

Philosophy 338
Philosophy of Law
2017
Note Twenty-two

This note is mandatory reading

SOME FOLLOW-UP ON THE LECTURE OF TUESDAY MARCH 28TH

1. I was saying that one of the most philosophically interesting things about the common law is that it embodies an epistemology of implicitness and tacitness. Because lawyers, judges and legal scholars aren't trained in epistemology, this remarkable feature of common law is not known to the legal community.
2. Two essentials of this common law epistemology are these properties of implicitness and tacitness. It falls to us to get the clearest possible grasp of these concepts, and to do that it is essential that we have a clear understanding of the distinction between information-processing in the cognitive up-above and information-processing in the cognitive down-below, and of how each contributes to the successful workings of the human cognitive economy. And to do *that*, we'll need a good grasp of their respective characteristics.
3. Information-processing in **the cognitive up-above** has most or all of the following properties and does so in various degrees of intensity.
 - *agent-centred*: centred in how human agents function
 - *conscious*: the person is consciously aware at the time.
 - *controlled*: to some extent, the human agent directs the processing traffic.
 - *attentive*: to some extent, the agent is aware of what's happening and can direct his mind to it.
 - *voluntary*: to some extent, whether the information is being processed consciously is a matter for the agent freely to decide.
 - *linguistically expressible*: the information that's being processed can be accurately formulated in a human language.
 - *semantically loaded*: the information has semantic content. Spoken or not, it is propositionally structured.
 - *linear*: the processing is done one step at a time.
 - *surfacedly contextualized*: the information is out in the open, having broken the surface into conscious awareness.

- *computationally weak*: the instruments of processing have very limited computational fire-power; so the information cannot be too complex.

4. Information-processing in **the cognitive-down below** has most or all of the following properties in varying degrees of intensity:

- *mechanism-centred*: centred in how our cognitive *devices* operate.
- *unconscious*: the person whose devices are doing the processing is unaware of the information that's being processed.
- *automatic*: the processing is beyond the control of the person himself, and the devices operate "on their own".
- *inattentive*: the processing is not subject to the agent's inspection.
- *involuntary*: the processing is not something he freely decides to initiate or direct.
- *linguistically unformable*: tacit
- *semantically inert*: the information being processed lacks semantic content; it is not propositionally structured.
- *parallel*: the processing is a multi-tasking one, performing several operations at once.
- *deep-down*: the information is being processed out of sight of the mind's eye, beyond the reach of the heart's command, and engageable by tongue or pen (or keystroke).
- *computationally luxuriant*: the processing devices have vastly greater computational power than the human process does, and can therefore handle even very complex information.

For ease of reference let's call these characteristics *processing-parameters*.

5. *Some points to remember.*

- levels of upness and downness need not be *uniform*. For example, in down-below processing the unconscious parameter might outweigh in intensity (or parameter-value) the weight (or value) of semantic inertness parameter. Equally in the cognitive up-above, the consciousness parameter could carry a lower value than the computationally weak parameter.
- all parameters are subject to some variation of intensity. Sometimes an agent has *some* conscious awareness of what's going on even when he's unaware of most of it.

- Up and down are not rivals. They are equal partners in the cognitive economy, each indispensable to its good functioning in complex alliances of cooperation.
- For the most part, these alliances are effectuated in the cognitive down-below.
- Most of the heavy lifting of human knowledge-production is done in the down-below. Why? Because the cognitive resources of the down below are many and very cheap! The cognitive processes of the up-above are greatly encumbered by the consciousness's suppression of information. (Make sure that you've got a good handle on this. See pp. 174-175).

We can now turn to the business at hand, to implicit and tacit.

6. *Implicit*

Let's take belief as an example. We could also consider knowledge, doubt, presumption and so on, but there isn't time.

- S implicitly believes that the cat is hungry to the degree that the information in the scope of the believes-that operator ("The cat is hungry") is semantically inert and propositionally unstructured, and the cognitive devices that have brought this implicit belief about are in good working order and functioning in this case as they should.
- It follows at once that implicit beliefs are tacit. The reason why is that human fact-stating language is semantically loaded and propositionally structured.
- From which it also follows that if you apply semantically loaded measures of linguistic formulability to a belief or principle that is semantically unstructured, you're *guaranteed* to get it wrong.

7. *Precedents*

Very well, then, if the rules of law created by precedents are semantically empty and propositionally unstructured, then they don't *say* anything. They give no instruction to judges and legislatures. How does a judge know what they are? How does she know whether she's doing what it requires in the case she's deciding?

This is the hardest of the logico-epistemic questions that will arise in our examination of criminal proceedings at the common law bar of justice. If we don't get a handle on this, we'll leave an important part of our present business undone. So, how in blazes do we answer these questions?

8. *Presumptions*

We've already had our say about presumptions (not the presumption of innocence which is a very different thing and is really a presumption in name-only). We have also discussed the importance of Harman's Clutter-Avoidance Principle, which tells us not to fill up our minds with irrelevant distractions. Finally, we already are acquainted with the several filtration-devices of recent coverage. This is all we need to handle presumption.

- The presumption that *p* is implicit and tacit. What makes it so is that it is a *causal disposition* housed in the cognitive down-below. It is a causal disposition to take conscious note of *p* upon recognizing a counter-instance of it. Recall the Mary example. It is a true generic generalization that if Mary's car is not in the driveway, Mary is not at home. One day you're driving home and notice that Mary's car is not there but, lo and behold, Mary pops out of the house wearing a sun-hat and carrying some pruning shears. "Holy smoke", you cry, "she's not away after all!" Mary's presence is a counterinstance of the generic generalization that if the car's away, so is she. It is a counter-instance which, like Ozzie the ocelot, doesn't falsify the generalization. But what matters here is that although you're no stranger to the generalization you might have had no occasion to call it expressly to mind or to give it propositional formulation. But something has happened here which turned your mind to it, quite possibly for the first time. The thing that happened was a *cue* supplied by Mary's sudden presence, and the cue caused your tacit presumption to surface into some degree of conscious awareness.
- Why would things work this way? The short answer is that it is a simply lovely way of not cluttering up your mind with stuff you don't need to be there. (Think here of just-in-time-delivery of parts to an assembly-line in Windsor or Oshawa.) The chief value of this set-up is how *cheap* it is to have dispositions rather than fully formed beliefs!

Precedents work this way, too. When a judge writes his *ratio* in a precedent-making decision, the precedent is not stated. When a judge in a later case is bound by that precedent, she has an implicit and tacit understanding of it. This is partly because she has a perfectly explicit understanding of how she's required to decide this case. The cue here is a *sufficiency of relevant similarity* between the facts in her present case and the facts in the original precedent-creating case. The important constant is how good judges are at spotting these *sufficiencies*.

Of course, they do that too implicitly and tacitly. There are no sufficiency-scales to calculate the closeness of the new facts to the old ones. The judge is on her own, relying on her devices to get this right. So the dominant fact here is that the cue *doesn't* take the precedent into conscious awareness.

The fact to keep in mind here is that if, as the common law insists, these precedent-created rules of law are subject to an implicit understanding only, they are laws that lack semantic-content and therefore cannot accurately be put into words, no matter how learned. The unspeakability of judge-made law justice is one of its greatest epistemological achievements.

9. Last words

The question of whether implicit beliefs take truth values (i.e. are either true or false) is a profoundly good one. My answer is no. But they do take truth values *implicitly*. What this means is that if the implicit belief were cued to surface into conscious awareness it would acquire the semantic content that enables it to have a truth value. Notice, however, that on this same reckoning rules of law have truth values only implicitly.

There was a brief discussion last time about whether judicial activism plays an active role (no pun intended) in how precedents function in our courts. The short answer is no. Activist judges spend most of their time trying to minimize the role of statutes they don't like or seeking advantage from statutes they do like. Don't forget, the Canadian Constitution is a statute.

