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A "MEETING OF THE MINDS" – THE GREATER ILLUSION**

INTRODUCTION

The distinction between legal obligations imposed upon contracting parties and those imposed by statute, regulation or common law is the concept of consent. Lay persons, as well as legal theorists, generally regard a "meeting of the minds"[1] as a significant, if not necessary, step in the creation of an enforceable contract. Stated more precisely, a "meeting of the minds" refers to the assent of two or more individuals to identical intentions that they each possess with respect to the terms of a proposed understanding. The purpose of this article is to examine the historical, legal and philosophical foundations of this concept.

I. THE PRIMACY PRINCIPLE

Broadly stated, there are two competing legal theories of contract interpretation: the subjective school and the objective school. The subjective school asserts that in determining the existence of possible contract obligations, a court's highest priority should be to identify each parties' actual understanding of the purported terms to the contract, and, if their understandings are identical, then, irrespective of all other factors, to enforce these terms as the parties' binding agreement. This policy, the "Primacy Principle," finds approval in the repeated observation of judges, that courts cannot, and will not, make contracts between parties; courts merely enforce agreements that the

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[1] The phrase was first utilized in *Reniger v. Fogossa*, 75 Eng. Rep. 1 (Ex 1551) and reported as the Latin term *aggregatio mentium* and *aggreamentum*. See W. S. Holdsworth, *A History of English Law* (1926); Farnsworth, *"Meaning" in the Law of Contracts*, 76 *Yale L. Journal* 939 (1967): 943–945.

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parties themselves have reached.[2] According to Professor Arthur Corbin, a proponent of the subjective school, the theory underlying the Primacy Principle was originally based upon the 16th century "so-called will theory of contracts" which held that a contract is made by the "voluntary agreement of men and not by the state. A man is not bound by a contractual duty unless he willed it so."[3]

The subjective school does not apply the Primacy Principle with equal vigor in the inverse circumstance. Indeed, where discord exists between parties as to the terms of their supposed agreement, no legal theorist's claims that the Primacy Principle prevents the imposition of legal obligations. Obligations imposed in these circumstances are, however, based upon principles entirely unrelated to the "will theory of contracts." For example, in the Case of the Black Car, Party A desires to have his car painted red, but executes a written contract with Party B specifying the color black. Party B paints the car, but Party A later refuses to pay for the contracted work because the car was painted black not red. Assuming no other facts, in particular that Party A and Party B did not both intend, despite the contrary terms of their written contract, that the car would be painted red, the subjective school would render a judgment in favor of Party B. The rationale supporting this conclusion is that, even though the parties' actual intentions may have differed, and hence the Primacy Principle could not apply, Party B, in performing the work, reasonably and

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[2] This phrase has been cited by American courts in countless instances.

[3] A. Corbin, 1 *Corbin on Contracts* §106, at 477 (1960). Professor Corbin was a special consultant of the Restatement of Contracts, 2d. The Primacy Principle is stated in rule form at § 201(1) of the Restatement 2d. "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." In the comment to this section, the authors observe that "Subsection (1) makes it clear that the primary search is for a common meaning of the parties, not a meaning imposed on them by the law. To the extent that a mutual understanding is displaced by government regulation, the resulting obligation does not rest on 'interpretation' in the sense used here. The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: 'the courts do not make a contract for the parties.' " See Restatement of Contracts 2d, comment c. at p. 84.

detrimentally relied upon Party A's unambiguous manifestation of intent: black.[4]

In contrast to the subjective school, proponents of the objective school of contract interpretation place a higher priority on the acts of contracting parties on the parties' actual intentions. The difference between the subjective school and objective school is most succinctly stated by Professor Robert Birmingham:

Subjective Theory: There is a contract if and only if the minds of the parties meet.

Objective Theory: There is a contract according only to the outward manifestations of the parties.[5]

The most colorful iterations of this policy, however, were made by Learned Hand:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.[6]

Under this formulation, the subjective school's search for a "meeting of the minds" is replaced by the objective school's search for a "meeting of the words."

The debate between proponents of the objective and subjective schools has gone on for decades, and under other namesakes for centuries. Nevertheless, because unswerving allegiance to the principles espoused by each school requires both to adopt extreme positions in certain situations, neither school has been able to deal a decisive intellectual blow to its adversary. In this on-going debate, countless

[4] This rule is specifically provided for in the Restatement of Contracts, 2nd §201 (2)(b) which states –

> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made if
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> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

[5] Birmingham, "Holmes on 'Peerless:' *Raffles v. Wichelhaus* and the Objective Theory of Contract," 47 *Univ of Pitt L Rev* (1985): 183, 185.

[6] *Hotchkiss v. National City Bank of N.Y.*, 200 F. 287, 293 (DCNY 1911).

refinements have been proposed to eliminate or minimize these difficulties. In an article entitled, "The Theory of Legal Interpretation,"[7] Oliver Wendel Holmes added his brush to this canvas. Consistent with *dicta* by the Massachusetts Supreme Court in *Goode v. Riyal*,[8] Holmes suggested that the Primacy Principle should not apply to the use of proper names. Under Holmes' proposed exception, where parties to a written contract utilizing the term "Bunker Hill" actually meant (as a result of a secret code or otherwise) "Old South Church," but later disagree as to the meaning of the term, then, irrespective of their actual understanding or code, they would be held by a court to the "common meaning" of the written term: Bunker Hill.[9]

In addition to "common meaning," common sense supports Holmes' argument. When the parties to the fictitious Bunker Hill / Old South Church example executed their written agreement, both were aware, or should have been, that if they were to later disagree on the terms of their understanding, the matter would come before a court for resolution. The court, in turn, would not be familiar with the parties' private code, and, would interpret the language of the written document as any "speaker of English." To protect oneself from the possibility of future betrayal by a contracting partner, a prudent party, in memorializing the terms of any such understanding, would not use a private code. As a result, in Holmes' view, the party utilizing a private code in this circumstance, assumes the risk of his contracting partner's duplicity.

> (E)ach party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.[10]

Even though this observation would support a far more expansive application of this exception to the Primacy Principle, Holmes, without adequate explanation, restricted his proposal to the use of "proper names."[11]

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[7] Holmes, "The Theory of Legal Interpretation," 12 *Har. L. Rev.* (1899): 417.

[8] *Goode v. Riyal*, 153 Mass. 585 (1891).

[9] See Holmes, *supra*. Note 6 at 420.

[10] See Holmes, *supra*. Note 6 at 419.

[11] See W. Young, "Equivocation in the Making of Agreements," 64 *Colum. L. Rev.* (1964): 619, 623–625. In his discussion of Holmes' proposed exception, with which he had substantial reservations, Young observed that there was no

The practical need for the kind of exception proposed by Holmes, coupled with the seeming inability for any exception of this sort to be logically restricted, underscores an inherent tension between the theoretical extremes of both the objective and subjective schools. If Holmes' exception were applicable to all the terms of an agreement, not just proper names, it could swallow the Primacy Principle whole. Conversely, if the Primacy Principle were applied without any exception, unambiguous written contracts would be subject to substantial challenge in every instance where one of the contracting parties later claims that while the parties utilized the term "black" in their written agreement, they both actually meant "red." Grant Gilmore observed that where "the 'actual state of the parties' minds' is relevant, then each litigated case must become an extended factual inquiry into what was 'intended,' 'meant,' 'believed' and so on"[12] which results in delay and substantial uncertainty. In a commercial context, where the utility of an agreement is often dependent upon the swift and certain enforcement of its terms, delays of this sort impinge upon the use of contract law to effectively order business relationships. More importantly, when the terms of a legally binding agreement are determined in large measure by the appeal to the trier of fact of one's party's witnesses compared to the appeal to the trier of fact of his adversary's witnesses, then the purportedly certainty in ordering relationships permitted by contract law is substantially reduced.

Notwithstanding these legitimate concerns, proponents of the subjective school cannot abide any exception to the Primacy Principle. From Professor Corbin's perspective, to be consistent with its foundations, a body of law that is founded upon the exercise of individual free will, as contract law is, must insure that within the confines of all available evidence (not just a "meeting of the words") individual choice is fully investigated and properly put into effect. As Corbin observed, in criticizing even Holmes' limited exception to the Primacy Principle –

> The statement that no word or phrase has one true and unalterable meaning is as true of proper names as it is of common nouns and verbs. No name, whether "Peerless" or "John Smith" has any meaning in the absence of a user of it and of

persuasive justification for restricting Holmes' exception "on the grammarian's ground that no proper name was involved." *Id.* at 625.

[12] G. Gilmore, *The Death of Contract* 42 (1974).

surrounding circumstances. One who speaks or writes such a name usually has a meaning for it. The hearer or reader also gives it a meaning, perhaps a different one, one that is just as "correct," and one that may be just as reasonable to hold. A "normal speaker of English" (or of Sanskrit) could give it no meaning without knowing surrounding circumstances; and if he knew all the circumstances that were known to both the speaker and the hearer, he could still give it no "correct" meaning of his own.[13]

In pressing this argument, Corbin decrys the objective school of contract interpretation as founded upon a "great illusion – the illusion that words, either singly or in combination, have a 'meaning' that is independent of the persons who use them."[14]

Holmes' analysis of the famous *Peerless* case while further explicating the differences between the objective and subjective schools, also reveals certain similarities in their perspective. In *Raffles v. Wichelhaus*,[15] a seller in Bombay agreed to ship cotton on a ship named Peerless to an English buyer. At the time, there were two ships named Peerless: one known to the buyer which left Bombay in October (October Peerless) and the other known to the seller which left Bombay in December (December Peerless). At a trial, the buyer interpreted their agreement to mean October Peerless; whereas the seller contended that the parties intended shipment on December Peerless. In contrast to the Bunker Hill/Old South Church example, *Raffles v. Wichelhaus* involved the use of an ambiguous manifestation of assent (Peerless) rather than the use of an unambiguous term (Bunker Hill). In analyzing the *Peerless* case, Holmes concluded that no contract formed in *Raffles v. Wichelhaus* because, irrespective of their *actual intentions*, the parties' manifestations did not coincide. "There is no contract when the proper name used by one party (Peerless) means one ship (October Peerless), and that used by the other (Peerless) means another (December Peerless)."[16] The *Peerless* case has been the subject of unending scholarly discussion. In the context of this article, however, Professor Melvin Eisenberg's

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[13] 3 Corbin, *supra*, Note 3, §535 at 16.

[14] 1 Corbin, *supra.*, Note 3, §106 at 474.

[15] *Raffles v. Wichelhaus*, 2 H&C 906, 159 Eng. Rep. 375 (Ex 1864) and in 33 L.I.N.S. 160 (Ex. 1864). For the complete story of this celebrated case, see also A.W. Brian Simpson, "Contracts for Cotton to Arrive: The Case of the Two Ships Peerless," 11 *Cardozo L. Rev.* 287 (1989).

[16] Holmes, *supra.*, Note 6 at 418. References in parentheses are added to original text.

criticism of Holmes' analysis of *Raffles v. Wichelhaus* has particular application:

> Holmes had it precisely backward; the result in *Peerless* is correct, not because the parties *said* different things, but because they *meant* different things.[17]

The fact that over the reach of several decades Holmes and Eisenberg can square off in a debate about this famous 19th century contract case and say, with defensible alacrity, that each others' conclusion is "right for the wrong reason" is because the subjective and objective schools of contract interpretation, despite their differing perspectives, share a common axis in orientation.

II. THE PRIMACY DILEMMA

In applying the Primacy Principle, proponents of the subjective school face a seemingly impenetrable barrier. This barrier results from the fact that since one cannot look into the mind of another person and observe what he is thinking, no advocate can present, as Exhibit A in his lawsuit, what might be called the plaintiff's "mental template" of a particular contract term. For the finder of fact, this apparent factual circumstance creates a dilemma (the "Primacy Dilemma"): (i) under the Primacy Principle, the trier of fact is charged with the task of ascertaining the actual intentions of the parties; (ii) since, however, the trier of fact has no way of directly viewing the actual intentions of another person, in arriving at his decision, the trier of fact can only rely upon the manifestations of parties and witnesses, which may or may not coincide with their actual intentions.

To principled proponents of the subjective school, the most frustrating aspect of the Primacy Dilemma is the realization that even after a trial, the full ascertainment of individual "will," the mission of the Primacy Principle, can never be certain. Corbin acknowledges that "the best" the trier of fact –

> . . . can do is to put himself so far as possible in the position of that person or persons, knowing their history and experience and their relations with other men and things, and then to determine what his own meaning and intention would have been. To do this requires a *lively imagination*, full and complete information

[17] Eisenberg, "Responsive Contract Law," 36 *Stan L Rev.* (1984): 1107, 1117.

obtained from the document and extrinsic testimony, and what we shall describe as *sound judgment* and *common sense*.[18]

While the objective school's blinder-like focus on a "meeting of the words" has no place in the theoretical framework of the subjective school, the converse is not true. Although much more restricted in application, the Primacy Principle nevertheless finds a place in the theoretical framework of the objective school of contract interpretation. Indeed, even Learned Hand acknowledged the possibility that under some circumstances a "meeting of the minds" must take precedence over a "meeting of the words." Learned Hand's statements, earlier referenced in this article, but now fully stated, contain precisely such a caveat.

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning while the law imposes upon them, he would still be held, *unless there were some mutual mistake or something else of the sort.*[19]

In the context of this article, the significance of Learned Hand's caveat is that while the trier of fact under the objective school will do so on a far less frequent basis, he, too, from time-to-time, will confront the Primacy Dilemma in reaching an adjudicative decision.[20] Thus, while the objective and subjective schools do not view the Primacy Principle as having the same position in their respective hierarchies of contract values, each acknowledge the factual circumstance of the Primacy Dilemma.

From this perspective, the principal difference between the objective and subjective schools is at what point along the continuum leading to the Primacy Dilemma each resorts to a source of information that is external to the parties themselves to resolve

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[18] 3 Corbin, *supra.*, Note 3, §536, at 34 (1960). [Italics added.]

[19] *Hotchkiss v. National City Bank, supra.*, Note 5 (italics added).

[20] As a proponent of the objective school, Learned Hand's caveat is restricted to circumstances permitting the "reformation" of a contract. For the subjective school, except in instances where third parties are involved, questions of reformation are no differently analyzed than those of interpretation. "Reformation . . . is merely the translation of their language into the language of other people, just as is true in the process that is called Interpretation." Corbin, *supra.*, note 3, §540, at p. 92.

the matters at issue. By interpreting words as any "speaker of English," the objective school applies this external solvent to the level of manifestations. In so doing, and in all but the limited circumstance of a "mutual mistake," the objective school avoids any confrontation with the Primacy Dilemma by replacing the search for a "meeting of the minds" with an analysis of the "meeting of the words." In contrast, until its inquiry collides with the opaque surface of the Primacy Dilemma, the subjective school applies its external solvent (Corbin's imaginative trier of fact) only after permitting the trier of fact to examine all available evidence, albeit circumstantial, of each parties' mental template of the contract terms in dispute.[21]

III. EXHIBIT A

If the Primacy Dilemma did not exist, that is, if Exhibit A – the mental template possessed by a party at the time of manifesting his or her consent to a contract term – could be introduced as an exhibit at trial, the debate between the objective and subjective schools would be at an end. Exhibit A could satisfy the concerns of both opposing theorists. It would be, *at once*, a "tangible intention" and an "unambiguous word." To further examine the position of the Primacy Dilemma as an axis to both theories of contract interpretation, it is useful to consider how a trial would be conducted if Exhibit A could be introduced into evidence. Suppose, as Corbin mused,[22] Exhibit

[21] "How is a court to find out whether either party knew or had reason to know the intent or understanding of the other? Knowledge of such a factor may be proved by any evidence that is ordinarily admitted to prove a state of mind. This would include the party's own admissions, his actions from which knowledge may be inferred, testimony of statements and information given him from which knowledge may reasonably be inferred, and the usages and meanings of third persons with which he probably was familiar . . . the court should be advised of all the surrounding circumstances; of the meaning that is given to the language of the agreement by common usage, by usage in the trade or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other." 3 Corbin, *supra.*, note 3, §538, at pp. 66–69.

[22] "It may be that some day we may be able to observe a state of mind in the same way that we observe chemical processes and electrical discharges. At present, however, what we observe for judicial purposes is the conduct of the parties." 1 Corbin, *supra.*, note 3, §9, at p. 20.

A could be identified through the use of an imaginary CT Scan that would probe the minds of contracting parties and display, in a holographic image, the mental template of a particular contract term that each contracting party possessed at the time the purported contract was formed. Apparatus of this sort would allow Eisenberg to compare the parties' respective mental templates of the ships Peerless and to authoritatively determine whether their intentions matched. Conversely, this imaginary CT Scan would allow Holmes to determine if the word "Peerless" as used by the parties in *Raffles v. Wichelhaus* had a single meaning and could thereby serve as an appropriate term to an enforceable contract. Such an examination, might even put Holmes' and Eisenberg's scholarly dispute to rest with the joint observation that there was no contract in *Raffles v. Wichelhaus* because the parties "Exhibit As" did not match.

To fairly balance the scales of any trial where this imaginary CT Scan might be employed, however, requires an equally *imaginative* litigant. There is one fictional character, often cited by courts in contract disputes, who is particularly well suited to this challenge – Lewis Carroll's ultimate purveyor of nonsense: Humpty Dumpty.[23] Humpty Dumpty's solvent to the Primacy Dilemma is neither Holmes' "speaker of English" nor Corbin's trier of fact. Humpty Dumpty's solvent is whimsy.

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[23] Humpty Dumpty's famous assertion that a word "means just what I choose it to mean" is referenced in United States Supreme Court decisions, *Tennessee Valley Authority v. Hill*, 437 US 153; 98 S Ct 2279; 57 L Ed 2d 117; (1978) (opinion by Justice Berger); *Adamo Wrecking Co. v. United States*, 434 US 275; 98 S Ct 566; 54 L Ed 2d 538 (1978) (opinion by Justice Rhenquist); *Secretary of Agriculture v. United States*, 350 US 162; 76 S Ct 244 ; 100 L Ed 173 (1956) (opinion by Justice Frankfurter); as well as in appellate decisions of nearly every federal circuit: *La Plante v. American Honda Motor Co.*, Inc. 27 F 3d 731 (1st Cir 1994); *Connecticut Coastal Fishermen's Association v. Remington Arms Co. Inc.*, 989 F2d 1305 (2nd Cir 1993); *United States of America v. Essig*, 10 F 3d 968 (3rd Cir 1993); *Potomac Valve & Fitting v. Crawford Fitting*, 829 F 2d 1280 (4th Cir 1987); *Long v. Shultz Cattle Company*, 881 F 2d 129 (5th Cir 1989) *United Thermal v. Asbestos Training & Em.*, 920 F 2d 1345 (7th Cir 1991); *Janklow v. Newsweek, Inc.*, 788 F 2d 1300 (8th Cir 1986); *United States v. Alvarez-Sanchez* 975 F 2d 1396 (4th Cir 1992); *Meller v. The Heil Company*, 745 F 2d 1297 (10th Cir 1984); *Duncan v. Poythress*, 777 F 2d 1508 (11th Cir 1985); *Majewski v. B'Nai B'Rith Intern.*, 721 F 2d 823 (DC Cir 1983), and *Woods v. Tsuchiya*, 754 F 2d 1571 (Fed Cir 1985). A Lexis search of "All States" and federal decisions finds the phrase "Humpty Dumpty" in 339 reported cases.

"I don't know what you mean by 'glory,' " Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant 'there's a nice knock-down argument for you!' "

"But 'glory' doesn't mean 'a nice knock-down argument,' " Alice objected.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all.[24]"

In the role of defendant in the Case of the Black Car, Humpty Dumpty would not only assert that when he expressed his intent to the plaintiff painter, he (Humpty Dumpty) meant red despite the fact that he signed a contract that read black, but, would also assert, that in their contract the written term black *means* red. Who is to control the meaning of this term – Humpty Dumpty or the plaintiff car painter? In the context of a lawsuit, the correct answer is, of course, the judge. But applying the Primacy Principle to Humpty Dumpty is highly problematic. If Humpty Dumpty is master of the meaning of words, how is the trier of fact ever to be certain that he has correctly interpreted what Humpty Dumpty means by the words he employs. For example, if Humpty Dumpty defines "glory" as "a nice knock-down argument," how does he define "argument," "nice," "a," or "knock-down?" Indeed, if Humpty Dumpty is not held to the meaning of Holmes' "speaker of English" for any word, how can a trier of fact even begin to build a lexicon to communicate with Humpty Dumpty? Moreover, if words are subject to Humpty Dumpty's mastery, glory might have one meaning in one sentence and another meaning in another sentence.

Given a litigant of Humpty Dumpty's character, it might be that if the imaginary CT Scan were applied to Humpty Dumpty in the Case of the Black Car, Humpty Dumpty would produce inconsistent Exhibit As. A CT Scan on Monday for the word "black" might produce an Exhibit A that signifies the color red, whereas, if Humpty Dumpty receives the same test on Wednesday, he may produce an Exhibit A signifying the number 5. Indeed, before one enters into

[24] L. Carroll, *Through the Looking Glass*, 94 (Random House 1964).

contract negotiations with Humpty Dumpty, it might be prudent to administer a CT Scan to Humpty Dumpty. This process might be repeated every day of negotiations, maybe every hour or even every minute. One might also find that when Humpty Dumpty uses words, he produces Exhibit As that are different from everybody else's Exhibit As. Whatever the case, Humpty Dumpty is either an advocate's ultimate dream or ultimate nightmare, or, maybe *at once* both.

Humpty Dumpty's portrayal of the defendant car owner in the Case of the Black Car leads to an examination of the Primacy Dilemma from a philosophical perspective. In contrast to debates between proponents of the subjective school and objective school of contract interpretation, in philosophical discussions, the Primacy Dilemma has been viewed as a potential obstacle to the way that individuals learn the meaning of certain words, e.g., sensations. In this context, however, the legitimacy of the Primacy Dilemma is itself the subject of the debate.

IV. LANGUAGE GAMES

In *Philosophical Investigations*,[25] Ludwig Wittgenstein begins his examination of how individuals learn the meaning of words with a quotation from Augustine, Confessions, I.8–

> When they (my elders) named some object, and accordingly moved towards something, I saw this and I grasped that the thing was called by the sound they uttered when they meant to point it out. Their intention was shewn by their bodily movements, as it were the natural language of all peoples: the expression of the face, the play of the eyes, the movement of other parts of the body, and the tone of voice which expresses our state of mind in seeking, having, rejecting, or avoiding something. Thus, as I heard words repeatedly used in their proper places in various sentences, I gradually learnt to understand what objects they signified; and after I had trained my mouth to form these signs, I used them to express my own desires.[26]

[25] L. Wittgenstein, *Philosophical Investigations*, x[e] (1958) (hereinafter *Philosophical Investigations*). Wittgenstein is without question the most provocative philosopher of the 20th Century. In a biography of Wittgenstein, Ray Monk reports that despite the fact that Wittgenstein's principal work, *Philosophical Investigations* was not published until 1951, as of 1990 there were 5,868 books and articles on his works. R. Monk, *Ludwig Wittgenstein, The Duty of Genius* (1990), see Introduction.

[26] *Philosophical Investigations*, §1.

For example, according to Augustine's model, children learn the meaning of the term "chair" by observing others pointing at dining room chairs, living room chairs and patio chairs while mouthing the term "chair." The pupil's mastery of the term is demonstrated when he points out chairs to others and "mouths" the word "chair." While this model seems straight forward enough, Wittgenstein questions its utility.

> Augustine describes the learning of human language as if the child came into a strange country and did not understand the language of the country; that is, as if it already had a language, only not this one. Or again: as if the child could already *think*, only not yet speak. And "think" would here mean something like "talk to itself."[27]

The inadequacies of Augustine's model become more apparent in wider application. One can learn about the correct use of the term "chair" by "pointing," but how does one learn the term "toothache?" To teach this term, Augustine's elders might point to a particular tooth and grimace, but they could also argue that while having one's elder point to his tooth and grimace may be confusing at first, the meaning of the term will become far more comprehensible the first time the pupil experiences a toothache.[28] In any event, the Augustinian formula for teaching the use of words to describe the sensation of pain does not so easily transfer to sensations not necessarily accompanied by a physical reaction of the individual or some "natural expression for the sensation."[29] Reflecting this criticism backwards, Wittgenstein asks, "What would it be like if human beings shewed no outward sign of pain (did not groan, grimace, etc.)? Then it would be impossible to teach a child the use of the word 'tooth-ache.' "[30] In the face of this criticism and others offered by Wittgenstein, proponents of the Augustinian model must rely upon an ever more elaborate, and seemingly never ending, series of refinements. As Wittgenstein makes clear, however, for every refinement of the Augustine model, his criticism simply proceeds to another level. Inevitably this line of analysis leads to the observation that even after experiencing a toothache, a pupil cannot know for certain if the sensation to which

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[27] *Philosophical Investigations*, §32.

[28] "Perhaps by means of gestures, or by pricking him with a pin and saying 'See, that's what pain is!' " *Philosophical Investigations*, §288.

[29] *Philosophical Investigations*, §256.

[30] *Philosophical Investigations*, §257.

he ascribes to the term "toothache" is the same sensation that his elders experience when they say the word "toothache," point to a tooth and grimace. This obstacle to learning and certainty is the Primacy Dilemma.

For Corbin, the factual circumstance of the Primacy Dilemma is plate and template to the *imperfections* of language.

> Words, oral or written, are merely a medium by which one person attempts to convey his thoughts to another person. They are merely audible sounds or visible sights. It is individual men who have "meanings" which they try to convey to others by the use of words; and it is individual men who receive "meanings" by reason of words used by others.[31]
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> Their words and acts are called "expressions" because they are external symbols of the thoughts and intentions of one party, symbols that convey these thoughts and intentions to the mind of the other party.[32]
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> In the process of determining lack of identity in meaning, the meaning given by each party is a separate issue.[33]
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> In every language, the words and other symbols composing it are an *imperfect* instrument of expression, one that always requires for its sound interpretation a high degree of linguistic knowledge and human experience.[34]

To Corbin, language, through its "external symbols," forms an imperfect bridge between the internal "thoughts and intentions" of two separate minds. It is the imperfections in this bridge that Corbin's imaginative trier of fact attempts to smooth over through "lively imagination," "sound judgment," and "common sense."

Bertrand Russell, who was Wittgenstein's early mentor at Cambridge University, proposed a perspective and solution to the purported factual circumstance posed by the Primacy Dilemma which resonates with Corbin's views. Russell, who was clearly an imaginative trier of fact, asserts that to link an individual's "mental phenomena" to outward behavior one must depend upon a principle of "analogical inference:"

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[31] 1 Corbin, *supra.*, note 3, §106, at p. 474.

[32] 1 Corbin, *supra.*, note 3, §107, at p. 478.

[33] 3 Corbin, *supra.*, note 3, §536, at p. 34.

[34] 3 Corbin, *supra.*, note 3, §544, at p. 158 (emphasis added).

The behavior of other peoples' bodies – and especially their speech behavior – is noticeably similar to our own, and our own is noticeably associated with "mental" phenomena. (For the moment it does not matter what we mean by "mental.") We therefore argue that other people's behavior is also associated with "mental" phenomena. Or rather, we accept this at first as an animal inference, and invent the analogy argument afterward to rationalize the already existing belief.

Analogy differs from induction – at least as I am using the words – by the fact that an analogical inference, when it passes outside experience, cannot be verified. We cannot enter into the minds of others to observe the thoughts and emotions which we infer from their behavior. We must therefore accept analogy – in the sense in which it goes beyond experience – as an independent premise of scientific knowledge ....[35]

Russell's so-called "principle of analogical inference" as a possible aide to modulate the "imperfections" of language as an "instrument of expression" directly parallels Corbin's requirement that the imaginative trier of fact employ "a high degree of linguistic knowledge and human experience."

For Wittgenstein, however, analogy is not the solution to the apparent factual problem presented by the Primacy Dilemma. Instead, it is the cause. From his perspective, the Primacy Dilemma is a product of the misapplication of what Wittgenstein calls the "grammar" of one language game to a different language game. The point is not metaphysical. Indeed, it is precisely the opposite:

What *we* do is to bring words back from their metaphysical to their everyday use.[36]

* * *

Our investigation is therefore a grammatical one. Such an investigation sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, caused, among other things, by certain *analogies* between the forms of expression in different regions of language.[37]

While Wittgenstein's use of the term "language games" has subtle nuances, the Primacy Dilemma involves only two language games: the language games for "things external" and the language games for "things internal." The distinction between these two language games is based upon the concept of "pointing." The language game for "things external" involves only "things" that one can "point to," e.g.,

[35] B. Russell, *Human Knowledge*, 193 (1960) (emphasis added).

[36] *Philosophical Investigations*, §116.

[37] *Philosophical Investigations*, §90 (emphasis added).

chairs, cars, ships. The language games for "things internal" does not permit "pointing" and involves sensations, intentions, memories, etc. Based upon these distinctions, Wittgenstein questions (1) whether it makes sense to apply the grammar of language games involving "things external" to language games for "things internal," e.g., to say that we *possess* "pain" as we might *possess* a "chair" when, unlike a "chair," one cannot *point* to "pain," and (2) whether this misapplication of grammar creates a compelling, yet false, image of reality.[38] What is placed at issue by Wittgenstein is the *tool of analysis* (the grammar of language games) not the *apparent factual circumstance* (the Primacy Dilemma).

However much a work of genius, Wittgenstein's philosophy is not easily accessible. Nevertheless, certain passages in *Philosophical Investigations* do permit a direct comparison of Wittgenstein's perspective of the Primacy Dilemma with the perspectives of legal theorists involved in issues of contract interpretation.[39] Based upon the Augustinian model of learning "colours," Wittgenstein proposes a language game in which "R" equals "red" and "B" equals "black." Under this game, an arrangement of colored squares in the following sequence –

BLACK	RED	RED	BLACK

would be the equivalent of B R R B. While one might expect Augustine's pupils to master this game in short order, Wittgenstein begins to identify some problems associated with even so simple a model:

> Is it that the person who is describing the complexes of coloured squares always says "R" where there is a red square; "B" when there is a black one, and so on? But what if he goes wrong in the description and mistakenly says "R" where he sees a black square – what is the criterion by which this is a *mistake*?[40]

Wittgenstein acknowledges that this difficulty might be overcome by creating a reference table –

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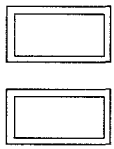
[38] "What we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stand." *Philosophical Investigations*, §118.

[39] *Philosophical Investigations*, §48–58.

[40] *Philosophical Investigations*, §51.



such that, in instances where there is a dispute between individuals as to the meaning of B and R, one could refer to the reference table to determine the correct application. However, like other proposed refinements to the Augustinian model, this solution creates its own difficulties. For example, *who* will make the reference table? What if *he* is mistaken? How will a party know if he is *correctly* applying the reference table to a particular situation or when he might have made a *mistake*? As an alternative to creating a single reference table, proponents of the Augustinian model might suggest that a number of reference tables be created. But this solution raises even more difficulties. *Who* makes the additional reference tables? How do we know if one table is the *same* as another table? *Who* decides?

The piling on of refinements against counter-arguments by Wittgenstein in his discussions of sensations and other related matters has led philosophy scholars, notably Saul Kripke,[41] to label Wittgenstein as the ultimate skeptic. He is not. Unlike Humpty Dumpty, Wittgenstein's purpose in pursuing these questions is not "glory." His aim, instead, is to expose false images of reality. And, since, in this exposé, he is necessarily restricted to the tools of the illusionist – language – the only way he can accomplish his task is to demonstrate the "senselessness" of their misapplications. The reason that *Philosophical Investigations*, in its complex and seemingly disjointed passages, has few 90-degree angles, is that in exposing illusions of this sort, Wittgenstein cannot walk behind the stage of language to explain its trickery; the explanation must be made from the audience.

Wittgenstein's analysis of the Augustinian model for learning "colours" is ultimately designed at exposing a particular false image, that is, the compelling idea that "red exists."

> ... the proposition looks as if it were about the colour, while it is suppose to be saying something about the use of the word "red." – In reality, however, we quite readily say that a particular colour exists; and that is as much as to say that

[41] S. Kripke, *Private Language* (1985).

something exists that has that colour. And the first expression is no less accurate than the second; particularly where 'what has the colour' is not a physical object.[42]

The reader must appreciate that the "red" under consideration in this context is not a tangible red, as opposed to the "red" that allows one to determine the color of the car in the Case of the Black Car. As Wittgenstein observed,

One has already to know (or be able to do) something in order to be capable of asking a thing's name.[43]

* * *

How does pointing to a colour differ from pointing to its shape.[44]

The creation of the false, yet compelling, image of reality that "red exists" is a direct result of analogizing objects that can be *pointed to* in language games involving "things external" to the grammar of language games involving "things internal," and, thereby, concluding that "red exists" in some intangible dimension. While this misapplication of the grammar may initially appear to have little correspondence to the axis of legal theories for contract interpretation, closer examination reveals identical mechanisms at work in both circumstances.

To apply Wittgenstein's perspective to the problems addressed by legal theorists in the context of contract interpretation, one must begin with the observation that while one can "point" to a written agreement or verbal testimony, much as one can "point" to a chair, one cannot point to an "intention." As a result, when contract theorists refer to a party's intention or his mental template of a particular contract term – Party A's mental template of the contract term ("red" in the Case of the Black Car), as opposed to Party B's mental template of this term ("black") – they misapply the grammar of "things external" to "things internal." Exhibit A, like "red" is not an "it."

In legal theories involving contract interpretation, the false image that a "mental template of contract term" "exists" is further compounded by the concept of *possession*. In his analysis of sensations, Wittgenstein notes that since no one else can experience *my* "pain," or *your* "pain," it is "senseless" to utilize the concept of *possession*

[42] *Philosophical Investigations*, §58.
[43] *Philosophical Investigations*, §30.
[44] Wittgenstein, *The Brown Book*, §3 (1958).

in this context. After all – who, but *me*, could possess *my* pain? If an idea of this sort did make sense, one might legitimately question whether, when you feel pain, the pain felt is "*my* pain" or "*someone else's* pain."[45] This analysis applies equally to concepts of *possession* in the context of a "mental template of a contract term," viz. *my* Exhibit A. Who, but *me*, would *possess my* Exhibit A or *my* "understanding of the meaning of a particular contract term?"

The final step in Wittgenstein's exposé of the misapplication of this aspect of the grammar of language games involving "things external" to language games involving "things internal" deals with comparison. Significantly, the model he selects to demonstrate the "senselessness" of the application of the concept of "comparison" to circumstances involving "sensations" and "colours" is identical to the Primacy Dilemma:

> Now someone tells me that *he* knows what pain is only from his own case! – Suppose everyone had a box with something in it: we call it a "bettle." No one can look into anyone else's box, and everyone says he knows what a bettle is only by looking at *his* bettle. – Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word "bettle" had a use in these people's language?[46]

By substituting the phrase "one party's mental template of a contract term" for "bettle," the Primacy Dilemma can first be restated from Wittgenstein's perspective, and then exposed as illusory:

> Now someone tells me that *he* knows what *a contract term* [pain] is only from his own case! – Suppose everyone had a box with something in it: we call it *one party's mental template of a contract term.* No one can look into anyone else's box, and everyone says he knows what a contract term [pain] is only by looking at *his mental template of the contract term.* – Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word *mental template of the contract term* had a use in these people's language?[47]
>
> * * *
>
> [If the word "bettle" or "one party's mental template of a contract term" or "pain" had a use in someone's language], it would not be used as the name of a thing. The thing in the box has no place in a language game at all; not even as a *something*: for the box might even be empty. – No one can "divide through" by the thing in the box; it cancels out, whatever it is. That is to say: if we construe the expression

[45] *Philosophical Investigations*, §253.
[46] *Philosophical Investigations*, §293.
[47] *Philosophical Investigations*, §293 [adapted].

of sensations [or the "mental templates of contract terms"] on the model of "object and designation" the object drops out of consideration as irrelevant.[48]

Under this formulation of the Primacy Dilemma and Wittgenstein's exposé, the idea that "pain," or the "mental template of a contract term," "exists," as if it were "something" that one could point to – the bettle – is a "false image." And, thus, the idea of *possessing* these "false images" – the "box" – is revealed, not as a circumstance of fact, but as an illusion. Under this analysis, it is clearly "senseless," even for the most imaginative of Corbin's triers of fact, to "divide through" or to attempt to "compare" one person's "bettle" or "mental template of a contract term" with anyone else's. It is a comparison of false images resulting in a mistaken assertion that there must be real enterprise in seeking to compare those "intangible objects" – the mental templates of meaning – that each of us possess but, that except through words, cannot otherwise express or identify.

Corbin was correct in his observation that the "great illusion" to the objective school of contract interpretation is its assertion that "words have a meaning independent of the persons who use them." However, from Wittgenstein's perspective, supporters of both the subjective and objective schools of contract interpretation labor under an even greater illusion, the Primacy Dilemma. By "clearing misunderstandings away" involving the Primacy Dilemma through Wittgenstein's analysis, it becomes evident that the process at work in resolving legal disputes over the meaning of purported contract terms cannot involve a clash between the goals of the Primacy Principle in never-ending conflict with the perceived factual circumstances of the Primacy Dilemma. Instead, this perceived conflict is revealed as the product of misapplied analogy. Shorn of its false images of reality, the concept of a "meeting of the minds" can be properly viewed as that "greater illusion."

V. CONCLUSION

Despite a superficial similarity in circumstance, the dynamics of the judicial process of contract interpretation are not equivalent to the circumstances giving rise to the Primacy Dilemma. The Primacy

[48] *Philosophical Investigations*, §293 [adapted].

Dilemma involves two parties; the judicial process involves a third: the court. This distinction is critical for while Wittgenstein's exposé of the Primacy Dilemma as illusion does not require that centuries of refinements to theories of contract interpretation be scrapped, it does require an abandonment of the ideal that courts "do not and cannot make contracts; courts merely enforce agreements that the parties themselves have reached."

Unlike the philosophical search for meaning, in the judicial context, Exhibit A is real: it is the judgment of the court. The fact that courts often seek to legitimize their rendering of judgment (Exhibit A) through adherence to an illusionary conflict that purportedly pits "individual will" against the "imperfections" of language as "an instrument for the expression" of "thoughts and intentions" masks the true processes at work.

Although he did not have the benefit of Wittgenstein's insights into the Primacy Dilemma, Harvard's Dean Zachariah Chafee's instinct was right when he observed some 50 years ago in an address to the Judicial Section of the New York State Bar –

> In short, what is commonly called "the intention of the parties" is in large measure the intention of the judge, subject to all sorts of traditional restraints of his range of choice. When all is said and done, the court of last resort in an interpretation case can echo quite a bit of the famous boast of Humpty Dumpty ... ["When I use a word ... it means what I choose it to mean ... "][49]

Once the illusion of the Primacy Dilemma is removed from the fray of an "interpretation case," the many arcane rules and principles of contract interpretation require some reorientation. As a starting point, the focus should be on how best to permit parties, through rules espoused by the objective school, to protect themselves from liars; while, at the same time, through rules promoted by the subjective school, to protect parties from becoming hobbled by their own mistakes or imprecise use of words. While less uplifting than the romanticism of the 16th century "will theory" of contracts, the proper orientation for legal theories of contract interpretation should proceed from these more tawdry, but undeniably certain, aspects of human experience.

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[49] 2. Chafee, "The Disorderly Conduct of Words," 61 *Colum. L. Rev.* 381 (1941): 401–402.