition and turn that into a concrete measure. It is not an objective measure of the weight of a principle, but a quantification which gives each one a value relative to its competing counterpart. The result being that,

If a quotient  $W_{ij}$  is greater than [one],  $P_i$  takes precedence. In cases in which a quotient is below [one],  $P_j$  takes precedence. If the quotient amounts to [one], a stalemate occurs.<sup>78</sup>

It is a methodology not devoid of its criticisms,<sup>79</sup> and, like Bengoetxea *et. al.*'s attempt, investigates the structure of the balancing rather than the make-up of the qualifications that can be reviewed independently. It is an effort to bolster the exercise of balancing in criteria to justify the reasoning of the application of general principles. It is, however, devoid of criteria which would allow an observer to classify such judgments in their respective degree of severity. This isn't Alexy's fault. It is a symptom of a reductionist application of legality. The qualities of defeasibility and coherence make more sense here if the reality of a fool-proof structural system is understood to be tentative at best. A concession Alexy and Bengoetxea *et. al.* readily make. Their focus on the aspects of the framework of weighing as a solving mechanism (of which these studies are but two examples) is one approach. Another, and perhaps more compelling theory, if what we are interested in is the

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<sup>75</sup> Klatt, Matthias and Schmidt, Johannes; 2012 at 74.

<sup>76</sup> *id* at 76.

<sup>77</sup> Alexy, Robert; 2003 at 440.

<sup>78</sup> Klatt, Matthias and Schmidt, Johannes; 2012 at 74.

<sup>79</sup> See the aforementioned Klatt, Matthias and Schmidt, Johannes; 2012; Webber, Grégoire ; 2010. 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship,' 23 *Can. J. L. & Jurisprudence* 179; Urbina, Francisco; 2017. *A Critique of Proportionality and Balancing*. Cambridge University Press.

coherence of the system, is to look at the aspects of classification. This is a lonelier road to travel in legal theory.

## 6. Interpretation and Cognitive Theory

Luckily, wading into the deep doesn't have to be done completely alone. There are a few legal theorists (and cognitive scientists, linguists, and psychologists alike - as the next chapter will cover) who are willing to delve headfirst into classification and, by proxy, Peczenik's murky aporia of all knowledge. One of those who dares to launch himself into this morass is Steven Winter.<sup>80</sup> Like Alexy, in his formulas of balancing and justifiable criteria of their application, or the quandary over universal principles and their particular application, or Peczenik's *greatest number thesis*, the emphasis is (mostly) reserved for the *hard cases*. The presumption is an oft-repeated one. It is based in the fallacious notion that the rules and principles in law adhere to an objectivity that can be *found* about a given situation, even when scholars admit their approaches are aimed at optimisation. The previous approaches obscure the *easy cases* by way of assuming that their *ease* is related to their objective empirical status; that if we all agree, that if the outcome is obvious, it therefore means it is more easily justified. It is a reliance on the static conception of the law, where principles are to be *found*, not *created*, hence the overwhelming obsession with treating judicial discretion with such animosity. While judicial discretion must be examined in the optimised system, it is as important to explore it within the non-optimised framework; in 'hard' cases as well as 'easy' ones. Winter, is not so constrained by the easy case.

Winter draws from Karl Llewellyn and his appreciation of the "profoundly human dimension of law," echoing the latter's belief that "legal meaning, like all linguistic meaning, changes with the emergence of new social conditions."<sup>81</sup> For Llewellyn, the application of the universal to the particular relies on a judge's ability to "make the direction and degree of semantic change in a legal rule...keep up with the corresponding change in the real-life situation."<sup>82</sup> There is a dynamism to

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<sup>80</sup> Winter, Steven L.; 2001. *A Clearing in The Forest: Law, Life, and Mind*. University of Chicago Press; Winter, Steven L.; 2013. 'Frame Semantics and the Internal Point of View,' in *Current Legal Issues: Law and Language*. Micheal Freeman & Fiona Smith (Eds.). Oxford University Press. 115.

<sup>81</sup> Winter, Steven L. 2001 at 216.

<sup>82</sup> Llewellyn, Karl; 1989. *The Case Law System in America*. University of Chicago Press at 82-3.

law that Llewellyn and Winter both recognise. Theirs is a different model which is less troubled by the issues of objectivity and subsequent indeterminacy than the frameworks of optimisation of the previous authors. As noted at the beginning of the chapter, it isn't law's optimised framework that guarantees legal certainty, it is its continual change through the discretion and categorisation of competing interests that keeps it up to date and knowable.

However laudable his efforts were, Llewellyn also fell short of breaching Peczenik's aporia, a drawback that did not go unnoticed by his many critics.<sup>83</sup> He explained the reasoning that led judges to make semantic changes to the law as a "situational sense" which could act as "a normative ideal," thus allowing the activity of law to rid itself of what would be undesirable in an objectively justified theory of legal reasoning.<sup>84</sup> Winter picks up Llewellyn's concept of situational sense and its weaknesses by moving into the aporia with the aid of cognitive science.

Winter's basic premise examines the role of the human mind as understood by cognitive science in the interpretations that are made in judicial reasoning. While the basics of cognitive linguistics will be covered in the next chapter, it is important here to point out Winter's contribution to the legal ramifications of applying it to law and legal theory. Firstly, Winter agrees with the premise of the function and importance of understanding categorisation's role in legal thought and adjudication. However, he takes issue with the conventional view that categories can have an 'all-or-nothing' nature to them:

The conventional view treats the notions of a category as an a priori conceptual structure that...is homogeneous in content...[they are] descriptive, definitional and rigidly bounded. The empirical evidence, in contrast, presents a picture of categorisation as an imaginative and dynamic process that is flexible in its application and scope.<sup>85</sup>

The role of cognitive theory in understanding legal reasoning is that it, "transforms everything that depends on categories – including phenomena as prosaic as rules and as obscure as judgement."<sup>86</sup> Legal reasoning is only possible "because we have assimilated the tacit knowledge that makes the

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<sup>83</sup> Winter, Steven L. 2001 at 218 ft.60

<sup>84</sup> *id* at 218.

<sup>85</sup> *id* at 69.

<sup>86</sup> *id* at 7.



rules comprehensible, defines patterns of legal inference, and enables the productivity of crucial legal categories.”<sup>87</sup> He opposes the intuition to let hard cases be the defining factor in drawing out an optimised system of justified legal reasoning. Hard cases exist when the background knowledge does not meet an expectation of where the border exists in relation to category membership or the perception of the ‘typical’ member of that category is challenged. However, this does not mean that the easy cases are any less incumbent on the cultural contingency of category understanding. As Winter states, “even the ‘simplest’ rule makes sense only against the backdrop of a massive cultural tableau that provides the tacit background assumptions that render it intelligible.”<sup>88</sup>

Winter’s theory hinges on the idea of the ‘ideali[s]ed cognitive model’ or ICM. The function of the idealised cognitive model is much akin to the coherent framework of the aforementioned authors. Like understanding the death of Cleopatra, “a cognitive model [that] typically includes among its features representations of relations between entities and events,”<sup>89</sup> that make up a coherent whole must already exist. What differs in Winter’s approach is his exploration of this idea in terms of what cognitive science understands about how ICMs are formed and how they act in reasoning, a subject outlined in the next chapter.

For our current pursuit of understanding the relationships between universals and particular circumstances, and crucially the balancing of competing interests, cognitive science has an important role to play. With regard to the first question we posited about how a case gets framed as *x* through the use of precedent, the understanding of classification is an invaluable tool to understand how this takes place:

A cognitive account of [a rule application] makes it possible to specify precisely why a rule ‘seems utterly obvious’ and ‘utterly appropriate’ at its ‘core’. One would first reconstruct the cognitive model at work...the normative understandings and assumptions that it encodes, and the social practices that motivate it...One would then be in a position to...make predictions about the nature of the arguments for and against extension of the rule.<sup>90</sup>

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<sup>87</sup> *id* at 3.

<sup>88</sup> *id* at 103. Also at 199, ““There can be no purely positivist system of legal norms when categorization and comprehension already implicate the legal decisionmaker in the process of making classifications and distinctions relative to the practical commitments and normative assumptions of her culture.”

<sup>89</sup> *id* at 93.

<sup>90</sup> *id* at 159.

The second question concerning the balancing of competing reasons, and how we might quantify (or at least make comparative judgments) about weight, can also be addressed in a similar manner. In a traditional test of balance (such as Alexy's formula), competing weights are treated as equal entities to be compared in isolation with one against the other. This is to rip them from their social context and treat them as *a priori* categories, in the conventional sense. A cognitive account of the comparison of competing principles on the other hand, can take into account the "relative importance or...the role that any particular factor [plays] in the analysis" as those factors can "frame[...] the value and meaning of...other...factors," relative to a ICM.<sup>91</sup> Chapter 3 goes over the basic tenets of this framing, and Chapter 4 explains the method of applying this to case law. It is a way to probe whether or not the attribution of relative weight is coherent with the dominant framing of the rule or general principle at hand.

The merits and applications of Winter's approach have not been empirically tested to a thorough extent. There are some examples of applying Winter's approach (as indicated in Chapter 3), but so far they have taken a largely general approach to cognitive theory and law. This is similar to the earlier critique levelled at Winter's approach in that he uses examples to make his point but stops short of a deeper investigation into how the mechanisms of ICMs play over a body of case law.

After the publication of *A Clearing in The Forest*, Brooklyn Law School held a symposium discussing Winter's outstretched hand to cognitive theory. The resulting publication<sup>92</sup> discussed the merits of Winter's assertion that reasoning "is imaginative, and relies heavily on metaphorical structure and cognitive models developed from experience."<sup>93</sup> The criticisms and extrapolations of the authors in the volume reflect the enormous impact his approach has on legal theory. They range from explorations of public reason, legal education, and race in the law, to the metaphorical structure of criminal law and the 2000 US presidential election. As Lawrence Solan points out in his introduction:

[Winter's ideas are] provocative, and perhaps controversial. In fact, there is not complete consensus among the authors on significant issues. But the breadth of subject matter and richness of analysis must inevitably lead one to respect the

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<sup>91</sup> *id* at 149.

<sup>92</sup> Solan, Lawrence M. (Ed.); 2002. 'Symposium: Cognitive Legal Studies: Categorization and Imagination in the Mind of Law,' 67(4) *Brook. L. Rev.* 941.

<sup>93</sup> Solan, Lawrence M.; 2002. 'Introduction,' 67 *Brook. L. Rev.* 941 at 942.

endeavor and recognize its explanatory power. At the end of the day, the issue is really a simple one: Won't we learn more about how law functions if we take more seriously the ways in which its players understand their world?<sup>94</sup>

It is perhaps most informative here is to examine the response of Dan Simon, a theorist whose work lies at the intersection of law and psychology, to Winter's proposal. His primary praise of Winter's work is much akin to the leading purpose in the current project. That,

To better understand the legal system, we are advised to relax the conventional fascination with what the law is or should be, and start examining more seriously (inter alia, empirically) how we do what we do when we engage in legal thinking.<sup>95</sup>

Simon explains that by rejecting the traditional model of legal reasoning leads to a quagmire of indeterminacy, it might "free legal scholarship from the deadlock of objectivist and subjectivist claims, striving instead towards an understanding of law as a relatively regular, systematic and, in some senses, predictable social practice."<sup>96</sup> Like the thinking outlined so far, Simon takes the view that judicial reasoning is concerned with providing coherence. Using empirical studies, Simon posits,

The most notable phenomenon is that during the process [of adjudication], the cognitive system dynamically changes the evaluations of the arguments leading towards a strong endorsement of one set of arguments and a rejection of the competing set.<sup>97</sup>

Through an explanation of the process of adjudication, Simon uses the concept of neural networks to examine the cross-activations of certain elements of an argument that result in the active elements suppressing the non-active as the pattern-supportive elements reinforces themselves. This pattern of constitutive elements "impose[s] a coherence-maximizing order on the sets"<sup>98</sup> and forces the individual elements into the coherent whole, giving a judge confidence in the 'fit' when justifying their own reasoning.<sup>99</sup> This argumentation offers both a degree of confirmation and a challenge to

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<sup>94</sup> *id* at 947.

<sup>95</sup> Simon, Dan; 2002. 'Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology,' 67 *Brook. L. Rev.* 1097 at 1097.

<sup>96</sup> *id* at 1098.

<sup>97</sup> *id* at 1113.

<sup>98</sup> *id* at 1116.

<sup>99</sup> Even though the evidence suggests this not just "ex post" activity and that it plays "an important part in driving the process." *id* at 1128.

Winter's basic theory, and there is clearly still much research to be done on whether the aim towards coherence is an *ex post* exercise or a justificatory one, at least based on the current empirical evidence. What can be said is that the importance of this type of work lies in its potential to find the compass needle that points to how a method of cognitive science and law could be operationalised to help reveal what coherence, framing, and weighing look like in the wild.

## Chapter 3: Literature Review: Conceptual Metaphor Theory

“We sort the mail, build sand castles, solve jigsaw puzzles, separate wheat from chaff, rearrange chess pieces, collect stamps, alphabetize books, create symmetry, compose sonnets and sonatas, and put our rooms in order ... We propagate structure ... We disturb the tendency toward equilibrium... Not only do living things lessen the disorder in their environments; they are in themselves, their skeletons and their flesh, vesicles and membranes, shells and carapaces, leaves and blossoms, circulatory systems and metabolic pathways - miracles of pattern and structure. It sometimes seems as if curbing entropy is our quixotic purpose in the universe.”

James Gleick<sup>1</sup>

What if we had a way to look at categories and concepts that skipped over the essentialism that seems so intuitive to reach for, and instead drilled down to the different aspects of how a concept is structured? As shown in the previous chapter, legal theory is often so concerned with the large task - the overarching *what should be* questions - that it misses the processes and aspects that build the concepts it is asking about. So, it is important to escape the legal myopia, and look elsewhere for guidance. Given law's reliance on language, linguistics- and more specifically conceptual semantics, the field dedicated to investigating how language construction facilitates meaning construction- is the perfect place to look.

Steven Pinker, first in *Learnability and Cognition: The Acquisition of Argument Structure* and subsequently expanded upon in *The Stuff of Thought*, outlines the basic facets of conceptual structure. Stemming from Kant, he looks at the dimensions of time, space, causality, substance, and agency and their use in language to form the categories that,

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<sup>1</sup> Gleick, James; 2012. *The Information: A History, A Theory, A Flood*. Vintage Books at 281-2.

determine the kinds of entities we count and keep track of, the compartments into which we sort people and things, the way we manipulate the physical environment to our advantage, and the way we ascribe moral responsibility to people for their actions.<sup>2</sup>

These are not just arbitrary distinctions of the facets of concepts, but given their role in reflecting the ways in which we sort the world, they are corrupting to “our commerce, our politics, our legal disputes, even our humor.”<sup>3</sup> Pinker’s work on the structure of concepts, which mostly looks at verb use, is acutely interesting for the law, and particularly so for those categories and concepts that escape even the most rigorous of generalisations. Conceptual structure for Pinker has a few salient characteristics. Drawing on the work of other linguists,<sup>4</sup> he contends that “the human mind contains a level of representation that interfaces between language and inference.”<sup>5</sup> This interface “underlines many high level cognitive processes, including inference, intuitive physics, argumentation, and shared social and moral norms”.<sup>6</sup>

By grounding even the most complex of concepts in concrete notions of space, time, agency, and causation, language reflects the ways in which they can be translated from one *family* of concepts (to use the Wittgensteinian term) to another. We do this by importing the conceptual structure from one domain to another using metaphorical extensions.<sup>7</sup> Differing conceptions of movement through space and/or time can have profound consequences not just for the grammar of sentences, but, more importantly, also influences the ways in which we infer meaning. For now, we can understand this as a way to grasp the structure of concepts which reveals that deriving meaning via essentialism is indeed misplaced. This is to say, if meaning is relational to different temporal, spatial and causal dimensions, then pinning down any generalisable meaning is quite erroneous, and one must instead look to map out the ways these constructions are formed in the law. The tools provided by cognitive linguists allow us to look at the ways in which these structures

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<sup>2</sup> Pinker, Steven; 2007. *The Stuff of Thought: Language As A Window Into Human Nature*. Penguin at 162-3. See also, Pinker, Steven; 2013. *Learnability and Cognition: The Acquisition of Argument Structure*. MIT press; Pinker, Steven & Jackendoff, Ray; 2005. 'The Faculty Of Language: What's Special About It?,' 95 *Cognition* 201.

<sup>3</sup> *ibid.*

<sup>4</sup> See among others, Jackendoff, Ray; 1978. “Grammar as evidence for conceptual structure.” in *Linguistic theory and psychological reality* M. Halle, J. Bresnan, & G. A. Miller (Eds.), MIT Press; Talmy, Len; 2000. *Toward a cognitive semantics: Concept structuring systems*. MIT Press.

<sup>5</sup> Pinker, Steven; 2011. “Language as a Window into Conceptual Structure”, *Psychoontology Conference*. The Shalem Center, Jerusalem, Israel. Dec. Lecture.

<sup>6</sup> *ibid.*

<sup>7</sup> See generally, Lakoff, George & Johnson, Mark; 2008. *Metaphors We Live By*. University of Chicago press.

are built in language when applicable to defining meaning, and certainly offer options for piercing ambiguity in the law.

As Steven Pinker notes, “many disagreements in human affairs turn not on differences in data or logic but on how a problem is framed.”<sup>8</sup> This framing takes place by understanding abstract concepts in terms of the knowable, concrete aspects of their metaphorical counterparts. Since George Lakoff and Mark Johnson’s seminal work, *Metaphors We Live By*,<sup>9</sup> the importance of metaphor has enjoyed a privileged place in language research. The publication highlighted the importance of the work of linguists and cognitive scientists alike, and prompted further investigation into the link between metaphor, conceptual framing, and behaviour.<sup>10</sup> No longer just the baby of rhetoric and literary analysis, the examination of metaphor has evolved to include disciplines such as: political science<sup>11</sup>, psychology<sup>12</sup>, economics<sup>13</sup>, foreign policy analysis<sup>14</sup>, and legal theory (to some extent). We will address the legal approach to metaphor in a moment, but for now it is necessary to cover the basics of cognitive linguistics.

## **I. Conceptual Metaphor Theory, the Basics:**

Here is how linguist Vyvyan Evans describes Conceptual Metaphor Theory (hereafter CMT):

The basic premise of Conceptual Metaphor Theory is that metaphor is not simply a stylistic feature of language but that thought itself is fundamentally metaphorical in nature. According to this view, conceptual structure is organised by cross-domain mappings or correspondences between conceptual domains. Some of these mappings are due to pre-conceptual embodied experiences while

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<sup>8</sup> Pinker, Steven; 2007 at 243.

<sup>9</sup> Lakoff, George & Johnson, Mark; 1980. *Metaphors We Live By*. University of Chicago press.

<sup>10</sup> See for instance, Tversky, Amos & Daniel Kahneman; 1981. “The Framing of Decisions and the Psychology of Choice,” 211 *Science* 453; Hofstadter, Douglas, & Emmanuel Sander; 2013. *Surfaces and Essences*, Basic Books; Jackendoff, Ray; 2002. *Foundations of Language: Brain, meaning, grammar, evolution*. OUP; Geary, James; 2011. *I is an other: The secret life of metaphor and how it shapes the way we see the world*. HarperCollins.

<sup>11</sup> Consensual understanding among the political elite or citizens: Bougher, Lori D; 2012. “The case for metaphor in political reasoning and cognition. 33(1) *Pol. Psy.* 145.

<sup>12</sup> Lee, Spike W. S. & Schwartz, Norbert; 2014. “Metaphor In Judgment And Decision Making” in *Metaphorical thought in social life*. M. J. Landau, M. D. Robinson, & B. P. Meier (Eds.).

<sup>13</sup> Morris, Michael W., Sheldon, Oliver J., Ames, Daniel R., & Young, Maia J.; 2007. ‘Metaphors and the Market: Consequences and Preconditions of Agent and Object Metaphors in Stock Market Commentary,’ 102 *Organizational behavior and human decision processes* 174.

<sup>14</sup> Flanik, William; 2011. “Bringing FPA Back Home”: Cognition, Constructivism, And Conceptual Metaphor,’ 7 *Foreign Policy Analysis* 423.

others build on these experiences in order to form more complex conceptual structures. For instance, we can think and talk about the concept of quantity in terms of the concept of vertical elevation, as in She got a really high mark in the test, where high relates not literally to physical height but to a good mark.<sup>15</sup>

Thought structures language use in the form of abstractions shaped by certain characteristics of time, space, substance, etc. We then take these very basic forms and extrapolate them to new circumstances (though it should be noted that there is an ongoing debate regarding *how much* the old structures inform the new context semantically). In short, it is not wholly clear whether or not meaning is *dependent* on these structures or whether it only helps to make sense of them. One could imagine it as a spectrum, with the hardliners who believe that thought itself is metaphorical<sup>16</sup> on one side, and those who believe metaphor to be superfluous rhetoric on the other. Most linguists fall somewhere in the middle as there is an exorbitant amount of reliable evidence to suggest that metaphor does indeed shape our thought. How strongly it does so is debated and dependent on experimental context.<sup>17</sup> What is clear, and what is important for the discussion here, is that there certainly is a relationship between metaphor and thought in the conceptual translation process; that, thinking in terms of one conceptual structure affects the meaning(s) derived in the second.

This results from the systematicity of metaphor. Concepts are not simply 'one offs', they fall into a systematic frame that helps categorise and give meaning to abstract concepts through a reliance on embodied experience: the idea that the abstract concepts are based in the more tactile realm and gained through bodily experiences, such as those of "space (up-down, front-back, left-right, near-far, centre-periphery, contact, straight, verticality)", "containment (in-out, surface, full-empty)", "locomotion (momentum, source-path-goal)", "balance (axis balance, twin-pan balance, point balance, equilibrium)", "force (compulsion, blockage, counterforce, diversion, removal of restraint, enablement, attraction, resistance)", "unity (merging, collection, splitting, iteration, multiplicity, part-

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<sup>15</sup> Evans, Vyvyan; 2007. *A glossary of cognitive linguistics*, Edinburgh University Press at 34-5.

<sup>16</sup> See for instance, Feldman, Jerome; 2008. *From molecule to metaphor: A neural theory of language*, MIT press.

<sup>17</sup> See generally: Littlemore, Jeannette, & John R. Taylor (Eds); 2014. *The Bloomsbury companion to cognitive linguistics*, Bloomsbury Publishing; See also, Schubert, Thomas W., et al.; 2011. "More than a metaphor: How the understanding of power is grounded in experience," *Spatial dimensions of social thought* 153; Boroditsky, Lera; 2000. 'Metaphoric structuring: Understanding time through spatial metaphors', 75(1) *Cognition* 1; Boroditsky, Lera; 2001. 'Does language shape thought?: Mandarin and English speakers' conceptions of time' 43(1) *Cog. Psy.* 1; Thibodeau, Paul H., and Lera Boroditsky; 2011. 'Metaphors we think with: The role of metaphor in reasoning,' 6(2) *PLoS One*.



whole, count-mass, link(age))”, etc.<sup>18</sup> These form systematic image schemas that “recur[...] as a source domain (or a structuring part of a source domain) for different target domains,”<sup>19</sup> such as in Vyvyan Evans’ above example GOOD IS UP.

This is how CMT research formulises metaphors, such as LOVE IS A JOURNEY in ‘our relationship has come to a crossroads’, or ARGUMENT IS WAR in ‘he couldn’t defend his argument’; where LOVE and ARGUMENT are the target domains and JOURNEY and WAR are the source domains, respectively. The ‘target’ concepts are typically abstract, less well understood, and harder to delineate in comparison with the latter, ‘source’ concepts, which are usually more concrete, better understood and easier to specify.”<sup>20</sup> There is a vocabulary in CMT that is important to understand as we go forward, and so it is necessary to clarify a few key terms, namely: *image schemas*, *frames*, *mental spaces*, and *idealised cognitive models (ICMs)*.<sup>21</sup>

## 2. The Vocabulary of Cognitive Linguistics

*Image Schema:*

Conceptual metaphors allow for an abstract thought to be built on concrete *image schemas* which give it grounding. An image schema can be understood as an “abstract conceptual representation that arises directly from our everyday interaction with and observation of the world around us,” where ‘image’ refers to “the use of this term in psychology, where ‘imagistic’ experience relates to and derives from our experience of the external world,” and ‘schema’ to “abstract concepts consisting of patterns emerging from repeated instances of embodied experience.”<sup>22</sup> We can understand this as the way in which we chop concepts into the aspects of time, space, agency, substance and causality that are based on non-abstract, sensory, lived experience, such as in/out, up/down, on/under, etc.

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<sup>18</sup> Evans, Vyvyan; 2007. *A Glossary Of Cognitive Linguistics*. Edinburgh University Press at 108.

<sup>19</sup> Geeraerts, Dirk (Ed.); 2006. *Cognitive linguistics: basic readings*, Walter de Gruyter at 12.

<sup>20</sup> Steen, Gerard, 2014. ‘The cognitive-linguistic revolution in metaphor studies,’ in Littlemore, Jeannette, & John R. Taylor, (eds) *The Bloomsbury companion to cognitive linguistics*, Bloomsbury Publishing at 117.

<sup>21</sup> Other key concepts like prototypes and conceptual blending will be covered in later chapters.

<sup>22</sup> Evans, Vyvyan 2007 at 106-7.

These image schemas help concretise abstract concepts, and, in turn, bring their own inferences along. It is important to note that, despite what some cognitive linguists purport, this is not a claim about the whole of reasoning and thought. What matters is the ways in which schemas can frame a concept and structure the intuitive physics that it entails. For instance, if we were to look at verb use and its relation to causality, we could look at simple causal verbs such as “begin, bring about, cause, force, get, make, produce, set, and start,” those that convey prevention such as, “avoid, block, check, hinder, hold, impede, keep, prevent, save, stop, and thwart,” or verbs suggesting enabling like, “aid, allow, assist, enable, help, leave, let, permit, and support.”<sup>23</sup> Depending on the verb choice, there are different image schematic abstractions one might make entailing different levels of, what Len Talmy refers to as, “force dynamics”<sup>24</sup> that constrain or allow for the easier understanding of an abstract concept based on our tactile experience with the world.

Take, for instance, the example used by Gibbs et al. with the image schema of balance.<sup>25</sup>

We come to know the meaning of balance through the closely related experiences of bodily equilibrium or loss of equilibrium. For example, a baby stands, wobbles, and drops to the floor. It tries again and again, as it learns how to maintain a balanced erect posture. A young boy struggles to stay up on a two-wheeled bicycle as he learns to keep his balance while riding down the street. Each of us has experienced occasions when we have too much acid in our stomachs, when our hands get cold, our heads feel too hot, our bladders feel distended, our sinuses become swollen, and our mouths feel dry. In these and numerous other ways we learn the meanings of lack of balance or equilibrium.<sup>26</sup>

This idea of balance can then be metaphorically abstracted to understand further notions of balance.

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<sup>23</sup> Pinker, Steven; 2007 at 219.

<sup>24</sup> Talmy, Len; 200. “Force dynamics in language and cognition,” In *Toward a cognitive semantics: Concept structuring systems*, MIT Press.

<sup>25</sup> Gibbs Jr, Raymond W. and Herbert Colston; 2006. “The Cognitive Psychological Reality Of Image Schemas And Their Transformations” in *Cognitive linguistics: Basic readings*. Geeraerts, Dirk, René Dirven and John R. Taylor (Eds.). Mouton de Gruyter 239.

<sup>26</sup> *id* at 241.

In the cases of bodily and visual balance, there seems to be one basic scheme consisting of a point or axis around which forces and weights must be distributed so that they counteract or balance off one another. Our experience of bodily balance and the perception of balance is connected to our understanding of balanced personalities, balanced views, balanced systems, balanced equilibrium, the balance of power, the balance of justice, and so on.<sup>27</sup>

One of the strengths of CMT is the wealth of experimental evidence that supports its claims. For example, in one study into the claims for the psychological reality of image schemas, Gibbs and others conducted a series of experiments<sup>28</sup> to test if “people’s understandings of the meanings of *stand* are partly motivated by image schemas that arise from their bodily experiences of standing.”<sup>29</sup> While image schemas may not be at play in every single facet of meaning creation, the conclusions reached by Gibbs et. al. showed a large amount of evidence to suggest that image schemas are an integral part of reasoning about abstract concepts from their tangible, embodied corollaries.

#### *Frame Semantics:*

The concept of the image schema is much like the idea of Charles Fillmore’s “frames.”<sup>30</sup> Where image schemas can be understood as the organising image to link the embodied to the abstract to understand the latter in the tangible sense, a frame is the operationalising of that schematic.

As Fillmore states,

...frame semantic research can be thought of as the effort to understand what reason a speech community might have found for creating the category represented by the word, and to explain the word’s meaning by presenting and clarifying that reason.<sup>31</sup>

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<sup>27</sup> *ibid.*

<sup>28</sup> See, Gibbs Jr, Raymond W., Dinara Beitel, Michael Harrington, and Paul Sanders; 1994. 'Taking A Stand on The Meanings Of Stand: Bodily Experience As Motivation For Polysemy,' 11 *Journal of Semantics* 231.

<sup>29</sup> Gibbs Jr, Raymond W. and Herbert Colston; 2006 at 245. Original emphasis.

<sup>30</sup> See generally, Fillmore, Charles; 2006. 'Frame Semantics,' in *Cognitive linguistics: Basic readings*. Geeraerts, Dirk, René Dirven and John R. Taylor (Eds.). Mouton de Gruyter 373; Fillmore, Charles; 1982. Frame Semantics in Linguistics in the Morning Calm. The Linguistic Society of Korea (Ed.). Hanshin Publishing Co. 111; Goldberg, Adele E.; 2006. *Constructions at Work: The Nature of Generalization in Language*. Oxford University Press.

<sup>31</sup> Fillmore, Charles; 2006 at 374.

Frame semantics deals with the frame understood as a “system of concepts related in such a way that to understand any one of them you have to understand the whole structure in which it fits.”<sup>32</sup> This is very close (and often used synonymously) to the term schema. The main difference is the motivating factor behind its use; simply put, framing involves the motivation to use a certain structure of word-meaning. To use Fillmore’s own analogy, the schema might be to understand the structure of a hammer, where a frame is to understand who uses it and how it is used.<sup>33</sup> For Fillmore, we have both “cognitive frames” and “interactional frames.”<sup>34</sup> Cognitive frames are those that are independent of the “communicational context,” and interactional frames, those that arise in actual communication situations:

When we understand a piece of language, we bring to the task both our ability to assign schematizations of the phases or components of the ‘world’ that the text somehow characterizes, and our ability to schematize the situation in which this piece of language is being produced.<sup>35</sup>

Interactional frames combine our knowledge of cognitive frames to create expectations about the nature of relationships arising within each one, during either authorship, interpretation, or both:

It is frequently the case that such expectations combine with the actual material of the text to lead to the text’s correct interpretation. And once again this is accomplished by having in mind an abstract structure of expectations which brings with it roles, purposes, natural or conventionalized sequences of event types, and all the rest of the apparatus that we wish to associate with the notion of ‘frame’.<sup>36</sup>

These frames, much like the venom theory of death in Cleopatra’s case in the previous chapter, are used to create a coherent system of meaning for a given context. This framing is made to make meaning intelligible and conveyable through its background assumptions. When we say ‘motivating’, doesn’t necessarily mean consciously explicit (though it certainly could be). It is to say that the use of a frame allows the speaker to use certain relationships between word meanings, and to lay a foundation of tacit, shared background understanding with an audience. That being said, it is not

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<sup>32</sup> *id* at 373.

<sup>33</sup> *ibid*

<sup>34</sup> *id* at 379.

<sup>35</sup> *id* at 378-9.

<sup>36</sup> *id* at 379.

just in the intention of an author where a frame exists. There are two distinct directions in which framing can take place, both from author to interpreter, and vice-versa:

On the one hand, we have cases in which the lexical and grammatical material observable in the text 'evokes' the relevant frames in the mind of the interpreter by virtue of the fact that these lexical forms or these grammatical structures or categories exist as indices of these frames; on the other hand, we have cases in which the interpreter assigns coherence to a text by 'invoking' a particular interpretive frame.<sup>37</sup>

As Steven Winter has pointed out, the framing of a given text is important to the understanding of judicial behaviour.<sup>38</sup> He argues not only that the law as a whole, and legal theorists - like Hart or Dworkin - concerned with the 'what the law is', often use this type of framing,<sup>39</sup> but that it is also employed at the more individual level when a judge and/or a lawyer argue or understand a certain situation against the backdrop of a particular set of background assumptions that are called for when using precedent as a framing tool (as already discussed). An important feature of frames is that they create a category without necessarily having shared feature sets among members and, in this way, run contrary to the traditional legal doctrinal notion of a legal category being made of necessary and sufficient conditions.<sup>40</sup>

### *Mental Spaces:*

If *frames* and *image schemas* are the more constructed and refined systems for grouping concepts into categories, *mental spaces*<sup>41</sup> are the bottom level, the undifferentiated collections of the

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<sup>37</sup> *id* at 385.

<sup>38</sup> Winter, Steven L.; 2013. 'Frame Semantics and The Internal Point of View' in *Current Legal Issues: Law and Language*. Micheal Freeman & Fiona Smith (Eds.). Oxford University Press. 115.

<sup>39</sup> He offers a non-exhaustive list of six frames with which to understand "law as": "Law as authority", "Law as social obligation", "Law as moral imperative", "Law as social mechanism", "Law as strategic tool", and "Law as social identity", see, Winter, Steven L.; 2013 at 125.

<sup>40</sup> See Lakoff, George; 2008. *Women, Fire, And Dangerous Things*. University of Chicago press at 21. See also, Barsalou, Lawrence; 1983. 'Ad-Hoc Categories,' 11(3) *Memory & cognition* 211; Barsalou, Lawrence; 1985. 'Ideals, Central Tendency, And Frequency Of Instantiation As Determinants Of Graded Structure In Categories,' 11(4) *Journal of experimental psychology: learning, memory, and cognition* 629.

<sup>41</sup> See, Fauconnier, Gilles; 1994. *Mental Spaces: Aspects of Meaning Construction in Natural Language*. Cambridge University Press; Fauconnier, Gilles & Turner, Mark; 2006. 'Mental Spaces: Conceptual Integration Networks' in *Cognitive linguistics: Basic readings*. Geeraerts, Dirk, René Dirven and John R. Taylor (Eds.). Mouton de Gruyter. 303; Fauconnier, Gilles; 2007. 'Mental Spaces' in *Oxford Handbook of Cognitive Linguistics*. Geeraerts, Dirk, and Hubert Cuyckens (Eds.). Oxford University Press. 351; Fauconnier, Gilles & Turner, Mark; 2008. *The Way We Think: Conceptual*

concepts of thought. The theory of mental spaces was developed by Gilles Fauconnier and are, at the base level, “very partial assemblies constructed as we think and talk for purposes of local understanding and action...” containing the basic “elements [of concepts] and are structured by frames and cognitive models.”<sup>42</sup> Fauconnier’s work has had a major influence on varied aspects of cognitive linguistics, from ‘Construction Grammar’ to metaphor and narrative theory.<sup>43</sup> An integral component of mental space theory is the “Access Principle.”<sup>44</sup> The *Access Principle* (also referred to as the *Identification Principle*) states that “an expression which names or describes an element in one mental space can be used to access a counterpart of that element in another mental space.”<sup>45</sup> Fauconnier uses the example of the sentence “Maybe Romeo is in love with Juliet” to describe how this principle works across mental spaces.<sup>46</sup>

The English sentence brings in a frame from our pre-structured background cultural knowledge, x in love with y, with two roles highlighted (the lover x and the loved one y)... The word *maybe* is a space builder; it sets up a *Possibility space* relative to the discourse *Base space* at that point. The Base space contains elements *a* and *b* associated with the names *Romeo* and *Juliet*, and presumably those elements have been linked to other frames by background knowledge and previous meaning construction in the conversation. The new sentence sets up the Possibility space and creates counterparts *a'* and *b'* for *a* and *b*, which can be identified by the names *Romeo* and *Juliet*, in virtue of the Access Principle. The new space is structured internally by the frame X IN LOVE WITH Y, whose roles are filled by the elements *a'* and *b'*.<sup>47</sup>

This formalised process can be visualised in the following way:

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*Blending and The Mind's Hidden Complexities*. Basic Books; Dancygier, Barbara and Sweetser, Eve; 2005. *Mental Spaces in Grammar. Conditional Constructions*. Cambridge University Press.

<sup>42</sup> Fauconnier, Gilles; 2007 at 351.

<sup>43</sup> See among many others, Fauconnier, Gilles and Sweetser, Eve; 1996. *Spaces, Worlds, And Grammar*. University of Chicago Press; Turner, Mark; 1996. *The Literary Mind*. Oxford University Press; Lakoff, George; 2008. *Women, Fire, And Dangerous Things*. University of Chicago press.

<sup>44</sup> Fauconnier, Gilles; 2007 at 353.

<sup>45</sup> *id* at 353. This is more formally expressed by “If two elements *a* and *b* are linked by a connector  $F(b = F(a))$ , then element *b* can be identified by naming, describing, or pointing to its counterpart *a*.” *Id*.

<sup>46</sup> *id* at 355.

<sup>47</sup> *id* at 355, original emphasis.

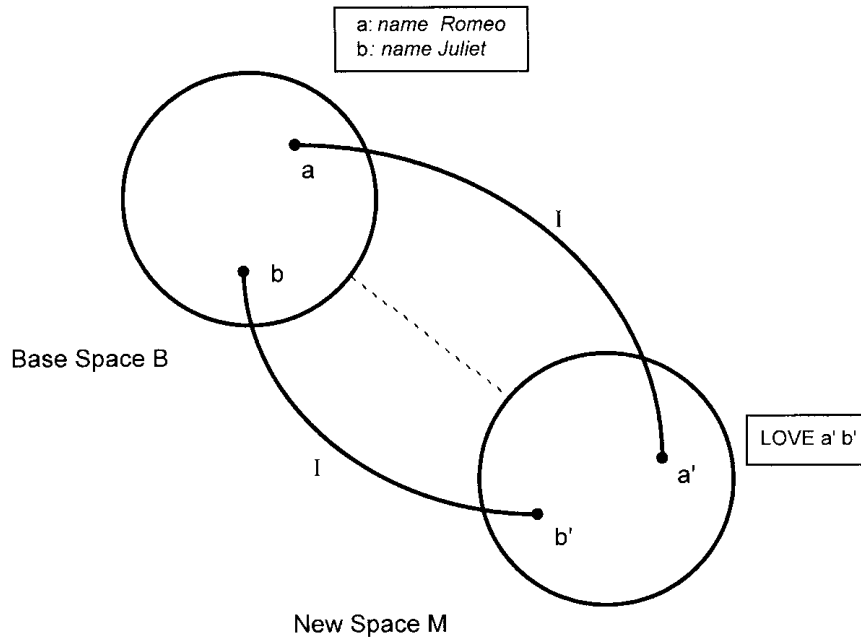


Fig 3.1 Basic mental space model<sup>48</sup>

The corollary spaces allocate the internal structure from one space to another in a way that creates coherence between the two spaces and their background structures, so long as the spaces do not contradict each other.<sup>49</sup> The concept of mental spaces is used to indicate the process by which frames can interact and create coherence among themselves. This example is certainly not the only way in which this happens<sup>50</sup> (conceptual blending – a key concept for the present study – will be taken up further in Chapter 6), but it is illustrative of the basic tenets of mental space theory. It is important to note that mental spaces should not be completely thought of as unique to the language capacity of thought but how thought itself is organised. It is not the expression of language that typifies mental spaces, but the conceptual structure that underlies its use.

<sup>48</sup> *id* at 356, where, “The dotted line from B to M indicates that M is set up relative to its Parent space B (it is subordinate to B in the lattice of discourse spaces). In the present example, the Base space is the Parent space for M. I is the connector (in this case identity) linking a and b in space B to a' and b' in space M. The boxes represent internal structure of the spaces next to them.”

<sup>49</sup> For instance, if we imagined that “the conversation participants are talking about Romeo’s hostile behavior toward Juliet. In B, this has the consequence that Romeo does not like Juliet. But this background structure will not transfer to the new space M, because it contradicts the explicit structure love a' b'.” *id* at 356.

<sup>50</sup> For just a few more examples of language ‘devices’ for the interaction and creation of mental spaces see Fauconnier, Gilles; 2007 at 371.

### *Idealised Cognitive Models:*

The fourth basic concept integral to this project is the concept of the *Idealised Cognitive Model* (or hereafter, ICMs). The importance of the concept of the ICM is twofold: firstly, it integrates the previous concepts into a coherent system, and secondly, it creates categories of a *graded quality* rather than a binary system of 'fit'. The classic example (taken here from Charles Fillmore<sup>51</sup>) is the concept of a *bachelor*. The classic definition holds that a bachelor is an "unmarried adult man".<sup>52</sup> But, this definition belies the mental spaces and image schemas (as described above) in locating this term. The definition only makes sense in an existing background schema of a society where framed spaces such as marriage, adulthood, a gendered role of masculinity, and their respective background suppositions and expectations have been established. So, within this interwoven model of framed spaces, the pope - though technically meeting the basic, classic definition - would not be properly thought of as 'a bachelor'. As Lakoff states,

In other words, *bachelor* is defined with respect to an ICM in which there is a human society with (typically monogamous) marriage, and a typical marriageable age. The idealized (sic) model says nothing about the existence of priests, 'long-term unmarried couplings', homosexuality, Moslems who are permitted four wives and only have three, etc. With respect to this idealized (sic) cognitive model, a *bachelor* is simply and unmarried adult man.<sup>53</sup>

The ICM allows the interpreter to compare the framed mental spaces of bachelorhood and find the level of coherence displayed when one considers the categorisation of the Pope (for one). In this way, coherence is made by comparing the elements of mental spaces, and the framing and schematic structures within them, not by a feature set of necessary and sufficient conditions like those that law theorists are quite used to in legal tests, for example. Of particular importance here is that ICMs set up a graded category where some elements can be considered to be more key to the frame than others (explaining the *want* to categorise by necessary and sufficient conditions), but do not make up a binary set in some universal way. These effects are noted as *prototype effects*, to be explored more closely in the following chapter.

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<sup>51</sup> Fillmore, Charles; 1982. 'Towards A Descriptive Framework For Spatial Deixis', in *Speech, Place and Action*. Jarvella, R. and Klien, W. (Eds.). John Wiley. 31.

<sup>52</sup> Fillmore, Charles; 1982. as quoted in Lakoff, George; 2008. *Women, Fire, And Dangerous Things*. University of Chicago press at 70.

<sup>53</sup> Lakoff, George; 2008 at 70, original emphasis.



Putting these concepts together, let's revisit the conceptual metaphor with all of this in mind. The formula of a conceptual metaphor, with its target and source domains, is an expression of the framed mental spaces that compare and use constitutive elements from those spaces to construct a coherent linkage between their idealised models. Coherence here can be understood not as the comparison of the definitions of different categories, but as the interaction between the make-up and background schemas of complex constitutive spaces that depends significantly on the two categories being compared. The conceptual metaphor bridges the connection made by (typically) two framed spaces that allows the conceptual transfer of its formative elements and ICMs in such a way that metaphors may be judged on fitting an interpreter's own model in varying degrees.

### **3. Some Criticisms of CMT:**

Like any good theory, conceptual metaphor theory has been critiqued by theorist in the field and external commenters. The most common criticism, perhaps, is CMT's difficulty in pinpointing the explicit (and some have sought for it to be foolproof) method or criteria by which to define speech that is metaphorical and speech that is not. These are typified by the criticisms of the "dead" metaphor.<sup>54</sup> The usual gist of this type of criticism is that the studies of metaphor in CMT are calling things metaphorical that aren't. However, as Gibbs points out,

...simply calling something literal or polysemy... does not explain why there is systematicity in conventional expressions and why individual linguistic expressions appear to reflect the detailed correspondences that arise from the metaphorical mapping of source onto target domains in talking about abstract concepts.<sup>55</sup>

Critics also make this assertion without providing any counter hypothesis of why this might be the case.<sup>56</sup> Critics will then take aim at the systematicity thesis of CMT; if these mental spaces and schemas are mapped onto each other, why doesn't it map the entire feature set? To illustrate this

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<sup>54</sup> See for instance, Jackendoff, Ray; 1983. *Semantics and Cognition*. MIT press; Glucksburg, Sam; 2001. *Understanding Figurative Language: From Metaphors to Idioms*. Oxford University Press. McGlone, Matthew; 2007. 'What is the Explanatory Value of a Conceptual Metaphor?', 27 *Language & Communication* 109.

<sup>55</sup> Gibbs Jr, Raymond W.; 2011. 'Evaluating Conceptual Metaphor Theory,' 48(8) *Discourse Processes* 529 at 534.

<sup>56</sup> *ibid*.

type of criticism, take for instance the version articulated by Matthew McGlone which zeros in on the metaphor construction THEORIES ARE BUILDINGS, as in “*She constructed a theory to explain the incident, That theory is on shaky ground, etc.*”<sup>57</sup> McGlone’s argument is based on the strong version of CMT that “suggests that we don’t understand theories in any real sense; we can only understand buildings, and must piggy- back the “theory” concept on this understanding.”<sup>58</sup> He makes this assertion even though he readily admits that “Lakoff and his colleagues do not explicitly endorse this version,” but, he continues, “they have made several claims consistent with it.”<sup>59</sup> In the ‘consistent claims’ McGlone simply takes the conclusive statement rather than the nuanced argument.

His main premise concerns the systematicity of metaphor; he asks if one concept translates to another, why do we not “occasionally make erroneous inferences about the applicability of building properties to the abstract concept.”<sup>60</sup> (Such as: “Theories not only can have foundations (assumptions), architects (formulators), and blueprints (origins), but also stairwells (?), hallways (?), sprinkler systems (?), etc.”)<sup>61</sup> This is another instance of McGlone attacking a claim that CMT doesn’t make. As Gibbs deftly points out, “CMT does not maintain that *all* aspects of the source domain are mapped onto the target domain in metaphorical expressions or conceptual metaphors.”<sup>62</sup> As discussed in the section on mental spaces, coherence and finding fit does not have to be an all or nothing game, and the experimental evidence would support that this is indeed the case.<sup>63</sup> McGlone’s other criticisms are similarly bereft of a deep reading of the literature - had he included this he might have found the evidence he would need to support CMTs stronger tenets.<sup>64</sup>

Another criticism levelled at CMT is the embodiment thesis. As Atilla Cserep describes this, “Critics responded to the strong emphasis on the embodiment principle by citing evidence that metaphors are not all based on universal aspects of human experience and consequently exhibit

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<sup>57</sup> McGlone, Matthew; 2007 at 113. Original emphasis.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> *id* at 114.

<sup>61</sup> *ibid.*

<sup>62</sup> Gibbs Jr, Raymond W.; 2011 at 535. Original emphasis.

<sup>63</sup> See for instance, Getner, Diedre & Kurtz, Kenneth; 2006. ‘Relations, Objects, And The Composition Of Analogies,’ 30 *Cognitive science* 609.

<sup>64</sup> Gibbs Jr, Raymond W.; 2011 at 538-543.

variation cross-culturally.”<sup>65</sup> This (the cultural aspect of embodiment) is something that theorists in CMT have acknowledged and continue to focus on by widening their studies. Rather than seeing it as a crack in the foundation of CMT it is merely an area open for further construction to better sturdy the building. Further criticisms (and supplementary evidence) aside, one of the main strengths of CMT is its sheer multitude of levels (in various disciplines) relating to human understanding that provide evidence of the impact of conceptual metaphors:

1. Cultural models of many abstract concepts.
2. The evolution of language.
3. Contemporary language (e.g., conventional expressions, novel extensions, and polysemy).
4. Aspects of contemporary speakers’ nonlinguistic thinking and communication.
5. Contemporary speakers’ entrenched knowledge structuring many abstract concepts that motivate people’s tacit understandings of why various words, phrases, and texts convey the figurative meanings they do.
6. Contemporary speakers’ entrenched knowledge that is immediately recruited (i.e., accessed or activated) during online metaphorical language use.
7. Neural and computational processing underlying certain abstract thought and language use.<sup>66</sup>

While some critics may disagree on the extent of how ‘deep’ metaphor may go, the impact of even just a few of these levels (and many critics accept at least a few) on the construction of human thought is considerable. Given CMTs criticisms, there have been a number of attempts to try and systematise metaphor identification (one such approach is outlined in the following chapter and other attempts at automatic processing are discussed in Chapter 9).

#### **4. Metaphor and Law:**

Law isn’t without its scholars who have attempted to use metaphor to explain certain facets of legal thought. However, the studies that have been produced neglect to examine the deep structure of metaphor use or to operationalise how their conceptual structures get built in a rigorous fashion. There are four main strains of previous work on metaphor and law that work

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<sup>65</sup> Cserep, Attila; 2014. ‘Conceptual Metaphor Theory: In Defense Or On The Fence,’ 10 *Argumentum* 261, at 268.

<sup>66</sup> Gibbs Jr, Raymond W.; 2011 at 552.

over three levels. The first is the meta-level, which focuses on the over-arching effect of language and conceptual structure on the legal enterprise<sup>67</sup> and their effect on legal reasoning generally.<sup>68</sup> The next is the set of studies that take up metaphors on a more domain specific level. These studies cover various sections of social life, but for the purposes of this study, the focus is on those that relate to the internet and digital information and law's responses to them.<sup>69</sup> The final level is case specific studies on the uses of metaphor.<sup>70</sup> These studies cover various jurisdictions and methodological approaches. Working up these levels will situate this project by seeing what the literature has to say about metaphor and the law.

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<sup>67</sup> See for instance, Gibbons, John; 2014. *Language and the Law*. Routledge; Graham, Lorie M. & McJohn, Stephen M.; 2008. 'Cognition, Law, Stories,' 10 *Minn. J.L. Sci. & Tech.* 255; Hirsch, Adam J.; 2002. 'Cognitive Jurisprudence,' 76 *S. Cal. L. Rev.* 599; Larsson, Stefan; 2011. *Metaphors and Norms-Understanding Copyright Law in A Digital Society*. Lund Studies in Sociology of Law; Larsson, Stefan; 2013. *Conceptions, Categories and Embodiment: Why Metaphors are of Fundamental Importance for Understanding Norms*. Ashgate Publishing; Larsson, Stefan; 2017. *Conceptions in The Code: How Metaphors Explain Legal Challenges in Digital Times*. Oxford University Press; Makela, Finn; 2011. 'Metaphors and Models in Legal Theory,' 52 *C. de D.* 397; McCubbins, Mathew D. & Turner, Mark; 2012. 'Concepts Law,' 86 *S. Cal. L. Rev.* 517; Morra, Lucia; 2010. 'New Models for Language Understanding and the Cognitive Approach to Legal Metaphors,' 23 *International Journal for the Semiotics of Law* 387; Smith, Michael R.; 2006. 'Levels of Metaphor in Persuasive Legal Writing,' 58 *Mercer L. Rev.* 919; Turner, Mark; 2001. *Cognitive Dimensions of Social Science*. Oxford University Press.

<sup>68</sup> See, Hibbitts, Bernard J.; 1994. 'Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse,' 16 *Cardozo L. Rev.* 229; Hobbs, Pamela; 2012. 'Not Semantics but Just Results: The Use of Linguistic Analysis in Constitutional Interpretation,' 44 *Journal of Pragmatics* 815; Lee, Spike W. S. & Schwartz, Norbert; 2014. 'Metaphor in Judgment and Decision Making', in *The Power of Metaphor: Examining its Influence on Social Life*. M. J. Landau, M. D. Robinson, & B. P. Meier (Eds.). APA;

<sup>69</sup> Bailey, Jane; 2003. 'Of Mediums and Metaphors: How a Layered Methodology Might Contribute to Constitutional Analysis of Internet Content Regulation,' 30 *Manitoba LJ* 197; Blavin, Jonathan H. & Cohen, L. Glenn; 2002. 'Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary,' 16 *Harv. JL & Tech.* 265; Gore, Stephanie A.; 2003. 'A Rose by any other Name: Judicial Use of Metaphors for New Technologies,' 2 *U. Ill. JL Tech. & Pol'y* 403; Jimenez, William Guillermo & Lodder, Arno R.; 2015. 'Analyzing Approaches to Internet Jurisdiction Based on a Model of Harbors and the High Seas,' 29 *International Review of Law, Computers & Technology* 266; Katsirea, Irini; 2015. 'Electronic Press: Press-Like or Television-Like?' 23 *International Journal of Law and Information Technology* 134; Larsson, Stefan; 2013. 'Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case,' 21 *International Journal of Law and Information Technology* 354; Loughlan, Patricia; 2006. 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property,' 28 *Sydney L. Rev.* 211.

<sup>70</sup> Achtenberg, Miriam Jacks; 2006. 'The Misleading Metaphor of the Slap in the Face: An Analysis of *Ash v. Tyson*,' 29 *Harv. JL & Gender* 501; Berger, Linda L.; 2006. 'Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation,' 58 *Mercer L. Rev.* 949; Flanik, William; 2011. "'Bringing FPA Back Home": Cognition, Constructivism, and Conceptual Metaphor,' 7 *Foreign Policy Analysis* 423; Oldfather, Chad M.; 1994. 'The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions,' Faculty Publications. Paper 475; Parker, Carol McCrehan; 2012. 'The Perfect Storm, The Perfect Culprit: How A Metaphor of Fate Figures in Judicial Opinions,' 43 *McGeorge L Rev* 323; Peikoff, Amy; 2003. 'No Corn on this Cobb: Why Reductionists Should Be All Ears for Pavesich,' 42 *Brandeis LJ* 751.

### *Case Studies:*

The case studies, from disparate backgrounds and covering a multitude of approaches, often leave the legal language analyst hoping for something a bit more robust. For instance, Miriam Jacks Achtenberg looks at the use of the metaphor of “the ‘slap in the face’ standard” in *Ash v. Tyson Foods, Inc.*, a US Supreme Court (USSC) case involving racial discrimination in employment. In deciding whether or not there had been discrimination towards certain candidates for employment, “a disparity in qualifications” amongst applicants was found as signaled by the judge as “so apparent as virtually to jump off the page and slap you in the face.”<sup>71</sup>

In Achtenberg’s view (and the Court’s view in this instance), this standard is imprecise given its reliance on a metaphor that is completely within the judge’s purview of how and when it can be applied based on “different acts of imagination.”<sup>72</sup> This basic reading of the act of metaphor is fairly indicative of legal research into the use of judicial metaphor. It focuses on the overt and apparent metaphors invoked in rhetorical speech. Given this chapter’s foray into the intricacies of the use of metaphor, analyses like these do not do much more than say: *metaphors are sometimes used and they are hard to interpret and shouldn’t be used as a standard*. What, if anything, this adds to legal scholarship is unclear, other than pointing out that legal theorists should take metaphor seriously. There are numerous articles that display this type of analysis are usually be identifiable by their use of Benjamin Cardozo’s warning about metaphor<sup>73</sup>, without mentioning Lakoff (or anyone after) who have spent thirty plus years analysing its use.

To avoid being accused of picking low hanging fruit, let’s take another example. Linda Berger, engaging with the enterprise a bit more seriously, uses metaphor and metonymy to examine the language surrounding campaign finance reform in the USSC. She studies the use of the source domain of a free person and their attributes being transferred to a corporation,

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<sup>71</sup> Achtenberg, Miriam Jacks; 2006 at 502.

<sup>72</sup> *id* at 504.

<sup>73</sup> “metaphors had ‘to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it.’” *id* at 503. The irony, of course, being that in his warning, Cardozo himself is invoking a slavery metaphor.

Transforming corporate money into protected speech is metaphorical; it requires three metaphors acting together to compose the full picture - (1) the corporation must be viewed as a person, (2) spending money must be viewed as speech, and (3) the free market must be viewed as the appropriate model for analyzing free speech issues. With those metaphors mapping the way, corporate money talks, and it is protected as speech.<sup>74</sup>

Berger does a wonderful job in analysing the use of metaphor and metonymy to structure the ICMs associated with campaign finance. However, though she highlights that, “metaphor derives some of its persuasive power from its ability to be present without calling attention to itself”<sup>75</sup>, her analysis still relies on the major attributes of the explicit CORPORATIONS ARE PEOPLE or MONEY IS SPEECH metaphors, rather than the more embedded spatial and embodied schemas that allow for the subtle inferences to take hold. This is true of a number of legal analyses that take CMT into account showing that there is a major gap in the research which would explain how these processes function on a level that is on par with their cognitive grounding.

*The Law's Conception of Digital Information:*

Much like the gap of the case specific studies, some of the studies that look at the legal regulation of information (particularly digital information) focus on the broad generalisations made about the internet and, as recourse, ask normative questions about how the internet *should* be regulated. For instance, Jane Bailey's analysis of the legal construction of the internet looks at the US Supreme Court's and Canadian Human Rights Tribunal's approaches to it that both “mythologize the “Internet” as necessarily being a certain way” which then “precludes explicit consideration of factors that may affect the veracity of commonly accepted ideas about the nature of the Internet.”<sup>76</sup> Instead of tracing the linguistic factors in an explicit way to see how these generalisations are built, she argues for a competing metaphor that would fit the nature of the internet in a way that is more conducive to regulation. While a laudable effort and a fine example of a nuanced approach to legal scholarship, aiming the analysis at this meta-language level neglects other, and perhaps even more apt, metaphors for internet regulation that she might adopt to better describe the elusive ‘nature’ of the internet and to reach her own ends of providing a “more explicit

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<sup>74</sup> Berger, Linda L.; 2006 at 950.

<sup>75</sup> *id* at 957.

<sup>76</sup> Bailey, Jane; 2003 at 198.

examination of the elements that affect what Internet communication *is*, *was* and *can be*--elements that may be material to maintaining existing public and constitutional values."<sup>77</sup>

This stance on investigating the normative aspects of regulating digital information is not shared by all authors. For instance, Jonathan Blavin analyses conceptualisations of the internet in the USSC to investigate the "various sociological, technological, and ideological conceptions of the world that support" the court's "different conceptions of the internet."<sup>78</sup> Blavin identifies three major metaphorical constructions that he feels regulate court rulings in cases relating to the internet: "The internet as conduit", "The internet as a novel space", and "The internet as real space."<sup>79</sup> Identifying these metaphors, he structures his analysis with evidence from the jurisprudence of the USSC and the its consequences. Again, this is a noble effort to identify salient metaphor constructions in legal discourse, but his methodology leaves something wanting in the analysis. His starting point and p top-down model, within which metaphors are identified prior to the analysis of text, doesn't provide a thorough analysis of the metaphors that are dominant in a given decision. It provides no explanation of how these ideas transfer, just that they do. Without a method to explore conceptual transfer, it is still only a study of explicit metaphors that, while common and interesting, doesn't tell us much about how the law works in relation to using metaphor.

Focusing on the explicit metaphors of digital information and the internet is a common theme in both the case studies and the domain specific accounts reviewed. Whether it is an argument for a different type of metaphor,<sup>80</sup> or an examination of leading metaphors without a normative argument, the research still contains an obvious space that could be filled by bringing in the nuanced features of CMT's conceptual analysis.

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<sup>77</sup> *id* at 226. Original emphasis.

<sup>78</sup> Blavin, Jonathan H. & Cohen, L. Glenn; 2002 at 268-9.

<sup>79</sup> *ibid*.

<sup>80</sup> See for instance, Wu, Tim; 2003. 'When Code isn't Law,' 89 *Virginia Law Review* 679; Wu, Tim; 2003. 'Network Neutrality, Broadband Discrimination,' 2 *J. on Telecomm. & High Tech. L.* 141; Wu, Timothy; 1999. 'Application-Centered Internet Analysis,' 85 *Virginia Law Review* 1163.

### *Metaphor and Legal Reasoning:*

Outside of Winter's discussion of metaphor and legal reasoning, there are a few examples of studies on the application of CMT in legal reasoning literature. These studies often, if not always, look at law's metaphors at the meta-level – the understanding of law as represented by common metaphors. Take, for a singular example of this type, Bernard Hibbitts' study of the metaphors of visual and aural representation in legal discourse. On visual metaphors he notes,

We frequently consider law as a matter of looking: we “observe” it; we evaluate claims “in the eye of the law”...we speak of law as something one would usually look at: it is a “body”, a “text”, a “structure,” a “bulwark of freedom,” a seamless web” and even a “magic mirror.”...We associate legal reasoning with the manipulation of visible geometric forms: we try to “square” precedents with one another...we repeatedly agonize over “where the line [between different doctrines and situations] can be drawn.”...we discuss legality in terms of light and darkness...<sup>81</sup>

He contrasts this with the writing of critical legal scholars who, by changing the language from the visual to aural metaphors, provide “a significant-if still nascent-reconfiguration of American legal discourse.”<sup>82</sup> The aim of this type of analysis is to look at law and its metaphors as a reflection of the society that generates them and for Hibbitts,

...it seems reasonable to suggest that the traditional popularity of visual metaphors in American legal language has much to do with the bias towards visual expression and experience that has traditionally characterized American culture and, inevitably, American law.<sup>83</sup>

Legal language scholarship of this kind is often focused on the grand narratives and discussions within the law which cast a reflection on the society over which it yields power. However, many of these studies, like the studies cited in previous sections, often concentrate their gaze on preselected metaphors. They pick their metaphors before their data. Whether or not the

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<sup>81</sup> Hibbitts, Bernard J.; 1994. 'Making Sense Of Metaphors: Visuality, Aurality, And The Reconfiguration Of American Legal Discourse,' 16 *Cardozo L. Rev.* 229 at 231.

<sup>82</sup> *id* at 232.

<sup>83</sup> *id* at 238.



conclusions bear out (even though Hibbits makes a valid point) they aren't often supported by a rigorous analysis of just what metaphors are in play. This drawback can (and does) lead to many of these studies being criticised for not providing ample enough evidence of the power of metaphor, precisely on these grounds. And, in that, I concur with those criticisms regardless of whether or not the conclusions of the studies may be sound. The validity of this methodology should be called into question. That being said, I think it is vital in legal scholarship to find evidence of dominant strands of legal usage and its effects.

### *The Next Step:*

Methodology-wise, there is a consistent gap in the application of a specific and generalised model for understanding legal metaphor. Nevertheless, that seems to be changing. As more scholars are looking further into the work in cognitive linguistics, the methodology has started to adopt the tools of linguists to make analysis more robust. One scholar who is significant in this regard is legal sociologist Stefan Larsson. His *Conceptions in the Code* is indicative of a novel turn in the relationship between law and cognitive linguistics. It makes a number of major contributions that are important to review.

First, it sits in between the three levels we have outlined so far. It is focused on the case specific, the internet and digital information as a domain, and the meta-narratives of law and discourse. Second, it looks at the law from a point of view of conceptual change and attempts to provide mechanisms to explain that change using metaphor theory, which represents a large step in the right direction from the point of view this project . His analysis,

demonstrates how legislative statutes express significant aspects of our social reality that cannot be devalued by reductive approaches to legal reasoning. Although the meaning is very much bound to specific patterns, these patterns can, and probably often do, differ from the 'objectively' defined patterns of meaning.<sup>84</sup>

Using examples from digital copyright law, Larsson examines the underlying structures in the law's attempt to conceptualise ownership and control. He tracks the conceptual change and posits that,

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<sup>84</sup> Larsson, Stefan; 2017. *Conceptions in the Code: How Metaphors Explain Legal Challenges in Digital Times*. Oxford University Press at 151 (digital edition).

Having concluded that legislation which emerged largely in a pre-digital era is encountering difficulties in regulating primarily digitally mediated phenomena satisfactorily, it would seem reasonable to seek the explanation from a chronological perspective—i.e. that the thought structures that underlie a specific law or paragraph are quite simply anachronistic in a changing world.<sup>85</sup>

This explanation, in Larsson's mind, calls for an investigation into what he terms "Conceptual Path Dependence": "...when different ways of understanding certain phenomena become subject to 'lock-in effects'."<sup>86</sup> What is missing in Larsson's method is a detailing of the linguistic mechanism by which this path dependence works. This is due to a reliance on a locus of research that is situated between law and society and their different approaches. Although this remains an invaluable effort of scholarship, by not choosing the linguistic practices of one field exclusively, the analysis suffers from a lack of exposition concerning the intricacies of how conceptual path dependence works on a more subtle level, an flaw he readily admits: "I seek to problematise cases where the conceptual lock-in and path dependence becomes *overly* conservative and retrospective, and lead in a direction that frustrates law's relation to society."<sup>87</sup> Nevertheless, it is a magnificent step in the right direction. The next stage for this study is to examine how this mechanism might play out, and to sketch what a method for doing so might look like.

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<sup>85</sup> *id* at 156 (digital edition)

<sup>86</sup> *ibid.*

<sup>87</sup> *id* at 157. (digital edition). Original emphasis.

## Chapter 4: Methodology

No man's error becomes his own Law nor obliges  
him to persist in it.<sup>1</sup>

-Thomas Hobbes

This study isn't the first attempt to examine legal scholarship through the lens of cognitive linguistics, but, as noted in Chapters 2 and 3, it does add to existing efforts to bring legal research up to speed with current practices. Metaphor research often suffers from a lack of definition in saying precisely what is metaphorical and what is not, especially in the borderline cases. This problem is currently being addressed by cognitive linguists, and legal analysis would do well to incorporate these efforts into their own field. It is often the case that even when a scholar is familiar with the work of Lakoff and Johnson, they tend to stick to the original methodology, ignoring about 30 years of further work on the subject. Of course, this is not always the case. But, it is clear that the field could use a helping hand from approaches in cognitive linguistics that might rectify any deficiencies in their approach. They stick to the idea of overarching metaphors but, in

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<sup>1</sup> Hobbes, Thomas; 2010. *Leviathan, Parts I And II - Revised Edition*. Broadview Editions at 240

the process, miss all of the subtleties of conceptual structure and how it can lead to a metaphor being invoked in the first place: the process that underlies the metaphorical extension.

This is not true of the whole field of legal metaphor analysis; Steven Winter, for one, stands out as an example of a scholar who goes beyond the work of Lakoff and Johnson. But even the best approaches still lack a robust method to incorporate technical advances into the analysis of figurative language, which could then be allied with an outlook towards the future to plan a method that anticipates future capabilities.

Within the context of the applications of principles to unique circumstances as outlined in Chapter 2, our question is: how are general concepts structured and then translated into new, particular cases? It is not just the obvious metaphors that are important, also the small metaphors that construct images and ideas, often in obscured ways, must also be taken into account. This inquiry raises a pressing issue: how can we be sure that the preposition or the verb that we are analysing is being used metaphorically? How can we ensure that the linguistic data we pull out is not just a subjective reading of a text, but a method that can be reapplied?

When going back to the bare basics of verb and preposition use (as this is where most conceptual metaphors are found<sup>2</sup>), separating the literal from the metaphorical is a task wrought with difficulty. Luckily, we don't have to reinvent the wheel. Cognitive linguists (taking the Pragglejaz Group<sup>3</sup> and Michael Kimmel as exemplars<sup>4</sup>) have developed methods to design and implement this type of research. But, there are still kinks to work out, and it must be said that this approach hasn't been specifically adapted for use in legal theory.

Applying their respective frameworks in this project ensures that it doesn't fall prey to the pitfalls of other metaphor research in law and, at the same time safeguard that it is as state of the art as possible. In the least, it is academically honest in stating that the method is a work in progress. A

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<sup>2</sup> See Cameron, L.; 2003. *Metaphor in Educational Discourse*. Continuum.

<sup>3</sup> Pragglejaz Group; 2007. 'MIP: A Method for Identifying Metaphorically Used Words in Discourse,' 22 *Metaphor and Symbol* 1.

<sup>4</sup> Kimmel, Michael; 2012. 'Optimizing the Analysis of Metaphor in Discourse: How to Make the Most of Qualitative Software and Find a Good Research Design,' 10 *Review of Cognitive Linguistics* 1.

proof of concept for a much larger field of inquiry. So, to ask the same question posed by Michael Kimmel, “[w]here do we presently stand in the methodology debate?”<sup>5</sup>

## **I. The Approach to Coding:**

Gerard Steen has outlined the general approach to identifying metaphors.<sup>6</sup> This method has been used and subsequently modified for over thirty years to create an “instrument for capturing the bulk of the linguistic expressions of metaphor.”<sup>7</sup> The method aims to delineate the “contrast between the contextual meaning of a lexical unit and its more basic meaning.”<sup>8</sup> For instance, if we use the verb “attack or defend...in a context of argumentation [he couldn’t defend his argument], its contextual meaning has to do with verbal exchange,”<sup>9</sup> which is something quite different from the word’s more basic meaning of engaging in a physical confrontation.

This is a non-literal comparison. How do we know we are right in what we say? The long and short of it is; we don’t. As Rudolph Schmitt says, “the systematic analysis of metaphor, as a hermeneutic process, remains an applied art. The reconstruction of metaphorical models cannot be automated; the process can only be learned.”<sup>10</sup> There is no way to objectively ground the hierarchy between literal and indirect meanings. What we can do, however, is to use a method that makes the hierarchy that develops as transparent and repeatable as possible.

*The Metaphor Identification Procedure VU University Amsterdam (MIPVU):*

The basic principles of this method are outlined by Steen:

- I. Read the entire text to establish a general understanding of the meaning.

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<sup>5</sup> *id* at 3.

<sup>6</sup> See Steen, Gerard J., et al.; 2010. *A Method for Linguistic Metaphor Identification: From MIP to MIPVU*. John Benjamins Publishing Company; Steen, Gerard J.; 1999. ‘Metaphor and Discourse: Towards A Linguistic Checklist for Metaphor Analysis,’ in *Researching and Applying Metaphor*. L. Cameron & G. Low (Eds.). Cambridge University Press. 81; Steen, Gerard J.; 2002. ‘Identifying Metaphor in Language. A Cognitive Approach,’ 36 *Style* 386.

<sup>7</sup> Steen et. al. 2010 at 81.

<sup>8</sup> *id* at 6

<sup>9</sup> *ibid*.

<sup>10</sup> Schmitt, Rudolph; 2005. ‘Systematic Metaphor Analysis as a Method of Qualitative Research,’ 10 *The Qualitative Report* 358, at 369.

2. Determine the lexical units in the text.
3.
  - a. For each lexical unit in the text, establish its meaning in context, i.e. how it applies to an entity, relation, or attribute in the situation evoked by the text (contextual meaning). Take into account what comes before and after the lexical unit.
  - b. For each lexical unit, determine if it has a more basic contemporary meaning in other contexts than the one in the given context. For our purposes, basic meanings tend to be:
    - more concrete; what they evoke is easier to imagine, see, hear, feel, smell, and taste;
    - related to bodily action;
    - more precise (as opposed to vague);
    - historically older
  - c. If the lexical unit has more basic/contemporary meaning in other contexts than the given context, decide whether the contextual meaning contrasts with the basic meaning but can be understood in comparison with it.
4. If yes, mark the lexical unit as metaphorical.<sup>11</sup>

This method allows researchers to identify and document even the most subtle of metaphors which may be obscured by the large over-arching images an author uses to frame an abstract idea. This study uses the same approach, with minor adjustments to account for the nature of legal language. This method has been tested for reliability (concordance of metaphorical marking by a number of assessors) in a variety of discourse types. This solves our first problem of how to deal with identifying metaphors. But, how does one go forward to then analyse the metaphors and extract information about the construction of certain concepts? Here, Michael Kimmel has expanded on Steen's work.

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<sup>11</sup> Steen et. al. 2010, at 5-6.

Kimmel focuses on the next aspect of metaphor studies, namely the use of computer software (Atlas.ti) to collect and analyse data. Atlas.ti is a program that allows the user to take on projects including “text annotation, retrieval, filtering, data searches, [and] perhaps some basic number-crunching.”<sup>12</sup> There are a number of similar programs, but given that this work relies on the expanding of an existing methodology created with Atlas.ti, it will use the same and the approach already developed. The use of software has a few notable benefits. It “allows complex tagging” which facilitates research that “provides tabulated or filtered data and complex search queries.”<sup>13</sup> Using software also allows for the creation of “‘audit trails’ for tracing where scholars categorize [sic], select, discard, arrange, or combine data,”<sup>14</sup> to give complete transparency in the choice and categorisation of metaphors. Kimmel outlines his approach for moving from the identification of metaphors to their grouping, as well as outlining procedures for best practice in research design. His model does a number of things:

- guide[s] scholars through a project step-by-step in their endeavor to reconstruct
  - (a) conceptual models, or
  - (b) discourse dynamics through a collection, categorization [sic], and analysis of metaphors in a corpus,
- provide[s] checks and keep the moorings of the analysis in the data backwards traceable, and
- reflexively explicate[s] all strategic choices and the possible bias that results from it.<sup>15</sup>

After metaphors have been identified in a text, the next task is to “group metaphors into sets of conceptually similar tokens.”<sup>16</sup> This means mapping the various ‘target’ and ‘source’ domains into metaphor formulas, like GOOD IS UP or ARGUMENT IS WAR. In law, (particularly in privacy law), image schemas are built in so many different ways that it is unsurprising the concept is so hard to

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<sup>12</sup> Kimmel 2012 at 11.

<sup>13</sup> *id* at 38.

<sup>14</sup> *id* at 39.

<sup>15</sup> *id* at 4.

<sup>16</sup> *id* at 5.

pin down to one essential feature. The answer is likely that it is not a concept that can be essentialised down to any necessary and sufficient components.

Constructing the salient metaphor formulas for different contextual conceptual structures allows for an understanding of the growth, evolution and application of the abstract concept of privacy. This project has not solely relied on trying to extract a general rule from a field where interpretation can be as binding as statute. As metaphor formulas vary from sentence to sentence (even those written by the same author), it was important for the research to collect as many as possible to see how certain constructions influenced the inference a judge might make on rendering spatial, temporal, or causal issues. Taking all of these elements into account, it is evident that Kimmel's approach has added a rigour to the investigation of metaphorical construction in texts.

His method aims to identify which formula best fits a specific metaphor construction. As Kimmel states, "[f]inding such a summarizing [sic] formula is, for better or for worse, guided by an intuition of what counts as conceptually similar."<sup>17</sup> How general or how specific should we be? Kimmel suggests a "two-tier[ed]" approach.<sup>18</sup> The idea is that this will cover both the broad image schemas that domains may share and the specific, more conceptually committed schemas that are just as important for analysis.

...[E]ach metaphor can be described from two viewpoints, with two cognitive "layers" that inform metaphor processing. The expression "the state ship confronted an iceberg" invites both path and collision image schemas that are shared with non-nautical metaphors such as "running into a wall of silence". Parallel to that, our example calls up knowledge about ship navigation, crews, and captains shared with any ship metaphor, but quite independently of collisions or paths. One layer is the image-schematic core representation that "carries" the ontology of a mapping, ... while the other layer, ...[adds] richer knowledge and inferential entailments. As a matter of principle, metaphors should be coded at both levels, as different similarities with other metaphors are brought out by each layer.<sup>19</sup>

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<sup>17</sup> *id* at 8.

<sup>18</sup> *id* at 15.

<sup>19</sup> *ibid*.



Two-tier coding requires keeping separate lists of image-schematic tags (which are more concrete and sensory) and rich tags (which are more specific). This method has both benefits and drawbacks. The main drawback is that after coding, we are left with no metaphor formulas and only a number of separate lists of target and source domains in both the image schematic and rich types. However, instead of making the analysis portion a bit lengthier, this turns out to be beneficial for deeper analysis. It allows for metaphorical mappings (formulas) to “arise in a combinatory fashion via code co-occurrences.”<sup>20</sup> This means that rather than hoping to get it right every time that LOVE IS A JOURNEY appears during coding, one can simply query the software to produce co-occurrences between target = love and any of the image schematic or rich tags in the sources that, if not explicitly tagged “journey”, nonetheless cover the same conceptual domain. These could be found in the more image schematic realm (such as, path, movement, etc.), or as much more explicit references, like vehicle, car, boat, transit, etc. Using software, and a method which allows for back-tracking to find the relevant co-occurrences, is the only way for the research to have a reliable prospect of seeing what the prominent conceptual structures are. As we will see in the construction of privacy, this is extremely important. It is not only important for understanding the meanings given to privacy and data in different contexts but, more crucially, is necessary for developing a method that may be used to tackle the translation problem in any area of law.

Chapter 5 goes into detail and shows the result of this process in coding the *Schrems* case, with analysis of the precedent cases in Chapters 6 and 7, but for the sake of clarity it is briefly outlined here. Building on the approaches of Steen and Kimmel, *Schrems* was first read through to get an overview of the context of the case. Then, line-by-line, the case was separated into lexical units.<sup>21</sup> The units were then coded in keeping with the two-tier process outlined above. For example, “in the light of that requirement,”<sup>22</sup> would be attributed the initial code ‘metaphor’ to include it in analysis for a set of all coding co-occurrence{s} named ‘metaphor’. Next, it was coded with the source domains ‘light/dark’, ‘light’, ‘vision/visible/invisible’, ‘visible’, and the target domains ‘Law is...’, ‘Directive 95/46 is...’ and ‘Adequate Protection is...’.<sup>23</sup> When analysing for co-occurrences, the

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<sup>20</sup> *id* at 17.

<sup>21</sup> More on lexical unit length will be discussed in Chapter 9.

<sup>22</sup> *Schrems* §81

<sup>23</sup> The full sentence refers to the directive and the specific requirement of adequate protection not seen in the small lexical unit here.

metaphor formulas would be flexible enough to have a wider range of groupings that can accommodate numerous constructions rather than for formulas to be determined before-hand. The results of this data are discussed in Chapters 5, 6 and 7.

## 2. Issues with Coding

### *Conventional Metaphors/Literalness*

The above example, “in light of that requirement,” may not seem particularly metaphorical to some readers and, in fact, there is ongoing and constant debate about how to deal with the distinction between a literal meaning and a metaphorical one. As computational linguist Ekaterina Shuktova remarks,

the distinction between metaphorical and literal meanings is not always clear-cut. A large number of metaphorical expressions are conventionalised to the extent that they are perceived as literal by most native speakers (e.g. “He found out the truth”).<sup>24</sup>

This problem is manifest in several different sectors. Krishnakumaran and Zhu identify a number of issues in the handling of metaphors by computers in place of human annotators. Prime among these factors is the notion of conventionality in metaphor usage. Based on their choice, Krishnakumaran and Zhu’s research only focuses on metaphors they describe as novel. Given that the present study has been done by hand, many of the issues they highlight did not present as much of a problem. That notwithstanding, if this method were to be used for further research that would, and should, include automatic processing, these problems should be noted.<sup>25</sup> In particular we must take account of the problem posed by conventional metaphors versus dead metaphors.

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<sup>24</sup> Shutova, Ekaterina; 2015. ‘Annotation of Linguistic and Conceptual Metaphor,’ in *Handbook of Linguistic Annotation*. Nancy Ide and James Pustejovsky (Eds.), at 8

<sup>25</sup> See Krishnakumaran, S. & X. Zhu; 2007. ‘Hunting Elusive Metaphors Using Lexical Resources,’ *Proceedings of the Workshop on Computational Approaches to Figurative Language* 13.

Conventional metaphors are those phrases that are used so often as to lose their metaphorical quality in the minds of the listener, and there is a substantial amount of literature on this topic.<sup>26</sup> The point is taken up by Steen in the development of MIPVU; by focusing on the context of the sentence construction and the subject of discussion, the problem of dead metaphors and conventionality isn't as injurious as it might be with regard to automatic processing. He takes the view "that metaphor is always a relational term, and is short for 'metaphorical to some language user'."<sup>27</sup> Whether a judge has chosen a term specifically for its quality of being a metaphor that is conventionalised or, on the other hand, whether she reads a statement that may or may not be understood as metaphorical by the listener, is a central concern of this research. To follow Steen *et al's* lead, the idea that something *could* be read as metaphorical is the very reason it is important to point it out,

literal and figurative meanings are situated at the ends of a single continuum, along which metaphoricity and idiomaticity are spread. This makes demarcation of metaphorical and literal language fuzzy.<sup>28</sup>

The approach taken in this work makes note of anything and everything along that continuum towards metaphoricity. If our goal is to find the most salient metaphors, it is better to err on the side of caution than to rule out something that could be valid data. It would be better practice to include as much data as possible, and then document subsequent idioms as and when they come up in the results upon further analysis.

### *Subjectivity*

Given the relative nature of demarcating metaphor in text, there is a danger that the selection of metaphors may not be grounded on some objective standpoint. To safeguard against that risk, I have relied on the work of other linguists who have run measures that test the reliability of approaches across different methods and coders. To guard against introducing a significant level of

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<sup>26</sup> See Taylor, John R.; 2003. *Linguistic Categorization*. Oxford University Press; Bowdle, Brian F. & Gentner, Dedre; 2005. 'The Career of Metaphor,' 112 *Psychological review* 193; Gibbs, Raymond W.; 2006. 'Metaphor Interpretation as Embodied Simulation,' 21 *Mind & Language* 434; Gibbs Jr, Raymond W.; 1994. *The Poetics of Mind: Figurative Thought, Language, And Understanding*. Cambridge University Press.

<sup>27</sup> Steen *et al* 2010 at 6.

<sup>28</sup> Shuktova 2015 at 5

subjectivity, linguists test their approach through *interannotator agreement*, to see whether a majority of annotators agree on the literalness/metaphoricity of a lexical unit.<sup>29</sup> The method used in this project (MIPVU) has been put through similar testing.

Unfortunately, given that this study has been done by a single coder and that the text is a singular and not a commonly used corpus, there is no opportunity to verify the choices made through a comparison with another coder(s) reading of the same text. That being said, with the high level of inter-annotator agreement using MIPVU, the work should be viewed with an understanding that the subjective nature of metaphor coding is as minimal as it can be. However, future projects would benefit from taking this into account and would ideally use a team of coders to ensure that this is the case.

### **3. Network Analysis:**

#### *Previous Approaches to Citation Networks*

Law is no stranger to network analysis.<sup>30</sup> Although it is a fairly recent development in legal scholarship, network analysis is certainly expanding into a common practice in North American courts,<sup>31</sup> as well as in individual European countries<sup>32</sup> and their regional courts.<sup>33</sup> The main objective

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<sup>29</sup> *id* at 13; see also, Landis, J. & G. Koch; 1997. 'The Measurement of Observer Agreement for Categorical Data,' 33 *Biometrics* 159.

<sup>30</sup> See for instance, Smith, T.A.; 2007. 'The Web of Law,' 44 *San Diego L. Rev* 309; Chandler, S.J.; 2005. 'The Network Structure of Supreme Court Jurisprudence,' 10 *The Mathematica Journal* 501; Fowler, H. & Jeon, S.; 2008. 'The Authority of Supreme Court Precedent,' 30 *Social Networks* 16; Whalen, R; 2013. 'Modeling Annual Supreme Court Influence: The Role of Citation Practices and Judicial Tenure in Determining Precedent Network Growth,' 424 *Complex Networks* 169.

<sup>31</sup> Neale, T.; 2013. 'Citation Analysis of Canadian Case Law,' 1 *Journal of Open Access to Law* 1.

<sup>32</sup> Agnoloni, T. & Pagallo, U.; 2014. 'The Case Law of The Italian Constitutional Court Between Network Theory and Philosophy of Information,' Proceedings of the Second International Workshop on Network Analysis in Law (NAIL 2014) 26.; Winkels, R., de Ruyter, J. & H. Kroese; 2011. 'Determining Authority of Dutch Case Law,' 235 *Legal Knowledge and Information Systems (JURIX)* 103.; Bourcier, D. & P. Mazzega; 2007. 'Codification, Law Article and Graphs,' 165 *Legal Knowledge and Information Systems (JURIX)* 29; Boulet, R., P. Mazzega, & D. Bourcier; 2011. 'A Network Approach to The French System of Legal Codes - Part I: Analysis of A Dense Network,' 19 *Artificial Intelligence and Law* 333.

<sup>33</sup> Koniaris, M., I. Anagnostopoulos, & Y. Vassiliou; 2015. 'Network Analysis in The Legal Domain: A Complex Model for European Union Legal Sources,' *CoRR*; Derlen, M., & J. Lindholm; 2014. 'Goodbye Van Gend En Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments,' 20 *European Law Journal* 667; Mirshahvalad, A., J. Lindholm, M. Derlen, & M. Rosvall; 2012. 'Significant Communities in Large Sparse Networks,' 7 *PLoS one* e33721.

of many (if not all) of these analyses, is to measure the strength or importance of a given case in the citation network of their particular jurisprudence. In order to accomplish this, they often use the notion of an *authority* or *hub* case<sup>34</sup> as a unit of measurement to infer the reasoning of judges and assess why they have or have not cited a specific case. In terms of finding these important hubs, earlier works on citation networks have done a commendable job, albeit without looking into the inner workings of *how* concepts travel through these citation networks. The idea that there are cases that hold more authority than others is an interesting result, but unfortunately it tells us nothing about legal reasoning. In fact, a focus on the prevalence of landmark cases tempts researchers to suggest that the existence of a landmark ruling is *the* reason that a judge cites it.

For example, in Lupu and Voeten's work on the citation network of the ECtHR, the political reasons why a judge might use citations from a particular case are investigated.<sup>35</sup> They go through the possible theoretical approaches to precedent that could explain the choice of a citation. However insightful, this undermines the idea of a judge using reasons outside of political motivations, such as conceptual coherence, to shape decisions. Without veering towards the proverbial, it is like a situation of having a hammer and seeing every problem as a nail. Their work, though admirable, misses an understanding of the human mind in the way we organise and combine concepts, and certainly if we are trying to have a full understanding of a judge's reasoning in any small sense, in addition to the citations, the text itself should be investigated for its reasoning.

### *A Different Approach*

Recognising the contributions of this earlier work, the attempt made here has focused on conceptual change to see if it can give either an alternative - or more likely supplementary - view of judicial reasoning. Rather than identifying hubs and authority cases from the entire body of case law, I have identified the intertextual links within a particular case to explore the links themselves at a deeper level. Where past networks have succeeded in covering the breadth of a body of law, this study has prioritised depth.

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<sup>34</sup> See, Lupu, Y., & E. Voeten; 2012. 'Precedent in International Courts: A Network Analysis of Case Citations by The European Court of Human Rights,' 42 *British Journal of Political Science* 214.

<sup>35</sup> *ibid.*

This impetus stems directly from Lupu and Voeten's work;

In order to advance this study, we need a better understanding not just of how courts develop precedent but also how to measure attributes of precedent, such as its relative importance or centrality. In accordance with recent developments in the study of domestic courts, we argue that network analysis is the most appropriate tool for providing such measures.<sup>36</sup>

To hone in on those attributes, it is paramount to look at the internal structure of the networks. By focusing on the internal structure, the temptation to attribute political reasons to a judge's decision to cite a previous case is reduced. It is the assumption of this work that though the political reasons are arguably a factor, they should not serve as the only proxy for understanding judicial reasoning. This is a notion that is backed up by the extensive literature on cognitive science outlined in Chapter 3.

Legal scholars who have undertaken research in this specific domain can attest to the need for an alternative approach that takes other relevant data into account. Tarissan and Panagis added a time value to their data to take the respective influence of older vs newer cases into account, and then assessed all the available metadata on cases to expand the analysis beyond political-theoretical commitments, thereby highlighting the need for this direction to be pursued,

... we believe our methodology provides ... a useful framework to study the importance of case-law by leveraging the citation network and the available metadata on the case. We seek to extend our methods by defining new metrics or combinations of the existing ones and by extending our study...<sup>37</sup>

And yet, this approach still makes the assumption that the relevant measure of the importance of a case is how 'landmark' it is to the detriment of content and the concepts cited within its network. The approach here is different and executed with the aid of software to organise and examine the network.

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<sup>36</sup> *id* at 439

<sup>37</sup> Sadl, Urska, Fabien Tarissan & Yannis Panagis; 2016. 'Selecting the Cases That Defined Europe: Complementary Metrics for a Network Analysis,' *proceedings of The 2016 IEEE/ACM International Conference on Advances in Social Networks Analysis and Mining (ASONAM)*, at 8.

Michael Kimmel's description of his own methodology was extremely helpful in designing this analysis. To make this approach replicable for future work, I will outline the step by step approach taken in Atlas.ti.

The *Schrems* case was annotated for its citation network by rigorously marking the relevant citations in each section, keeping a master list of cited sections and a master list of cases developing from sections 78 and 91. Organisation was essential in managing the data. These master lists were used to double-check and develop the network views in Atlas.ti as there is no automated feature for developing an entire network in one or two clicks.

The first step was to drill as far back into the cited literature as possible. The process involved reading a section, finding the citation, and linking it in Atlas.ti. The relevant cases were downloaded from their respective online databases, depending on the court where the case was heard; either the HUDOC database for the ECtHR cases or CURIA database for CJEU cases. As the *Schrems* case dealt with the interpretation of the right to privacy most of the cases came from the ECtHR as the CJEU referred to the interpretation of privacy in the ECHR. Once downloaded, the text was incorporated into Atlas.ti and linked using the software's 'relations' function. This allows the researcher to pin relationships between quotations in one text and/or between documents.<sup>38</sup> This tool has many options to describe relationships between quotes. The two types of relations used most frequently were the 'supports' and 'continues' functions. Others were used, but were not ultimately included in the final network for reasons explained in the next sub-section.

The support relation was used to link a descendant quote to its origin quote. For example, *Schrems* §78 cited *Digital Rights Ireland* §47-8, so the support relation was drawn from the two-paragraph quotation in *Digital Rights Ireland* to *Schrems* §78. This process was repeated with each citation in the network until all the citations were uploaded and connected. The continues relation was used in circumstances where the necessary quotation extended over multiple pages and metadata from the PDF of the document would be included inside it. This was not a desirable outcome for the

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<sup>38</sup> See Atlas.ti user manual for more information.

purpose of text retrieval once reports were generated for analysis, so the continues function was used to create a gap that would exclude the unwanted metadata text. For future research, it would be better to convert the text to (or download it as) HTML to avoid this problem altogether, as the continues relation does clog up the network building efforts.

The next step was to build the network itself in Atlas.ti's network view. After importing the original quotation from *Schrems*, the 'import neighbor>import quotations' function was used to find all supports and continues links associated with that quote. Here I used the master list developed by the reporting feature in the relations manager in Atlas.ti to organise the network and make sure that every node was checked for linked quotations. The master list was used to systematically check off every relation stemming from a given node, so as to ensure that all relevant data was included in the process of network building. Once all the nodes were included in the network, it then needed to be displayed in an organised fashion. Unfortunately, Atlas.ti's automatic organisation features aren't particularly helpful with this type of network, so it was preferable to sort through the data and map the network manually. Future research requiring the use of Atlas.ti's network views should be conducted with this fact in mind during the researcher's network building stage.

### *Exceptions*

There were a number of exceptions for the inclusion or exclusion of information in the network. The first was the (un)availability of certain cases in English. These cases (of which there were only two) were cases at the extreme edges of the network and had no forward citations, which is to say that the network terminated at their node. Given the outlying nature of these citations, and the fact that their texts would not be analysed in the same way as the other more prominent cases in the network anyway, they were discarded from the network.

The second type of exceptions were those documents that referred to national court opinions. These were omitted for the reasons that either,

a. the documents were in the language of the respective national court and were consequently not included for the same reason as the first group of exceptions, or



b. this study was concerned with international decisions and if those cases went on to cite their own national jurisprudence, this would water-down the content of the international citations with data that was erroneous to the project's target of international decisions. Although it should be said, that this would be an extremely interesting avenue for further research.

As with the first category exception, there were very few texts of this kind.

The third exception dealt with those passages that were overly general or procedural in nature. This is a harder exception to make an objective decision about. Almost all of the citations relating to procedural aspects of European Law were kept in the network, in so far as they had some minor relevance to the construction of privacy law. There was no concrete rule for this choice and, like the other exceptions, these decisions were rare occurrences pertaining to documents at the outer limits of relevance to the whole of the network.

The greatest exception for inclusion into the network was a methodological choice about my ability to parse through the data. While looking at the reasoning of the Court, it is common to come across internal citations, such as, 'As noted in paragraph 44 of the present opinion' or similar. These inner citations were included as they are often followed by a chain of reasoning that covers a few paragraphs linked to the citation that does not explicitly cite anything internally but, from the point of view of reasoning and sentence structure, is justifying a claim or expanding on an earlier point.

In an earlier phase of the research, these links were mapped out using the relation function to make them explicit and to show their importance in the network. This was manageable for smaller networks with only a few nodes, but once the networks grew in size, it was no longer a feasible amount of data for this project to process as a single, manual coder. Furthermore, this project was more concerned with external relationships between cases rather than with the internal reasoning of decisions. For these reasons, I feel my decision to ultimately exclude this data was legitimate. However, future research in this field would do well to take this extra-network into account and reflect it in the method. Exactly how this would be possible is not clear at this time, though some suggestions are discussed in Chapter 9.

#### 4. Gephi and Network Metrics

Once the networks (particularly those of §78 & §91) had been built, the next step was to analyse the importance and weight of certain nodes, as previous work on citation network analysis has done. Unfortunately, Atlas.ti's capability in network analysis is limited to the building function and it cannot complete running metrics. Consequently, the open-source software Gephi<sup>39</sup> was employed to run a number of metrics on the large networks. The purpose of this phase was to add an empirical grounding to the selection of important cases. This could have been done through textual analysis alone, but it was decided that using a proven method would be more appropriate and informative for the research design. In this regard, the project used the approach of network theorists who use Gephi and Atlas.ti in conjunction for a similar reason. As noted by Brailas,

the researcher, who has been immersed in the field systematically studying the phenomenon and acquiring a deep knowledge of the empirical data, develops the fundamental blocks of a theory, making every effort to ensure that the concepts are based solely on the empirical data and not on his/her own personal beliefs, preconceived views, or stereotypes. Today, we can take advantage of the methodological advances in the study of networks in order to analyze the network graph and determine the possible latent conceptual structure.<sup>40</sup>

Gephi was used to analyse the network for measures of centrality and to organise the network into clusters based on those measures. The data was exported from Atlas.ti and entered into Gephi manually, node by node, and edge by edge, as Atlas.ti's exporting tool is, at present, not perfectly compatible with Gephi.

The data was then analysed using Gephi's algorithms for computing measures of Eigenvector Centrality, Betweenness Centrality, Closeness Centrality, Distance from the Parent case, and Eccentricity.<sup>41</sup> Using these metrics, the ForceAtlas2 algorithm was then applied to organise the

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<sup>39</sup> Bastian, M., Heymann, S., & Jacomy, M; 2009. 'Gephi: An Open Source Software for Exploring and Manipulating Networks,' *the International AAAI Conference on Weblogs and Social Media*. Retrieved from <http://www.aaai.org/ocs/index.php/ICWSM/09/paper/view/154>

<sup>40</sup> Brailas, A. v.; 2014. 'Networked Grounded Theory,' 19 *The Qualitative Report* 1, at 7.

<sup>41</sup> For a thorough understanding of these metrics see Newman, Mark; 2010. *Networks: An Introduction*. Oxford Univ Press. Also, see the discussion in Chapter 6 on the relevance of these metrics of centrality.

structure of the network into clusters that could be analysed.<sup>42</sup> ForceAtlas2 “belongs to a class of imaging algorithms that operate through attraction-repulsion forces. The core principle of these algorithms is that the densely interconnected nodes are attracted to each other more and the less interconnected ones are repelled.”<sup>43</sup> In this way the network could be separated into distinct groups based on how connected the nodes were. The resultant clusters, and the main hubs of those clusters are discussed in Chapters 6 and 7.

## **5. Issues with Network Analysis**

Network analysis was a wonderful tool for analysing the data in the present case but, as with all methodologies, there are a few underlying issues with the approach overall.

### *Hybrid Metrics*

The first issue concerns the use of multiple metrics to build the networks into clusters. Each metric has its own strengths and weaknesses but, as yet, there is no established or reliable model for combing these metrics in a directed and constructive way. Given this circumstance, the choice was made to consider each cluster separately and to consolidate the findings through textual analysis of the coding of metaphor itself. This approach does have its drawbacks, such as weakening the capacity of using network metrics to provide an empirical safeguard. However, as a first attempt at applying this method in legal theory, the analysis is substantive enough to produce a significant amount of reliability despite the subjective nature of metaphor coding.

### *Breadth of Coverage*

Perhaps the most noticeable drawback of the approach is the lack of breadth in the treatment of precedent. Given the immense amount of data that required hand coding, it was not feasible for one coder to tackle any more than the networks stemming from a single case. Though the project

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<sup>42</sup> See, Jacomy, M., Heymann, S., Venturini, T., & Bastian, M.; 2014. 'Forceatlas2, A Continuous Graph Layout Algorithm for Handy Network Visualization,' 9 *PLoS one* e98679.

<sup>43</sup> Brailas 2014, at 10.

would be a lengthy one, it would be valuable to expand the data to include all cases relating to European privacy law. This idea is discussed in Chapter 9.

## **6. Prototype Analysis**

### *Understanding Prototypes:*

Steven Winter calls the “fundamental problem of law and language...the ‘illusion of transparency’.”<sup>44</sup> The law often takes its own construction for granted and it is only when the controversial or the misunderstood aspects of interpretation arise that the law asks its questions. However, this situation obfuscates the underlying functioning of categorisation that all language entails. Law does not sit on some separate and distinct pedestal, away from the natural construction of language. In fact, it is likely the domain most susceptible to the vagaries of language, given its reliance on the written word. One of these symptoms (as Winter points out) is the strength of prototype effects on the law and its interpretation(s).

Prototype effects are properties in language categorisation where belonging to a category can be understood as having a tighter or looser fit for different members. It is a graded construction that allows comparison of a feature set to a prototypical member, often times sublimating unique and important features of the object being graded. In the law this can take many forms, but it is their effect on the nature of rules and rule following that is of particular consequence. Winter uses the example of a hypothetical rule dictating that “running in the hall” is forbidden,

"Running" is a graded category that extends from a sprint to a jog, with no clear boundary to demarcate a run from a fast walk. Application of the "no running" rule necessarily involves consideration of its purposes, for it is only in light of those purposes that a decision-maker can determine the degree of category-extension appropriate to the rule. This consideration of purpose is evident in the marginal case, as when the decision-maker must determine whether to apply the

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<sup>44</sup> Winter, Steven L.; 2013. 'Frame Semantics and The Internal Point of View,' in *Current Legal Issues: Law and Language*. Micheal Freeman & Fiona Smith (Eds.). Oxford University Press. 115, at 117

rule to a fast walk in a crowded corridor or a slow trot in an empty one. But it is also evident in the case of a student sprinting down the hall.<sup>45</sup>

The rule is easily applicable and makes sense to most observers, as their silent understanding of the concept of running would easily rule out instances of barring “a candidate for student counsel from campaigning in the halls,”<sup>46</sup> or similar metaphorical extensions of the rule prohibiting running. This is due to the fact that the implicit understanding of the category “running” has more true and less true members, and the metaphorical extension to the candidate would be against the purpose or meaning of the rule. This, as Winter skilfully points out, is at odds with the law’s understanding of itself, as an exposition of language that can easily sort out what is clear and what is not,<sup>47</sup> and that the law should realise the “inherent inadequacy of categorical structures such as formal rules.”<sup>48</sup>

This is how the Court approached *Schrems* whether they realise it explicitly or not, when they invoked taking “all of the circumstances” into account. It is an approach that recognises that purpose and context matter, but it is not explicitly justified when announcing imperative interpretations of cited precedent. The balancing of all the circumstances through a legal test such as the one defined in the next chapter is, as Winter states, “a decidedly second-best solution.”<sup>49</sup> It is better to simply recognise the nature of rulemaking explicitly, for,

...once we understand how rules work, everything about our concept of law changes: Rules operate with the flexibility of standards; standards operate with the clarity of rules; and both forms of legal directives depend upon shared tacit understandings of their motivating contexts just to operate at all. More profoundly, one cannot give a meaningful account of legal rules (including standards) without according a fundamental, constitutional role to the world of social practice that the rules supposedly govern. Indeed, the concept of a formal rule is but a special case of the more general process of institutionalization by which social practice comes to be seen as normative and binding.<sup>50</sup>

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<sup>45</sup> Winter, Steven L.; 2001. *A Clearing in The Forest: Law, Life, And Mind*. University of Chicago Press, at 187.

<sup>46</sup> *ibid.*

<sup>47</sup> *id* at 188.

<sup>48</sup> *id* at 190.

<sup>49</sup> *id* at 191.

<sup>50</sup> *id* at 210.

Methodologically, there is a choice here. If, as Winter posits, law can only be understood by the constitutive role of social practice and the law does a lacklustre job of explicitly explaining its reasoning in those terms, then to understand how and to what extent those social practices make up legal categories one must find a way to either investigate those larger social categories by themselves or a way of investigating the decisions themselves to bring out the categorical distinctions made and prototypes identified, whether explicit or not. Winter is quite right here.

There have been attempts to look at how metaphors understood outside of law conflict or coincide with their legal counterparts, most of which come from the field of socio-legal theory. Stefan Larsson's book, *Conception in the Code* is a strong example of this type of effort.<sup>51</sup> However, the ability of a search algorithm like Google's n-gram viewer, or of survey data (no matter how vast), to analyse and ultimately explain the complexities and power of a certain conception on society as a whole, is limited at best. Given the absence of a functional or apt method to understand these categories in any meaningful way on an entire societal level, the latter approach to excavate legal decisions directly for their underlying conceptual commitments can produce the data necessary for investigated the use of metaphors within the law.

Prototypes here have a significant role to play. If what is at issue is the building of graded categories, the process by which these are built must be understood, not just at the theoretical level drawing on hypothetical examples or those drawn out in exclusion, but by analysing the process as it takes place in the wild; namely, to operationalise the position that Winter takes.

Chapter 5 covers the first step in the approach to identifying salient metaphors; what to look for and where to look for it. As we shall see, the analysis indicates that spatial configuration, *the orientational metaphor*, was the most dominant form in the construction of the notion of privacy protection in the *Schrems* case. It goes on to stipulate the necessary and sufficient conditions required to analyse the case from a legal standpoint, the standards by which to test whether a case falls into the category of privacy protection, and whether or not the circumstance is deemed to infringe an article's protection. Chapters 6 and 7 take the next step in identifying the prominent prototypical cases as found within the network structures, digging into the metaphors represented

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<sup>51</sup> Larsson, Stefan; 2017. *Conceptions in The Code: How Metaphors Explain Legal Challenges in Digital Times*. Oxford University Press.

in those cases, and subsequently comparing them to the arguments used by the Court to satisfy the use of the imperative 'must be understood to mean.'

Chapter 5 found that even by going backwards through the chain of cases, that it wasn't altogether clear how the precedents were related to each other. The precedents don't explicitly state how the derived notion of privacy entailed can be analogous between the invasion of a home or intimate life, and the situation relating to the protection transferred data in *Schrems*. To try to answer the question of why this might be the case, the investigation turned to analysing the networks stemming from specific sections of the *Schrems* decision.

In order to do this, it was necessary to develop a method by which the networks could be parsed, created, and selected for analysis.

#### *Selecting for the Relevant Data*

In Chapter 5, the precedent network stemming from section 78 of *Schrems* is laid out. This, of course, is not the only network in *Schrems*, but it serves as a useful selection for the purpose of the chapter. Given the excessive amount of data that these networks generated, choices had to be made to identify the salient information; the signals from the noise. There were 29 sections that had citations to other cases, to the opinion of the Advocate General, or internal citations to another section. Of those 29, only 11 had networks that extended beyond the first citation, clearly, these weren't prime candidates for analysis.<sup>52</sup> Figure 4.1 shows of the amount of nodes stemming from those 11 sections in the *Schrems* decision:

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<sup>52</sup> This would however be a great approach for future work, with the aid of automatic processing.

<b>Section</b>	<b>Nodes</b>
38	6
39	11
40	2
41	4
42	5
51	4
58	2
78	157
87	3
91	96
92	5

Figure 4.1 Nodes to section ratio in *Schrems*

Originally these numbers were much higher, but there was an issue with the way that Atlas.ti compiled neighbouring citations. One of the strategies employed was to cut the links between cases that went upward with no other connection to the network.

This resulted in only focusing on cases that derived from a parent case, and omitting those that had no other derivative link to the network. For instance, if case A §1 *cites* case B §1 and subsequently B §1 *cites* case C §1, the fact that case B §1 is also *cited by* case D §1 is not relevant unless case D §1 is cited by another case or section in the whole of the network (see figure 4.2). Case D §1 and its descendants were eliminated if their only connections to the network were an upward support relation from a case within the network. This also holds true with references to sections within the same case.



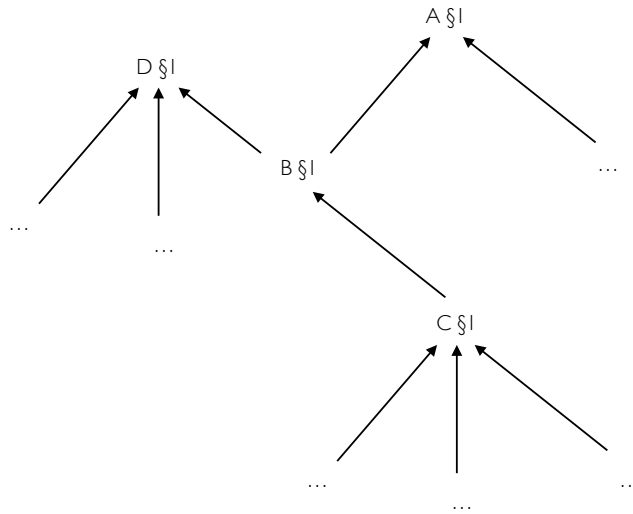


Fig. 4.2 Network pruning

The most important measure was direction, therefore these outlying cases were eliminated for their arbitrariness, To choose to include them in the network because they happen to fall within the ‘common neighbors’ tool in Atlas.ti and, in essence, to then expand the analysis to cover the whole of every cited paragraph in every direction, would mean analysing the entirety of European jurisprudence. This would undoubtedly be a worthwhile project to be undertaken with the aid of automated processing (as discussed in the final chapter), but one which is currently quite out of the realm of possibility for a hand-coded approach.

Given this reduction, the resulting networks were mapped out using the process described in section 3. With the drastic difference in size between sections 78 and 91 in comparison to the nine others, and similarly in their relevance to the legal test that was decisive in the *Schrems* case, they were singled out for analysis. Not only did sections 78 and 91 produce the largest networks, they were also intrinsic to understanding why the *Schrems* case was extended to cover a privacy violation based on the large number of people affected by a propertyed intrusion of privacy. I don’t believe this is a happy coincidence. The fact that the most ambiguous (and perhaps contentious)

part of the decision is also the one that has the largest citation network is evidence of the vagueness of the category of privacy, and moveable nature of its boundaries.

As we shall see in Chapter 5, the infringement of privacy in *Schrems* is not about the depth at which an interference occurred, nor is it described or analysed in terms of a breach's effect on the enjoyment of 'intimate' key rights; it is primarily discussed in terms of the breadth of its application, which is quite different from the cases within the network that are cited as precedent. Like the running in the halls of Winter's example, we are presented with a situation in which it is obvious to one interpreter where the separations between categories in the broad collection of data and the depth of what it describes (whether or not it is intimate) can be drawn, whereas this might not be remotely the case for another. And yet, these distinctions or categorical decisions aren't made clear at all. Therefore, it is critical to look at those sections which deal directly with these delininations: §78 and §91.

Section 78 concerns the discretion afforded to the Commission in their review of the adequacy of third country protection. In this the Court found that the review should be strict given two considerations,

1. "...the important role played by the protection of personal data in the light of the fundamental right to respect for private life", and
2. "...the large number of persons whose fundamental rights are liable to be infringed"<sup>53</sup>

The Court stipulates these conditions by referring to the decision in *Digital Rights Ireland* by analogy, where the second condition was specified as "the extent and seriousness of the interference"<sup>54</sup> not the large number of persons *as a matter of principle*.

Section 91 adds to these stipulations with a third condition in that "[t]he need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a

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<sup>53</sup> *Schrems* §78

<sup>54</sup> *Digital Rights Ireland* §48

significant risk of unlawful access to that data,”<sup>55</sup> again echoing to *Digital Rights Ireland* where, in this instance, the wording is near identical. Given the importance of these two sections into interrogating the meaning of adequate protection and, how “a large number of persons” is considered as a serious instance of interference and, the large amount of data of their given networks, these two sections were selected for their ability to produce salient results. The reworked networks can be seen below.

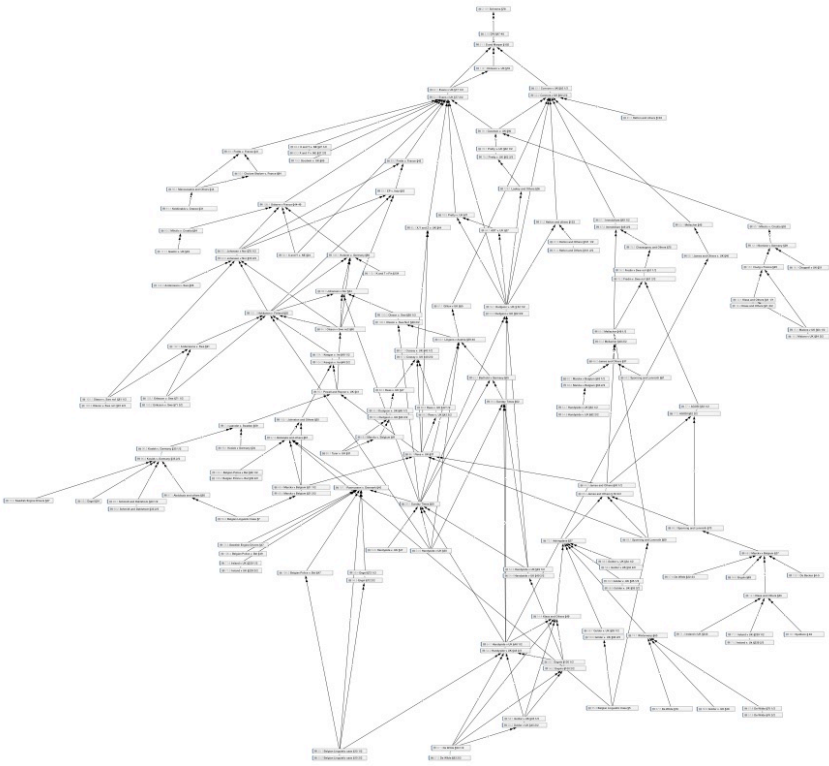


Figure 4.3. Schrems §78

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<sup>55</sup> Schrems §91

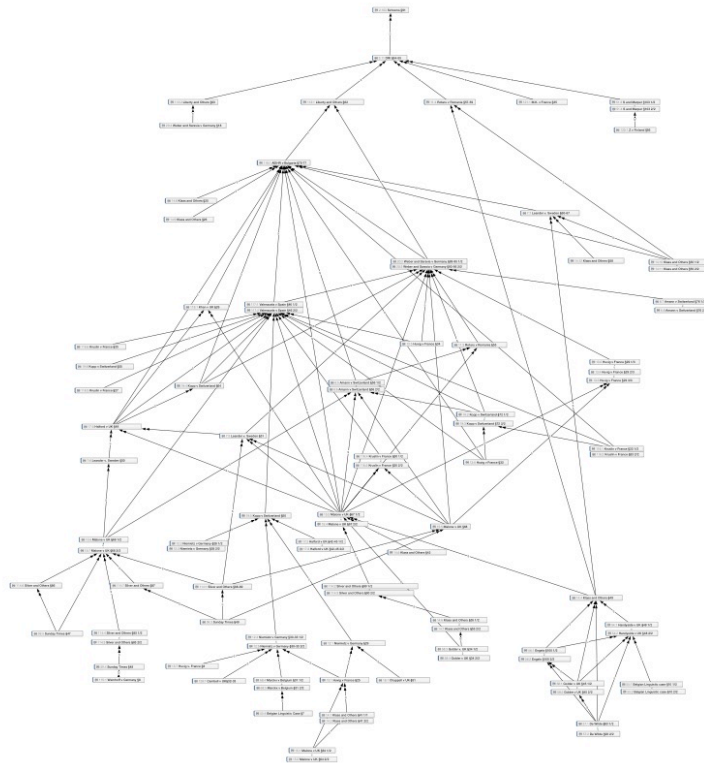


Figure 4.4. Schrems §91

With that knowledge, the networks of sections 78 and 91 are explored in Chapters 6 and 7 using a number of metrics from graph theory to provide an empirical justification for the selections of prototype precedents outside of linguistic theory. This reinforces the analysis using means outside of the theoretical commitments of conceptual metaphor theory to give it a more consolidated grounding. This includes a network analysis using factors such as Eigenvector Centrality, Betweenness Centrality, Closeness Centrality, Distance from the Parent case, and Eccentricity. These metrics are used to define clusters of conceptual similarity among precedent cases to compare with the conceptual clusters found in the network analysis.

Finally, the analysis looks at the specific metaphors in the prototype cases, edge cases (those outside the network clusters), and the construction of certain categorical distinctions. It explores how some precedent cases come to exemplify prototypes when invoked by the Court through the use of principle and purpose rather than the more nuanced approach of an actual, detailed comparison of the cases.

## Network Metrics and Clusters

As suggested by Fowler et. al.,

A network analytic approach ... comports with how scholars generally think of law as an interconnected set of legal rules resulting from the repeated use and interpretation of those rules in different cases over time .... It therefore seems reasonable to determine how relevant a particular opinion is by considering how it is embedded in the broader network of opinions comprising the law.<sup>56</sup>

However, these network analyses are not weighted equally. They show the relevance of case citations on the whole but they neglect to address the intersectional nature of legal reasoning. Without an understanding of where the citations come from in the text of the decisions, the relevance of the linkages is only a surface attribute of the reliance on precedent. This notwithstanding, the method employed in network theory, in this regard is still highly useful if done at the correct level. The approach taken by Fowler *et. al.* and similar precedent analyses are still informative namely, for the metrics used to discuss the relevance of certain nodes. These nodes (the cases themselves vs sections of cases in previous approaches vs this approach, respectively) are measured for centrality.

In network theory, there are different measures of centrality that each have their strengths and weaknesses. The most basic type of centrality is *degree centrality*. This is measured by calculating the degree of a node by its incoming and outgoing citations (named *in-degree* and *out-degree*).<sup>57</sup> While this is helpful in identifying the most powerful or significant nodes, its drawback is that "it does not fully use information in the precedent network because it treats all inward citations in exactly the same way."<sup>58</sup> Degree centrality treats all neighbours with equal import and does not make any differentiation between a given node's links to well-connected or poorly-connected neighbours. One way around this is to use the metric of Eigenvector centrality.

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<sup>56</sup> Fowler, H., Johnson, T., Spriggs, J., Jeon, S., & Wahlbeck, P.; 2007. 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court,' 15 *Political Analysis* 324, at 326.

<sup>57</sup> See for reference, Newman, Mark; 2010. *Networks: An Introduction*. Oxford Univ Press.

<sup>58</sup> Fowler et. al. 2007, at 329.

Eigenvector centrality not only measures the amount of neighbours a node has, but also the relative importance of those neighbours. This means that a section of text can be seen as significant if it is connected to a substantial number of other sections or if it has a few key neighbours, or a combination of these factors. In the analysis here, this kind of metric is instrumental to measuring the prospects of prototypical cases of privacy. The sections that have the higher results after measuring for Eigenvector centrality are the sections that are the most well-connected in the network. This gauge is a good substitute for the subjective reasoning that might come from assuming prototypical membership without objective grounding (which can't be done for an abstract notion), and more time-effective than searching for the notion by analysing all of European jurisprudence.

Eigenvector centrality allows us to examine the structure of the relationships between citations as a measure of their connectedness to the network. Not only does this give us a rough score for potential value of information but, more importantly, it also allows us to build clusters of related ideas. These clusters represent different types of prototypes of privacy which are dependent on the context of the case.

Before discussing how this relates to the concept of privacy, it will help to work from a tangible example. We can explain this idea by examining the category of *birds*, an often used example in the study of prototypes.

If we wanted to find out what the prototypical member of the category *bird* was, then we would have to make a number of choices. One of the ways we might begin is to ask a representative group of people to describe a bird, then compare their responses to each other, and finally, mark down the category *bird*'s necessary and sufficient conditions. How would we do that? We could say: feature *A* appears in all examples, so it should be included as a necessary component of the category *bird*. Then we could rank the occurrences of other features (*B*, *C*, *D*, etc.) and proceed to list the features that are most common as more central to the category.

A second approach might be to note the sequence in which the features were listed; *has feathers*, *flies*, *lays eggs*, *has a nest*, etc. and label them as feature one, two, three, four, etc. We could then

rank the conditions by taking their cumulative score from all respondents. Both of these approaches might be indicative of how people rank category membership on the whole. It would give us a good approximation of the average set of conditions on which category membership is judged. However, it wouldn't tell us anything about the structure of that membership.

To find out about structure, we might build a network to trace the responses in a way that shows what features followed others and how often these combinations were expressed. As in, if someone said *has feathers* first, would they say *lays eggs* next? Or *flies*? If you mapped all of these responses, you would start to have an idea of the answer to the question as the relative importance of certain features to make a good case defining the category *bird*. More importantly, what you would also have discovered is the existence of clusters of certain types/sets of answers. You would be able to identify the cluster of interviewees who were picturing a robin vs. those who were picturing an eagle (perhaps measured by the relative importance given to features like colourful feathers vs. talons). With this information it would be possible to run *community detection* algorithms to determine “the natural fault lines along which a network separates.”<sup>59</sup> This process not only allows for an understanding of prototypes in the entire network, but also the prototypes in specific clusters, or communities of nodes. Prototypes are not single images in the middle of a complex Venn diagram listing common and uncommon feature sets, but clusters of features that interact with each other and form independent relationships. Measuring Eigenvector centrality and other metrics will help expose exactly this type structure.

The aim of the approach is to identify and explore clusters and their prototypes.

Once the clusters, their prototypes, and their hubs were identified, the approach outlined in section I was used to identify and understand the salient metaphors within the different clusters. The results of this analysis (explored in Chapters 6 and 7) were then compared to the legal category distinctions made in the cited cases, and ultimately to those found in *Schrems*, to understand how a judge conceived of, and expressed, the notion of privacy and data protection.

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<sup>59</sup> Newman, Mark 2010, at 357.

By the end of the project, I will have mapped out the metaphors that are being used to construct a concept of privacy, and compared them to the traditional legal determination in *Schrems*. This allows for a review of the method to extend it to other notions of information and information law. If we are to find a solution to the translation problem, rigour may be our only escape from an endless morass of competing concepts, ambiguous language, and the requirement to adapt to an ever-shifting landscape.



## Chapter 5:

### *Max Schrems v the Data Protection Commissioner: Spatial Metaphors of Adequate Protection*

“The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.”

-Robert Cover<sup>1</sup>

“If linguistics can be said to be any one thing it is the study of categories: that is, the study of how language translates meaning into sound through the categorization of reality into discrete units and sets of units.”

- William Labov<sup>2</sup>

Dan Hunter, a legal theorist who recognises law’s need for a theory like cognitive linguistics, paints a simple picture to highlight the issues raised through the ambiguity of concepts in the law. He begins by describing a situation where a judge must decide on an arguably undefined rule in a case that only has two precedents. Imagine a man who is on an overnight ferry. During the course of his trip, his luggage is lost. Feeling that the ferry company should be held responsible, the man sues them. The judge now has a decision to make about whether or not the company is liable, which is complicated by the fact that there are only two precedents in this case for reference. Hunter lays out the precedent:

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<sup>1</sup> Cover, Robert M.; 1983. ‘The Supreme Court, 1982 Term, Foreword: Nomos and Narrative,’ 97 *Harv. L. Rev.* 4, at 18.

<sup>2</sup> Labov, William; 1973. ‘The Boundaries of Words and their Meanings,’ in *New ways of analyzing variation in English*. Charles-James N. Bailey and Roger W. Shuy (Eds.). Georgetown University Press. 340, at 342.

The first precedent involved a hotel proprietor who was found liable for a guest's stolen luggage, since it was held that part of the contract of hospitality involved reasonably safe storage of the guest's belongings. The second precedent involved a railroad company, which was found not liable for the loss of the luggage of a passenger who traveled in a sleeper berth, on account of the contract being primarily for travel and not for lodging.<sup>3</sup>

So, it falls to the judge to figure out whether the ferry is more reasonably conceived of as a "floating hotel" or a "seagoing train".<sup>4</sup> There are many similarities between the case at hand and the precedent examples that could be applied either way. What tools does this judge have at his or her disposal to inform the decision in a case like this? Moreover, how is a judge to decide when the terms in play are even more ambiguous? Take, for instance, concepts like "adequate protection", or "essential equivalence"; what is a judge to do in a situation where the concepts are so abstract that his or her only recourse or satisfactory solution is to find the "essence" of a law?

Judges usually do note that these concepts, these vague terms, are inaccurate and devoid of meaning in themselves. However, the justification for their interpretations are found in phrases such as, "must be understood as" or "must be read to mean." How they arrive at these interpretive imperatives is anybody's guess. They are at once acknowledging a term's ambiguity while simultaneously connoting its concrete meaning. To put this another way,

Typically, interpretations should not fill the law with that which it does not already contain, but should uncover what is already there. The text should separate permissible from impermissible interpretations. The myth that sustains this view is the idea that legal provisions come with meanings attached to them. If one had access to the underlying meaning, then the law could be found, correct applications could be distinguished from incorrect readings, and development could be distinguished from a mere statement of what the law really is. Alas, this premise crumbles under a little closer reflection and with a little distance from the legal enterprise.<sup>5</sup>

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<sup>3</sup> Hunter, Dan; 2001. 'Reason is Too Large: Analogy and Precedent in Law,' 50 *Emory LJ* 1197, at 2000

<sup>4</sup> *ibid.*

<sup>5</sup> Venzke, Ingo; 2011. 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation,' 34 *Loy. LA Int'l & Comp. L. Rev* 99.

The law traditionally treats its categories as containers to be filled with criteria for tests of necessity and sufficiency to enable them to apply precedent based on an idea that there is meaning to be found in the categories in and of themselves. But, as we have seen, categories are not built like this. As Lakoff and Johnson note,

...abstract concepts are not defined by necessary and sufficient conditions. Instead they are defined by clusters of metaphors. Each metaphor gives a partial definition. These partial definitions overlap in certain ways, but in general they are inconsistent, and typically have inconsistent ontologies.<sup>6</sup>

If distance is required from traditional legal scholarship, then a generous step back is what we will now take. The problem of legal ambiguity isn't less obscured when judges empty their lexical repositories of phrases like 'apparently' or 'must be understood to mean' without giving any qualification of their reasoning. In fact, it is often the case that when a jurist is faced with dispelling the inner workings of meaning constructions, they inevitably reach for an emotive or rhetorical crutch by referencing the 'nature' or 'essence' of a law, right, or liberty. It is certainly not new to suggest that the law doesn't contain all its inherent meaning within itself, but the ambit of law requires a conceptual construction that often goes overlooked: the use of space built by spatial metaphor. The law attempts to squeeze ideas through the sieve of analogical precedents, building up essential components to qualify everything from jurisdiction to practical action by building notions on spatial premises. Though rule-generative law has its function, it doesn't contribute in a substantive way when it comes to exploring the meaning of its edicts. This investigation is best performed by analysing conceptual metaphors in the law.

This chapter investigates the spatial metaphors in *Schrems* to give an idea of the research's starting point, before the following chapter traces the precedent chain of the *Schrems* case's consideration of adequate protection, the margin of appreciation given to the Data Protection Commissioner, and the relationship between personal data and the right to privacy. This chapter aims to show the viability of:

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<sup>6</sup> Lakoff, George & Johnson, Mark; 1986. 'The Metaphorical Structure of The Human Conceptual System,' in *Perspectives on Cognitive Science*. D. Norman (ed.). Ablex Publishing Company 198 at 206.

- the use of spatial metaphors in the reasoning of the Court
- metaphor processing to identify salient image schemas, and
- introducing the idea of the force of prototype to allow for a more in-depth consideration in later chapters

The next chapters will continue this project by using other concepts found in the precedent network in *Schrems*. They will look at the force of prototypes in the precedent chain to identify stronger vs weaker examples of a given principle, assess how those influence the construction of a legal category (like the right to privacy), and how this relates to data protection.

## **I. Max Schrems v the Data Protection Commissioner**

### *Background and Framework*

...the referring court asks, in essence, whether and to what extent Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, prevents a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from being able to examine the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.<sup>7</sup>

Throughout the process of Maximillian *Schrems*' challenge to the European privacy framework, the emphasis has been on the dismantling of Commission Decision 2000/520/EC outlining the infamous Safe Harbour principles for overseas data transfers to countries outside the European Union. The case does not hinge solely on the question of whether the United States provided an adequate level of protection against surveillance in content, but ultimately asks whether the Data Protection Commissioner had a legal duty and the requisite authority to *investigate* whether the United States provided an adequate level of protection beyond the Commission's previous

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<sup>7</sup> *Schrems* §37.

appraisal of those protections. This is to say, the content of the data surveilled in the United States was not the criterion used to measure the safeguarding of Mr. *Schrems*' data/privacy; the case's central concern was to determine whether the principles outlined in the Safe Harbour agreement provided an adequate level of protection regardless of the material reality of surveillance of Mr. *Schrems*' data in the United States. Yet, to apply the legal test they developed, the Court relied on analogy to previous cases to justify the seriousness of the purported interference with Mr. *Schrems*' right to privacy.

Mr. *Schrems* brought the case to the High Court of Ireland, submitting that,

the law and practice in force in that country [the US] did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities. Mr *Schrems* referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA').<sup>8</sup>

The High Court agreed that the mass surveillance conducted in the United States did, in fact, violate the principles of privacy set out in the Irish constitution and,

if the main proceedings were to be disposed of on the basis of Irish law alone, it would then have to be found that, given the existence of a serious doubt as to whether the United States ensures an adequate level of protection of personal data, the Commissioner should have proceeded to investigate the matters raised by Mr *Schrems* in his complaint and that the Commissioner was wrong in rejecting the complaint.<sup>9</sup>

The High Court then felt it necessary to send the claim to the CJEU to ask whether or not the Safe Harbour decision, which outlines the guarantees for the protection of data between the EU and the United States, is in violation of EU law; in particular, whether Articles 7 and 8 of the Charter “authorized the Commissioner to break free”<sup>10</sup> of the Safe Harbour decision.

What is interesting about this case for this project is its heavy reliance on concepts built on notions of 'essential', 'adequate', and 'proportional'; measures which are fairly devoid of meaning in and of

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<sup>8</sup> *Schrems* §28.

<sup>9</sup> *Schrems* §33.

<sup>10</sup> *Schrems* §35.

themselves. What follows is an investigation into how the concepts used by the Court were constructed so as to fill the semantic void of vague language. Subsequent sections will then interpret the spatial metaphors used and ask what conceptual picture the Court paints in relation to the processing of personal data and its relation to private life; in the grander scheme, the difference between the universal and the particular.

### *Building the Legal Concepts: Adequate Protection*

The pertinent legislation for the assessment of adequate protection for the transfer of personal data is Article 25(2) of Directive 95/46, known as the Data Protection Directive.<sup>11</sup> The Commission is given power through Articles 25(5) and 25(6) to enter into negotiations with third countries to rectify any deficiencies of protection. These negotiations resulted in the ratification of the Safe Harbour agreement under review by the Court. The Court notes in paragraph 70 of the *Schrems* judgment that “neither Article 25(2) of Directive 95/46 nor any other provision of the directive contains a definition of the concept of an adequate level of protection.”<sup>12</sup> The only semblance of a definition is given as,

The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied within that country.<sup>13</sup>

This non-exhaustive list outlines the first frameworks of the legal test of adequacy. Though the Court doesn't follow this reasoning in this particular order in the judgment, all the points are non-sequentially covered and can be recompiled as,

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<sup>11</sup> The Data Protection Directive was replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council Of 27 April 2016.

<sup>12</sup> *Schrems* §70.

<sup>13</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281. 23/11/1995 P. 0031 - 0050.

- I. Under the heading of 'ALL of the circumstances':
  - I.1 The *nature* of the data
  - I.2 *Purpose and duration* of the operations
  - I.3 The sending country and the receiving country
    - I.3.1 Essential Equivalence of laws
  - I.4 Effective Compliance

#### *Condition 1.1: The Nature of the Data*

In looking at the *nature* of the data, the Court never attempts to distinguish between the data in question (Mr. *Schrems* Facebook data) and other types of data, save for defining it as *personal data* within the meaning of the directive.<sup>14</sup> Although it is termed personal data, the Court never goes into an explanation or exploration of if or why the data qualifies as 'personal'. The test for this categorisation [of data and information] is the following:

...any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.<sup>15</sup>

That the Court doesn't qualify Mr. *Schrems*' data as personal is perhaps a moot point, as the definition cited above seems to cover nearly all data regarding just about any individual. As discussed in Chapter 2, in the European framework, and to use the words of Paul Schwartz and Daniel Solove, "[t]he definition [of personal identifying information] turns on whether a natural person is capable, directly or indirectly, of identification through a linkage or some other reference to available data...information that is identified or identifiable receives an equivalent level of legal protection."<sup>16</sup> The point here is that the "nature" of the data doesn't seem to matter much and what should concern us is its uses; an ontological (and teleological) assumption not clearly reasoned out by the Court, but one which we will see is intricately linked to the way the Court has set up the structure of its concepts in point 1.2.

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<sup>14</sup> *id* Art 2(a)

<sup>15</sup> *ibid.*

<sup>16</sup> Schwartz, Paul M. & Solove, Daniel J.; 2013. 'Reconciling Personal Information in the United States and European Union,' 102 *California law review* 877.

We can add to the criteria to be tested in point I.I so that it now reads:

I.I. The *nature* of the data

I.I.I. Is the data of a 'personal' nature? Does it relate to an identified or identifiable person?

*Condition I.2: Proportionality*

The Court, in paragraph 34 of the judgment, lays down two initial conditions by which to evaluate the purposive component of data privacy. The first stipulates that data must not be collected on a "casual and generalised basis without any objective justification based on considerations of national security or the prevention of crime that are specific to the individual concerned."<sup>17</sup> The Court continues in paragraph 90, supported by Commission communications 846 and 847<sup>18</sup>, that the processing of data in the US must respect the "purposes for which it was transferred," and that any processing beyond that purpose was "beyond what was strictly necessary and proportionate to the protection of national security."<sup>19</sup> This is a call for an assessment of the proportionality of the intrusion into privacy, a topic explored in a wealth of scholarship on the subject.<sup>20</sup> The second condition is that this justification is paired with "appropriate and verifiable safeguards."<sup>21</sup> This requirement can be subsumed under requirement I.4. In the case of the *duration* condition, the Court references the decision in *Digital Rights Ireland and Others*, making the point that the duration of the retention of data must relate to the specificity and purpose of the intercepted or collected data, and that it must be objectively "targeted", "specific", and "justified". In this way it is subject to the same proportionality assessment as the initial teleological test.<sup>22</sup> The Court refers to the Irish High Court's analysis according to the Irish constitution, in that,

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<sup>17</sup> Schrems §34

<sup>18</sup> Communication from the Commission to the European Parliament and the Council on Rebuilding Trust in EU-US Data Flows, COM(2013) 846 final, 27.11.2013; Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, COM(2013) 847 final, 27.11.2013.

<sup>19</sup> Schrems §90

<sup>20</sup> See Chapter 2's review of proportionality.

<sup>21</sup> Schrems §34

<sup>22</sup> Schrems §93 and *Digital Rights Ireland* §57-61.



it would be necessary to demonstrate that the interception is targeted, that the surveillance of certain persons or groups of persons is objectively justified in the interests of national security or the suppression of crime and that there are appropriate and verifiable safeguards.<sup>23</sup>

However, the Court doesn't go through an analysis of the content of, or reasoning behind, the interception, as the US intelligence services' lack of transparency made this information unavailable. We can add these stipulations to point 1.2:

- 1.2 *Purpose and duration* of the operations must be proportional to a legitimate aim
  - 1.2.1 Is the interception or processing targeted and specific?
  - 1.2.2 Is the interception or processing legitimate for national security?
  - 1.2.3 Has the data been retained beyond the duration needed to achieve that aim?

### *Condition 1.3: Essential Equivalence*

In paragraphs 70-72 the Court states, “as is apparent from the very wording of Article 25(6) of Directive 95/46,” a third country must “ensure” adequate protection. The Court reasons that it is the “legal order”<sup>24</sup> of the third country that is responsible for ensuring protection, and that adequacy does not have to come from an identical framework but from a system which shares “essential equivalence”.<sup>25</sup>

In this case, the Court initially marks out what is to be considered as part of a third country’s “domestic law...or international commitments”<sup>26</sup> and then weighs it against the protection enshrined in EU law. Their conclusion, in essence, is that it is not necessary for a protection to be the domestic law of a third country or an international commitment, as long as it,

...is founded essentially on the establishment of effective detection and supervision mechanisms enabling any infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life...<sup>27</sup>

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<sup>23</sup> Schrems §33.

<sup>24</sup> *id* at §74.

<sup>25</sup> *id* at §73.

<sup>26</sup> *id* at §81.

<sup>27</sup> *ibid*.

The system by which data is protected must be capable of detecting, identifying, and punishing infringements of the rules. The Court goes on to specify that having non-specific or unmonitored access to “the content of electronic communications” is a breach of “the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter”<sup>28</sup>. The Court supports this by referring to the case law cited in the judgment of *Digital Rights Ireland and Others*,<sup>29</sup> where even though the directive in question in that case did constitute an interference with the right to privacy, it didn’t deal with the *content* of electronic communication. The Court further stipulates that the legislation did not give any legal remedy for someone “to have access to personal data relating to him, or to obtain the rectification or erasure of such data,”<sup>30</sup> thus violating a condition of the essence of privacy protection. Consequently, point 1.3 can be stated as:

### 1.3. The sending country and the receiving country

1.3.1. Essential Equivalence: Do the rules of law in the receiving country have mechanisms that;

- 1.3.1.1. Have independent authority?
- 1.3.1.2. Can identify breaches of privacy?
- 1.3.1.3. Contain judicial mechanisms to provide recourse?

### *Condition 1.4: Effective Compliance*

The laws of the receiving country must comport *purposively* (they must share the same intentions, i.e. point 1.2) AND those laws must set up a mechanism which shares the same essence of privacy reflected through protection and recourse requirements. Even with those mechanisms in place, “those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within the European Union,” the remit of point 1.4.<sup>31</sup> Not only is there a duty to enshrine equivalent law, but that law must bear fruit by complying with those mechanisms and providing the Commission with “the content of the applicable rules... and the practice designed to ensure compliance with those rules.”<sup>32</sup> Point 1.4 can be understood as:

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<sup>28</sup> *id* at §94.

<sup>29</sup> *Digital Rights Ireland* §34

<sup>30</sup> *Schrems* §95

<sup>31</sup> *id* at §74.

<sup>32</sup> *id* at §75.

## I.4 Effective Compliance

I.4.1. Are the established mechanisms effective at providing (point I.3)?

I.4.2. Are the mechanisms transparent in their means and reality of compliance?

Furthermore, given the heading “under all the circumstances” (one of which is the amount of time which has passed since an adequacy decision has been made), the Commission is obliged to review those mechanisms “when evidence gives rise to a doubt in that regard.”<sup>33</sup> The Court argued that the Commission must go beyond the mere purpose of the third country’s legislation and commitments to look at all of the circumstances (both when it makes its assessment and at any time after to include new situations as they arise), one of which would necessarily be the utter breadth of people who may be affected. Therefore, as the Court states, “the Commission’s discretion...is reduced...[and] review...should be strict.”<sup>34</sup> We can summarise point I.5 as the obligation to review in light of new evidence.

The fully elaborated test is now more rigorous and categorically stated:

I. Under the heading of ‘ALL of the circumstances’, chiefly:

I.1. The *nature* of the data

I.1.1. Is the data of a ‘personal’ nature? Does it relate to an identified or identifiable person?

I.2. *Purpose and duration* of the operations must be proportional to a legitimate aim

I.2.1. Is the interception or processing targeted and specific?

I.2.2. Is the interception or processing legitimate for national security?

I.2.3. Has the data been retained beyond the duration needed to achieve that aim?

I.3. The sending country and the receiving country

I.3.1. Essential Equivalence: Do the rules of law in the receiving country have mechanisms that;

I.3.1.1. Have independent authority?

I.3.1.2. Can identify breaches of privacy?

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<sup>33</sup> *id* at §76.

<sup>34</sup> *id* at §78.

1.3.1.3. Contain judicial mechanisms to provide recourse?

#### 1.4. Effective Compliance

1.4.1. Are the established mechanisms effective at providing (point 1.3)?

1.4.2. Are the mechanisms transparent in their means and reality of compliance?

#### 1.5. Review of the adequacy

1.5.1. Has evidence arisen that questions the reality of (1.3) or (1.4)?

1.5.2. Is the harm in question enough to warrant a strict review?

As the Commission doesn't "state, in Decision 2000/520, that the United States in fact 'ensures' an adequate level of protection" by fulfilling these conditions, and as a result of their finding that the US' self-certification principles were not passable (particularly on condition 1.5.1), the Court invalidated the Safe Harbour agreement and concluded that the Data protection authorities had a duty to revisit the substantive merits of Mr. *Schrems*' claim.

#### *Legal Categories*

Adequate level, essential equivalence, effective legal order, reduced discretion...

To call these terms vague would be a wild understatement. Jargon, legalese, however else one may label them, they leave something to be desired when it comes to explication. Even though the terms they use are informed by a long litany of cited case law that helps to draw the boundaries of each concept's construction, the ambiguity is still pernicious. The danger is to allow these ambiguous terms to serve as a scaffolding for big concepts whose finer details can be blurred out as and when new circumstances demand it, creating a situation which depends less on the subtlety of the inner structure of a concept and more on finding comparable precedents that share some of the necessary conditions. A situation which depends more on principle and edict than it does on an expertise of 'all the circumstances' and knowledge of the way legal concepts may be built. Concept construction, in this regard, can be understood to mean formation of categories with boundaries demarcated by a chain of justification; a networked chain of justification to mark out necessary and sufficient conditions by which a legal category, or generalised principle, can be assessed in the light of a particular circumstance.

We begin to see the Court spelling out the conditions by which the essence of privacy, adequate protection, and essential equivalence should be measured, citing previous case law to justify their reasoning. But even though the case law is cited, it is often just a restatement of principles or a replacement of one ambiguity with another. Take, for instance, the chain of justification stemming from adequate protection in paragraph 78, requiring that the Commission's discretion in measuring adequate protection is reduced on the basis of, "the important role played by the protection of personal data" in the protection of privacy and "the large number of persons whose fundamental rights are liable to be infringed."<sup>35</sup> Here the Court again bases its reasoning on the *Digital Rights Ireland and Others* case, in which paragraphs 47 and 48 state,

With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, **the nature of the right at issue** guaranteed by the Charter, **the nature and seriousness of the interference** and the **object pursued by the interference**. (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).<sup>36</sup>

It is not entirely clear what the duty is; we are told the factors that must be considered but not *how* to consider them. One must again look back at the referenced precedent. In the cited section of *S. and Marper*<sup>37</sup> refers by analogy to the margin of appreciation given to the Commission in its review by way of the analogous margin of appreciation given to national authorities. In this case, the Court is more explicit in explaining the conditions of examples where a narrow margin is required,

where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004, with further references).<sup>38</sup>

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<sup>35</sup> *id* at §78

<sup>36</sup> *Digital Rights Ireland* §47, emphasis added

<sup>37</sup> *S. and Marper v. The United Kingdom*, Judgement of the Court of 4 December 2008. CE:ECHR:2008:1204JUD003056204. (*S and Marper*).

<sup>38</sup> *S and Marper* §102.

Or,

Where a particularly important facet of an individual's existence or identity is at stake...(see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-...).<sup>39</sup>

To be contrasted with circumstances where a wide margin of appreciation must be given,

Where...there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it...(see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-...).<sup>40</sup>

As discussed in point 1.5 above, part of the essence of adequate protection is consideration for the seriousness of the infringed right in question. The court uses this metric to determine how narrow or wide the margin of appreciation will be. Whether something is “crucial”, affects “intimate or key rights”, or whether a “facet of an individual's existence or identity is at stake”, is what the Court must first establish and we are given indications on where to look to decode those criteria.

The first is the effective enjoyment of key rights; as laid out in *Connors* paragraph 82:

In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A, no. 104, § 55).

The Court attributes the power to decide how key rights are to be understood in national contexts to national authorities, given that their proximity to a national understanding of these principles is closer to the truth than an international body. In cases where the court finds that the rights in question pertain to a fundamental sphere of intimacy and have been infringed upon in a

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<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

serious way, the Court can act as an arbiter of the violations and as an authority on the understanding of those rights.

The court continues by citing *Dudgeon* §52 (in part):

As was illustrated by *the Sunday Times judgment*, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (p. 36, par. 59). The Government inferred from *the Handyside judgment* that the margin of appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in *the Handyside judgment*, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (p. 22, par. 48).

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2).<sup>41</sup>

The Court weighs the legitimacy of interference by looking at whether a situation involves an issue of morality and if, as in *Connors*, the proximity of national authorities to the communal understanding of a right supercedes the general principle, unless "the activities involved" in that interference with a right existed in the "most intimate" of ways. The court is attempting to qualify the margin of appreciation being reduced in its current case by reaching to analogous case law in which the court weighed in on the contents of the right to privacy citing infractions that are of the most intimate kind. It further supports this action with another case in *Gillow* §55:

As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be made to the Court's case-law (see, notably, *the Lingens judgment* of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-40). The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued. In addition, the scope of the

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<sup>41</sup> *Dudgeon v. The United Kingdom*, Judgement of the Court of 22 October 1981. CE:ECHR:1983:0224JUD000752576 (*Dudgeon*) at §52.

margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved. In the instant case, the economic well-being of Guernsey must be balanced against the applicants' right to respect for their "home", a right which is pertinent to their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.<sup>42</sup>

Is this a defensible 'extension'? The *Dudgeon* case was concerned with a law outlawing homosexual acts, *Gillow* asked whether a breach in privacy allowed the Commission to make a decision that would lead to an individual being deprived of their home. These two cases fit, quite evidently, into the category of private life, particularly in regards to the *seriousness* of an enjoyment of rights in the "most intimate aspects" of privacy. However, exactly how this same reasoning can be extended to a case that does not relate to the intimate privacy of one (or two) individual(s), but to a less intrusive violation of the privacy of a large number of people, is a valid question. The interference of privacy in *Schrems* is not a question of the depth at which it occurred, or how it is described and analysed in terms of the breach's effect on the enjoyment of 'intimate' key rights; the central problem is the breadth of the intrusion's application. In light of this, we might be compelled to ask if this case is actually about privacy, in its traditional legal sense? The Court never states how *Schrems* qualifies as the same level of seriousness as the aforementioned cases, at least not in an explicit manner. Their opinion hinges instead on whether *Schrems* meets the conditions set out by case law; conditions which are not reasoned out with any sort of transparency.

Taking a little distance from traditional justificatory reasoning, to push our understanding further, we can investigate the extension process from precedent cases to their peripheral arms.

## **2. Networks of precedent**

One way to look at networks of precedent is through the ideas of proximity, weight, and vision, which inform the spatial metaphorical scaffolds set up in the *Schrems* judgment. With these

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<sup>42</sup> *Gillow v. The United Kingdom*, Judgement of the Court of 24 November 1986. CE:ECHR:1987:0914JUD000906380 (*Gillow*) §55.



frameworks laid out, we can then work back to uncover the original interpretations cited in the Court's reasoning in this case. Looking at the force of precedent is not an entirely new phenomenon, particularly utilising the strength of network analysis.<sup>43</sup> As noted in Chapter 4, most network analysis focuses on the connections as a unit of measure in and of themselves, as though all connections have equal weight behind them. Urska Sadl and Sigrid Hink characterise these studies by noting that they,

can successfully map the structure of the case-law, but they are not able to say anything about the 'legal quality' of case to case citations, the dynamics behind citation patterns and their precise interconnectedness to specific outcomes.<sup>44</sup>

Yet, even their analysis falls prey to an over-generalisation about the force of precedent as it relies on an analysis devoid of the content of the cited paragraph, and only notes the fact that each one has a citation.<sup>45</sup> They found that the strength of case citations (how interconnected the citations are to each other) wasn't terribly indicative of how the rationalisation was made to categorically use citizenship law to decide the relevant precedent. They found it difficult to ascertain underlying principles in the citation chains:

The cases are held together by specific repeated formulations, meaning judicial rhetoric, rather than the rationale of cases. Sometimes, the principles that underlie the concept of EU citizenship (most prominently non- discrimination) are mentioned as keywords and case classifications, accompanying the judgments, but not in the text of the judgments (or even not mentioned at all).<sup>46</sup>

However difficult it may be, there is a way to look into the rhetoric of citation chains and discover its underlying properties. By applying conceptual metaphor theory to the work of network theorists (and developing the networks by hand rather than by automated analysis in the hope of finding keyword similarity), that rhetoric and its foundational conceptual framework can be exposed.

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<sup>43</sup> See for instance, Fowler, H. & Jeon, S.; 2008. 'The Authority of Supreme Court Precedent,' 30 *Social Networks* 16; Lupu, Y., & E. Voeten; 2012. 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights,' 42 *British Journal of Political Science* 214.

<sup>44</sup> Sadl, Urska & Sigrid Hink; 2014. 'Precedent in The Sui Generis Legal Order: A Mine Run Approach,' 20 *European Law Journal* 545.

<sup>45</sup> Something they admit themselves in their discussion.

<sup>46</sup> Sadl, Urska & Sigrid Hink 2014.

Before looking at the spatial metaphors set up by *Schrems*, it is first necessary to consider the network which supports them. An example of this is shown below, which represents the citation chain in §78 of *Schrems*, and provides us with an opportunity to look at this exact concept. As stated earlier in the chapter, §78 deals with the margin of appreciation being strict, reasoning that the infiltration of privacy was on par with other examples of infringement due to the breadth (rather than depth) of the interference's application.

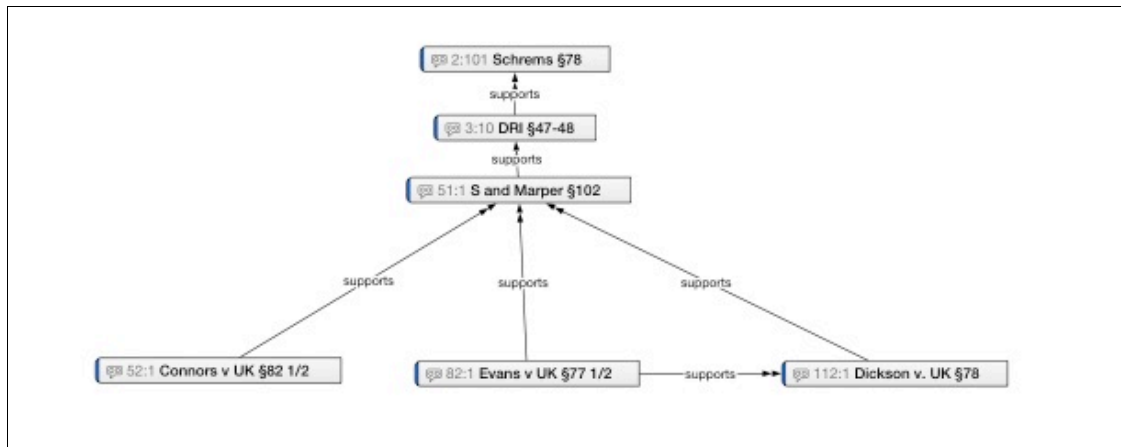


Figure 5.1 Initial network splits

Figure 5.1 shows the first layer of abstraction deriving from the citation chain started in §78. Figures 5.2-3 show that abstraction protracted layer by layer by linking the cited paragraphs to their 'parent' paragraph or paragraphs in the referent case. Each case is then linked to create a web which terminates when the 'child' paragraph no longer has a citation to a previous case, as described in Chapter 4.



Figure 5.4 shows the final result of that mapping (12 layers of connection).<sup>47</sup>

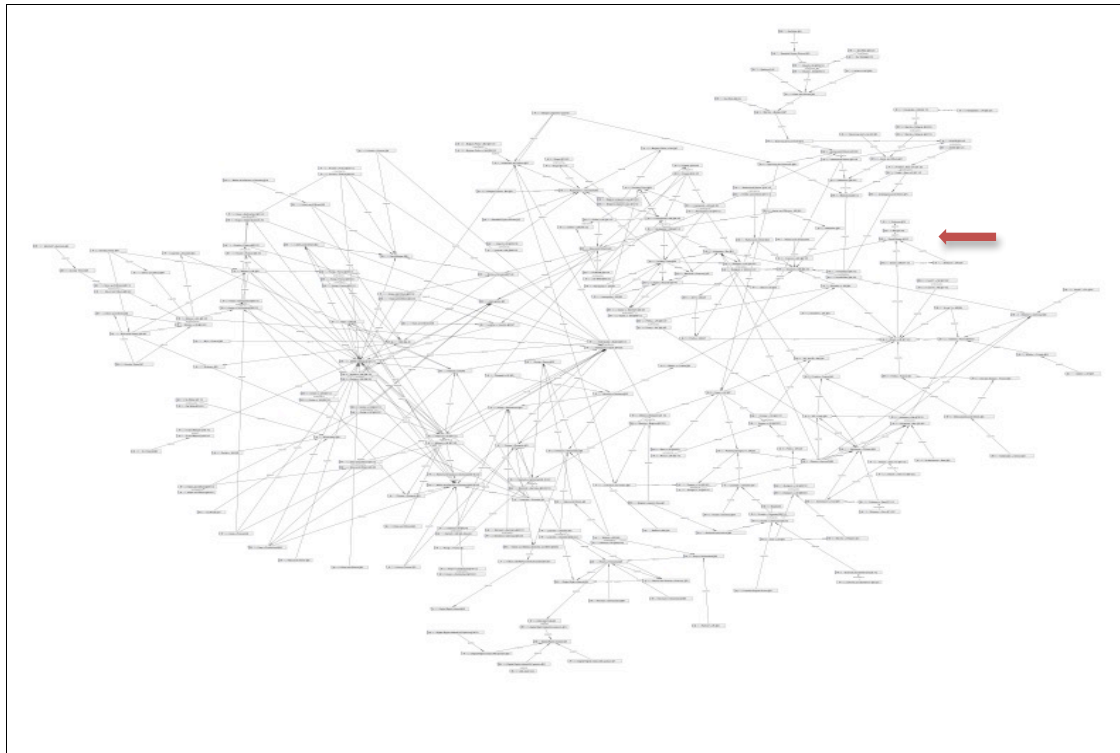


Figure 5.4: Schrems, §78, chain of citations.

In the upper right corner of Figure 5.4 (indicated by the arrow), one can see the beginning of the original chain starting with *Schrems* to *Digital Rights Ireland and Others* to *S. and Marper* to *Connors, Evans, and Dickson*, and so on. The web reveals a number of clusters that are spread throughout the web (for instance, *Malone v. UK*, §67, *AIEHR v. Bulgaria*, §75-77, and *Weber and Saravia v Germany* §93-95). Might these be the prototypical conceptual units that will let us zero in on the elusive essence of privacy through references to margin of appreciation or principles of proportionality? There seems to be a disconnect here between the notion of privacy as a function of the personal sphere of space and privacy merely as a relation between a citizen and the justification of state action. Though the two ideas are not mutually exclusive, they are certainly distinct. Before we continue down that road we have to discuss what one means here by prototypical conceptual units.

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<sup>47</sup> This networking methodology is explained more thoroughly in Chapter 4 for its justifications and methodological issues.

### *Prototype Theory, a Reminder:*

As noted in Chapter 4, the development of prototype theory is credited to Eleanor Rosch.<sup>48</sup> Her work has significantly affected the discipline of cognitive linguistics, amongst others<sup>49</sup>, and a number of legal theorists have used prototype theory to investigate legal category making.<sup>50</sup> Prototype theory boils down to where “some members of a category are regarded as more ‘true’ representatives of that category than other members of the same category.”<sup>51</sup> Rosch gives the example of membership to categories of colour,

[c]olor categories are processed by the human mind (learned, remembered, denoted, and evolved in languages) in terms of their internal structure; color categories appear to be represented in cognition not as a set of criterial features with clear-cut boundaries but rather in terms of a prototype (the clearest cases, best examples) of the category, surrounded by other colors of decreasing similarity to the prototype and of decreasing degree of membership.<sup>52</sup>

The most succinct and relatable example is given by polymath Douglas Hofstadter, in the process by which a child learns the single-member category of ‘Mother’,

A mother in a park, a mother in a soap opera, an adoptive mother, a den mother, a mother doll, a mother bee, a mother cell, a mother board, a mother drop of water, a mother deity, a mother company, the mother lode... Given that some mothers, such as Tim’s mommy Sue, are certainly “real mothers”, while others, like the mother board, are just as certainly “metaphorical mothers”, the goal of drawing a sharp, objective boundary between the two distinct subcategories seems as if it might well be within

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<sup>48</sup> For a lengthy discussion on the evidence for and debate over prototype theory see, Taylor, John R.; 2008. ‘Prototypes in Cognitive Linguistics,’ in *Handbook of cognitive linguistics and second language acquisition*. Robinson, Peter, and Nick C. Ellis, (Eds.). Routledge. For Rosch’s work see mainly: Rosch, E.; 1975. ‘Cognitive Reference Points,’ 7 *Cognitive Psychology* 532; Rosch, E.; 1975. ‘Cognitive Representations of Semantic Categories,’ 104 *Journal of Experimental Psychology: General* 192; Rosch, E.; 1977. ‘Human Categorization’ in *Studies in cross-cultural psychology*. N. Warren (Ed.). London: Academic Press. 3; E. Rosch & B. Lloyd (Eds.) 1978. *Cognition and Categorization*. Lawrence Erlbaum; Rosch, E., & Mervis, C. B.; 1975. ‘Family Resemblances: Studies in The Internal Structure of Categories,’ 7 *Cognitive Psychology* 573.

<sup>49</sup> “prototype categorization is now a locus communis of the cognitive linguistics literature, having found applications, not only in the study of categories designated by linguistic expressions but also in the study of the categories of language itself. These include the lexical categories (noun, adjective, etc.), clause types, and syntactic constructions, and even phonological categories such as the phoneme.” Taylor 2008, at 40.

<sup>50</sup> See, Larsson, Stefan; 2013. *Conceptions, Categories and Embodiment: Why Metaphors are of Fundamental Importance For Understanding Norms*. Ashgate Publishing.; Johnson, Mark L.; 2006. ‘Mind, Metaphor, Law,’ 58 *Mercer L. Rev.* 845; Winter, Steven L.; 2001. *A Clearing in the Forest: Law, Life, and Mind*. University of Chicago Press.

<sup>51</sup> Larsson 2013, at 121.

<sup>52</sup> Rosch 1975 ‘Cognitive representations of semantic categories’, at 193 as quoted in Taylor 2008, at 40.

reach. However, as we have shown with our list of blurry examples, such as the person in a novel, the doll mother, and the adoptive mother, that hope is but a beckoning mirage.<sup>53</sup>

The idea that members of a category fit more or less truly is essential to our enquiry about the distinction in the law about the essence of protection. Steven Winter, a legal theorist, looks at how the category of chair is changed by the context of a given situation and draws parallels with a similar mechanism in law. He explains that the reliance on necessary and sufficient conditions leads to a reliance on prototypes for category membership (a reliance that he would call an assumption about categories, although I don't think one needs to go that far). He makes a distinction between two effects:

- “assimilation-to-prototype effect...when all the members of a group are perceived or assumed to be like the prototypical member” and
- “reduction-to-prototype effect”, where “the variants of the central model are not even perceived as instances of the same category. The effect is to reduce the category to its central case—as when someone insists that modern art is not “real’ art.”<sup>54</sup>

The next chapter will dutifully take this concept up in its entirety to demonstrate its relevance to the present case; it is merely mentioned here as a signpost. To conduct this full analysis effectively, we must first look at both the necessary and sufficient conditions that traditionally make up category membership and then compare these to the metaphorical extensions that arise through spatial conceptualisation in the parent case. In short, we must understand where we've ended up to know how we got there.

### **3. Spatial Metaphor in *Schrems***

How can we move from embodied meanings tied to our sensory-motor experience all the way to abstract concepts like love, justice, mind, knowledge, and freedom? How can we move from embodied spatial logic and inferences all the way to abstract logical relations and inferences?<sup>55</sup>

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<sup>53</sup> Hofstadter & Sander 2008 at 38.

<sup>54</sup> Winter 2001, at 150-151.

<sup>55</sup> Johnson, Mark 2007, at 857.

Mark Johnson, among many others, has investigated this question thoroughly. As explained in Chapter 3, his work with the linguist George Lakoff is foundational to the study of cognitive linguistics. The importance of spatial metaphor is found in its ability to set up the framework of concepts. This framework enables inferences that only arise due to a spatial construct. Take, for instance, the Court's supposition regarding the margin of appreciation; "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements".<sup>56</sup> This application of proximity {contact, position, etc.} gives the State authority to know what its citizenry understands as the content of a principle in question. This conventional metaphor, understood broadly as CLOSENESS IS STRENGTH OF EFFECT, has been studied thoroughly both by Lakoff and Johnson (and subsequently by others after them).<sup>57</sup>

In their view,

We conceptualize sentences metaphorically in spatial terms, with elements of linguistic form bearing spatial properties (like length) and relations (like closeness). Therefore, the spatial metaphors inherent in our conceptual system (like CLOSENESS IS STRENGTH OF EFFECT) will automatically structure relationships between form and content. While some aspects of the meaning of a sentence are consequences of certain relatively arbitrary conventions of the language, other aspects of meaning arise by virtue of our natural attempt to make what we say coherent with our conceptual system. This includes the form that we say things in, since that form is conceptualized in spatial terms.<sup>58</sup>

Now we can begin to look at that form in *Schrems*. The first task, to follow Michael Kimmel's lead,<sup>59</sup> is to identify the relevant metaphors in the text. It is understandably tempting to look at the *Schrems* case and deduce that the explicit metaphor of 'safe harbour' (wherein DATA IS CARGO ON A JOURNEY and PRIVACY IS A SAFETY) is the most salient. However appealing and straight forward this approach might seem, it is likely to overlook many (if not all) of the implicit and obscured metaphors pertaining to privacy, margin of appreciation, and other comparable

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<sup>56</sup> *Handyside v. The United Kingdom*, Judgement of the Court of 7 December 1976. CE:ECHR:1976:1207JUD000549372 (*Handyside*) §48.

<sup>57</sup> See Lakoff & Johnson 2008, at 132.

<sup>58</sup> *id* at 137.

<sup>59</sup> See Chapter 4.

ideas/concepts. So, following the methodology laid out in Chapter 4, the text of *Schrems* has been coded and quantified to uncover the salient metaphors in the text.

In the analysis of *Schrems*, the case was coded for target and source words and analysed for co-occurrences. There were a total of 83 source domains and 41 target domains. The most common target domains for each domain are shown in Table 5.1 removing any domains that were  $n < 10$ . Table 5.2 shows the corresponding results for source domains. The prevailing conceptual structure was that of up/down space positioning and was used in relation to the law, previous case law, and general principles and complaints on infringement, among others in a spatial field of *up vs down*. The second most salient conceptual structure was intimately linked to the up/down model, and alluded to *vision, lightness/darkness, and force*, with *structure* and *entity* not far behind.

Name	Groundedness(n)
Law is...	38
Protection is...	38
Authority is...	26
Complaints are...	15
Safe harbour is...	12
Rights are...	11
Surveillance is...	11
Opinion is...	10

Table 5.1: Target domains  $n > 10$

Name	Groundedness(n)
up/down	86
up	35
vision/visible	31
lightness/darkness	24
light	20
structure	18
down	17
force	17
entity	16
container	14
path	14
spatial	13
balance	10

Table 5.2: Source domains  $n < 10$



Tables 5.3-6 show the top ten co-occurrences for those target domains.

Authority is...		Complaints are...	
up/down	13	up/down	9
up	9	entity	6
entity	8	up	6
force	7	foward/back	3
path	6	structure	3
structure	6	down	2
vision/visible	6	path/goal	2
container	5	buildings	1
source	4	commodity	1
held/holding	3	force	1

Table 5.3: Source-Target Domain Co-occurrences for {Authority is..., Complaints are...}

Law is...		Opinion is...	
up/down	10	entity	8
light	9	up/down	4
lightness/darkness	9	journey	3
up	9	animacy	2
vision/visible	9	path/goal	2
force	6	structure	2
structure	6	up	2
container	5	vision/visible	2
restraint/tied	5	balance	1
movement/no movement	4	control	1

Table 5.4: Source-Target Domain Co-occurrences for {Law is..., Opinion is...}

Protection is...		Rights are...	
up/down	36	entry/access	5
up	5	container	4
entity	3	up/down	4
force	3	structure	3
journey	2	light	2
lightness/darkness	2	lightness/darkness	2
vision/visible	2	up	2
countable/quantifiable	1	vision/visible	2
down	1	balance	1
found	1	down	1

Table 5.5: Source-Target Domain Co-occurrences for {Protection is..., Rights are...}

Safe harbour is...		Surveillance is...	
up/down	10	path	7
spatial	6	entity	6
up	6	landscape	3
down	4	obstruction	3
structure	3	vision/visible	3
conduit	2	held/holding	2
force	2	lightness/darkness	2
over	2	path/goal	2
restraint/tied	2	animacy	1
under	2	control	1

Table 5.6: Source-Target Domain Co-occurrences for {Safe Harbour is..., Surveillance is...}

It does not come as a complete surprise that the spatial construction of an up/down dynamic is by far the most common and widely-used given that schema's importance in conceptual thought, particularly in its relation to certainty vs. uncertainty. Lakoff and Johnson noted its prevalence as early as the 1980's. They show that the conventional metaphors of "UN-KNOWN IS UP and KNOWN IS DOWN," are found in the following examples,

That's still *up in the air*.

I'd like to *raise* some questions about that. That *settles* the question.

It's still *up* for grabs.

Let's *bring it up* for discussion.<sup>60</sup>

These metaphors are similar to the common legalese expressions of looking to the 'settled case law' or 'raising an objection or complaint'. Given the law's impetus to reach agreement on the truth of a matter, this should not come as a surprise. Lakoff and Johnson give this theory further grounding by stating that even a person's tone of voice follows this pattern. For instance, when asking a question the inflection of the voice rises even if no up/down conceptual metaphors are directly used to indicate an unknown. This is further borne out by looking at examples of rhetorical questions or statements intended as questions,

questions with falling intonation are understood not as real questions but as rhetorical questions indicating statements. For example, "Will you ever learn?" said with falling intonation is a way of saying, indirectly, "You'll never learn." Similarly, statements with rising intonation indicate uncertainty or inability to make sense of something. For example, "Your name's Fred" said

<sup>60</sup> Lakoff & Johnson 2008, at 138.

with rising intonation indicates that you're not sure and want confirmation. "The Giants traded Madlock" said with rising intonation indicates an inability to make sense of something—that it doesn't fit with what you know. These are all examples of the use of rising and falling intonation coherently with the UNKNOWN IS UP, KNOWN IS DOWN metaphor.<sup>61</sup>

Conceptually, this is also buttressed by the strength of co-occurrences with notions of vision, clarity, and lightness/darkness. We are primarily concerned with the interpretative strategies used by the Court, and therefore asked about the justification of sentences like "it is clear that," or "it is apparent", both of which are visual metaphors. With this as our starting point, we can investigate the up/down structure to find out more about the balancing act (note the spatial metaphor) of proportionality or margin of appreciation.

Given the use of an up/down structure, the inference made here is that vision is embedded in the intuitive physics of the model. Things that are clear are in the KNOWN and vice-versa, meaning that uncompromised vision should correlate with down, and obscured vision with UP. However, this isn't always corroborated in the data, and intuitively seems to be at odds with our everyday experiences. Surely, if one is at the top of a mountain (UP) their vision of the terrain is clearer than that of a person at the bottom (DOWN).

In *Schrems* these diametric senses of the up/down model are distinct. In one, the law, protection, and/or authority are viewed as up, in another they are down, and in some instances some there isn't a clear view of either (as documented in the tables of results). The reason for this is that two competing conceptual constructions are at play, and this requires explanation.

Take, for example, the following collection of quotations from §39 of the judgment, in which the Court details the importance of a respect for private life.

"It is *apparent from Article 1* of Directive 95/46 and recitals 2 and 10 in its preamble"

"in particular *the fundamental* right to respect for private life *with regard to* the processing of personal data,"

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<sup>61</sup> *ibid.*

“a *high level* of protection of those *fundamental rights* and freedoms.”<sup>62</sup>

And section 40:

“Directive 95/46 requires Member States *to set up* one or more public authorities responsible for monitoring”

“In addition, that requirement *derives from* the primary law of the European Union,”<sup>63</sup>

We have an up/down model riddled with inconsistencies about where it situates settled law and responsible authority. In some cases up and in some cases down. What are we to make of this? Gilles Fauconnier and Mark Turner have done extensive work on these types of metaphors, known as “orientational metaphors”.<sup>64</sup> They give many examples of up/down schemas that function in everyday language, such as:

HAPPY IS UP; SAD IS DOWN[...]CONSCIOUS IS UP; UNCONSCIOUS IS DOWN[...]HEALTH AND LIFE ARE UP; SICKNESS AND DEATH ARE DOWN[...]HAVING CONTROL. Or FORCE IS UP; BEING SUBJECT TO CONTROL Or FORCE IS DOWN[...]MORE IS UP; LESS IS DOWN[...]FORESEEABLE FUTURE EVENTS ARE UP (and AHEAD) [...]HIGH STATUS IS UP; LOW STATUS IS DOWN[...]GOOD IS UP; BAD IS DOWN[...]VIRTUE IS UP; DEPRAVITY IS DOWN [...]RATIONAL IS UP; EMOTIONAL IS DOWN<sup>65</sup>

The result in these findings on different senses of the up/down schema may be influenced or shaped by the need to generalise and create larger encompassing terms to work with while coding target domains. In one circumstance up may refer to the control of the State, and in another it may refer to the unknown. However, this doesn't pose too much risk to the method of inquiry, as the primary function of the coding is to tell us what metaphor structures are salient and in need of further analysis.

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<sup>62</sup> Schrems §39 emphasis added

<sup>63</sup> Schrems §40 emphasis added

<sup>64</sup> Fauconnier, Gilles & Turner, Mark; 2008. *The Way We Think: Conceptual Blending and The Mind's Hidden Complexities*. Basic Books, at 15; see chapter 4 generally.

<sup>65</sup> *ibid.*

Metaphor processing shows us what to look for and where to look. When a judge searches for the 'essence' or 'nature' of a law, she is setting up a conceptual framework that colours the eventual relationships of coherence between cases. The two networks marked out for analysis (§78 and §91) deal with the margin of appreciation and effective protection, respectively. Now that we know what we are looking for (a spatial model of law), the next two chapters continue the analysis to follow the progression of these conceptions in order to answer the question: how does one conception lead to another?

## Chapter 6: Prototypes through Precedent §78

In an extreme view, the world can be seen as only connections, nothing else. We think of a dictionary as the repository of meaning, but it defines words only in terms of other words. I liked the idea that a piece of information is really defined only by what it's related to, and how it's related. There really is little else to meaning. The structure is everything.

-Tim Berners-Lee<sup>1</sup>

What connects a case involving the retention of DNA records, to one pertaining to forced eviction from a residential property, or the parental right to look after their own children, or the outlawing of homosexual acts, or the right to be recognised as a transsexual? To answer this question, it is not sufficient to simply find out what these things have in common - namely that they all fall under Article 8 - we are required to ask how those commonalities are understood.

Section §78 in *Schrems* discusses the test for the margin of appreciation of national authorities. As noted in the previous chapter, this test outlines the specific conditions for measuring the proportionality of a State action (namely point 1.2 of the legal test):

- 1.2 *Purpose and duration* of the operations must be proportional to a legitimate aim
  - 1.2.1 Is the interception or processing targeted and specific?
  - 1.2.2 Is the interception or processing legitimate to national security?
  - 1.2.3 Has the data been retained beyond the duration needed to achieve that aim?

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<sup>1</sup> Berners-Lee, Tim; 2000. *Weaving the Web: The original design and ultimate destiny of the World Wide Web by its inventor*. Harper Information at 12.

The seemingly logical way to examine these conditions was to find analogies in the precedent case law and to assess how in *Schrems*, with regard to the proportionality of a state action, the breadth of an interference can be understood as having equal importance to its depth. The question isn't whether these conditions *are* met, but *how* they are conceptualised in order to *be* met.

The network of precedent allows us to investigate this question by looking for the authoritative conceptions of proportionality within the network. But, as stated in Chapter 4, it is necessary to methodologically ground our understanding of the centrality, or relative peripherality, of cases. In the last chapter, the branches of the precedent chain were mapped out, and after completing this initial step it is imperative to find out which nodes are more central than the others. In order to identify the centrality of citations, the network was run for Eigenvector centrality in §78 of *Schrems*. As is shown in figure 6.1, the sizes of nodes correspond to the strength of the Eigenvector centrality of the given citation. Some cases are clearly larger and evidently more central than others. These central nodes are important for the network as a whole but, as already mentioned, the different communities within the network must also be identified as different clusters/communities indicate the level of connectivity to their neighbours. The modularity feature (internode connectivity) in Gephi was used to locate and demarcate these communities and the results can be seen in fig. 6.1. The resolution of the modularity function was used to identify five distinct communities, and their hubs, based on Eigenvector centrality. This chapter goes through the major hubs of those communities to examine their unique features. Figure 6.2 shows the separation of those communities, with the citations ranked for Eigenvector centrality.

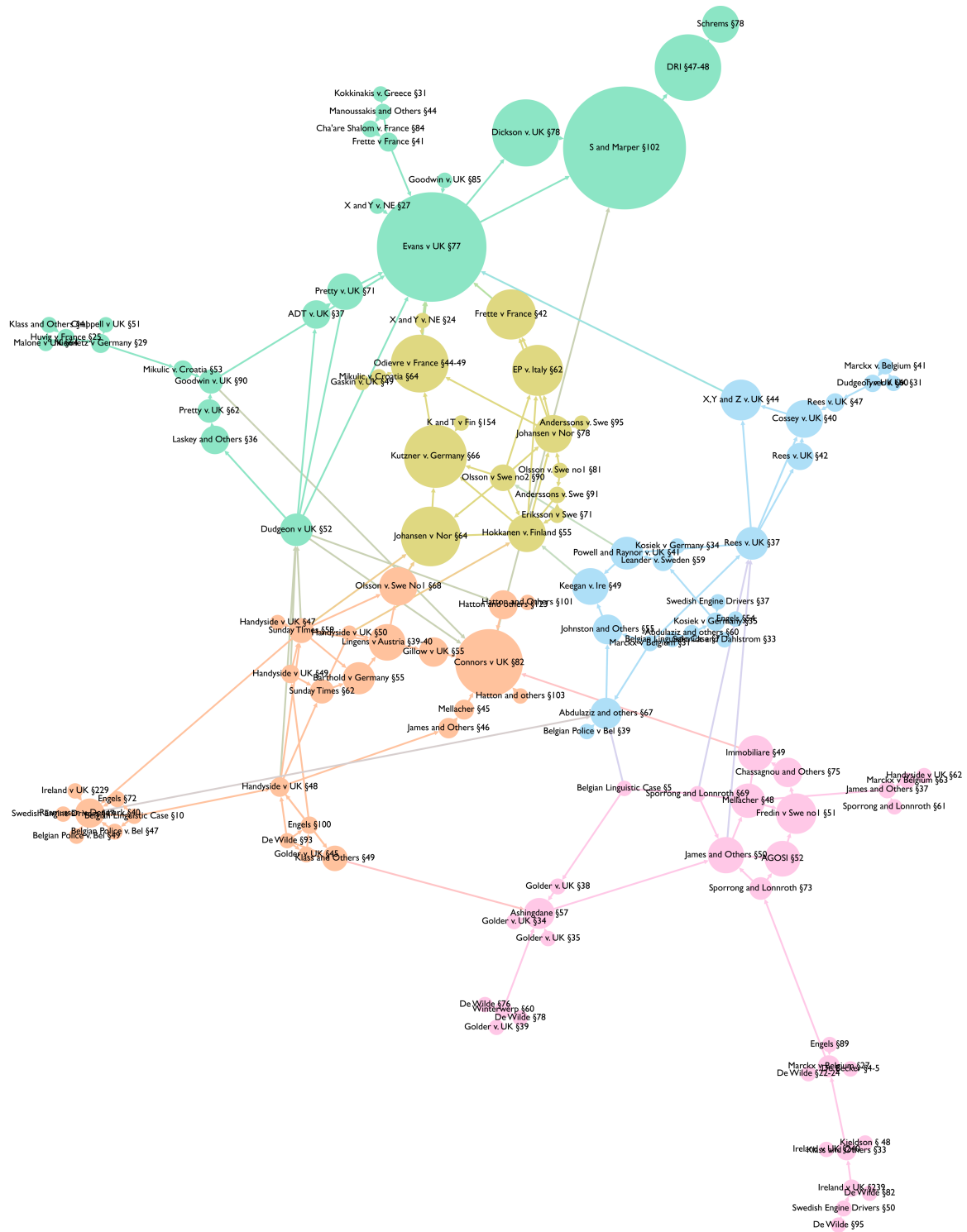


Fig. 6.1 - Schrems §78 network mapped by centrality and communities



GROUP 1		GROUP 2		GROUP 3		GROUP 4		GROUP 5	
Label	E_Cent.	Label	E_Cent.	Label	E_Cent.	Label	E_Cent.	Label	E_Cent.
S and Marper 102	1.0000	Connors v UK 82	0.4852	Kutzner v. Germany 66	0.4430	X,Y and Z v. UK 44	0.2366	Fredin v Swe no I 51	0.2330
Evans v UK 77	0.8753	Olsson v. Swe No I 68	0.2127	Johansen v Nor 64	0.4117	Cossey v. UK 40	0.2066	James and Others 50	0.1939
Dickson v. UK 78	0.4810	Lingens v Austria 39-40	0.1971	Odievre v France 44-49	0.3944	Keegan v. Ire 49	0.1983	Immobiliare 49	0.1890
DRI 47-48	0.4754	Barthold v Germany 55	0.1562	EP v. Italy 62	0.3307	Powell and Raynor v. UK 41	0.1615	AGOSI 52	0.1884
Schrems 78	0.2008	Gillow v UK 55	0.1304	Frette v France 42	0.3234	Rees v. UK 37	0.1611	Mellacher 48	0.1762
Pretty v. UK 71	0.1969	Rasmussen v. Denmark 40	0.1293	Hokkanen v. Finland 55	0.2087	Abdulaziz and others 67	0.1479	Ashingdane 57	0.1444
Dudgeon v UK 52	0.1598	Hatton and others I 23	0.1264	Johansen v Nor 78	0.2078	Johnston and Others 55	0.1343	Chassagnou and Others 75	0.1304
ADT v. UK 37	0.1213	Klass and Others 49	0.0940	Olsson v Swe no2 90	0.1043	Rees v. UK 42	0.1093	Sporrong and Lonroth 73	0.0671
Laskey and Others 36	0.1213	Sunday Times 59	0.0876	Anderssons v. Swe 91	0.0101	Leander v. Sweden 59	0.0502	Marckx v Belgium 27	0.0623
Goodwin v. UK 90	0.0810	Sunday Times 62	0.0826	Mikulic v. Croatia 64	0.0051	Kosiek v Germany 35	0.0286	Klass and Others 33	0.0386
Pretty v. UK 62	0.0756	James and Others 46	0.0471	Anderssons v. Swe 95	0.0000	Rees v. UK 47	0.0285	Ireland v UK 239	0.0185
Mikulic v. Croatia 53	0.0387	Mellacher 45	0.0421	Eriksson v Swe 71	0.0000	Dudgeon v UK 60	0.0185	James and Others 37	0.0185
Frette v France 41	0.0335	Handyside v UK 48	0.0386	Gaskin v. UK 49	0.0000	Abdulaziz and others 60	0.0051	Winterwerp 60	0.0152
Niemietz v Germany 29	0.0335	Handyside v UK 49	0.0285	K and T v Fin 154	0.0000	Marckx v Belgium 31	0.0051	Golder v. UK 38	0.0051
Huvig v France 25	0.0185	Engels 100	0.0185	Olsson v. Swe no I 81	0.0000	Marckx v. Belgium 41	0.0051	Marckx v Belgium 63	0.0051
Cha'are Shalom v. France 84	0.0134	Belgian Police v. Bel 47	0.0051	X and Y v. NE 24	0.0000	Belgian Linguistic Case 7	0.0000	Sporrong and Lonroth 69	0.0051
Klass and Others 41	0.0051	Engels 72	0.0051			Belgian Police v Bel 39	0.0000	Swedish Engine Drivers 50	0.0051
Manoussakis and Others 44	0.0051	Golder v. UK 45	0.0051			Engels 54	0.0000	Belgian Linguistic Case 5	0.0000
Chappell v UK 51	0.0000	Belgian Linguistic Case 10	0.0000			Kosiek v Germany 34	0.0000	De Becker 4-5	0.0000
Goodwin v. UK 85	0.0000	Belgian Police v. Bel 49	0.0000			Schmidt and Dahlstrom 33	0.0000	De Wilde 22-24	0.0000
Kokkinakis v. Greece 31	0.0000	De Wilde 93	0.0000			Swedish Engine Drivers 37	0.0000	De Wilde 76	0.0000
Malone v UK 64	0.0000	Handyside v UK 47	0.0000			Tyrer v. UK 31	0.0000	De Wilde 78	0.0000
X and Y v. NE 27	0.0000	Handyside v UK 50	0.0000					De Wilde 82	0.0000
		Hatton and Others 101	0.0000					De Wilde 95	0.0000
		Hatton and others 103	0.0000					Engels 89	0.0000
		Ireland v UK 229	0.0000					Golder v. UK 34	0.0000
		Swedish Engine Drivers 47	0.0000					Golder v. UK 35	0.0000
								Golder v. UK 39	0.0000
								Handyside v UK 62	0.0000
								Ireland v UK 240	0.0000
								Kjeldson 48	0.0000
								Sporrong and Lonroth 61	0.0000

Fig. 6.2 - Relative Eigenvector centrality of §78 descendent cases

## I. The Central Cases:

Group I was by far the strongest in terms of link centrality. This should not come as a surprise given that in an acyclic directed network the nodes nearer to the parent node will have the strongest connections. The first, and most central, hub in the network was *S. and Marper v. The United Kingdom*.<sup>2</sup>

The case of *S and Marper* concerned two individuals who were arrested and had samples of their DNA and fingerprints collected. After their subsequent acquittal and release, this information was retained by police. S and Marper's complaint was based on a purported interference with their private life, as denoted by Article 8. The government replied by saying that Article 8 had not been infringed as the retention of the DNA information was related to the specific purpose of

<sup>2</sup> *S. And Marper v. The United Kingdom*, Judgement of the Court of 4 December 2008. CE:ECHR:2008:1204JUD003056204. (*S and Marper*)

preventing or detecting crime and balanced proportionally against the rights of the applicants. The Court, however, found that this was not the case. That,

the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard.<sup>3</sup>

The relevant cited section (the node corresponding to §102) concerns the margin of appreciation given to national authorities regarding the interpretation of Article 8. In this case, the ruling of the Court stated that the United Kingdom's margin of appreciation for the interpretation of Article 8 needed to be very strict, as the common practices of other countries in the convention (and some of those outside of it) consider the retention of DNA to be an interference of private life.<sup>4</sup>

Like *Schrems*, the salient metaphors here were spatial in nature. Relevant to [the question of how] the edict of looking at the breadth of application of data collection rather than its depth in *Schrems*, there are a number of instances where the Court extended the spatialisation of the conceptual metaphor of privacy from depth to breadth, particularly with reference to the assessment of the proportionality argument. These spatial framings can be broken down into three sub-categories: weight, space, and time.

The Court evaluated certain measures in terms of their *weight* or *gravity*. This distinction can be split into two conceptions: EGREGIOUS OFFENCES ARE HEAVY and GOOD REASONS ARE HEAVY/BAD REASONS ARE LIGHT. Take for instance the following passages:

“...depending on the *gravity* of the offence...”<sup>5</sup>

“...having committed offences of a *certain minimum gravity*...”<sup>6</sup>

“...it attached special *weight*...”<sup>7</sup>

“...*Weighty reasons* would have to be put forward...”<sup>8</sup>

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<sup>3</sup> *id* at §125.

<sup>4</sup> *id* at §112.

<sup>5</sup> *id* at §34.

<sup>6</sup> *id* at §108.

<sup>7</sup> *id* at §82.

“...or *gravity* of the offence...”<sup>9</sup>

The second type of metaphorical frame included a notion of time. Normally, we would consider the invocation of time as its own category. However, given the significant literature on the consideration of TIME IS SPACE<sup>10</sup>, the time category here is sublimated into the general category of spatial metaphors. The foundational idea is that time is conceptualised as a place or location in an expanse. This can be seen in the following examples:

“...could have been achieved through more limited retention *in time*...”<sup>11</sup>

“...*At the same time*...”<sup>12</sup>

“...*at the time* the matches were made...”<sup>13</sup>

Through these, and other similar forms of language usage, time is spatialised; when the Court considers the duration of the retention of data, time is understood in the same context as space. This is to say that both 'categories' are relativised by being continuous and expansive versus occupying a fixed or marked location. These expanses are used to measure space conceptually so that the proportionality of a suspected infringement on Article 8 can be assessed on the basis of: PROPORTIONALITY IS A LIMITED SPACE or INFRINGEMENT IS AN ENDLESS EXPANSE.

Subsequently, the invocation of the idea of wealth is an interesting metaphor as, like allusions to time, it takes on a spatial nature. For example,

“...given *the wealth* of private information that became *permanently available* to others...”<sup>14</sup>

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<sup>8</sup> *id* at §123.

<sup>9</sup> *id* at §119.

<sup>10</sup> See among many others, Pinker, Steven; 2007. *The Stuff of Thought: Language as a Window into Human Nature*. Penguin. at 236; Gibbs, Raymond W.; 2008. 'Metaphor and Thought: The State of the Art,' in *The Cambridge handbook of metaphor and thought*. Raymond J. Gibbs (Ed.). Cambridge University Press. 3.

<sup>11</sup> *S. and Marper* at §88.

<sup>12</sup> *id* at §116.

<sup>13</sup> *id* at §15.

<sup>14</sup> *id* at §60.

Wealth here can be understood as the notion of abundance, or size, which exerts its influence over an expanse *permanently*, thus creating the image of a block of personal information covering the landscape.

The third set uses much more explicit references to the idea of space, as in the following passages:

“...The applicants further submitted that the retention was disproportionate because of its *blanket nature* irrespective of the offences...”<sup>15</sup>

“...the Court is struck by *the blanket* and indiscriminate nature...”<sup>16</sup>

And,

“It covers the physical and psychological integrity of a person”<sup>17</sup>

“it is designed to *cover* and the number and status of those to whom it is addressed”<sup>18</sup>

“...An individual's DNA contains the '*highest level* of personal and private information...”<sup>19</sup>

There are two spatial conceptions here that are interesting. The first is the nature of the infringement indiscriminately *covering* a general and expansive space. The second is the role of law to protect (*cover*) the rights of its citizens. A third dimension must also be noted which is illustrated in the UP/DOWN schema of *highest level*. Combining these two ideas gives an indication that protection should be *above* the *blanket coverage* of infringement and therefore have the ascendancy. If the level of the infringement rises above the cover of law, or attempts to push the boundaries of protection, the infringement is considered disproportionate to the coverage of the law.

Here the court decided that given this conception of a wide, expansive (viewing time in its *permanent* sense), and heavy coverage of the idea of infringement, the margin of appreciation must be set at a similar standard to other cases where it was necessary for review to be strict.

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<sup>15</sup> *id* at §89.

<sup>16</sup> *id* at §119.

<sup>17</sup> *id* at §66.

<sup>18</sup> *id* at §96.

<sup>19</sup> *id* at §54.

The second hub was the case of *Evans v. The United Kingdom*.<sup>20</sup> *Evans v. UK* concerned the dispute between two parties over IVF treatment and, more specifically, the UK law regulating consent and the withdrawal of consent for said treatment to be undertaken. To sum the case up succinctly, Ms. Evans had a medical condition which, within a few years, would make her unable to have children. Her partner at the time, “J”, consented to the use of his sperm which would give Ms. Evans the opportunity to go forward with an IVF procedure at a later date. However, as time passed, J withdrew his consent for the use of his sperm, and therefore nullified the consensual use of the frozen embryo [which his sperm had fertilised]. The Court approached the case by considering the obligations of the UK’s law under Article 8; essentially, they needed to establish whether the State had positive duties above and beyond the negative duties to not infringe on the right to private life, and asked “whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved.”<sup>21</sup> The Court decided that Article 8 was not infringed in this case as,

the Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.<sup>22</sup>

In comparison to the case of *S. and Marper*, *Evans v. UK* §77 calls for a wider version of the margin of appreciation. Given that there was no existing consensus on the regulation of IVF treatment and that a balance had to be struck between the irreconcilable rights of two competing parties, the Court decided that the margin of appreciation would be wide.

We see a few additional spatial metaphors in *Evans*. The first is the notion of *the coverage* of law, its expansive reach, and its capability to draw a conclusion. Not only is the conception of a wideness of space invoked, but also an ability on the part of the law to create certainty by being

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<sup>20</sup> *Evans v. The United Kingdom*, Judgement of the Court of 10 April 2007. CE:ECHR:2007:0410JUD000633905 (*Evans*).

<sup>21</sup> *Evans* at §76

<sup>22</sup> *id* at §91.

able to see *with clarity* over the expanse it surveys. Article 8, if it is premised on this expanse, must have coverage over the entire panorama in order to provide a legal interpretation that is clear and unambiguous. This is borne out in the following conceptual metaphors in *Evans*.

The primary metaphorical conception is the notion that the law is *built upward above its dominion*. This idea, like the tangible tower in a field, allows the viewer to have a clear and complete outlook over their surroundings. The law must be able to have a similarly unobstructed view. This can be seen in metaphors like LEGAL RULES ARE STRUCTURES,

“*strong policy considerations underlay the decision of the legislature*”<sup>23</sup>

The law viewed as a structure that has strong foundations makes perfect sense when you couple this idea with the conception that AMBIGUITY IS WIDE (such as “...‘private life’, which is a *broad term*,”<sup>24</sup>) and you see the need for law to have visual coverage of an area in order to have certainty,

“...The Grand Chamber considers that this more *limited issue...falls within the scope of Article 8...*”<sup>25</sup>

This is a derivative of the basic metaphor KNOWING IS SEEING. However, the conception here is stretched to include the modal description of whether something might be “seeable”. It ties together a group of metaphors that construct a whole: KNOWING IS CLEAR, CLEAR IS UP, RULE OF LAW IS UP, CLEAR LAW IS COVERAGE, PUBLIC INTERESTS ARE WIDE, and LEGAL QUESTIONS ARE UP.

“...the legislation in question also served a number of *wider, public interests, in upholding the principle of the primacy of consent and promoting legal clarity and certainty.*”<sup>26</sup>

“...The extent to which it was permissible *under Article 8* for the State to give *weight* to these considerations...”<sup>27</sup>

“...there is no *uniform* European approach in this field...”<sup>28</sup>

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<sup>23</sup> *id* at §60.

<sup>24</sup> *id* at §71.

<sup>25</sup> *id* at §72.

<sup>26</sup> *id* at §74.

<sup>27</sup> *id* at §74.

“...since the *questions raised* by the case *touch on areas* where there is *no clear common ground* amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State *must be a wide one*...”<sup>29</sup>

The construction of this metaphor (or group of metaphors) is familiar to most. When determining whether the UK exceeded its margin of appreciation, the Court used the concept of the coverage of law and its ability to have a clear view of where the line is drawn (to use the same conception), given that the law could not see where that line may be drawn.

To follow the AMBIGUITY IS WIDE metaphor, the more complex things become, the further away from sight they are, and thus the coverage of the margin of appreciation should extend to cover the expanse of any grey or undefined areas.

“[A] *broad margin of appreciation* in this field, given the complexity of the moral and ethical issues to which IVF treatment *gave rise*...”<sup>30</sup>

A legal issue *comes up*, like an object or a structure - a tower on the horizon - from beyond clear view; the territory beyond the reach of clear law. As it grows in height, it becomes noticeable, seeable, and more detailed, which increases the probability that any ambiguities will become visible to the eyes of clear law. For “...[i]n addition to the principle at stake, the absolute nature of the rule served to *promote legal certainty*.”<sup>31</sup>

These hub cases (those with the high Eigenvector centrality in the network) in Group I, all display notions of clarity and expanse, and aim to match the law's coverage to the coverage of the infringement in order to make a decision about the *balance* of proportionality or *the scope* of a margin of appreciation. But if we take one of the non-hub cases from the same group, will this observation still hold true? Although all of the cases contain spatial metaphors relating to expanse, clarity, and coverage, to some degree, many of the edge cases (the non-hubs, or more explicitly

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<sup>28</sup> *id* at §79.

<sup>29</sup> *id* at §81.

<sup>30</sup> *id* at §69.

<sup>31</sup> *id* at §89.

those with an Eigenvector centrality of 0.00) conceptualise space in a different way. Take, for instance, the case of *X and Y v. The Netherlands*.<sup>32</sup>

In this case the Court's salient metaphors reference the notion of a container, and the actions that can be performed within or upon it, or a journey that has been blocked or curtailed:

PRIVATE LIFE IS A CONTAINER, ARTICLE 8 IS THE SEAL ON A CONTAINER, MARGIN OF APPRECIATION IS A CONTAINER,

"...that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8 (art. 8), had been *infringed*..."<sup>33</sup>

"...*the object* of Article 8..."<sup>34</sup>

"...*to secure respect* for private life even *in the sphere*..."<sup>35</sup>

"...*in the sphere* of the relations of individuals..."<sup>36</sup>

"...*in principle* a matter that *falls within* the Contracting States' margin of appreciation..."<sup>37</sup>

And, PROTECTION IS A JOURNEY, VIOLATION OF ARTICLE 8 IS AN OBSTACLE, LAW IS A PLACE ON A JOURNEY, RESPECT FOR PRIVACY IS THE FULFILLMENT OF A JOURNEY,

"...The *only gap*, so far as the Commission and the Court have been made aware, is as *regards* persons in the situation of Miss Y; *in* such cases, this system *meets* a procedural *obstacle* which the Netherlands legislature had apparently not *foreseen*..."<sup>38</sup>

"...it was the exceptional nature of the facts of the case which *disclosed the gap* in the law..."<sup>39</sup>

"...It is in no way the task of the European Court of Human Rights to *take the place* of the competent national courts in the interpretation of domestic law..."<sup>40</sup>

"...protecting the individual against arbitrary *interference*..."<sup>41</sup>

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<sup>32</sup> *X and Y v. The Netherlands*, Judgement of the Court of 26 March 1985. CE:ECHR:1985:0326JUD000897880. (*X and Y*).

<sup>33</sup> *id* at §18.

<sup>34</sup> *id* at §23.

<sup>35</sup> *ibid*.

<sup>36</sup> *id* at §24.

<sup>37</sup> *ibid*.

<sup>38</sup> *id* at §27.

<sup>39</sup> *id* at §28.

<sup>40</sup> *id* at §29.



These driving metaphors help to explain the combination of the conception when it comes to the proscription of how to interpret wording and understand the perceived interference with Article 8. In fact, there is a silent and implicit refusal of the expanse model of protection, "...a gap in the law, but it could not be filled by means of a broad interpretation to the detriment of Mr. B..."<sup>42</sup>

This is not to say that one metaphor is more valuable, accurate, or objectively fits the meaning of privacy better than another. It is indicative that the constructions in the cases that are more important to the network comport with the conception in the ancestor case, *Schrems*.

Like the previous cluster, Group 2 deals with tests of proportionality and the margin of appreciation given to states in that determination. Unlike the previous cluster, Group 2 doesn't display a large set of central nodes, but appears to be centered around one case that is an apparent authority, *Connors v. The United Kingdom*.<sup>43</sup>

The *Connors* case concerned a family in the UK who identified as Gypsy and were forced to leave their property after complaints were made about their behaviour on the site. This was a very complex case involving a family who had no redress to falsify the claims made against them, while also bringing to bear their minority protected status. The Court found the issue of minority status hard to place in the case; evidence showed a shift in the nomadic and lifestyle habits of the Gypsy community, and it was deemed necessary to weigh the Government's reaction to this reality when discussing the implementation of a law that was designed to uphold certain living practices in Gypsy communities. The Court had to measure the margin of appreciation given to the UK judiciary as, normally, in circumstances involving societal need, national authorities are thought to be better placed to decide given "their direct and continuous links with that society."<sup>44</sup> However, ultimately the Court decided that "the authorities must take some responsibility, [it] places considerable obstacles in the way of Gypsies pursuing an actively nomadic lifestyle while at the same time

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<sup>41</sup> *id* at §23.

<sup>42</sup> *id* at §12.

<sup>43</sup> *Connors v. The United Kingdom*, Judgement of the Court of 27 May 2004. CE:ECHR:2004:0527JUD006674601. (*Connors*)

<sup>44</sup> *id* at §91.

excluding from procedural protection those who decide to take up a more settled lifestyle.”<sup>45</sup> As the national authorities provided no “proper justification”<sup>46</sup> for the eviction, it was therefore concluded that there was a breach of Article 8.

The relevant cited section in the network is §82, cited by the *S and Marper* decision. It is odd, given the extended space the Court reserves for the discussion of the qualifying conditions to measure the margin of appreciation, that this is the only section cited for that reason.<sup>47</sup> Normally, the Court considers, “in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide.”<sup>48</sup> However, even in these cases “the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.”<sup>49</sup>

The Court recites chapter and verse on the many different applications of the margin of appreciation given to national authorities, yet claims this particular instance is of a specific nature that cannot be subsumed into the same character as earlier instances relating to social and economic policies. They later state,

The central issue in this case is therefore whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights.<sup>50</sup>

The Court is deliberating on a situation which has previously been directly adjudicated (in the sense that the subject matter was the eviction of Gypsy residents). However, the Court differentiated this case from the previous High Court decisions by noting a few key distinctions. For instance, they seemed to be swayed by the applicant’s argument that while a previous case “concerned a local planning decision grounded in local knowledge and understanding of local conditions”<sup>51</sup>, “this case was a matter of a general policy at national level.”<sup>52</sup> The Court notes that,

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<sup>45</sup> *id* at §94.

<sup>46</sup> *id* at §95.

<sup>47</sup> The Court does give the caveat “with further references” see *S. and Marper* at §102. Whether this qualifies as an explicit chain of reasoning is up to the reader.

<sup>48</sup> *Connors* at §82.

<sup>49</sup> *ibid.*

<sup>50</sup> *id* at §85.

<sup>51</sup> *id* at §76.

<sup>52</sup> *ibid.*

In spheres such as housing, which play a central role in the welfare and economic policies of modern societies, [the Court] will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without *reasonable foundation*.<sup>53</sup>

The Court ultimately found that the legislation made was without any *reasonable foundation*. In *S. and Marper*, the Court's complex back and forth dynamic from the *Connors* case is subsumed under the terminology: "The margin will tend to be narrower where *the right at stake is crucial to the individual's effective enjoyment of intimate or key rights*."<sup>54</sup> We are left to wonder: what process of translation occurred between the two cases? How are the intimate and key rights of housing and DNA related when it comes to the margin of appreciation in the resolution of disputes?

Unlike the conceptual metaphors in *S and Marper*, those used in *Connors* are less focused on measuring the *coverage* of the law, although the spatial aspect of vision and clarity was similar. In this regard, the case contained an exceptionally large number of references to weight and impact, relying on the idea of LAW IS A STRUCTURE to give them (no pun intended) weight.

Take, for instance, some of the WEIGHT/FORCE metaphors in *Connors*:

"...*On the other hand*, the regime applicable to local authority gypsy sites..."<sup>55</sup>

"...An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "*pressing social need*..."<sup>56</sup>

"...there is thus a *positive obligation imposed* on the Contracting States..."<sup>57</sup>

"...The serious interference with the applicant's rights under Article 8 requires, in the Court's opinion, *particularly weighty reasons* of public interest by way of justification."<sup>58</sup>

"...There *is force in the Government's argument* that *some weight should be attached* to the views of national judges..."<sup>59</sup>

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<sup>53</sup> *id* at §82

<sup>54</sup> *S. and Marper* §102. Emphasis added.

<sup>55</sup> *Connors* §80.

<sup>56</sup> *id* at §81.

<sup>57</sup> *id* at §84.

<sup>58</sup> *id* at §86.

<sup>59</sup> *id* at §91.

These metaphors construct an image of the weight of the reasons given by both the applicant and the government for the Court to balance in their appraisal of the conditions of a margin of appreciation. This is in direct opposition to the less frequent examples of competing metaphors such as: VISION/CLARITY, UP/DOWN, general spatial, and particularly CONTAINER and JOURNEY metaphors, as can be seen in the following examples:

VISION:

"...no *clear* national policy..."<sup>60</sup>

"...He *saw* no reason why..."<sup>61</sup>

"...*in light of the evidence* submitted..."<sup>62</sup>

UP/DOWN:

"...ensuring an *adequate level* of provision for gypsies..."<sup>63</sup>

"...the *issues raised* in the recent reports..."<sup>64</sup>

"...that would *overcome* the applicant's complaints..."<sup>65</sup>

"...policy considerations *have arisen* in the context of Article 8..."<sup>66</sup> 82

"...to require local authorities to justify in court their management decisions in relation to individual occupiers *would add significantly* to their administrative burden, *increasing costs and licence fees ...*"<sup>67</sup>

Other Space:

"...*in principle better placed* than an international court..."<sup>68</sup>

"...the *vulnerable position* of gypsies..."<sup>69</sup>

"...with the much *narrower issue* of the policy of procedural protection..."<sup>70</sup>

CONTAINER:

"...particular significance *attaching* to the extent of the *intrusion into the personal sphere* of the applicant..."<sup>71</sup>

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<sup>60</sup> *id* at §74.

<sup>61</sup> *id* at §75.

<sup>62</sup> *id* at §79.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> *id* at §82.

<sup>67</sup> *id* at §79.

<sup>68</sup> *id* at §82.

<sup>69</sup> *id* at §84.

<sup>70</sup> *id* at §86.

<sup>71</sup> *id* at §82.

“...remained within its margin of appreciation...”<sup>72</sup>

## JOURNEY

“...no straightforward answer was possible...”<sup>73</sup>

“... the domestic courts *stopped short* of finding any breach of the provisions of the Convention...”<sup>74</sup>

The guiding metaphor in *Connors* relies on a conception of the law as a structure on which to balance the weight of competing arguments, as in,

“...The domestic courts’ position cannot therefore be analysed as *providing strong support* for the justification of continuing the current regime...”<sup>75</sup>

“...his principal objection *was based*.”<sup>76</sup>

Without a *reasonable foundation* that could withstand the stress of the applicant’s arguments, the Government’s position was rejected and therefore the margin of appreciation needed to be narrowed, leading to the ultimate conclusion that there was a violation of Article 8. This construction of stress and weight can be borne out of the precedents stemming from *Connors*.

To make sense of where these constructions originate, we must contrast them with the dominant metaphor forms in the *Evans* hub case which are built around notions of vision and expanse. By comparing the metaphors in cases with wide margins of appreciation stemming from *Evans* with those used in the narrow margin of appreciation cases deriving from *Connors*, and taking due note of those metaphors that *Connors* and *Evans* share, we can map out the lineage of the dominant constructions.

What we expect to find is:

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<sup>72</sup> *id* at §83.

<sup>73</sup> *id* at §91.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.

<sup>76</sup> *id* at §92.

1. the wide margin of appreciation cases following from *Evans* are dominated by expanse/area metaphors and,
2. those from *Connors* would focus on impact and weight.
3. The precedents shared by the common citations will combine both without exhibiting a predominant metaphor construction.

## 2. Wide Margins from *Evans*

Two major hubs precede the citation in *Evans*; *Kutzner v. Germany*<sup>77</sup>, and *Johansen v. Norway*,<sup>78</sup> both of which come through *Odièvre v. France*.<sup>79</sup> These two cases involve the balance between competing public and private interests (as the majority of the cases referenced in this research do). What is distinct about them is the manner in which the Court decides to describe that balancing act; as a measure of expanse vs as a measure of weight and force. Here we find two significant cases in the network that both proscribe that a wide margin of appreciation be given to state authorities within that balance. This does not mean that when a court expresses this type of conception, the margin will *always be and must be* wide. It is to say that when the Court, in this instance and within the network, describes the margin as wide, metaphors invoking area, vision, and direction will tend to be prevalent.

The *Kutzner* case involved a German couple with certain intellectual deficiencies. The German court, on the basis of advice and reports from the state social worker, retracted the couple's parental rights to care for their children owing to their inability to ensure the children's safety and wellbeing, "...not through any fault of their own...but because they did not possess the requisite intellectual capacity."<sup>80</sup> Through a number of legal appeals, the Kutzners applied for increased visiting hours with their children in foster care and for the appointment of a new guardian to the

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<sup>77</sup> *Kutzner v. Germany*, Judgement of the Court of 26 February 2002. CE:ECHR:2002:0226JUD004654499. (*Kutzner*).

<sup>78</sup> *Johansen v. Norway*, Judgement of the Court of 7 August 1996. CE:ECHR:1996:0807JUD001738390. (*Johansen*).

<sup>79</sup> *Odièvre v. France*, Judgement of the Court of 13 February 2003. CE:ECHR:2003:0213JUD004232698. (*Odièvre*).

*Odièvre* is a case that does not designate the margin of appreciation as wide but still demonstrates the same metaphorical conceptions of expanse and clarity as *Kutzner* and *Johansen* but not nearly as strong. Also, given that its hub score is lower than the other two cases, the analysis focuses on the other two cases.

<sup>80</sup> *Kutzner* §20.

children (ostensibly in the hope that the new guardian would allow increased visitation rights ). These requests were denied.

The case was brought before the Court to ascertain whether there had, among other violations, been a violation of Article 8. The Court (as in many of the cases this project has looked into) unwaveringly recognises the relationship between a parent and child as an integral aspect of private life. However, in the *Kutzner* case, the issue the Court faced was to understand and mediate the competing interests of the public authorities, the parents, and the children themselves. What the Court needed to decide was how to demarcate “...the boundaries between the State's positive and negative obligations under this provision,”<sup>81</sup> which admittedly has no “precise definition.”<sup>82</sup> As in *Evans*, the Court used the imagery of space, vision, and movement/direction, to place this boundary. This is not to say other metaphors weren't present<sup>83</sup>, merely that orientational metaphors were predominant.

These include the metaphors of clear vision:

“...it has to consider whether, *in the light of the case as a whole...*”<sup>84</sup>

“...it will also *have regard to the obligation...*”<sup>85</sup>

“...*perceptions as to the appropriateness of intervention by public authorities...*”<sup>86</sup>

“...when care measures *are being envisaged...*”<sup>87</sup>

“...*to review under the Convention...*”<sup>88</sup>

“...the evidence in the case file *shows...*”<sup>89</sup>

And movement or direction through space:

“...such *further limitations* entail the danger that family relations between the parents and a young child *are effectively curtailed...*”<sup>90</sup>

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<sup>81</sup> *id* at §62.

<sup>82</sup> *ibid.*

<sup>83</sup> For instance, arguments as force metaphors: “...the first of whom *stressed the applicants' intellectual deficiencies...*” *id* at §68, or “...as soon as reasonably feasible will *begin to weigh on the responsible authorities with progressively increasing force...*” *id* at §76.

<sup>84</sup> *id* at §65.

<sup>85</sup> *ibid.*

<sup>86</sup> *id* at §66.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *id* at §78.

“...there must exist other circumstances *pointing to the* “necessity” for such an interference with the parents' right under Article 8...”<sup>91</sup>

“...unlike *the position in* other cases of the same type...”<sup>92</sup>

“...should be consistent with the *ultimate aim*...”<sup>93</sup>

It is Interesting, though not distinctly metaphorical, to note the instances where the Court describes the matter at hand in terms of spatial separation of the children from the parents. As seen in §77,

However, in the instant case, not only have the children been separated from their family of origin, they have also been placed in separate, unidentified, foster homes and all contact with their parents was severed for the first six months. In addition, the children themselves have at no stage been heard by the judges.<sup>94</sup>

Whether this is integral to the Court's decision, or decisive in the choice of their conceptualisation, can't reasonably be deduced, but should be pointed out nonetheless.

*Johansen v. Norway*, in a very similar manner, was concerned with the State's obligation with regards to public policy, a citizen's right to private life, and the specific right to parental care within it. Like in *Kutzner*, the Court relied on a spatial conception of balance, with a particular emphasis on *vision*, to consider the applicant's ability to *show* their reasons in a *clear* manner. This conception is particularly strong in the cited node in the network §64,

...the Court will consider whether, *in the light of the case as a whole*, the reasons adduced to justify them were relevant and sufficient...in so doing, the Court *will have regard* to the fact that...*perceptions as to* the appropriateness of intervention by public authorities in the care of children vary...the margin of appreciation so to be accorded to the competent national authorities *will vary in the light* of the nature

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<sup>90</sup> *id* at §67. It should be noted here that this particular conception of movement through space is also characterised as part of a PATH-GOAL schema. However, as it is part of the larger orientational metaphor schema it is included here.

<sup>91</sup> *id* at §69.

<sup>92</sup> *id* at §74.

<sup>93</sup> *id* at §76.

<sup>94</sup> *id* at §77.



of the issues.....the Court recognises that the authorities enjoy a wide margin of appreciation...it is against this background that the Court will examine...<sup>95</sup>

Even though the proceedings "...had adversely affected the applicant's possibility of presenting her views..."<sup>96</sup>, ultimately the Court decided that the decision-making process had given the applicant a clear opportunity to present those views "...to a degree sufficient to provide her with the requisite protection of her interests."<sup>97</sup>

In both cases, the Court uses the conception of competing visions and ruled on the side of the State on the basis that enough room had been afforded for the applicants' views to be clear. In this way, the balancing test is decided on the metric of a fairness in opportunities for clarity. The 'seriousness' of an interference is sublimated into an idea of legitimacy, as the fairness rather than the weightiness of the reasons, as was the case in the previous section.

### **3. Narrow Margins Stemming from *Connors***

Following from *Connors*, the condition of necessity was deliberated in *Gillow v. The United Kingdom*.<sup>98</sup> Of the cases directly cited by *Connors* that do not share a citation with *Evans*, *Gillow* had the highest Eigenvector centrality (.1304) of the remaining group.<sup>99</sup>

Like the rest of the network, the key feature in the cited section of *Gillow* was the question of the interpretation of 'necessity' and 'legitimacy' of interference in a suspected infraction of Article 8 as it relates to the margin of appreciation given to states. *Gillow* questioned the legitimacy of the applicant's deprivation of the housing rights. The Court asked whether or not the applicant's

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<sup>95</sup> *Johansen* at §64.

<sup>96</sup> *id* at §65.

<sup>97</sup> *id* at §66.

<sup>98</sup> *Gillow v. The United Kingdom*, Judgement of the Court of 24 November 1986. CE:ECHR:1987:0914JUD000906380. (*Gillow*).

<sup>99</sup> The group of citations and their respective Eigenvector centrality were *Dudgeon v. The United Kingdom*, Judgement of the Court of 22 October 1981. CE:ECHR:1983:0224JUD000752576 at §52 (.1598), *Gillow* §55 (.1304), *Mellacher And Others v. Austria*, Judgement of the Court of 19 December 1989. CE:ECHR:1989:1219JUD001052283 at §45 (.0421), *Christine Goodwin v. The United Kingdom*, Judgement of the Court of 11 July 2002. CE:ECHR:2002:0711JUD002895795 at §90 (.0910), *Hatton and Others v. The United Kingdom*, Judgement of the Court of 8 July 2003. CE:ECHR:2003:0708JUD003602297 at §103 (.0000) and at §123 (.1213), where both *Dudgeon* §52 and *Goodwin* §90 are shared citations of *Connors* and *Evans* to be explored in the next section.

residence should be considered as “home”, within the strict meaning of the convention, and whether there was an interference on the Government's part in not allowing the Gillows to take up residence in the house. The government argued that the family were not entitled to reside in the house, citing their ineligibility for ‘residence qualifications’ for a property owned by Mr Gillow, yet still regulated as “controlled housing” administered by the States of Guernsey.

Like *Connors*, *Gillow* contains a high number of spatial metaphors which make reference to weight, force, and structure. This can be seen in the initial part of the Court's reasoning, where the items to be considered are listed,

“...The notion of necessity implies a *pressing social need*...”<sup>100</sup>

“...the economic well-being of Guernsey *must be balanced against* the applicants' right to respect for their ‘home’...”<sup>101</sup>

“...whether *the obligation imposed* on the applicants...”<sup>102</sup>

“...the applicants *attached considerable weight* to the facts...”<sup>103</sup>

Even though “...there was no longer *any pressing social need* for the housing control legislation...”<sup>104</sup>, and although “...the legislation had succeeded in containing within *acceptable limits the pressure* on residential accommodation in the island...”,<sup>105</sup> the Court decided that the fact that the Guernsey authority acted to exercise its power in the domain of housing matters doesn't run afoul of Article 8 (“...the statutory obligation *imposed on the applicants* to seek a licence to live in their “home” cannot be regarded as disproportionate to the legitimate aim pursued...”<sup>106</sup>). Going further, the Court stated that “...whilst recognising the relevance of the facts relied on by the applicants...the Guernsey legislature *is better placed* than the international judge to assess the effects of *any relaxation of the housing controls*...”<sup>107</sup>

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<sup>100</sup> *Gillow* at §55.

<sup>101</sup> *ibid.*

<sup>102</sup> *id* at §56

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

Nonetheless, the manner in which the Government imposed their authority remained in question. The Court reasoned "...that *insufficient weight* was given to the applicants' particular circumstances..."<sup>108</sup>. The Gillows "...[a]t that time, they possessed 'residence qualifications' and continued to do so *until the entry into force of the Housing Law 1969*..."<sup>109</sup>. Like the spatialisation of time in *S and Marper*, the length of time of their residence (and the weight given to that fact) metaphorically extended through space. This was to be balanced against the weight of the Act that had less time to propagate and, in this sense, the extra mass of the Gillows' rights arguably *outweighed* that of the act itself. Furthermore, "...the decisions of the Housing Authority were, despite the granting of certain periods of grace, *even more striking*..."<sup>110</sup>. The efforts of the Government to rectify the situation, in the Court's interpretation, "...did not *materially alleviate* Mr. and Mrs. Gillow's already precarious situation..."<sup>111</sup>

The use of force and weight in *Gillow* is quite consistent with what we have found in *Connors*. The use of an abstract quantity of weight and force to balance the needs and rights of two parties, particularly in the sense of necessity and legitimacy on the part of the Government's actions, help clarify the sense of embodied grounding the Court gives its abstract concepts. This is true of the cases stemming from *Gillow* as well.<sup>112</sup> Concretely, we have two different lineages leading up to *Schrems* which take different viewpoints on understanding the margin of appreciation when it comes to privacy.

If what is asserted here is true, we would expect that: first, the sections cited by both *Connors* and *Evans* will share a mix of these conceptions; and second, that the final outcome in *Schrems* will be a blend of these metaphors as well, albeit in a slightly different way. The next section investigates the first claim and the following section investigates the latter.

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<sup>108</sup> *id* at §57.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> See for instance, *Lingens v. Austria*, Judgement of the Court of 8 July 1986. CE:ECHR:1986:0708JUD000981582. (*Lingens*) §39-40 has a high centrality measure of (.1971). Though the case has to do with Article 10, it still looks at the notion of necessity with a similar approach to metaphor use, though not as much. It relies a bit more on the LAW IS A STRUCTURE metaphor. This is due to the account, as one could surmise, of having to do with free-expression rather than privacy, where a different conception may be used.

#### 4. Mixed cases

Both sections from *Evans* and *Connors* cite two common case sections: *Dudgeon*<sup>113</sup> §52 and *Goodwin*<sup>114</sup> §90. *Dudgeon* involved the distinction between public and private interests in light of the laws in Northern Ireland regulating acts between consenting homosexual adults. Mr. Dudgeon argued “that homosexual acts which he might commit in private with other males capable of valid consent are criminal offences under the law of Northern Ireland,”<sup>115</sup> and thus the law violated his right to private life under Article 8. The Court agreed that there was indeed interference.

However, the Court was required to decide whether or not the term necessity applied to the infraction, in that it was necessary for a democratic society to have the authority to interfere with Mr. Dudgeon’s private life. They state,

Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question...<sup>116</sup>

In doing this, the Court used a number of different conceptions of the margin of appreciation and of the duty of the government to balance a pressing social need with the rights of the applicant. In characterising the understanding of necessity with the metaphor of weight and force, the Court is stating that the need must be of a significant value to be passable as necessary. However, the weight conception is not particularly dominant throughout the decision. Unlike the cases in the previous two sections, *Dudgeon* contains references to a number of competing conceptions of the conditions of how the margin of appreciation will be interpreted, but no one formulation appears to supersede the others. Below are several examples of this.

STRUCTURE metaphors:

“...it is *on that basis* that the case has been argued by the Government...”<sup>117</sup>

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<sup>113</sup> *Dudgeon v. The United Kingdom*, Judgement of the Court of 22 October 1981. CE:ECHR:1983:0224JUD000752576.

<sup>114</sup> *Christine Goodwin v. The United Kingdom*, Judgement of the Court of 11 July 2002. CE:ECHR:2002:0711JUD002895795.(*Goodwin*).

<sup>115</sup> *Dudgeon* §39

<sup>116</sup> *id* at §51.

<sup>117</sup> *id* at §39.

"...the two purposes *relied on* by the Government..."<sup>118</sup>

"...to draw a *rigid distinction* between "protection of the rights and freedoms of others" and "protection of morals..."<sup>119</sup>

"...The Court's task is to determine on the basis..."<sup>120</sup>

#### FORCE/WEIGHT:

"...the *maintenance in force* of the impugned legislation..."<sup>121</sup>

"...which *directly affected* the applicant in the enjoyment of his right..."<sup>122</sup>

what the United Kingdom Government judged to be *the strength of feeling* in Northern Ireland *against the proposed change*..."<sup>123</sup>

#### TIME AS SPACE:

"...constitutes a *continuing interference* with the applicant's right to respect for his private life..."<sup>124</sup>

"...the very existence of this legislation *continuously and directly* affects his private life  
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a specific measure of implementation..."<sup>125</sup>

#### UP/DOWN

"...the *threat hanging over him* was real..."<sup>126</sup>

"...In the Government's submission, the law in Northern Ireland relating to homosexual acts *does not give rise to a breach* of Article 8..."<sup>127</sup>

"...It next *falls to be determined*..."<sup>128</sup>

"...*issue arising under* Article 8 (art. 8) in this case..."<sup>129</sup>

#### VISION:

"...it *showed* that..."<sup>130</sup>

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<sup>118</sup> *id* at §45.

<sup>119</sup> *id* at §47. There is also the competing metaphor here of the physicality of *drawing* this distinction rather than building it that could be understood not as structure but of physical action. However, given the point here is to show the variety of metaphors this distinction in this limited context isn't as important.

<sup>120</sup> *id* at §54.

<sup>121</sup> *id* at §41.

<sup>122</sup> *ibid.*

<sup>123</sup> *id* at §46.

<sup>124</sup> *id* at §41.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> *id* at §42.

<sup>128</sup> *id* at §45.

<sup>129</sup> *id* at §48.

<sup>130</sup> *id* at §41.

“...the Government *took the view that*...”<sup>131</sup>  
“...the Government *drew attention to*...”<sup>132</sup>  
“...*as was illustrated by more restrictive laws even in the field*...”<sup>133</sup>  
“...*measures must be seen in the context*...”<sup>134</sup>

#### SUBSTANCE:

“...it would be *seriously damaging to the moral fabric* of Northern Irish society...”<sup>135</sup>  
“...it is *somewhat artificial* in this context...”<sup>136</sup>

#### SPATIAL EXPANSE:

“...is to *what extent, if at all*...”<sup>137</sup>  
“...for *some degree of control may even extend*...”<sup>138</sup>  
“...*remain within the bounds of what, in a democratic society*...”<sup>139</sup>

#### WEATHER

“...it follows that *the moral climate* in Northern Ireland...”<sup>140</sup>

These are, of course, not all of the metaphors identified in *Dudgeon*, but a chosen sample showing the broad range of conceptions regarding the conditions of measuring the balance between competing public and private interests. The conclusion to be drawn is that the use of a predominant metaphor is absent, but the top metaphors are certainly a mix of the structure, expanse, vision, and force metaphors that we have seen in the cases documented so far.

The *Goodwin* case shows a similar pattern of metaphor use. The case of *Goodwin* was brought forward in the UK by a post-operative transsexual (male to female) who wasn't allowed to file sexual harassment claims as she was “considered in law to be a man.”<sup>141</sup> Christine Goodwin further

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<sup>131</sup> *id* at §47.

<sup>132</sup> *id* at §56.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> *id* at §46.

<sup>136</sup> *id* at §47.

<sup>137</sup> *id* at §48.

<sup>138</sup> *id* at §49.

<sup>139</sup> *ibid.*

<sup>140</sup> *id* at §57.

<sup>141</sup> *Goodwin* §15.

stipulated that she was discriminated against on the basis of her transsexuality in other areas of her life, such as sexual categorisation when it came to pensions or automobile insurance. Through a mix of conceptual metaphors similar to those quoted in *Dudgeon*, the Court decided that the evidence was not substantial enough to view the State's margin of appreciation as wide and ruled in favour of Christine Goodwin. Both of these cases validate the hypothesis that cases that are cited by two distinct lineages of metaphor conception will display a mixed use of metaphor in conceptualising the same right, at least in terms of how to understand the balance between public and private interests. Whether this is the case for standards or rules with clearer definitions is yet to be determined and should supplement research in this field in future investigations.

The next section aims to answer the final question in this chapter: how do the two competing metaphor constructions blend (or are actively blended) to form a framework for the understanding of the margin of appreciation in *Schrems*?

## 5. Conceptual Blending

The *Schrems* case adopted the expanse metaphor to comport with the idea that the breadth of infringement was as important as its depth, with *Digital Rights Ireland* acting as the intermediary of a conceptual blend. A conceptual blend, as discussed in Chapter 3, is the theory proposed by Fauconnier and Turner<sup>142</sup> that “sets out to explain...how blended spaces are constructed via the selective projection of elements from multiple input spaces.”<sup>143</sup> Fundamentally, there are two or more “input spaces” (in our case conceptual metaphor frames) which, when combined, produce a “general space” which contains “what the inputs have in common” and a “blended space” which “contain[s] generic structure captured in the generic space but also contain more specific structure.”<sup>144</sup>

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<sup>142</sup> See Fauconnier, Gilles & Turner, Mark; 2008. *The Way We Think: Conceptual Blending and The Mind's Hidden Complexities*. Basic Books.

<sup>143</sup> Veale, Tony, Shutova, Ekaterina, & Klebanov, Beata Beigman; 2016. *Metaphor: A Computational Perspective*. Morgan & Claypool Publishers. at 26.

<sup>144</sup> Fauconnier, Gilles & Turner, Mark; 2008 at 41-46.

The concepts used in the cases in this chapter exhibited two distinct lineages regarding the use of conceptual metaphor. We can understand these concepts as input spaces for blending. What is interesting in these two lineages is that the metaphors are borrowed from their prototypical cases (the hubs) with notions of expanse, weight, structure, and vision appearing far more frequently than constructions of journey, path/goal, or container, among others, that come from outliers in the network. The conceptual metaphors that have become combined are those that are the typical, even prototypical, notions of the relationship between the conditions that lead to a balancing of a margin of appreciation and international judicial review. Taking these two observations in conjunction, we can begin to see how the concepts are combined to make the ideational claim that breadth and depth are equally important and part of the same coherent systematic metaphor structure.

Fig. 6.3 shows the basic relationship of conceptual blending that translates depth to breadth in *Schrems*. The metaphors surrounding the understanding of the margin of appreciation in *Schrems*, unsurprisingly (or perhaps surprisingly), exhibit features of both the *Connors'* and *Evans'* (through *S and Marper*) lineages.

<i>Connors</i>		<i>S and Marper (through Evans)</i>		<i>Schrems</i> <sup>145</sup>
LAW IS A STRUCTURE THAT CAN WITHSTAND FORCE	+	LAW IS A STRUCTURE THAT PROVIDES CLEAR VISION	→	LAW IS A STRONG STRUCTURE THAT PROVIDES CLEAR VISION AND SUPPORT
PROPORTIONALITY IS A CONSISTENCY OF EQUAL WEIGHT AND FORCE	+	PROPORTIONALITY IS A CONSISTENCY OF EQUAL AREA	→	PROPORTIONALITY IS A CONSISTENCY OF EQUAL AREA AND WEIGHT
Time?	n/a	PERMANENCE IN TIME IS EXPANSE IN AREA	→	PERMANENCE IN TIME IS EXPANSE IN AREA

Fig 6.3

*Schrems* contains a number of metaphors with the highest proportion coming from a blend of these two lineages, a small selection of which can be seen below.

UP/DOWN

<sup>145</sup> Through the intermediary case of *Digital Rights Ireland*.



“...Such a check is required...when evidence *gives rise* to a doubt...”<sup>146</sup>  
“...the circumstances *that have arisen*...”<sup>147</sup>  
“...not ensuring *an adequate level* of protection...”<sup>148</sup>  
“...the Commission’s discretion as to the *adequacy of the level of protection* ensured by a third country *is reduced*.”<sup>149</sup>

#### VISION

“...*in view of, first*...”<sup>150</sup>  
“...*in the light of* the fundamental right to respect for private life...”<sup>151</sup>  
“...*as is apparent* from the second subparagraph...”<sup>152</sup>

#### FORCE/WEIGHT

“...*in force* in the third country...”<sup>153</sup>  
“...results in responsibility *being shifted*...”<sup>154</sup>  
“...Article 25 of Directive 95/46 *imposes* a series of obligations...”<sup>155</sup>  
“...where US law *imposes* a conflicting obligation...”<sup>156</sup>

#### EXPANSE

“...*the large number of* persons...”<sup>157</sup>  
“...the third country *covered by it*...”<sup>158</sup>  
“...The national supervisory authorities *have a wide range of* powers for that purpose...”<sup>159</sup>

#### TIME AS SPATIAL EXPANSE

“...*the continuity of* data protection rights of Europeans...”<sup>160</sup>  
“...could not be profitably *put forward*...”<sup>161</sup>

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<sup>146</sup> Schrems at §76.

<sup>147</sup> *id* at §77.

<sup>148</sup> *id* at §78.

<sup>149</sup> *ibid*.

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid*.

<sup>152</sup> *id* at §64.

<sup>153</sup> *id* at §2.

<sup>154</sup> *id* at §20.

<sup>155</sup> *id* at §50.

<sup>156</sup> *id* at §85.

<sup>157</sup> *id* at §78. *Large number* here could reasonably be thought of as an UP/DOWN schema, but considering the subject is people it is more likely to be thought of over an expanse.

<sup>158</sup> *id* at §52.

<sup>159</sup> *id* at §43.

<sup>160</sup> *id* at §25.

<sup>161</sup> *id* at §29.

“...the arguments *put forward*...”<sup>162</sup>

## STRUCTURE

“...*structural shortcomings*...”<sup>163</sup>

“...*based on* considerations of national security...”<sup>164</sup>

“...*in support of* such a claim *are unfounded* and therefore rejects it...”<sup>165</sup>

Combinations of VISION and EXPANSE:

“...[a]ny *gap in transparency*...”<sup>166</sup>

If we take the metaphor constructions from the precedent cases and blend them, what we find in *Schrems* is precisely what we would expect: a mix between the metaphorical features of a tangible embodied understanding of “balance” and a reflection on how to measure that balance. As we saw from the previous cases, this is not always done the same way, but taking into account the lineage of the precedent cases, the measuring process becomes somewhat predictable. Take, for instance, the traditional metaphor for the margin of appreciation that describes it as either narrow/wide or strict. In *Schrems*, It is interesting that the Court decided to use UP/DOWN metaphor and the imagery of *reduction* (or *reduced*) vs the more traditional *strict* or *narrow* articulation/framing. What may help to explain this choice is the structure that is formed from blending the two lineages of metaphor construction.

It gives an idea of how the Court understands the meaning of *specific* and *general* state action in this frame. Let’s picture for a moment what this frame looks like using the diagram of conceptual blending from Fauconnier and Turner as support.

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<sup>162</sup> *id* at §64.

<sup>163</sup> *id* at §15.

<sup>164</sup> *id* at. §34.

<sup>165</sup> *id* at §64.

<sup>166</sup> *id* at §20.

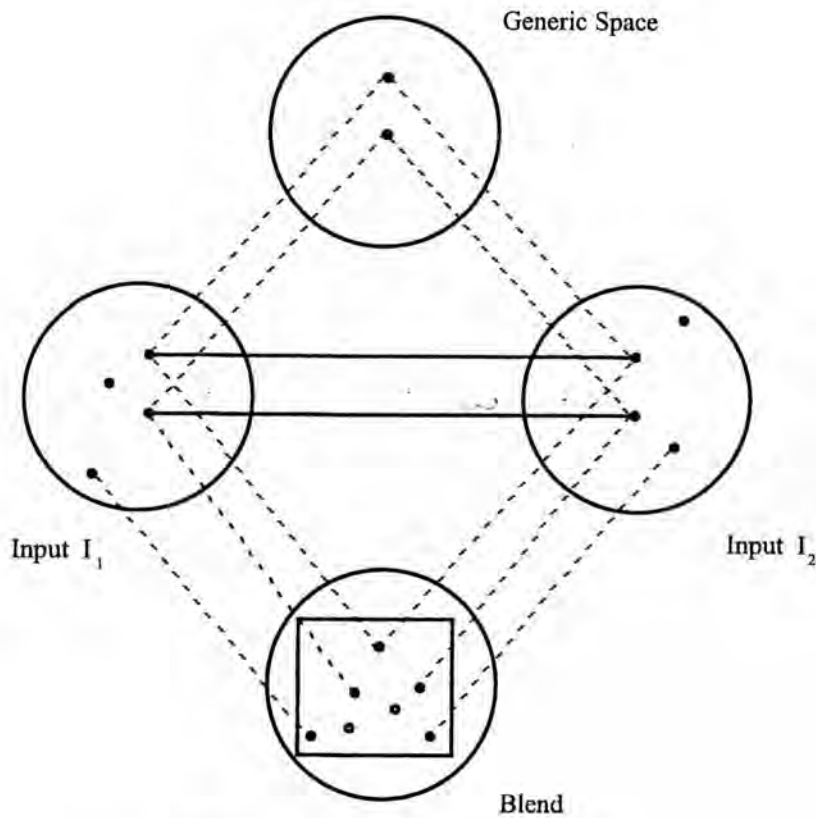


Fig 6.4 The basic conceptual blending diagram from Fauconnier and Turner<sup>167</sup>

If we think of input space 1 ( $I_1$ ) as containing the metaphor constructions from *Connors*, and input space 2 ( $I_2$ ) as containing the constructions from *S and Marper*, with the dots within those spaces marking their respective conceptual frames, we can think of the blended space as containing the combination of those spaces in *Schrems*, and the generic space as the space that only contains the similarities between  $I_1$  and  $I_2$ . The result is a denser construct than would have been achieved by investigating each of the precedent cases on their own. It would be fair to ask whether it is possible that *Dudgeon* and *Goodwin* undergo this same kind of blend? They likely do, but to understand how that functions and to substantiate the claim would take a full networking of all of the precedents for every single case, and not just a look into the cited sections in *Schrems*. The future options for research of this type are discussed in Chapter 9.

<sup>167</sup> Fauconnier, Gilles & Turner, Mark; 2008 at 46.

To see how this construction impacts on the reading of depth vs breadth in *Schrems*, we have to visualise the law as it is constructed in the blended space. This can be done by looking at the paragraphs paying particular attention to the italicised words which are cited in [one, or more, of] the cases we have already discussed .

We need to imagine a three-dimensional space with a plane that represents the law running horizontally across it in all directions, then we can add in the components. First, let's imagine the space as described for the State. The State is understood as both *underlying* society and *building up* a *structure*; a peak on that plane that comes into existence and is *built up* with every legislative act; giving meaning to the understanding of something being *foundational*. This peak must have *clear vision* over its domain. This *scope of vision* can be understood as the proper functioning of the law. Any obstacle to that vision, either by obstruction or something existing outside of its view can be understood as a legal ambiguity, an objection or *claim being raised in front of the law*, or an improper functioning of the system. The clarity and expanse of that view are important, but it also crucial to recognise that law's *force to impose power* over all that it can see.

Now we add in the spatial construct of the private citizen. Our citizen is represented by a point on this plane. If the law *imposes a burden* on this citizen's rights, that point is depressed *beyond the vision* of the law; their congruity to the plane is disrupted. If the infringement is necessary or proportional to a legitimate aim, this measure *will not add such a burden* that the point is depressed beyond reach/sight. Likewise, if *a claim has good support* or *strong and forceful reasons underlying it*, if *it holds enough weight*, or if the seriousness is grave, the depression can be deepened, which correlates to an infringement taking place. However, even if the depression is given *more weight* (depth in this spatial sense), if the depression is deep enough to undermine or endanger the structure of the law as it is *set up* to view its entire domain (think a tower toppling over), then even though a claim holds the quality of being serious, it cannot escape the proscription of the State to do *what is necessary* to keep its structure and *foundation* intact; namely, determining that the State is *within its margin of appreciation* to reverse the depression back into its contiguous plane. If there is a *pressing social need* for a certain law, that weight is what holds the structure together and is too *vital* to remove as an integral part of the law.

Now add in time. If a small depression *continues over a long period* of time, *the pressure* deepens which makes a small problem bigger. Or, one could visualise it by imagining the depression travelling through that plane, and gradually turning a small hole into a crevice or, using the terminology from many of the cases, *a gap*.

Now add in predictability. This plane must possess the quality of *being transparent*, so that any individual on the plane can see how it is built and how far it extends. The ups and downs of this plane must be patterned and predictable. If they are *not in accordance* with previous up and down movements within this space, then they are infractions of the law.

Of course, this isn't what is literally going on in the mind of a judge as they deliberate. But the conceptual representation has enough consistency for us to confidently posit that this is the construction that allows the intuitive physics of tangible space to aid the interpretation of an abstract concept like proportionality in privacy law.

With this in mind, it is useful to revisit the specific legal test we set up for the margin of appreciation in point 1.2 of the previous chapter, which outlined how to test the proportionality of data interception and how to measure the margin of appreciation given to states.

- 1.2 *Purpose and duration* of the operations must be proportional to a legitimate aim
  - 1.2.1 Is the interception or processing targeted and specific?
  - 1.2.2 Is the interception or processing legitimate to national security?
  - 1.2.3 Has the data been retained beyond the duration needed to achieve that aim?

These are no longer straight forward or one-dimensional questions.

1.2.1 deals with the number of points on the plane where pressure is applied. If the number is not specific, this will cause a general depression and the plane will be lowered, thus falling out of sight of the overseeing structure and putting its structural integrity into jeopardy.

1.2.2 asks whether the impugned action has the requisite force to hold the structure together.

I.2.3 asks about the nature and size of the gap that has been opened up in the plane.

We can see that by placing the concept of data interception within the 'container' provided by our existing notion of privacy, the Court is working within its own framework which does not require the legal landscape to be remodelled in order to understand the qualifications of data privacy to the old conceptions of privacy using necessary and sufficient conditions or through strict analogical case comparison. To the Court, a phrase such as "must be understood to mean" is apparently clear. Why wouldn't it be? It is just a combination of the prototypical concepts that the Court has already dealt with and understands.

In this metaphor, citizens' rights are the same as State's rights. They are part of the same fabric. But there are still questions and answers outstanding: how do we measure pressure and stress on a structure or citizen? How do we measure the height and depth of arguments? Those are questions taken up in the next chapter.

## Chapter 7: Evaluative Judgement §91

“...we should not just describe concepts and categories by means of an abstract definition, but ... we should also take into account the things that the definition is about, if we are to achieve an adequate level of knowledge.”

Dirk Geeraerts<sup>1</sup>

The analysis of the precedents stemming from §78 of the *Schrems* case gave us an idea about the construction of the abstract spatial conception of proportionality. However informative the analysis of the margin of appreciation may be, to show how that spatial construction helps inform narrow or wide discretion through conceptual blending is only one facet of the issue at hand. What remains is to show *how* the Court uses that framing to infer an evaluative judgment about competing conceptual constructions. To do this, we can use ideas expressed by research on evaluative judgment and particularly, the metaphoric fit hypothesis.

The first stage is to look at the constitutive chains in the network stemming from §91, which refers to the *quality of a law* and how each one can be marked as containing *sufficient safeguards*. To review quickly, the *Schrems* case hinged on a judgment determining whether or not the US privacy protection scheme (in how it was constructed under the Safe Harbor arrangement) could be understood as giving ‘adequate protection’ or as having ‘essential equivalence’ to the EU data protection regime.

The leading question in this chapter is: how does the Court use the spatial framing of its precedent network to evaluate the quality, sufficiency, or adequacy of two sets of legal frameworks, and to then qualify the deference given to national governments in interpreting their own standards?

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<sup>1</sup> Geeraerts, Dirk; 2006. “Introduction: A rough guide to Cognitive Linguistics” in *Cognitive Linguistics: Basic Readings*. Dirk Geeraerts, René Dirven and John R. Taylor (Eds.). Walter de Gruyter at 1.





The colour groups were identified using a clustering coefficient to identify 5 communities among the case sections: groups one (pink), two (light green), three (orange), four (dark green), and five (blue). The sizes of the nodes correspond to their Eigenvector Centrality. Within the entire network, five nodes were immediately identified for their high centrality measure: *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria* §75-77,<sup>4</sup> *Liberty and Others v. The United Kingdom* §62,<sup>5</sup> *Weber and Saravia v. Germany* §93-95,<sup>6</sup> *Valenzuela Contreras v. Spain* §46,<sup>7</sup> and *Digital Rights Ireland and Seitlinger and Others v. Minister of Communications and Others* §54-55.<sup>8</sup> While these were the largest hubs in the network as a whole, each group contained its own smaller hubs with different relations to the entirety of the network. These results are shown in Fig. 7.2.

GROUP 1		GROUP 2		GROUP 3		GROUP 4		GROUP 5	
Label	E_Cent	Label	E_Cent	Label	E_Cent	Label	E_Cent	Label	E_Cent
AEIHR v Bulgaria 75-77	1.0000	Liberty and Others 62	0.7773	Klass and Others 49	0.0786	Kopp v Switzerland 50	0.0779	Leander v Sweden 50	0.0522
Weber and Saravia 93-95	0.5985	DRJ 54-55	0.3821	Leander v Sweden 60-67	0.0723	Niemetz v Germany 30-33	0.0411	Malone v UK 66	0.0520
Valenzuela v Spain 46	0.4120	Schrems 91	0.1583	Rotaru v Romania 57-59	0.0676	Niemetz v Germany 29	0.0255	Silver and Others 85	0.0108
Halford v UK 49	0.1637	S and Marper 103	0.0047	Handyside v UK 48	0.0411	Huvig v France 25	0.0156	Sunday Times 48	0.0047
Rotaru v Romania 55	0.1628	Liberty and Others 63	0.0047	Engels 100	0.0156	Klass and Others 41	0.0047	Silver and Others 86	0.0047
Khan v UK 26	0.1540	M.K. v France 35	0.0000	Golder v UK 45	0.0047	Marckx v Belgium 31	0.0047	Silver and Others 87	0.0047
Amann v Switzerland 56	0.1529	Z v Finland 95	0.0000	Klass and Others 50	0.0000	Chappell v UK 51	0.0000	Sunday Times 47	0.0000
Leander v Sweden 51	0.0947	Weber and Saravia 18	0.0000	Klass and Others 58	0.0000	Huvig v France 8	0.0000	Wemhoff v Germany 8	0.0000
Kopp v Switzerland 64	0.0909			De Wilde 93	0.0000	Campbell v UK 32-33	0.0000		
Malone v UK 67	0.0870			Belgian Linguistic Case 10	0.0000	Malone v UK 64	0.0000		
Huvig v France 29	0.0838					Niemetz v Germany 28	0.0000		
Kruslin v France 30	0.0838					Halford v UK 42-45	0.0000		
Malone v UK 68	0.0156					Belgian Linguistic Case 7	0.0000		
Silver and Others 90	0.0108					Amann v Switzerland 76	0.0000		
Kopp v Switzerland 72	0.0095								
Klass and Others 55	0.0047								
Silver and Others 88-89	0.0047								
Golder v UK 34	0.0000								
Klass and Others 42	0.0000								
Sunday Times 49	0.0000								
Huvig v France 32	0.0000								
Kruslin v France 33	0.0000								
Huvig v France 34	0.0000								
Kopp v Switzerland 55	0.0000								
Kruslin v France 35	0.0000								
Klass and Others 25	0.0000								
Klass and Others 26	0.0000								
Kruslin v France 27	0.0000								

Fig 7.2 Group distribution and their nodes' respective eigenvector centrality

<sup>4</sup> *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*, Judgement of the Court of 28 June 2007. CE:ECHR:2007:0628JUD006254000. (AEIHR)

<sup>5</sup> *Liberty and Others v. The United Kingdom*, Judgement of the Court of 1 July 2008. CE:ECHR:2008:0701JUD005824300. (Liberty)

<sup>6</sup> *Weber and Saravia v. Germany*, Judgement of the Court of 29 June 2006. CE:ECHR:2006:0629DEC005493400. (Weber and Saravia)

<sup>7</sup> *Valenzuela Contreras v. Spain*, Judgement of the Court of 30 July 1998. CE:ECHR:1998:0730JUD002767195. (Valenzuela)

<sup>8</sup> *Digital Rights Ireland and Seitlinger and Others v. Minister of Communications and Others*, Judgement of the Court of 8 April 2014. EU:C:2014:238. (Digital Rights Ireland)

The sufficiency we are concerned with here relates to a number of universal rules, as set out by the CJEU and ECtHR's case law. The first step is to trace the legal rules underpinning that test of sufficiency.

## **I. Characteristics of Sufficiency:**

As Group 2 contained the origin node of the present network, *Schrems* §91, it is the logical starting point for the chapter's investigation. Though the group contains 8 nodes, only 5 have a centrality measure above the threshold of 0.0000: *Liberty and Others* §62, *Liberty and Others* §63, *Digital Rights Ireland* §54-55, *S and Marper* §103, and the origin node *Schrems* §91.

*Schrems* §91 states in full, that any,

EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data.<sup>9</sup>

The cited cases detail the conditions of this rule more explicitly. §62 in *Liberty and Others* calls for “the requirement of legal “foreseeability,”<sup>10</sup> where foreseeability is quoted at length from the *Weber and Saravia* case (which we will look at in a moment). The second cited section in *Liberty and Others*, transfers the *original* circumstances of the case law on the “measures of surveillance targeted at specific individuals or addresses”<sup>11</sup> to the context of general surveillance in *Liberty and Others*,

The Court does not consider that there is any ground to apply different principles concerning the accessibility and clarity of the rules governing the

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<sup>9</sup> *Schrems* at §91.

<sup>10</sup> *Liberty* at §62.

<sup>11</sup> *id* at §63.

interception of individual communications, on the one hand, and more general programmes of surveillance, on the other.<sup>12</sup>

*Liberty and Others* concerned the interception of communications data (“10,000 simultaneous telephone channels coming from Dublin to London and on to the continent”<sup>13</sup>) by the UK government. Like the cases examined in the previous chapter, it relied on both the clear vision and strong structure metaphors that the Court uses to frame the discretion of a national government to justifiably interfere with citizens' fundamental rights. Though not specifically pertinent to the realm of ‘personal data’, the principles set out in this case are carried over to *Digital Rights Ireland* (and subsequently *Schrems*) by blending with a case that definitely does relate to personal data: *S and Marper*.

The third cited case section<sup>14</sup> addresses the question of DNA data retention, as discussed in the previous chapter, and outlines certain proscriptions for the handling of such intimate data. The domestic law of a country must:

1. “afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article [Article 8]”
2. “ensure that such data are relevant and not excessive in relation to the purposes for which they are stored”
3. “preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.”
4. “afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse.”<sup>15</sup>

These conditions are weighted more heavily if the law recognises or “regards the protection of special categories of more sensitive data”, “and more particularly of DNA information”, which “are used for police purposes”, and/or “undergo[...] automatic processing.”<sup>16</sup> Using the framework established in the previous chapter to combine these two contexts (where the circumstances of DNA collection can be understood as mental space I, and the interception of communications

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<sup>12</sup> *ibid.*

<sup>13</sup> *id* at §5.

<sup>14</sup> *S and Marper* at §103.

<sup>15</sup> *ibid.* Numbers added.

<sup>16</sup> *ibid.*

data can be understood as mental space 2), it is easy to see how *Digital Rights Ireland* conscripts properties from both cases to inform its own blended space in order to make general rules applicable to a specific case. In the second space, we have proscriptions of foreseeability, as outlined in *Weber and Saravia* §93-95; the law must give, “clear, detailed rules on interception of telephone conversations...” and outline “the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures”, it must be “open to scrutiny by the individuals concerned or the public at large”, where it “ must indicate the scope of any such discretion”, and “the manner of its exercise.”<sup>17</sup> The case proceeds to stipulate that the minimum safeguards must include:

the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed.<sup>18</sup>

Like the cases in the last chapter, the process takes relevant features from each mental space to construct a blended space which lends itself to the wider categorical use of a general rule. And, again like the cases in the last chapter, this is done through a process of underlying image schemas that infer the way the court conceptualises the distinction between different types of data (communications, DNA, or digital data). It is important to explore this notion, and in order to do so we must first look at how these ideas have become manifest by working backwards through the network. To backtrack properly, particular attention must be paid to the concept of circumstances requiring “added weight”, and understanding what counts as being foreseeable, and most importantly, to noting instances where the Court makes an evaluative judgement on the *quality of a law* or *sufficiency* of a specific framework of safeguards to protect a citizen’s Art. 8 rights. To investigate the evaluative judgment of the Court, we need to establish the main path of the Court’s use of precedent; we need to look at the path that connects the central hubs in their respective groups and the schemas that underlie their framing. This path can be seen in fig. 7.3.

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<sup>17</sup> *Weber and Saravia* at §93-95.

<sup>18</sup> *ibid.*

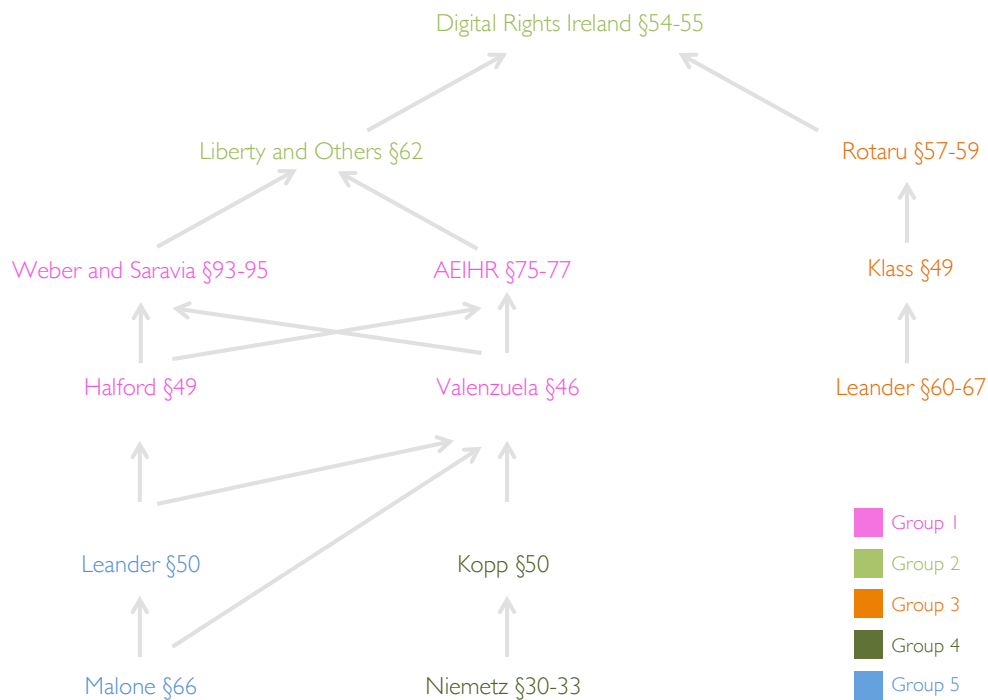


Fig 7.3 Basic path structure between the main hubs of the five groups

It is one thing to focus on the cited sections that are represented by each node, but those sections need to be understood in the wider context of their respective circumstances of fact, particularly with respect to the dominant framings within them. Our first task, therefore, is to set out the factual circumstances of the central node cases to lay out the different situations in order to then compare them substantively, while analysing how the evaluative judgments of the ‘quality of law’ themselves play out.

## 2. The Circumstances of Fact in the Central Cases:

*Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria:*

*Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria* is a case in which the applicants, the Association for European Integration and Human Rights (hereafter AEIHR) and an independent lawyer, contested the protocol that had to be followed to bring human rights applications before the ECtHR. They contended that a piece of legislation (the Special Surveillance

Means Act of 1997, hereafter SSMA) was in violation of Articles 6.1, 8, and 13 of the Convention, even though they themselves had not been subjected to any surveillance under the legislation. The first requirement in the case was to determine whether or not the AEIHR could be considered as an entity that can be legally covered by a notion of private life, given their contested status as a 'legal person'. The Court decided that,

While it may be open to doubt whether, being such a person, it can have a "private life" within the meaning of that provision, it can be said that its mail and other communications, which are in issue in the present case, are covered by the notion of "correspondence" which applies equally to communications originating from private and business premises.<sup>19</sup>

Given this assessment, the Court had to decide on the two parties' differing claims as to whether the purported interference with Article 8 satisfied the conditions of being "in accordance with the law" and "necessary in a democratic society."<sup>20</sup> In regard to the first, the Court stated that,

The expression "in accordance with the law", as used in Article 8 § 2, does not only require that the impugned measure should have some basis in domestic law. It also refers to the quality of this law, demanding that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and compatible with the rule of law.<sup>21</sup>

The court was satisfied that the SSMA met the first two conditions of the rule of law standard; as for being accessible, however, it held that the legislation failed on account of its lack of foreseeability. The Court referred to the hub node to find the description of foreseeability in the case law, §75-77, as discussed in the beginning of the chapter. Given the possibilities for abuse, the fact that the law did not require an independent authority to oversee the use of secret surveillance and that such surveillance did not have to be disclosed to those being monitored (even after the fact), the Court ruled that the measures were not sufficiently foreseeable and therefore not "in accordance with the law". It concluded that the SSMA was in violation of Article 8.

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<sup>19</sup> AEIHR at §60.

<sup>20</sup> *id* at §70.

<sup>21</sup> *id* at §71.

*Weber and Saravia v. Germany:*

This case concerned the interception and recording of a newspaper reporter's telecommunications data and correspondence. In the course of her duty, the reporter often travelled to South and Central America, and with relevance to the complaint, often corresponded with the second applicant during these trips. The applicants contended that amendments to the G10 Act (the "Fight Against Crime Act") infringed their Article 8, 10, and 13 rights under the convention. Concerning Article 8, the applicants specified 5 major infractions:

1. "the process of strategic monitoring"<sup>22</sup>
2. "the transmission and use of personal data"<sup>23</sup>
3. "the transmission of personal data to the Offices for the Protection of the Constitution and other authorities and its use by them"<sup>24</sup>
4. "destruction of personal data"<sup>25</sup>
5. "the provision authorising the refusal to give notice of restrictions on the secrecy of telecommunications"<sup>26</sup>

The Court was of the opinion that the amendments to the G10 act were an infringement on Art. 8 rights, and so continued on to discuss whether the interference was justified by being "in accordance with the law" and "necessary in a democratic society". On the first point - whether it was in accordance with the law - the Court noted that given the legal definition for minimum safeguards (as referenced earlier in the chapter), the act provided those safeguards and was therefore in accordance with the law. As for necessity, the Court examined all of the supposed infractions and assessed the parties' competing arguments, counterbalancing the rights of the applicants vs the necessity of the government's action (namely, the risk of abuse). Given that the German Constitutional Court had amended and strengthened those safeguards the Court found that, "the applicants' complaints under Article 8 must be dismissed as being manifestly ill-founded."<sup>27</sup>

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<sup>22</sup> *Weber and Saravia* at §74.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> *id* at §138.

*Valenzuela Contreras v. Spain:*

This case involved a Spanish citizen, Valenzuela Contreras, who, at that time, was the “deputy head of personnel of the W. company.”<sup>28</sup> An employee, Ms. M., had made a complaint to the Spanish authorities about a number of threatening telephone calls and letters she had received. The Spanish authorities inquired into the calls by tapping Ms. M's telephone, at her request, to find their origin. The calls were subsequently found to to have been made from the W. company's telephones. The access to the phones was narrowed down to a few suspects, including Mr. Valenzuela Contreras. The judge ordered that the company telephones be tapped, letters analysed for their origin (make of typewriter), and saliva and fingerprint samples taken. Given the evidence presented, Mr. Valenzuela Contreras's telephone was ordered to be tapped. That line tapping uncovered, “that a number of calls had been made from his telephone to Mrs. M., her fiancé, and their close relatives. Although, “the caller had hung up as soon as the telephone was answered,”<sup>29</sup> thus while withholding their identity, a total of “twenty-two calls had been made from the applicant's telephone while it was being tapped, three to Mrs. M.'s home, eight to Mr. R.'s home, two to Mr. R.'s aunt and nine to his superior.”<sup>30</sup>

Given the evidence, a criminal proceeding was launched in which Mr. Valenzuela Contreras was eventually convicted. In response to this ruling, he appealed to the supreme and constitutional courts, and finally to the Commission, complaining, “that he had not had a fair hearing in that his guilt had not been established by lawful means and that the monitoring of his telephone line had infringed his right to respect for his private life.”<sup>31</sup> The Court found that there was an infringement of Article 8 in that the telephone surveillance constituted an interference, however the *foreseeability* of the law<sup>32</sup> was at stake, and “[t]he Court must therefore assess the *quality* of the legal rules that were applied in Mr. Valenzuela Contreras's case”<sup>33</sup> The Court noted that although, since the time of the wire tapping, the Spanish authorities had taken measures to ensure adequate

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<sup>28</sup> *Valenzuela* at §7.

<sup>29</sup> *id* at §15.

<sup>30</sup> *id* at §18.

<sup>31</sup> *id* at §35.

<sup>32</sup> *id* at §51.

<sup>33</sup> *id* at §53. Emphasis added.



safeguards, at the time of the infringement, those safeguards were inadequate in their specificity and as such, “Mr. Valenzuela Contreras did not, therefore, enjoy the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society,”<sup>34</sup> and a violation of his Article 8 rights had consequently been committed.

*Halford v. The United Kingdom:*

This case concerned Ms. Alison Halford, of the Merseyside police. She was, at the time, the “most senior-ranking female police officer in the United Kingdom.”<sup>35</sup> She applied numerous times for higher positions as vacancies opened up. These promotions were not granted. She subsequently complained to the Industrial Tribunal that she had been discriminated against on the grounds of her sex. She also claimed that telephone calls had been intercepted and leaked to the press to create a “campaign” against her,<sup>36</sup> which she presented strong evidence of to multiple tribunals and, finally, to the Commission. Ms. Halford had two telephone systems at her disposal, one at home and one in her office. Within the office system, she had two lines; one of which was designated for private use. The Court found, given that previous case law had determined that business premises encompass the domain of private life under Art. 8 and that the “domestic law did not provide any regulation of interceptions of calls made on telecommunications systems outside the public network,”<sup>37</sup> the interference with Ms. Halford’s business telephone system was not “in accordance with the law.”<sup>38</sup>

Her home telephones, on the other hand, were a different matter. Ms. Halford argued that the interception of her private telephone communications qualified as an interference on the basis that the Court’s case law supported that the mere “menace” of surveillance, as proscribed by a law, is tantamount to an infraction of Art. 8.<sup>39</sup> However, given that the alleged interception was undertaken “unlawfully”, the Court could not apply that standard. The court stated,

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<sup>34</sup> *id* at §61.

<sup>35</sup> *Halford v. The United Kingdom* at §9.

<sup>36</sup> *id* at §12.

<sup>37</sup> *id* at §50.

<sup>38</sup> *id* at §51.

<sup>39</sup> *id* at §53.

the essence of Ms Halford's complaint...was not that her Article 8 rights (art. 8) were menaced by the very existence of admitted law and practice permitting secret surveillance, but instead that measures of surveillance were actually applied to her. Furthermore, she alleged that the Merseyside police intercepted her calls unlawfully, for a purpose unauthorised by the 1985 Act<sup>40</sup>

The Court then went on to reason if there was a "reasonable likelihood" this interception took place which they could not establish,<sup>41</sup> and therefore decided that her Art. 8 rights in respect to her home telephones were not infringed.

*Leander v. Sweden:*

This case concerned Mr. Torsten Leander, a carpenter, who applied for a temporary position at a Swedish naval base. Because this entailed working within a secure area, the applicant was required to undergo "personnel control", which is ostensibly equivalent to a background check made through police registers.<sup>42</sup> However, he had already started working at the vacancy before the check was carried out, and was therefore told to take leave while it was being processed. The outcome of the personnel control was ultimately not in Mr. Leander's favour. Mr. Leander petitioned the Navy, requesting access to the information that had determined this decision. This information was collected by the National Police Board, and Mr. Leander asserted, in regards to this information, "...the Government should, before taking a decision ... give him the right to be apprised of and to comment upon the information thus released by the Board," ... "at least orally and subject to a duty of confidentiality."<sup>43</sup> Mr. Leander's fear was that his personnel control had been rejected due to his past political associations which, if it were the case, would be contrary to

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<sup>40</sup> *id* at §57.

<sup>41</sup> There is some dubious reasoning here that should be pointed out. Even though it isn't of significant importance to the current study, it is interesting nonetheless. §59 states, "The Court observes that the only item of evidence which tends to suggest that calls made from Ms Halford's home telephone, in addition to those made from her office, were being intercepted, is the information concerning the discovery of the Merseyside police checking transcripts of conversations. Before the Court, the applicant provided more specific details regarding this discovery, namely that it was made on a date after she had been suspended from duty...However, the Court notes that this information might be unreliable since its source has not been named. Furthermore, even if it is assumed to be true, the fact that the police were discovered checking transcripts of the applicant's telephone conversations on a date after she had been suspended does not necessarily lead to the conclusion that these were transcripts of conversations made from her home." How this circumstance doesn't qualify as a "reasonable likelihood" should be examined in a later study.

<sup>42</sup> *Leander v. Sweden* at §10.

<sup>43</sup> *id* at §15.

Swedish law. Mr. Leander complained to the Commission that his rights under Articles 6,8,10, and 13 had been violated because,

he had been prevented from obtaining a permanent employment and dismissed from a provisional employment on account of certain secret information which allegedly made him a security risk; this was an attack on his reputation and he ought to have had an opportunity to defend himself before a tribunal.<sup>44</sup>

The Commission found no breach of Mr. Leander's Art 8 rights, and the case was taken to the ECtHR, with the contention that his rights were infringed because,

nothing in his personal or political background ...could be regarded as of such a nature as to make it necessary in a democratic society to register him in the Security Department's register, to classify him as a "security risk" and accordingly to exclude him from the employment in question. He argued in addition that the Personnel Control Ordinance could not be considered as a "law" for the purposes of paragraph 2 of Article 8 (art. 8-2).<sup>45</sup>

The Court agreed with Mr. Leander that the control was an infringement on his private life; with regard to it being in accordance with the law, the Court determined that the quality of the law (namely its foreseeability: "the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable"<sup>46</sup>) took precedence over a simple "compliance" with domestic law.<sup>47</sup> This opinion contains a strong caveat; in the context of "national security" and the hiring of staff, this foreseeability "cannot" include the "precise" checks that the security forces carry out, it needs only to be "sufficiently clear."<sup>48</sup> The Court concluded that in this regard, the infringement was in accordance with the law. As for the necessity component, the Court reasoned that in balancing the infringement of Mr. Leander's right to private life, the State had implemented enough safeguards to outweigh that infringement. They concluded,

The fact that the information released to the military authorities was not communicated to Mr. Leander cannot by itself warrant the conclusion that the interference was not "necessary in a democratic society in the interests of

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<sup>44</sup> *id* at §45.

<sup>45</sup> *id* at §47

<sup>46</sup> *id* at §50.

<sup>47</sup> *ibid*.

<sup>48</sup> *id* at §51. Emphasis added.

national security", as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure.<sup>49</sup>

Given its compliance with the standards of Art. 8-2, the Court upheld the Commission's decision that the State had sufficiently met the standards set out by the Convention in not releasing the information of the personnel control to Mr. Leander, and thus, there was no breach of Article 8.

*Malone v. The United Kingdom:*

The *Malone* case pertained to the wiretapping and surveillance of the accused (and acquitted), Mr. James Malone. Though acquitted - twice - of a crime, Mr. Malone contended that the use of wiretapping and intercepted correspondence was beyond the scope of a warrant issued in order to produce evidence in the cases against him concerning the handling of stolen goods. Mr. Malone asserted that, although the use of warrants was an accepted administrative practice at the time, "no power to tap telephones had been given by either statute or common law, [and as such] the tapping was necessarily unlawful,"<sup>50</sup> thus violating his Art. 8 rights. The Commission agreed with this appraisal and the case was sent to the ECtHR, upon the UK government's request, to ascertain if the interception was legitimate under the terms set out in Art. 8.

The Court, in considering whether the interference was in accordance with the law, made clear that this line does not necessarily mean only "domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law."<sup>51</sup> Like in the *Leander* case, the Court considered that though foreseeability is a requisite factor in domestic law, it can also be more widely construed in special contexts. In this context, the Court held that an administrative practice, while not strictly part of domestic law, must have at least "sufficient clarity" to provide "adequate protection".<sup>52</sup> Given the above, the main question for the Court was to determine "to what extent the circumstances in which a warrant might be issued and implemented were themselves circumscribed by law."<sup>53</sup> The Court decided that without "any reasonable certainty what elements

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<sup>49</sup> *id* at §66.

<sup>50</sup> *Malone v. The United Kingdom* at §35.

<sup>51</sup> *id* at §67.

<sup>52</sup> *id* at §68.

<sup>53</sup> *id* at §70.

of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive,"<sup>54</sup> the practice of issuing a warrant by executive fiat was not satisfactory to the requirement of being in accordance with the law, and thus found it unnecessary to discuss the condition of necessity, concluding that Mr. Malone's Art. 8 rights had been breached.

*Kopp v. Switzerland:*

Like many of the aforementioned cases, *Kopp* involved a breach in Art. 8 rights relating to the tapping of telephones. The case concerned the telephones of Mr. and Mrs. Kopp, two Swiss lawyers who resigned from their firm after being suspected of money laundering (Mr. Kopp) and disclosing confidential information (Mrs. Kopp). After an inquiry conducted by the Swiss authorities, it came to light that an American citizen (Mr. X), suspected of being involved in organised crime, had obtained confidential information withheld by the Swiss authorities about himself and the supposed crimes of Mr. Kopp. This information came from within the Swiss Federal Department of Justice and Police, and so "the Federal Public Prosecutor opened an investigation against a person or persons unknown in order to question the informant Y and to identify the person working at the Federal Department of Justice and Police who might have disclosed official secrets,"<sup>55</sup> and tapped the phone lines of Mr. X, Mr. Y, and Mr. and Mrs. Kopp ("monitored as a "third party", not as a suspect"<sup>56</sup>).

The investigation found that Mr. and Mrs. Kopp were innocent of any wrongdoing, and was subsequently closed. Shortly thereafter, the Swiss authorities revealed to Mr. Kopp that his telephone lines had been monitored during the investigation. Mr. Kopp asked to receive the file containing the details of his intercepted telephone calls. This request was denied, and in response Mr. Kopp asserted that the tapping which had taken place was contrary to both Swiss law and his Article 8 rights. Applying through the Commission, the Court appraised the matter and ruled in favour of Mr. Kopp, stating that through an extension of what it considers "law" beyond its formal sense, the tapping could be seen as having a basis in domestic law.<sup>57</sup> However, "Swiss law, whether

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<sup>54</sup> *id* at §79.

<sup>55</sup> *Kopp v. Switzerland* at §15.

<sup>56</sup> *id* at §16. "The order expressly mentioned that 'the lawyers' conversations [were] not to be taken into account"; *id* at §18.

<sup>57</sup> *id* at §61.

written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter."<sup>58</sup> Therefore, Mr. Kopp's Art. 8 rights had been infringed.

*Niemietz v. Germany:*

Mr. Gottfried Niemetz was a lawyer whose firm represented a man accused of "the offence of insulting behaviour"<sup>59</sup> arising from the accused's refusal to pay the state church tax and then allegedly sending a pseudonymous letter to the district court judge demanding his acquittal. Given the anonymity of the letter's author, a warrant was issued to search the offices of the lawyers representing the accused to reveal this person's identity. The Court dedicated several sections in their decision to a meticulous analysis of whether or not the searching of a business premises constituted an interference, as this had not been addressed in such a forthright manner in previous case law. They ultimately found it to be an interference, an estimation cited in other cases included in this chapter where surveillance of a business premise is at issue, although this decision isn't reasoned out and is simply stated categorically in the affirmative.

Pertaining to the quality of the law, the Court declared that the warrant was a disproportionate remedy, stating that "the warrant was drawn in broad terms... without any limitation," and without "any special procedural safeguards, such as the presence of an independent observer."<sup>60</sup> As such, there was a breach with regard to Mr. Neimetz's Art. 8 rights.

*Klass and Others v. Germany:*

Gerhard Klass and the four other applicants in this case were lawyers and judges working for the judiciary in Germany who challenged a law pertaining to the surveillance powers of the state (hereafter the G10), "in that it permits those measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it excludes any remedy before the courts against the ordering and execution of such measures."<sup>61</sup> Unlike the cases detailed above,

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<sup>58</sup> *id* at §75.

<sup>59</sup> *Niemietz v. Germany* at §9.

<sup>60</sup> *id* at §37.

<sup>61</sup> *Klass and Others v. Germany* at §10.

this case contained no element of personal harm to a specific individual but was lodged on the basis of an objection to the legislation itself. The Court considered the quality of the legislation against the backdrop of the criteria applied in the previous cases. The main contention was whether or not the structure of the safeguards against arbitrary interference was comparable to the standards set by the understanding of Art. 8. While the government argued “that the system of review established under the G 10 does effectively protect the rights of the individual,”<sup>62</sup> the applicants saw that same system as a “‘form of political control’, inadequate in comparison with the principle of judicial control which ought to prevail.”<sup>63</sup> The Court was tasked with deciding,

whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the “interference” resulting from the contested legislation to what is “necessary in a democratic society”.<sup>64</sup>

In their review, the Court considered the implications of the time aspect of covert surveillance measures: “when the surveillance is first ordered, while it is being carried out, or after it has been terminated.”<sup>65</sup> The Court found that, in all three circumstances the protection offered to individuals was sufficient and that, even though “the applicants have constantly invoked the danger of abuse as a ground for their contention that the legislation they challenge,”<sup>66</sup> there was no breach of Article 8. They reasoned,

While the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court’s present review are *the likelihood of such action and the safeguards provided to protect against it*.<sup>67</sup>

The Court set the balance between the two paragraphs of Article 8 (8-1 and 8-2) and found no foreseeable issue in the structure of the legislation that provided reasonable grounds to rule in favour of Klass and others.

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<sup>62</sup> *Klass and Others v. Germany* at §54.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> *id* at §55.

<sup>66</sup> *id* at §59.

<sup>67</sup> *ibid.* Emphasis added.

*Rotaru v. Romania:*

This case involved a man seeking redress from the former communist regime in Romania for unlawful imprisonment based on a secret file that contained false information. Mr. Rotaru claimed, in essence, that the existence of a file in his name holding information that could not plausibly be correct (which domestic courts corroborated) allowed the government to “at any moment make use of information about his private life,” and because this information was specious, this constituted a violation of his Art. 8 rights.<sup>68</sup> Though the information about him was (as the government argued) of a “public” nature,<sup>69</sup> the Court didn't accept that this justified the information's exclusion from consideration as part of the make-up of the term private life,

public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.<sup>70</sup>

Noting that the interference was applicable under Art. 8 and that it was based in domestic law, the Court again turned to the quality of the law. It found that, “[n]o provision of domestic law, however, lays down any limits on the exercise of those powers,”<sup>71</sup> and “the ground allowing such interferences is not laid down with sufficient precision.”<sup>72</sup> Lastly, it was noted that the adequacy of those safeguards should be measured by the extent to “which [they] apply...supervision of the relevant services' activities...[and]... must follow the values of a democratic society as faithfully as possible.”<sup>73</sup> Deciding that the relevant law did not do this, the Court ruled in favour of Mr. Rotaru.

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All of these cases describe situations of infractions of private life in some form that ask for rectification by assessing the ‘quality’, ‘adequacy’, or ‘sufficiency’ of a law intended to balance the protection of individual rights with the rights of a state to implement measures, within a certain margin of appreciation. Balance, however, is not the dominant schema in the language of these

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<sup>68</sup> *id* at §41.

<sup>69</sup> *id* at §42.

<sup>70</sup> *id* at §43.

<sup>71</sup> *id* at §57.

<sup>72</sup> *id* at §58.

<sup>73</sup> *id* at §59.



cases. As we saw in the Chapter 6, the dominant constructions were spatial in nature (verticality, vision/light, and expanse) with a significant emphasis on structure and weight, the soundness of structures, and/or their ability to depress a point or push it out of view; which differs from the EQUILIBRIUM schema of balance. Our aim at the beginning of the chapter was to examine how the invoked image schemas might function in the Court's depictions and derivative evaluations of the quality or effectiveness of the law. Before looking at this explicitly in the cases themselves, we must first consider the function of framing and inference on evaluative judgment.

### **3. Evaluative Judgment and Metaphoric Fit**

The preceding chapter focused on the framing of issues and the general reasoning of inference using blended mental spaces. Inferential reasoning can produce a number of possible options (is x, y or y<sup>l</sup>?) where a solution can be found by a blended space of those two options, as we saw. It focuses on what the literature would call “solution generation,”<sup>74</sup> where “messages metaphorically comparing an abstract problem to an embodied problem cause people to generate solutions to the abstract problem that fit their understanding of how to solve the embodied problem.”<sup>75</sup> However, this doesn't explain how to proceed when those two spaces are incongruous, or how either respective framing provides an *effective* solution to a given problem. As Keefer *et. al.* state, this is the role of evaluative judgment or “solution evaluation”,

voters decide among proposed policies, consumers choose products to meet their needs, and politicians select among negotiation strategies. Such evaluations can be difficult when not only the problem is abstract, but so too are the means by which candidate solutions purportedly address that problem. Using metaphor to understand both the problem and the effectiveness of candidate solutions may facilitate evaluation in such cases.<sup>76</sup>

There are a number of empirical studies that address the evaluative judgment process in terms of metaphorical framing. For instance, Landau *et. al.* showed that,

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<sup>74</sup> See, Keefer, Lucas, Landau, Mark, Sullivan, Daniel, and Rothschild, Zachary; 2014. 'Embodied Metaphor and Abstract Problem Solving: Testing a Metaphoric Fit Hypothesis in the Health Domain ,' 55 *Journal of Experimental Psychology* 12, at 12.

<sup>75</sup> *id* at 13.

<sup>76</sup> *ibid.*

participants were more likely to judge immigrants negatively after being primed to view their own country as a human body (e.g., a nation undergoing a growth spurt) rather than as an abstract entity (e.g., a nation undergoing a period of innovation), an effect that is congruent with a conventional metaphor that describes immigrants and immigration in terms of disease.<sup>77</sup>

This study is corroborated by numerous others. Paul Thibodeau, for instance, considered the effects of congruency of metaphor framing when people evaluate the effectiveness of solutions to a given problem. In his study, Thibodeau focused on the metaphorical framing of crime. He found that, “people are more likely to endorse approaches to crime-reduction that emphasize social reform when crime is framed as a *virus*,” and more telling, “they are even more likely to do so when the reform is described as a “treatment” (i.e., in the context of a re-instantiation of the initial metaphor frame).”<sup>78</sup> Lichtenstien and Shutova give an example of the same result in their study of metaphor framing relating to the economy and economic solutions,

given a description of economic hardship in terms of a BALANCE schema, participants preferred a solution that involved “returning to equilibrium”. When the description was given in terms of a SPLITTING schema, they preferred one that “narrowed the gap”.<sup>79</sup>

In a similar study, Keefer *et. al.* looked at the framing of depression; the effects of the choice between different metaphorical frames used to talk about depression, and how solutions aimed at depression were evaluated given different metaphorical and non-metaphorical (literal) framings.<sup>80</sup> Over four studies, participants were presented with differing metaphorical frames where depression was presented as “being spatially down or low” or similar to being in “a state of darkness.”<sup>81</sup> They were then asked to evaluate the efficacy of treatments which were either given a

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<sup>77</sup> Lichtenstien, Patricia, and Shutova, Ekaterina; 2017. 'Metaphor Congruent Image Schemas Shape Evaluative Judgment: A Cross-Linguistic Study Of Metaphors For Economic Change ,' *Proceedings of CogSci 17*, London, UK at 1, referencing Landau, Mark, Sullivan, Daniel, and Greenberg, Jeff; 2009. 'Evidence That Self-Relevant Motives and Metaphoric Framing Interact to Influence Political And Social Attitudes. ,' 20 *Psychological Science* 1421.

<sup>78</sup> Thibodeau, Paul; 2016. 'Extended Metaphors Are the Home Runs of Persuasion: Don't Fumble The Phrase,' 31(2) *Metaphor and symbol* 53 at 64. Original emphasis.

<sup>79</sup> Lichtenstien, Patricia, and Shutova, Ekaterina; 2017 at 2.

<sup>80</sup> Keefer, Lucas, Landau, Mark, Sullivan, Daniel, and Rothschild, Zachary; 2014. 'Embodied Metaphor And Abstract Problem Solving: Testing A Metaphoric Fit Hypothesis In The Health Domain ,' 55 *Journal of Experimental Psychology* 12.

<sup>81</sup> Keefer, Lucas *et. al.*; 2014 at 13.

metaphorically congruent, a metaphorically incongruent, or a literal framing. Keefer *et. al.* expected to find that,

when a down- or dark- metaphoric framing of depression is salient, framing a depression treatment as “uplifting” or “illuminating” will influence its perceived effectiveness, despite the fact that these metaphoric framings are, in a strict literal sense, peripheral to understanding depression's nature or the actual means by which a candidate treatment purportedly alleviates depression symptoms.<sup>82</sup>

The treatments Keefer *et. al.* proposed were two fictional anti-depressant drugs - “Liftix” and “Illuminix” - each of which was presented with a suitable or corresponding metaphorical frame: Liftix was described using phrases such as “ ‘has been shown to lift mood’; ‘patients everywhere have reported feeling uplifted,’ ”<sup>83</sup>, and Illuminix was framed with statements such as “ ‘has been shown to brighten mood’; ‘patients everywhere have reported a brighter outlook.’ ”<sup>84</sup>The purpose was to test their hypothesis of, what they call, “metaphoric fit.”<sup>85</sup> The *metaphoric fit hypothesis* tests the following premises:

If an embodied-metaphoric framing of an abstract problem prompts people to reason about it using their knowledge of a bodily problem, then they should positively evaluate candidate solutions that are themselves framed metaphorically as addressing that bodily problem.<sup>86</sup>

And,

that metaphorically framing a problem not only increases preference for metaphorically fit solutions, but also decreases preference for metaphorically misfit solutions. . . . [In this instance] framing depression as being darkened would cause participants to evaluate the elevating anti-depressant as less effective than the non-metaphoric alternative, because spatial solutions fail to address the bodily problem of being darkened.<sup>87</sup>

To further bolster the *metaphoric fit hypothesis*, Lichtenstien and Shutova investigated whether this phenomenon was restricted to English, or whether it occurred cross-linguistically - in similar ways in different languages. Referencing the work of Keefer *et. al.*, they asked, “if spatial metaphors for

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<sup>82</sup> Keefer, Lucas *et. al.*; 2014 at 14.

<sup>83</sup> *ibid.*

<sup>84</sup> *id* at 15.

<sup>85</sup> *id* at 12.

<sup>86</sup> *ibid.*

<sup>87</sup> *id* at 17.

depression were predominant in one language, while visual metaphors for depression were in another, would speakers of the first language favour Liftix and speakers of the second Illuminix?”<sup>88</sup> This research was done by analysing whether metaphoric framings of the economy (either as MOTION or VOLUME) would affect participants’ confidence in evaluative judgements across two languages (English and Spanish speakers). Their results suggested that, “evaluative judgment, which differs from reasoning in that it is not logic-based, is a crucial component of decision-making,”<sup>89</sup> and that all of these studies “taken together... present compelling evidence that the image schematic information specified by metaphorical language can impact how people evaluate situations.”<sup>90</sup>

In our terms, this is akin to the measure of *coherence* derived from a linguistic analysis of the texts, as opposed to the less precise results obtained from the application of other models (such as those discussed in Chapter 2, e.g. Peczenik and Alexy’s *greatest number thesis* or Alexy’s *weight formula*). In this way, we are buttressing assumptions about the way judicial decisions are made by using an empirical analysis of the data that is supported by psychological and cognitive research. The concept of evaluative judgment when conceived of as a process that is partly made up by metaphoric fit, may help us to understand the process of weight attribution and to identify the mechanisms by which a decision evaluates (read: *balances*) competing options or measures the effectiveness of solutions provided by competing sides of a case.

#### **4. Applying the Metaphoric Fit Hypothesis to the Quality of a Law in the §91 Cases:**

Let us take, for instance, the use of *independent authority of sufficient safeguards* to decide upon the quality of a law in the cases documented in this chapter. We learned from the previous chapter that the law could be understood by schematic reference to its existence as a strong structure on a three-dimensional plane. This structure must be understood (as any reference to the strength of a structure would in a non-metaphorical sense) to have a strong foundation and multiple levels of support that cannot be undermined by an upward force against it (as would metaphorically be the case if it is open to a *high risk of abuse* or to claims that *raise a high level of concern*). In the *Leander*

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<sup>88</sup> Lichtenstien, Patricia, and Shutova, Ekaterina; 2017 at 2.

<sup>89</sup> *id* at 5.

<sup>90</sup> *id* at 2.

case, the support structure is easily identifiable and given the multiplicity and independence of its supportive struts, it can withstand the risk of abuse by authorities. §62 lists multiple checks that the law proscribes for protection against abuse. Notably, twelve independent measures:

(i) the existence of personnel control as such is made public through the Personnel Control Ordinance; (ii) there is a division of sensitive posts into different security classes ...; (iii) only relevant information may be collected and released...;(iv) a request for information may be made only with regard to the person whom it is intended to appoint...;(v) parliamentarians are members of the National Police Board...;(vi) information may be communicated to the person in question;... (vii) the decision whether or not to appoint the person in question rests with the requesting authority and not with the National Police Board...;(viii) an appeal against this decision can be lodged with the Government...;(ix) the supervision effected by the Minister of Justice...;(x) the supervision effected by the Chancellor of Justice...;(xi) the supervision effected by the Parliamentary Ombudsman...; (xii) the supervision effected by the Parliamentary Committee on Justice.<sup>91</sup>

Similarly, in the *Klass* case, the Court describes the multiple “limitative conditions”<sup>92</sup> on state action, asserting that “*under the law* there exists an administrative procedure *designed* to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration.”<sup>93</sup> Add to this the multiple independent supportive props of oversight (“the Minister *is bound* every month to provide the G 10 Commission with an account of the measures he has ordered,” and “The Commission members...are completely independent *in the exercise of their functions*,”<sup>94</sup> “the democratic character is reflected in the *balanced* membership of the Parliamentary Board,”<sup>95</sup>), and one can see that when taken in the context of a solid-structure schema, any haphazard or irregular feature, any unbalanced measure, or non-independent functioning of duties causes the structure to fail or be subject to failure. In this way, the concrete image schema is used to attribute features of that schema to functions of the law. If it is a question of the quality of the law, we are reasoning with the embodied quality of strong structures. Figure 7.4 shows a sketch of this kind of embodied metaphor, where the underlying structure schema is used to make inferences that would normally concern the qualities of strong structures to the judgement made about the quality of the law.

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<sup>91</sup> *Leander* at §62.

<sup>92</sup> *Klass* at §51. Emphasis added.

<sup>93</sup> *ibid.*

<sup>94</sup> *id* at §52.

<sup>95</sup> *id* at §56.



Fig. 7.4 Metaphoric fit

In both *Klass* and *Leander*, the Court reasoned that given the multiple independent and flexible mechanisms to prevent abuse of authority, the applicants' requests to recognise the infringement of their Art. 8 rights were unfounded. Let's take a further example.

In *Weber and Saravia*, the applicants' appeal on the grounds that the quality of the law infringed upon their Art. 8 rights was also denied. Interestingly, in this case the Court used distinct image schemas to encapsulate the competing arguments of the applicants and the government. For instance, in describing the harm caused to the applicants by surveillance, the image schema of a tree was used (a rich domain variant of the structure schema):

The Federal Intelligence Service was entitled to monitor all telecommunications *within its reach* without any reason or previous suspicion. Its monitoring powers therefore inhibited open communication and *struck at the roots* of democratic society.<sup>96</sup>

In a later section, the Court then made reference to the applicants' argument by mixing the tree structure with the schema of CONTAINMENT:

The fact that interception was *limited to content* of "relevance for the intelligence service" ...as a result of the decision of the Federal Constitutional Court, was

<sup>96</sup> *Weber and Saravia* at §111. Emphasis added.

*not sufficient to constrain effectively the monitoring powers of the Federal Intelligence Service.*<sup>97</sup>

Contrast this to the Court's portrayal of the government's argument, in which we find a predominance of the more familiar *structures as buildings* metaphor:<sup>98</sup>

...the Federal Constitutional Court *raised the threshold* for interception by finding that such an offence could be serious enough to justify monitoring only if it was capable of *threatening monetary stability* in Germany. Surveillance could be ordered only *on* a reasoned application by the President of the Federal Intelligence Service or his deputy and if the *establishment of the facts*...<sup>99</sup>

Now compare this wording to the language used where the Court *did* find reason to accept that the circumstances gave rise to an Art. 8 violation.

For instance, in *Rotaru*, the Court again describes the government's and the applicant's arguments in different schematic terms. When assessing whether there was interference on the government's part, the Court employed several image schemas: CONTAINMENT, CONTROL, and MECHANISMS. For instance,

As to the alleged impossibility of refuting the information, the Government maintained that, on the contrary, *it was open* to the applicant to refute untrue information but that he *had not made use of* the appropriate remedies.<sup>100</sup>

Here, the Court found in Mr. Rotaru's favour. To examine the quality of the Romanian law and determine whether it was of a good enough (or I should say *high* enough) standard, the Court employs the traditional structural metaphor. In considering whether the measure in question had a basis in the law, the Court described this as asking "whether...the organisation and operation of the RIS, which was likewise *relied on* by the Government, can provide *the legal basis* for these

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<sup>97</sup> *id* at §112. Emphasis added.

<sup>98</sup> It would be interesting to note if in fact the written arguments from each side were written with the same image schematic underpinnings. Unfortunately, multiple requests for this material across the network of cases were either unanswered or refused for this research. If, however, this hurdle could be overcome, this would be a fantastic test for future research. This factor, as well as the collegiate nature of the writing of the Court will be discussed in chapter 9 reflecting on the proof of concept of the method.

<sup>99</sup> *Weber and Saravia* at §115. Emphasis added.

<sup>100</sup> *Rotaru v. Romania* at §45. Emphasis added.

measures.”<sup>101</sup> It found that the Romanian government's actions were grounded in the national law. However, when describing the quality of the law in terms of its foreseeability and necessity, the Court ruled that the structure was lacking the integrity required of a strong structure (“[n]o provision of domestic law, however, *lays down any limits* on the exercise of those powers.”<sup>102</sup>; “...the *ground allowing* such interferences is *not laid down* with sufficient precision.”<sup>103</sup>). On the other hand, when describing the applicant's claim, the Court used a higher measure of verticality (“He argued that the circumstances that *had given rise* to the application had not *fundamentally* changed”<sup>104</sup>). Whether or not this is how the applicant and government argued their respective cases *themselves* is a different question, and could be a topic for future research (as discussed in Chapter 9). What can clearly be seen is the justificatory rhetorical wrangling the Court uses in describing both arguments, and the conclusions they arrive at that are inferred from those metaphorically fit schemas.

One further example. Recall that *Malone v. The United Kingdom* similarly involved the tapping of the applicant's telephone. In *Malone*, we can see a clearer instance of the Court vying with different image schematic frames resulting in different inferences and interpretations. When reasoning between the various framings given in the pleadings, the Court noted that,

the pleadings revealed a fundamental difference of view as to the effect, if any, of the Post Office Act 1969 in imposing legal restraints on the purposes for which and the manner in which interception of communications may lawfully be authorised by the Secretary of State.<sup>105</sup>

That “difference of view” is best highlighted by the framing applied by the Vice Chancellor of the Chancery Division of the High Court, Sir Robert Megarry, where the claim originated. The Vice Chancellor, reasoning through the applicant's many configurations of how privacy might be conceptualised, “held in substance that the practice of tapping on behalf of the police...was legal and accordingly dismissed the action.”<sup>106</sup> In considering the question of whether the wire-tapping was illegal, he was not concerned with other analogical extensions of communications interception,

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<sup>101</sup> *id* at §53. Emphasis added.

<sup>102</sup> *id* at §57. Emphasis added.

<sup>103</sup> *id* at §58. Emphasis added.

<sup>104</sup> *id* at §34. Emphasis added.

<sup>105</sup> *Malone v. The United Kingdom* at §72.

<sup>106</sup> *id* at §31.



and they were discarded, and Sir Megarry focused exclusively on “tapping which consists of the making of recordings by Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use.”<sup>107</sup> He refuted the idea that the tapping violated any “right of property (as distinct from copyright) in words transmitted along telephone lines”<sup>108</sup> or “confidentiality”<sup>109</sup>, and further argued that telephone tapping, “did not involve any act of trespass” and thus, for *Malone*, “no assistance could be derived from cases dealing with other kinds of warrant”<sup>110</sup>, such as warrants for the search of a premises. He concluded that in spite of deficiencies in the English system of law, it was not within his purview to decide the matter himself as “[a]ny regulation of so complex a matter as telephone tapping is essentially a matter for Parliament...”<sup>111</sup>. Given that the English system did not require him to enforce the Convention’s interpretation of privacy, and in view of the UK’s existing legislation relating to the legality of the uses of Post Office interception, he sided with the government.

What is particularly interesting for the current study is the Vice Chancellor’s characterisations of the English system and its European counterpart. When focusing on the tenets the English Common Law system, he uses the image schema of bodily structure and animism; when focusing on the requirements of the Convention, he uses the familiar schema of the law as structure. In regards to the English system, he states in full,

It may perhaps be that the common law is *sufficiently fertile* to achieve what is required by *the first limb* of [the above-stated proviso]: possible ways of *expressing* such a rule may be seen in what I have already said. But I see the greatest difficulty in the common law framing the safeguards required by *the second limb*. Various institutions or offices would have *to be brought into being* to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts *to struggle with* such a problem. *Give full rein* to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what

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<sup>107</sup> *Malone v. Commissioner of Police of the Metropolis* (No. 2), [1979] 2 All England Law Reports 620 at 629 as quoted in *Malone v. The United Kingdom* at §32.

<sup>108</sup> *Malone v. Commissioner of Police of the Metropolis* (No. 2) at 631 as cited in *Malone v. The United Kingdom* at §33.

<sup>109</sup> *ibid.*

<sup>110</sup> *Malone v. Commissioner of Police of the Metropolis* (No. 2) at 640 as cited in *Malone v. The United Kingdom* at §33.

<sup>111</sup> *Malone v. Commissioner of Police of the Metropolis* (No. 2) at 647-649 as quoted in *Malone v. The United Kingdom* at §34.

circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.<sup>112</sup>

Compare this framing to that of the protection required under the Convention, which is dominated by a mixture of MECHANISM and STRUCTURE schemas,

“... Not a single one of these safeguards is to be found as a matter of *established law* in England, and only a few corresponding provisions exist as a matter of administrative procedure...”<sup>113</sup>

“...it is impossible to read the judgment in the *Klass* case without it becoming abundantly clear that *a system* which has no legal safeguards whatever has small chance of satisfying the requirements of that Court...”<sup>114</sup>

“...Even if the system [*in operation* in England] were to be considered adequate in its conditions, *it is laid down merely* as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could *at any time be altered without warning or subsequent notification.*”<sup>115</sup> [leading to a weakness in foundation]

He summarises that “...[c]ertainly *in law* any ‘adequate and effective safeguards against abuse’ are wanting...”. “*In law*”, in this sense, has better metaphorical links to STRUCTURE than to CONTAINMENT, given the above framing. He concludes with the imperative, “I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention.” When referring to the Vice-Chancellor’s ruling and its reading by the Commission, the Court evokes the verticality model of STRUCTURE,

Whilst the exact *legal basis* of the executive’s power in this respect was the subject of some dispute, *it was common ground* that *the settled practice of intercepting communications* on behalf of the police in pursuance of a warrant issued by the Secretary of State for the purposes of detecting and preventing crime, and hence the admitted interception of one of the applicant’s telephone conversations, were lawful under the law of England and Wales. The legality of

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<sup>112</sup> *Malone v. Commissioner of Police of the Metropolis* (No. 2) at 647-649 as quoted in *Malone v. The United Kingdom* at §34. Emphasis added.

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

this *power to intercept* was established in relation to telephone communications in the judgment of Sir Robert Megarry...<sup>116</sup>

Given that it was lawful, the Court continues that,

The issue to be determined is therefore whether, *under domestic law*, the essential elements of the power to intercept communications were *laid down with reasonable precision* in *accessible legal* rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.<sup>117</sup>

In discussing this question, the Court does not adopt the Vice-Chancellor's body schema of "first limb" and "second limb" but stays with the more familiar spatial terms of "first point" and "second point."<sup>118</sup> In fact, it singles out the different bodily reading, as unsatisfactory,

It was also somewhat surprising, so the Commission observed, that no mention of section 80 as regulating the issue of warrants should have been made in the White Paper published by the Government in the wake of Sir Robert Megarry's judgment (see paragraph 21 above). Furthermore, the Home Secretary, when presenting the White Paper to Parliament in April 1980, expressed himself in terms suggesting that the existing arrangements as a whole were matters of administrative practice not suitable for being "*embodied in legislation*"<sup>119</sup>

Given the divergence in the government's, the applicant's, and the Commission's interpretations, the Court found the English Law wanting in its obligation to establish a system with foreseeable consequences, particularly when one of those submissions was framed within an ill-fitting and inappropriate rhetoric. The Court chose the option with metaphorical fit, which lends support to the metaphoric fit hypothesis outside of the controlled conditions of the laboratory. It is an example of the kind of rhetorical choices a court might make if we are to take the metaphoric fit hypothesis seriously when considering what it looks like *in the wild*. One might argue that this is simply a rhetorical choice of the Court in choosing its terms. This is an acceptable retort, but one that nonetheless assumes the premise that rhetorical choices are free from any form of constraint; a premise which the previous two chapters have offered a fair amount of evidence to show is untenable.

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<sup>116</sup> *Malone v. The United Kingdom* at §69. Emphasis added.

<sup>117</sup> *id* at §70. Emphasis added.

<sup>118</sup> *id* at §71.

<sup>119</sup> *id* at §78. Emphasis added

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The evidence provided thus far would suggest that the explanation for the Court's use of framing in a consistent and often constrained manner is more likely to be found in the realm of cognitive linguistics than in the traditional legal notions of weight, balance, and ultimately, coherence.

Through the use of conceptual blending, framing, and metaphoric fit, the Court builds a structure of law that asks: what use x law is to the greater structure of the Law itself? The previous two chapters have looked into the intricacies of margin of appreciation and spatial constructs of the EU privacy regime, and the force of the framing of precedent to inform future cases. They have considered the form and content of the rules surrounding privacy, but have not established what *privacy itself* looks like in view of this new knowledge. This is the subject of the next chapter.

## Chapter 8: Alternative Framings & The Personal of Private Life

“Believe me, dear Wilhelm, I did not allude to you when I spoke so severely of those who advise resignation to inevitable fate. I did not think it possible for you to indulge such a sentiment. But in fact you are right. I only suggest one objection. In this world one is seldom reduced to make a selection between two alternatives. There are as many varieties of conduct and opinion as there are turns of feature between an aquiline nose and a flat one.”

- Johann Wolfgang von Goethe.<sup>1</sup>

The two fundamental questions throughout this work are: how is privacy framed, and how are competing frames weighed against each other? By asking these questions, the intention was to broach and ideally answer the larger, theoretical questions of how universal principles can be applied to specific cases by using precedent and, ultimately, how a coherent body of law is made. Asking this in the specific context of the *Schrems* case has provided a sample study which raises foundational questions of its own; namely, how does the breadth of interference compare to a deep interference, as explained in privacy jurisprudence, and how does the court make use of those framings to arrive at a degree of certainty in their decisions? These enquiries were resolved by looking at the notions of metaphorical framing, conceptual blending throughout the precedent, and the overarching idea of metaphoric fit. We saw ways in which competing notions were combined to blend differing metaphorical frames, ways in which frames were eliminated and deemed to be less weighty or less persuasive than others, and ultimately how they interacted throughout the chain of precedent. These processes all followed the general proscriptions laid out by conceptual metaphor theory and cognitive linguistics. If our goal is to show pattern recognition,

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<sup>1</sup> Goethe, Johann Wolfgang von; 1774. *The Sorrows of Young Werther*. <http://www.gutenberg.org>

and if legal certainty and coherence is tied into being able to describe that pattern, then the tenets of CMT can certainly give our search that direction.

The Court doesn't use its jurisprudence to fit the circumstances of facts or privacy into a coherent, essentialised whole with necessary and sufficient conditions, as implied by the use of a traditional legal test. At least not directly. The Court proceeds indirectly through the use of inferences made from a more concrete notion of *what the law requires*. Inferences made by applying conceptual metaphor to each element in the legal test. The notion of privacy is built (metaphor intended) by an argument structure with conditions which are both necessary and sufficient, like proportionality and margin of appreciation. However, those conditions must have a certain quality, and that quality is judged by inference from a spatially based idealised cognitive model of what a proper structure is made of, looks like, and does.

What remains to be explored is the rationalisation of the link between data protection and privacy. In order to do this, we must first look at alternative framings of what the law requires to further buttress this argument by analysing the content of dissenting opinion. Some of the dissenting opinion anticipates the tentativeness of the link between data protection and privacy. It asks; what connects traditional privacy case law to the idea of data protection? We see hints of this elusive link in cases involving surveillance and the retention of surveillance records, but in *Schrems*, we have yet to discover exactly what the *personal* of personal data is that propels it into the domain of private life.

## **I. Dissenting Opinions in *Rotaru v Romania***

Let us return for a moment to *Rotaru*. The Court held (by a margin of 16 to 1) that there had been an infringement of Rotaru's article 8 rights. The dissenting judge expressed an interesting and singular view on exactly why private life is *private*. Judge Bonello's primary concern was "*Opening up Article 8 to ... new perspectives*"<sup>2</sup> that, "would add an exciting extra dimension to human rights protection."<sup>3</sup> If this were to occur, it is a conceptual shift that, in his opinion, should be explicit and

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<sup>2</sup> *Rotaru v. Romania* at §13. Emphasis added.

<sup>3</sup> *ibid.*

not glossed over. In Bonello's words, "the Court, in my view, ought to handle this reform frontally, and not tuck it in, almost surreptitiously, as a penumbral fringe of the right to privacy."<sup>4</sup> Bonello, known for his rhetorical flair, embodies a plethora of divergent conceptual metaphors in framing his assertion that there was no violation of Article 8 in this case. Recall that in the judgment in *Rotaru*, the Court weighed the applicant's claim and the quality of the Romanian law by means of the LAW IS STRUCTURE schema, as well as incorporating CONTAINMENT and MECHANISM. Judge Bonello has a different take on whether privacy itself, as a concept, fits into this scheme, and he raises the issue through his conception of what makes an act private and therefore applicable to the STRUCTURE schema itself. He states in his dissent:

Article 8 protects the individual's private life. At the core of that protection lies the right of every person to have the *more intimate segments of his being* excluded from public inquisitiveness and scrutiny. There are *reserved zones in our person and in our spirit* which the Convention requires *should remain locked*. It is *illegitimate to probe for, store, classify or divulge data* which refer to those *innermost spheres of activity, orientation or conviction, sheltered behind the walls of confidentiality*.<sup>5</sup>

Judge Bonello lays out the difference in his formulation of the requirements of the quality of law in regards to privacy. The private is set in the framing of locked containment where it is beyond the purview of data or information that *flows*, or can be caused to *flow*, from within that inner sphere or zone. Contrast this with his notion of public data, "activities which are, *by their very nature*, public and which are actually *nourished by publicity, are well outside* the protection of Article 8."<sup>6</sup> Data, information, or public vs private activities are sublimated to the domain of NATURE and the rich domains of fluid, flow, natural growth, etc. Though the spatial elements are retained from the visibility schema, this framing sees the public as an area nourished by light and visibility wherein the nature of an act, or information about that act, is framed as an organism that needs publicity (light/vision in this sense) to flourish.

He refers to the information gathered and stored by the Romanian security services (concerning Rotaru's political affiliations and his political writings) as being "[e]minently public"<sup>7</sup>: He states,

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<sup>4</sup> *ibid.*

<sup>5</sup> *Rotaru v. Romania* (separate opinion of Judge Bonello) at §2. Emphasis added.

<sup>6</sup> *id* at §3. Emphasis added.

<sup>7</sup> *id* at §5.

“political and publishing activism requires, and depends on, the maximum publicity for its existence and success,” a statement that, although not metaphorical in itself, reflects the framing of PUBLICITY IS NOURISHMENT as a common premise. Bonello asks, “[i]n what way does the storage of records relating to the eminently public pursuits of an individual violate his right to privacy?”<sup>8</sup> and then makes a distinction between “public activism”<sup>9</sup> and the type/classes of data that the Court has traditionally viewed as private:

such as medical and health data, sexual activity and orientation, family kinship and, possibly, professional and business relations and other *intimate areas* in which *public intrusion* would be an unwarranted *encroachment on the natural barriers of self*.<sup>10</sup>

Bonello seeks a common thread to reiterate and reinstate what he sees as the *natural barriers* of public and private. A thread we will return to in a moment. The major criticism articulated in Bonello’s dissent is his condemnation of the conflation of the infringements on Article 8 with the storage of Rotaru’s criminal records. He refers twice to his dissatisfaction with the Court’s judgement in section 44, which contains the discussion of Rotaru’s criminal records and whether the storage of that information should be considered under Art. 8 § 1. The Court, following the traditional visibility/structure/weight blend described in the previous two chapters, found that, “when systematically collected and stored in a file held by agents of the State, [it] falls within the scope of ‘private life’ for the purposes of Article 8 § 1 of the Convention.”<sup>11</sup> Bonello, however, quite vehemently disagrees with the caveat that it is the “storage of criminal records,”<sup>12</sup> and not the “wanton and illegitimate *disclosure* of the contents of those records,”<sup>13</sup> that he takes issue with. It is interesting to note Bonello’s repeated use of the sphere schema when conceptually framing the distinction between public/private (albeit a common metaphorical device). His issue with the storage of Rotaru’s information is twofold, and relates to problematic aspects of the nature of the information itself: “that of the falsity of the information, and that of its defamatory nature.”<sup>14</sup> He continues,

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<sup>8</sup> *id* at §6.

<sup>9</sup> *id* at §6.

<sup>10</sup> *id* at §6. Emphasis added.

<sup>11</sup> *Rotaru v. Romania* at §44.

<sup>12</sup> *Rotaru v. Romania* (separate opinion of Judge Bonello) at §10. Original emphasis.

<sup>13</sup> *ibid*. Original emphasis.

<sup>14</sup> *id* at §11.



Some of the data in the applicant's security file actually referred to another person sharing the applicant's name, and not to him. This, undoubtedly, rendered that information “false” in the applicant's regard. But does falsity *relating to matters in the public domain* alchemise that public information into private data? The logic behind this sequence of propositions simply passes me by.<sup>15</sup>

The choice of the word *alchemise* in this context should be telling of the different frames that Judge Bonello applied to shape his decision. While the use of the alchemy metaphor (to transmute one substance to another) could arguably be deliberate, the intentionality would not take away from the evidence of a different framing of the concepts of private and public information. Furthermore, there are a number of other facets to this statement that are important to note.

It isn't simply the use of the alchemy metaphor that is intriguing, it is the coherence of that framing to the NATURALISM conceptual framework Judge Bonello has set up. It makes use of characteristics from within each frame space and extends them into a coherent whole. Private actions are those contained in a locked sphere from which information can flow or be forced/allowed to flow. Public actions are those that *live* (using this word intentionally) outside this sphere of private information and action. The role of the fundamental right to private life is to protect that sphere from being penetrated and thus compromised, except in situations of dire need for national security, or for use in pursuit of a legitimate aim. In Bonello's view, the law under review must be one that cannot violate that rule. Let us think of the private sphere as possessing the physicality of a hard, semi-impenetrable shell. If it is fundamental right we are talking about, that shell's hardness would increase and the structure would become more resistant. The realities, situations, and actions that live outside this shell, necessarily live in a world that requires them to be seen and visible. Their substance and make up must, therefore, be different to that of the things inside this shell, if we are to take the conceptual metaphor seriously. So, by inverting their places - the act of calling something that thrives outside the protection of the shell an 'inside' element, and vice versa - must change their respective substances altogether. It is no surprise, then, that perhaps the alchemy the Court employs “passes [Judge Bonello] by”.

This disagreement is a perfect example of *corrective framing*. In short, corrective framing is a deliberate alteration of the frame of a concept so as to create a context where the two

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<sup>15</sup> *id* at §12. Original emphasis.

explanatory frames are in diametric opposition, and then using that second frame's constituent attributes to explain a phenomenon, category, or conceptual metaphor.<sup>16</sup> In this case, it takes the form of an "A is B, not C" construction, a construction commonly found in political and media rhetoric.<sup>17</sup> For Bonello, privacy is a natural sphere of containment, not the interaction of structure, weight, and visibility. By using the construction he views unfavourably, Bonello is asking the reader directly: which one draws a more coherent picture? Or rather, which better fits their understanding of the concept, his own or the framing applied by the Court? The struggle here is to find a common thread which establishes the concrete difference between one substance and another. And, essentially, this is just a slightly different way of phrasing the fundamental investigation of this research: what makes the private, *private*? Even when certain criteria can be laid out which allow us to say that these types of acts or issues belong in the private rather than the public domain (such as those pertaining to our intimate our sexual life), the argumentation still relies on conceptual framing to make the point. This argument can be given some more clarity by referring back to *Dudgeon*.

## **2. Dissenting Opinion in *Dudgeon v The United Kingdom***

In the *Dudgeon* case, Jeffery Dudgeon complained "against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences."<sup>18</sup> The Northern Irish government began to look at reforming the existing laws (in force since 1865 and 1885) that make sodomy a crime between consenting (male) adults. After a process of consultation with institutions and the public, it was decided that the reform would not take place. One of the many reasons given for not enacting the reform was that the law was rarely, if ever, enforced. In 1976 (5 years before the case was brought to court), the police entered Mr. Dudgeon's home on a drug warrant and,

Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life.<sup>19</sup>

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<sup>16</sup> Bogetic, Ksenija; 2017. 'Language is a 'Beautiful Creature', not an 'Old Fridge': Direct Metaphors as Corrective Framing Devices,' 7(2) *Metaphor and the Social World* 190.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Dudgeon v. The United Kingdom* at §1.

<sup>19</sup> *id* at §33.

Ultimately, no charges of “gross indecency”, as termed by the 19th century acts, were pressed, and Mr. Dudgeon’s effects were returned to him after a period of one year. The Court, in determining the infringement of his Article 8 rights, decided 15 to 4 that his right to privacy had been breached.

As documented in Chapter 6, there was no obvious dominant construction (in numerical terms) in the metaphors and frames used by the Court in *Dudgeon*. However, this isn’t to say a closer look might not reveal more about the conception of privacy which comes across, particularly if we examine the separate opinions of the dissenting judges.

In the determination of the majority, the Court considered how to decide, “whether the interference is aimed at ‘the protection of morals’ or ‘the protection of the rights and freedoms of others’, the two purposes relied on by the Government.”<sup>20</sup> In deciding between the two, the Court ultimately stated that, “it is somewhat artificial in this context to draw a rigid distinction between ‘protection of the rights and freedoms of others’ and ‘protection of morals’,”<sup>21</sup> because although

the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society... the general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland...<sup>22</sup>

as,

"protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals"<sup>23</sup>

In conceptualising morality, the Court relies on two main metaphors: MORALITY IS A FABRIC<sup>24</sup> and MORALITY IS CLIMATE/NATURAL FORCE<sup>25</sup>. Both are rich domain variants of MORALITY AS A WHOLE

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<sup>20</sup> *id* at §45.

<sup>21</sup> *id* at §47.

<sup>22</sup> *id* §46.

<sup>23</sup> *id* at §47.

<sup>24</sup> e.g. “a change in the law would be seriously damaging to the *moral fabric of society*” *Dudgeon v. The United Kingdom* at §57. Emphasis added.

SUBSTANCE, MORALITY IS AN INTEGRATED SYSTEM. These, in turn, are variants of the structure metaphor. This general source domain is clear, for instance, when the Court discusses the necessity of the legislation to protect morals with reference to “the moral ethos of society as a whole.”<sup>26</sup> The understanding of the underlying debate surrounding the notion of morality, as one of the preconditions for a State to interfere with the private life of a citizen, is a crucial precondition to understanding privacy itself. The framing of morality as a whole substance brings its own inferences into play, and in turn affects the argumentation of the Court and the basis of its dissents.

Take, for instance, the Court's consideration of the will of the public in opposition to homosexuality in Northern Ireland, where the Court refers to it as, “*a strong body of opposition stemming from a genuine and sincere conviction.*”<sup>27</sup> Reading “*a strong body of opposition*” in the context of an effect on a fabric requires the force to be strong enough to do more than pull on a small thread. Rather than conceptualising morality in terms of the structural (building variant) metaphors the Court is want to use in describing the function of law where a small change in the foundations of the structure will have devastating consequences, through conceptual metaphor the Court can infer that without substantive evidence showing a devastating force on the whole of the fabric, the necessity of an interference cannot be justified. Thus, it can rightly conclude that,

[n]o evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law. It cannot be maintained in these circumstances that there is a “pressing social need” to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.<sup>28</sup>

Looking at morality in terms of an integrated and natural system (e.g. climate, climate acting on a terrestrial body, etc.), the Court can lean towards a similar conclusion.

[T]he moral attitudes towards male homosexuality in Northern Ireland and the concern that *any relaxation in the law would tend to erode existing moral*

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<sup>25</sup> e.g. “it follows that the *moral climate* in Northern Ireland in sexual matters” *Dudgeon v. The United Kingdom* at §57. Emphasis added.

<sup>26</sup> *id* at §49.

<sup>27</sup> *id* at §57. Emphasis added.

<sup>28</sup> *id* at §60.

*standards* cannot, without more, warrant interfering with the applicant's private life to such an extent.<sup>29</sup>

If the Court used the structural framing of morality, it might conceivably have a more protectionist attitude towards a small change. But here it is conceptualised as a force acting on a whole body which can withstand the pressure (societal fabric) vs the *point* concept of the individual and the application of a targeted vertical pressure (as discussed in the previous chapters). In this framing, Mr Dudgeon has the weight of the law as a real "threat *hanging over him*."<sup>30</sup> The dissents in *Dudgeon* see things differently.

The first of the dissents discussed the precondition of the protection of morality by a State to interfere with private life by dissecting the idea into a question of a private vs a public morality. In essence, it questions whether sexual life itself is to be judged as a private or public act, given sex's (supposed) moral entanglements. This is diametrically opposed to the Court's firm judgment that sex is "an essentially private manifestation of the human personality."<sup>31</sup> Judge Walsh asks,

...whether sexual morality is 'only private morality' or whether it has an inseparable social dimension. Sexual behaviour is determined more by cultural influences than by instinctive needs. Cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges.<sup>32</sup>

Judge Walsh (we must set his questionable scientific credentials aside), establishes a distinction between the homosexual and heterosexual act when constructing a legal category of "private family life". As stated in Art. 8§1,

It is to be noted that Article 8 § 1 (art. 8-1) of the Convention speaks of "private and family life". If the *ejusdem generis* rule is to be applied, then the provision should be interpreted as relating to private life in that context as, for example, the right to raise one's children according to one's own philosophical and religious tenets and generally to pursue without interference the activities which are akin to those pursued in the privacy of family life and as such are in the

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<sup>29</sup> *id* at §61. Emphasis added.

<sup>30</sup> *id* at §41. Emphasis added.

<sup>31</sup> *id* at §60.

<sup>32</sup> *Dudgeon v. The United Kingdom* (Separate opinion of Judge Walsh) at §15.

course of ordinary human and fundamental rights. No such claim can be made for homosexual practices.<sup>33</sup>

He attempts to link private family life to the concept of reproduction and 'the traditional family' by invoking the FAMILY LIFE IS/MORALITY IS/FUNDAMENTAL RIGHTS ARE A JOURNEY metaphor in statements such as “*pursuing*”, “*the course of ordinary...rights,*”, that “[v]irtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult *the struggle after virtue,*” or finally that, “[t]he ultimate justification of law is that *it serves moral ends.*”<sup>34</sup>

Perhaps more tellingly, he highlights the risk posed by the development of a public morality by framing the role of morality as inseparably linked to that of the law, through references to the Court’s verticality and its control frames: “The legal arrangement and prescriptions *set up to regulate* sexual behaviour are very important formative factors in *the shaping* of cultural and social institutions.”<sup>35</sup> But his sense of morality is not the small force on a whole substance; it is an obstacle in the way of a pursuit of virtue, and thus even small pressures can have a great affect, meaning that sexual behaviour cannot be treated in the same way as other types of fundamental rights,

In all cultures matters of sexual morality are particularly sensitive ones and the effects of certain forms of sexual immorality are not as susceptible of the same precise objective assessment that is possible in matters such as torture or degrading and inhuman treatment.<sup>36</sup>

So, when Judge Walsh speaks of, what he terms as, sexual immorality *having* “an eroding effect on the moral ethos of the community in question,”<sup>37</sup> this erosion doesn't impact a whole substance, as in the Court’s example, but is a form of erosion that makes the pursuit of virtue and justice an impossibility.<sup>38</sup>

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<sup>33</sup> *id* at §23.

<sup>34</sup> *id* at §14. Emphasis added.

<sup>35</sup> *id* at §15. Emphasis added.

<sup>36</sup> *id* at §18.

<sup>37</sup> *id* at §14.

<sup>38</sup> Judge Matscher takes a similar journey based approach: “At paragraph 51, it is said that the adjective “necessary” implies the existence of a “pressing social need” for the interference in question... To my mind, however, once it has been granted that an *aim is legitimate* for the purposes of Article 8 § 2 (art. 8-2), *any measure directed towards the accomplishment of that aim is necessary* if failure to take the measure would create a risk that that aim would not be achieved. It is only in this context that one can examine the necessity for a certain measure and, adding a further factor, the proportionality between the value *attaching to the aim and the seriousness of the measure* (see paragraphs 54 and 60 in fine). Since the adjective “necessary” thus refers solely to the measures (that is, *the means*), it does not permit an

Judge Zeika approaches his dissent in a slightly different manner by mixing the metaphors of MORALITY IS CLIMATE/NATURAL FORCE (where MORALITY should be understood to mean solely public morality) with the verticality of GOOD IS UP. For instance, he posits that his proximity to a religious nation (Cyprus) puts him in “a better position *in forecasting* the public outcry and the *turmoil* which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland.”<sup>39</sup> Given that “[m]oral conceptions to a great degree *are rooted in religious beliefs*”<sup>40</sup> and that the “religious-minded...adhere to moral standards which are centuries’ old”<sup>41</sup>, rather than erode the fabric of public morality, the turmoil unleashed by any such changes to the legal framework would uproot the society's centuries'-old tree of morality. And this is unthinkable for a tree that is held in *the highest of esteem*:

we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of such people who are completely against unnatural immoral practices...A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one’s private life, to *underestimate the necessity* of keeping a law in force for the protection of *morals held in high esteem* by the majority of people...A change of the law so as to legalise homosexual activities in private by adults is very likely to *cause many disturbances* in the country in question.<sup>42</sup>

Judge Walsh, Judge Matscher, and Judge Zeika all view private and family life with a distinction or separation between homosexual and heterosexual sex (and any related acts or behaviours), and as such cannot conceive of the former within the same rubric of protected intimate private life befitting the latter.<sup>43</sup> These dissents cannot be ascribed in full to failures of basic scientific

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assessment whether the *aim itself is legitimate*, something that the judgment appears to do when it links "necessary" with "pressing social need". *Dudgeon v. The United Kingdom* (Separate opinion of Judge Matscher) at para. 5. Emphasis added.

<sup>39</sup> *Dudgeon v. The United Kingdom* (Separate opinion of Judge Zeika) at §2. Emphasis added.

<sup>40</sup> *ibid.* Emphasis added.

<sup>41</sup> *id* at §1.

<sup>42</sup> *id* at §3. Emphasis added.

<sup>43</sup> “The judgment of the Court does not constitute a declaration to the effect that the particular homosexual practices which are subject to penalty by the legislation in question virtually amount to fundamental human rights. However, that will not prevent it being hailed as such by those who seek to blur the essential difference between homosexual and heterosexual activities.” *Dudgeon v. The United Kingdom* (Separate opinion of Judge Walsh) at §20; “Of course, the applicant and the organisations behind him are seeking more: they are seeking the express and formal repeal of the laws in force, that is to say a "charter" declaring homosexuality to be an alternative equivalent to heterosexuality, with all the consequences that that would entail (for example, as regards sex education). However, this is in no way

understanding, they are in part catalysed by the ways in which morality is framed to begin with. By breaking the notion of sex into the categories of moral and immoral sex, their respective conceptions of morality can influence how they form their opinions as to whether there is an infraction of a right to private family life to begin with, or whether a recognised interference can be justified.

It is interesting to note that the dissents in both cases - *Rotaru* and *Dudgeon*- use ideas of naturalism to describe a public and private divide. Neither of these conceptions fits neatly into the coherent whole of the structure/vision/weight metaphors in the Court's jurisprudence (at least not in the network we have looked at here), and instead use corrective framing devices to deliver their message (albeit in the second case, a rather abhorrent one). Why is that? Let's return to this in a moment.

### **3. "Bound" by law:**

In sections 38 and 39 in *Schrems*, the Court stated,

It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter<sup>44</sup>

and,

It is apparent from Article 1 of Directive 95/46 and recitals 2 and 10 in its preamble that that directive seeks to ensure not only effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the fundamental right to respect for private life with regard to the processing of personal data, but also a high level of protection of those fundamental rights and freedoms. The importance of both the fundamental right to respect for private life, guaranteed by Article 7 of the Charter, and the fundamental right to the protection of personal data, guaranteed by Article 8 thereof, is, moreover, emphasised in the case-law of the Court<sup>45</sup>

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required by Article 8 (art. 8) of the Convention." *Dudgeon v. The United Kingdom* (Separate opinion of Judge Matscher) at para. 14.

<sup>44</sup> *Schrems* at §38

<sup>45</sup> *Schrems* at §39.



The cited case law refers to the link between Article 7 and 8 in the Charter, which brings us straight back to the question: what connects privacy and personal data?

One answer, given by the “Article 29 Working Party”<sup>46</sup> (“the European advisory board concerning data protection and privacy”<sup>47</sup>), is that it is through the development of the legislative history from ECHR’s Article 8 to the Charter’s article’s 7 and 8. Beginning from the ECHR’s definition of the concept of protection of “private life” and the conditions of a “legal basis” of interferences with that right<sup>48</sup>, the Council of Europe’s Convention 108<sup>49</sup> subsequently introduced “the protection of personal data as a separate concept.”<sup>50</sup> They explain,

The underlying idea at the time was not that processing of personal data should always be seen as 'interference with privacy', but rather that to protect everyone's fundamental rights and freedoms, and notably their right to privacy, processing of personal data should always fulfil certain conditions.<sup>51</sup>

This is also stressed by the OECD guidelines’ emphasis on “lawfulness” in the protection of personal data.<sup>52</sup> This is all incorporated into Directive 95/46 where,

In addition to a broader requirement set forth in its Article 6(1)(a) that personal data must be processed 'fairly and lawfully', the Directive added a specific set of additional requirements, not yet present as such in either Convention 108 or the OECD Guidelines: the processing of personal data must be based on one of the six legal grounds specified in Article 7.<sup>53</sup>

These articles and their content are enshrined in The Charter, where the “provisions reinforce both the importance of the principle of lawfulness and the need for an adequate legal basis for the processing of personal data.”<sup>54</sup> It isn’t hard to see the structural metaphorical precepts being

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<sup>46</sup> See, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC Adopted on 9 April 2014.

<sup>47</sup> See Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) entry into force 31/07/2002

<sup>48</sup> Opinion 06/2014 at 6.

<sup>49</sup> Convention 108 for the Protection of Individuals with regard to automatic processing of personal data. (opened for signature on 28/1/1981) (entry into force 01/10/1985)

<sup>50</sup> Opinion 06/2014 at 6.

<sup>51</sup> *id* at 6-7.

<sup>52</sup> *id* at 7.

<sup>53</sup> *ibid*.

<sup>54</sup> *id* at 8.

interpreted when data protection is understood as relating to the quality of law vs an infringement on privacy. Cue Bonello's ire.

The interpretation is that the quality of the law must be read "in the light" of fundamental freedoms, in particular the right to privacy. They are indissolubly linked. How that reading affects the notions of the quality and legitimacy of a law (or the processing of data) has been the remit of this study. While the Art29 Working Group might decide that personal data was introduced as a separate concept, they cannot escape that it is structural metaphor that grounds the quality of law. To be read in the light of a structure is to be proximally close, and ultimately, to be bound by it. The metaphor calls for a way to read legitimate aims that are, to all intents and purposes, unavoidable. Through the use of the negation of legitimate aims that the jurisprudence has set up, protection of data is appropriated by the concept of privacy as an extended member of the radial category of privacy. It is set within privacy's casting light.

The radial category's innermost layer is comprised of the *most intimate rights*: those areas which are so prototypical in the category of private that they cannot be conceived of in any other way; medical data, sexual life, family and children, the home, and correspondence. The next layer out, by extension through the use of negating legitimate interference, contains things such as: business correspondence and public records. In the outer layer, we could add: data of an identified, or even, identifiable person. It is all based on a concept of privacy as a notion measured on the legitimacy of the *interference with*, not the *constituents of* the category.

Steven Winter makes a similar point about the notion of free speech in the US,

"Speech," in other words, is a radial category whose central case is characterized by the CONDUIT metaphor-system and its cognate, the marketplace of ideas. Speaking, writing and publishing are the prototypical cases. First tier extensions include the protest march and the demonstration, relatively early additions that differ from the central case because they involve conduct implicating pragmatic concerns (traffic, congestion) that justify reasonable time, place and manner restrictions. Second tier extensions include the non-print media and symbolic commercial speech. Thus, the broadcast media are subject to legal mandates - the fairness doctrine, the regulation of indecent but non-obscene language - that

would not be tolerated for more prototypical media...As one moves further from the core, First Amendment protections progressively weaken.<sup>55</sup>

This would also seem to be the case with the radial category of privacy. However, unlike the category of speech at its “pre-numbral fringes” (to use Bonello’s term), the law must introduce an entirely separate act to cover personal data as it can’t be wrestled in as a prototypical member on its own merit. This is exactly what happened, for example, in Directive 95/46. The use of a separate category of privacy protection (informational data and particularly its processing) added another layer around the radial category of privacy. Privacy is both the delineation of spheres *and* the basis of the laws made to protect it. One can argue about the value or utility of drawing a line in the sand somewhere between data and personal data, but that line is drawn through the lens of a conceptual path dependence built on metaphors that wade through the borders of the radial categories it has set up for itself.

Put simply, path dependence, as noted in Chapter 3, is the idea that preceding events can have “lock-in effects”<sup>56</sup> dictating a specific outcome. Legal theorist Oona Hathaway describes it in more depth. Much like the work here, Hathaway’s goal is to seek out conceptual change using instruments and theories borrowed from outside the law. The disciplines of economics, rational choice theory, and evolutionary biology<sup>57</sup> provide the backdrop for Hathaway to study the role of history in law’s determination of concepts named “path dependence”.<sup>58</sup> In her words, path dependence,

means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage. At the most basic level, therefore, path dependence implies that “what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.”<sup>59</sup>

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<sup>55</sup> Winter 2001 at 279.

<sup>56</sup> Larsson, Stefan; 2017. *Conceptions In The Code: How Metaphors Explain Legal Challenges In Digital Times*. Oxford University Press at 151 (digital edition).

<sup>57</sup> Hathaway, Oona A.; 2003. 'Path Dependence In The Law: The Course And Pattern Of Legal Change In A Common Law System,' Paper 270 *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers* 101, at 105.

<sup>58</sup> *id* at 103.

<sup>59</sup> *id* at 104. Internal reference omitted.

Hathaway's work is reliant on the premise that it is a "court's adher[ence] to the doctrine of *stare decisis*"<sup>60</sup> that allows us to look at the path dependence of precedent, (though she admits it fits any system that "look to non-binding decisions for persuasive precedent"<sup>61</sup>). However, as the previous chapters' exposition has clearly shown, the model is equally applicable in systems where precedent is not legally binding, where the use of metaphor, frames, and conceptual blending still produce path dependent effects.

She identifies three types of path dependence: "increasing returns", "evolutionary", and "sequencing",<sup>62</sup> based on theories from economics, evolutionary biology, and rational choice theory respectively.<sup>63</sup> In the increasing returns theory, "[p]ath dependence occurs because once a court makes an initial decision, it is less costly to continue down that same path than it is to change to a different path."<sup>64</sup> In evolutionary path dependence, the "possibilities for today and tomorrow are determined by the evolutionary changes of the past," irrespective of whether these changes occur as a steady process or as the frantic starts and stops of "punctuated equilibria"<sup>65</sup>. Sequencing refers to the idea that "the order in which the alternatives are considered—or the path by which they are selected—shapes the outcome."<sup>66</sup>

Let's consider each of these strands of path dependence in relation to the evidence presented here, using the lens of cognitive linguistics. In Hathaway's work, increasing returns path dependence,

operates through the gradual building of legal rules upon one another over time. Not only does an earlier decision influence the later decisions of courts, but it also influences them in a particular way: It makes it more likely that courts will choose to resolve similar legal dilemmas in a similar manner.<sup>67</sup>

She gives the example of a situation where a case "does not constitute formally binding precedent...[but] the judge may nonetheless draw on the insights and knowledge gained from

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<sup>60</sup> *id* at 102.

<sup>61</sup> *id* at 106.

<sup>62</sup> *id* at 104.

<sup>63</sup> *id* at 106.

<sup>64</sup> *id* at 107.

<sup>65</sup> *ibid.*

<sup>66</sup> *id* at 108.

<sup>67</sup> *id* at 127.

such cases.”<sup>68</sup> The evidence presented in Chapters 6 and 7 appears to be in accordance with this theory. Both conceptual blending and systems of metaphoric fit give acuity for *how* “influence”, “knowledge”, and “insights” are built. The “self-reinforcing” mechanisms described by increasing returns theory can be partially explained by the conceptual dependence built by metaphoric framing, and with a tool like cognitive linguistic analysis, a legal scholar can hope to “predict the way the system will operate.”<sup>69</sup>

The evolutionary paradigm, as Hathaway notes, is not a new insight for traditional jurisprudential theory.<sup>70</sup> In tracing the history of its use in legal theory, Hathaway highlights the “classical evolutionary paradigm” that enables the system to efficiently cut out weak links through competitive rules and principles.<sup>71</sup> This “evolution-to-efficiency argument”, as she calls it, is incompatible with the path-dependent model.<sup>72</sup> Instead, evolutionary path dependency should be understood in concordance with its biological analogue in that,

“survival of the fittest” simply indicates that natural selection favors those animals that are most successful at reproducing in a given environment (which of course requires that they possess qualities that allow them not only to reproduce successfully but also to survive to an age at which they can reproduce).<sup>73</sup>

It is more about an environment-organism interaction than efficiency or “objective perfect[ion].”<sup>74</sup> This work has given evidence of that interaction in the process of fitting frames to their precedent analogues. Firstly, as it has been shown, this is done through a relation of comparison to prototypical group members (rather than correlation with those on the peripheries of a radial category), and when it is not rejected by dissent that considers alternate frames. Secondly, comporting with Hathaway’s evolutionary path dependence, this change can often be likened to the

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<sup>68</sup> *id* at 128.

<sup>69</sup> *id* at 129.

<sup>70</sup> see Cardozo, Benjamin; 1921. “The Nature of the Judicial Process” at 48-9 “The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or broadly, and has to be reframed. Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unite with other strains, and persisting permeate the law.” as quoted in Hathaway, Oona A.; 2003 at 135. See also, Elliot, Donald; 1985. ‘The Evolutionary Tradition in Jurisprudence,’ 85 Columbia Law Review 38.

<sup>71</sup> Hathaway, Oona A.; 2003 at 137-8.

<sup>72</sup> *ibid*.

<sup>73</sup> *id* at 139.

<sup>74</sup> *id* at 138.

punctuated equilibrium of biology when a new circumstance forces a rethink of an old category.<sup>75</sup> This is the exact circumstance required by the Court in *Schrems*.

The last of Hathaway's three models of path dependence, sequencing, is also supported by the research's investigation. The evidence in this work clearly shows a relationship of conceptual blending and, furthermore, that hub cases dictate the composition of future cases in a sequenced way. Though sometimes gradual and sometimes punctuated, the referenced cases build on existing rules, such as the margin of appreciation, by adding new circumstances and conditions for consideration. Had *Evans* or *Connors* not come before *Schrems*, or in fact *Digital Rights Ireland*, the combination of structural schemas may have been quite different or, in the least, a different set of cases would have been cited to support the same decision and the same framing. Although that counterfactual can't be tested, in light of the evidence, there is good reason to believe that the relationships would have evolved in a different way. What could be interesting for future research would be to run an automated analysis of the entire body of the case law, testing different conditions by removing certain cases from the network to see which conceptual schemas are weakened and/or strengthened by doing so.

All of the concordant evidence notwithstanding, this analysis ultimately does not reach the same conclusion as Hathaway. It is her determination that,

[...]legal change is unpredictable ex ante and nonergodic, and early outcomes may become locked in. The law evolves gradually over time, drawing on an existing stock of precedent, punctuated by periods of rapid adaptation. And ultimate legal outcomes depend significantly on the order in which decisions are made.<sup>76</sup>

This interpretation bypasses any opportunity to develop a method to forecast models of legal change through conceptual path dependence. It is not a weakness of the system, but it is the key to escaping its own murky aporias.

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<sup>75</sup> *id* at 141.

<sup>76</sup> *id* at 150.

#### 4. From Private to Personal

The radial category of private life relies very heavily on its metaphorical spatial structure. Its path-dependence in the use of the precedents building up to the *Schrems* case give us insight into the personal of private life. Privacy's spatial structure is not just a series of spheres of interference, or a quality of visibility, it is embodied in the ways it is described. The idea that "processing of personal data should [not] always be seen as 'interference with privacy'"<sup>77</sup> is one that could be kept separate if only it hadn't become part of the radial category of privacy protection and thus reliant on the prototype of privacy protection: the personal sphere. Dinev et. al. assert that, amongst the many varying themes in definitions of privacy from different disciplines, the common trait is to portray privacy as a *state*:

the most common theme that emerges is that privacy is a state in which an individual is found in a given situation at a given moment of time. This consensus emerges regardless of how the authors begin their conceptualization of privacy or whether basic assumptions varied. For example, Westin... refers to 'states of privacy' and both Altman ... and Westin ... discuss 'state of control' and 'state of limited access'... Also, Warren and Brandeis's ...definition of general privacy as a 'right to be left alone' implicitly refers to a state – of being left alone.<sup>78</sup>

This conceptualisation fits well with the linguistic evidence we have seen throughout this study. A change of state can most easily be visualised through a mix of ICMs that depend on a spatial schema. Dinev *et al* note that "[d]ue to the inconsistencies in conceptualizing and measuring privacy *per se*, much behavioral research on privacy uses *privacy concerns* as a proxy for *privacy*."<sup>79</sup> Much the same can be said in regards to the Court's reasoning. By basing the protection of data on the structural schema of the right to privacy, the Court has created a path for itself to follow that necessarily involves the radial category of privacy protection. If one were to look at competing

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<sup>77</sup> Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC Adopted on 9 April 2014. at 6-7

<sup>78</sup> Dinev, Tamara, Heng Xu, Jeff H. Smith & Paul Hart ; 2013. 'Information Privacy And Correlates: An Empirical Attempt To Bridge And Distinguish Privacy-Related Concepts ,' 22 European Journal of Information Systems 295 at 298, internal references omitted (see works cited).

<sup>79</sup> *ibid.* Original emphasis.

frames, this may not be the case. Take, for instance, the writing in Directive 95/46 defining the notion of processing:

'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction,<sup>80</sup>

This doesn't refer to a change of state that data undergoes, but to any position along a path that describes a state (a dubiously static understanding to give the moniker 'processing' to). Though the terms themselves refer to operations which are a state change, the definition lacks the conceptual framework to understand them, namely a state change from what to what. When the definition refers to *collection* for instance, is it collection in the sense of gathering indiscriminately or the notion of collection for a purpose? Or both? Is it talking about the 'natural' state of data being altered, collected, then housed and stored in a place where it did not originate? A state change is a narrative distinction which often invokes the schemas of "PART-WHOLE...SOURCE-PATH-GOAL...BALANCE...and...FORCE-BARRIER."<sup>81</sup> The spatial representations of a change of state invoke movement, not a static conception of being *in* a specific state. Directive 95/46 doesn't convey processing of data in this way, but instead links data processing on the periphery of the larger category of privacy, and invokes privacy jurisprudence's definitions and legitimate purposes to constrain the category, rather than defining and designating data processing on its own merit. This is neither a good or a bad thing. It is merely useful to note because, due to the conceptual path dependence of privacy law, the consequences for anticipating the legal uses of data processing are subject to the definition of privacy when, as Solove notes, "privacy seems to be about everything, and therefore it appears to be about nothing."<sup>82</sup>

What if we took a different perspective? If state change is understood as a change from natural to artificial, for instance, then the state *change* would be the subject of discussion. To elucidate this argument, it is helpful to return to the alternative framings of the dissents in *Rotaru*.

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<sup>80</sup> 95/46/EC Art 2(b)

<sup>81</sup> Winter 2003 at 110.

<sup>82</sup> Solove, Daniel J.; 2006. 'A Taxonomy of Privacy,' 154 *University of Pennsylvania law review* 477, at 479.



Recall that Bonello's position was based on the naturalism of privacy. As continually stated in this chapter, private actions are those contained in a locked sphere from which information can flow or be forced/allowed to flow. Public actions are those that *live* outside of this sphere of private information and action. The importance of a fundamental right to private life is to protect that sphere from being penetrated, with exceptions made for situations of dire need to national security, or for use in pursuit of a legitimate aim. For Bonello, a state change (and his use of the term *alchemise*) is the important issue. There are data that are public and those that are private. The corrective frame is used to interrogate a state change from natural to artificial. The issue is not *that* data was stored, but that there is a lack of criteria to determine whether the *kind* of stored data is now public or private. Then through its processing (its change of state), we can investigate whether the processing itself is what alters the state of information from private to public (or vice versa). Perhaps if DATA AS COMMODITY had been invoked from the beginning, the state change wouldn't be as important, so the only logical legal recourse would be to classify it as a market product and consequently hold it to different standards. While the desirability of this option is questionable, it would certainly alter the conversation about the metric of natural vs artificial states. Recall that Directive 95/46 states,

Whereas the establishment and functioning of an internal market in which...the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;<sup>83</sup>

This comes awfully close to naming personal data a good in itself. If it had, the last clause about fundamental rights would certainly lose some of its sway, the cases cited would change, and the conceptual path dependent structure of the network would take a different direction. The jurisdiction or area of law covering the issue of personal data wouldn't change; it would just become a different question.

Solove's quip that because privacy means everything it does not mean anything, isn't true. Privacy and data protection require a negotiation between competing corrective frames, that have allegiances to the path that came before them. By tying the breadth of categories of personal data

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<sup>83</sup> 95/46/EC recital 3

to those of the intimate protections of privacy means that, going forward, the idea of privacy can be transposed beyond the sphere schema that many scholars (and laymen alike) use to delineate the layers of the radial category of traditional privacy. Just as in *Schrems*, new prospects and new cases will rely on the justifications found within the network of case citations. Whether these rationalisations are justified will be determined by the normal validations of post-hoc analysis and argument. However, by investigating those networks for their consistency of metaphor, and indeed even by forecasting how specific path dependent models are built on metaphorical constructions, we will have a more complete, in-depth understanding of why these rationalisations will be made. Privacy, with the addition of data processing, is now subject to a wider sphere of rights than ever previously held. And it has got here by the normal stretching by increments of human thought, not by the fiat of a judge, or the now less murky aporia of legal reasoning. As a discipline that leans so heavily towards defined and strict rules of procedure and edict, a method for interrogating and forecasting that thought is more than helpful; it is necessary.

## Chapter Nine: Towards the Future

“They were tinkerers first, though, and philosophers only second. Could they make a bridge from the strange attractors they knew so well to the experiments of classical physics? It was one thing to say that right-left-right-right-left-right-left-left-left-right was unpredictable and information generating. It was quite another to take a stream of real data and measure its Lyapunov exponent, its entropy, its dimension. Still, the Santa Cruz physicists had made themselves more comfortable with these ideas than had any of their older colleagues. By living with strange attractors day and night, they convinced themselves that they recognized them in the flapping, shaking, beating, swaying phenomena of their everyday lives.

They had a game they would play, sitting at a coffeehouse.

They would ask: How far away is the nearest strange attractor? Was it that rattling automobile fender? That flag snapping erratically in a steady breeze? A fluttering leaf? ‘You don’t see something until you have the right metaphor to let you perceive it,’ Shaw said, echoing Thomas S Kuhn.”

- James Gleick<sup>1</sup>

This work has established a proof of concept for a new method to investigate the underlying conceptual framework on which the notion of privacy is built. The evidence of spatial metaphor use, conceptual blends, metaphoric fit, evaluative judgment, and the examination of the consequences of alternative framings in this project have shown that a combined linguistic and network analysis of cited case law is a powerful tool for investigating how principles are applied to novel cases and how concepts change throughout a body of law to provide coherence. The research's final task is to reply to certain considerations and counter-arguments, and to reflect on

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<sup>1</sup> Gleick, James; 1987. *Chaos: Making a New Science*. Penguin. at 262-3.

the method so it can be strengthened where deficient and extended where it offers prospects for future research.

## **I. Reflections & Responses**

### *Cross-Lingual Challenges*

The first and most glaring critique which could be made of the research is its use of English as the primary language. There are two separate challenges to respond to here. The first is that the processes described (conceptual blending, metaphoric fit, etc.) are often laboratory tested in English, and are not as robustly tested in other languages. The second is that the Courts' decisions are not always written in English and are often translated from their original language. On the first point, though it is true that CMT has its foundations in the English language, there is a significant amount of evidence to show that the processes it describes operate in similar ways in other languages. However, the issue of the construction of metaphor (or concepts generally) in different languages remains a question of how those differences play out. This is better known as the "linguistic relativity hypothesis":

If speakers of different languages exhibit differences in their cognitive and linguistic behavior, how do speakers of more than one language behave? Does learning a new language entail internalization of an alternative interpretation of experience, or does the first language continue to dominate the conceptual repertoire of second language users?<sup>2</sup>

This theory has a much-debated history, and current research still focuses on establishing the extent to which linguistic relativity affects thought. As Athanasopoulos et. al. note,

inquiry by scholars working on the linguistic relativity hypothesis is still far from reaching consensus about the nature and extent of the influence of linguistic structure on cognitive processes, such as memory, attention, and categorization; what conditions suppress or promote this influence; and which experimental paradigm may best capture [the] phenomena.<sup>3</sup>

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<sup>2</sup> Athanasopoulos, Panos, Emanuel Bylund, & Daniel Casasanto; 2016. 'Introduction to the Special Issue: New and Interdisciplinary Approaches to Linguistic Relativity,' 66(3) *Language Learning* 482 at 482-3.

<sup>3</sup> id at 483.

The lack of consensus, however, doesn't equate to a lack of effect, and research into meanings derived from conceptual frames of judicial decisions must take the language problem into account. For instance, French differs considerably from English in terms of respective speakers' conceptions of space<sup>4</sup> and motion<sup>5</sup>; these conceptual differences will certainly have implications for the way that the structural metaphors which this work has investigated are constructed in each language, and to study this phenomenon it could, and should, be an area for future research (and one which would surely produce an enormous amount of interesting data).

The second point, that the original decision may or may not have been translated into English, is equally important to address. Translation is an art form and the translator's full fidelity to the meanings and uses of metaphor in the original text can't be assumed. Where there has been a translation of a judgment, responsibility falls to the researcher to either identify and exclude those decisions from the analysis or be clear about the tentative reliability of the cited material. In the current work, I can only be honest and say that the only way to circumvent this issue would have been to personally retranslate each case from the original (or have one person undertake this work). Realistically, this would not have been feasible, given the amount of cases in the network that incorporate translations. Further research would ideally be conducted in multi-lingual teams until automatic translation systems become reliable enough to be entrusted this work. This being said, it is not clear how large an effect the use of translated text would have on the present results. Given the collegial nature of the documents, it is usually not 'one voice' that is being heard and thus the impact of the idiosyncratic use of metaphors from different languages should be minimal.

### *Collegial vs Individual Writing of Judgements*

Further on this point, the nature and standing of the Courts (and their decisions) examined in this work mean that the conclusions drawn will not be applicable in all other court settings. Given the panel make-up of the Strausbourg and Luxembourg Courts, in most cases there is a counter-argument that the text will not reveal the reasoning of "a" mind. This is perfectly true. However,

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<sup>4</sup> Hickmann, M., and H. Hendriks; 2006. 'Static and Dynamic Location in French and in English,' 26(1) First Language 103.

<sup>5</sup> Hickmann, M., P. Taranne, and P. Bonnet; 2009. 'Motion in First Language Acquisition: Manner and Path in French and English Child Language,' 36 Journal of Child Language 705.

this work focuses on the reasoning of a court, not the mind of a judge (perhaps with the caveat of singularly written dissents). As noted in the opening chapters, the law is taken as an artefact, as a text in itself. It is a considered premise based on the idea that the citations themselves are not the work of a single judge, but of a judgment, as a singular work. As this work has shown, when the Court writes its decision, the wording is subject to a path dependence of choices made prior to the decision about how the law reacts to certain legal tests and principles. Whether a system integrates the voices of all its judges, or allows for more singular dissent, doesn't pose much of a problem in this approach. The text dependence remains the same in either scenario.

However, this is a sound argument in assessing the applicability or generalisability of this approach to other legal systems, for instance the United States Supreme Court or other domestic systems. It may be the case that there is no path dependence when dissents are referenced in a manner that curtails the majority decision. With this being said, there would be a major benefit to testing the current methodology across different legal systems.

#### *Lexical Unit (Length) Choice and Different Types of Metaphor Use*

There are a few technical choices made in this work that it is helpful to provide more explication of. The first is the choice of where to draw boundaries to determine the length of lexical units. In the methodology of the MIPVU approach, one of the first tasks is to identify lexical units. The starting point is to take the singular word and to then work towards creating coded sets as lexical units.<sup>6</sup> Another approach is to choose a lexical unit relative to the sentence construction, where the length of the phrase that is marked as metaphorical may vary from a single word to a larger piece of text.<sup>7</sup> Both approaches have their pros and cons, depending on the purpose of the research. If the aim is purely to show the prevalence of metaphor in a text, then consistency in the length of phrases obviously has an important quantitative value in determining how prevalent metaphorical lexical units are in relation to the number of words in a text. This is one type of comparison. In this approach, consistency in lexical unit length would be paramount in achieving reliable results. This is particularly true when the same large corpus is used by other researchers to

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<sup>6</sup> See Steen, Gerard J.; 2016. 'Identifying Metaphor in Language', in *The Routledge Handbook of Metaphor and Language*. Elena Semino & Zsófia Demjen (Eds) 73.

<sup>7</sup> See, Cameron, Lynne & Robert Maslen (Eds); 2010. *Metaphor Analysis: Research Practice in Applied Linguistics, Social Sciences and the Humanities*. Equinox.

compare methodological approaches to analysing metaphor, like the oft used British National Corpus.

However, if the research is primarily concerned with the prevalence of competing metaphors or of the frequency in use of any number of metaphorical frames, then the length of the lexical unit will not have a significant effect on the results unless, as in the first approach, it is based solely on a quantitative outcome. For the research in the current project, the quantitative value of metaphor occurrence was only important insofar as identifying the dominant construction. Dominance, in this sense, was quantified, but only in relation to how it linked to certain legal principles or descriptions. If, however, this research were to be extended to automatic processing and a larger reliance on quantitative metrics, a comparison of the methods and their effects should be done in the preliminary stages in order to see how the approaches affect the 'metaphoricity' of a text. The target of the present analysis was not to quantify *how much* metaphor was used, but to examine *how* metaphor was used.

Linked to this idea of lexical unit length is the differentiation between types of metaphor. This could mean classifying metaphors more distinctly into rich and basic domains, identifying metaphor vs metonymic usage, separating metaphors in 'legal' and non-legal senses, creating categories for metaphor used in discourse vs meta-discourse situations, and outlining the types of metaphor used in different parts of speech. Separating all of the subdomains of metaphor uses would certainly add multiple layers to what is already a rich analysis. For this hand-coded project, the choice was made to prove the method first. I wholeheartedly agree that looking at delineations of metaphor usage could be extremely informative over the entire network of case law, for instance. It may reveal underlying mechanisms to elaborate upon the evidence presented here. Given the already intimidating amount of data to analyse in the present project, it was important to solidify the foundation of the approach before building upwards. It is necessary to establish that it is snowing before asking about the structure and dynamics of a floating ice crystals. But, in the following section, the options for pursuing this exact type of research are laid out.

## 2. Extensions & Avenues for further study

### *Automatic Processing*

This work has relied heavily on the use of hand-coding and techniques for hand-building networks. This didn't have to be the case, but given the researcher's lack of programming knowledge in the early phases of the project design, it didn't seem sensible to plan a project built on incomplete knowledge. Couple that with the intensely hard task of developing natural language processing capabilities that can reliably identify metaphor and figurative language in text. Though it is not yet at the height of its power, automatic processing of figurative language is a burgeoning field in computational linguistics, and the time will surely come sooner rather than later when automatic processing will be a feasible prospect.

Take, for instance, the work being done by Ekaterina Shutova and researchers in her lab at Cambridge University. They have been working on the automatic processing of metaphor, but have stated from the outset how difficult this is for machines to do.<sup>8</sup> Like this current work, she and her co-authors state that, “[f]or many years, computational work on metaphor evolved around the use of hand-coded knowledge and rules to model metaphorical associations, making the systems hard to scale.”<sup>9</sup> There have been a number of different approaches to trying to solve this outstanding problem.<sup>10</sup> However, much of this work has “been predominantly applied in limited-

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<sup>8</sup> Shutova, Ekaterina, Lin Sun, Elkin Dario Gutierrez, Patricia Lichtenstein, & Srinu Narayanan; 2017. 'Multilingual Metaphor Processing: Experiments with Semi-Supervised and Unsupervised Learning,' 43(1) *Computational Linguistics* 71: “Manifestations of metaphor are pervasive in language and reasoning, making its computational processing an imperative task within Natural Language Processing... metaphor is currently a bottleneck, particularly in semantic tasks. An accurate and scalable metaphor processing system would become an important component of many practical NLP applications.” at 72.

<sup>9</sup> id at 73.

<sup>10</sup> e.g. Li, Hongsong, Kenny Q. Zhu, and Haixun Wang; 2013. 'Data-Driven Metaphor Recognition and Explanation,' *Transactions of the Association for Computational Linguistics* 379; Shutova, Ekaterina and Lin Sun ; 2013. 'Unsupervised Metaphor Identification Using Hierarchical Graph Factorization Clustering,' *Proceedings of NAACL 2013* 978; Mohler, Michael, Bryan Rink, David Bracewell, and Marc Tomlinson; 2014. 'A Novel Distributional Approach to Multilingual Conceptual Metaphor Recognition,' *Proceedings of COLING 2014, the 25th International Conference on Computational Linguistics: Technical Papers* 1752; Wilks, Yorick, Adam Dalton, James Allen, and Lucian Galescu; 2013. 'Automatic Metaphor Detection Using Large-Scale Lexical Resources and Conventional Metaphor Extraction,' *Proceedings of the First Workshop on Metaphor in NLP* 36; Neuman, Yair, Dan Assaf, Yohai Cohen, Mark Last, Shlomo Argamon, Newton Howard, and Ophir Frieder; 2013. 'Metaphor Identification in Large Texts Corpora,' 8(4) *PLoS one*; Veale, Tony and Yanfen Hao; 2008. 'A Fluid Knowledge Representation for Understanding and Generating Creative Metaphors,' *Proceedings of COLING 2008* 945.



domain, small-scale experiments. This is mainly due to the lack of general-domain corpora annotated for metaphor that are sufficiently large for training wide-coverage supervised systems.”<sup>11</sup> New techniques would need to make those “methods scalable to new data and portable across languages, domains, and tasks, bringing metaphor processing technology a step closer to a possibility of integration with real-world NLP.”<sup>12</sup> This would certainly aid future research, particularly in legal studies incorporating metaphor, and would make the initial steps in comparing cross-linguistic data to see whether the usage patterns shown in this work are reliable across different regions, systems, courts, and/or judges.

Identifying metaphor as a task is something that future research in this area should definitely keep pace with. A second avenue would be to conduct a similar type of analysis that relies less on all of the metaphors in a text to prioritise automatically identifying image schemas. The strength of this approach would be in its capacity to find the spatio-temporal grounding of the metaphors in this work and process them in a way which is indicative of what metaphors are dominant in the greater legal milieu. This hasn't yet been shown, but given the largely dominant structure of spatial metaphors, as featured in the repetitive legal speech and in particular when it comes to formal legal concepts like balance or proportionality, automatic image schema identification may be able to stand-in as a substitute until more advanced methods are able to identify metaphor themselves. Work to this effect is being done in computational linguistics and in research on artificial intelligence. For instance, Dagmar Gromann and Maria Hedblom have used such a method to process image schemas found in the text of the European Parliament.<sup>13</sup> By using a system of “sentence parsing”, “semantic role labelling”, and “spectral clustering”, they can “semi-automatically” identify image schemas in a corpus.<sup>14</sup> However, like metaphor processing and the work presented here, there is still a substantial amount of work to be done in formalising an approach to ensure its reliability.

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<sup>11</sup> Shutova, et. al. 2017 at 73.

<sup>12</sup> *ibid.*

<sup>13</sup> Gromann, Dagmar & Maria M. Hedblom; 2017. Kinesthetic Mind Reader: A Method to Identify Image Schemas in Natural Language. Available at: [http://www.cogsys.org/papers/ACS2017/ACS\\_2017\\_paper\\_9\\_Gromann.pdf](http://www.cogsys.org/papers/ACS2017/ACS_2017_paper_9_Gromann.pdf).

<sup>14</sup> *id* at 11.

Another approach would be to use corpus linguistic methods to extract data from the interlinked networks of case citation. Simply put,

Corpus Linguistics involves the construction of large digital collections of authentic texts (corpora) and their investigation through dedicated software tools ... initially primarily applied to the study of lexis and grammar, but have recently been extended to a wider range of areas, including discourse analysis, translation studies and (first and second) language acquisition, as well as other branches of the humanities and social sciences.<sup>15</sup>

Corpus Linguistics differs from the approach taken in this project in that it (generally) treats all of the text as a single corpus with, for instance, no demarcation of the significance of specific passages to an argument. As Semino states, it is often used “to make or test generalisations about metaphor use in a whole (national) language, such as British English, or across two languages.”<sup>16</sup> This method can, and has, been successfully used to investigate the prevalence and use of metaphor in a variety of different disciplines and practices including, among others, healthcare communication,<sup>17</sup> language learning,<sup>18</sup> political and media discourse,<sup>19</sup> and the role of metaphor in creativity and humour.<sup>20</sup> We don't have to look outside of the legal realm to see the method of corpus linguistics already being introduced, albeit not specifically for metaphor usage. Sadl and Olsen incorporate corpus methods in their investigation of the language of the CJEU and ECtHR when creating legal categories “which have not hitherto been recognized in generalist European law scholarship, but which might be

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<sup>15</sup> Semino, Elena; 2017. 'Corpus Linguistics and Metaphor' in *The Cambridge Handbook of Cognitive Linguistics*. Dancygier, B. (ed.). Cambridge University Press 463 at 463.

<sup>16</sup> id at 464.

<sup>17</sup> Demmen, Jane, Elena Semino, Zsafia Demjén, Veronika Koller, Andrew Hardie, Paul Rayson and Sheila Payne; 2015. 'A Computer-Assisted Study of The Use of Violence Metaphors for Cancer and End of Life by Patients, Family Carers and Health Professionals,' 20(2) *International Journal of Corpus Linguistics* 205

<sup>18</sup> Skorczynska, Hanna; 2010. 'A Corpus-Based Evaluation Of Metaphors In A Business English Textbook,' 29(1) *English for Specific Purposes* 30.

<sup>19</sup> L'Hôte, Emilie; 2014. *Identity, Narrative and Metaphor: A Corpus-Based Cognitive Analysis Of New Labour Discourse*. Palgrave Macmillan.

<sup>20</sup> Veale, Tony; 2012. *Exploding The Creativity Myth: The Computational Foundations of Linguistic Creativity*. Bloomsbury Publishing.

distinct and significant from the perspective of courts and practitioners in a specific area.”<sup>21</sup> Like the work here, their intention is to link the quantitative corpus data with network citations in order to allow “legal scholars gain a stable and comprehensive quantitative basis for a qualitative study of case law, precedent and interpretation.”<sup>22</sup> The approach looks for specific wordings throughout the precedent chain. To contribute to their goal, it would be extremely fruitful to merge their approach with that of linguists working on metaphor use combined with more focused qualitative studies. This could be done in a number of ways.

One such approach would be to add more meta-data to the existing citation networks. Currently, the database used by Sadl and Olsen features metadata provided by the database of the Courts. To add further quantitative value to their networks it could be helpful to incorporate more collocation techniques, parts of speech tagging, and explicit and implicit metaphor use, among others. One way to accomplish this would be to use computer assisted methods, as noted above, and through the use of other language parsing algorithms, like NLTK, for instance.

NLTK - the Natural Language Toolkit, an “open source library”<sup>23</sup> made for the python programming language - would be an optimal tool for adding in this kind of data<sup>24</sup> to the network of legal citations. NLTK has been used by language scholars to accomplish various goals, not least those in natural language processing and computational linguistics.<sup>25</sup> The utility of this kind of tool is to enrich centrality measures in citation network analysis. For instance, when investigating their citation network on Article 14 citizenship rights within ECtHR case law, Sadl and Olsen found (much like the present study with Article 8 rights) that, “[q]ualitative analysis, which accompanies quantitative findings, shows that the ECtHR substantially extended its own jurisdiction by broadening the scope of protection of Article 14 ECHR to include new legal categories and rights.”<sup>26</sup> However, their quantitative data was limited to looking at meta-data that linked the date of judgments to the collocation data with the word ‘effectiveness’ to investigate that singular concept.

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<sup>21</sup> Sadl, Urska & Henrik Palmer Olsen; 2017. 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network And Corpus Linguistic Analysis To Understand International Courts , ' 30 *Leiden Journal of International Law* 327 at 330.

<sup>22</sup> *id* at 349.

<sup>23</sup> see <http://www.nltk.org/> for more information.

<sup>24</sup> e.g. classification, tokenization, stemming, tagging, parsing, and semantic reasoning.

<sup>25</sup> Bird, Steven, Ewan Klein, & Edward Loper; 2009. *Natural Language Processing With Python*. O'Reilly Publishing.

<sup>26</sup> Sadl, Urska & Henrik Palmer Olsen; 2017 at 344.

As they acknowledge, “while the findings of corpus linguistic analysis strongly indicate the increasing importance of a new category of effectiveness in legal discourse they are inconclusive in themselves.”<sup>27</sup> Though not completely novel in the field of legal research, this method could be improved with the addition of more data for qualitative investigation to the existing repository, such as: image schematic constructions, parsing for parts of speech, and by going beyond the collocation approach. Incorporating this data into the network could significantly change the structure of the centrality of certain hub cases which could, in itself, raise interesting new questions. Additionally, improvements in automatic processing would allow as yet uninvestigated data sources to be added to the network analysis.

### *New Data Sources*

Scholars working on citation networks - including the author - focus exclusively on the judgments themselves to create the link between the citation of a case (or text within a case) to measure and track conceptual change. The strength in this method is that it looks at decisions as an artefact of human reasoning. However, the obvious drawback is that the same method misses out on an enormous amount of data that could be used to support its findings. If conceptual change, particularly in the current work, can be measured through metaphor use, blending, metaphoric fit, and the use of alternative frames, it is then crucial to look at the persuasive value of the metaphors used in argumentation given to the court to consider a particular case. Some scholars already take this into account when measuring the influence of the advocate general on the Court of Justice.<sup>28</sup> Within that study there is an enormous obstacle to be overcome in describing the implicit influence of the advocate general on the Court.<sup>29</sup> They measured implicit influence by

assum[ing] that it can be observed through four measurable aspects of the case law: the choice of precedent (or case law), the method of interpretation, the reasoning, and the outcome...<sup>30</sup>

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<sup>27</sup> id at 340.

<sup>28</sup> Sadl, Urska & Suvi Sankari; 2017. 'The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship,' *Yearbook of European Law* 1.

<sup>29</sup> Where explicit influence would be noted by: “a direct reference of the Court to the AG opinion in the judgment.” id at 3.

<sup>30</sup> *ibid.*

where the method of interpretation is defined by proxy as a measure of agreement between the Advocate General and the Court “[w]ith regard to...whether the AG interprets EU law broadly or narrowly and whether the Court uses the same method of interpretation as the AG,”<sup>31</sup> as measured on a four-level graded scale from 0-1. This kind of analysis could produce extremely interesting results by adding the use of metaphorical analysis to the measure agreement between the Court and AsG. And if done automatically, the analysis could be enacted on a very wide-reaching data set.

That work notwithstanding, the literature which uses empirical methods on a broad swath of case law is thin, and is but one of many data sources that could be combined to add another layer of rich data to our understanding. The AG is obviously not the only persuasive force within the system of law itself. The first glaring data source to explore the influence of metaphorical framing on decisions would be the written arguments themselves. Taking the written arguments and subjecting them to a process of analysis similar to the one undertaken in the present work (along the lines of metaphoric fit and conceptual blending in particular) would add an invaluable data set in the empirically based approach to case law and interpretation. Further, it would allow for the analysis of the networks of citations that applicants and governments use to construct their arguments, and could help to show which networks ended up being used by the Court to subsequently ask whether the conceptions of certain principles and legal categories change, are adopted in full and are subject to the same dynamics found in the work here, supplying more evidence that the phenomena described in the previous chapters holds true not just from decision to decision but with the greater weight of potential adopted argumentation and conceptual frames.

In addition to these two data sources that come from outside of the judgments themselves, it would be helpful to look at the internal reasoning of the decisions. Though this project looked at intertextual citations (section to section rather than case to case), it didn't look at the internal referencing of the decisions themselves. This could be broken up into two phenomena; that of explicit referencing, when a judgment refers to a paragraph within its own decision, and that of implicit referencing through the use of logical argumentation. Implicit reasoning could be broken up into further subgroups indicated by keywords such as *therefore*, *thus*, *as noted previously*, etc., and

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<sup>31</sup> id at 6.

those that come from a more focused qualitative analysis on the argumentative structure within the decision. This, again, would be a valid reason for using NLTK or other natural language processing tools that can automate the predicates and conclusions of arguments in varied corpora.

All of these approaches will still necessarily rely on the qualitative measure of metaphor analysis. The only real quantitative measure, so far, is the occurrence of metaphor. This is a drawback as it is our only proxy for adding it to the meta-data in the network analysis. Given this work's results, which show a heavy reliance on the spatial language used in the decisions, it would be worth considering adapting tools from cognitive linguistics to further elaborate on the construction of spatial language. One of those models is Deictic Space Modelling.

Deictic Space Theory uses simple Euclidean geometry to model conceptual structures from the perspective of a given speaker (represented by S). This theory has been pioneered by linguist Paul Chilton<sup>32</sup> to explore the idea that, "conceptual space...is inevitably tied to a point of view attributed to the speaker."<sup>33</sup> The model places referents and the relationships between them on three axes (distance d, time t, and modality m) corresponding to a speaker's inferred conceptual structure that is "essentially deictic, situating entities and events (i) in terms of their relative salience, (ii) in terms of their relation to the speaker's time and [...] (iii) in terms of epistemic 'distance' from the speaker."<sup>34</sup> These relationships are represented by vectors for their ability to display a relationship that represents direction and distance between referents. This modeling could help to visualise and ultimately quantify patterns in the data of conceptual space that inhere in the schemas of the Courts' reasoning. Figure 9.1 shows the basic axis set up that should be understood as scalar and non-quantified but, given the use of vector notation, could certainly generate a quantification.

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<sup>32</sup> See Chilton, Paul; 2014. *Language, Space and Mind: The Conceptual Geometry of Linguistic Meaning*. Cambridge University Press.

<sup>33</sup> Chilton, Paul; 2010. 'The Conceptual Structure Of Deontic Meaning: A Model Based On Geometrical Principles,' 2(2) *Language and Cognition* 190 at 195.

<sup>34</sup> *ibid.*

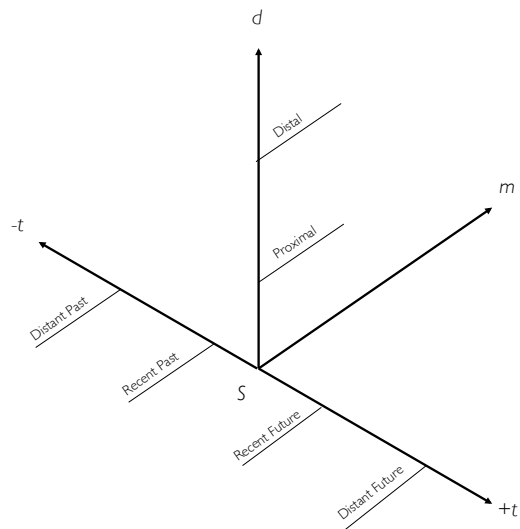


Figure 9.1 - Fundamental Deictic Space Model<sup>35</sup>

Referents and their relationships can then be modeled on these axes to create “geometrical diagrams [as] a form of abstract analytic modelling of conceptualisations.”<sup>36</sup> These conceptualisations result in our ability to go from simple spatial representations to their application on “the more abstract realms of properties, changes of state, mental processes and causation.”<sup>37</sup> The use of Deictic Space modelling could help to investigate the different forms of the up/down, and visible/not visible schemas used by the Courts to explore the patterns of conceptual models that permeate the precedent chain. Ultimately, quantifying this model would be ideal, and is ripe for future research.

Another potential area for future research would be the comparison of categorical qualifications across different domains of law. For instance, in the previous chapter the example of an alternate framing - DATA AS COMMODITY - was offered as an alternative frame. By comparing this alternative construction in the body of privacy law with, for example, that of the case law of market competition or intellectual property law and tracking commodity as a source domain in those areas, the research could establish the differing treatments of alternative framings, and their consequences for a harmonious and coherent body of principles across different legal domains.

<sup>35</sup> Chilton, Paul; 2014.

<sup>36</sup> Chilton, Paul; 2010 at 195.

<sup>37</sup> Chilton, Paul; 2014 at 104.

Combining the different approaches of these methods and data sources is an obvious extension of the proof of concept described in this work, and would add dense layers of empirical support to the evidence already manifest in the present work.

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### **3. A Final Note**

Bernard Vonnegut worked at General Electric in the 1940s. He worked in a lab where the team's aim was to understand and control the weather. They fiddled with dry ice, silver iodide, and artificial (and then naturally forming) cloud systems, until they had a small breakthrough; they produced snow, and cloud seeding was born.<sup>38</sup> The US military jumped at the prospect of this new knowledge, organising cloud seeding operations over Vietnam, and eventually causing, or at least contributing to, an incontrovertible ban on any weather modification in the US and subsequently also by the UN.<sup>39</sup> Some years later, Kurt Vonnegut, brother of Bernard, used his brother's work as the inspiration for the novel *Cat's Cradle*, in which a cloud seeding method using a fictional chemical leads to the Earth's reduction to a frozen ice-ball.<sup>40</sup> It is often our small achievements that have unforeseen consequences. Investigating metaphor in legal language isn't building the atomic bomb, or diverting hurricanes, but even the smallest degree of tinkering has its consequences. The automatic processing of language in law will get to a point where the question will need to be asked (and has been asked continually throughout this research): where does this ultimately lead? Will we, one day, replace judges with machines?

This point is well taken by the researcher, and the current project does contain an ethical and philosophical conundrum. If language processing software becomes reliable enough to recognise the patterns of judicial decisions to the extent where models forecasting future decisions can be created, will this be the right thing to do? This research has said, from the outset, that answering

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<sup>38</sup> See Barnett, Cynthia; 2016. *Rain: A Natural and Cultural History*. Broadway Books

<sup>39</sup> Convention on the prohibition of military or any other hostile use of environmental modification techniques (adopted 10 December 1976) (Entry into force 5 October 1978) United Nations, Treaty Series, vol. 1108

<sup>40</sup> See Strand, Ginger; 2015. *The Brothers Vonnegut: Science and Fiction in the House of Magic*. Farrar, Straus and Giroux



the normative questions about law (and principally applying universals to particulars) is not what we are after. But the question is raised about coherence being the lynchpin of providing clarity and foreseeability in legal systems. This chapter, "Towards the Future", should also include a re-statement of the questions pertaining to the need for, and utility of, coherence, particularly in a world where technology not only changes the world itself but also recalibrates the tools with which we investigate it. If this work has emphasised anything, it is the importance of considering counter concepts and alternative frames, before deciding what fits. We are often so subject to our metaphorical and schematic commitments that our biases go unnoticed. This research implores the legal world to notice.

The initial response to the question is no; we are nowhere near ready to replace judges, but that doesn't mean that supplements to aid in their reasoning, in their search for coherence, can't be met with a new tool. It is also crucial that legal theorists, and laymen alike, have access to the inner workings of judicial decisions not just for ease of access, reducing case processing times, or principles like basing the moral foundation of the justice and law on its predictability, equity, and coherence. If we can't determine the categories that promote justice on objective grounds, one might argue that justice is stuck in a relativistic mire, a swamp of shifting lines and arbitrary tests bound to tradition and linguistic coherence. And then what? The foundations of justice are not just bound by fairness, liberty, or freedom. Justice is not reflected by a line drawn in the sand, but by the hand that draws it. It is not designed to make the world fair by fiat or by the application of a universal principle, but by action. Justice, in all its guises, is about recourse, and recourse should be readily available to all who require it. A tool can do that. A method can do that. As the arc of justice bends towards freedom, the law must endeavour to be the force that makes it bough, and a tool to help every man and woman be that force. This goal is worth any risk.

It is a worthy goal, but we are not close to achieving it... yet. For now, we are developing the tools to peel away layers of ambiguity, to trace strands of complexity, and to design gears that create a fully functioning legal machine. Understanding different layers of just about anything is so often spoken about with the use of metaphor. An onion. A spider web. Mechanical systems. Structure. We are left to visualise a complex interconnected system from references to the features of it that we deem sufficient to understanding the system as a whole. Peczenik, Alexy, Hart...and the list goes on. To borrow a line from Robert Sapolsky, who labours to uncover the layers of complexity

that make up the antecedents of human behaviour involved in decision making, violence, religion, free will... “[i]t’s complicated. Nothing seems to cause anything; instead everything just modulates something else.”<sup>41</sup> Metaphorical reasoning isn’t the be all and end all of judicial decision making, nowhere near it. But it *is* a modulating factor. To ignore it and reduce it to an aporia, an unobtainable needle in a haystack where each needle alters the haystack’s shape as it is plucked, is a reduction that can be avoided, provided we have the right kinds of tools. It can be said of the physicists of chaos theory, meteorologists, biologists, etc.: “[t]hey were tinkerers first, though, and philosophers only second.”<sup>42</sup> With a development of a method, the same should be said of legal theorists too.

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<sup>41</sup> Sapolsky 2017 at 1291 (digital edition).

<sup>42</sup> Gleick 1989 at 262.

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