ARTICLES

THE SEMANTICS OF JUDGING

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Sólo sección I, para la Unidad I

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This Article has two objectives. It will first attempt to demonstrate the inadequacies of legal formalism as a theory of adjudication either to explain or to justify the decisions of judges. This demonstration will be accomplished by examining the semantic theories upon which formalism would have to rely if formalism could truly explain how judges decide, or ought to decide, cases. It will also attempt to extract—during the argument against formalism—the kind of knowledge of language upon which a judge may draw in deciding cases under any theory of adjudication. This will be accomplished by examining those same semantic theories.

The first objective may require some justification in light of the contemporary belief that formalism has already been thoroughly discredited. The second objective, however, can be justified more briefly. No theory of adjudication displacing formalism can reasonably urge judges to ignore either logic or the meaning of words appearing in the rules which they must interpret and apply. If logic and meanings make a difference in the disposition of cases on any plausible theory of adjudication, then any such theory must give an account of what meanings are and how close to deductive certainty judges can be in their application of authoritative language. The alternatives to formalism offered so far have amounted to no more than sketchy metaphors on these issues. Holmes, for example, posited that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[1] Similarly, Cardozo recognized that judges must legislate, but only between the gaps. According to Cardozo, judges "fill the open spaces in the law."[2] Dworkin's more recent but equally vague metaphors assert that the words in a *statute* "provide a limit to [the] otherwise . . . unlimited" political decisions "that the statute may be taken to have made,"[3] that the language of a *common law rule* has only "gravitational force,"[4] and that the words in the *Constitution* represent concepts about which there can be more specific but disputed "conceptions."[5] Even H.L.A. Hart, usually a master of clarity, was reduced to vague notions of a "core" and a "penumbra" when giving his classic account of these issues. In the "penumbral" area judges have discretion to decide by their own lights, whereas in the "core" area judges are bound to follow the language.[6]

To develop a theory of adjudication superior to that of these and other familiar metaphors, it is necessary to work through a theory of

1. Southern Pac. Ry. v. Jensen, 244 U.S. 205, 221 (1916) (Holmes, J., dissenting).
2. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).
3. R. DWORKIN, TAKING RIGHTS SERIOUSLY 109-10 (1977).
4. *Id.* at 111.
5. *Id.* at 134.
6. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958). Hart later recognized the provisional nature of his idea that a "core" has a set of "standard instances," stating that "[I]t is a matter of some difficulty to give any exhaustive account of what makes a 'clear case' clear or makes a general rule obviously and uniquely applicable to a particular case." Hart, *Problems of Philosophy of Law,* in 6 ENCYCLOPEDIA OF PHILOSOPHY 264, 271 (P. Edwards ed. 1967). Hart's notion of the core is initially construed as having to do with vagueness, *see* text accompanying notes 108-23 *infra*, then construed as having to do with paradigmatic examples, *see* text accompanying notes 257-96 *infra,* and finally reconstructed as having to do with what are later called "stereotypes" and weakly paradigmatic examples. *See* text accompanying notes 297-301 *infra*.

what words mean and how judges can know when to apply them. Thus, those who remain unconvinced by the discussion that follows (suggesting that the possible advantages of formalism still deserve consideration), may read this Article as the necessary first step toward a theory of adjudication which could lay claim to succeeding formalism.

This critique begins by defining legal formalism. Formalism is essentially a theory of adjudication. A perennial question of American jurisprudence has focused on what a judge does and should do in deciding a case.[7] Any answer to this question may be called a theory of adjudication. Such a theory should do three things: (1) describe what judges actually do when they decide a case; (2) recommend what they ought to do when they so decide; and (3) make assumptions about what is possible for judges to do in deciding cases, in order to give accurate descriptions and sound recommendations. Thus, any complete theory of adjudication will undertake the threefold task of stating what is the case, what ought to be the case, and what can be the case in judicial decisionmaking.

What does a theory of adjudication encompass? Does adjudication include the rolling of dice to decide cases? Or does it extend to the dunking of litigants in water, the winner depending on some particular variation of Archimedes' principle? Lon Fuller defined adjudication as "a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments."[8] Because this right of participation was meaningfully exercised only if a party appealed to principles by which his arguments could be judged correct or incorrect, and because Fuller took a demand supported by principle to be the essence of a claim of right, Fuller concluded that any "issues tried before an adjudicator tend to become claims of right or accusations of fault."[9] Accordingly, dice-rolling, litigant-dunking, and other forms of arbitrary decisionmaking that did not possess these features did not deserve the name "adjudication."

Whether one adopts Fuller's argument, his conclusion is surely correct.[10] Adjudication is concerned with the application of a standard

7. The preoccupation of American jurisprudence with the theory of adjudication is nicely introduced in Ackerman, *Law and the Modern Mind,* 103 DAEDALUS 119 (1974), an essay on J. FRANK, LAW AND THE MODERN MIND (1930). *See, e.g.,* G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

8. Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 369 (1978).

9. *Id.*

10. For other arguments leading to the conclusion that it is the business of adjudication to declare preexisting rights, see R. DWORKIN, *supra* note 3, at 81-130; J. GRAY, THE NATURE AND

to events that have already occurred. Judicial experiments to establish whether a litigant floats, whether he can beat his opponent in hand-to-hand combat, or whether his witnesses can repeat their stories without variation, are not adjudication. Such situations do not require a judgment that one party deserves to win and the other to lose, based on rights that were fixed before the parties entered the courtroom.

The focus of jurisprudence on the theory of adjudication stems from the political ideals encompassed in the concept of the rule of law. The most important of these ideals are the following: (1) the democratic principle holding that elected representatives should make laws and that non-representative officials (such as judges) should merely apply them; (2) the principle of formal justice mandating that like cases be treated alike; and (3) the principle of substantive fairness requiring that notice about what the law commands be given to those who must obey a law, and protecting reliance upon the implied promise of consistency and predictability envisioned in a system of law.[11] These ideals about the rule of law depend on certain answers to the threefold question of what judges in fact do, what they ought to do, and what they can do in deciding cases. The American preoccupation with the theory of adjudication is an understandable concern about whether those ideals can be met.

The theory of adjudication that such ideals seem to recommend is formalism. The formalist theory of adjudication asserts that legal disputes can be, should be, and are resolved by recourse to legal rules and principles, and the facts of each particular dispute.[12] Thus, a formalist judge has an extremely limited set of materials to consider as relevant to his decision in a particular case—the rules and the facts. His deci-

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SOURCES OF THE LAW 114-15 (2d ed. 1927); R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975).

11. For a classic if somewhat different taxonomy of such ideals, see L. FULLER, THE MORALITY OF LAW 33-94 (2d ed. 1969).

12. *See, e.g.*, Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918):

> Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity. The old syllogism, "All men are mortal, Socrates is a man, therefore he is mortal," states the exact form of a judicial judgment. The existing rule of law is: Every man who with malice aforethought kills another in the peace of the people is guilty of murder. The defendant with malice aforethought killed A.B. in the peace of the people, therefore the defendant is guilty of murder.
>
> The rule of law and its application may be reached in a thousand different ways, but a judgment of a court is always this pure deduction.

Id.

sion is to be logically deduced[13] from these two items alone.

An example may be helpful. In *Interstate Commerce Commission v. Kroblin,*[14] a non-certificated carrier (Allen Kroblin) transported frozen, eviscerated chickens interstate. A statute required carriers to obtain certificates from the Interstate Commerce Commission unless the carriers were transporting agricultural commodities, as opposed to manufactured products. The court decided that eviscerated chickens were agricultural commodities, not manufactured products, and that Kroblin was therefore exempt from the certification requirements. A formalist reconstruction of the court's reasoning would be as follows. The major premise (based on a simplified version of the statute which ignores those requirements not at issue) may be stated:

1. Objects that are not manufactured products may be carried without an ICC certificate.[15]

The minor premise is obtained from the facts of the case. The court decided that eviscerated chickens were agricultural commodities, not manufactured products. Thus:

2. These things (eviscerated chickens) are not manufactured products.[16]

From these two premises, the conclusion of the court does indeed follow—eviscerated chickens may be carried by Kroblin without obtainng

13. Some will think that formalism so defined is clearly impossible, arguing that standard deductive logic cannot be used in legal reasoning; rather, "legal logic" is differentiated because it must take into account the prescriptive force of legal rules. The contrary is assumed in this Article—that is, the predicate calculus with quantification is the way to begin to symbolize legal reasoning, realizing that deontic operators will have to be added on some occasions to give a complete symbolication of legal norms. For one way of accomplishing this, see I. TAMMELO, MODERN LOGIC IN THE SERVICE OF LAW 83-84 (1978). Use of the standard predicate calculus with quantification to symbolize the deductions, is thus somewhat incomplete (although sufficiently complete to raise the problems in semantics that constitute the core of this Article). This use is not invalidated because of the intentional ignoring of the normative nature of law. Thus, the formalism considered is no strawman because of its *logic*.

14. 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd,* 212 F.2d 555 (8th Cir. 1954).

15. Since symbolism of the standard predicate calculus with quantification will become necessary later in this Article, it is appropriate to introduce it here.

Let M stand for the predicate "is a manufactured product," C stand for the predicate "may be carried without an ICC certificate," ~ for "not," ⊃ for the material conditional roughly equivalent to the English expression "if . . . then," and (x) for the universal quantifier "everything." (For a summary exposition of the meaning of the logical connectives, see W. SALMON, LOGIC 34-45 (2d ed. 1973); for quantifiers see *id.* at 74-79. For a more detailed treatment of each, see G. MASSEY, UNDERSTANDING SYMBOLIC LOGIC 1-25, 42-63 (1970). In the notation of symbolic logic, the statutory major premise is:

1. (x) (~M x ⊃ Cx)

16. Symbolized as:

2. ~Mx

an ICC certificate.[17]

What such a theory of adjudication excludes as improper for consideration by the judge is striking. The consequences of his decision upon the parties to the action and upon the public at large are to be ignored. Ethical principles play no part. General social policies that will be frustrated or furthered by the rule resulting from the judge's decision are not fit grist for the judicial mill. Rather, the judge's role is to decide solely on the basis of the meaning of legal rules applied to the facts before him.

Two items require further clarification in this definition of legal formalism. One is the extent to which formalism is committed to the thesis that there is a single right answer in *every* case. The other is the extent to which formalism is committed to a deductive structure existing behind positive law, so that the rules from which decisions are deduced are themselves deducible from more general principles.

"Formalism," as used in this Article, denotes a theory that a judge can deduce a single answer in at least some, if not all, cases. To argue against formalism, accordingly, one must demonstrate that there are no "easy" or "plain" cases in which such a result may be deduced. The idea of a single, unique result may itself be unclear. The discussion that follows assumes that a fact-finder is presented with a simple decision: he either agrees or disagrees with some proposition about the case presented. In *Kroblin,* for example, the fact-finder either affirms or de-

17. The full deduction would be:

1.	(x) (~Mx⊃Cx)	P
2.	~Mx	P
3.	~Mx⊃Cx	1, U.I.
4.	Cx	2, 3, M.P.

For readers unfamiliar with the symbolism, the following may be helpful. Sentences one and two are both premises; thus, the "P." Sentence three follows from sentence one under a rule of inference known as "universal instantiation;" thus, the "1, U.I." after sentence three. Universal Instantiation simply asserts the intuitively plausible proposition that from a universal statement a singular statement may be deduced. For example, from "everything is such that, if it is not a manufactured product, it may be carried by a noncertificated carrier," it follows that "if the things in Kroblin's truck are not manufactured products, then those things may be carried by a noncertificated carrier."

The fourth sentence is the conclusion the judge seeks to deduce—that the things in Kroblin's truck, x, may be carried by a noncertificated carrier, C. Sentence four follows from sentences two and three by the rule of inference known as *Modus Ponens*. Thus, the "2, 3, M.P." In English this last deduction would be: from sentence three ("if the things in Kroblin's truck are not manufactured products, then they may be carried in a non-certificated carrier"), and from sentence two ("these things are not manufactured products"), sentence four, the conclusion must follow (therefore, "the things in Kroblin's truck may be carried by a non-certificated carrier").

nies that eviscerated chickens are manufactured products. The lack of clarity of such an idea, and of the assumption behind it, can be quickly appreciated when it is remembered that all legal terms are dispositive in nature. That is, legal terms look to both the factual states which they describe *and* the legal consequences that they engender.[18] For example, "not a manufactured product" is a phrase that both describes certain objects and, when used in a legal rule, prescribes that a certain legal result obtain, *i.e.,* that the item can be transported by a non-certificated carrier. This Janus-like characteristic of words used in legal rules guarantees that a judge has more to decide than whether the facts before him match some legal description. In addition, the judge must decide whether the contemplated remedy results in legal consequences prescribed by the rule. In *Kroblin,* even if the judge decides that eviscerated chickens are manufactured products, he still must reach the determination that enjoining Kroblin from carrying such things is *the* remedy the rule prescribed. Given both the indeterminancy of language in the description of legal consequences and the often explicit grant of discretion to judges to choose among alternative remedies, often no single remedy *can* plausibly be said to be required by the rule.

Thus, the assumption that a judge has only one choice, to which he answers yes or no, is plainly unrealistic; any adjudication in fact has a many-valued choice (of remedy), and not just a two-valued choice (of applying some description). A discussion of formalism without such a simplifying assumption is unnecessary, however. The problems of meaning faced by a formalist judge in determining whether some dispositive legal concept truthfully describes the facts before him are the same as the problems that affect his decision concerning the propriety of the remedy he proposes to give. This special assumption will thus allow the critique to proceed without unnecessary duplication of the argument.

The second item requiring further clarification in this definition of formalism is the deductive structure thought by many formalists to exist behind positive law. This is a separable aspect of formalist theory that merits special attention. C.C. Langdell, the archformalist to many, thought that law, no less than natural science, had a deductive structure behind it, in which theories using nonordinary terms lacking any reference to physical objects—terms such as "estate," "title," and "meeting of the minds"—could be found. The justification for such terms and

18. The dispositive nature of legal concepts has long been noticed. *See, e.g.,* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 27-31 (1919); Ross, *Tû-Tû,* 70 HARV. L. REV. 812 (1957).

the theories that used them was for Langdell the same as the justification for a similar enterprise in science. Such words were necessary to predict and to explain "the data," which in law were the decisions of judges and the rules which they applied.

Langdell's classification of law as a science seems to assume that legal reasoning could be reconstructed properly to include not only rules and facts, but also more general, theoretical statements.[19] Science, too, is concerned not only with laws connecting observable events, but also with more general theories explaining these laws. An example is the legal rule that acceptance of an offer is effective upon dispatch, whereas revocation of an offer is effective upon receipt. Although Langdell recognized that there might be policy arguments to support such a rule, for him the true justification lay in the deducibility of the rule from a more general, theoretical principle of contract law: no contract exists until there is a meeting of the minds.[20] The ability to deduce a rule from a more general principle rendered policy arguments irrelevant.

Although in the abstract formalists need not subscribe to this conception of theories in law,[21] they must do so in the context of a familiar legal system. The systems with which we are familiar have such a paucity of rules that some recognition of theories behind the rules is necessary to enrich the strictly legal materials available to a judge. Accordingly, this separable claim has been included as part of a formalist theory of adjudication. So construed, formalism asserts not only that there exists, in all or some cases, one unique result deducible from the rules and the facts, but also that the rules themselves may be derived from some more general theoretical statements.

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19. Law, considered as a science, consists of certain principles or doctrines. . . . [T]he number of fundamental legal doctrines is much less than is commonly supposed . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (1871). For a softened statement of the Langdellian ideal of a deductive structure behind positive law, see Cohen, *The Place of Logic in the Law,* 29 HARV. L. REV. 622 (1915). More contemporary examples are provided by Ronald Dworkin and Rolf Sartorius, whose thesis that there is a right answer in every case depends upon there being some such structure of principles "behind" rules. *See* notes 47-51 *infra*.

20. C. LANGDELL, *supra* note 19, at 1-163.

21. A formalist, however, will have to attribute some meaning to what this Article has loosely called "theoretical terms," such as "malice," "title," and "estate." For even if the ideal of deductive structure behind the law is dispensed with, these non-ordinary terms appearing in indisputedly legal rules must be defined. For such a formalist account, see text accompanying notes 66-73 *infra*. Later discussion will show that these non-ordinary words contained in legal rules are not the true theoretical terms of law. *See* text accompanying notes 187-204 *infra*.

Formalism, so defined, has long been parodied and ridiculed in American jurisprudence. From Holmes' sometimes aphoristic attack,[22] through Pound's celebrated assault on "mechanical jurisprudence,"[23] to the contemptuous dismissals by the loose assemblage of persons sometimes called Legal Realists,[24] formalism has been scorned as a theory of adjudication. Yet formalism is central in our ideas about law. Formalism is not just *a* theory of adjudication. It has all the appearances of being *the* theory of adjudication that permits faithfulness to those ideals encompassed in the concept of the rule of law. An elected legislature can perform its function of representing the popular will only if the law limits judicial discretion. Similarly, the functional division of government—the separation of powers—can exist only if judges do perform a job different from that of the legislature. In its decision halting construction of the almost completed, $100 million dollar Tellico Dam, the Supreme Court reminded us of the relationship of formalism to basic political ideals:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. . . .
>
> Here we are urged to view the Endangered Species Act 'reasonably,' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.' . . . But is that our function? . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
>
> . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the

22. O.W. HOLMES, THE COMMON LAW (1881); Holmes, *The Path of the Law,* 10 HARV. L. REV. 457 (1897).

23. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605 (1908).

24. The most famous list of Realists was published by Karl Llewellyn, as a response to Pound's attack on realism, in Llewellyn, *Some Realism About Realism—Responding to Dean Pound,* 44 HARV. L. REV. 1222 (1931). For more contemporary accounts of Legal Realism and its historical antecedents, see W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). *See also* G. WHITE, *supra* note 7; Ackerman, *supra* note 7.

political branches.[25]

Similarly, a tie exists between formalism and the other political ideals embodied in the rule of law. The law's intervention into private behavior is predictable only if rules have determinate implications. Reliance on those rules is protected only if judges do not have discretion to ignore them. This is recognized most dramatically in the refusal to enforce criminal statutes when the vagueness of their formulation leaves citizens unsure of what is required of them. Finally, it may seem that the goal of treating like cases alike—the ideal of formal justice—can be attained only through legal rules that specify the relevant features that make one case "like" another. Factually, every case is like *every* other case in some respects, and unlike *any* other case in other respects.

However *desirable* the above may be, it may seem that Legal Realism has shown that none of it is *possible*. But an examination of Realist literature does not support such a conclusion. First, some of this literature has addressed the desirability of formalism rather than its possibility. Arguments that rules should be left open to revision as conditions change, or as unanticipated situations arise, are normative. As such, they are subject to being balanced against the normative arguments discussed above in favor of formalism, and thus cannot be conclusive. A judge might well admit the force of all such normative arguments, yet decide many cases on formal grounds because the political ideals underlying formalism are not easily outweighed.

Second, Realists have often contended merely that *some* cases could not or should not be decided on the basis of rules and facts. For "routine," "plain," or "easy" cases, a judge could and should apply the literal meaning of the words in a rule to the facts in order to deduce the result. Cardozo, commonly recognized as an ancestor of the Realists, held this view: "In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps."[26] Cardozo thought such "gap-less" cases constituted the majority of court decisions.[27] H.L.A. Hart's reconstruction of the Realist's insights similarly assumes that there is no discretion for what might be called "easy cases," even if there is discretion for "hard"

25. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978) (quoting Powell, J., dissenting, at 196).

26. CARDOZO, *supra* note 2, at 129.

27. *Id.* at 164.

cases.[28] Hart saw the deduction of the decision from the rules and facts in easy cases as the "nerve" of judicial reasoning.[29]

Third, as Hart himself pointed out,[30] Realists tended to confuse the issues of power and correctness. They tended to blend the argument that judges often have the power to interpret laws as they wish without correction by others, with the quite different argument that judges have no standard of correctness with which to decide. To say that judges may have the power to decide incorrectly and to make it stick is not to say that there are no standards through which one could judge a decision as correct or incorrect.

Fourth, some Realist literature dealt with strategies for *reaching* decisions rather than standards for validation of those decisions.[31] A judge might well shun conscious deduction as a decisionmaking procedure, just as a scientist might shun it as a means of formulating hypotheses in science. Indeed, waiting for "hunches" for guidance in making both legal decisions and scientific discoveries may be preferable.[32] Yet the efficacy of such nondeductive decisionmaking procedures is irrelevant when the issue is *justification* of the decision as correct. One could easily follow "hunches" in reaching a decision (trusting one's intuitive knowledge of logic and language) and formalism in validating the decisions reached thereby.

Fifth, (and least charitably), significant work on the possibility of formalism was beyond the Realist's level of language sophistication. The language-based arguments of the Realists were usually no more than simple-minded contextualist theories taken to an extreme.[33] Because of this lack of sophistication, the questions discussed in the body of this Article are, for the most part, unaddressed in the Realist literature.

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28. H.L.A. HART, THE CONCEPT OF LAW 120-50 (1961). Hart speaks of "plain cases," not easy ones.

29. This conclusion is drawn by negative implication from what Hart said about hard cases, where deduction is *not* the "nerve" of judicial reasoning. Hart, *supra* note 6, at 607-08.

30. *Id.*

31. Hutcheson, *The Judicial Intuitive: The Function of the "Hunch" in Judicial Decision,* 14 CORNELL L.Q. 274 (1929).

32. *See* I. SCHEFFLER, SCIENCE AND SUBJECTIVITY 69-73 (1967) (pursuing the parallel confusion in science between methods of discovery and criteria of evaluation).

33. *See, e.g.,* Cohen, *Field Theory and Judicial Logic,* 59 YALE L.J. 238, 240-41 (1950):

> Perhaps, if we look closely enough, a sentence never means exactly the same thing to any two different people. For no two minds bring the same apperceptive mass of understanding and background to bear on the external fact of a sound or a series of marks. Indeed, I doubt whether any sentence means exactly the same thing to me the first time I hear it that it makes the tenth time or the hundredth time.

Formalism is far from dead, in part because of the inconclusiveness of the Realist attack. In fact the formalism espoused by Hart or Cardozo—where deduction is possible at least in some "plain" or "easy" cases—is probably the common sense position prevalent among most lawyers, judges, and legal scholars today. A striking contemporary example is provided by the Supreme Court's recent decision, discussed above,[34] halting construction of a Tennessee Valley Authority dam for the protection of one of the many species of snail darters. The Court found the word "action," as used in section 7 of the Endangered Species Act of 1973, plainly applicable to the construction of the Tellico Dam, and therefore refused to weigh the consequences of its decision.[35] The Court noted that courts have no "authority to make . . . fine utilitarian calculations" when the language is plain.[36]

Contemporary legal theory often presupposes and, at times, explicitly defends this version of formalism. Aside from the explicit defense in the work of Cardozo and Hart earlier mentioned, one can see such theory at work in particular analyses, such as Richard Epstein's recent analysis of the law of nuisance. Epstein notes with approval that judges do and should decide nuisance cases guided by the ordinary meaning of the term "invasion."

> "[I]nvasion" is not used as a disguised synonym for the legal conclusion that the defendant's activities are of the sort to which tortious liability should attach, when liability is at bottom imposed for other, possibly economic, reasons. Instead, the term "invasion" is *a description of a natural state of affairs which in itself serves as a justification for imposing legal responsibility*.[37]

Epstein analyzes "invasion" in terms of causation, itself analyzed as resting on two paradigms of the causal relationship Epstein finds in

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34. *See* note 25 *supra*.

35. It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

One would be hard pressed to find a statutory provision whose terms were any plainer. . . . This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978).

36. *Id.* at 187.

37. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 53 (1979) (emphasis in original).

ordinary thought.[38] He distinguishes rigorously between cases where a defendant's action causes air molecules to blow onto another's land (an invasion) and those where the defendant's action prevents the molecules from following their normal motion across another's land (no invasion). According to Epstein, only in the "penumbral" area of the applications of the causal paradigms constitutive of the meaning of "invasion" should a judge consider the social consequences of his decision. In the "core" area, where the causal paradigms are clearly applicable one way or the other, a judge should ignore social policy considerations such as maximizing efficient resource utilization.

In a recent treatise on criminal law,[39] similar reliance on formalism is evident in the author's argument against act-utilitarian views of the criminal law that would allow judges to decide issues of guilt and punishment based on the need for legal reform, or on the dangerousness, or other characteristics, of the particular defendants before them. Such considerations should be excluded from the decisional processes of judges even if the justifying goals of punishment are crime prevention or criminal reform. Judges should decide according to "the legalist philosophy," of which a central tenet is that legal and administrative processes are "radically different," and their difference "is precisely whether the overall aims of the system guide decisions in particular cases."[40] For any decisional process to lay claim to being a *legal* process, "it is important that . . . rules be interpreted in particular cases without adverting to the overall goals of the system . . . ."[41] Arguments for nonpurposive interpretation make sense only if there are at least some cases that can be decided solely on the basis of the language of the rules.

Formalist tendencies are not limited to legal theorists whose underlying social philosophy is deontological. Contemporary utilitarian legal theorists, such as Calabresi, also share this faith in the ability of a rule to make decisions under it different in kind than the decision to have the rule. The economic analysis of law is often a rule-utilitarian analysis which justifies rules with its calculations of efficiency and assumes that both private parties and judges can apply those rules, using their knowledge of language, without duplicating the efficiency consid-

38. Although Epstein's methodology is not explicit here, it may be seen as an analysis of causation in terms of what are referred to later in this Article as "strong paradigms." *See* text accompanying notes 284-301 *infra*.

39. G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

40. *Id.* at 170-71.

41. *Id.*

erations given to justify the rules initially. Calabresi is most explicit about this latter assumption in his detailing of the presuppositions and the inadequacies of the fault system in tort law:

> Such wrongful acts or activities cannot always be described *precisely* before a specific event such as an accident. But they must at least be sufficiently definable and defined so that a normal individual can, if he wishes, apply the definition to the particular situation in which he finds himself.[42]

This linguistic possibilty must also exist if individuals are to be "specifically deterred" by tort fines attached to specific rules, a part of Calabresi's own recommendation for the reduction of accident costs.[43] There must be at least enough cases where such "plain" applications are possible (and deterrence thus attainable), so that the primary accident costs saved in such cases outweigh the "tertiary" costs of adjudicating the other cases when such activities are not deterred.[44] Calabresian tort theory thus presupposes at least the version of formalism that assumes "there are *some* easy cases."

Other versions or aspects of formalism have also been emphasized in contemporary legal theory. There has been a particularly strong revival of the Langdellian theory that there exists a deductive structure existing "behind" positive law. One sees this, for example, in the claim of Richard Posner that the common law rules in negligence cases reflect in large part the principle that such rules should achieve an efficient level of accidents and safety.[45] Similarly, others have urged that the various rules having to do with different excuses to criminal liability are reducible to the principle that no person should be held criminally liable unless he could have chosen to do other than he did.[46]

More striking than the Langdellian revival, however, are the more general approaches to such theories in contemporary jurisprudence. Two of the more recent theories, set forth by Ronald Dworkin[47] and

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42. G. CALABRESI, THE COSTS OF ACCIDENTS 268 (1970) (emphasis in original).

43. *See generally id.* at 95-129.

44. *See id.* at 287 n.2.

45. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29 (1972).

46. *See, e.g.,* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28-53 (1968).

47. *See* Dworkin, *No Right Answer?,* in LAW, MORALITY, AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977).

It is perhaps surprising to one familiar with contemporary jurisprudence to think of Dworkin as a formalist in light of Dworkin's attempt to infuse moral principles into judicial decisionmaking. Dworkin's arguments against positivism, however, are attacks on the positivist presupposition of there being a factual pedigree for all legal standards. Moral principles become part of the law for Dworkin because there can be no such factual pedigree for principles. Thus Dworkin is not a positivist in his argument *to* the existence of certain principles as part of the law. Once such

Rolf Sartorius,[48] have revived the more extreme formalist position that there is a uniquely correct result in *every case*, even if a judge restricts his attention to legal standards and facts. Of the two theories, Sartorius' is the least guarded in expounding the formalist nature of his normative thesis. He states that "in adjudicating a dispute, [a court] should have no business in creating new legal relations, or in appealing to anything other than legal standards. Although others . . . should perhaps be granted, explicitly or implicitly, considerable personal discretion in applying the law, judicial adjudications should have none."[49] Sartorius is also forthright about the descriptive and possibility claims that underlie his normative thesis.[50]

The only thing that saves this "there is always a right answer" thesis from being wildly implausible on its face is the accompanying Dworkin/Sartorius thesis that there are principles that "underlie"[51] the statutes and decisional rules of courts. Such principles are thought to enrich the standards a judge should employ sufficiently that he will always be able to find a single, unique result.

Formalism is thus not an antiquated theory of merely historical interest. The claims of these contemporary theorists are not isolated instances of an impoverished legal education. Formalism survives because it is, prima facie, the theory of adjudication required by our ideals about the rule of law. No theory of adjudication can be successful unless it takes such ideals more seriously than did the Legal Realists, who seemed at times to regard the supposed impossibility of the attainment of these ideals as a cause for celebration. Any normative and descriptive theory of adjudication must thus start with formalism, even if the theory does not end there. Any theory that asserts that judges should ignore logic or the ordinary meanings of words can hardly be given serious consideration because it would have to ignore the political ideals that give the rule of law its point. Any theory of adjudication

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principles or rules are so legitimated, however, the decision *from* them is unproblematic for Dworkin, for they determine a uniquely correct result in all cases.

48. R. SARTORIUS, *supra* note 10.

49. *Id.* at 175 (footnote omitted).

50. *Id.* at 182. Sartorius claims that "no such discretion exists now in legal systems such as our own and, more importantly, given the prescriptive argument . . . [just quoted,] judicial discretion is by no means a necessary feature of the rule of law." *Id.*

51. "Underlie" is just one of the metaphors in which Dworkin and Sartorius express their view of the relationship between rules and the principles "behind" them. Principles are also said to garner "institutional support" from rules; to be "embedded" in rules; to be "exemplified" by rules; to be "established" by rules; to be "incorporated" in rules; and to be "implied by" rules. All of these relationships appear to presuppose the kind of meaning connection between words that this Article will discuss. *See* text accompanying notes 76-216 *infra*.

must answer the question that is the central topic of this Article: If judges are restricted in their premises to authoritative legal standards (rules and principles), factual statements, and meaning-truths, is deduction of decisions possible in all, or even in any cases; and if in some cases, which cases? If, as this Article argues, deduction of a decision from such restricted premises is not possible in *any* cases, such a theory must indicate "how close" one can come. The political ideals referred to as the rule of law suggest a theory that is as close to formalism as knowledge of language will allow.

I. LEGAL FORMALIST PRESUPPOSITIONS ABOUT MEANING

A. THE REFERENTIAL THEORY OF MEANING

The theory of formalism and the opinions of its proponents are familiar enough to many. Less familiar are the presuppositions that must be true if the formalistic theory of adjudication could be either a true description or a sound recommendation. The presuppositions discussed below have to do with "meaning," the meaning of which is one of the perennial quests of philosophy. Standard treatment of "meaning" in this century is to divide it into two aspects: the reference or extension of the word, and its sense or intension.[52]

The extension of a predicate is the class of all things of which the predicate is true. The extension of the predicate, "is a dog," is the class of all dogs, of "is red," is the class of all red things, and so forth. All the words relevant to the present inquiry will be words that can be used to predicate of some particular thing that it possesses the property, relation, class membership, trait, et cetera, that the words describe. One way of rephrasing the general problem of formalism is whether the thing (object, action, or event) before the court is within the extension of the relevant legal predicate.

The sense or intension of a word is what remains of the meaning of the word after one has determined the extension of the word. For a logical positivist the sense of an expression is encompassed in the list of criteria used to define it. Thus, the intension of "is a dog" could well be "is a carnivorous mammal with non-retractable claws."

52. *See* Frege, *Über Sinn und Bedeutung,* 100 ZEITSCHRIFT FUR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892), *translated and reprinted in* G. FREGE, *On Sense and Reference,* in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56 (P. Geach & M. Black eds. 1970).

This division roughly parallels the more familiar distinction, introduced by Mill but long since adopted in ordinary speech, between the "connotation" and "denotation" of a word. A word denotes when it refers to something, and its denotation is the thing or class of things to which it refers; a word connotes when it suggests other ideas, and its connotation is the idea that it suggests. "Connotation" is thus a much broader and more subjective notion than "sense" or "intension" because the connotation of a word will vary from person to person depending upon the mental associations each one makes.[53]

To illustrate the parallels between these two theories of meaning, the sentence "Fido is a dog" can be considered. The denotation of the word "dog," like its extension, is the class of things to which it refers, *i.e.,* all dogs. But the connotation of "dog" does not refer to an objective set of criteria; rather, it depends on what the word "dog" suggests to each individual who uses the word. An anthropologist to whom the word "dog" connotes carnivorous mammals with non-retractable claws would agree with the assertion, "a cheetah is a dog." But to a child whose ideas may be largely based on physical appearances, the word "dog" would connote something more like Lassie, or the family pet. To use such a child's connotation, a cheetah is obviously not a dog.

One way to classify theories of meaning is by their emphasis on one or the other of these two aspects of meaning.[54] One of the most

53. *See* F. PALMER, SEMANTICS 63-64 (1976) (discussing connotation); D. TAYLOR, EXPLANATION AND MEANING 171-82 (1972) (discussing meaning and "meaning-for-him"). Some philosophers simply stipulate away this ordinary meaning of "connotation," making the denotation/connotation distinction the same as the extension/intension distinction. *See, e.g.,* W. ALSTON, PHILOSOPHY OF LANGUAGE 16-17 (1964).

54. The taxonomy of theories of meaning around which this Article is organized actually has two basic distinctions. The first is the distinction between objective theories and subjective theories of meaning. Subjective theories urge that the context (usually the mental state of the speaker) determines the meaning of sentences and thus of words. An objective theory asserts that the meaning of words and sentences can be ascertained independently of the mental states of any particular speaker or listener. The second distinction is one within objective theories, namely, between those which are extensional and those which are intensional.

A more typical taxonomy is in terms of the sorts of *things* meanings are, an ontological criterion; or in terms of how one comes to know what the meaning of a word or sentence is, an epistemological criterion; or in terms of what semantic units—*i.e.,* sentences, words, or utterances of either—one should be seeking the meaning. For example, G.H.R. Parkinson uses all such criteria in his division of theories into: (1) the referential theory; (2) the image theory; (3) the concept theory; (4) the picture theory; (5) the causal theory; (6) the verificationist theory; and (7) the use theory. *See* THE THEORY OF MEANING (G. Parkinson ed. 1968) (particularly the introduction); READINGS IN THE PHILOSOPHY OF LANGUAGE, ch. 5, at 391-466 (J. Rosenberg & C. Travis eds. 1971). All of these theories will find a home in the taxonomy used herein. Many of them are not discussed because the issues that they raise about the meaning of "meaning" are not germane to the problems of formalism.

straightforward theories of meaning is the referential, or naming theory, which identifies the meaning of a word with the thing(s) it names. Proper names are the easiest examples of this theory; *e.g.,* the meaning of the word "Fido" is Fido himself.[55]

Because formalism is concerned with the classification of things, an extensional theory of meaning, such as the referential theory, might seem to be best suited to a formalist's needs. Such a theory directly addresses the problem of formalism: the classification of factual particulars as within the extension of some legal predicate because of the meaning of that predicate alone. Of course, a good deal more would have to be said about the epistemology of such a theory of meaning: Even if the meaning of "manufactured product" is the class of all manufactured products, how does a judge know whether the thing in front of him is or is not within the extension of the words or phrase?[56] The referential theory of meaning would not be a viable theory even without such problems. Many arguments against such a theory are raised continually in most contemporary books on the philosophy of language.[57] Four of these arguments deserve mention. First, sentences are not constructed out of names alone. A sentence contains prepositions, conjunctions, and other elements that do not plausibly "refer" to anything. Second, there is the argument from examples like "witch" or "Pegasus": if the meaning of a word is the thing(s) to which the word refers, the words are meaningless because they don't refer to anything. But then the statement, "there are no witches," is not a true statement, nor is the statement, "there are witches" a false one: both are meaningless. Third, words may have different meanings yet the same physical referent. To borrow the example used by Gottlob Frege, the phrase "Morning Star" and the phrase "Evening Star" refer to the same physical thing: the planet Venus. Yet they do not "mean" the same thing. If they did, the discovery that what was perceived in the morning and in the evening was the planet Venus would not have been an empirical discovery of Babylonian astronomers, but an analytic truth anyone could have perceived who knew the meaning of the two phrases. From the possibility of there being different meanings to words with the same referent, it follows that meaning is not simply the thing referred to.

55. This theory has been perjoratively labelled the "Fido-Fido" theory of meaning. *See* Ryle, *The Theory of Meaning,* in BRITISH PHILOSOPHY IN THE MID-CENTURY 239, 256 (C. Mace ed. 1966).

56. For a discussion of an extensional theory, alternative to the referential theory, *see* text accompanying notes 283-300 *infra*.

57. *See, e.g.,* W. ALSTON, *supra* note 53, at 10-31; Ryle, *supra* note 55; D. TAYLOR, *supra* note 53; READINGS IN THE PHILOSOPHY OF LANGUAGE, *supra* note 54, at 163-66.

Fourth, there is the converse of Frege's argument: there may be different referents of a word on different occasions of the word's use, but it is counterintuitive to think that it has different meanings on each such occasion. The meaning of the word "I" does not seem to vary with each speaker, although to whom it refers depends upon who is speaking.

Such concerns about the failings of the referential theory have enhanced the plausibility of an alternative theory of meaning: logical positivism.[58] Logical positivism asserts that the meaning of a word is to be found in its sense, or intension, not in its reference or extension. That does not mean that the word has no extension; logical positivism assumes that it does, but that the extension is determined by the word's intension (which has been previously defined as its objective criteria). To determine whether the object before one is within the extension of "chicken" for example, one lists the set of properties necessary and sufficient for anything to be a chicken and empirically verifies whether the given object has those properties. Hence, one way of describing the positivist theory of meaning is by the slogan, "intension determines extension"; *i.e.,* if a term has the same criteria as another term, then the class of things in the extension of the two terms is the same. By way of contrast, the referential theory could be characterized by the slogan, "extension determines intension." The preceding discussion has demonstrated that this is not necessarily the case. What the positivist theory of meaning more precisely asserts, and how it aids formalism in making out its theses, is discussed below.

B. The Logical Positivist Theory of Meaning

1. *Analytic Truths*

The first presupposition required by formalism is that there are such things as analytic truths, statements that are true solely by virtue of the meanings of the words which appear within them. According to logical positivism, most true statements are true because they are verified by factual observations. A few statements, however, are true no matter

58. The three presuppositions shortly to be examined are called "logical positivist" because they are propositions asserted at certain times in the course of a philosophy so labelled. No attempt is here made to link historically formalism in law with logical positivism in philosophy. While doubtlessly such causal links exist, nothing asserted herein depends on such matters of intellectual history. The propositions presupposed by formalism are propositions logically necessary for it to work. That certain legal or philosophical figures perceived the logical connection and allowed one set of beliefs to influence causally another set of beliefs is interesting, but not the main point.

what the facts are because the truth of such statements is a function solely of meaning and not of meaning and fact. A standard example is the statement: "A bachelor is an unmarried man." This is said to be true solely by virtue of the meanings of "bachelor," "unmarried," and "man." No factual observations are necessary to show such a statement to be true.

The existence of analytic truths is presupposed by formalism. To restate, as an example, the syllogism derived from the *Kroblin* case in the introduction, a judge's reasoning under a formalistic structure would proceed as follows:

1. Objects that are not manufactured products may be carried without an ICC certificate.
2. These things are not manufactured products.
3. Therefore, these things may be carried without an ICC certificate.

It is evident that such a deductive process, while impeccable as a matter of logic, seems to ignore the basic problem for decision in the case: Are eviscerated chickens to be classified as manufactured products or not? The second premise of the syllogism assumes an answer to this difficult question. Thus the syllogism is of little use in understanding what it is a judge does, and should do, in deciding the case.

By characterizing the facts in the above example in a less question-begging way, the formalistic deductive process may become more illuminating. Thus, the second premise might read:

2. These things are eviscerated chickens.

Now, however, it is clear that from the two premises available to us—the rule and the facts—nothing whatsoever can be deduced. That is,

1. Objects that are not manufactured products may carried without an I.C.C. certificate,

and

2. These things are eviscerated chickens.

Nothing follows at all. What is needed is some connection between the predicate, "are eviscerated chickens," and the predicate, "are not manufactured products." A third premise of the following form would allow the deduction to go through:

3. All eviscerated chickens are not manufactured products.

Now by standard logic the conclusion of the court can be deduced.[59]

The problem, of course, is how a formalist may justify the insertion of the third premise. It is not a statement of the facts of the case, but rather a general statement about all things that happen to be eviscerated chickens. It is not a legal rule, for there is no legal authority that has established it as true. Nor may one look to logic, for there is no license in logic to create whatever premise one happens to need. One alternative for a formalist is to assert that the third premise is an analytic truth—that is, that it is always true solely by virtue of the meaning of the phrases "manufactured products" and "eviscerated chickens."[60] A formalist must therefore hold the belief in the existence

59.

1.	(x) (~Mx⊃Cx)	P
2.	Ex	P
3.	(x) (Ex⊃~Mx)	P
4.	Ex⊃~Mx	3, U.I.
5.	~Mx	2, 4, M.P.
6.	~Mx⊃Cx	1, U.I.
7.	Cx	5, 6, M.P.

60. It might seem that there are other possibilities regarding this third premise. It could, to begin with, be a factual truth of either of two sorts: (1) it might be an accidental generalization that is true; or (2) it might be a true scientific law. If it were the first, it would be like the statement, "All professional basketball players now playing in the NBA are over five feet tall." If it were the second, it would be like the statement, "Sugar is soluble in water."

The logic of either of these statements is such that, if true, they license the kind of inference a formalist needs. In addition, such statements should be a part of a formalist judge's tool kit. Although they are not facts about the particular case which he has found, no one can expect a judge to decide a case beginning in a position of Cartesian doubt.

Is the third premise, clarifying eviscerated chickens as being manufactured products, of this sort? It might seem to call for factual verification—that is, that one would have to go out and see if there are any eviscerated chickens that are not manufactured products. First, however, one must answer the questions of meaning—that is, what does "eviscerated chicken" mean, and what does "manufactured product" mean? Yet if one determines the list of properties sufficient for the truthful application of each of these terms, he will have also determined (on the positivist account) the extension of each of these terms, and thus will be in a position to conclude whether or not eviscerated chickens are or are not manufactured products—*without resort to any factual observations at all* (other than those necessary to find meanings themselves). Premise three, accordingly, must be an analytic truth for the formalist—a statement true solely by virtue of the meanings of the words alone.

If it is not (yet) plausible that the third premise must be an analytical truth, it may be because of the simplification introduced regarding the second premise. There are, of course, many other useful facts about these chickens other than that they were eviscerated. Witnesses might describe them as "scalded chickens" or "formerly feathered bipeds." Yet this sort of factual investigation and redescription in no way alters the nature of the third premise as an analtyic truth, for an enriched description of the facts of the case helps only if it matches the properties analytically true of "manufactured products."

Two other kinds of truths require brief mention here: a priori truths and synthetic necessary truths. An a priori truth is one which "can be *known* to be true independently of all experience." Kripke, *Identity and Necessity,* in NAMING, NECESSITY, AND NATURAL KINDS 84 (S. Schwartz ed. 1977) (emphasis in original). One does not, in other words, need to make inferences from obser-

of analytic truths close to his heart. Such a belief is necessary so he may generate the particular kinds of analytic truths necessary for legal formalism to work.

2. *The Criterial Theory of Meaning*

The second presupposition required by formalistic theory is the criterial theory of meaning. It is apparent that the first presupposition, the thesis of analytic truths, demands that a formalist develop some theory of meaning. To assert that statements are true solely by virtue of the meaning of the words that appear within them presupposes the existence of some theory about what meanings are. Moreover, a formalist cannot simply scan the history of philosophy and produce any defensible theory of meaning that happens to appeal to him; a formalist needs a theory that costumes meaning in such a way that the kind of analytic truths formalism requires could exist.

The most popular theory of meaning in the philosophy of this century, the criterial theory of meaning, suits his needs exactly.[61] The criterial theory of meaning asserts that the meaning of any word is the criteria, the necessary and sufficient conditions, which govern that word's correct application. The meaning, for example, of the word "bachelor" is the conjunction of two conditions, each individually nec-

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vation in order *to know* that an a priori truth is true. So defined, a priority is an epistemological category, not a semantic or metaphysical one. While an analytic truth may be known to be true a priori (*see* Swinburne, *Analyticity, Necessity, and A Priority,* 84 MIND 225 (1975)), there may be some a priori truths that are not analytic, *e.g.,* one's knowledge of one's own mental state.

Two points should be made about this third premise being an a priori truth. First, even if it were known a priori, such an epistemological characteristic is irrelevant to the guarantee of truth a formalist judge needs to be "unoriginal" in his deduction. He needs the third premise to be "necessarily true." He needs, in other words, an analytic truth, not an a priori truth. Second, it is implausible to suppose that statements about chickens being manufactured products is known a priori unless it is also an analytic truth, for few synthetic truths are known a priori.

The concept of necessity is taken by Kripke to be a metaphysical notion, not an epistemological or semantic one. *See id.* Thus, the truths of science for Kripke are necessarily true, though not analytically true nor known to be true a priori. Synthetic necessary truths are thus no more than one kind of the factual truths earlier discussed, which the third premise does not seem to resemble.

For an alternative way of pedigreeing this third premise (as a factual truth about the legislature's state of mind), see text accompanying notes 74-75 *infra*.

61. For a classic expression of the theory, see Carnap, *The Elimination of Metaphysics through Logical Analysis of Language* in LOGICAL POSITIVISM 60 (A. Ayer trans. 1959). The criterial theory has more recently been associated with Wittgenstein. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. G. Anscombe trans. 1958). Although Wittgenstein did believe that meaning was criteria, by "criteria" he emphatically did not mean "necessary and sufficient conditions." *See* text accompanying notes 108-23 *infra* (vagueness). *See also* Wellman, *Wittgenstein's Concept of a Criterion,* 71 PHILOSOPHICAL REV. 433 (1962), *reprinted in* WITTGENSTEIN AND THE PROBLEM OF OTHER MINDS 154 (H. Morick ed. 1967). Wittgenstein's theory is thus not a criterial theory of meaning as defined in the text.

essary and only together jointly sufficient, *i.e.,* that the thing in question be unmarried and a man.

The importance of the criterial theory of meaning to the formalist lies in the deduction it makes possible from a sentence using the criteria of a word to a sentence using the the word itself. Thus, if we know that the item in front of us is an unmarried male person, we may deduce—solely from the meanings of the words—that it is indeed a bachelor. We may deduce "*X* is a bachelor" from "*X* is an unmarried man" because the latter is a *sufficient* condition for the former.[62] Also, if we know that the item in front of us is not a man (suppose, for example, that it is an unmarried chicken), we then may deduce that it is not a bachelor, because the meaning (criteria) of bachelor is such that some *necessary* condition of being a bachelor is negated by the item being a non-person.[63] Reverting back to *Kroblin,* suppose we believe that "manufactured product" has as a *necessary* condition (even if it alone is not sufficient) that the item "change its nature."[64] If we also believe that a chicken, eviscerated or not, is still a chicken, *i.e.,* that it has not changed its nature, we then may deduce from "eviscerated chicken" the conclusion "not a manufactured product." If we can make such a deduction solely by virtue of the meaning of the words in question, we then have the analytic truth we need: Everything that is an eviscerated chicken is not a manufactured product.[65]

62.

1.	(x)[Bx≡(Ux·Mx)]	P (Analytic truth about bachelors)
2.	Ux·Mx	P (Facts found to be true)
3.	Bx≡(Ux·Mx)	1, U.I.
4.	Bx	2, 3, equivalence

63.

1.	(x)[Bx≡(Ux·Mx)]	P (Analytic truth about bachelors)
2.	~Mx	P (Facts found to be true)
3.	Bx≡(Ux·Mx)	1, U.I.
4.	~Bx≡~(Ux·Mx)	3,
5.	~Bx≡(~Uxv ~Mx)	4, DeMorgan's Laws
6.	[~Bx⊃ (~Uxv~Mx)]·[(~Ux v~Mx)⊃~Bx]	5, Equivalence for equivalence
7.	(~Ux v~Mx)⊃~Bx	6, Simp.
8.	~Bx	2, 7, D.S.

64. Such a criterion for "manufactured product" was suggested:

> Chickens, turkeys, ducks, geese and guineas alive and after having been killed are still known by the same names. The dressing and cutting into pieces of a chicken or a turkey does not result in the production of a distinctive article having any new characteristics or uses. It still is an agricultural commodity.

Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, 561 (1951) (Lee, Comm'r, concurring).

65. For a more rigorous philosophical statement of the connection between analyticity and the criterial theory of meaning, see Putnam, *The Analytic and the Synthetic,* in III MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 358 (H. Feigl & G. Maxwell eds. 1962).

Central to the matter, of course, is a finding of meanings to general words like "manufactured product" such that either a sufficient condition is satisfied by some true description of the facts of the case (in which event we may deduce that the item is manufactured) or a necessary condition is not satisfied (in which event we may deduce that the item is not manufactured). The criterion suggested—change of nature—is neither clear in meaning nor problem-free as a necessary condition of an item being a manufactured product; that, however, is to anticipate later criticism. Its pertinence here is only for illustration.

3. *The Empiricist Thesis*

The third presupposition of formalism, often called the verificationist criterion of meaning,[66] may be more briefly and precisely termed the empiricist thesis. This thesis asserts that a non-analytic statement is meaningful if and only if its criteria are stated only in observation sentences, or in sentences deducible from observation sentences. Logical positivists used this thesis to attack metaphysics as nonsense, because metaphysical statements were not reports of observations nor deducible from such reports. More pertinent to this discussion,[67] the thesis also led to a conception of the meaning of theoretical terms in science. Theoretical statements in science were held to be significant only if reducible to observation sentences. Such reduction of the sentences of scientific theory was to be accomplished by replacing all theoretical words in such sentences by the more complicated set of observation statements in terms of which the theoretical words were defined.[68] In this way, theoretical terms and theoretical statements using such terms could be regarded as a convenient shorthand for the more complicated factual statements that in principle could always be made.

This third logical positivist presupposition is often confused with the second presupposition, the criterial theory of meaning. They are in fact quite distinct, however. The criterial theory of meaning asserts that meaning is criteria; the empiricist thesis adds that only empirically

66. This criterion of meaningfulness is sometimes elevated into a theory of meaning, that is, that the meaning of some expression is just the mode of verifying it. *See, e.g.*, Schlick, *Meaning and Verification*, 49 PHILOSOPHICAL REV. 339 (1936) ("The meaning of a proposition is the method of its verification.") Nothing this strong need have been asserted, only that any criterion (which is part of the meaning of the word) must use, or be translatable into, observation terms (which can be verified).

67. *But cf.* Williams, *Language and the Law* (pt. 1), 61 L.Q. REV. 71, 81-86 (1945) (attempting to transform an attack on realist metaphysics into a reductionist program (of sorts) for legal terms which are "abstractions").

68. For further explanation, see text accompanying notes 181-86 *infra*.

verifiable criteria may serve as criteria. Regarding ordinary words having physical objects or classes of objects as their referents, the separation is less important. With theoretical terms, however, the empiricist thesis must be separated from the criterial theory, for the empiricist thesis makes a significant, extra assertion, *i.e.,* that theoretical terms are mere shorthands for, or abbreviations of, some set of observation statements. One might reject this reductionist aspect of the empiricist thesis without rejecting the criterial theory of meaning generally.

To the extent that authoritative legal standards use theoretical terms lacking any obvious physical referents—words such as "malice," "title," "right," and "estate"—a legal formalist must also subscribe to the empiricist thesis and its reductionist implications; for if all a judge has is a legal rule framed with such terms and facts described with observation sentences, he needs some bridge between the two. He needs, indeed, a bridge of a quite sturdy sort, for it must allow him logically to cross from fact to law of the most abstract sort. Seemingly, only the empiricist thesis allows him to construct this bridge, because only it guarantees that even the most abstract legal words have analytic connections to verifiable descriptions.[69]

DOLO!

Suppose a murder statute defines "murder" as "the killing of another person with malice." The judge has before him a case rich with facts about the action of the defendant and about his mental state. How is the judge to *deduce* that malice was or was not present? In order to arrive at the analytic truths necessary to make a deduction, the judge must specify the criteria of "malice" in observational terms—terms that "meet the facts." Yet "malice" is an acknowledged nonordinary term in the law. It does not refer to any single mental state of the actor, as "intent" or "motive" arguably do. The judge, to have usable criteria for "malice," must thus reduce the word to more basic terms.

The judge would start with something like section 188 of the California Penal Code, which provides that malice may be either express or implied. One should interpret this as meaning that there are two independently sufficient conditions of malice: x (some particular killing) is done with malice, if and only if, it was done with express malice or with implied malice. Using the symbols of the predicate calculus, this may

69. If words lacking physical referents were used in the law in the way they are used in scientific theories, then the empiricist thesis would not be the only was such abstract terms might have empirical impact. For an explanation of how this is possible for words of scientific theories, see text accompanying notes 181-86. Such words are not so used in law, however, with the result that the empiricist thesis is required for such words in law. *See* text accompanying notes 187-205 *infra*.

be represented as: (x) [Mx ≡ (EMx v IMx)]. To advance beyond the level of technical terms at both sides of the biconditional, definitions of "express malice" (EM) and of "implied malice" (IM) remain necessary. Express malice is defined by the California Penal Code as an intentional killing; implied malice is defined as depraved heart murder or unprovoked murder.[70] If express malice is defined as intentional (I), then I can be substituted for EM in the criteria for malice. Likewise, if the disjunction of depraved and malignant heart (DH) or unprovoked (~P) is the definition of implied malice, then their disjunction may be substituted for the latter phrase.

The result is:

(x) [Mx ≡ (Ix v (DHx v ~Px))]

This is equivalent to:

(x) [Mx ≡ ((Ix v DHx) v ~Px)]

A formalist judge at this point will just have to know that this is not what section 188 of the California Penal Code should mean. The absence of provocation is a necessary, but not a sufficient, condition of malice. Therefore, the last logical connective should not be "or"; it should be "and." The corrected statement thus is:

(x) [Mx ≡ ((Ix v DHx) • ~Px)]

Reading the relevant cases, the judge will discover that the above formula is not complete. People are found to kill with malice: (1) when they intend grievous bodily harm (GBH); and (2) only if they do not have a diminished mental capcity (DC). A correct reading of those cases will allow him to complete the formula as follows:

(x) [Mx ≡ ((Ix v DHx v GBHx) • (~Px • ~DCx)]

Arguably, the judge now has a complete set of criteria for malice. However, he is not yet in a position to deduce malice, or its absence, from the facts of the case before him, for all of the criteria for malice are themselves stated in technical terms. He needs to reduce terms like "intentional," "depraved heart" or "diminished capacity" to criteria that can be verified or falsified by the facts. The clearest example of the difficulties in this process may arise from an attempt to reduce the term closest to ordinary usage, "intentional."

The cases might convince the judge that there are two independently sufficient conditions of an intentional killing: if the purpose

70. CAL. PENAL CODE § 188 (West 1970). One would have to sophisticate the logic used herein considerably if one were to adequately symbolize a legal rule using the mental state words defining "malice." Such sophistications would deal with the thorny problem of how to quantify into the contents created by mental state words. For suggestions in this regard, see Kaplan, *Quantifying In,* in REFERENCE AND MODALITY 112-44 (L. Linsky ed. 1971).

(PP) with which the act was done was to kill; or if the act was done with knowledge to a substantial certainty (K) that death would follow. If this is correct, then he may substitute "knowledge or purpose" (K *or* PP) for I.

Can the judge further reduce the terms? What are the criteria for terms of ordinary speech, such as "purpose" or "knowledge"? "Purpose," for example, is often analyzed so that it is imputed to an actor only if three criteria are satisfied: (1) the consequence is desired by the actor; and (2) the actor believes his act has some chance of bringing about the consequence; and (3) this belief/desire set caused the actor to act as he did.[71]

This still cannot satisfy a formalist judge. Like the logical positivists, he will note that mental terms such as "desire," "belief," and "knowledge" must themselves have verifiable criteria if they are to be significant by the empiricist criterion of significance. They cannot refer to inaccessible, private mental states.[72] He will accordingly have to reduce "desire," for example, to some statements about observable behavior. Since no descriptions of actual behavior are at all plausible as criteria of "desire," he will rely on dispositional terms—terms that do not describe behavior but that describe dispositions, or tendencies, to behave. His list of criteria might be as follows:

A desires object O if and only if:

1. *A* has a tendency to act in ways that achieve the object (O) of the desire;
- and 2. *A* has a tendency to notice O when present;
- and 3. *A* has a tendency to say, on appropriate occasions, "I desire O," etc.;
- and 4. *A* has a tendency to give expression of pleasure if O is achieved;
- and 5. *A* has a tendency to give expression of displeasure if O is not achieved.[73]

71. This is one interpretation of Aristotle's practical syllogism.

72. *See* text accompanying notes 136-45 *infra* for a more detailed exploration of the notion that these logical positivist theses about meaning require a Logical Behaviorist stance about the meaning of mental words.

73. For suggestions from which the list in the text was compiled, see Brandt & Kim, *Wants as Explanations of Actions,* 60 J. PHILOSOPHY 425 (1963); Smythe, *Unconscious Desires and the Meaning of 'Desire,'* 56 MONIST 413 (1972). For strictly Behaviorist accounts, see T. MILES, ELIMINATING THE UNCONSCIOUS 65-69 (1960); G. RYLE, THE CONCEPT OF MIND (1949); Carnap, *Psychologic in Physikalischer Sprache,* 3 ERKENNTNIS 107 (1932-1933).

If the judge completes such an analysis for all of the other legal terms that form the criteria for "malice," he seems to be in a position to deduce the presence of this required element of murder from the facts alone. For example, if one assumes for the moment that the criteria immediately above are independently necessary and jointly sufficient for "desire," then in the appropriate circumstances he may deduce that the defendant desired the death of the victim *V* (*i.e.,* defendant acted on a number of occasions in ways likely to kill *V*; defendant said a number of times that it was his desire to kill *V*; defendant leapt with joy on news of *V*'s death in the hospital; et cetera). If the judge may deduce that the defendant desired the death of *V* and may also deduce the requisite belief and causation, then he may deduce that the defendant had as his purpose the death of *V*. This means that the killing was intentional, which, if not provoked or performed by a person with diminished capacity, means the killing was with malice.

To summarize, the formalist judge must be able to reduce abstract terms in law to observation statements. Only by doing so can he move from the facts of a case to a legal conclusion while using the meaning of the legal terms alone.

C. A Subjectivist Alternative to the Logical Positivist Theory of Meaning

A formalist might seek to defend a theory of meaning other than the criterial theory. He might adopt certain contemporary theories of meaning that consider the meaning of an utterance as more a function of the speaker's intention than of any set of linguistic conventions.[74] He will usually be a "contextualist" of one stripe or another, perhaps urging that words as words have no meaning that is not completely dependent upon the particular context of their utterance, and that the most important item in the context in which a statement is made is the intention of the person making the statement.[75]

In marked contrast to the criterial theory of meaning, such a subjectivist approach would not require the existence of necessary and sufficient conditions for a word's justified application. No analytic truths

74. S. Schiffer, Meaning 7-16 (1972); Grice, *Meaning,* 66 Philosophical Rev. 377 (1957).

75. *See, e.g.,* Cohen, *supra* note 33, at 240-41; Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 Harv. L. Rev. 630 (1958); Williams, *Language and the Law* (pt. 5), 62 L.Q. Rev. 387, 392-93 (1946). This unfortunate view of meaning is rejected in this Article. *See* text accompanying notes 217-32, 257-83 *infra*.

connecting legal predicates to factual predicates would be necessary either. The first three logical positivist presuppositions would thus not be necessary. In their place would be a subjectivist theory of meaning: the meaning of any word (including theoretical, legal terminology) is to be found in the intentions of the user of it on any occasion of its utterance. For statements of rules by legislatures or courts, such a theory of meaning would direct a judge's attention to legislative intent or to the intent of prior judges who authored certain common law rules.

To a formalist, the advantage of this alternative theory is ultimately the same as that for the criterial theory. In both cases the third premise necessary to complete the deduction is supplied without resorting to judicial originality. The premise is an analytic truth. For a subjectivist-formalist, the premise is the object of the enacting legislature's intention, a factual question which does not require a judge to use his own values. To revert to the example from *Kroblin,* the deduction is identical except in the way in which the third premise is legitimated: If the judge finds that the legislature intended every eviscerated chicken to be a manufactured product, he may deduce his result just as before. In this way the subjectivist theory of meaning is an alternative presupposition to the first three logical positivist presuppositions.

II. PROBLEMS FACING THE FORMALIST THEORIES OF MEANING

The major problem facing formalism is to show that the meanings of general words are such that there is some correct classification of particular items as either meant by those words or not. The problem is not with the logic of formalism, but with formalism's strict requirements for what meanings can be. The following discussion of this problem focuses principally on the criterial theory of meaning, for this is the theory of meaning most obviously compatible with formalism. Some attention, however, is also devoted to the "subjective" theory of meaning, under which the meaning of a statute is found in the intent of the enacting legislature. A third theory of meaning, which focuses on what words objectively mean but which analyzes the meaning of those words in terms of standard examples rather than in terms of criteria, is also introduced. These three different theories of meaning, defining three different models of formalism, are discussed in each of the succeeding subsections of this section.

A. Problems Facing the Logical Positivist Theory of Meaning

1. *General Problems with Any Objective Theory of Meaning*

As Locke pointed out long ago, communication requires the use of general classifying words.[76] There could not be a language consisting solely of proper names, for nothing could then be said about the things so named. We must deal with general predicates such as "is a lemon" or "is intentional" in our legal as well as ordinary communication.

Along with generality, however, come characteristics which severely hamper the ability to discover the criteria for which the criterial theory of meaning exhorts us to look. These characteristics—ambiguity, metaphor, vagueness, and open texture—do not destroy the criterial theory as a theory of meaning. They do, however, show that language deviates far enough from the ideal of the criterial theory so as to make it impossible as a theory of law of how *all* cases can be resolved, and highly questionable as a theory of how *any* cases can be resolved, even supposed "easy" cases.

a. *Ambiguity:* A serviceable paraphrase for "ambiguity" in linguistic theory is "multivocality"—having more than one sense. "Bore" is an example of an ambiguous word, as in the sentence, "Our mothers bore us." The word "bore" has different senses; the sense intended is not made clear in the context of the single sentence example, so its use therein is ambiguous.

According to the criterial theory, the sense of a word is the criteria, the necessary and sufficient conditions, that govern its correct application. Thus, each sense of a word has a set of criteria independently sufficient for the proper use of the word. Ambiguity, so understood, is distinct from vagueness. An example of vagueness is the word "mountain," when we wish to know whether the Appalachian foothills are mountains. Our problems in classifying hills as mountains or not mountains do not stem from any ambiguity of "mountain," for we know the sense of the word germane to our concern. Our problem stems from the vagueness of the word—that is, the uncertainty about what should count as satisfying the criteria for mountainhood. Any word can be both ambiguous and vague, by having distinct senses, each of which is vague, but which does not blur the distinction between the two characteristics.

76. J. Locke, An Essay Concerning Human Understanding bk. III, ch. I (1689).

The word "ambiguous" is itself vague. The linguistic phenomena—words, sentences, and utterances—that are potentially ambiguous—occupy a continuum without sharp lines, at one end of which is generality, at the other, homonymity, and in between, ambiguity. For example, do we wish to say of the word "hard," as in "there are hard choices and there are hard chairs," that it is ambiguous, or only that it is more general in its application than previously thought?[77] Sometimes it is possible to tell the difference. For example, in the sentences "the chair is light" and "the person is light," a shift in the sense of "light" can vary the truth value of the sentence. In such a situation there must be two distinct senses of "light." The same cannot be said of "hard," yet it is not clear that "hard" is only general, not ambiguous.

At the other end of the continuum, it is not always possible to distinguish one word in the different senses, from different words that share the same sound and symbol (homonyms). "Bore" might be considered ambiguous, or, because of the symbol's different etymology in the two exemplified uses, might be regarded as two different words that are homonyms.[78]

The clear cases of ambiguity can be systematically grouped. First, there are syntactic ambiguities. The meaning of a sentence can be unclear, not because some word has more than one sense, but because the ordering of the word leaves room for more than one interpretation. The following three examples are from Quine's work:[79] "A lawyer once told his colleague that he thought a client of his more critical of himself than of any of his rivals" (ambiguity of pronominal cross reference); "He went to the pretty little girls camp" (ambiguity of grouping indicators); and, a paraphrase of Shakespeare, "All that glistens is not gold" (ambiguity of the placement of the logical connective, "not").

In keeping with the division of meaning earlier introduced, semantic, as opposed to syntactic, ambiguities can be one of two kinds—either intensional or extensional. Intensional ambiguity stems from our use of words that take intensional objects, such as "believe" in the sentence, "John believes that Tully is buried here." The ambiguity in the use of such words is in whether we construe them as "referentially opaque" or "transparent." If "belief" is construed as opaque, as is usu-

77. The examples in this paragraph are from W. QUINE, WORD AND OBJECT § 27, at 129-34 (1960). It becomes particularly difficult to distinguish generality from ambiguity once it is recognized that adjectives such as "hard" may be used attributively, that they depend on the words that they modify for their meaning. *See* note 210 *infra*.

78. *See also* F. PALMER, *supra* note 53, at 65-71.

79. W. QUINE, *supra* note 77, §§ 28-29, at 134-41.

ally done, the sentence will not imply anything about what John believes with regard to the burial site of Cicero—even though "Cicero" is just another name for the person named by "Tully." If "belief" is construed as transparent, one can substitute differing names of identicals without changing the truth value.[80]

Extensional ambiguity of words is the type of ambiguity most frequently encountered. The earlier examples of "bore" and "hard," if ambiguous, are ambiguous in this way. Quine[81] further classifies categories of extensional ambiguities. There are, for example, process/product ambiguities, as in the phrase "There was an *assignment* of claims." Does this phrase mean that there was an act of assignment, or that there was a product of it, a legal document called an assignment? There are action/custom ambiguities, as in the question "How many skiers are there at the ski area?" Does this question ask for the number of people presently engaged in the activity of skiing, or for the number of people who customarily ski a sufficient amount to be called "skiers"?

The problem ambiguity poses for the formalist enterprise is unambiguous: How can a judge know which sense of a word used in a legal rule, or which interpretation of an entire sentence, should be used? Ambiguity need not prevent the formalist judge from making deductions, but there will be as many deductions possible as there are sets of necessary and sufficient conditions the word's meanings support. Because a judge is likely to be able to deduce *both* results in a given case, an unacceptable embarrassment results.

Ambiguity is a pervasive feature of language. An examination of any dictionary will show that most, or even all, words that the law uses have more than one sense. Thus, every sentence, in a statute or in language generally, may have more than one possible reading.

That people communicate as well as they do, despite the inherent ambiguity of language, is attributable to a number of factors often collectively labelled "context." The meaning of a sentence (or its meaning on the particular occasion of its utterance) is often said to be sufficiently clear because the context surrounding the sentence eliminates many of the ambiguities of the words composing the sentence. To assess the degree to which this is true it is necessary to isolate the components of "context."

80. For Quine's explication of this see *id.*, §§ 30-31, at 141-51. The opaque reading of mental words is of considerable importance in the law. *See* text accompanying notes 136-45 *infra*.

81. *Id.* §§ 27-28, at 134-41.

One should first distinguish what might be called the linguistic context.[82] A word in a statute does not appear by itself, but surrounded by other words in a sentence. The sentence, in turn, is surrounded by other sentences. Because one could transform any set of sentences into a single sentence by inserting the appropriate logical connectives,[83] both the surrounding words and the surrounding sentences should be considered part of the linguistic context. In light of the native speaker's knowledge of the language's syntax and its semantics, and knowledge of general facts about the world, this omnipresent "context" frees some words from ambiguity.

Consider, for an example using syntax, a statute prohibiting the encouragement of the immigration of any alien into the United States "to labor or perform service of any kind . . . ."[84] One sense of "labor" is the reference to a group of people who labor, as might be the case in a discussion of economics or politics (*e.g.,* "labor wants higher wages"). Yet it would make no syntactic sense to apply that sense of "labor" in this case, for a verb and not a noun is needed to follow the word "to." One competing sense of the word may thus be ruled out solely on grounds of syntax.

Surrounding words may also eliminate various senses of a word because of the semantic absurdities that would otherwise result. For example, a city ordinance might prohibit the "entertaining of questions" from the audience at certain city council meetings.[85] The sense of "entertain" that means feeding or singing songs can be ruled out because of the apparent category mistake[86] in assuming one could entertain a question in the same manner as one can entertain a guest.

"Common sense" knowledge of general facts may also be used to

82. The distinction between linguistic and non-linguistic context has been adopted from Katz & Fodor, *The Structure of a Semantic Theory,* in READINGS IN THE PHILOSOPHY OF LANGUAGE, *supra* note 54, at 472.

83. *Id.*

84. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458 (1896) (a statute closely resembling that imagined in the text was construed).

85. The example is from Fillmore, *Entailment Rules in a Semantic Theory,* in READINGS IN THE PHILOSOPHY OF LANGUAGE, *supra* note 54, at 535. *See also* Ziff, *About What an Adequate Grammar Couldn't Do,* I FOUNDATIONS LANGUAGE 5 (1965), *reprinted in* READINGS IN THE PHILOSOPHY OF LANGUAGE, *supra* note 54, at 548. Ziff imagines construing "tore" in "the man tore up the ticket," in the same sense as its use in the sentence, "the man tore up the street."

86. The notion of a category mistake was popularized in G. RYLE, *supra* note 73, at 16. Ryle's examples of category mistakes are an ellipsis of different senses of words ("three things are now rising, namely, the tide, hopes, and the average age of death"). Such ellipses are said to violate the semantic markers of words when one tries to give the word (*e.g.,* "rising") just one reading.

reduce ambiguity. To illustrate, "shooting" in the sentence, "I saw the shooting of the men," is ambiguous because it could mean the men were shot, or that they themselves did the shooting. Our knowledge about the capacities of elephants precludes a similar ambiguity in the meaning of "shooting" in the sentence, "I saw the shooting of the elephants."[87]

Thus, the linguistic context in which a word is used may eliminate ambiguity. As this Article has shown, however, the linguistic context will sometimes render a sentence ambiguous even if the words within it are not (*i.e.,* syntactic ambiguity). In addition, the ambiguity of words is often not removed by their context. Consider the American who encourages his pregnant, alien wife to come over to work on her tennis while she is waiting to deliver her baby, thus involving established senses of the terms "labor" and "service." Or consider the person who is prosecuted under a statute which prohibits "bringing a vehicle into the park," when his act consisted of bringing a book with him to better help him think. Does a formalist judge have adequate grounds for acquitting such persons? What will prevent him from deducing guilt from analytical truths connecting "labor" with what a woman does to give birth, "service" with tennis, and "vehicle" with a carrier of thought?

The rejoinder might be that the statutes so construed would make no sense. Now, however, we are playing on the ambiguity of "sense." Such statutes do make sense as sentences. Such statutes do not "make sense" only: (1) because of certain pragmatic features of the non-linguistic context of the utterance; or (2) because of the unintelligibility of the purposes a judge would have to ascribe to the statute. Each of these further senses of "nonsense" merits brief discussion.

Pragmatics, as opposed to semantics, deals with the conditions under which an utterance of a sentence is appropriate. When one uses sentences, one does things with words; one performs speech-acts of various kinds. These speech-acts, in their respective contexts, may, like all other actions, be appropriate or inappropriate. Stating, "it is raining," to a thoroughly drenched person who has been standing in the rain for an hour is both true and impeccable as a matter of its semantics. But

87. This example is from P. ZIFF, *supra* note 85, at 551. As Ziff's example makes clear, this third mode of disambiguation by linguistic context really includes the second, for the collapse of the criterial theory, and with it the notion of analytic truth, makes Ryle's "category mistakes" and Katz and Fodor's violation of "semantic markers" in truth no different from other factual errors. *See* text accompanying notes 129-216 *infra*.

such a statement is deviant in its pragmatics, because it is inappropriate to assert such a proposition in such circumstances.[88]

The pragmatics of utterance is widely relied upon as the foremost aid in disambiguating expressions.[89] The sentence, "I see a shark," is ambiguous because the word "shark" is ambiguous since it can mean real sharks or pool sharks. An utterance of that sentence, however, while staring at the ocean, or while in a poolroom, need not be ambiguous.[90] Similarly, the sentence, "Jones follows Marx," is ambiguous, however. Nevertheless, one reading of the sentence can be eliminated if the sentence is uttered by a lecturer in intellectual history; this non-linguistic context makes it unlikely that the lecturer meant that Jones followed Marx around like a lost puppy.[91]

There are two problems in relying on the pragmatic features of a statute's "utterance" by the legislature in order to make the statute less ambiguous. First, application of this non-linguistic context presupposes that a court's proper role is to determine what the legislature meant by its utterance, rather than what the words uttered mean. This is a controversial proposition of political theory that values obedience to legislative wishes over the giving of fair notice. A statute's meaning, as shall subsequently be argued, is better thought of as a function of the conventions that infuse sentences and words with meaning, rather than as a function of the intentions of a speaker that constitute what that speaker meant by uttering those sentences and words.[92] Because pragmatics analyzes the problem in terms of what the speaker intended by an utterance, rather than in terms of what the utterance means,[93] it does not promote a theory of statutory interpretation seeking only the latter, objective meaning.

The second problem with pragmatics is that attention to the pragmatics of utterance of a sentence does not always clarify an ambig-

88. For the separation of pragmatics from semantics, see Katz & Fodor, *supra* note 82, at 476-81; Mates, *On the Verification of Statements About Ordinary Language,* 1 INQUIRY 161 (1958), *reprinted in* ORDINARY LANGUAGE 64 (V. Chappell ed. 1964).

89. Parsons, *Ambiguity and the Truth Definition,* 7 NOUS 379 (1973).

90. This example is given in Ziff, *supra* note 85, at 552.

91. This example is given in Katz & Fodor, *supra* note 82, at 477.

92. *See* notes 217-53 and accompanying text *infra*.

93. The meaning of the phrase "the meaning of an utterance" is ambiguous because "utterance" is ambiguous. For purposes of this Article an utterance is an instance of which the sentence uttered is a type. The meaning of an utterance, accordingly, is a function of the meaning of the sentence. Because sentences are not disambiguated by the differing circumstances surrounding their utterance on different occassions, neither are utterances as tokens of sentences. *See* notes 225-27 and accompanying text *infra*.

uous expression. The intellectual historian in the earlier example may have intended to convey the thought that Jones came later than Marx temporally, not that Jones adopted Marx's ideas. Cognizance that the speaker was an intellectual historian may disfavor the "tag-along" interpretation of "follow," but it does not preclude the temporal sense of "follow." This inability of pragmatics to prevent all competing readings of a sentence will be even greater with statutes. As utterances, statutes lack many of the non-linguistic, contextual features which constitute the foundation for a pragmatics analysis. Statutes are institutionalized utterances. Consequently, the richness of time and circumstance which the pragmatic approach embraces to interpret the intent of an ambiguous expression is eliminated by this institutionalized nature of statutes.

In summary, a judge may refuse a particular interpretation of a statute containing ambiguous words because: (1) syntactically it would make no sense to so interpret the words; or (2) semantically it would be nonsense; or (3) it would make no sense as a matter of common sense factual beliefs; or (4) pragmatically it would make no sense because the utterance so construed would be inappropriate. More often, a judge intends none of these interpretations when concluding that a statute makes "no sense." Rather, the judge may mean that he is unable to discern any intelligible purpose for the statute. For example, the judge may be unable to imagine why a legislator would want to keep books out of a park or pregnant tennis players out of the country. Such wants are unintelligible to the judge in the same sense in which a desire to soak one's elbow in the mud all afternoon is unintelligible to him—none of these are familiar to him as ends anyone pursues for their own sake nor can he imagine other, more ultimate ends to which these could be means. In contrast, the promotion of safety and peace of mind in a park are intelligible purposes for a statute, so that construing "vehicle" in the anti-vehicle ordinance as meaning cars but not books "makes sense" to the judge.[94]

As should be clear, no formalist judge can rely upon this last technique to interpret an ambiguous expression, since it requires the judge to rely upon shared values with which he can empathize. Such technique does not rule out competing interpretations because a judge's linguistic knowledge, but because of his moral knowledge. As a result, the

94. For an examination of this notion of intelligibility, and its link to purposive statutory interpretation, see notes 233-46 and accompanying text *infra*. *See generally* Watt, *The Intelligibility of Wants,* 81 MIND 553 (1972) (discussing the concept of the intelligibility of human ends).

formalist possesses only the syntactical, the semantic, and the factual modes of interpreting ambiguous expressions—not a very powerful tool, given the pervasive ambiguity of words in natural languages.

A final formalist rejoinder might be that ambiguous words have a primary sense, and that it is this sense that a judge should use in applying the rule containing the ambiguous word.[95] Two points merit consideration here: first, it is unclear that ambiguous words have one primary sense, as opposed to other, secondary senses. The differences between established senses of a word, as opposed to metaphorical ones are discernible, but by what criteria is one of those established senses deemed "primary"? Should one count the number of different combinations of the word with other words in each of the former's senses, and thereby determine the primary sense by the greatest number of possible combinations? Or is the absolute frequency of use of each of the senses, irrespective of differences in combination, to govern? The philosophers of the fifties and sixties who used this distinction of primary and secondary senses never answered this question of criteria. Second, if there were a primary sense of a word, always applying this "primary" sense would lead to the formalist's "heaven of concepts" so justly mocked by the Realists.[96] It would mean that every word would be given one sense in all its applications in different legal rules. This would inevitably lead to syntactical or semantic absurdities in some rules employing the word, or affronts to common sense factual beliefs. Furthermore, such univocal interpretation of words in statutes would lead to interpretations promoting no intelligible purpose. For example, "labor" would be construed in an immigration statute as referring to the pre-birth activity of a woman, should this interpretation of "labor" be its primary interpretation. While this last kind of absurdity cannot be persuasive to those already committed to excluding consideration of values, it is a good reason not to be a formalist to begin with.

b. *Metaphor:* Logical positivists early recognized the difficulty of accommodating metaphorical use of language into their theory of meaning. Indeed, "metaphorical" became a pejorative word synony-

95. Alternatively, but even less plausibly, a formalist might assert that underlying all senses of a word is a "core" meaning that all senses share. One commentator contends that any such core meaning would have to be vague in the extreme, or more likely, non-existent. *See* F. PALMER, *supra* note 53, at 69-70.

96. *See* 3 ALI PROCEEDINGS 222, 225-29 (1925) (W.W. Cook arguing against the viability of a single definition of "domicile" for the different contexts in which the term appears). Von Iherring's phrase, "the heaven of legal concepts," has been employed by the Realists. *See, e.g.,* Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935).

mous with "lacking cognitive significance." Like ethical expressions, metaphors were denied any "descriptive meaning" and were allowed, at best, only an expressive or prescriptive function (sometimes called "emotive meaning").[97] If the positivist account of metaphor were correct, then a formalist would be forced to concede the inapplicability of the criterial theory to such expressions, but assert that the defeat for his enterprise was minimal in light of the rare use of metaphor in statutes. The positivist account of metaphor is not correct, however, nor is the use of metaphors rare in legal standards.

The nature of metaphor is best examined by comparing it with ambiguity. It is sometimes stated[98] that metaphor is just a special case of ambiguity. On this account a word is used ambiguously when one cannot determine which of its several established senses is intended; a word is used metaphorically when none of its established senses is intended, but, rather, some new sense is intended for the word. Thus analyzed, metaphor would be like ambiguity in the indeterminacy of sentence-meaning generated, but with an added difficulty: in addition to selecting among different senses, an interpreter would be compelled to articulate the new sense the metaphorical, but not merely ambiguous, use creates.

The problem with this account is that it leaves out what seems to be the essence of metaphor; namely, the use of words to assert, presuppose, or get one to notice some similarity between each of the things referred to by those words in their established senses.[99] For example,

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97. Thus, Carnap states:

> Many linguistic utterances . . . are analogous to laughing in that they have only an expressive function, no representative function. Examples of this are cries like "Oh, Oh," or, on a higher level, lyrical verses. The aim of a lyrical poem in which occur the words "sunshine" and "clouds," is not to inform us of certain meteorological facts, but to express certain feelings of the poet and to excite similar feelings in us.

R. CARNAP, PHILOSOPHY AND LOGICAL SYNTAX 28 (1935), *reprinted in* S. LANGER, PHILOSOPHY IN A NEW KEY 83-84 (3d ed. 1957). For a discussion of the emotivist theory of meaning of ethical words, see notes 205-16 and accompanying text *infra*.

98. This statement has been articulated by Aristotle, and more recently in N. GOODMAN, LANGUAGES OF ART 71 (1968).

99. A majority of the "philosophy of metaphor" concurs with what Davidson calls the "trite and true observation" that "[a] metaphor makes us attend to some likeness, often a novel or surprising likeness, between two or more things." Davidson, *What Metaphors Mean,* 5 CRITICAL INQUIRY 31, 33 (1978). The text of this Article equivocates on one important issue: should one say that a metaphorical utterance *asserts* the corresponding simile? (For a discussion of the "condensed simile" view of metaphor, see J. MURRAY, 2 COUNTRIES OF THE MIND 3 (1931).) Or that it *presupposes* the corresponding simile? *See* W. ALSTON, *supra* note 53, at 98-99. Or only that the metaphor is used to "nudge" the listener to find the similarities? *See* Davidson, *supra*, at 33. If one says that metaphors assert the simile or presuppose it, there is also the issue of the degree to which the particular similarities that may exist between the two things, is also asserted or presup-

the statement "man is a wolf" would be unintelligible even as a metaphor if one were to ignore what "man" or "wolf" ordinarily (literally) means. The metaphor draws our attention to some similarity between men and wolves, but this similarity is between ordinary men and ordinary wolves.

That the drawing of attention to similarity is the essence of metaphor can be seen by taking the "new sense" view of metaphor seriously. On this latter view the statement "man is a wolf" becomes literally true because the statement is a stipulative definition of "wolf." By stipulating to a new sense of "wolf," the statement makes it true that man is a wolf. Artistic metaphor is reduced to tautology.[100] Moreover, such uninteresting truths create needless ambiguity, since the word "man" is already a perfectly good symbol for two-legged wolves. As Davidson puts it: on the "new sense" view of metaphor, "to make a metaphor is to murder it."[101]

Metaphor poses the identical problem for the criterial theory as that posed by simile, which explicitly asserts the similarity that metaphors only intimate, *e.g.*, "men are in some way(s) like wolves." The problem in either case is the complete lack of specification of the respects in which one item is like the other. To create a metaphor, or to use a simile, is to expect the audience to be creative themselves in constructing the similarities. This amorphousness regarding the possible discernible similarities—for everything is like everything else in indefinitiely many respects—precludes any possibility of specifying criteria for the "true" or "correct" interpretation of language used metaphorically.

Thus, the result for formalism would be devastating if metaphor

posed. *See* M. BLACK, MODELS AND METAPHORS 25-47 (1962). *See also* I. RICHARDS, THE PHILOSOPHY OF RHETORIC 89-138 (1936). While each of these issues is critical in deciding what meaning metaphorical expressions have, formalism's problems in interpreting metaphorical expressions are the same no matter what position one takes. The inability to limit the similarities underlying metaphor prevents deductions no matter what the semantic status of those similarities might be.

100. The more often the same metaphor is used, the more likely such usage will generate a new sense of the word. For example, dictionaries now use "fierce, rapacious, or destructive person" as a sense of "wolf." *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 2629 (3d ed. 1971). Recognizing this capacity of metaphor to create new senses of a word is not inconsistent with saying that a metaphorical use of a word is not to stipulate a new meaning. A metaphorical use of a word may initiate a more general usage that establishes a new sense of a word; the metaphorical use is not itself a stipulation of that new sense. Metaphors become dead when they become an established sense of a word, for they have lost the assertion of similarity that makes them metaphors. *See* W. ALSTON, *supra* note 53, at 99.

101. Davidson, *supra* note 99, at 34.

were widely used in law, or equally devastating if one could not be certain whether any particular use of words in law was metaphorical (in which event judges could never be certain they were to adhere to the established senses of words). In either case, the total lack of criteria for reaching a correct interpretation would preclude deduction of decisions. It might be thought, however, that this particular interpretational problem will not arise in legal decisionmaking. Legal rules are, after all, rather utilitarian tools to communicate to people what is expected of them and how they may direct their efforts to achieve their objectives. It would be an uncommon legislature that aimed at artistic expression in the legal rules it formulated, drafting statutes employing the metaphors of literature or poetry. Lawmakers may inadvertently use words metaphorically, but the metaphors used would likely be in the process of becoming established senses of the word, *e.g.,* "one must look both ways upon coming to a fork in the road." The problem of interpreting such "dying metaphors" is that of deciding which sense of the word was intended, the same problem posed by ambiguity generally.

If the foregoing is true, then there will be little metaphorical use of language in statutes, and judges can assume that they are to focus their attention upon the established senses of words. Yet there is one major area of legal rule-making in which metaphors abound. Judicially created rules posited in the opinions of judges are filled with metaphors which, because of stare decisis, other judges must interpret. Judges create metaphors such as "Chinese persons are Indians,"[102] or "A child who ignores no trespassing signs to go on another's land is invited onto the land."[103] Moreover, consider the string of metaphors that confronted Cardozo in *MacPherson v. Buick Motor Co.*:[104] a steamboiler is not an inherently dangerous instrumentality,[105] a coffee urn is an inherently dangerous instrumentality[106] and the like, stemming from various earlier New York products liability decisions.

The deducibility of subsequent decisions from such judicially created metaphors depends upon how "metaphor" is interpreted. If they

102. People v. Hall, 4 Cal. 399 (1854) (holding that Chinese persons were precluded from being witnesses by a statute stating that "No Black, or Mulatto person, or Indian, shall be allowed to give evidence . . . .").

103. For cases and discussion of the attractive nuisance doctrine, see L. FULLER, LEGAL FICTIONS 66-68 (1967). Much of what are called "legal fictions" are these kinds of judicially created metaphors.

104. 217 N.Y. 382, 111 N.E. 1050 (1916).

105. Losee v. Clute, 51 N.Y. 494, 21 N.Y.S. App. 141 (1873).

106. Statler v. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063, 155 N.Y.S. App. 1130 (1909).

are genuine metaphors, then formalism would be impossible for decisions applying such rules, for it would be impossible to formulate a correct statement of the similarities between Indians and Chinese, or between trespassing children and invitees. A judge, like an art critic, must be creative in discovering the important similarities. On the other hand, should the "new sense" interpretation of metaphor be adopted, then such rules present problems no greater than those involving ambiguous words. According to this view, the judge would in effect be saying, "for law purposes, henceforth there will be two kinds of Indians: American Indians, and Chinese 'Indians.' "

In truth, judicial statements such as the foregoing are both true metaphors and stipulative definitions of new senses of the words. For example, in subsequently interpreting the same statute (using the word "Indian" to name a class of persons ineligible to be witnesses), the earlier judicial statement is treated as a stipulation of a new sense to "Indian." Whenever a subsequent judge seeks to use the statement in interpreting the word "Indian" in other rules, *e.g.,* "only Indians may enter Indian Reservations," the judge must treat the earlier judicial statement as a metaphor. In doing so the judge must discover what was the underlying similarity between Indians and Chinese that prompted the original statement in order to determine whether that similarity should prompt him to repeat the statement in his decision of a different case.

This application of metaphor—both in discovering the similarity, and in deciding whether that similarity is relevant to a new judicial context—involves a judge in value judgments. Thus, a formalist must avoid construing any legal statements as metaphors. He may do this by construing all apparent metaphors as authoritative stipulations, limited in application to the rule under which they originated, or he can abjure the binding force of common law statements entirely.[107] What the formalist cannot do is accommodate the notion of precedent as our courts practice it, since it involves the manufacture and interpretation of metaphor.

107. Bentham's position supports this view. Bentham perceived that judicial statements, such as those quoted in the text, regarded either as metaphor or as stipulation of a new sense to words, were symptoms of the exercise of legislative power by courts: "A fiction of law may be defined a willful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it. . . ." C. OGDEN, BENTHAM'S THEORY OF FICTIONS xviii (1959). But Bentham did not perceive the inevitability of judges making statements such as those in the text. This Article posits that there is no properly pedigreed third premise allowing a deduction to succeed in any case; judges must manufacture such a premise, and this will often lead them to manufacture these metaphors.

c. *Vagueness:* The word "vague" is ambiguous. A word may be vague in three different senses. The most important kind of vagueness, for present purposes, is what might be called "intensional vagueness." "Intension" or "sense," to a logical positivist, means criteria. Thus "intensional vagueness" has to do with the impossibility of combining the criteria of any word to form a set of necessary and sufficient conditions. For example, William Alston analyzed the word "religion," a word which appears in important legal rules. He suggests nine criteria, which are worth quoting at length:

1. Beliefs in supernatural beings (gods).
2. A distinction between sacred and profane objects.
3. Ritual acts focused around sacred objects.
4. A moral code believed to be sanctioned by the gods.
5. Characteristically religious feelings (awe, sense of mystery, sense of guilt, adoration, etc.), which tend to be aroused in the presence of sacred objects and during the practice of ritual, and which are associated with the gods.
6. Prayer and other forms of communication with gods.
7. A world view, that is, a general picture of the world as a whole and of the place of the individual in it, including a specification of its over-all significance.
8. A more or less total organization of one's life based on the world view.
9. A social organization bound together by the preceding characteristics.[108]

Two aspects of this list make it intensionally vague, and each of them poses a serious problem for the formalist enterprise. To begin with, only a few of the institutions normally thought of as religious meet all of these criteria, yet those that do not are still called religions. Therefore some subset of this list must be sufficient, but it cannot be determined which or how many conditions will suffice. Consequently, when less than all nine criteria are satisfied—as in a case where a conscientious objector to the military draft disavows belief in supernatural beings—a judge cannot deduce that the practices before him are "religious."

Second, not one of these nine criteria—short again of all nine together—is necessary to establish the existence of religion. A metaphor from Wittgenstein[109] may help illustrate this. Imagine a rope of many strands. No single strand runs the entire length of rope. Thus cross

108. W. ALSTON, *supra* note 53, at 88.
109. L. WITTGENSTEIN, *supra* note 61, § 67, at 32.

sections of the rope from different points along its length will show different strands. Some cross sections may not share a single strand with some others. Nonetheless it is properly considered a single rope, because there is enough overlap amongst the comparatively short strands that a single rope of greater length is formed.[110] Similarly, for "religion," none of the nine criteria will always be present in every institution called a religion. None of them is a necessary condition for an item to be a religion. But many of these items are properly called religions, because the criteria they share sufficiently overlap.

Due to this second aspect of intensional vagueness, judges can not deduce that some institution or belief is *not* religious. For if no one criterion (or combination of criteria, short of all nine) is necessary, then the absence of that criterion's satisfaction cannot be a sufficient ground for determining that something is not a religion. These two aspects of intensional vagueness together prevent a formalist judge from deducing that something either is or is not a religion. Formalism thus fails when it encounters such words in many of their applications.

The second kind of vagueness stems from the impossibility of determining whether a given condition is or is not a criterion of the word at all. Consider, for example, the ordinary usage of "intentional." If a person performs an action, knowing to a substantial certainty that a prohibited harm will be brought about, but not having that harm as one of the purposes for which he acts, does he intentionally bring about that harm? If a person shoots a gun in order to kill a snake approaching him, does he intentionally alert the enemy, if his action has that consequence and he knew when he shot that it would? Or should one say that he alerted the enemy unintentionally? The only convincing conclusion to be drawn from several decades of ordinary language philosophy[111] is that there is no consistent set of linguistic intuitions which resolve this problem. The ordinary usage of "intentional" simply does not suggest an answer that will be generally agreed upon. Accordingly, there is a vagueness in the criteria of "intentional"; there is no answer

110. *Id.*

111. *Compare* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 82-88 (new ed. 1823), *and* S. HAMPSHIRE, THOUGHT AND ACTION 90-168 (1960), *and* H.L.A. HART, *Intention and Punishment,* in PUNISHMENT AND RESPONSIBILITY 113 (1968), *and* J. MEILAND, THE NATURE OF INTENTION 86-90 (1970) (concluding that knowledge alone may suffice), *with* G. ANSCOMBE, INTENTION § 25, at 41-45 (2d ed. 1963), *and* Fleming, *On Intention,* 73 PHILOSOPHICAL REV. 301, 307-10 (1964), *and* Fried, *Right and Wrong—Preliminary Considerations,* 5 J. LEGAL STUD. 165 (1975), *and* Kenney, *Intention and Purpose,* 63 J. PHILOSOPHY 642 (1963), *and* Locke, *Intention and Intentional Action,* in THE BUSINESS OF REASON (J. MacIntosh & S. Coval eds. 1969) (arguing that the actor's purpose marks the morally important distinctions).

to the question whether knowledge to a substantial certainty that a harm will occur, is a criterion of the word or not.

A third sense of vagueness is "degree-vagueness." Examples are the predicates, "is red," "is middle-aged," "is bald," and "is a heap." These predicates are vague in the sense that the class of things to which they might apply can be ordered along a continuum along which there are no natural breaking points. Ordinary usage does not fit any line that separates red from pink, middle age from youth and from old age, bald from not bald, and a heap from less-than-a-heap.

The problem posed for formalism by degree-vagueness is obvious. Any rule regulating the behavior of bald men in some way, for example, would produce many cases in which the deductions of formalism would be impossible. Searching for the criteria of "bald" would be of no help because the criteria for "bald" must be just as vague as "bald" itself if they are to accurately reproduce the way in which the word "bald" is normally used. Thus, if "no hair" were proposed as a sufficient condition of "bald," this would not reflect the common application of "bald" to many persons who have only a little hair on their heads. "*X* is bald if and only if *X* has no hair, *or* only a little hair," would be a more accurate set of criteria, but that is because one of the sufficient criteria—"a little hair"—is just as vague as "bald."

Any of these forms of vagueness renders formal deduction of legal decisions impossible in the "penumbral" area of the application of a word.[112] Whether this poses a serious problem for formalist theory depends upon the extent to which words in our everyday speech are vague. Some believe that intensional vagueness is a characteristic of only some words (which they call "cluster" words[113] or "polytypic" words[114]), while others believe that all words are intensionally vague in this sense, and that the things within the extension of any predicate will only bear a "family resemblance" to each other.[115]

112. "Since the law has to be expressed in words, and words have a penumbra of uncertainty, marginal cases are bound to occur. Certainty in law is thus seen to be a matter of degree." Williams, *supra* note 75, at 302. This early formulation of the "core/penumbra" distinction that later figured in the Hart/Fuller debate treats the distinction as a matter of vagueness. For alternative interpretations in terms of both strong and weak paradigms, see text accompanying notes 283-300 *infra*.

113. *See* H. PUTNAM, MIND, LANGUAGE AND REALITY 52 (1975); Gasking, *Clusters,* 38 AUSTRALASIAN J. PHILOSOPHY 1 (1960).

114. M. Beckner, *Biology,* in 1 ENCYCLOPEDIA PHILOSOPHY 310, 312-13 (P. Edwards ed. 1967); Kenney, *Intention and Purposes*, 63 J. PHILOSOPHY 642 (1963); Locke, *Intention and Intentional Action,* in THE BUSINESS OF REASON (J. MacIntosh & S. Coval eds. 1969).

115. This was Wittgenstein's own position. L. WITTGENSTEIN, *supra* note 61, § 67, at 32.

Speculation on this question is not conclusive. Yet an attempt to specify criteria for common words used in the law may demonstrate the probable pervasiveness of vagueness. Consider once again the phrase "manufactured product." The phrase appears to be vague in all three senses of the word. Suppose one suggests as a possible criterion, applicable at least to dead poultry, that the poultry be "plucked." "Manufactured product" would be intensionally vague because even if all the other eligible criteria, such as scalded, cooked, canned, and smoked, were known, it still would not be possible to specify what combinations of criteria to consider necessary or sufficient to identify a "manufactured product." Second, ordinary usage is not be exact enough to show that "plucked" is a criterion of "manufactured" at all. Finally, the phrase would suffer from degree-vagueness in that the suggested criterion—"plucked"—provides us with no answer for those dead chickens that have a few feathers left.

It is important to stress that confusion about such matters is not due to ignorance of the facts. One could know everything there is to know about the chickens in Kroblin's truck, as well as all the facts about the usage of "manufactured" and "product," both singly and combined in a phrase, and still be unable to deduce whether the things in Kroblin's truck are manufactured products simply because the phrase is vague.

Several remedies are often proposed as means for eliminating or reducing the vagueness of legal terms. First, vagueness can be remedied to some extent by explicit definition. Indeed, the law often attempts just such a remedy; *e.g.,* the criminal law usually defines "intention" such that knowledge is an independently sufficient criterion.[116] Such stipulations are not analyses of what a word such as "intentional" means. They are, "by definition," stipulative definitions of what it henceforth shall be taken to mean.[117] Because of this, such definitions must themselves be contained in authoritatively stated legal rules, for they could not be presented as an analysis of the ordinary meaning of the words appearing in substantive legal rules. Such authoritative definitions do not often exist in our legal system, with good

116. *E.g.,* MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962).

117. One cannot discover a set of equivalent expressions (criteria) to some word that does not preserve the vagueness of that word; if vagueness is not preserved, the expressions are not equivalent. "City of fifty thousand or more inhabitants" is not equivalent to "large city." The drafters of the Model Penal Code recognized this, for their "definition" of "intentional" in fact was a proposal to eliminate the word and its criterial vagueness. *See* MODEL PENAL CODE § 2.02, Comment 2 (Tent. Draft No. 4, 1955).

reason. Often the legislature does not know what it wants to accomplish precisely enough to accompany its substantive rules with vagueness-eliminating definitions of the words in those rules.[118]

Moreover, there is something futile about attempting to eliminate vagueness through explicit definition, for the words used to define a vague word will themselves be vague. An explicit definition of "man" as "rational animal," for example, merely substitutes the vagueness of "rational" and of "animal" for the vagueness of "man."

A second remedial factor stems from the possibility that the clarity of some applications of legal rules may be increased by increasing the number of vague words describing the situation. According to Quine, "[V]agueness is not incompatible with precision"[119] because of this possibility of overlapping vague terms. To borrow a metaphor, a painter can achieve more precise representations by thinning and combining his colors than a mosaic worker could achieve with his more precisely colored tiles.[120] Dworkin's argument that there is a right answer in every case, despite the vagueness of words, relies in part on a similar idea.[121]

It may seem paradoxical to think that increased precision can be achieved by *increasing* the number of vague words applicable to a situation, but the argument would be as follows. For each of the three types of vagueness, there remain instances when the words either clearly do or do not apply. An institution which possesses none of the nine criteria Alston lists for "religion" is not a religion; an institution which satisfies them all, is. Having hair all over your head is not to be bald; having no hair is to be bald.

The more vague words that are required by the law to be applied to a single thing (so the argument goes), the more likely it is that the thing will be part of the clear application of one of those words—in its "core" of included or excluded cases, rather than in the "penumbral" area. A more complete wording of the major premise in *Kroblin,* for example, would take into account another phrase appearing in the agricultural exemption of the Interstate Commerce Act, "agricultural (including horticultural) commodities" that are not manufactured products thereof. "Agricultural commodities" is probably as vague as "manufactured products," yet once it is known that an item has to be

118. H.L.A. HART, *supra* note 28, at 125.
119. W. QUINE, *supra* note 77, at 127.
120. I. RICHARDS, *supra* note 99, at 69-70.
121. *See* Dworkin, *supra* note 47, at 67-69.

both an agricultural commodity and not a manufactured product of it, it may be easier to "place" the item in question. Some items that might have been puzzled over about whether they were manufactured, can be excluded because they were clearly not agricultural commodities, *e.g.*, partly refined minerals. With eviscerated chickens, of course, this additional requirement does not resolve the problem because chickens are as arguably agricultural commodities as eviserated chickens are arguably manufactured products. The argument is that with more words, vagueness would eventually be eliminated altogether.[122]

As with definitions, however, this last hope is illusory. An overlay of vague words or phrases, each of which a judge must apply to some situation, only moves the vagueness around a bit. It does not eliminate or even diminish vagueness. Returning to the *Kroblin* example, the knowledge that the certification exemption applies only when the items carried are *both* agricultural commodities and not manufactured products, will clarify the status of those items that are in the penumbra of "manufactured products" (about which there would otherwise be doubt) but that are in the core of cases excluded by "agricultural commodities" (about which there can now be certainty). But supplementing one vague phrase, "not a manufactured product," with another, "agricultural commodity," will also confuse a number of cases that would have been clear with the first predicate alone. Suppose, for example, Kroblin's trucks had been carrying wild turkeys caught by farmers. While these might be in the core of items not covered by "manufactured products" (and thus the right to exemption from certification would be deducible), they are probably not in the core of items excluded from certification as "agricultural commodities" and thus Kroblin might need the certificate after all. For remember, the overlay of vague phrases requires that the item meet both the "agricultural commodity" and the "not a manufactured product" criteria if "no certificate required" is to be the result deduced. It seems possible that for every case clarified by this kind of overlay, another case is made less clear.

This overlapping of vague terms has a result that is quite devastating to the formalist enterprise. Any legal system worthy of the name will have a number of rules or principles *potentially* applicable to any factual situation. And there is no reason at all to think that all of those decisional standards license a decision in only one direction, as both

122. For additional optimism in this regard which is spelled out more fully than Dworkin's, see Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885 (1964).

"agricultural commodities" and "not manufactured products" do in the preceding example. Inevitably some potentially applicable standards will license one consequence to be deduced, and others to be negated. In any system relatively rich in decisional standards, vagueness will prevent rules being framed so that this kind of conflict cannot arise.

The well-worn example of *Riggs v. Palmer*[123] is a good illustration. The court assumed that a testamentary disposition to an heir who murdered his testator was a relatively clear application of the New York Probate Code. Nevertheless, the second ground for the court's decision was that the New York Probate Code conflicted with a fundamental maxim of the common law: no one shall profit from his own wrong. The heir, if allowed to inherit, would be profiting from his own wrong in an obvious way, so the court faced a conflict in the results dictated by the two standards.

Vagueness exacerbates this problem because it prevents a rule-maker from saying when his rules or principles do *not* apply. It is not enough to show that the facts of a case fit in the core of included cases of some predicate of some legal rule; to deduce one result, one must also show that they fit into the core of excluded cases of all predicates in all legal rules and principles that could dictate a contrary result. Otherwise, a judge could not deduce the result in the case; he would have a relatively clear application of one rule, but would remain in a quandary about the application of equally authoritative rules requiring the opposite result.

The greater the generality of the words used in legal standards, the greater the impossibility of excluding conflict among them. It only requires a few broad principles like those used in *Riggs* to rule out entirely the possibility of deducing the results in any cases at all.

In addition to remedying vagueness by definition or the overlapping of terms, it is also sometimes proposed that the vagueness of some legal standard be matched by a vagueness in the remedy attached to that standard. For example, "is negligent" is a degree-vague predicate in that the degree of fault or culpability attached to actions varies along a continuum with no natural breaking points. Recognizing this, comparative negligence statutes attach a remedy that itself is not an all-or-nothing affair, but which is capable of being as much a matter of degree as negligence itself: the degree of any party's negligence determines the percentage of the total damage for which he must be responsible.

123. 115 N.Y. 506, 22 N.E. 188 (1889).

How often can the law deal with vagueness in this way? Three limitations would appear to confine this kind of response to comparative negligence and very little else. First, for the strategy to work, there must be an ability in the judges or jurors applying the rule to rank-order cases along a continuum. They must be able to say when various defendants are more or less negligent than each other, when things are more red, less bald, and the like. Where legal predicates are only degree-vague, legal fact-finders should have such a capacity; where the words are intensionally vague, however, they may not. It is doubtful, for example that people have any capacity to rank-order degrees of causal contribution that two or more factors make in producing a single harm.

Second, for this third strategy to work, there must be a legal remedy that can be divided along a continuum. Damage awards in dollars and years of sentenced imprisonment are such remedies, but injunctions, declaratory relief, the quieting of title, and the requiring or awarding of licenses, certificates and the like, are not.

Third and most important, it must make sense to correlate the two sets of rank-ordered judgments such that any difference in degree in the legal standard is matched by a proportionate difference in degree in the remedy attached to that standard. The fault principle in torts, for example, is often said to make sense of such a correlation between the degree of negligence and the degree to which one must pay for the harm in the comparative negligence statutes. Most of the time, however, such correlations make less sense; for example, correlating both decreased prison time and the increased hospitalization time with the degree to which a criminal defendant is found to be insane or of diminished capacity. While irrationality is a matter of degree, it probably ignores too much of what is relevant in sentencing to arrive at some sentence simply by applying some percentage figure to the maximum sentence possible for any category of crime.

d. *Open texture:* The last of the particular characteristics of ordinary language that raise problems for the legal formalist is that of the open texture of natural kind words. Frederick Waismann coined the phrase "open texture"[124] to label those ambiguities which he considered to be inherent in all natural kind words.

124. Waismann, *Verifiability,* 19 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME 119, 123 (1945), *reprinted in* THE THEORY OF MEANING, *supra* note 54, at 35. For a definition of natural kind words, see text accompanying note 129 *infra.*

> Suppose I have to verify a statement such as "There is a cat next door": suppose I go over to the next room, open the door, look into it and actually see a cat. Is this enough to prove my statement? Or must I, in addition to it, touch the cat, pat him and induce him to purr? And supposing I had done all these things, can I then be absolutely certain that my statement was true? Instantly we come up against the well-known battery of sceptical arguments mustered since ancient times. What, for instance, should I say when that creature later on grew to a gigantic size? Or if it showed some queer behaviour usually not to be found with cats, say, if, under certain conditions, it could be revived from death whereas normal cats could not? Shall I, in such case say that a new species has come into being? Or that it was a cat with extraordinary properties? . . . Have we rules ready for all imaginable possibilities?[125]

The same arguments can be made for all natural kind words, even those used in natural science. Waismann uses the example "gold":

> The notion of gold seems to be defined with absolute precision, say by the spectrum of gold with its characteristic lines. Now what would you say if a substance was discovered that looked like gold, satisfied all the chemical tests for gold, whilst it emitted a new sort of radiation? . . . [W]e can never exclude altogether the possibility of some unforeseen situation arising in which we shall have to modify our definition. Try as we may, no concept is limited in such a way that there is no room for any doubt. . . . That is what is meant by the open texture of a concept.[126]

The open texture of words—that is, their incompleteness of criteria—comes about because of the essential incompleteness of any empirical description. Any situation can be truly described in an indefinitely large number of ways, "stretch[ing], as it were, into a horizon of open possibilities . . . ."[127] Hence, the very method of giving a lexical definition will carry over to the criteria so discovered by this "horizon of open possibilies." Fact, it seems, will always remain richer than diction.

Open texture is closely related to intensional vagueness.[128] The difference is that vagueness relates to doubt about the applicability of words as used in ordinary situations; open texture is only the possiblity

125. Waismann, *supra* note 124, at 121-22; THE THEORY OF MEANING, *supra* note 54, at 37.

126. Waismann, *supra* note 124, at 122-23; THE THEORY OF MEANING, *supra* note 54, at 38.

127. Waismann, *supra* note 124, at 124; THE THEORY OF MEANING, *supra* note 54, at 39.

128. Waismann, *supra* note 124, at 123; THE THEORY OF MEANING, *supra* note 54, at 38. When H.L.A. Hart uses Waismann's concept of "open texture," Hart seems to mean both vagueness and open-texture. H.L.A. HART, *supra* note 28, at 124.

of vagueness, in that it demonstrates that in new situations that can be envisioned but which have not yet materialized, there would be doubt as to the applicability of the word.

The problem raised by open texture for a legal formalist does not differ from that posed by vagueness; each of these characteristics of language shows that often there can be no sufficient conditions for the application of a word to describe a situation. Open texture perhaps raises this problem less obviously than does intensional vagueness, because open texture is itself a less obvious characteristic of language; but the problem itself is essentially the same.

The probable pervasiveness of open texture and intensional vagueness in natural languages raises doubt about the criterial theory of meaning itself. If no term has a set of conditions necessary and sufficient for its correct application, what can be made of the claim that this is nonetheless what the meaning of a word is? The following section addresses this question.

2. *Problems for the Criterial Theory of Meaning Posed by Particular Kinds of Words*

In contrast to the rather piecemeal critique of the criterial theory of meaning set forth above, the problems to be examined now fundamentally question whether meaning has anything at all to do with criteria. The argument below asserts not only that most words of both ordinary speech and scientific theory do not attain the ideal of having necessary and sufficient conditions for their justifiable use, but that most words do not even approach that ideal because it is irrelevant to meaning in the first place.

The argument differs with respect to different kinds of words. Among words that appear or could appear in legal rules there are two classifications which should be made. The first principle of classification has to do with whether a word is a natural kind word or not. Natural kind words are common individuated nouns like "dog" or "lemon," mass nouns like "gold" or "water," or the names of natural qualities, like "red" or "soft." Such words derive from some division of nature adopted in ordinary life. These divisions are based on intuitive notions of similarity which some believe to be innate.[129] The clearest examples of non-natural kind words are theoretical words and specifi-

129. W. QUINE, *Natural Kinds,* in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 123 (1969). On natural kind words, see generally H. PUTNAM, *supra* note 113, *passim*; Wilder, *Quine on Natural Kinds,* 50 AUSTRALASIAN J. PHILOSOPHY 263 (1972). *See also* N. GOODMAN, FACT,

cally defined words, such as "force-field," "election," "psi function," "title," "estate," and "malice." These words take their meaning not from our intuitive notions of natural kinds, but rather from the dictates of the theory that uses them. The extension of such terms is accordingly not a set of objects, qualities, relations, actions, or events that are found in nature. Rather, the extension of terms such as "title" or "psi function" is the set of abstract entities posited to exist by the legal or scientific theory that uses the theoretical terms.

It is debatable whether the dichotomy between natural kind words and theoretical terms exhausts the sorts of words that appear in legal rules. The following do not, at least obviously, fit either category: (1) mental predicates; (2) "nominal kind" words that describe artificial or social artifacts, such as "lawyer," "sloop," "pencil," and "bachelor"; (3) dispositional terms, which name propensities of objects to behave in certain ways rather than those objects or their behaviors themselves; and (4) ethical words, such as "good," "unjust," "good faith," et cetera.

The discussion that follows is accordingly sorted around these six kinds of words. Left open for argument is whether all non-theoretical terms can be classified as natural kind words. Opponents of the criterial theory's account of the meaning of natural kind words tend to assume that their anti-criterialist arguments apply to all non-theoretical terms. Whether this is so will be discussed later.

The second principle of classification is the distinction between words drawn from ordinary speech and words invented by makers of the scientific or legal rules in which the words appear and which have uniquely scientific or legal definitions. "Motive" is a word of the first sort; "malice," as used in murder statutes, is a word of the second sort. Intermediate cases are words like "intentional," which are used in ordinary speech but arguably have a somewhat different meaning as used in legal rules.

It will turn out that most words of scientific theory are neither ordinary nor specially defined terms, whereas all words of legal theory are either specially defined terms or are words of ordinary speech. If this were not so (that is, if all terms used in scientific and legal theories were specially defined terms), and if all words of ordinary speech were natural kind words, these two principles of classification would sort

FICTION, AND FORECAST 84 (1955) (discussing "projectible predicates," a notion about natural kind words).

words in the same way. That neither of these things is obviously true is the justification for this already too long introduction.

a. *Natural kind words:* Heretofore it has been assumed that there were only two possibilities, broadly speaking, for a theory of meaning. Either one could adopt the slogan, "extension determines intension," as does the referential theory in a very straightforward way, or one could adopt the more plausible positivist slogan, "intension determines extension." Not yet examined is whether there is room for a theory of meaning that rejects both of these propositions, and which holds that the extension of a term is determined in some way independent of the sense the term may have in the language. Hilary Putnam, in the course of his critique of the criterial theory, has proposed such an alternative theory, and what follows is an adoption of his argument.[130]

Putnam's conclusion is perhaps the place to start. As has been shown,[131] all or most words are vague with respect to their criteria, in one or both of two ways: There can be doubt about whether a condition is or is not relevant to the meaning of a word, or doubt about how all conditions that are relevant are to be combined to form sets of necessary and sufficient conditions. Of the latter form (intensional vagueness) it was concluded that for a word such as "religion," no single condition could be said to be necessary, nor could any grouping short of all relevant conditions be said to be sufficient because of the open texture of "gold." Putnam's more striking conclusion is that the entire set of proposed conditions is neither necessary nor sufficient, even for words that arguably are not intensionally vague. Consider again the word "gold." A positivist account of the meaning of gold would be a set of criteria, including perhaps the predicates: "is yellow," "is very precious to most cultures," "is malleable in its pure state," et cetera. The earlier conclusion was that a set of such criteria can never be sufficient. Putnam's conclusion goes further: the whole set of such criteria is not even necessary. A black, nonmetallic substance, harder than diamond and not valued by anyone, might be gold without any change in the meaning of the word "gold."

This startling possibility comes about because of the following considerations. One's use of the word "gold" (and all natural kind

130. *See* H. PUTNAM, *supra* note 113. The negative conclusion of Putnam's argument—that the criterial theory is wrong—is presented in this section; Putnam's conclusion about what a good theory of meaning looks like is discussed at notes 283-300 and accompanying text *infra*.

131. *See* notes 108-23 and accompanying text *supra*.

words) is what Putnam calls "indexical." A word is indexical if its extension changes from context to context. Thus, "I," "here," "now," and "this" are all highly indexical words. Yet it is difficult to maintain that their meaning is different with every use, or else how does one understand someone who uses them? Yet if their sense is the same despite the different referents, then one cannot maintain that the sense of a term determines its extension.

Indexicality is a matter of degree. "Gold," "water," and "lemon" are somewhat indexical, due to the intentions with which a linguistic community speaks when it uses them. When a person uses a word like "gold," he intends to include anything which is just like some standard examples (paradigms) that the community shares. This is in accordance with what linguists think happens when children begin to learn the meaning of words.[132] Children learn by ostensive definition: they are shown items that are clearly within the extension of a word, *e.g.,* pieces of gold, and associate the object with its symbol, the word. Thus a word like "gold" is partly indexical because its extension is determined by bearing some similarity to standard examples of gold.[133]

Determining the extension of a natural kind word is thus not a matter of facing an item with a checklist of the criteria for that word and checking off its properties to determine whether it is a piece of gold. Rather, it is assumed that gold, water, lemons and other natural kind words have a hidden nature, a basic and fundamental similarity to standard examples. It is this hidden nature that truly determines whether the particular item is to be classified as "gold."

All of this so far may sound quite compatible with the criterial theory of meaning. For a positivist too can admit that we learn our first words by ostension and that all natural kind words have paradigmatic examples. A positivist would say that the proper procedure is to examine the paradigmatic examples carefully and to abstract from them the criteria they have in common. Those criteria can then be formed into a set of necessary and sufficient conditions.

Putnam's important insight is that one cannot do this to paradigm

132. Nothing in Putnam's argument logically depends on this learning theory being true. If the theory is true, it is helpful only in explaining how a linguistic community might come to have indexical intentions.

133. [W]ords like "water" have an unnoticed indexical component: "water" is stuff that bears a certain similarity relation to the water *around here*. Water at another time or in another place or even in another possible world has to bear the relation, same L, to *our* water *in order to be water*.

H. PUTNAM, *supra* note 113, at 234 (emphasis in original).

examples and accurately reflect our intentions in using words such as "gold," either in ordinary speech or in science. For what the positivist presupposes is that users of the word *know* the similarities that the various paradigmatic examples of "gold" bear to one another. The positivist assumption is that if the word has a present use, *i.e.,* if it is significant, then that significance can be articulated in terms of criteria.

Why this is wrong is better seen by a different example. Consider the use of the word "polio" before the discovery of its virus origin. The criteria of "polio" were the various symptoms by which doctors diagnosed the disease in people. Yet, if the meaning of "polio" as then used was just "the presence of the following symptoms," then the following sentences would be nonsensical: (1) "I think the person has polio, despite the absence of any of the symptoms," or (2) "I know all of the symptoms are present, but I do not think he has polio."[134]

Doctors, however, said such things frequently. To make sense of these expressions, one must reconstrue what "polio" meant before its origin was discovered. "Polio" meant anything that bore some relation to standard examples of polio. The doctors understood, however, that they did not know what that relationship was. They literally meant more than they knew. They assumed polio had a hidden nature or essence that science should discover. It was this unknown, hidden nature that determined the extension of "polio," not the criteria in use, the symptoms of polio.

The same is true of the current use of "gold" and "polio." There are scientific theories about the "nature" of these items—in terms of atomic weight, or viri. Yet they are just that, scientific theories. They do not constitute a set of statements that are necessarily true because of the meaning of "gold," for example; they simply represent the best understanding we have to date about what gold really is. As theories, they can be proven false. They are thus not analytic truths.[135]

For these reasons the meaning of a natural kind word cannot be a set of necessary and sufficient conditions. One may further clarify these reasons through an examination of the two types of criteria that

134. This example is from H. PUTNAM, *supra* note 113, at 329.

135. One might be tempted to say that the theories give us new tests for "gold" and "polio," and that these tests can be made into necessary and sufficient criteria for these words. Yet such tests are totally theory-dependent. This dependency is true even if we avoid ordinary language, and attempt to stipulate a meaning to "gold." *See* notes 168-75 and accompanying text *infra* for a discussion of why operational definitions of theoretical terms are not possible if "giving a definition" is to be an analytic activity distinct from discovering more facts about the world.

most plausibly might be suggested for natural kind words: the indicators used in ordinary speech for predicating "is gold" or "has polio," and the hidden nature scientific theory postulates. Ordinary indicators, such as "yellow," "malleable," and "valuable" for gold, are not even collectively necessary and sufficient conditions. In the first place, those indicators are disregarded whenever scientific theory about gold contradicts them. If a black, very hard substance which is not valued by anyone is discovered—a substance that nonetheless shares the atomic structure of gold, it will be called gold, even though it satisfies none of the ordinary indicators. Calling that substance "gold" does not shift the meaning of "gold." Rather, when one uses the word "gold," one intends to include in its extension any substance which shares the hidden nature of those things that are surely gold. Additionally, it may be that there are more instances of "black gold" than of yellow gold. Indeed, pure gold is more white than yellow. If this is so, then the standard examples of gold would not be "normal" members of the set of things gold, but rather a deviant variety of gold that happened to have been discovered first. For this second reason, the ordinary characteristics of those standard examples cannot simply be abstracted and turned into criteria. For how can one discern which characteristics the normal members share when one cannot know—with the certainty of a definition—which members are in fact normal members of the set of things that are gold?

Similarly, the scientific theory about the hidden nature of gold cannot be transformed into a set of necessary and sufficient conditions for a thing being gold. This is so for two reasons. First, at times there is no reliable theory about the hidden nature of natural kind words. An earlier example was polio. A present one would be "multiple sclerosis." In such cases there is only a set of everyday indicators, judged to be inadequate by a theory presumed to exist but not yet known; second, even when a theory is available, it is still no more than a theory. A theory may change, for it is dependent on the advance of science. A theory cannot provide a set of conditions analytically necessary and sufficient from which the sentence, "it is gold" may be deduced. The theory can only provide a set of scientific hypotheses that are relatively central to the web of common belief, but nonetheless open to revision and improvement. "Whale," for example, was once thought to mean a species of fish. More advanced scientific theory classifies whales as mammals. Such theory-change about what whales are is possible only if one does *not* freeze the prevailing as a necessary definition of whale.

b. *Mental predicates:* The force of the argument just concluded seems to depend on a word having in its extension observable, paradigm examples. It is these examples, with their at least partially known nature, that make all criteria provisional and non-analytic. However, mental predicates, a class of predicates very important in the law, seem to escape this argument entirely. To what natural kinds of things or qualities can one point if the things and qualities one is discussing are mental? Mental words cannot be learned by ostension, nor can their meaning be guided by paradigm instances in their extension, for there are no things or qualities that can be observed. Consequently, it may seem that for such words to have meaning at all, that meaning must be determined strictly by their sense, that is, by the verifiable criteria of their application.

This is precisely the position of logical positivists on the meaning of mental words. If one adheres to the criterial theory of meaning and the empiricist thesis, one is led ineluctably to the position known as logical behaviorism.[136] If one requires that mental words have verifiable criteria, the only items out of which one could construct criteria are instances of behavior. Private mental experiences, assuming they exist, cannot serve as such criteria. And physiology, although in principle open to public inspection, is at the moment only speculatively correlated with mental states such as pain, fear, alertness, anger, or hopefulness. The criterial theory of meaning requires more than such speculative correlations. Conditions are needed that are *presently* necessary and sufficient for the application of such words. Accordingly, for mental words, behaviorism is the only theory of meaning consistent with positivist standards.

Logical behaviorism asserts that the meaning of any mental word is to be found in the list of criteria describing the subject's behavior or, more usually, his disposition to behave a certain way. The problem with behaviorism as a theory of meaning for mental words is that no combination of statements about behavior or dispositions to behavior seems plausible as an adequate translation of the meaning of any mental word.

Consider two well worn examples in philosophy, "pain" and "dream." A list of behavioral criteria for "pain" might contain the following:

136. *See generally* note 73 *supra*.

X is in pain $\equiv$ X has:	1.	Tendency to say "ouch," "it hurts," "I am in pain," "(expletives deleted)," et cetera;
and? or?	2.	Tendency to grimace, wince;
and? or?	3.	Tendency to remove self from situation;
and? or?	4.	Tendency to avoid such stimuli in the future.

Any such list of criteria, even taken collectively, cannot be necessary or sufficient for saying that someone "is in pain." There are counterexamples both ways. To begin with, the list collectively is not necessary. For example, if a person is given curare, the Brazilian arrow poison that paralyzes but does not render one unconscious, there is no pain behavior. Is there therefore no pain? Only a behaviorist would accept curare as a general anesthetic—and then probably only once. Analogously, the list collectively is not sufficient. For example, a person may have learned pain behavior, including nicely shaded verbal discriminations. Suppose the person is then given an operation that eliminates painful sensations. In an appropriate circumstance (*e.g.,* the person putting his hand on a hot stove) he emits what he has learned to be the appropriate response (the above list). Is the person in pain if he feels no pain?

Any behaviorist meaning of "dream" is even more implausible, for the only possible behavioral criterion for the predicate "has dreamt" is that the dreamer has the ability, on awakening, to describe events that he will also say did not really occur. This definition produces several unacceptable consequences. By this definition, if the dreamer has no memory of the dream, he has no dream; if he has different memories, he has different dreams (no matter how slight the difference—and Freud tells us that dream reports always differ somewhat).[137] The most remarkable result of this definition is that the present tense use of "is dreaming" would make no sense; "is dreaming" has no meaning, because it has no criterion. One who is asleep has no ability to say that he is dreaming—and what other criterion is there?[138]

137. *See generally* 4 S. FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 43-47 (1968); 5 *id.* at 512-32.

138. It may seem that recently discovered phenomena such as rapid eye movements (REM) and brain wave patterns (EEG) might stand as new criteria for dreaming. Yet a critical theorist cannot accept them, for how are they correlated with the ordinary idea of "is dreaming," when there is no such idea (because there are no behavioral criteria)? Since there are no definitive tests of "X is dreaming at time t," the expression is nonsense; to give it sense (criteria) is thus not to make a scientific discovery about what dreaming is. It is merely to stipulate a sense to a word.

These counterexamples to behaviorist analyses of mental words show that the logical positivist theory of meaning fails to allow for the open-endedness of the intentions with which a linguistic community uses its words, be they mental or natural kind words. Current knowledge of the real nature of pain, dreams, and thoughts is far less than was the extent of knowledge of polio prior to Salk's research. Even the general nature of the kind of things that mental states might be is unclear to a speaker when talking about these states. Plausible arguments have been constructed to show that when speakers talk of mental experiences, the speakers are talking about: an irreducibly distinct class of things that exist in time, but not in space; straightforwardly physical states of the brain; or functionally defined states which may or may not have physical correlates.

The criterial theory of meaning fails because it cannot accommodate ignorance about such things. Rather, it imposes a straight-jacket of criteria. In doing so, criterial theory leads directly to behaviorism and away from what is actually meant by the use of mental words. The paralyzing sterility of logical positivist presuppositions is well illustrated by the failure of behaviorism in psychology, a lesson that those legal theories relying on the same presuppositions could well take to heart.

The above selection of examples may seem unfair, and accordingly, the analysis may seem to suffer from the kind of "inadequate nutrition" Wittgenstein warned against, for it is relatively standard in the philosophy of the mind to divide mental words between experiential words and those which form part of the "action-calculus." The counterexamples above, "pain" and "dream," are both experiential words and behaviorism has often been thought to be inadequate regarding such words precisely because it seems to leave out the essential, namely, mental experience. Much more plausible, however, is a behaviorist translation of the words used in the action-calculus, words such as "belief," "intention," "motive," "desire," "hope," "fear," and the like, because such words have a more obvious connection to behavior.

There are a variety of reasons why even this restricted application of the logical positivist theory of meaning to mental words will not suf-

"Blapping" would have been as appropriate a label for the REM/EEG phenomena, and much less misleading because it would not have (falsely) suggested that there was any connection between what is ordinarily meant by "dream" and those phenomena. For an example of a criterial theorist who indeed says all of this about dreaming, see N. MALCOLM, DREAMING (1959). Malcolm's book was critiqued by Putnam. Putnam, *Dreaming, and "Depth Grammar,"* in ANALYTICAL PHILOSOPHY 211 (R. Butler ed. 1966), *reprinted in* H. PUTNAM, *supra* note 113, at 304.

fice. Particularly relevant to law is the following objection. "Desire," "belief," and the other mental words we use to describe and to explain human action, all take what are called "intensional objects." While such "objects" were once construed as existing things,[139] they are better regarded as facets of language than of the world—that is, one does not simply desire, intend, or wish in the abstract; one desires *that* something be the case, intends *that* certain things occur, et cetera. Intensional objects are those propositions, not things, grammatically necessary to complete a sentence using such mental words.

The objection to behaviorism stems from the fact that desires, beliefs, and other mental states used in the action-calculus are individuated by their intensional objects. What counts as one desire as opposed to another desire depends largely on what the objeet of that desire is. One of the striking facts about mental language is that it is "opaque"; that is, the substitutivity of identicals does not hold for intensional objects.[140] Hence, no aggregate of behavior can pinpoint the object of a

139. Brentano asserted that "every mental phenomenon is characterized by what scholastics of the Middle Ages called the Intentional Inexistence of an object which we would call . . . the reference to a content, a direction upon an object . . . ." F. BRENTANO, PSYCHOLOGIE VOM EMPIRISCHEN STANDPUNKT —— (1874), *translated and reprinted in* R. CHISHOLM, REALISM AND THE BACKGROUND OF PHENOMENOLOGY 39, 50 (1960). The word "Intentional" is capitalized to distinguish this characteristic from the more familiar "intention," and "intentional" of ordinary speech. Modern philosophy views Intentionality as a characteristic of mental language, not of underlying mental phenomena. Roderick Chisholm's explication of the concept is in terms of three criteria: (1) A sentence is Intentional if it uses a name or description in such a way that neither the sentence nor its contradictory implies either that there is or is not anything to which the name or expression truly applies. "I hope for a 60 foot sailboat," for example, does not imply there is a 60 foot sailboat. (2) A sentence is Intentional if it contains a propositional clause the veracity of which is not implied by the sentence as a whole, or its contradictory. "I hope that it will rain," for example, does not imply that "it will rain" is true or false. (3) A sentence is Intentional if codesignative names or descriptions cannot be substituted while at the same time preserving truth. One may, for example, order the largest room in some inn; even if the largest room is identical with the dirtiest room in the inn, one cannot substitute the second description for the first; the dirtiest room in the inn was not ordered. R. CHISHOLM, PERCEIVING: A PHILOSOPHICAL STUDY 170-71 (1957).

140. For an explanation of this notion, as well as its relation to the idea of Intentionality, see Cornman, *Intentionality and Intensionality,* 12 PHILOSOPHICAL Q. 44, 45-46 (1962). An extensional language is a language of which two things (at least) must be true: its logical connectives must be truth functional, and one must be able to substitute numerical identicals without change of truth value. These are thought to be necessary requirements for a scientific language, for they allow scientific laws to be formulated without regard to varying descriptions of the particular things covered. Whatever can be truthfully said of the Morning Star can also truthfully be said of the Evening Star, because they are one and the same thing—Venus. This substitution-preserving-truth is not possible for the mental predicates we use for describing and explaining the actions of persons. Such vocabulary is accordingly said to be intensional, in that substitution-preserving-truth now depends on sameness of meaning (inteusion) of descriptions. If we are not talking about the Evening Star itself, but about a person's beliefs about the Evening Star, the fact that

belief or a desire, for even if behavior seemingly "pointed to" some object in the world as the goal of the actor, it would not differentiate that object under one description as opposed to another. Yet as the goal of the actor, *i.e.,* as the intensional object of his intention, desire, et cetera, it is so differentiated. This is what the non-substitutivity of identicals in opaque constructions means. One could not, for example, distinguish a desire to stand on Cicero's grave from a desire to stand on Tully's grave on the basis of behavior of someone tending to place himself on that grave, for Cicero and Tully were one and the same person, and thus, there is only one grave. Yet under the opaque interpretations[141] of "desire" the two desires are different. An actor may desire to stand on Cicero's grave, but ignorant of the fact that Cicero was Tully, not want to stand on Tully's grave. No extensional language of behavior or its dispositions can reproduce this intensional feature of mental language. Thus, no equivalence may be asserted between behavioral criteria and a mental word such as "desire."[142]

Aside from constituting an argument against the behaviorist, logical positivist interpretation of mental terms, the intensional nature of mental language raises an independent difficulty for formalism. Contrary to the arguments regarding natural kind words set forth previ-

"Evening Star" and "Morning Star" name the same thing is no guarantee that the one description may be substituted for the other and still preserve truth. For the classic treatment of this, see W. QUINE, *Reference and Modality,* in FROM A LOGICAL POINT OF VIEW 139 (1961). It is because of this unamenability to the tools of modern logic that many philosophers, such as Quine, give up on there being a science of the mental in intensional terms. *See* W. QUINE, *supra* note 77, §§ 40-47, at 191-232 (1960).

141. As noted in the earlier discussion of intensional ambiguity, mental words sometimes may be interpreted transparently. *See* note 80 *supra*.

142. It may seem that this objection proves too much, for what in the world could come "under a description" to meet the apparent way in which we individuate mental states such as desires and intentions? No phenomenon, one might think, appears with a canonical description printed on it, and this is true of brain states no less than natural objects. Yet there is a phenomenon that "comes under a description"—namely, a description. We all have the capacity to talk about our mental states, and thus to issue descriptions of their intensional objects. Moreover, we grant a person's first person, present tense descriptions of his mental states an authority unparalleled in other areas. If someone who knows the language sincerely tells us that he intends to go downtown, then ordinarily it is true that he indeed intends to go downtown at the time he makes the statement. Conversely, if he does in fact intend to go downtown, then he ordinarily knows this fact and can avow that he has this intention. These epistemic features of first person mental statements (known, respectively, as incorrigibility and self-intimation) have long been noted in philosophy and have been used in the law even longer in its adjudications involving such states. Some adjustments have to be made for *unconscious* mental states. See Moore, *The Nature of Psychoanalytic Explanation,* in PITTSBURGH SERIES IN THE PHILOSOPHY AND HISTORY OF SCIENCE (1981), *reprinted in* 3 PSYCHOANALYSIS & CONTEMP. THOUGHT 459 (1980). (a discussion of the epistemic features of mental language in relation to "unconscious").

ously,[143] assume there are necessary and sufficient conditions for natural kind words and, thus, that one could connect certain factual descriptions with certain legal descriptions via analytic truths of the requisite sort. Assume further that mental words appearing in legal rules always take for their intensional objects propositions containing nothing but natural kind words. The intensional nature of mental discourse still will not allow the formalist deduction to proceed.

Two examples will clarify this. First, suppose a legal rule makes it relevant to the disposition of some legal issue that someone believe another to be a bachelor—*e.g.*, "If any man believes another to be a bachelor, he shall invite him to a disco-dance." Suppose the fact proven is that the defendant, who extended no invitation, believed that another was an unmarried male. Now even if it is analytically true that all and only bachelors are unmarried males, one cannot infer that the accused believed the man to be a bachelor. Whether the accused believed him to be a bachelor depends upon mental facts beyond the belief proven. In addition, the accused must know the general truth that all unmarried males are bachelors, and he must have drawn the conclusion that therefore, this unmarried male must be a bachelor. One must prove the belief the statute calls for under the description of the intensional object which the statute itself uses, and no other, for the analytic connections that may (hypothetically, here) hold between "unmarried male" and "bachelor" do not hold for the corresponding belief states with these words as their objects.[144]

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143. *See* notes 130-35 and accompanying text *supra*.

144. All of this can be seen more easily when symbolized. Let "(x)(y)[y]B(Bx)⊃Pyx" represent the hypothesized legal rule, namely "if anyone believes that anyone else is a bachelor, the first such person shall invite the second to a disco-dance"; let "yB (Ux)" represent the facts proven, that y believes that x is an unmarried male; and let "(x) (Ux≡Bx)" represent the hypothesized analytic truth, that all and only unmarried males are bachelors. From the legal rule, the facts and the hypothesized analytic truth, nothing follows at all.

1.	yB (Bx) ⊃ Pyx	Legal Rule
2.	yB (Ux)	Facts Proven
3.	(x) (Ux≡Bx)	Analytic truth

The third premise does no good. What is needed is:

4. (x)(y) [yB(Ux) ≡ yB(Bx)] (*i.e.*, for all persons x and y, if y believes that x is an unmarried male, then y believes x is a bachelor, and vice versa).

The fourth premise, however, far from being an analytic truth, is false. People may believe another is unmarried, but not that he is a bachelor; they may not know that a bachelor is an unmarried male. Indeed, even if they do know that all unmarried males are bachelors, and even though they do believe he is an unmarried male, they still might not believe that x is a bachelor. Our use of "belief" does not assume that people are perfectly rational in seeing the logical implications of their beliefs. We are accordingly not entitled to ascribe a belief to someone just because he has

As a second example, imagine a statute making dispositive of some legal issue the predicate, "intended to wound the victim." The facts proven may be that the accused intended to cut the victim with a knife. Even if cutting someone with a knife is *necessarily* to wound that person, the legal question cannot be resolved from the supposed analytic truth. For we cannot infer that X intended to wound Y from his admitted intent to cut Y with a knife, even though all cuttings with a knife are woundings. The only intent that will satisfy the rule is an intent *to wound*—an intent that adopts the statutory description.[145] The problem with intensional discourse, then, is that extensionally equivalent descriptions, whether used in law or science, cannot be substituted in intensional contexts.

Mental words thus present an additional problem of classification for formalist theory. They not only lack necessary and sufficient conditions, as do natural kind words with physical objects or qualities in their extensions; but, in addition, mental states cannot be classified so well as physical objects and qualities, because of this intensional feature of their individuation.

c. *Nominal kind words:* If all words of ordinary speech were natural kind words or mental words, this discussion of the inadequacies of the criterial theory could conclude with an examination of theoretical words. Unfortunately for the brevity of exposition, not all words of ordinary speech can plausibly be construed as either natural kind of mental words.

As an opening wedge, consider once again negative existential statements, this time with classes as their subjects rather than some particular things, *e.g.*, "Unicorns do not exist." To say that "unicorns" is a natural kind word would imply that there are at least some examples of unicorns on which our indexical intentions may operate to say, "anything just like *that* is a unicorn." If one construes the meaning of "unicorns" as being its sense—a collection of properties, such as having one

two beliefs, the objects of which imply the object of the third. From B (p≡q) and B(p), B(q) does *not* follow, even though from p≡q and p, q of course follows.

145.

From 1.	(x) (y) [yI(Wyx) ⊃ Py]	Legal Rule
2.	y I(Cyx)	Facts Proven
3.	(x) (y) (Cyx ⊃ Wyx)	Analytic Truth

Again, nothing follows at all. What is needed, again, is an analytic truth of the form, (x)(y)[yI(Cyx)⊃yI(Wyx)], which is false. An intentional cutting is not always an intentional wounding, even if all cuttings are woundings.

horn, et cetera—no such difficulties are encountered.[146]

If "unicorns," "witches," and the like were the only examples of "unnatural" kind words, this category of words would be only of philosophical interest, for laws which regulate the behavior of unicorns regulate nothing (although some legal officer might incorrectly round up some rhinos, just as Salem legal officials treated some putative witches badly). Meaning for purposes of legal theory would thus be only as Putnam analyzes it.

Consider also the notion of a "bachelor." Some have argued that being an unmarried male person is not necessary and sufficient for being a bachelor, and that the connection of "unmarried male person" to "bachelor" is accordingly not analytic: Gilbert Harman stated that "A common example of a supposed analytic statement is *bachelors are unmarried*. This shows how philosophy becomes tied to an outmoded morality. As non-philosophers know, in this era of unstable marriages there are many bachelors who are still technically married."[147] Surely this misses the point. A bachelor who is married is not just an ineligible bachelor; he is not a bachelor at all. If there is any room for argument here, it is because of the beginning of an ambiguity about "bachelor": either as an unmarried male or as a male no longer mentally committed to another. What is implausible is to think that "bachelor" is a natural kind word, the extension of which is determined by the hidden nature of standard examples.

Putnam recognizes this. "Bachelor" is what he calls a "one-criterion word."[148] Granting the existence of such words is not much of a concession, for as Putnam recognizes, they are quite rare in natural language. Thus, if the only examples of non-natural kind words were one-criterion words, Putnam's theory of meaning would still extend across almost all of our language. It does not, however. There are many words that, although they are not one-criterion words, still resemble

146. *See* B. RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY 167-68 (12th impression 1967). *See also* W. QUINE, *On What There Is,* in FROM A LOGICAL POINT OF VIEW 1 (1961) for a famous use of Russell's analysis of descriptions to resolve the old Platonic riddle of statements about nonexistent entities. Nothing in the text presupposes that Russell's account of proper names is correct. Proper names may well rigidly designate that which they name, as Saul Kripke has suggested. That would not mean that all common nouns rigidly designate natural kinds; indeed, the thrust of this section is to indicate that some nouns do not rigidly designate natural kinds. ("Rigidly designate" is the Kripkean analogue to Putnam's "fixing the extension with indexical intentions.").

147. G. HARMAN, THOUGHT 105 (1973).

148. *See* H. PUTNAM, *supra* note 113, at 56-59, 135, 152, 244 (particularly the extended discussion at 56-59).

"bachelor" in that they have their meaning determined by some criteria, however numerous or loose in their combination and individual precision. Think of all the non-natural kinds of things that exist, and the words which are used to name them: sloops, lawyers, manufactured products, pencils, hair brushes, and can openers are only a few examples. One does not seem to fix the extension of the words describing these classes of things by looking to paradigms with hidden natures; rather, one does so in just the way the traditional (criterial) theory asserts, by looking to the properties of the things in question. No hidden nature is assumed about such things because they are not natural things but artifacts that have been manufactured (or in the case of lawyers, trained). We have created the things to which the words refer and thus do not assume any hidden nature to such things other than that conventionally assigned them when they were invented.

Putnam explicitly disagrees with the foregoing, using as his example "pencil."[149] As a thought experiment, Putnam imagines that pencils are organisms, stating "We cut them open and examine them under an electron microscope, and we see the almost invisible tracing of nerves and the other organs. We spy upon them, and we see them spawn, and we see the offspring grow into full-grown pencils."[150] Putnam urges that in such a turn of events, we would say "pencils are organisms;" not "the things we always thought were pencils turn out not to be pencils; there are no pencils." These things—whatever their hidden nature might turn out to be—would still be assumed to be pencils. Our intentions would be indexical, and "pencils" would behave just like a natural kind word that had no property, such as, "is an artifact intended to be written with," or collection of properties that is constitutive of its meaning.

If Putnam's theory is correct, it seriously undermines criterial theory. It is probably not correct, however. First, Putnam's "pencil" example begs the very question it was designed to answer—that is, whether pencils are natural kinds of things. The example supposes that they are, and not surprisingly concludes therefore that the analysis of natural kind words applies to pencils no less than to other natural kinds. The real point of the example could be that there are no linguistic guarantees about any word not being a natural kind word, and that

149. Putnam discusses this issue at only one place in his numerous articles on meaning. *Id.* at 243-45.

150. *Id.* at 242. The example is from Albritton, *On Wittgenstein's Use of the Term "Criterion"*, 56 J. PHILOSOPHY 845 (1959).

therefore all seemingly "criteriological" or "nominal kind" words are hostage to having their seemingly analytically necessary criteria shown to be contingent and false. The implication in the present context of saying that all words are potentially natural kind words might thus be the same as saying that they are natural kind words; that there are no criteria analytically necessary for the words' correct use.[151]

Another problem for Putnam is whether one can generalize from his example, assuming his example is valid. Even if Putnam is right that words like "pencil" have a "tendency . . . to develop a 'natural kind' sense, with all the concomitant rigidity and indexicality,"[152] this need not be true of other words naming non-natural kinds. For one thing, pencils share a structural similarity. What of words whose putative criteria are more functional—words such as "pediatrician," "hunter," (two more of Putnam's examples), "lawyer," "paperweight," or perhaps even "can-opener?" Such words classify things not so much by their structure but by their function.[153] Many very different sorts of

151. This is not, in fact, Putnam's argument, and it is not clear that it should be. Putnam does argue that there is no guarantee that what we think to be a natural kind is in fact a natural kind; we may simply be as mistaken about some class sharing a hidden nature as we were about jade and may be about multiple sclerosis. H. PUTNAM, *supra* note 113, at 241. We may, in other words, have only our ordinary indicators to rely upon in fixing the extension of such words.

A natural kind word thus has the potential to become a nominal kind word. The reverse would seem to be equally possible, as Putnam recognizes with his discussion of "bachelor." It is just possible that "all bachelors share a special kind of neurosis universal among bachelors and unique to bachelors," *id.* at 58, some special form of sexual frustration, let us imagine. If this neurosis is easily identifiable—more so than the legal status, unmarried—it might then become the criterion of the word and govern other legal status should there turn out to be a few married males with the neurosis. "Bachelor" might thus turn out to be the name of a natural kind, although at present that seems quite unlikely.

The hooker is that Putnam would have to say that when we use such words, such changes in our intentions do not constitute a change of meaning. Yet it is not clear that one should say this, for if a change in the status of the word from natural kind to nominal kind, or vice versa, does not constitute a change of meaning, then nothing would. *See* Goosens, *Underlying Trait Terms,* in NAMING, NECESSITY, AND NATURAL KINDS, *supra* note 60, at 133, which argues that, at least, a word is a natural kind word is the semantic feature which allows one to fix its extension indexically. *See also* H. PUTNAM, *supra* note 113, at 68 ("If 'bachelor' ever becomes a 'law cluster word, then we shall simply have to admit that the linguistic character of the word has changed."). Seemingly that a term rigidly designates is part of its meaning, for that is the one semantic fact Putnam holds constant in order to portray all other semantic markers as contingent and transitory.

If gain or loss of indexicality is a change of meaning, then the possibility that pencils might be organisms is beside the point, for to assume they are organisms is to assume a change of the meaning of "pencils"—from the name of a nominal kind to the name of a natural kind. Putnam's example would then indeed beg the very question for which it was to provide an answer.

152. H. PUTNAM, *supra* note 113, at 244.

153. *See* R. HARE, THE LANGUAGE OF MORALS 100 (1952) ("A word is a functional word if, in order to explain its meaning fully, we have to say what the object it refers to is *for*, or what it is supposed to do."). *See also* Cragg, *Functional Words, Facts and Values,* 6 CANADIAN J. PHILOSO-

things might be "paperweights," and it is not assumed that there is some common, hidden nature that all such structurally different things share. If it should turn out that hunters do not hunt, paperweights do not serve the function of holding down papers, and pediatricians do not medically treat children, but that all of them are Martian spies in different forms,[154] then one might say that these things were not hunters, paperweights, or pediatricians.

Assuming that there is a class of words that are neither natural kind words, nor even potentially the names of natural kinds, has formalism been given a beachhead? Are there at least some "nominal kind" words, therefore, whose criteria form necessary and sufficient conditions such that formal deductions are possible? Unfortunately for formalism, the answer is largely "no."[155] Even if Putnam is wrong about the reach of his theory that "hidden nature" is the basis of meaning, semantics does not advance the cause of legal formalism. If the meaning of some words can be reduced to criteria or sense, the logical positivist ideal of criteria as necessary and sufficient conditions for the application of a term is not met.

According to a standard modern characterization of criteria, "[w]e may characterize the criteria for the truth of a judgment as those states of affairs that are (whose existence would be) direct and noninductive

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PHY 85 (1976). Functional words have played a large role in jurisprudence, it having been urged that legal words are inherently functional in character. The motive for saying this has usually been to say that value judgments are of conceptual necessity necessarily involved in applying law. *See* L. FULLER, THE LAW IN QUEST OF ITSELF 11-12 (1940); Fuller, *Human Purpose and Natural Law,* 3 NAT. L.F. 68 (1958); Fuller, *A Rejoinder to Professor Nagel,* 3 NAT. L.F. 83 (1958). *See also* T. BENDITT, LAW AS RULE AND PRINCIPLE 95-99 (1978).

If all or even most words used in laws were functional words, this Article would approach semantics differently. Not many legal words *are* functional, however. One should distinguish: (1) the claim that the concept of law is a functional concept (one of Fuller's points); (2) the claim that the concept of a legal system is a functional concept (Benditt's explicit claim); and (3) the claim that any law should be construed by reference to its purpose (a claim of Fuller's). None of these claims have anything to do with the claim that most words the law uses in its legal standards are functional words. *E.g.,* one might construe "gold" in a legal rule by that rule's purpose, without "gold" being anything other than it is, a natural kind word, not a functional word.

154. This is Putnam's imagined alternative. Putnam, *supra* note 65, at 244.

155. "Largely," because one should leave room for the very rare "one-criterion" words, such as "bachelor." If one adopts more extreme, but widely accepted, criticisms of the notion of analyticity than those relied on in this Article (*e.g.,* W. QUINE, *Two Dogmas of Empiricism,* in FROM A LOGICAL POINT OF VIEW, *supra* note 140, at 20; Goodman, *On Likeness of Meaning,* in SEMANTICS AND THE PHILOSOPHY OF LANGUAGE (L. Linsky ed. 1952); White, *The Analytic and the Synthetic: An Untenable Dualism*, in SEMANTICS AND THE PHILOSOPHY OF LANGUAGE, *supra* at 272) then there are no words in natural languages for which we can specify necessary and sufficient conditions as criteria of application. *But see* Putnam, *supra* note 65.

evidence in favor of the truth of the judgment."[156] The disagreement discussed above between Putnam and such modern criteriologists is about whether any evidence is noninductively, *i.e.,* analytically, connected to any word or statement. If it is assumed, *contra* Putnam, that there are analytic connections for many nominal kind words, *e.g.,* between "is an artifact used for writing" and "is a pencil," the first is only evidence of the second. It is neither a sufficient nor a necessary condition of the second's being correctly applied.

Unlike necessary and sufficient conditions for the application of a term, evidence of the truth of a proposition generates no deductive certainty about that for which proof is sought. There might always be other evidence suggesting the contrary. Evidential well-foundedness can offer no more than a prima facie showing that some proposition is true.

Suppose that grimacing, crying out "it hurts," and like behavior are necessarily taken to be evidence that another is in pain. Even so, there can be no deduction that another is in pain. Needed for the deduction, "if pain behavior, then pain," is the sufficiency of the criteria for the word. Yet pain behavior is only evidence of pain; its being *necessarily* evidence of pain (a criterion of "pain" as a nominal kind rather than a natural kind word) does not alter in the least the fact that it is only evidence. There is no deduction possible from the satisfaction of the criterion, pain-behavior, to the predicate in question, "pain." The most that can be said is that normally, one who exhibits pain behavior is in pain, and that therefore the burden of proof is on those who would dispute that the subject is in pain to come forward with countervailing evidence.[157] The certainty one can have about the application of any word on any particular occasion, therefore, is not deductive certainty. It is only the "more-or-less" certainty of "I have good reason to think he is in pain, and have been shown no evidence to suggest the contrary."

Anyone with either natural or incubated positivist tendencies will find this argument totally unacceptable for two reasons. First, this

156. S. SHOEMAKER, SELF-KNOWLEDGE AND SELF-IDENTITY 3 (1963).

157. *See* Lycan, *Noninductive Evidence: Recent work on Wittgenstein's 'Criteria,'* 8 AM. PHILOSOPHICAL Q. 109 (1971). *See also* Rorty, *Criteria and Necessity,* 7 NOUS 313 (1973), which similarly delineates the "criteriological" view before rejecting it on Putnamesque and Quinean grounds. This "criteriological" account is one way of construing Hart's thesis that because legal words were what he called "defeasible," it was "absurd to use in connection with them the language of necessary and sufficient conditions." Hart's notion of defeasibility is discussed at notes 198-204 and accompanying text *infra*.

criteriological view seems to require that all evidence that could bear on the correct application of a word be part of the meaning of that word. For most words, this evidence can include very remote information—*e.g.*, the supposed pain-experiencing subject's character for acting sincerely most of the time, and the objection is that the meaning of "pain" includes too much. The short answer to this objection lies in the earlier distinction betwen symptoms and criteria. Most evidence is only symptomatic of some other state of affairs; it is not criterial even in this weak sense of "criteria." For example, if people walk into a room wearing wet clothes there is some evidence that it is raining outside. However, this is only symptomatic; it is not criterial in the way that seeing water falling out of the sky is evidence that it is raining. Lawyers familiar with the direct/circumstantial evidence distinction can grasp this criteria/symptom distinction easily and also appreciate its vagueness.[158]

The second positivist objection may seem more troubling. It asks how there can be evidence necessarily linked to the correct use of some word, when there is no necessary or sufficient condition to which that evidence relates. The idea of evidence, the objection continues, only makes sense if there is something one is trying to prove. Yet, there is something one is trying to prove in all such cases, such as whether so-and-so is in pain, whether it is raining, et cetera. The sticking point is the positivists' refusal to accept that the correctness in application of words is never certain the way that a deduction is certain. The objection really amounts to nothing more than a reassertion that words must have more certainty in their applications to the world than mere "evidential well-foundedness." But they need not. As has been shown, natural kind words do not have deductive certainty in their application. A native speaker must determine by intuition[159] whether the thing in front of him bears some unknown relation to other things so described. In the case of nominal kind words, the speaker must likewise decide whether, on both the symptomatic and criterial evidence before him, the word likely applies. There is in neither case sufficient conditions satisfied, nor necessary conditions not satisfied, that can guarantee the correctness of the application of such words.

158. Facts that are "criterial" are just a special kind of evidence, direct evidence. *See* Lycan, *supra* note 157. Acknowledging the criteria/symptom distinction, so construed, does not commit one to there being a deductive relation between criteria for "pain," and being in pain, as Norman Malcolm suggests in his explication of this distinction. N. MALCOLM, KNOWLEDGE AND CERTAINTY 113 (1963).

159. This may be done using a variety of heuristic devices, such as standard examples, stereotypical pictures, or core facts, as discussed at notes 283-300 and accompanying text *infra*.

The criteriological (evidentiary) nature of the criteria of nominal kind words is distinct from intensional vagueness. This criteriological account of meaning does not merely assert that there is no individual condition necessary, nor any subgroup of conditions sufficient, for the correct use of a term. Rather, the point is the same as for natural kind words: the entire set of conditions is neither necessary nor sufficient. Presence of all criteria is only strong evidence of some term being truthfully applied; absence of all is only strong evidence of that term's non-applicability to the situation at hand. But such limited certainty is all one can have in the application of such words to any factual situation.

d. *Dispositional terms:* Another class of words sometimes thought[160] to be exempt from Putnam's theory of meaning proposed for natural kind words is the class of dispositional terms. A dispositional term seems to refer not to a directly observable characteristic, such as an object or an event, but rather to a tendency on the part of an object to display certain reactions under certain conditions. Thus, "soluble," "brittle," "greedy," and "stupid" are dispositional terms. Such terms are frequently found in scientific, ordinary, and legal discourse.

Whether such terms are or are not the names of natural kinds is a debated point, although the debate is not usually carried on in exactly those terms. Rather, two preliminary questions have been the locus of controversy; first, whether the possession of a disposition to behave in certain ways entails that the person or object whose disposition it is, is in a certain (dispositional) state; and second, whether that state is merely an abstract entity, or whether it is a physical state of an unknown or partially known nature (a natural kind) about which there could be indexical intentions when the words are spoken.

A position on the first issue was taken by Gilbert Ryle in his account of minds.[161] Largely in order to avoid the horrors of interactionist dualism and the other minds problem, Ryle attempted to analyze mental states as often being dispositional. A disposition, however, did not mean or imply to Ryle that the possessor of the disposition was "in any state."[162] To say that a man is vain, according to Ryle's theory, is only to say that he is disposed to be pleased when his name is men-

160. *See, e.g.,* Goosens, *supra* note 151, at 138-39.

161. *See* G. RYLE, *supra* note 73.

162. *Id.* at 125. "Dispositional statements are neither reports of observed or observable states of affairs, nor yet reports of unobserved or unobservable states of affairs. They narrate no incidents."

tioned in a flattering way, disposed to be disappointed when it is not, disposed to avoid conversations when others are praised, et cetera. To say that a lump of sugar is soluble "is to say that it would dissolve if submerged anywhere, at any time, and in any parcel of water."[163]

One payoff for Ryle from taking this rather odd position was that it appeared to free him of any commitment to the existence of any mental things. If mental words are dispositional, and dispositional terms do not refer to anything, then one could not even frame the question of what sorts of things minds were. Ryle's *argument* for this position, however, was based on considerations of language, not of mind. He postulated that sentences, even indicative sentences mentioning particular individuals, have certain "jobs" to do other than to predicate properties of those individuals. The "job" of dispositional statements, he argued, is to license inferences to what will occur, or about what has occurred; such sentences do not describe any existents themselves, since that is not their "job."[164]

The problem with this argument is one of the fundamental problems of the old Oxford ordinary language philosophy. It confuses the meanings of words with all the different things that may be done with words. In fact, dispositional terms are used not only to predict what will occur, or to explain what has occurred, but also to disapprove of a certain person or his action, or to encourage him to do better next time, *e.g.,* "you are greedy,"[165] or to accomplish a hundred other things. None of the potential speech-acts that can be done with these words is relevant to what the words mean.

Rejection of Ryle's theory allows a straightforward interpretation of dispositional statements: To say that sugar is soluble is to describe sugar as having a property. Moreover, the way dispositions are talked about shows a commitment to the idea that dispositions are things, and that every disposition implies a dispositional state. People in their use of language predicate qualities to dispositions, and relationships between them, and mean this in the sense that commitment to such dispositional states as things is not paraphrased away. People talk of one's

163. *Id.* at 123.

164. *See id.* at 124:

> Dispositional statements about particular things and persons are also like law statements in the fact that we use them in a partly similar way. They apply to, or they are satisfied by, the actions, reactions and states of the object; they are inference-tickets, which license us to predict, retrodict, explain and modify these actions, reactions, and states.

165. John Dewey, for example, once urged that words naming dispositions of persons are often used in these evaluative ways. J. DEWEY, HUMAN NATURE AND CONDUCT 118-22 (1930).

vanity being short-lived, outrageous, or absurd; or about a cup's brittleness being caused by its mode of construction, and (*pace* Ryle) about dispositions as causes, as when it is said that a cup's brittleness caused it to shatter when it fell from the table. The ontological commitment to dispositions as things (dispositional states) is too pervasive to deny.[166]

The determination that dispositional states do exist leads to the second issue: whether these states are abstract entities or physical (*i.e.,* natural kind) states. Often dispositions are physical states of the object whose disposition it is.[167] The statement that a bridge fell because of the lack of tensile strength of its steel support beams does not just mean that it fell because its beams were disposed to give way. No more than the statement that salt is *soluble* in water means only that it is disposed to dissolve if put into the water, or that a person's being *addicted* to a certain drug just means he is disposed to take a lot of it. A few dispositional words may fit such an interpretation—the words for human habits, perhaps—but most of the time the Putnam theory of metaphysical faith in hidden natures to natural things surfaces, so that the extension of "brittle," "soluble," "strong," or "addiction" is fixed by that nature as it is discovered. Such use makes dispositional words the names of natural kinds.

Ryle's theory about dispositions and, more generally, the positivist theory about meaning would urge that as more about the molecular nature of the tensile strength of metals or the physiological basis of addiction is discovered, one would change the *meaning* of those terms if their criteria are shifted from "disposed to break under certain conditions," or "disposed to take drugs," to the underlying physical states. But this, of course, begs the very question at issue: are those behavioral criteria part of the meaning of those words to start with? Because scientific realism intrudes here, as elsewhere, the *meaning* of "tensile strength," or "addicted" is "those underlying physical states, whatever their nature may turn out to be." The meaning of "addicted" does not change with such discoveries any more than the discovery of EEG patterns changes the meaning of "dreaming." In all such cases, the extensions of such terms are fixed by the assumptions about these states' hidden natures, not the dispositional criteria that may happen to be available at the moment.

Even if the above argument is assumed to be wrong, either in general or at least for some dispositional terms, it is still impossible to find

166. The criterion of ontological commitment implicit here is Quine's. *See* note 180 *infra*.

167. W. QUINE, *supra* note 77, § 46, at 222-26.

necessary and sufficient conditions for these words. One can appreciate this at the intuitive level simply by examining the unpacking of examples of dispositional terms given by Ryle. It is no accident that Ryle never even attempts a complete unpacking of the "multitrack" dispositions ascribed to human character (vanity, greed, stupidity, et cetera), for none could be given.

This can be seen more systematically from an attempt to "operationalize" the meaning of dispositional terms in science. An operationist believes that the meaning a dispositional term either has in ordinary speech, or should be assigned in scientific theory, consists of a set of statements about tests for the presence of the state to which the term refers. An operationist attempts to discover, or more often, to stipulate, definitions for dispositional terms, so that no statement using such a word lacks a mode of verification of any of its components. He is thus a reductionist about scientific theories. For example, an operationist would unpack the dispositional term "magnetic" by stipulating a test for "magnetic," *i.e.,* a statement about what magnetic things are disposed to *do*. An object x would be said to be *magnetic* if and only if a small iron object y, if placed next to x, will move toward x.[168] Yet the material conditional in the going scheme of logic is interpreted as equivalent to negation and disjunction, in the following way:

x is magnetic ≡ x is *not* close to y, *or* y moves towards x.[169]

The embarrassing result is that an object is "magnetic" if it draws iron filings toward it or if it just does not happen to be close to any iron filings. The latter possibility, of course, includes far too many objects that in no conceivable sense are magnetic.

Attempts have been made to remedy this result by the use of "reduction sentences."[170] A reduction sentence begins with the test conditions as the hypothesis, and then specifies what must happen if such conditions are met:

If x is close to y, then x is magnetic ≡ y moves toward x.[171]

168. Mx≡(Cxy⊃Gyx), where "Mx" means "x is magnetic," "Cxy" means "x is close to y," and "Gyx" means "y moves toward x." If one interprets the conditional here as a subjunctive conditional rather than the material conditional, one will quickly run into a need to assume some underlying nature to dispositions. *Id.* at 222-26.

169. Mx≡(~Cxy v Gyx).

170. Carnap, *Testability and Meaning* (pts. 1-2), 3 PHILOSOPHY SCI. 419, 441-44 (1936); 4 PHILOSOPHY SCI. 1 (1937), *reprinted in* READINGS IN THE PHILOSOPHY OF SCIENCE 47-92 (H. Feigl & M. Brodbeck eds. 1953).

171. Cxy⊃(Mx≡Gyx).

This avoids the problem above, but at the cost of giving only a partial definition of "magnetic." For the above statement still says nothing about what "magnetic" means for objects that are not close to iron filings.

This indeterminacy of meaning has been shown to be reducible by supplying further reduction sentences:[172]

> If x moves through a closed wire loop, then x is magnetic ≡ an electric current flows in the loop.[173]

Now the meaning for "magnetic" applies to a larger set of objects: those which are close to iron filings or those which generate an electrical current when they are moved through a closed wire loop.

The above discussion has two important consequences. First, all dispositional terms are indeterminate in their meanings, even if their meanings are construed to consist solely of their operational tests. No finite number of reduction sentences can specify fully the meaning of "magnetic." There will always be a certain "openness of meaning."[174] Because of this, a dispositional term cannot be reduced to a set of observation sentences describing testable operations. The dispositional term is open-ended for further definition by tests that are unspecified because they are still unknown.

Second, it is a mistake to regard such reduction sentences as being a set of *stipulations* about the meaning of "magnetic." Operational definitions were thought by many to be a matter of stipulation of an empirically testable meaning to theoretical terms. In fact, such definitions are not definitions at all, if such definitions are to be matters of stipulation and not factual discovery. An operationist might stipulate the first test for "magnetic," *e.g.,* the iron filings test, as a way to determine what term will be applied to this newly-discovered property. But to say that an object is magnetic also if it creates a current when passed through a closed wire loop, is a scientific discovery, not an arbitrary stipulation of meaning.[175] Thus, there is no distinction between "defin-

172. Hempel, *Operationism, Observation, and Theoretical Terms,* in PHILOSOPHY OF SCIENCE 101, 110 (A. Danto & S. Morganbesser eds. 1960). *See also* C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 85-100 (1966).

173. $Lxz \supset (Mx \equiv Fcz)$.

174. Hempel, *supra* note 172, at 101, 112.

175. If this is unclear, it can be explained more formally. The first two reduction sentences for "magnetic" imply a scientific law: if an object is close to iron filings and is moved through a closed wire loop, then the filings will move if and only if a current is also created in the loop. This is a scientific law which does not even use the word "magnetic," and thus, can hardly be said to stipulate a definition for it. The formal deduction is as follows:

ing" a dispositional term and making scientific discoveries; that is, there are no analytic truths about "magnetic," but only scientific hypotheses. An operationist who attempts to avoid this difficulty by saying that there are as many concepts of "magnetic" as there are ways of testing it,[176] both ignores the way dispositional words are used in ordinary speech and gives up the very benefit theoretical terms are said to provide in science: the systematization of diverse phenomena under broad and simple statements. This systematization is imposible if there are as many concepts of dispositional terms as there are tests.

e. *Theoretical terms:* It may seem that theoretical terms—either such words of scientific theory as may be used in legal rules, or words of *legal* theory—do not involve the problems of the criterial theory of meaning discussed above in connection with natural kind words. Theoretical terms do not refer to natural kinds of things; thus, they are not subject to the arguments from paradigm examples and indexical intentions. Moreover, it seems that once ordinary usage as the arbiter of sense is discarded, what is left is akin to Humpty Dumpty's freedom to make a word mean what he pleased. Since in theories a meaning is stipulated to the legal word, why should not the stipulation be to as precise a meaning as desired?

Whether these hopes are to be realized depends upon the role of theories and of the terms that theories employ, in both science and law. One must have some idea of the function that words like "electron" or "kinetic energy" have in science, or that "malice," "title," and "right" have in law, in order to determine whether such terms have as their meaning a set of conditions necessary and sufficient for their correct application. This Article shall proceed by examining first a crude skepticism held by some Legal Realists and others about such terms; second, the role of such terms in science; and third, whether an analogous role for such terms exists in law.

1.	$Cxy \supset (Mx \equiv Gyx)$	P (first reduction sentence)
2.	$Lxz \supset (Mx \equiv Fcz)$	P (second reduction sentence)
3.	$Cxy \cdot Lxz$	P
4.	Cxy	3, Simp.
5.	Lxz	3, Simp.
6.	$Mx \equiv Gyx$	1, 4, M.P.
7.	$Mx \equiv Fcz$	2, 5, M.P.
8.	$Gyx \equiv Fcz$	6, 7, Trans.
9.	$(Cxy \cdot Lxz) \supset (Gyx \equiv Fcz)$	3—8, Natural Ded.

176. *See* P. BRIDGMAN, THE LOGIC OF MODERN PHYSICS 6, 23-24 (1927).

(i) *The crude skepticism of Legal Realism:* The role of theoretical terms in law was an easy question for some Realists, for the answer was obvious. Such terms had *no role* to play in any proper theory of adjudication. The reasoning was quite simple: If one looks in the world for the things referred to by "malice" or "right," one finds no such things. If the words refer to nothing, they are meaningless and have no role to play (other than perhaps as a smokescreen behind which the real reasons for a decision may operate without scrutiny).[177]

The argument is a popular one for polemicists in all fields. It is seemingly a damning statement to say that "there is no such thing as a right." It is similar to the more modern controversy in psychiatry, sparked by the position that "there is no such thing as mental illness."[178] The conclusion is presented as an obvious empirical discovery: once upon a time there were unenlightened people who thought there were such things as demons, witches, winged horses, rights and mental illnesses. These people invented a vocabulary with which to refer to these things. But careful investigation of the world reveals that such things do not exist. A careful inventory of the furniture of the universe reveals only tables, chairs, and waterbeds—but no rights or mental illnesses. Accordingly, the vocabulary has no use and should be dropped.

The argument of the Legal Realists has ontology and language exactly backwards, at least with respect to theoretical terms. It is silly to suppose that one should be able to find a right, a title, or malice stacked in the corner of some back room along with some old books, tables, and pictures. No one who uses these words thinks they refer to physical things, or even to mental things.[179] If these words refer to things at all, they refer to abstract entities incapable of being observed by the five senses. Accordingly, the argument for or against the existence of such entities is not one of empirical discovery. Such entities exist if they are presupposed by a theory which has been adopted on other grounds. The question of the existence of such entities follows once the

177. Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935). *See also* the reference to American and Scandinavian Realists in H.L.A. HART, DEFINITION AND THEORY IN JURISPRUDENCE (1953).

178. I have discussed Szasz's use of this argument in Moore, *Some Myths About "Mental Illness,"* 18 INQUIRY 233 (1975), *reprinted in* 32 ARCHIVES GENERAL PSYCH. 1483 (1975).

179. On occasion, one might find a category mistake made by a judge or a lawyer in this regard. Arguably, Cardozo committed such an error in treating presence of a corporation in a state as he would the presence of a person in a state, Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 268-70, 115 N.E. 915, 917-18 (1917). Cohen certainly thought that he had. *See* Cohen, *supra* note 177.

goodness or badness of the theories which use them has been settled. The acceptability of the theories cannot be settled by the question of the existence of such abstract entities. Thus, a negative existential statement applied to abstract entities can only be the conclusion of an argument to the effect that no theory that one likes presupposes such things; it cannot itself be an argument that no theory should be accepted that does presuppose such entities.

It is possible to interpret the Legal Realist critique as being against the idea that there can be theories in law, and thus as being against the existence of the entities postulated by these theories. Such an argument would urge that law is not like science, which clearly does make use of theories and theoretical terms. This analogy, or lack of one, will be examined shortly. The important point is that what is needed is an *argument* against a theory or theories being any good; only in this way can the question of the existence of the abstract entities postulated by the theory even be approached.[180]

(ii) *The irreducibility of theoretical terms in science:* As set forth earlier, the formalist ideal in law mirrors the logical positivist ideal in science: All theoretical terms are to be reduced to statements in the antecedently understood terms of ordinary speech. A definition for each theoretical term should be stipulated so that some more complicated set of observation sentences in ordinary English could be substituted for the theoretical term, and vice versa. Why this goal is now regarded as impossible to attain in science must be examined in order to assess the parallel ideal in law.

An examination of the nature of theoretical terms in science requires an inquiry into the nature of theories themselves. The standard account of theories in the philosophy of science[181] may be summarized

180. This discussion has somewhat loosely described entities as being "postulated" or "presupposed" by a theory. What is meant is Quine's notion of ontological commitment: what exists is a function of the language employed. The bits of language that reveal our ontological commitments are not names. Rather, one is committed to just those entities necessary to serve as the values of variables bound by the existential quantifier. Thus, in the sentence "some persons are mentally ill," one is committed to there being persons, but not to there being mental illnesses, for the existential quantifier binds the variable, not the predicate "is mentally ill." *See* W. QUINE, *supra* note 140, at 128.

Whether mental illnesses exist is a question of whether any of the sentences of psychiatric theory we think to be true use "mental illness" in an ontologically committing way. Similarly, whether rights exist is a question of whether any of the sentences of moral or legal theory we think to be true use "rights" in an ontologically committing way.

181. This account of scientific theories was worked out by Rudolph Carnap in the later part of his career, together with Carl Hempel. For an excellent discussion of this view of theories,

as follows. A scientific theory is a set of statements with three characteristics: (1) the statements are in an artificial or formal language; (2) they comprise an axiom system; and (3) at least some of the terms in the theoretical statements are assigned an interpretation in ordinary English. Each of these characteristics requires some elaboration.

A formal language is usually thought to consist of three things: a vocabulary, a set of formation rules, and a set of special transformation rules that can be called definitions. The vocabulary of a formal language consists of a set of symbols, which at this stage should be conceived of as purely formal devices having no meaning. A vocabulary in this sense is simply a set of uninterpreted symbols. The formation rules that make up a large part of the syntax or grammar of the language tells how to combine these symbols into "sentences" or "well-formed formulae." Just as not every combination of words in English forms a sentence ("the is dog was"), so in a formal language not every combination of symbols makes a well-formed formula. It is the formation rules, or grammar, or syntax, that determine in each case what can be combined with what, and in what order, to make a sentence. Finally, those special transformation rules called definitions determine what symbols may be substituted for others. The symbols in terms of which others are defined but which themselves are undefined, will be the primitive symbols of the system.

An axiom system is a subset of the formulae of a formal language and consists of some formulae taken as basic, which will be the axioms. In light of certain transformation rules, the axioms will generate other formulae which will be called theorems. Thus an axiom system will consist of three types of things: axioms, theorems, and transformation rules that allow the generating of the theorems from the axioms.

Of course, an axiom system in a formal language is a purely formal device, a calculus, that allows the generation of an infinite number of formulae (theorems) from a few formulae (axioms). Unless and until some of the symbols are interpreted, *i.e.,* given a meaning or a semantics, such a calculus literally says nothing at all about the world.

"Giving an interpretation" to a formal language system involves assigning a meaning to some of the symbols in that system's vocabulary. One accomplishes this semantic task by giving translations into a previously understood language, *e.g.,* English, for the vocabulary of the

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together with the current criticisms of this view and a complete bibliography, see F. SUPPE, THE STRUCTURE OF SCIENTIFIC THEORIES (2d ed. 1977).

calculus. Heretofore uninterpreted symbols, such as "P," or "V," or "T," will be taken to mean pressure, volume, or temperature, in a theory about gaseous elements, so that formal axioms and theorems come to mean something; that is, to say something about the world.

Determining which symbols must be given an interpretation in the vocabulary of some theory is of primary importance. The early logical positivist goal was to assign semantic interpretations to each (syntactically) primitive term in the vocabulary of a scientific calculus. This is simply a more precise way of stating the reductionist corollary of the empiricist thesis, discussed earlier.[182] For, if theoretical terms are all nonprimitives—that is, each primitive symbol is given a definition in terms which are themselves interpreted into the observational language of ordinary English—then the transformation rules that define each theoretical term will allow its elimination in favor of statements in ordinary English.[183] Accordingly, theoretical terms like "electron" or "kinetic energy" could be eliminated entirely. The retention of such terms could be only as abbreviations; the motive for their use would be simply the practical convenience of shortened exposition.

The motive for this reductionist view of theoretical terms in science was laudable enough. The positivists thought this was the only way to *verify* theoretical statements. For if one takes formal symbols with no translation into English as *primitive,* how could one conform or disconfirm theoretical statements using such symbols? To those early positivists, theories based on any other conception of theoretical terms looked like metaphysics.

At least two separate problems demonstrated to even the most fervent positivists that reduction of theoretical terms to statements in ordinary English about observables was not possible. The first was the problem discussed earlier, regarding the non-reducibility of dispositional terms. As set forth earlier, one cannot even stipulate, let alone discover, necessary and sufficient conditions for dispositional terms such as "magnetic." The most that one can do is to make empirical discoveries about the connections between various tests. For example, it is an empirically verifiable fact that things that draw iron filings also generate electricity when moved through a wire loop. One can give a partial meaning to dispositional terms by means of reduction sentences

182. *See* text accompanying notes 66-73 *supra*.

183. A definition is called a transformation rule precisely because it allows one to transform one formula into another by substituting for the defined symbol the symbol in terms of which it is defined.

that incorporate these scientific discoveries. But the list of such tests can never be closed without simply barring—by Humpty Dumpty fiat—the possibility of future scientific discovery.

The openness of meaning problem left by reduction sentences occurs at a relatively low level of abstraction in scientific theorizing. One cannot fully define by stipulation of equivalences even these most plausible candidates for first order or least abstract theoretical terms, dispositional words, in terms of observation statements. The second reason reductionism was abandoned arises in a more abstract level of scientific theorizing. It has become evident that not even reduction sentences, or partial definitions, can be given for higher order theoretical terms in the natural sciences. The sorts of theoretical terms that science uses to explain and to predict natural phenomena simply cannot be reduced, even in the weak sense of reduction sentences such as those given for dispositional terms, to observational language. Instead, a scientific theory includes theoretical terms in its primitives and builds an axiom system with them. The whole system has empirical import because one gives some of the least abstract terms an interpretation. Also, some of the axioms, which are often called "correspondence rules" or "bridge principles," relate theoretical entities and observable entities in various ways.[184] But no theoretical term can be reduced to observation terms. This is simply a brute fact about successful theories that even positivists must live with:

> Would it be possible to formulate all laws of physics in elementary terms, admitting more abstract terms only as abbreviations? If so, we would have that ideal of a science in sensationalistic form which Goethe in his polemic against Newton, as well as some positivists seems to have in mind. But it turns out—this is an empirical fact, not a logical necessity—that it is not possible to arrive in this way at a powerful and efficacious system of laws.[185]

Because theoretical terms cannot be reduced to observation terms, higher order theoretical terms in science are not interpreted, except indirectly.[186] These higher order theoretical terms hold a logical space in

184. Bridge principles or correspondence rules are the key notions to understanding how theories on this concept can say anything about the world. Such statements use the theoretical terms without defining them or even partly defining them in reduction sentences. For how this is possible, see F. SUPPE, *supra* note 181, at 17-27.

185. R. CARNAP, FOUNDATION OF LOGIC AND MATHEMATICS 64 (1937). *See also* Carnap, *The Methodological Character of Theoretical Concepts,* I MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 38 (1976).

186. For a more modern view of "partial interpretation," see F. SUPPE, *supra* note 181, at 86-95.

an axiomatized formal language system; but such terms are not interpreted terms in that system, nor do the transformation rules of the system define these terms. Such abstract terms take what meaning they have from their logical place within the axiom system. Since the whole system has empirical import, so do these terms. The only possible way to specify the meaning of a theoretical term by itself, however, is to cite all the laws of the system in which it is used. Stipulating or discovering definitions in terms of necessary and sufficient conditions framed in terms of observables is out of the question for such terms.

(iii) *Are words of legal theory mere abbreviations?*: Langdell, no doubt, would have been dismayed to have found that his "law is a science" slogan would lead away from the reductionist nature of legal theory that he had envisioned, rather than toward it. If the formalist analogy of law to science is taken seriously, then in light of the shift in the prevailing conception of scientific theories, there can be no reduction of the words of legal theory to factual statements. But the analogy of one nineteenth century formalist should not be uncritically accepted. Do theoretical terms in law indeed serve the same function as theoretical terms in science, such that they are subject to the same antireductionist arguments?

The answer seems to be no, but some distinctions must be introduced in order to arrive at this conclusion in a systematic way. The first is a distinction in "points of view" once distinguished as "internal" and "external."[187] The external point of view treats judicial behavior like any other phenomenon that it is the business of science to predict and explain. The view is "external" in the sense that all scientific description, explanation, and prediction is external: an observer external to, *i.e.,* not involved with the data, is the one who describes, explains, and predicts. This was the point of view explicitly adopted by most Legal Realists. The internal point of view, on the other hand, is that of the participant in the system of thought under study.

Suppose certain religious practices of some remote islands are under study. The external point of view about such practices would be held by the anthropoligist conducting the study, whereas the internal point of view would be that held by the islanders themselves with regard to their practices. As holders of the internal point of view, the islanders do not describe their practice as a set of mental beliefs of a

187. H.L.A. HART, *supra* note 28, at 54-56, 86-88. This Article's description and use of the distinction differs somewhat from Hart's.

people (*e.g.*, "the islanders believe that incest is sanctioned by the gods"), but describe their practices as being part of the world (*e.g.*, "the gods sanction incest"). Further, they do not *explain* their practices with causes; they justify their practices with what they believe to be good reasons. Moreover, unlike the anthropologist, the islanders do not *predict* their own behavior in conforming to such practices; they *decide* what it is they are going to do.

In a legal system the internal point of view is adopted by judges and those who argue to judges, and the external point of view is adopted by social scientists and others who attempt to predict and explain judicial behavior. Judges do not describe the law with legal positivist operators in front of them. Instead of saying, "the sovereign has commanded that a non-holographic will shall have two witnesses," judges more often describe this rule as being *true*; *i.e.*, "a non-holographic will must have two witnesses." Judges do not explain their decisions with the factors that may have caused them (bad breakfasts or whatever); they justify decisions with what they think to be good and sufficient reasons. Judges do not attempt to predict how they are going to decide; they leave that to the political scientists. Judges decide. In short, judges necessarily adopt the internal point of view.

The question of the appropriateness of the application of natural science theory models to law must be approached separately with respect to each of these points of view. For what role a theory could play depends on what one is generally trying to accomplish with a set of theoretical statements.

From the external point of view the above question about law is no different from a similar question asked about theories in social science in general. Is it possible for social science to build the explanatory and predictive calculi of natural science, or is there something about human behavior that prevents it? There are, in fact, few examples of such theories in social science.[188] Where social science most closely imitates natural science in theory construction, it fails most dramatically. The metaphyschological viewpoints of psychoanalysis vividly demonstrate the failure. This failure is sometimes explained by saying that the science of human behavior is a "young science" waiting for its Newton. Alternatively, many philosophers in the last several decades have propounded hypotheses about why such theories can not be appropriate to the social sciences.[189] In any case, whatever may be possi-

188. *See* R. RUDNER, PHILOSOPHY OF SOCIAL SCIENCE (1966).

189. For example, the language of social science may be termed intensional, and thus not

ble someday for social science, the fact of the matter is that there are presently few theories that successfully predict and explain human behavior in any way analogous to the calculi of natural science. Further, there is no evidence to show that a "sociology of law," law studied from the external viewpoint, has fared any better in this regard. Theoretical terms in law must thus serve some function other than being a part of an abstract calculus that allows observers to predict and to explain the behavior of judges.

From the internal point of view theories must provide good reasons for deciding cases, not calculi making possible explanations and predictions. The difference in function by itself might seem to preclude the possibility of an analogy of theories in law to those in science. How can a *predictive/explanatory* calculus, assuming one existed, constitute a good reason with which to justify a judicial decision? Yet, a formalist might make out the analogy in the following way: genuinely systematizing theories make the law knowable, and thus maximize fair notice to the citizenry of what the law requires, which is one of our important ideals about the rule of law. If one fastens on this simplifying function to the exclusion of other normative considerations such as maximizing substantive justice, then any theory that performs this systematizing, simplifying function will constitute a good reason with which a judge may justify his decisions.[190]

It may be undesirable for judges to adopt and to apply a theory in this way, for a legal system may be better if it keeps its rules and theories open to reinterpretation and reformulation in accordance with the demands of fairness and justice in particular cases. Still, if one leaves aside these normative considerations, is it possible that judges might construct and employ such systematizing theories in a manner analogous to science? The answer to this question is presumably the same for legal theories viewed internally and externally; the failure to construct such theories in social science generally, prevents optimism for law.

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amenable to the basic tool for a calculus, a truth functional logic; or intensional and thus not reducible to an extensional language. Or, the data of social science may be called mental, and thus not accessible to the tools of observational science; motivational, and thus irretrievably mixed up with moral assessments; rule-governed and conventional, and thus opaque to external observation; free, and thus not subject to causal laws; or "epistemically peculiar"; that is, known with an authority incompatible with science. For two of these arguments, see A. LOUCH, EXPLANATION AND HUMAN ACTION (1969); P. WINCH, THE IDEA OF SOCIAL SCIENCE (1958).

190. Morris Cohen made a limited version of this argument in Cohen, *The Place of Logic in the Law,* 29 HARV. L. REV. 622 (1915).

Putting speculation aside, an actual examination of the kinds of things commonly called legal theories shows two quite distinct items: (1) what might be called definitional schemata;[191] and (2) genuinely systematizing theories. An example of the first item is the law's use of words like "malice" in murder statutes.[192] Examples of the second item are such things as Posner's theory of negligence[193] or Hart's theory of excuses in the criminal law.[194]

The second of these structures could be analogous in function to scientific theories because some deductive structure is claimed for these theories. Posner, for example, asserts that the liability rules of tort law generally can be deduced from a principle that requires a judge to achieve the efficient level of accidents and safety. Hart states that the rules of excuse in the criminal law may be deduced from the principle that no person should be punished unless he could have chosen to do other than he did. In all such cases, the seeming theoretical terms such as "efficiency" or "choice" appear in theoretical principles that "stand behind" liability rules in the same sense that scientific theories "stand behind" experimental laws: The theoretical statements imply the laws or rules.

One striking difference between such legal theories and scientific theories, however, is that in law one does not postulate syntactically primitive symbols that are left uninterpreted. Rather such legal theories either use ordinary terms in their ordinary meanings, or they explicitly define invented terms such as "efficiency." There thus seems to be a complete failure of analogy to the procedure in scientific theory construction of using undefined and uninterpreted symbols.[195]

The analogy to scientific theories also fails with regard to the law's definitional schemata. The definition of "malice" worked out earlier,

191. Law is not unique in having words that are neither ordinary words nor true theoretical terms on the model of science. Social science often invents "definitional schemata" for purposes other than theory construction. *See* R. RUDNER, *supra* note 188.

192. *See* notes 66-73 and accompanying text *supra*.

193. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29 (1972).

194. H.L.A. HART, *Legal Responsibility and Excuses,* in PUNISHMENT AND RESPONSIBLITY 28 (1968).

195. The dependence of legal theories on the vocabulary of ordinary English should hardly be surprising when one remembers that legal theories are to provide good reasons for deciding a case one way or the other from the internal point of view of the judge who will use them. Such statements usually will be clearly normative in their character—and a moral theory is never formulated as an abstract, uninterpreted calculus. Even if such theories are not clearly normative, they should at least provide better notice of what the law requires than the rules that they explain. Legal theories could not even provide that much notice if they were formulated in an artificial vocabulary.

for example, is not part of a true theory. It is simply an isolated definition of a non-ordinary term. Its function is simply abbreviatory of the various mental states that will suffice to be guilty of murder. One could have the following as the rule prohibiting murder:

> If [x does act A having as its consequence the death of another person y *and* act A is (done with death as x's purpose *or* done with x knowing to a substantial certainty that y will die *or* done with grievous bodily harm to y as x's purpose, *or* done with knowledge to substantial certainty by x that grevious bodily harm would ensue to y, *or* done with an abandoned and malignant heart by x), *and* it is not the case that (x is diminished in capacity *or* x was reasonably provoked by y into doing A)], *then* x is guilty of murder.

While one could have such a rule, it is easier, however, to say: "if x kills y maliciously, then x is guilty of murder."

There are two reasons which preclude considering "malice" as in any way analogous to a theoretical term in science. First, "malice" appears in an isolated legal rule. It does not appear in some higher order theoretical principle which is an axiom related to other axioms, theorems, and transformation rules in an axiomatized formal language system. "Malice" is not a part of any deductive structure that exists "behind" the rules. Second, "malice" is not a syntactically primitive term. "Malice" is defined in terms of other words which themselves are eventually defined in terms of words and phrases of ordinary English. It is thus unlike the theoretical terms of science, which are either taken as primitives, or are defined in terms of other theoretical terms taken as primitives. For true theoretical terms in science, there are no definitions into terms themselves having an interpretation in ordinary English.[196]

This failure of analogy can be seen most clearly by constructing a "theoretical term" in science that would be analogous to "malice" in its function. Suppose there is some experimental law using the product of pressure (P) and volume (V) of a gas, *e.g.*, P x V = kT. If one tired of repeating, "the product of pressure and volume," one might invent a new term, say "polume," to stand for this product. Then the experimental law would read: polume = kT. Although "polume" is not an ordinary word, it would be a mistake to think of it as a theoretical term, such as "kinetic energy" or "molecule." For "polume," unlike "kinetic energy," (1) appears in a single law and is not part of any deductive

196. This operationist goal for theoretical terms was discarded in science for reasons earlier discussed. *See* text accompanying notes 168-86 *supra*.

theory; and (2) it is defined into symbols themselves having an interpretation into ordinary English, unlike "kinetic energy" for which no such definition or transformation rule is possible. "Polume," like "malice," is not a theoretical term.[197]

This failure of analogy of nonordinary legal terms to theoretical terms in science, however, enhances the possibility of stipulating criteria to words such as "efficiency" or "malice." The failure of reductionism in science is thus no guarantee of a similar failure in law. Every nonordinary word used in law seemingly can be stipulated to have one, quite precise meaning.

There have been attempts to show that this cannot be done because of certain alleged peculiarities in the meaning of non-ordinary terms in law, such as "malice," "ownership," and "contract." Any simple-minded invocation of the supposed analogy to theoretical terms in science will fail for the reasons just concluded. More sophisticated arguments must thus be found if one aims to show that legal terms have unique characteristics that preclude such definitions into words or phrases of ordinary English. In a series of writings, H.L.A. Hart advanced a number of reasons why such definitions were not possible for legal words. He urged that legal words were irreducibly defeasible;[198] that the use of legal words was ascriptive rather than descriptive;[199] and that the characteristic use of legal expressions to apply rules to facts precluded definitions of the legal words used in such rules.[200]

Hart's last two arguments can be only of historical interest because they suffer from the same defect that plagued much of the Oxford ordinary language philosophy of the 1950's; *i.e.,* the confusion over the distinction between what one can do with words, and what the words actually mean.[201] Both arguments accordingly fail to make out the case that stipulation of definitions is impossible for legal words and fail for essentially the same reason: the meaning of any expression, legal or

197. For the importance of a systemic import to a term being a true theoretical term in science, see the discussion of scientific terms as "law-cluster" notions in Putnam, *supra* note 65, at 376-81. For law-cluster words one cannot stipulate definitions precisely because of the systematic use of such words in a body of theory. Such considerations do not preclude "definitional schemata" for "malice" or "polume."

198. The defeasibility thesis was first advanced by Hart in an analysis of the concept of action. Hart, *The Ascription of Responsibility and Rights,* 49 PROC. ARISTOTELIAN SOC'Y 171 (1949).

199. *Id. See also* H.L.A. HART, *supra* note 46, at 1-27 (repudiation of the ascriptivist thesis).

200. H.L.A. Hart, *Definition and Theory in Jurisprudence,* (1953) (Oxford Inaugural Lecture, Oxford 1953).

201. *See* Baker, *Defeasibility and Meaning,* in LAW, MORALITY, AND SOCIETY 26 (P. Hacker & J. Raz eds. 1977).

otherwise, is *not* determined by the function or illocutionary force of that expression in its characteristic use.

The first of Hart's arguments is of more interest. When Hart characterized legal concepts as defeasible, he meant that words and phrases such as "contract" and "mens rea" are never immune to being *defeated* in their application to a particular case. It only looks as if there are necessary and sufficient conditions for these terms. For example, conditions such as offer, acceptance, and consideration appear to be necessary and sufficient conditions for there being a contract. In fact, a contract may not exist even if these conditions are met because of the defenses that may be established, *e.g.,* fraud, duress, incapacity, avoidance for reasons of public policy, or frustration of purpose. Because of this ever-present possibility of defeat, Hart thought that it was absurd to use in connection with such words the language of necessary and sufficient conditions.

The main problem with the defeasibility thesis is in understanding why the negative conditions (*e.g.,* no duress, no fraud, for "contract,") that are defenses cannot simply be conjoined to the positive conditions (offer, acceptance, and consideration) to form one set of necessary and sufficient conditions. It may be true, as Hart points out, that the timing of the presentation of evidence satisfying negative conditions follows that of positive conditions. However, that is a procedural matter irrelevant to the logic of necessary and sufficient conditions. *When* the evidence is to be examined does not affect the criteria to which the evidence relates.

What Hart needed to show was that the list of negative conditions cannot be exhaustively specified. Thus there could be no finite set of statements that could be equivalent to, *i.e.,* necessary and sufficient for, the word "contract." Yet, what reason does Hart give one to think that the negative conditions of a legal word can only be incompletely enumerated? The only reason Hart suggests is that there is no one thing referred to by "contract," "mens rea," or "malice." Yet the very idea that these legal words are abbreviations of a complex sort that we invent, precludes the existence of any physical thing (a natural kind) referred to by these words at all. As abbreviations, they are simply stand-ins for more complicated expressions.

Alternatively, one might reconstrue Hart as urging that complete specification of negative conditions is undesirable (as opposed to impossible), presumably because of arguments that new situations when contracts ought not to be enforced will arise, and those situations will

not fit the traditional categories of excuse. This is not an argument about the *impossibility* of assigning necessary and sufficient conditions to the words of legal theory, but an argument about the undesirability of doing so, admitting that it is possible. As a normative thesis, defeasibility is on solid ground. Although it is possible to close the lists of criteria for "contract," "mens rea," and similar legal terms, they should not be closed because new cases ought to be decided on grounds of justice rather than by the way they fit in a fixed taxonomy. But these arguments may not be persuasive to a formalist. The necessary argument—that it is not possible to close the list of criteria for legal words, and by doing so, to define them in the words of ordinary English—is precisely the argument Hart could not give us.

The reason Hart's notion of defeasibility was not a successful anti-reductionist tool was that Hart thought of defeasibility as a characteristic of legal words. It was a thesis about the meaning of ordinary words for Hart only insofar as those words were used to ascribe responsibility and rights, in which event the responsiblity was ascribed *defeasibly*. Hart needed a notion of defeasibility that was both a semantic notion—one not just connected to the illocutionary force of ascriptive utterances—and also applicable to ordinary as well as legal words. He needed, in short, a more radical theory of meaning for ordinary language so that his defeasibility thesis about the meaning of legal expressions could be at all viable.[202]

One might construe the defeasibility thesis in the followng way: non-ordinary legal words are defeasible in the same way and to the same extent as are the words of ordinary language in terms of which those legal words are defined. As should be obvious, abbreviations such as "malice," or terms of legal theory for which stipulated definitions may be available, such as "efficiency," can be no more precise than that which they abbreviate (*i.e.,* than that to which they are stipulated to be equivalent); and what they ultimately abbreviate are statements in ordinary English. No matter how precisely a formalist may stipulate equivalences between words of legal theory, once he reaches the level of ordinary English he faces all the problems earlier encountered for ordinary words.

One can see this by reverting to the earlier discussion of "mal-

202. *Id.* Baker sees Hart's need for a general semantic theory, and in the second part of his essay explores what might be done for Hart's defeasibility thesis in terms of what Baker calls a "constructivist" semantics. Baker's constructivist semantics is the criteriological account mentioned earlier with respect to nominal kinds.

ice."[203] There are ultimately six equivalences a formalist must discover if he is to deduce from the facts described by the witnesses in the case that a killing was or was not malicious. Let us recapitulate these for convenience, again focusing attention on only one component of "malice" having to do with intentional killings:

(1) Some killing x is done with malice if and only if (*iff*) it is done with express malice or implied malice.
(2) x is done with express malice *iff* it is done intentionally and not by one who is provoked or who is of diminished capacity.
(3) x is done intentionally *iff* x is a purpose of the actor's or x was known by the actor to be substantially certain to occur.
(4) x is a purpose of the actor's *iff* x was desired by the actor, and x was believed by the actor to be a possible consequence of his act A, and he did A because of his desire and his belief.
(5) x was desired by the actor *iff* the actor then had a set of tendencies (dispositions) to act in ways that brought about x, to notice such opportunities, to say "I desire x" or like expressions, to be pleased if x was achieved, to give displeasure if x was not achieved.
(6) The actor had this set of tendencies *iff* he did the act that brought about x, he said, "I desire x," and he was pleased when the victim died.

Because witnesses describe the facts at the level of what was said and done, a formalist needs each of these connections to hold if he is to deduce from the facts described by the witnesses that the killing was malicious.

Unlike words of scientific theory, there is nothing to prevent a lawmaker from stipulating the equivalence in (1). Likewise, he can stipulate the equivalence in (2), although normatively he should not close off the list of possible defenses in this way. Nothing in either this normative argument, or in Hart's original notion of defeasibility, however, prevents a stipulation such as that in (2). A lawmaker might also make the stipulation in (3), in order to resolve the vagueness of "intentional" with respect to knowledge. His troubles begin, however, when he leaves legal words with special meanings for the ordinary words in terms of which those special meanings are given. In order to reduce legal words to the previously understood ordinary words, a formalist must at some point rely on words with ordinary meanings.

The formalist's difficulties can be seen by examining the equivalences asserted in (4), (5), and (6). As purported analyses of the

203. *See* text accompanying notes 69-73 *supra*.

ordinary meaning of "purpose," "desire," and various tendency statements, these equivalences are subject to all the defects in the criterial theory of meaning that prevent them from being true. A brief examination in review will illustrate this. First, such words are ambiguous. If "purpose" is taken in its motive sense, the asserted equivalence in (4) at least looks plausible; but if "purpose" is taken in its function sense, it does not. Similarly, if "desire" is taken in its sense of "want on which one acts," the asserted equivalence in (4) is again plausible, whereas if "desire" is taken in its sense of "wish on which one would not dream of acting," it is not. Second, such words are vague. There is no clue, for example, how one is to combine the criteria proposed in either (5) or (6). Are any of these necessary? Is any subgroup of them sufficient? Third, such words are open-textured. One can imagine, for example, cases when (4) would be false, namely, when the desire and the belief cause the actor to do the act which leads to the killing but the act is nonetheless not done with the killing as its purpose.[204] Fourth, some of these may be natural kind words: "desire," perhaps. If so, there is no condition nor set of conditions that are necessary or sufficient. Fifth, even if these are not natural kind words, if they are nominal kind words they also cannot be analyzed in terms of necessary and sufficient conditions. The items mentioned in (5) and (6) are at best *criteriological,* that is, good evidence of desire or of purpose, but no more than that. The possibility of there being better evidence the other way prevents these from being criteria. Sixth, the tendency statements analyzed in (6) are clearly dispositional. As such, they cannot be operationalized in the way (6) suggests. One cannot deduce "*B* was disposed to do x," from "*B* did x," or from "*B* said he wanted to do x." Finally, whatever else the words may be, some of these words, such as "desire," are plainly mental words. As such, an equivalence such as (5) must be false because no intensional expression (*B* desired x) can be equivalent to a set of behavioral dispositions described in extensional terms. While behavior may pinpoint the object of a desire, it cannot pinpoint that object *under a particular description*.

In short, "malice" is defeasible in the same sense that the ordinary words in terms of which it is defined can be said to be defeasible: Neither can ultimately be defined in terms of necessary and sufficient conditions because of ambiguity, vagueness, open-texture, indexical intentions, noninductive evidential relations, referential opaqueness, et

204. This set of counter-examples, by "wayward causal chains," is well known in the philosophy of action. *See, e.g.,* A. GOLDMAN, A THEORY OF HUMAN ACTION 61-62 (1970); I. THALBERG, PERCEPTION, EMOTION AND ACTION 56-62 (1977).

cetera. In this sense, defeasibility does prevent deductions from factual descriptions of witnesses to legal conclusions, not as a characteristic peculiar to legal words, but because it is a convenient name for an aggregate of characteristics of ordinary words that necessarily (because the latter are defined by the former) infect legal words.

f. *Ethical terms:* The above discussion has dealt with the kinds of words where the criterial theory seems most plausible: natural kind words, which seem to have clear criteria in ordinary speech because of their reference to physical objects or properties; and theoretical terms, which seem to hold open the possibility of clear criteria because of the ability to stipulate definitions for them without the hindrance of ordinary usage. But there is yet another class of words, appearing often in legal rules, that is even prima facie more difficult for the criterial theory: ethical words.[205]

It is evident that legal rules often use admittedly moral words and phrases. Custody statutes, for example, often award the custody of children so as to promote the "best interest" of the children affected.[206] Exclusion or deportation of aliens may be ordered for those who have committed acts amounting to crimes "involving moral turpitude."[207] One may still be prosecuted in some jurisdictions for a criminal conspiracy having as its object any "immoral" purpose.[208] And it has long been argued that the Constitution incorporates in its great phrases the fundamental "canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."[209]

Can a judge deduce his conclusions in cases having rules containing such words? Can he find criteria—necessary and sufficient conditions for correct use—from which he may extract the analytic truths that he needs in order to link factual descriptions with legal predicates such as "best interest"? That the criterial theory (and thus formalism) is much less plausible with such examples is obvious, in light of the well known generality in the use of ethical terms. "Good," for example,

205. Just what words are ethical words is a very thorny problem. This Article is considering at least the words "good" and "right," "bad," "evil," and "wrong," and "moral," and "immoral" to be ethical words. What else might be included is unclear; surely not all words that have an "evaluative connotation," such as "brave" or "greedy," should be analyzed in the same ways as "good" and other "basic" moral words.

206. *See generally* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROB., Summer, 1975, at 226.

207. 8 U.S.C. §§ 1182(a)(9), 1251(a)(4) (1976).

208. *See generally* LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW § 62 (1972).

209. Rochin v. California, 342 U.S. 165, 169 (1952).

may be used to modify almost any noun; it is hard to make a "category mistake" using such a general adjective.[210] Such generality, and its accompanying vagueness, is the usual basis for deciding that the meaning of ethical expressions is such that it can be of little help in deciding legal cases.

Yet the criterial theory, and thus formalism, faces greater problems concerning the meaning of ethical terms than simply that of great vagueness. An entire philosophical tradition has urged that any attempt to analyze the meaning of ethical expressions in terms of factual criteria rests on a fundamental mistake, the mistake G.E. Moore dubbed the "naturalistic fallacy."[211] The nature of the mistake, as explored by Moore, can be seen by imagining a divorce case in which custody of the minor child is to be decided by determining which parent will further the "best interest" of the child. What does "best interest" mean? Suppose the necessary and sufficient conditions for the phrase that formalism presupposes existed; they would have to be empirically verifiable criteria if they are to "meet the facts" in the way that formalism in law (and logical positivism in science) requires. Suppose one analyzes the phrase "best interest of the child" as having as its criteria descriptions such as: "greater stability and security," "maximizing the child's happiness," and "well adjusted."[212] The problem is that no such list of proposed criteria seems to be equivalent to "best interest," as evidenced by a paraphrase of Moore's "open question" technique: One can always ask of any proposed criteria for "good," "but is it good?" A significant question to ask of the conjunction of the above factual descriptions would be, are those factors in the best interest of the child. If "best interest" followed analytically from the conjunction of these descriptions, that question would not be significant. Since the question is always an "open" one—one that can be significantly asked, even if one thinks one knows the answer—there can be no such analytic truths connecting ethical terms to factual descriptions.

Some maneuvers appear to enable the formalist judge, deciding a

210. The generality of "good" is explored in G. VON WRIGHT, THE VARIETIES OF GOODNESS (1963). "Good" is general, and not ambiguous, because many of its uses seem to be what P.T. Geach called attributive. An adjective used attributively does not have a different meaning in different contexts even though the criteria of its application may change; a good cantaloupe, a good barber, and a good knife possibly share no good-making characteristics, yet "good" so used is only general, not ambiguous. *See* Geach, *Good and Evil,* 17 ANALYSIS 33 (1956), *reprinted in* THEORIES OF ETHICS 64 (P. Foot ed. 1967). *See also* J. MACKIE, ETHICS 54-57 (1977).

211. G. MOORE, PRINCIPIA ETHICA 1-109 (1903).

212. Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) (paraphrase of criteria considered by court).

case under a rule that contains an ethical expression, to avoid this problem. He might begin by asserting that "best interest" is not to be understood in its ordinary sense at all. Such a judge might say that the legislature, in using the phrase "best interest," did not mean that he should find whether custody to one parent or the other really was in the child's best interest; under this interpretation, the judge must ask if, *according to most people's moral beliefs,* his decision will be "best" for the child. He does not seek to judge the moral question: he is only to rely on conventional morality for the answer. This is a factual question about people's beliefs, and thus, the judge need not, it is concluded, deduce a moral conclusion from factual premises. He need only deduce a factual conclusion about what people believe on some moral issue.

It may be helpful to symbolize this difference in the following way. Let p be the proposition that any situation in which the child will get stability and security, will be happy, and will be well adjusted, is "best," and let B(p) be the proposition that most people believe that any situation in which the child will get stability and security, will be happy, and will be well adjusted, is best. B(p) and p are quite distinct; neither implies the other.

Since these expressions are distinct, a formalist needs an argument to show why, when the legislature told the judge he was to discover truths like p, he was really to discover truths like B(p). If one is asked whether it is raining, and one answers that some group of people believes that it is raining, the question has not been answered. "It is raining" may be inferred because people's beliefs about it are evidence that it is raining. Still, what is desired is to know whether it is raining, not what people's beliefs are. Similarly, when the legislature says that a child's best interest is determinative of some legal issue, it seems to mean just that, and not that what people believe about a child's best interest is determinative.

At this point, a formalist would probably trundle out his ethical skepticism to assert that ethical propositions like p have no meaning. There is no fact of the matter behind such propositions as, "helpful actions build good moral character" or "slavery is unjust." Thus, the *only thing* that could be meant by statutes using such expressions would be the beliefs of a societal majority about such things—for beliefs, at least, exist and can be ascertained like other mental facts. A formalist might rely on some theory that allows an "emotive mean-

ing"[213] or a "prescriptive force"[214] to such expressions, or he might say that they have no function. In any case, they do not describe anything.

It is very doubtful that ethical skepticism in any of its varied forms is not correct. For now, however, it is assumed to be correct, yet it does not get the formalist out of his difficulties. For if p makes no sense, then neither does B(p). Consider these "propositions":

q Ugh!
r Stand your ground!
s Purple capacities are square.

The first is an expression of distaste, the second, an order, and the third, nonsense. None makes any descriptive sense; none describes anything. But, likewise, B(*q*), B(*r*), and B(*s*) make no sense either. What most people believe, if they believe anything, has to be a proposition that itself makes sense (although it need not be true). "Belief," like other mental words examined earlier,[215] is a word that takes intensional objects. One does not just believe, hope, fear, intend, desire, know, et cetera, in the abstract; one believes, fears, hopes, et cetera *that* something is the case. To believe something is to believe some proposition to be true. A sentence about the belief of some group of people, thus makes sense only if the "thing" believed—the proposition—itself makes sense, that is, is capable of being true or false.

It is thus possible that the legislature meant what it said; the judge is to award custody only insofar as the best interest of the child is truly promoted. And if it is possible, why should the formalist judge—a good literalist—not take the ordinary meaning of the statute, instead of another meaning (B(p)) that the legislature could have set forth but did not?[216] But once a judge takes the legislature's language seriously, he

213. "Emotive meaning" is a famous, logical positivist theory of "meaning" for ethical utterances. For the classic expositions, see A. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1946); C. STEVENSON, ETHICS AND LANGUAGE (1944).

214. This is Hare's theory of the meaning of such words. R. HARE, *supra* note 153. Hare allows a "secondary" descriptive meaning to ethical expressions in addition to their primary, prescriptive meaning. Such descriptive meaning turns out to be only that ethical terms, like descriptive terms generally, are universalizable. Such "descriptive meaning" is not to be equated to criteria, as Hare made clear. *Id.* at 94-110.

215. *See* text accompanying notes 136-45 *supra*.

216. Some allowance should be made for the possibility that ethical terms can have an "inverted commas" sense to them, in which event they are to be interpreted as "not making a value judgment . . . but alluding to the value judgments of other people." R. HARE, *supra* note 153, at 124. One might thus say of another, "She has a 'bad character,' " and mean by it that others think that her character is bad, although we are taking no position on whether her character is really bad or not. Yet, there is nothing in most circumstances to indicate that the inverted commas sense is the one intended. An exception is Frankfurter's "fundamental notions of justice," and "canons

must find meanings of ethical words in terms of factual criteria—just the sort of meanings that Moore and those who have followed him said could not exist.

B. Problems for the Alternative, Subjectivist Account of Meaning: The Search for Legislative Intent

It may seem that all of the foregoing problems exist only if one has artificially narrowed his focus to the meanings of *sentences* and *words*. The earlier discussion has indeed proceeded as if the only meaning of "meaning" relevant to a theory of adjudication is that sought in expressions like, "sentence x means y," or "word w means z." Yet a formalist might properly point out that statutes are not just a set of sentences. Rather, they are sentences uttered on a particular occasion by a particular set of persons. Moreover, those persons—the legislature—*meant something* by uttering those sentences. A plausible alternative reconstruction of the meaning of a statute, accordingly, would proceed by ascertaining what the *speaker(s) meant* rather than what the words or sentences mean. As discussed below, one seeking to ascertain the meaning of a statute might look to the *speaker's meaning* rather than to sentence or word meaning.

If this point is granted, the second step of the argument is to urge that there is a conceptual connection between what the speaker of a sentence meant by uttering it and his intent in uttering it. The speaker's meaning is quite plausibly construed as a question of the speaker's intent: What did he intend his utterance to mean? Such an approach leads in a seemingly natural way to the desired conclusion: The meaning of a statute that a judge is to discover is not to be found in the meaning of its sentences or words, but rather in the intent of the speaker of them, the legislature. Thus begins the search for legislative intent.

Three general arguments seem to recommend this alternative theory of meaning. First, it is sometimes urged that there is conceptually no choice *but* to look to legislative intent to be able to find "the meaning of the statute." This follows from an analysis of meaning that asserts that the meaning of an utterance of a particular sentence (a statute) at a certain time by a legislature must be a function of what the legislature meant by its utterance, itself a function of the intentions

of decency and fairness which express the notions of English-speaking peoples," where the reference to standards is fairly explicit. Malinski v. New York, 324 U.S. 401, 415, 417 (1945) (Frankfurter, J., concurring).

with which the legislature spoke. The conceptual argument is that one must "inquire what [the speaker] meant in order to find out what he has said."[217] Second, normatively, much seems to recommend looking to the intent of the legislature. The principle of democracy is seemingly furthered only if the legislative will, defined by the intentions with which the legislature "spoke," is followed. Finally, looking to what was meant holds out the promise of avoiding the indeterminacies of interpretation earlier encountered. For although words and sentences as such may be indeterminate in their meanings, the intent of the utterer of them about what they should mean in a particular institutional context need not be. Each of these three arguments shall be examined in turn.

1. *The Necessity of Looking to Legislative Intent: Meaning and Intention*

Consider the following three statements using the word "mean":

1. Sentence x means proposition p. *E.g.,* the sentence, "manufactured products may be carried only by a certificated carrier," means that if naturally existing things are altered by human or machine labor, they may be carried by a noncertificated carrier.
2. Speaker *S*'s *utterance* of sentence x meant p. *E.g.,* the utterance, "manufactured products may be carried only by a certificated carrier," as uttered by the legislature yesterday, meant that if naturally existing things are altered by human or machine labor, then they may be carried by a noncertificated carrier.
3. Speaker *S*, when he uttered sentence x meant that p. *E.g.,* the legislature, when it uttered the sentence "manufactured products may be carried only by a certificated carrier," meant that if naturally existing things are altered by human or machine labor, then they may be carried by a noncertificated carrier.

The statements respectively exemplify:

1. "Mean" when the (grammatical) subject is a *sentence*.
2. "Mean" when the subject is an *utterance* on a particnlar occasion of a sentence.
3. "Mean" when the subject is the *speaker* of an utterance of a sentence.

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217. Holmes, *The Theory of Legal Interpretation,* 12 HARV. L. REV. 417, 418 (1899). *See also* Christie, *supra* note 122:

> No one doubts that it is the function of courts to interpret statutes in the light of the purposes which the legislature had in mind in enacting the statutes. This is no more than a specific application of the principle, self-evident to all students of language, that a speaker's remarks must be interpreted in the context in which the remarks are made.

Id. at 886.

These kinds of meaning may respectively be called sentence-meaning, utterance-meaning, and speaker's-meaning.[218]

Leaving open for the moment the question of whether these kinds of meaning are truly distinct, with which kind of meaning should "the meaning of a statute" be identified? Ultimately, some normative argument is necessary to answer this question. The only conceptual argument that could show that one must look to legislative intent would be one that collapses any distinction between these sorts of meaning, one which reduces: (1) sentence-meaning to utterance-meaning; (2) utterance-meaning to speaker's-meaning; and (3) speaker's-meaning to some set of the speaker's intentions. With such reductions, there would be nothing to argue about—one seeking the meaning of a statute would have to look to legislative intent.

Before discussing the second and third of these reductions, it is important to see the obvious irreducibility of the meaning of a sentence to any set of intentions of one particular speaker when he utters it on a particular occasion. The meaning of a sentence is a function of the conventions of its language, and, while those conventions may be a function of the intentions with which a *people* speaks, those conventions cannot be a function of the intentions of one speaker alone. A speaker cannot literally arrogate to himself Humpty Dumpty's power to "make words mean what he pleases" (although he can mean what he pleases by them).[219]

Thus, there will always be the possibility that a speaker said something (sentence-meaning) differing from what he meant to say (speaker's-meaning). Hence, it will require some normative argument to establish that a statute's meaning is not just the ordinary meaning of the sentences that compose it, for there plainly can be no reduction of sentence-meaning to the intentions of the legislature. Still, for the sake of this conceptual argument, the notion of "utterance-meaning" has been introduced between sentence-meaning and speaker's-meaning.

218. The distinction between a sentence and an utterance of a sentence on a particular occasion may be found in Strawson, *On Referring*, 59 MIND 320, 324-27 (1950).

219. *See* CAVELL, MUST WE MEAN WHAT WE SAY? 37-40 (1969). "[A]n individual's intentions or wishes can no more produce the general meaning for a word than they can produce horses for beggars, or home runs from pop flies, or successful poems out of unsuccessful poems." *Id.* at 38-39. Even Grice and Schiffer, discussed below, who do analyze sentence-making in terms of intentions, recognize that the relevant intentions must be those of the native speakers, *in general*, of the language. Grice, for example, states: " '[Sentence] x means$_{NN}$ (timeless) that so-and-so' might as a first shot be equated with some statement or disjunction of statements about what *'people' (vague) intend* . . . to effect by x." Grice, *supra* note 74, at 385 (emphasis added).

The conceptual argument could then proceed by urging that the relevant meaning of a statute is not the meaning of those *sentences* that compose it; but rather, that of the *utterance* of those sentences at a particular time and in a certain context. A statute is an utterance, and one might conclude therefore that the meaning of a statute should be the meaning of the statutory sentences as *uttered,* and not the meaning such sentences might have had in general. To find what an utterance means, the argument continues, is to find what the speaker meant, and to find the latter it is necessary to ascertain the intentions with which he spoke. Put this way, sentence-meaning is thrown out at the start, on the allegedly conceptual ground that the meaning of "the meaning of a statute" is a question of utterance-meaning. If the latter can be reduced to the intentions of the speaker, the argument succeeds.

This argument shall be examined, not as it has been put forward by legal theorists—where it is usually conclusionary at best—but rather as it has been advanced in contemporary philosophy.[220] The conceptual argument is clearly supported by Paul Grice's well-known theory of meaning,[221] which reduces utterance-meaning to speaker's-meaning and speaker's-meaning to the speaker's underlying intentions. Grice's theory thus merits careful attention.

The essential insight behind Grice's theory of meaning is that in speaking one acts for a reason. Speaking is one of the ways in which we can effect change in the world, and in speaking we usually intend to make some change. Thus, according to Grice, to say that speaker S means something by uttering sentence x to audience A, is to say that the speaker has three intentions:

(1) that his utterance of x produce a certain effect e in A;

220. To my knowledge, no legal theorist urging the conceptual connection of a statute's meaning to the legislature's intentions has relied on the body of philosophy to be discussed. That this kind of work in the philosophy of language is directly relevant to the concerns of such theorists should be plain from the discussion that follows. The most famous of the attempts in legal literature to make out a necessary connection between a speaker's purpose and the meaning of what he said is Lon Fuller's response to Hart, considered in the text accompanying notes 262-82 *infra*. For more offhand assertions of this allegedly necessary connection, see Christie, *supra* note 217; Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395, 400 (1950) ("If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road": I,* 40 TEX. L. REV. 751, 763 (1962) (" '[P]lain meaning' conceived as a standard to be applied to the skein of language without reference to legislative purposes behind its use is an intrinsically impossible standard incapable of operating as a legal rule or standard.").

221. Grice, *supra* note 74.

(2) that A recognize S's intention (1);

and

(3) that A's recognition of S's intention in (1) should function as at least part of A's reason for the effect e on A.

Grice further asserts that asking what S meant is asking for a specification of the intended effect.

By way of example, suppose S utters the sentence, "it is raining." Further suppose that the effect intended by S is the belief in listener A that it is raining; S intended that listener A recognize S's intention to induce that belief in A; and S intended A's recognition of S's intention to be at least part of A's reason for believing that it is raining. To Grice it is because of S's three intentions that S means something by his utterance, and what he means is for A to believe that it is raining.

Fortunately, it is not necessary to assess the general correctness of Grice's account of speaker's-meaning in terms of the aforementioned kinds of intentions. Surely, for whatever intentions are suggested, *some* of these determine what *a speaker meant* by uttering a sentence on a particular occasion. Surely, that is, speaker's-meaning is a function of the speaker's intentions.[222] Still, one needs to be clear about the kinds of effects a speaker may intend that could be of relevance to what that speaker meant by his utterance. Grice clearly considers effects that are either actions, emotional states, or beliefs of the audience. But what of more remote effects? If S utters "it is raining" to make A believe that it is raining, because S intends to sell A an umbrella, is this latter intent relevant to what S means?

Any analysis of speaker's-meaning must ignore such further intentions. By saying "it is raining," S may ultimately have intended to sell an umbrella, but what he meant is surely unaffected by that fact. Suppose a second speaker, S, utters the same words. Suppose S_2 intends to convince her audience that it is raining, but S_2's further intention is not to sell an umbrella but to get her son to take his galoshes to school. If these more remote intentions govern speaker's-meaning, then S means something different than S_2. Such a result is counterintuitive and is avoided if one restricts the effects intended by S to those kinds of effects involved in an audience understanding the utterance—the so-called "uptake" of the audience.[223]

222. S. SCHIFFER, *supra* note 74, at 17-87. Schiffer refines Grice's analysis of speaker's-meaning to meet some of the objections one might interpose here.

223. Grice himself rather vaguely suggests some such restriction: "[O]nly what I may call the primary intention of an utterer is relevant to the meaning of an utterance . . . . That is, if (say) I

The result of such a necessary restriction on the intentions relevant to speaker's-meaning is to rule out certain very popular conceptions of "legislative intent" as candidates for the meaning of a statute (even when the latter phrase is construed as a question of what the legislature meant by enacting it). *Relevant* to Grice's analysis of speaker's-meaning is evidence of the belief-states the legislature intended to induce in its audience; *irrelevant* to such an analysis is evidence of the further effects the legislature intended the statute to have. When Congress, for example, enacted the agricultural exemption to the Interstate Commerce Act, the ultimate effects the legislature may have desired from the statute (*e.g.,* to keep transportation costs low for farmers) are irrelevant to an analysis of what Congress meant in enacting the statute (and, *a fortiori,* irrelevant to the statute's meaning). Such further intent is only relevant to understanding what Congress *meant to bring about* by enacting the statute; it is not relevant to what Congress *meant* (the speaker's-meaning).[224]

The conceptual argument will thus be of no help to the most popular construction of legislative intent—the ultimate effects desired by the legislature. This is not to say that a court should not look to such further purposes in construing a statute; only, that some *normative* argument is required to justify such a practice. This kind of procedure is not a *conceptually necessary* ingredient in determining "what the legislature meant by a statute," and thus, not in ascertaining "what the statute means."

Much of the interest in the conceptual argument must surely fade when it is discovered that no such sleight-of-hand can justify resort to the most prominent items known under the name of "legislative intent." Still, what remains is of importance: is the meaning of a statute (as an utterance) to be explicated solely in terms of the intentions (properly limited, as above) of the legislature? Suppose that in passing the agricultural exemption to the Interstate Commerce Act, Congress intended to induce a belief in judges that anything not made by hand is

intend to get a man to do something by giving him some information, it cannot be regarded as relevant to the meaning$_{NN}$ of my utterance to describe what I intend him to do." Grice, *supra* note 74, at 386.

224. Grice properly excludes usages of "mean" such as what one "means to achieve" as irrelevant to an analysis of "meaning" in its sense of communication. What one "means to achieve" and what one "meant to do" are usages plainly synonymous with intent; Grice quite properly classifies such expressions with other usages of "mean" not relevant to its communication sense, *e.g.,* as in "clouds mean rain." Grice ignores such usages because the things which have meaning are not communications or communicative acts; any action, communicative or not, can have meaning in this excluded sense. Grice, *supra* note 74.

an agricultural commodity and not a manufactured product, and it intended to produce such belief by the judges recognizing its first intention, and it intended judges to adopt such a belief at least in part because of their recognition of the legislature's first intention. Is the meaning of the statute as an utterance, that anything not made by hand may be carried by non-certificated carriers?

Grice's analysis would presumably say yes. True, the example is a bit far-fetched, for no *rational* legislature would utter the above sentence as a means to induce such a belief by judges, in light of the fact that "manufactured" no longer means "made by hand." But there is nothing *logically impossible* about the example; a legislature could have such intentions if it held the requisite—admittedly irrational—beliefs about how its words would be understood.

To press a bit further, suppose the legislature enacts a "statute" that says in its entirety: "gleeg! gleeg! gleeg!"[225] and does so intending to induce a belief in judges that anything not made by hand could be carried by a non-certificated carrier. Even though the *legislature meant something* by the utterance—indeed, we know, hypothetically, precisely what it meant—the *utterance does not mean anything*.

Both thought experiments point to the conclusion that utterance-meaning is not a function of speaker's-meaning (Grice's first claim) even though speaker's-meaning is a function of the speaker's intentions (Grice's second claim). Why this is so is worth some elaboration. The problem with Grice's analysis of the meaning of an utterance stems from his failure to take seriously the ambiguity of the phrase, "the meaning of an utterance." The ambiguity stems from the dual nature of an utterance itself. An utterance can be viewed as a token of which the sentence uttered is the type. Or an utterance can be seen as an act of speech at a certain time by a particular person. The meaning of an utterance, accordingly, can either be the meaning of the *token* of some sentence p, which is simply the meaning of the sentence itself; or the

225. I have adopted this counterexample from one used by Paul Ziff in arguing against Grice. Ziff, *On H.P. Grice's Account of Meaning*, 28 ANALYSIS 1, 5 (1967). Perhaps Grice and Schiffer intend to rule out such counterexamples by supplementing the original analysis with the requirement that the speaker intend to induce belief states in an audience by that audience recognizing *conventional* features of the utterance in question. S. SCHIFFER, *supra* note 74, at 11-12; Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUNDATIONS OF LANGUAGE 225 (1968). Such a stipulation only spotlights the irrationality of the speaker's beliefs; it does not rule them out. Thus Ziff's kind of thought experiment still provides a valid counterexample to the Grice-Schiffer analysis of speaker's-meaning.

meaning of the particular *act* of utterance, which is determined by the purpose of the actor, *i.e.,* what he intended it to mean.

This ambiguity in what "utterance" refers to, and thus in "the meaning of an utterance," can easily be missed if one focuses on communicative acts that do not use conventional means of communication. Suppose actor *A* stands before an audience, twirling his fingers in a clockwise motion. Direct inquiry into the speaker's-meaning must be avoided as question-begging; instead of asking, "what did *A* mean by that?" (a question obviously determined by *A*'s intentions),[226] the question should be, "what does *that* (the twirling of the fingers) mean?" To inquire into the meaning of this act is seemingly to ask only for the intentions of the actor *A*. Actions such as *A*'s "have meaning" precisely because actions are done with intentions, as traditions as diverse as Freud, Weber, and ordinary language philosophy recognize. Such an answer (in terms of those intentions) is obvious only because the type of action of which *A*'s act was a token has no conventional meaning. There seems to be no competing interpretation of "the meaning of *A*'s twirling his fingers at *t*."[227] If actions of this *type*, twirling the fingers clockwise, are generally understood to mean, "it is time for dinner," then to ask for the meaning of *A*'s act may be construed as asking for the meaning of the *type* of action of which *A*'s act is a token. And, as before, *this* question of meaning has nothing to do with *A*'s intentions, nor with what *he means* by his action. Rather, the significance of *A*'s act is determined strictly by the conventions that invest this *type* of act with meaning. Since there are always such conventions surrounding the words employed in speech-acts, such as the passage of a statute, the meaning of a statute as an utterance is a function of those conventions at least as plausibly as it is a function of the speaker's intentions.

The above counterexamples and the analysis which underlies them suggest that there is nothing conceptually suspect in saying that a legislature means one thing by an utterance, but that the utterance means something else entirely—or even nothing at all. There are, accordingly, no *conceptual* necessities that force a judge to look to legislative intent to discover "the meaning of a statute."

It may seem that this critique avoids those examples where the

226. *See* note 222 *supra*. I am indebted to Norman Lane for this example.

227. In fact, once one perceives the ambiguity one can see that the second sense of the question arises here; it is only because the answer is so obvious that it appears that the question does not exist. In this sense of the question, communicative acts that are *A*'s invention have no meaning, even though *A* meant something by them and even though an audience understanding *A*'s intention, could understand what he meant.

conceptual argument is strongest, namely, definite referring expressions. Definite referring expressions include proper names ("Nixon"), definite descriptions ("the present Queen of England"), pronouns and other indexical words such as the demonstratives "this" and "that," and titles ("the Pope").[228] All such expressions refer to one definite entity.

Here, the conceptual argument—the idea that we must "inquire what he meant in order to find out what he has said"—is much stronger. Because there is nothing in the general meaning of such words or phrases that reveals which dog, pope, or prime minister is referred to by some particular utterance, it is necessary to know the speaker's intentions; in order to understand the meaning of the entire sentence in which the definite referring expression occurs, it is essential to know which thing was meant (intended).

While there is admittedly some dispute about whether reference exhausts the meaning of proper names, et cetera, or even whether it is part of the meaning of such words, clearly the law must look to this aspect of the word to carry out the legislative command. That is, even if the referent is no proper part of the meaning of a definite referring expression, the thing the phrase refers to is exactly the information a judge must posess to apply the rule containing such expressions. Accordingly, such examples have been avoided here, not because of some philosophical position which excludes reference as part of the meaning of proper names, but rather because of the comparative rarity of their use in legal rules. Legislative use of such terms is known to be largely confined to private bills.[229] Public legislation speaks more generally, dealing with words and phrases that have an extension but do not refer to one particular thing. The frequency of use of definite referring expressions is much greater in contracts than in statutes. Contract law provides that when both parties to a contract often intend to refer to some one thing by use of a definite referring expression, the contract provision is governed in its interpretation by that intent.[230] The con-

228. This classification is from J. SEARLE, SPEECH ACTS 81 (1969). For a comprehensive summary of the debate about the meaning of such expressions in philosophy, see L. LINSKY, NAMES AND DESCRIPTIONS (1977).

229. Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 868-69 (1930).

230. Even here, it should be pointed out, the conceptual argument is not conclusive. Even if the meanings of some definite expressions are settled by the intentions of the speaker, a court is free to conclude that as a matter of policy the meaning of the contractual expressions will not govern. In contract law such a move is unlikely, because the normative principles that underlie it reinforce the conceptual conclusion that the parties' intentions should govern. The lack of conclusiveness of the conceptual argument is more clearly seen in the law of defamation, where definite referring expressions are also common. Even though recourse to the speaker's intentions settles

ceptual argument may thus have some force in the interpretation of definite expressions in contracts, where such expressions are common.

But having exacted this much of a concession to the validity of the contractual argument, a formalist might seek to elicit a much more serious one. Suppose when the legislature "utters" a statutory sentence, it has in mind not a proposition as in the examples above, but rather intends its language to cover at least certain particular things. For example, when it utters "manufactured product," it may picture to itself[231] pieces of cotton underwear. Analogous to the argument just considered regarding fixing of the reference of definite referring expressions, it might seem that to fix the extension of a general predicate one must know the paradigmatic examples the speaker had in mind when he used it.

This apparent analogy fails simply because the extension of a predicate is not dependent upon the speaker's intentions in the same way as the reference of a definite referring expression. This can be seen by examining the same kinds of counterexamples as those adduced against Grice:[232] Congress could have enacted the agricultural exemption to the Interstate Commerce Act intending the extension of "agricultural commodities" to include cotton underwear; alternatively, it could have uttered "gleeg! gleeg! gleeg!" with the same intent. Yet despite its intent in that regard, the legislative utterances do not include cloth underwear in their extension. What those utterances "mean"—what is included in their extension, if they have one—is a matter of convention and not of an individual speaker's intention. There is accordingly no conceptual argument forcing one to look to the examples the legislature had in mind when it passed the statute; "the meaning of a statute" need have nothing to do with such examples so that if a judge

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who, conceptually, is referred to by a particular defamatory utterance, the law of torts makes no such inquiry. The speaker may be held liable for utterances defaming a person of whom he has no knowledge even though the intended reference is to someone other than the plaintiff. Tort law, for reasons of policy, chooses an interpretation of an expression at odds with its known meaning. A further example is provided by the law of testamentary dispositions where, again for policy reasons, one is not allowed to prove the testator's true intentions.

231. The well-known "picture" theory of meaning is thus a variant of the subjectivist theory here considered. For the theory's most famous exposition, see L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS ¶¶ 4.01-.53 (1961). In McBoyle v. United States, 283 U.S. 25 (1931), Holmes arguably applied the theory in determining whether an airplane was a vehicle under the National Motor Vehicle Theft Act. He concluded that an airplane was not a vehicle because " 'vehicle' calls up the picture of a thing moving on land." *Id.* at 26.

232. For an extended argument to this conclusion not relying simply on counterexamples, see H. PUTNAM, *supra* note 113, at 223-29, 246-49.

is to be told that he must look to them, some normative argument will be required to justify such a practice.

2. *The Desirability of Looking to Legislative Intent*

Although no conceptual necessities force a judge to look to legislative intent, should he nonetheless do so? Before addressing that inquiry it will be helpful to make clear the sorts of things one may refer to when speaking of legislative intent. A legislature, when it passes a statute, may have in mind:

(1) certain propositions it takes to be the meaning of the words and sentences it employes;
(2) certain exemplars of its general predicates; or
(3) certain further effects it intends its statute to bring about.

For convenience, the first two intentions will be referred to as the "locutionary" intentions of the legislature, and the last as its "perlocutionary" intentions.

To return to an earlier example, in its passage of the agricultural exemption to the Interstate Commerce Act, Congress may have intended:

(1) "manufactured product" to mean "anything made by human industry";
(2) "manufactured product" to include, among other things, cloth underwear;
(3) that the statute keep transportation costs low for farmers.

The purport of the preceding subsection is that nothing in "the meaning of a statute" forces a judge to look to any of these intentions. Are there nonetheless good reasons to justify his doing so? The reason often advanced stems from the principle of democracy: the majority's elected representatives are to effect social change, and the courts should carry out the representatives' intent to the extent that it can be ascertained.[233] Whether the practice of looking to legislative intent can be justified

233. *See* E. CRAWFORD, THE CONSTRUCTION OF STATUTES 255-56 (1940). It is unclear whether this democratic justification is to justify looking to what the legislature wanted to achieve (its prolocutionary intent) or to what it meant (its locutionary intents). There will be no conflict between the two types of intent only if the legislature has made no mistakes in its calculations. If, for example, construing "manufactured product" to mean "anything made by human industry," or so that it includes in its extension cloth underwear, in fact helps to keep farmers' transportation costs low, then there is no conflict between the legislature's locutionary and its perlocutionary intentions. There being no conflict, it would further what the legislature is trying to bring about by construing its language by reference to its locutionary intentions. Where there is conflict, however, the unanswered question is whether the principle of democracy is furthered by looking to the legislature's perlocutionary or to its locutionary intentions?

depends on how one conceives of the principle of democracy. One construction would be that the legislature is sovereign, and courts are to carry out that sovereign's command. On this construction, a statute is akin to an order, and a court to a servant who must not only obey the literal terms of the order, but must do so in a very pleasing way to his master. A servant who is concerned with pleasing his master would do well to ascertain his master's intentions to carry out his orders. The appeal of this construction lies in the dominance of a democratic institution, the legislature, over a (typically) nondemocratic one, the courts. This construction eliminates potentially arbitrary "judicial discretion" in favor of commands whose content is democratically determined. Yet such a construction leaves out the very idea of law itself.

The principle of democracy should not be construed as if its only purport were to condemn judicial caprice. It also condemns legislative caprice. The proper functions of a legislature as we have conceived it are not those of a sovereign whose wishes are to ascertained and followed, but rather those of a legislature acting *by law*. The legislative function is not to formulate objectives, and then leave it to courts and agencies to figure out what language will be effective means to those objectives; its function is to specify in canonical language what it wants to have done. The principle of democracy requires not just the triumph of majority will, but also that those triumphs be expressed in those public, prospective, general standards we call laws.

The *reductio ad absurdum* for the "legislature as sovereign" construction is to imagine a legislature whose will changes after it enacts a statute. If a court's job is to follow the legislative will, presumably it should follow the most recent legislative consensus that exists, just as a servant will construe his orders by what he perceives his master to now want. In such a case a court need not ask what the enacting legislature intended; it should guess at what the present legislature's wishes about the matter might be. And if it is going to raise this question, why not literally ask the legislature to state its present objectives and their implication for the particular case before the court? This would save the court from having to guess at what the present legislature's wishes might be. Of course, if courts proceeded in this way, the issuance of a statute in the first place would be an idle act—evidence only of what the legislature at one time intended. Courts would not have as their function the applying of statutes, but instead would become a kind of referral service, a means of communicating the existence of disputes to the legislature, rather like a specialized branch of the Postal Service.

This scenario clearly is as inconsistent with our idea of the "division of functions," "separation of powers," "government of laws and not by men," as is untrammeled judicial caprice. Both contradict the principle of democracy, which holds that the popularly elected legislature is to make *laws*.

Buttressing this objection from basic political theory is the objection based on the principle of substantive fairness: It is unfair to frustrate the expectations of private parties when based upon legitimate reliance on statutory language. This principle is usually taken to prohibit a judge from substituting his own idiosyncratic meaning for the ordinary meanings of the words in a statute. Private parties can only be expected to learn what a statute says; they cannot legitimately be expected to ascertain the mental states of judges. An analogous application of the principle bars recourse to legislative intent, because private parties can no more be expected to delve into the legislators' minds than they can into the minds of judges. They are in both cases entitled to rely upon the statutory language.[234]

While it may not be often that the (locutionary or perlocutionary) intentions of the legislature lead to a construction at odds with the ordinary meaning of the words used, where there is a difference both the principle of democracy and the principle of substantive fairness are offended by recourse to speaker's-meaning or any other form of legislative intent. It is not a theory of meaning that can be reconciled with the ideals of what the rule of law comes to.

This wholesale rejection of legislative intent does not necessarily call into question the "intent" found by judges "in the statute itself," or "the purpose" of a statute judges often claim to find in construing it. Both of these well-worn judicial distinctions are sound, with the result that one can reject legislative intent as a proper inquiry but retain the judicial practices the latter phrases describe. Since both these distinctions are badly in need of explication, a brief discussion follows to demonstrate how they are distinct from legislative intent, and why they are legitimate inquiries into a statute's meaning.

To deal first with the intention *in* a statute, consider the ideas of an intention *in* a painting in aesthetics, or the intention *in* a dream in psy-

234. This consideration seems to have prompted the "plain meaning" restriction on the use of legislative intent. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent . . . .").

choanalysis. Intentions *in* such things should not be confused with the *intentions with which* a painter painted a particular picture, or a dreamer dreamed some particular dream. Indeed, intentions in paintings, dreams, and statutes have nothing to do with the mental states of particular artists, dreamers, or legislators. Rather, such intentions are interpretations that observers impart to the phenomena because of the configuration of their elements; such expressions in no case imply any claim that the relevant actor actually *had* such intentions, even unconsciously, or that he did what he did *because* of such intentions.[235]

There are some restrictions on this "hermaneutic" approach to phenomena, for not every ordering of the elements of a painting, dream, or statute can give rise to the "discovery" of some intention in it. Limitations to interpretation arise from the assumption that human beings are rational when they paint, dream (according to Freudians), or write statutes (according to optimists). If one assumes that these activities are rationally governed, three minimal conditions must be satisfied.[236]

First, the ordering must be statable in the form of a practical syllogism. If some intention I(q) is to be discovered in a statute p, then the intention must be capable of serving as the major premise in the following schema:

$$\begin{array}{l} I(q) \\ \underline{B[U(p) \supset q]} \\ U(p) \end{array}$$

"I(q)" represents the intention "intends that q" (*e.g.,* intends that transportation costs be kept low for farmers); "B[U(p)⊃q]" represents the belief, "believes that if one utters p, then q" (*e.g.,* believes that if one utters "agricultural commodities that are not manufactured products may be carried by non-certificated carriers," then transportation costs will be kept low for farmers); and "U(p)" represents the act, "utters that p" (*e.g.,* utters "agricultural commodities that are not manufactured products may be carried by non-certificated carriers"). Understanding human behavior (such as the speech act of uttering some sentence) as rational is most fundamentally to see it as being the conclusion of such a practical syllogism. The restriction is one of logical form: the object

235. *See* Moore, *supra* note 142, at n.1 (separating the "hermaneutic" approach to understanding the psychoanalytic theory of dreams from more genuinely explanatory approaches).

236. These and another stipulation made in connection with rationality are explored in Moore, *Legal Conceptions of Mental Illness,* in MENTAL ILLNESS: LAW AND PUBLIC POLICY 25 (B. Brady & T. Euglehardt eds. 1980); Moore, *Mental Illness and Responsibility,* 39 BULL. MENNINGER CLINIC 308, 318-23 (1975).

of the intention must be identical to the consequent of the belief statement [q=q], and the antecedent of the belief statement must be identical to the action (U(p)=U(p)). Only then is it rational to do the act in question—for only in this way would adopting the action be the means of achieving the intended object.

Second, the belief (the second premise in the above schema) must be a rational belief. If, for example, a legislator believes that uttering "this session is *closed*," will close the session—despite his known lack of authorization to close the session—his belief is irrational.[237] This requirement that the belief be rational further restricts the set of intentions discoverable "in" a particular utterance, because the intentions must be connected to the phenomenon—dream, painting, or statute—by a belief that exhibits the required logical form *and* is rational. Third, the intention itself (the first premise) must be intelligible. Culturally determined standards of intelligibility are part of people understanding each other as creatures that act for reasons, and such general cultural standards rule out many consequences of an act as intentions in it. Particular contexts may further restrict the sorts of consequences eligible to serve as the objects of intentions (beyond the general restrictions inherent in our culture). In aesthetics some things one might intelligibly want in general are ruled out by our ideas of what a painting is. While it is intelligible in some contexts to want to scare flies, for example, to paint a painting so that its content, colors, et cetera, have this consequence, is not an intelligible artistic intention. Similarly, the act of passing a statute may have a host of generally intelligible intentions, whose objects may in fact be consequences of its passage. For example, the passage of statute S pleased the spouse of L_1, it pleased the constituents of L_2, it paid back the favor L_3 owed to L_4, it served the racial prejudices of L_5, et cetera. None of these, however, are potential intentions to be discovered *in* a statute by a court, because none of them are *institutionally appropriate* intentions for passing the statute. Intelligible intentions in this special context are limited to those *public* consequences likely from the statute's passage that could have been an intelligible intention of a rational legislator.

These three restrictions impose very minimal constraints on the intentions discoverable *in* a statute. Any change in society that it would be reasonable to believe a statute's passage would effect and

237. Psychoanalytic theory does not abide by this limitation in hermaneutics; often the beliefs necessary to complete the practical syllogisms of Freud's patients are irrational beliefs. *See* note 235 *supra*.

which would be an intelligible thing for a legislator *qua* legislator to want is equally eligible to serve as the intention discovered *in* a statute. This leaves room for a wide variety of different intentions for any given statute. This is a general problem for hermaneutic approaches, to dreams and paintings no less than statutes. This Article raises it here only to prevent the foregong as being seen as some powerful interpretative technique, for it is not.

It is important to see that none of the restrictions pertain to any mental state of any actual legislator. For such intentions discovered *in* a statute (also) to have been the intentions *with which* the statute was passed, requires that three additional things be true: (1) the legislature must have in fact intended its statute to have those effects; (2) it must have in fact believed that, if the statute in question were passed, it would have those effects; and (3) its intentions and beliefs must have caused it to pass the statute. Only these three items address questions of legislative intent, for only these items involve mental states and their causal influence on behavior.[238]

Looking for such intentions is *not* looking to speaker's-meaning, but rather to what the *words* mean, with one additional stipulation: In the sense above outlined, the utterance of the words is viewed as the act of a rational legislator. Statutes are interpreted in light of what the words ordinarily mean and in light of what a legislator *qua* legislator could intelligibly be seeking to achieve, if he had only those beliefs it would have been rational for him to have held. There is less of a problem of legislative caprice or lack of fair notice in such an additional stipulation, because one is not supplanting but only supplementing the ordinary meaning of the statutory language; moreover everyone assumes that a statute was not passed by accident—that like all communication its utterance was an intentional act—and that therefore there is an intelligible end which, in light of some rational beliefs, the statute

238. The law of evidence distinguishes clearly between an actual mental state of an actor, and situations in which such mental states are *possible* because they would have been intelligible and rational if they existed in the actor. In criminal trials, the accused may present evidence that he had no possible motive for committing the crime; the prosecution may present evidence that he had a possible motive. Any dispute about the existence of such possible motives is not about the actual mental state of the accused, but rather whether the situation was such that, in light of what it would be rational to have believed, there was some intelligible thing for the accused to gain from the crime. Such posible motives, or their absence, are only circumstantial evidence that the accused did or did not do the crime, because having a motive for doing something is not the same as doing it for that motive. *See generally* 1 J. WIGMORE, EVIDENCE in TRIALS AT COMMON LAW § 118 (3d ed. 1940).

furthers. Accordingly, this supplementary "aid to construction" can come as no surprise to anyone.

The second practice to distinguish from that of looking to legislative intent is looking to *the purpose* of a statute. "Purpose" is without doubt an overworked word in this context. Cases and commentary in this area isolate five senses of "purpose."

First, "purpose" is sometimes used as a synonym for legislative intent. "The purpose of a statute," in such a case, means both the locutionary and perlocutionary intents (purposes) of the legislature that enacted it.[239]

Second, sometimes "purpose" is used to mark the distinction between the locutionary and the perlocutionary intents of a legislature. What the legislature meant by its words, on this reading, is its legislative intent, whereas what it meant to achieve by uttering its words is the purpose of the statute.[240] Both "intent" and "purpose," when so used, still refer to mental states of the enacting legislature.

Third, sometimes "purpose" is used to mark the distinction between the locutionary and perlocutionary intentions of the legislature, on the one hand, and the institutionally inappropriate intentions (personal motives) of individual legislators.[241] According to this reading, both "intent" and "purpose" again refer to mental states.

Fourth, sometimes "purpose" is used to denote the intentions *with which* the legislature passed the statute as opposed to the intentions one can discover *in* a statute from its language alone.[242]

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239. *See* Brucken, *Interpretation of Written Law,* 25 YALE L.J. 129, 134 (1915); Johnston, *An Evaluation of the Rules of Statutory Interpretation,* 3 KAN. L. REV. 1, 15 (1954).

240. Such is the way I understand Landis' use of the word "purpose" in Landis, *A Note on Statutory Interpretation,* 43 HARV. L. REV. 886, 891 (1930). Landis' distinction between intent-as-purpose, and intent-as-meaning seems to mark precisely this distinction. *Id.* at 888.

241. *See generally* citations in Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute,* 47 VA. L. REV. 439, 445 n.22 (1961), equating "motive" and "purpose." More typically "purpose" is used in the first or second sense just mentioned when the context is reviewing a statute (as opposed to construing it). *See, e.g.,* Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics,* 49 CALIF. L. REV. 104, 115-16 (1961).

242. Learned Hand seemed to use "purpose" this way when he spoke of "the general purpose, declared in, or to be imputed to, the command." L. HAND, THE BILL OF RIGHTS 19 (1958). Hand discussed the finding of the purpose as being a "guess." On the interpretation given in the text, *there is nothing to guess at* once one perceives that purpose in this sense is not a mental state. Felix Frankfurter clearly saw this last point in also adopting this fourth sense of "purpose":

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy, is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek

Finally, "purpose" is sometimes used to mark the distinction between the function the statute serves (*its* purpose) and legislative intent (the legislature's purpose as opposed to the statute's purpose).[243] It is this fifth usage that will be considered here as a legitimate inquiry for judges. The first sense of "purpose" being synonymous with legislative intent is, of course, subject to the objections outlined above; "purpose" in the second sense, although marking a distinction useful for some purposes (namely, between intents relevant to what a speaker means and intents irrelevant to what he means), should not be relied on by judges for the reasons advanced earlier, for those objections apply equally to the locutionary and perlocutionary intentions of the legislature; no one would recommend "purpose" in its third sense as a relevant inquiry for judges in construing a statute; and discussing the fourth sense would be redundant to the discussion just concluded.

The "purpose of a statute" in its fifth sense may be clarified by a less problematic example. Consider the statement, "the purpose of a carburetor is to provide fuel to the engine." What does this statement mean? The information-content of such functional attributions is that the part or process (P) described (the carburetor or its operation) is a necessary condition of the event (E) that is described as its function (providing fuel to the engine). With certain systems that are familiar (most American made cars), E occurs only if P exists (or occurs, if P is a process).[244]

One might legitimately wonder why any particular consequence of P should be honored as *the* function (purpose). For carburetors do many things in addition to providing fuel—for example, they make a sucking noise. Why is not the function of a carburetor to make a sucking noise? Carburetors are just as much a necessary condition of sucking noises (of a certain particular sort) in American cars as they are for providing fuel to the engine. One consequence of a carburetor's operation is assigned to it as its function on the basis of a further causal judgment: that consequence (E) of a carburetor's operation that itself causes a car to operate properly, is its function. Providing gas to the engine helps the car to run properly; making a sucking noise does not. More generally, one can meaningfully talk about *the* function(s) of

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and effectuate, and he ought not to be led off the train by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members.

Frankfurter, *Some Reflections on the Readings of Statutes,* 47 COLUM. L. REV. 527, 538-39 (1947).

243. Max Radin explicitly adopts this sense of "purpose" in Radin, *supra* note 229, at 875-77.

244. Moore, *supra* note 235.

some phenomenon only when one has in mind, first, some *system* of which the phenomenon is a part, and second, some *end-state* of that system toward which that phenomenon contributes.

The assignment of purpose by functional attribution does not require inquiry into mental states. Functions need not be assigned by recourse to the purpose of the *designer* of the artifact, or to the purpose(s) of the *average users* of the article. Recourse to such mental states is unnecessary for successful functional attributions. Articles that have no human designers or users illustrate the point. Consider the statement, "the purpose of the heart is to pump blood." The statement makes sense without reference to the purpose of any being. Accordingly, one can look for the purpose of a carburetor, a heart, or a statute, without recourse to the mental states of car designers, gods, or legislators.

Although functional attribution can be discussed without recourse to mental states, it cannot be discussed without recourse to some system and some end state of that system. With a carburetor, the system is a car; the end-state is a properly functioning car. Likewise, with a heart the system is some human body; the end-state is health. For both carburetors *and* hearts, the systems and the end-states implied by a functional attribution are easily ascertained. With a statute, the system implicitly referred to is the society for which the statute becomes law; and the end-state furthered by some consequence of the statute's passage is nothing less than the good society. In other words, only when one can set forth one's notions of what an ideal society (including an ideally just society) looks like can one significantly attribute functions to a statute.[245]

The difference between hearts or carburetors, and statutes, is that relatively widespread agreement exists on what constitutes a properly functioning car and a properly functioning body; such agreement does not exist in political theory about how a good society should be structured. But differences in the levels of consensus do not in the least affect the normative nature of attributing functions to hearts, carburetors, and statutes. In all cases, one who attributes functions must presuppose certain normative facts.[246] A high level of agreement about

245. Radin seems to appreciate this intuitively when he states that "the avowed and ultimate purposes of all statutes, because of all law, are justice and security . . . ." Radin, *supra* note 229, at 876.

246. The essentially normative nature of functional attributions in the context of mental and physical health is explored in Moore, *Discussion of the Spitzer-Endicott and Klein Proposed Defini-*

these facts only disguises their normative nature; that nature is more obvious where there is less agreement, such as about the function of some statute.

So construed, it is not the purpose of this Article to denigrate the search for "the purpose of a statute," even while rejecting the practice of looking for legislative intent. Seeking the purposes behind statutes (in either the fourth or fifth senses of "purpose") is one of the ways discovery of normative facts becomes a part of an ethical theory of adjudication. A *formalist,* however, cannot accept this mode of construing statutes; the separation of law and morals forbids it. For him, the sole exclusively *factual* question was the one already rejected, concerning the intentions the enacting legislature had when it enacted the statute. If this factual question is rejected, then a formalist is back where he started—with the ordinary meanings of the words and sentences of legal rules, and with all the attendant problems that relying on such meanings poses for formalist theory.

3. *The Possibility of Finding Any Helpful Legislative Intent*

The *coup de grace* to the doctrine of legislative intent as the source of statutory meaning is a battery of familiar arguments having as their common conclusion that, even if it were proper to look for it, it would be impossible to ascertain legislative intent. Legislative intent could not, accordingly, solve the formalists' problems in deducing decisions from the meaning of rules. Since most of these arguments are familiar, only a summary need be given here.

There are three basic arguments: (1) that the idea of legislative intent does not make sense; (2) that adequate evidential support for any particular intent could never be found even if the idea does make sense; and (3) that, even properly evidenced, "sensible" legislative intent would not help significantly in deducing decisions in particular cases.

a. *The nonsense arguments:* The least conclusive of these arguments is the "group mind objection." This argument holds that intentions are mental states of individual persons, and cannot be attributed to collective bodies of persons, such as legislatures.

Assuming that "legislative intent" is taken literally to mean a single mental state of an entity, this argument is, of course, correct. Legis-

tion of Mental Disorders (Illness), in CRITICAL ISSUES IN PSYCHIATRIC DIAGNOSIS 85 (R. Spitzer & R. Klein eds. 1978).

latures can not have an intention in this sense any more than they can feel a pain. But the reason the argument as it stands has no bite is because few if any persons who speak of legislative intent assume that a collective body has a mind. The normal willingness to paraphrase the intent of the legislature into talk of the intentions of individual legislators in some combination, betrays the lack of any ontological commitments to minds of legislatures.

The better objection here is that it is difficult to specify *what* combination of individual intentions amount to "the intention of the legislature." The most obvious starting point is some majoritarian model, but it is far from clear what this would come to. Should one count the intentions of those who voted *against* the bill? There is some reason to do so in light of such dissenting votes *being* dissenting votes because particular interpretations being placed on the bill. On the other hand, consider the situation in which an absolute majority of the legislature thought the statute meant p, but a majority of those voting for it thought it meant not p but q. Assume, for example, that the bill passes 51% to 49%; that all those who voted against it thought it meant p, but only 2% of the 51% who voted for it thought it meant p; while the overwhelming majority of those who voted for it thought it meant q. It seems anomalous to have the interpretation of the majority who voted for the bill overriden by those who voted against it. If the intentions of those voting against the bill do not count, then a further question remains. Does one seek a majority of the majority that voted for the bill? If so, what if there are a number of meanings, *none* of which commands a majority? Should one then seek a plurality of the majority? In addition, does one count those who had no intentions one way or the other, or those who did not care or even consider whether it meant p or q? If those who did not care are included for purposes of the denominator of the fraction, are they included in the numerator as well, and if so, as having intentions which way?

These sorts of questions are surely dumb, mechanical questions, but a majoritarian model requires that they be asked and answered. Because of such questions, alternatives to the majoritarian model have been suggested. One such suggestion is a delegation mode, whereby those comparatively few legislators and their aides and attorneys who drafted the final language have their collective intentions considered to be the intentions of the legislature.[247] In many cases this will be the intentions of the attorneys on the committee staffs that drafted the leg-

247. McCallum, *Legislative Intent,* 75 YALE L.J. 754, 780-84 (1966).

islation. Yet, at this point it must be objected that the practice of looking to legislative intent loses its justification if the intent of one or a handful of persons, many not elected, is allowed to govern a statute's meaning. The principle of democracy, however construed, is not furthered if the intent of a tiny fraction of the legislature and its staff is to govern, particularly if other legislators who did not draft the legislation have different intents that are not counted in this model.

Perhaps this last objection can be remedied by softening the requirements about whose intent counts; one might count the intentions of any legislator who had a relevant intention about the language in question, and a majority (plurality?) of those who had such intentions should govern. But then there is the problem of deciding when any legislature's particular intention is relevant. For example, is the intention that "manufactured products" include in its extension cloth underwear relevant to the question of whether eviscerated chickens are manufactured products?

Aside from "counting problems"—whose intentions get counted, and what percentage of what total wins—there are other problems of combination. Is it meaningful to talk of combining different intentions? When the intensional objects of the legislators' intentions (which are themselves propositions) contradict one another (51% believe a statute means p; 49% believe it means not-p), it can still make sense to speak of the majority's intention. But that is a rare situation. Much more often one will have intentions whose objects are not contradictory propositions, so that the whole idea of counting minds to make a majority makes no sense. What is the resultant, intended meaning if one legislator believed that "manufactured product" meant p, another, that it meant q, and a third, that it meant r? How does one combine propositions like " 'manufactured products' means assembled commodities," " 'manufactured products' means items made by hand," and " 'manufactured products' means things changed from their natural states"? It is evident that one cannot, for two reasons apparent from the previous discussion: (1) There are no analytic truths connecting the phrase, "manufactured products" to some other words or phrases; p, q, and r will thus never be exact synonyms unless they are the very same propositions;[248] and (2) even if p, q, and r were exact synonyms—ar-

248. *See* text accompanying notes 130-216 *supra* which argues that there are virtually no such analytic truths for any words of ordinary, legal, or scientific speech. For a classic linkage of the mutual depeudence of the notions of synonymy and analyticity, see W. QUINE, *supra* note 155. Both notions, Quine shows, stand or fall together.

guably like "bachelor" and "unmarried male" are—each legislator's *intention* may yet be different,[249] and thus, I(p) is not the same as either I(q) or I(r)—even if p, q, and r are synonymous phrases. The ideal case in which the intensional objects of the intentions of a majority of the legislators are identical (and so can be *combined*), and in which the intensional objects of the intentions of every other legislator are just the logical contradiction of the majority's intention (and so can be *ignored* because "outvoted"), is surely so rare that it can be ignored. In almost every real world case, the propositional objects of the individual legislators' intentions can neither be combined into a majority nor ignored as a contradictory minority.

Another set of objections stems not from problems of combination, but from the nature of the mental state one should be looking for in each legislator. Suppose some legislator L_1 believes that "manufactured products" as used in ordinary discourse has in its extension, live chickens. Assume further that live chickens are not within the extension of "manufactured products," as ordinarily used. Is such a belief relevant, even in a case involving transportation of live chickens? Contrast L_1 with L_2. L_2 does not know whether live chickens are usually classified as manufactured products or not, but he *intends* that they be so classified in this statute. Should one allow mistaken beliefs about what words ordinarily mean to be sufficient (L_1), or should one require in addition that the legislator intend that any mistakes he makes of this sort be corrected to conform what he said to what he should have said (L_2)?

Finally, what if a legislator has not one but several relevant intentions? Suppose he intends the statute to achieve several effects. How does he order them? And even if each individual legislator does order them, how can they be combined in the face of the yet unrefuted theorem that there can be no such combination even of quantified, individually ordered preferences?[250]

Unless these questions can be answered, there can be no idea of what is being sought under the term, "legislative intent."

249. *See* note 144 *supra*. There is of course one set of intensional objects about which one can be sure there was exact agreement, and that is the language of the statute itself. Such statutory language may be treated presumptively as the only thing on which agreement could be reached, which is one rationale for courts often limiting their search to the "intention in the language of the statute itself." *See* text accompanying notes 235-38 *supra*.

250. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

b. *Evidentiary objections:* Even if one knew what one was looking for, one could not find it. The problem of finding adequate evidence with which to verify any of the foregoing models is staggering. This is demonstrated by the failure of courts that purport to find "legislative intent" to look for evidence that would verify a majoritarian model of legislative intention. Good reason exists for this failure to look: The cost of digging for evidence of each legislator's intentions, to see if he had any that were of relevance, and if so what they were, would be prohibitive.

c. *The utility of any discovered intent:* Assume that one discovered well-evidenced and unanimously held intents of each legislator about some statute: Would it make possible the deduction of decisions applying the statute? The answer is yes, but only in a negligible, *de minimis* way. If, for example, Congress passed the agricultural exemption to the Interstate Commerce Act intending the phrase "manufactured products" to include eviscerated chickens, then one could justify the insertion of the third premise, "Anything that is an eviscerated chicken is a manufactured product," which would allow that conclusion to be deduced. But such intents are so rare that legal theory is justified in ignoring them. Much more often the legislature will intend such things as:

(1) that manufactured products are things assembled from raw materials;

(2) that a good example of a manufactured product is a piece of cloth underwear; or

(3) that the costs of transportation should be kept low for farmers.

These more typical intentions do not supplement a judge's statutory and factual premises in a way that facilitates the deductions.[251] This

251. Nor do the "rules" of statutory construction, such as the rule of *ejusdem generis*, help in this regard. This is so, not just because such "rules" are essentially ad hoc and inconsistent in their invocation (*see, e.g.,* Llewellyn, *supra* note 220), but also because such a rule of construction abstracts from a set of intended examples, the legally relevant features such examples share. As is widely known with regard to the factual conception of the doctrine of precedent, any set of examples will generate as many ways in which they are similar and dissimilar, as there are ways of describing such examples. *See, e.g.,* J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS §§ 12-14 (1964). Accordingly, to select some subset of these similarities as general characteristics necessary or sufficient to the application of the statutory predicate, one must bring to the analysis some *value judgments* about what are relevant similarities. In the context of statutory interpretation, such value judgments would take the form of ascertaining the purpose of the statute and using that purpose as a standard with which to select those similarities that were relevant. No

section shall conclude by elaborating on this.

Consider first the kind of legislative intent in which the object is a proposition the legislature intends to be taken as the meaning of some statutory word or phrase. All of the problems of the objective theory of meaning earlier encountered will be duplicated here. The intensional object of this sort of legislative intention is itself a proposition, and, moreover, has a canonical formulation like the statute itself. Unless this proposition is itself the exact analytic truth required, the needed third premise may no more be generated from the meaning of those words occurring as the object of intention than it was from the meaning of the statutory language itself.

The second kind of intention—in which the legislative intent is an example (or set of examples) of the statute's general predicates that the legislature has in mind—also cannot satisfy the formalist's needs. Only if the items before the court happen to be one of the intended examples can the formalist generate the premise he requires. Otherwise, there are no analytic truths to connect "eviscerated chicken" with "cloth underwear," any more than there were to connect "eviscerated chicken" with "manufactured product."

The last kind of intention—in which the legislature intends the passage of its statute to accomplish some effect—does not allow a decision to be deduced. If discovered to be a goal, however, it could *influence* decisions in the way goals always influence the action of rational agents. For example, a judge adopting this sort of intention as his goal would have grounds for preferring one interpretation to another insofar as one better furthers the intention he has adopted.[252] He is not deducing what decision he should reach any more than one ever deduces the conclusion of a "practical syllogism." Instead, he would be seeking the most efficient means to the achievement of some end.[253]

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formalist, of course, can accept this kind of contamination of the supposedly value-neutral nature of his enterprise. Yet a purely formal doctrine of *ejusdem generis* is as vacuous of content as is a purely formal doctrine of precedent.

252. This is the way in which a judge's "discovery" of an intention *in* a statute and the purpose (function) the statute serves would influence his interpretation. The difference between these modes of statutory interpretation and those relying on a perlocutionary legislative intent is not in the pattern of reasoning, for all are instances of practical reasoning. Rather, the difference lies in the legitimization of the major premise of the practical syllogism: one relying on legislative intent believes that he discovers such premises in the actual mental states of legislators; one relying on an intention in a statute, or on the statute's purpose, discovers such a premise because of his own knowledge of what is right.

253. The difference between "theoretical reasoning" and "practical reasoning," that is true logical syllogisms and practical syllogisms, no doubt requires some explanation. Although the

C. Easy Cases: An Objective, Extensional Theory Revisited

The arguments presented thus far conclusively show that one cannot deduce *any* decision from any rule or principle on the theories of meaning thus far considered. Yet such a conclusion may seem implausible. It seems that there must be at least some easy cases. Surely, to revert to the by now familiar example, cloth underwear *is* a manufactured product even if the status of eviscerated chickens is unclear, so that if Kroblin had been stopped carrying the former items instead of the latter, a judge could *deduce* that Kroblin needed a certificate.

Yet are there any "easy cases"? It may be helpful to review the state of the argument. First, it is necessary to distinguish an easy application of a rule to the facts of a given case from an easy case itself. For the purposes of this discussion, an easy case is one in which the relevant legal rules are all easily applied. Thus, the query about the existence of easy cases divides naturally into two subquestions: is a legal predicate in a legal rule ever easily applied? And, if so, are there cases in which all applications of all predicates in all relevant legal rules are easy applications?

The notion of an "easy application of the rules to the facts," or of an "easy case," may seem to be quite vague. Yet the two theories of meaning thus far presented make both notions clear. An "easy application of a rule to the facts" means that the conclusion is deducible from the rule, some set of characterizations of the facts, and either some analytically true statement of a meaning-connection between the two (on the objective theory of meaning) *or* some factually true statement of the legislature's intention, the object of which is just the proposition needed as a substitute for such analytic connection (on the subjectivist account). An "easy case," correspondingly, is one in which there are no conclusions (from which the ultimate decision is deduced) that are not deducible from legal rules and statements of fact in one of the ways indicated.

Very generally, two sorts of arguments have been relied on in reaching the conclusion that there are no easy cases under an objective theory of meaning.[254] The first has to do with the characteristics of

distinction is Aristotle's, his exposition of it is far from clear. (For a recent reconstruction of Aristotle's idea of a practical syllogism, see M. Nussbaum, Aristotle's De Motu Animalium 184-201 (1978). For my own account of a practical syllogism, similar to that attributed to Aristotle by Nussbaum, see Moore, *supra* note 235.

254. The intuition that there must be some easy cases seems to stem from an objective approach to meaning. (It did for Hart. *See* text accompanying note 257 *infra*). Accordingly, the

words endemic to the use of general predicates in the law: ambiguity, metaphor, vagueness, and open texture. These characteristics of language do not necessarily prove that there can be no easy application of rules to facts, for the grammar or other linguistic context of the rule may save all its words from ambiguity, and the facts of some cases may fit within the core of included or excluded cases of the predicate in some rule, and not in its vague penumbra. These characteristics are probably sufficient, however, to show that there can be no easy *cases* because of the inherent difficulty in attempting to fit the facts of any case both into the core of included cases of all predicates leading to one result, *and* into the core of excluded cases of all predicates in all rules requiring that a contrary result be reached.[255]

The second set of arguments advanced earlier shows that there cannot even be an easy application of a rule to the facts (and, *a fortiori,* that there can be no easy cases). For those arguments show that *no* word—be it a natural kind word, a mental word, a nominal kind word, a dispositional term, a theoretical term, or an ethical term—has a set of conditions that are necessary and sufficient for its correct application. Absent such conditions, there are no analytic truths that allow one to say, *necessarily,* that an eviscerated chicken (or a piece of cloth underwear) is or is not a manufactured product. The question to be considered here is whether this second set of arguments can either explain away, or validate in some way not yet perceived, the thought that some applications of words seem to have easier applications to some facts than others. The conclusion of this Article is that this common sense idea about easy cases, to the extent that it is not an illusion to be explained away,[256] can be accommodated in the theories of meaning used

arguments advanced against a formalist who is more subjective in his approach to meaning are not recapitulated.

255. The "core/penumbra" doctrine in the text is used in Glanville Williams' sense, as being exclusively a matter having to do with vagueness. *See* note 112 *supra.*

256. On the illusory nature of the common sense idea that there must be easy cases, we have already considered: (1) the tendency to clarify ambiguous words used in a legal rule by either pragmatics (not as useful for legal utterances as for ordinary utterances) or shared values masked as "good sense"; (2) the tendency to think that the similarities that unravel the meaning of judicial metaphors are "there" to be discovered rather than to be created by the interpreting judge; (3) the tendency simply to ignore more general legal standards whose vagueness should prevent one from saying that they do *not* apply; (4) the tendency to ignore open texture because the situations that exhibit it rarely come up so that one's criteria look sufficient even if they are not; (5) the tendency to think that one's linguistic intuitions are more certain than they are with regard to natural kind words, nominal kind words, and dispositional terms; (6) the illusion that artificial vocabularies can be more precise than the vocabulary of ordinary English, in whose terms they are defined; (7) the unnoticed substitution of the moral judgment that one mental state is as culpable as another for the linguistic judgment that no two mental states are ever the same if their intensional objects are

in section III earlier, but that even the easiest application of a legal predicate is not an easy application as herein defined.

The discussion proceeds in two steps. First, will be a reexamination of the old Hart-Fuller debate, part of which also had to do with whether lawyers can rely on the common sense insight that words apply more clearly to some facts than to others. Second, Hart's notion of "standard instances" and a "core" of meaning shall be considered in light of what has been said before about the existence of paradigmatic examples of natural kinds of things.

1. *The Hart-Fuller Debate Revisited*

We are indebted to Hart and Fuller for what is still the best attempt to deal with the stubborn, common sense judgment that there must be some easy cases. Hart's position was that of a common sense semantics:

> If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use . . . must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others . . . .[257]

While in the penumbral area the application of rules to specific facts "cannot be a matter of logical deduction, and so deductive reasoning . . . cannot serve as a model for what judges . . . should do in bringing particular cases under general rules";[258] in the core area deductive reasoning is the ideal judges can and should attain. This common sense semantics makes possible a "little bit" of formalism.

Contrary to Fuller's assumptions in his critique of Hart, discussed below, it is doubtful that Hart's core/penumbra doctrine presupposed any particular semantic theory about what meaning is. Nowhere in his

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differently described; and (8) the illusion that one's moral intuitions about whether something is good are really linguistic intuitions about the meaning of the word "good." The illusion is further fostered by the consideration that most linguistically easy cases are also morally easy cases. Thus the second judgment, that a case *is* a morally easy case, goes unnoticed. *See* text accompanying notes 274-82 *infra*.

257. Hart, *Positivism and the Separation of Law and Morals*, *supra* note 6, at 607.

258. *Id.* at 607-08.

writings did Hart work out a general theory of meaning.[259] Rather, Hart's common sense position seems to be based solely on the phenomenon of vagueness of meaning, and left open what meaning might be.[260] As such, it is simply the insight earlier discussed, *e.g.*, that we are reasonably sure that some men are bald and that some are not, even if we are unsure whether others should be said to be bald or not bald.

This common sense position founders as a basis for formalism for reasons already mentioned. First, for a case to be an easy case, its facts must not only be in the core of included cases of some relevant legal predicate, but they must also be in the core of excluded cases of all legal predicates contained in rules leading to a contrary result. This is not a likely prospect.[261] Second, and more fundamentally, discussing the core and the penumbra as phenomena due only to vagueness leaves untouched the more fundamental problems for deducibility that any plausible theory of meaning unveils. Hart's common sense position must thus be reconstructed as setting forth some theory of meaning, or those more fundamental problems are not even going to be addressed.

Before attempting such a reconstruction of Hart's argument in light of contemporary semantics, it is worth examining Lon Fuller's own attempts in that regard. Fuller accused Hart of adopting what Fuller called "the pointer theory of meanings,"[262] which seems to be Fuller's pejorative label for the referential theory of meaning. As shall be demonstrated shortly, Hart's argument can be reconstructed in a way that does not commit him to any such inadequate theory of meaning, and it is extremely doubtful that Hart ever subscribed to such a theory. Fuller's critique in any event does not depend on his successfully labeling Hart with such an inadequate theory of meaning, for Fuller makes essentially two arguments, the conclusions of which, if correct, would be considerably broader than the rejection of the referential theory of meaning.

Fuller was an exponent of "contextualism." His main linguistic

259. *Id.*; Hart dealt with semantics on one other occasion. *See* Hart, *Signs and Words*, 2 PHILOSOPHICAL Q. 59 (1952).

260. That Hart had vagueness in mind in the 1958 debate is shown by his discussion of John Austin's awareness of vagueness. *See* Hart, *supra* note 6, at 608-09. Curiously, Hart did not cite Glanville Williams, who explicitly developed the core/penumbra doctrine in terms of vagueness a decade earlier. *See* Williams, *Language and the Law* (pt. 2), 61 L.Q. REV. 179, 181-95 (1945). Hart's later discussion of the core/penumbra is in terms of open texture, but what Hart means by the phrase includes vagueness as well as open texture. *See* H.L.A. HART, *supra* note 28, at 121-32.

261. *See* text accompanying notes 108-23 *supra*.

262. Fuller, *supra* note 75, at 668.

argument against Hart was that *any* objective theory of the meaning of words would be inadequate because it would not take into account the dependence of the meaning of words *as uttered* on "the speaker's purpose and the structure of language,"[263] both of which Fuller thought of as "context." For Fuller, the first and most important of these elements of context, the speaker's purpose, is nothing more than a sketchy version of the subjectivist theory of the meaning of an utterance that was encountered in more systematic form previously in the theory of meaning of Paul Grice.[264] Fuller's notion that one cannot know what an utterance means unless the further intentions with which it was uttered are known is false for each of the reasons earlier addressed.[265]

By the second element of context, "structure," Fuller appeared to have in mind the idea that sentences (or larger units, such as paragraphs) are the basic units of semantic analysis, and that the attempt to find the meanings of single words is illusory.[266] Fuller's claim here is ambiguous: he could be arguing, along with certain contemporary philosophers of language,[267] that the basic units of semantic analysis are sentences, not words, because only sentences as uttered on some particular occasion assert something; if meaning is truth conditions (as such philosophers assert), then since only utterances of sentences are capable of being true or false, words (as types) cannot be the basic units of semantic analysis. Yet this interpretation of Fuller's claim about "structure" would not enable him to reach his desired conclusion, because word-meaning, even if not "basic," could be reconstructed from sentence-meaning.

Fuller's claim is probably more radical: the meaning of words can be grasped only in the context of their utterance in a sentence or paragraph. This is because what that meaning is, changes, depending on what words surround it: "[A] rule or statute has a structural or systematic quality that reflects itself in some measure into the meaning of every principal term in it."[268] Fuller's best example of this is the word "improvement." Fuller asserts that the meaning of "improvement" in a rule that begins, "All improvements must be promptly reported to . . . ," can only be known in light of the other words that complete the rule. Two of Fuller's suggested completions—"the head nurse" and

263. *Id.* at 669.
264. *See* text accompanying notes 218-32 *supra*.
265. *See* text accompanying notes 221-32 *supra*.
266. Fuller, *supra* note 75, at 662-63.
267. *See, e.g.,* Davidson, *Truth and Meaning,* 17 SYNTHESE 304 (1967).
268. Fuller, *supra* note 75, at 669 n.40.

"the Town Planning Authority"[269]—illuminate his argument.

This example shows that Fuller's contextualism (when "context" is construed as structure and not as purpose) comes to one of two truths: first, that many, if not all, words are ambiguous, and that sometimes, as earlier discussed,[270] the linguistic context helps to lessen the ambiguity. "Improvement" can refer to changes for the better in patients or to physical structures placed on land. Knowing what the improvements are an improvement *in* will often reveal what is meant in light of our general factual knowledge about what kinds of improvements are reported to what classes of people. Alternatively, Fuller's "contextualism" is a reminder that some words are attributive, that is, they depend on other words for making their meaning more precise.[271] "Improvement" in such a case will be thought of as a very general word, but with only one sense. "Improved patients" would then stand to "improved land" as "hard chairs" stands to "hard choices."[272] The word "improvement" may be thought of as a quite general, vague word, whose vagueness is reduced when juxtaposed to certain other words.

But against either of these points Hart's conclusion surely stands secure: words must have some objective (*i.e.*, non-context-dependent) meaning if communication is to exist at all. "Improvement" cannot mean anything at all, depending on its context. If the word, independent of its context of utterance on a particular occasion, were "almost as devoid of meaning as the symbol 'X,' "[273] as Fuller claimed, then it would do no clarifying work on the words in the rest of the sentence uttered. If "improvement" is supposed to typify the problematic character of words as words having meaning, then *no* words could help clarify the meaning of other words. But, then what is to be made of the claim of context as structure? If words are as opaque as "X," "Y," and "Z," then sentences—*e.g.*, "XYZ!"—are equally opaque. Structure can only clarify ambiguities or narrow vagueness because words like "improvement" *do not* mean just about anything.

Doubtless any objective theory of meaning must take ambiguity and vagueness into account. But if these features of natural languages really prevented words from having any non-contextual meaning, one could not understand a word that was said. Since what is said is often

269. *Id.* at 665.

270. *See* text accompanying notes 77-96 *supra*.

271. *See* note 210 *supra*.

272. For a discussion of the vague line between generality and ambiguity, see text accompanying notes 64-84 *supra*.

273. Fuller, *supra* note 75, at 665.

understood, Fuller must be wrong. His contextualism construed as a claim about structure is as ill-considered as is his contextualism construed as a claim about purpose.

Fuller's linguistic argument is so poor that one should wonder why his answer to Hart has often been found so persuasive. It is because interwoven with his linguistic argument is a quite persuasive *normative* argument about how legal words ought to be construed. Even if Hart is correct (as he surely is) about words having some general meaning, Fuller's best argument is a normative one urging judges to *disregard* that meaning when it does not fit into their notion of the rule's purpose.

Fuller's argument here is best introduced as he himself presented it, in terms of examples. Imagine the case in which a county sheriff arrests a federal mail carrier while the carrier is on his route, with probable cause to believe that the mail carrier is guilty of murder. If there is a federal statute making it a crime to "obstruct or retard the passage of the mail, or any driver or carrier," is the sheriff guilty of violating the statute?[274] Or consider the example provided by *Riggs v. Palmer*:[275] Laying aside any conflicting general maxims, should the relatively clear application of the terms of the New York Probate Code allow the heir to inherit when that heir murders the testator? Or, lastly, consider Fuller's example against Hart: Is a rule prohibiting "vehicles in city parks" violated by a veterans group placing a fully operational military truck on a pedestal as a memorial?[276]

It would be absurd for any legal system to construe its rules so as to reach these results. It is absurd not because the facts are not relatively clear examples of the relevant legal predicates, but absurd in light of either the purpose each of these rules serves or in light of more general considerations of fairness and justice. Courts do not, and ought not to, decide such cases on the basis of linguistic intuition alone; it

274. United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868). In rejecting the conviction of the sheriff, the Court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *Id.* at 486.

275. 115 N.Y. 506, 511 (1889). The New York Court relied on Blackstone for the proposition that, with regard to any statutes, if

> there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . . When some collateral matter arises out of the general words, and happen to be unreasonable, then the judges are in decency to conclude that the consequence was not foreseen by Parliament, and, therefore, they are at liberty to expound the statute by equity and only, quoad hoc disregard it . . . .

(deletion in original) *Id.* at 511, *quoting* 1 W. BLACKSTONE, COMMENTARIES * 91.

276. Fuller, *supra* note 75, at 663.

would be inefficient, absurd, and often unfair to do so. It would be inefficient because a legislature would have to amend the act to eliminate such absurd results; absurd, because the purpose of the anti-vehicle ordinance, for example, is not served by punishing the veterans group; unfair, for a variety of reasons in different cases, but in the first example, because no sheriff would have anticipated violating such a statute or because, in *Riggs,* justice would not be done by rewarding a murderer with the fruits of his crime.

Such "easy" cases (that are morally difficult) will not go away with more complete or more careful draftsmanship. Bentham's books of laws, in which one "need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency,"[277] is as undesirable as it is impossible if one is bound to apply the words in such a book by their ordinary meaning alone. Literal construction of a code, no matter how comprehensive or carefully drafted, will inevitably produce results that are contrary to the statute's purpose, are unfair or unjust in some more general way, or are simply contrary to common sense. Accordingly, in such cases a court ought to balance off its linguistic intuitions against its ethical intuitions about what, in rules of this sort, the word *ought to mean*. The clearer the judge's linguistic intuitions, the stronger must be any contrary intuitions he might have about how the case ought to be decided. Yet the lack of any break in the continuum of certainty a judge may have about his linguistic intuitions prevents there from being *any* case in which the linguistic intuitions are so strong that the ethical intuitions might not be determinative the other way.

None of this can be acceptable to a formalist. Yet what grounds has a formalist for rejecting absurd results in such cases? If a formalist is going to reject such results, it will have to be on non-formal grounds, namely, that such results are unjust, unfair, or otherwise absurd. Yet if a formalist utilizes *these* considerations, he is not deciding on grounds proper to his theory of adjudication.

A formalist might try to repair the damage done by these sorts of counterexamples in the following way. He might say that easy cases must have *two* dimensions, not just one: in addition to having results deducible from rules and facts, such applications must not lead to unjust, unfair, or otherwise absurd results. Now, he might continue, there

277. J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 342-43 (1945).

are still some easy cases, namely, those where the facts relatively clearly satisfy all relevant legal predicates, *and* where there is no injustice, absurdity, et cetera. These he might call easy, easy cases, because they are easy as a matter of meaning and logic *and* as a matter of morals and common sense.[278] There are thus, a formalist might continue, some easy, easy cases, although the number is further restricted by the second stipulation. An example, perhaps, is holding Kroblin liable if he carried cloth underwear interstate without an ICC certificate.

Yet this strategy of containment will not do. It is undoubtedly true that most linguistically easy cases[279] are also morally easy cases—for core applications of the words employed can not, more often than not, lead to absurd and unjust results, if our rule-makers are not either immoral or characteristically irrational in their choice of language. Yet the stipulation a formalist must make to contain such counterexamples means that *in every case* a judge must ask and answer a normative question. As Fuller pointed out in his reply to Hart,[280] the fact that the answer was obvious does not mean that the question was not asked. A formalist theory that requires that such questions be asked and answered in every case is not a theory that can point to *any* case as one where the conclusion can be deduced from rules and facts alone.

The only way a formalist could "seal off" the category of easy cases that are morally hard, from easy, easy cases, is by some properly pedigreed, formal criterion which tells a judge when he need not ask the normative question. Yet a little reflection will show that such a criterion is an impossibility. If a formalist judge seizes on some threshold degree of certainty in his linguistic intuitions to close off ethical questions, he will have committed himself to just those absurd results in the cases just discussed in which the language was relatively clear. Moreover, it is unclear how or where one could decide upon some degree of certainty for such a threshold, in light of the sliding scale of

278. Actually, the idea of a morally easy case itself has two dimensions. A case may be morally easy because what result ought to obtain is, *as a matter of morality,* clear enough. In other words, there is no difficult conflict of moral principles. Secondly, it may be a morally easy case in the sense that the morally required result does not conflict with the result to which a literal construction of the statutory language would lead. It is thus morally easy in this second sense because one need not resolve a difficult conflict between substantive moral principles, on the one hand, and that subset of moral principles that might incline a judge to a literal reading, on the other. Thus one might talk of easy, easy, easy cases, but the added complexity is unnecessary here. A morally easy case, as this Article uses the phrase, is one which is easy in both of these senses.

279. It is assumed for purposes of this argument that there are such linguistically easy cases.

280. Fuller, *supra* note 75, at 663. Fuller's insight here was expanded by Duncan Kennedy. Kennedy, *Legal Formality,* 2 J. LEGAL STUD. 351 (1973).

certainty that exists about linguistic intuitions. Alternatively, if the formalist judge seizes on some degree of injustice, unfairness, or absurdity as his criterion, he will have asked the safety valve question in order not to ask it. No rule can specify the class of cases in which the safety valve question of common sense and justice need not be asked, except by describing that class as consisting of those decisions not leading to unjust, and unfair or otherwise absurd results. Yet, if the rule so describes the cases in which the question need not be asked, then in every case the judge will have to ask whether *this* rule is satisfied, *i.e.,* whether the case as he proposes to decide it leads to unjust, unfair, or otherwise absurd results. The same would be true for any higher order rule telling him when he need not ask this latter question.[281]

There may seem to be something suspicious about questions "asked and answered" that are not literally asked and answered by judges deciding many cases. Yet the suspicion is founded on the confusion of explanation with justification. If one were solely describing and explaining the psychological processes that judges go through when they decide cases, there are doubtless some cases in which judges do not ask the safety valve question. Yet formalism is not just a descriptive theory; as a full fledged theory of adjudication it purports to state

281. The Supreme Court has on occasion attempted this impossible task of formulating a criterion that tells a judge when he should not ask the moral, safety valve question. In TVA v. Hill, 437 U.S. 153, 195 (1978), Justice Powell in dissent had quoted the well-known decision in Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892), for the propriety of checking linguistic intuition against common sense and morality. 437 U.S. at 204-05 & n.14. Chief Justice Burger's majority opinion treats the *Holy Trinity* safety valve question "as applying only in 'rare and exceptional circumstances.'" *Id.* at 187 n.33 (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). The Court further purported to lay down a criterion for when such circumstances existed: " 'There must be something to make plain the intent of Congress that the letter of the statute is not to prevail.' " *Id.*

This test, like any such test, suffers from the following dilemma: If, as one suspects, one may infer such congressional "intent" from the absurdity itself, then one has asked the safety valve question in order not to ask it. If, on the other hand, one requires other evidence of such intent, then there will be just those outrageous results the *Holy Trinity* doctrine was meant to avoid.

Even stranger is the test used in *Crooks*, *supra*: "[T]he principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances . . . to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense." *Id.* at 60. This is of course just to ask Fuller's question in order not to ask it. The *degree* of absurdity, injustice, or unfairness cannot serve as some kind of "triggering mechanism" for asking the safety valve question, for it suggests the following possibility: a case where clear language leads to a result sufficiently absurd that, if the court considered it, would suffice to construe the language differently. But the court does not ask the safety valve question because it is not *so* absurd as to be "shocking." If anything would be absurd, this would be. It would be as if a court, before it could inquire into a party's negligence, had to *find him grossly negligent*. To reply in the court's defense that the standards are really the same is to restate the point precisely. There is only one question, which, if ever asked, is always asked.

how judges ought to decide cases. This is a matter of stating what are good grounds with which to justify particular decisions. As a matter of justification, a formalist who asserts that a good ground for a decision of *any* case can be that such decision is just, fair, not absurd, et cetera, commits himself to asserting the same for *every* case, for he has no way to distinguish the two classes of cases except on those same moral grounds.

In short, a formalist cannot concede the earlier cases as counterexamples. The sheriff should be punished for interfering with the U.S. mails, Palmer should receive the fruits of his crime, and the veterans groups should be punished for having a vehicle in the park. These are easy cases because they can be decided solely on the basis of relatively clear linguistic intuitions. One does not ask the safety valve question of whether such cases are morally easy. That the results are absurd and unjust, and that such injustice and absurdities will be inevitable in any system of rules applied in this way, can be of no concern. That seems to be precisely the position of the most recent majority of the Supreme Court.[282] Against it, one can make Fuller's persuasive normative argument that no system of laws ought to be administered in this way. Further, one can also urge that the ideal of deductive certainty of formalism is in any event unattainable, so that there is no reason to cling so desparately to "plain meanings." If, as the bulk of this Article has argued, a judge must *make up* what he cannot discover, namely, the third premise necessary for deductions in law to succeed, he has no reason to exclude moral considerations from entering into this necessarily creative process.

2. *The "Core" Reconstrued: Standard Instances, Paradigm Examples, Core Meanings, and Stereotypes*

Hart's notions of a "core of meaning" and of "standard instances," as opposed to his concepts of "penumbral meaning" and non-standard instances (not standard non-instances—these are in the core also), seem to be no more than the conceptual apparatus with which he dealt with the various forms of vagueness. It is now time to examine whether more can be made of these notions in light of contemporary semantics. More specifically, can some particular situation (subject, person, action,

282. TVA v. Hill, 437 U.S. 153 (1978). *See also* H. KELSON, THE PURE THEORY OF LAW 245-50 (1967); Kelson, *The Pure Theory of Law,* 51 LAW Q. REV. 517, 527 (1935). In both works, Kelson argues that "gaps" are a covert way of smuggling value judgments into judicial decision-making, and that the proper route is to decide on the language and leave it to the legislature to correct unjust and absurd results.

event, state, et cetera) be known to be a standard instance of some predicate with the deductive certainty that the above critique of the criterial theory denied? If so, formalism could be saved by maintaining yet a third kind of semantic theory, one that does not undertake the hopeless tasks of discovering either the analytic connections or the mental state connections posited by the positivist and the subjectivist theories.

To see this possibility it is necessary to back up a step. Suppose that instead of seeking a meaning-connection or any kind of connection between the dispositive legal predicate and some description of the facts, reliance was placed instead upon "immediate knowledge" of whether the thing itself was or was not in the extension of the relevant legal predicate. Put another way, suppose one refused to describe the facts in any way except by use of the dispositive legal predicate or its negations. Then the conclusion is deducible, in the manner indicated earlier.[283]

The crux of the argument is whether the formalist can make sense of the idea that "one just knows" whether certain items are or are not manufactured products, gold, watches, lemons, or any other class of things a legal rule makes dispositive of certain sorts of issues. One would have to allow more sense than has usually been attributed to statements such as Justice Stewart's "I know it when I see it," applied to obscenity.[284] For all of the "work" in this kind of reasoning is done by the decision to describe the facts using the relevant legal predicate. It is at this crucial point that an alternative theory of meaning might rescue formalism. If it can be shown that a native speaker of English, such as a judge, can be certain as a matter of meaning that some items are in the extension of some predicate, then formal deduction of the results looks possible in at least some cases. Such an extensional theory of meaning avoids the need for any connection between legal predicates and factual *descriptions,* and thus avoids all the problems of an intensional theory; substituted for the word/word relationship of an intensional theory is the word/thing relationship of an extensional the-

283. *See* note 17 *supra*. Restated for convenience here, the deduction is:

1.	$(x)\ (\sim Mx \supset Cx)$	P (the legal rule)
2.	$\sim Mx$	P (the facts, described using the relevant legal predicate, "not a manufactured product")
3.	$\sim Mx \supset Cx$	1, U.I.
4.	Cx	2, 3, M.P.

284. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ory. The question is whether there is an extensional theory that can deliver on the promise that a judge can know, with all the certainty of an analytic truth, that some things are or are not in the extension of any legal predicate.

This Article will argue that one can make out an extensional theory of meaning that does not possess the objectionable features of the one extensional theory—the referential theory—we have already examined. Indeed, the critical arguments already made against any intensional theory for natural kind words, imply such an alternative, extensional theory. But in most cases legal fact-finders are burdened with word/word relationships, not word/thing relationships, and thus cannot avail themselves of the certainty of such an extensional theory, if it guaranteed it; in any event no plausible extensional theory can guarantee the certainty in classification that formalism demands.

The first of these factors stems ultimately from the nature of adjudication itself.[285] Adjudication is decision by virtue of a preexisting claim of right; and arguments based on, and decisions justified by, claims of right necessarily are supported by facts of what happened in the past.[286] Because of this, the kinds of facts a judge or jury must ordinarily find are not facts having to do with what transpires before them, but are facts of what transpired in the past.

This characteristic of adjudication requires the courts to learn the facts relevant to their decisions indirectly—from the testimony of witnesses. With the exception of real evidence infrequently presented, what judges and juries must rely on to decide what transpired in the past is the testimony—the description—of the facts by others. Unlike a scientist who can observe his own experiments to find his relevant facts, and unlike a dispute resolution procedure whereby some present demonstration (such as combat or coin-flipping) determines the winner, judges and juries face facts already packaged into descriptions.[287] They

285. *See* text accompanying notes 8-10 *supra*.

286. This is true even if one's underlying social philosophy is rule-utilitarian. Even if the only justification of criminal sanctions is the deterrence of future crimes (or of tort liability, to deter all and only an inefficient level of accident prevention), still such "forward-looking" justifications depend on future actors being guaranteed certain legal results because of the actions they take *before* they enter the courtroom.

287. Compare the oft-quoted language of Hart:

> [T]he facts and phenomena to which we fit our words and apply our rules are as it were *dumb*. The toy automobile cannot speak up and say, "I am a vehicle for the purpose of this legal rule,"; nor can the roller skates chorus, "we are not a vehicle." Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judges.

Hart, *Positivism and the Separation of Law and Morals, supra* note 6, at 607. Fact situations do

are thus obliged to seek some authoritative connection between those factual descriptions and the relevant legal predicate—just the connection whose existence it has been the burden of this Article hitherto to deny.

One analytic relationship not questioned is one of the form, "x is a bachelor ≡ x is a bachelor." If this connection is valid, and if witnesses are restricted in their descriptions of the facts to just those descriptions made dispositive by all legal rules (one hands them an approved list of predicates, perhaps), then one might still urge that a deduction is possible. The first of these conditions—validity of the equivalence—might be disputed if the focus were on factual and statutory descriptions *as utterances,* for although the same words (types) are used, these are different utterances (as tokens). Those who follow Grice or Fuller thus might question the asserted conditional, saying that the utterance-meaning of the legislature's utterance need not be equivalent with the utterance-meaning of the witness' utterance. Still, Grice and Fuller's kinds of contextualism has been rejected by this Article, and while there may be other grounds for quibbling,[288] there is much stronger objection to the above conclusion than can be made from questioning the validity of the equivalence. Far from restricting witnesses *to* using legal predicates in their descriptions, our system of jurisprudence generally restricts them *from* using such words. The opinion rule in evidence law exists in part to prevent just that kind of description by witnesses.

An official rationale for the opinion rule is that one must preserve the fact finding function of the judge and jury; that function includes the drawing of inferences from the facts.[289] Thus, under the old *Dur-*

await a judge "labeled, creased, and folded" (although not necessarily neatly) because witnesses' descriptions of them are all a judge or jury has with which to work.

288. Namely, ambiguity. *See* Parsons, *Ambiguity and the Truth Definition*, 7 NOUS 379, 384-85 (1973).

289. See the authorities cited in VII J. WIGMORE, *supra* note 238 § 1919. Wigmore is highly critical of this rationale, based largely on his insight that all factual descriptions are inference laden so there can be no hard and fast distinction between facts and opinions. Even though Wigmore is surely right about the latter point, there is a difference of degree between factual descriptions, some being "closer" to perception than others ("closer" in the sense of fewer and less general background beliefs being necessary to give such descriptions). Whether witnesses are actually *precluded* from testifying in terms of legal predicates is in any event not the crucial issue; it is rather the forcing of witnesses to give descriptions of the facts "closer" to perceptual reports, even if they may *also* give descriptions in terms of legal predicates. As Wigmore recognizes, no jury or judge is bound by the witness' description using the legal predicates, precisely because the decision that is entrusted to the judge or jury is the application of those legal predicates.

ham rule of legal insanity,[290] even expert witnesses were not allowed to describe the condition of the accused as being or not being the "product of a mental disease."[291] It was recognized that if witnesses simply so described the etiology of the mental condition of the accused, the jury would have nothing to decide but the credibility of equally (in)credible witnesses. Needed to preserve the jury's inference-drawing functions were descriptions of the facts that were removed from the legal description.

In seeking to preserve this function, the law of evidence recognizes something profound: that there is more to classification of particulars under general legal predicates than some analytically secure judgment that such examples constitute the meaning of such words. The opinion rule could recognize this for normative reasons of the kind discussed earlier with regard to Fuller: no legal predicate *should be* given its legal meaning by its ordinary meaning alone. Alternatively, the rule could be based on the insight about the frailty of meanings: that there are no such examples that are analytically sure to be meant by predicates in ordinary or legal speech. Thus, this not very mechanical task cannot be delegated to witnesses. This frailty of meanings is the second point preventing deduction of decisions in any case, even within an alternative, extensional theory of meaning. Examination of this second point follows.

Even if we had a system of adjudication where word/thing relationships were all judges and juries had to deal with—*e.g.*, where the witnesses *are* the juries, as was once true—the extensional theory one can have will not be such as to make deductions possible. Before detailing these problems, it may be well to show what a formalist would need in the way of an extensional theory of meaning.

A formalist would hope the nature of "meaning" to be such that some specific examples are paradigms in a strong sense: that is, paradigms that give a predicate its meaning, and without which it would have no meaning (or at least a different meaning if different paradigms were used). If this can be warranted by meaning theory about some examples, the formalist will have everything necessary for his deductions to succeed. That is, in cases involving this special set of examples,

290. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) ("[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.").

291. *See* Washington v. United States, 370 F.2d 444 (D.C. Cir. 1967). For a more complete tracing of the problems the District of Columbia Court of Appeals had in preserving the fact-finding function of the jury, see Moore, *supra* note 236.

the formalist has a truth solely by virtue of meaning, and that truth will be every bit as secure as the analytic truths sought earlier in vain. The only difference would be that the relationship, necessarily true by virtue of meaning, would be between words and things rather than between words and other words (descriptions, or criteria).

This view of meaning has had more than its share of adherents in the recent philosophy of language. The "paradigm case argument" was for a time used to refute skepticism in epistemology.[292] By way of illustration, consider the use of this view by J.O. Urmson.[293] Urmson describes a person who had doubts about whether an object, commonly regarded as red, was indeed red, although he was looking at it under standard lighting conditions with no known defect in his vision. If he expressed doubt that it was red notwithstanding his admission that these standard conditions were met,

> [w]e would then be at a loss and probably ask him what on earth he meant by red if he was unwilling to call this red, or say that by "red" we meant being of just some such colour as this—"If we do not call this red, then what would we?" Thus using a simple form of the argument from standard examples, we can make him see that there is something absurd in his question, since there is no better way of showing what the word "red" means than by pointing to things of this colour.[294]

Similarly, a formalist would like to reply to a legal skeptic that one can know with certainty that some items (such as some pieces of cotton underwear) are manufactured products because such items are the paradigmatic examples from which the phrase "manufactured products" takes its meaning. Thus, Hart's thesis, in which "standard instances" constitute a "core of meaning" of predicates, could be construed to be those paradigmatic examples that give meaning to the predicates used in law. So construed, Hart's thesis would then be not only an attempt to answer the problem of vagueness by referring to a core of settled

292. L. WITTGENSTEIN, THE BLUE BOOK (1934) ("It is part of the grammar of the word 'chair' that this is what we call 'to sit on a chair.' "). More recently, Anthony Flew has defended this theory of meaning. *See* Flew, *Divine Omnipotence and Human Freedom,* in NEW ESSAYS IN PHILOSOPHICAL THEOLOGY 144, 149-53 (A. Flew & A. MacIntyre eds. 1955); Flew, *Philosophy of Language,* in ESSAYS IN CONCEPTUAL ANALYSIS 1 (A. Flew ed. 1956). *See also* Flew's exchange with J.W.N. Watkins: Watkins, *Farewell to the Paradigm Case Argument,* 18 ANALYSIS 25 (1957); Flew, *"Farewell to the Paradigm Case Argument"—A Comment,* 18 ANALYSIS 34 (1957); Watkins, *A Reply to Professor Flew's Comment,* 18 ANALYSIS 41 (1957).

293. Urmson, *Some Questions Concerning Validity,* in ESSAYS IN CONCEPTUAL ANALYSIS, *supra* note 292, at 120.

294. *Id.* at 121.

meaning, but would also circumvent the need for connecting analytic or mental truths, by referring to this same core of paradigm examples.

Are there such paradigms, guaranteed to be instances of general predicates by the very meaning of those predicates? Since the meaning of nominal kind words, in the strong sense, is given by a set of descriptions rather than by examples. There are no paradigmatic examples (in the strong sense) for such words.[295] One should therefore focus on natural kind words, in which Hart's argument is more plausible.

Arguably, if the legal predicate is a natural kind word drawn from ordinary speech, then *the same arguments that show such words do not have necessary and sufficient conditions as their intensions also show that such words must have at least some standard examples in their extension*. Putnam's argument against the positivists' criterial theory depends upon speakers' indexical intentions, which speakers can have only if the linguistic community of which they are a part has some standard instances that native speakers can refer to and say, for example, "Anything that is fundamentally like that is gold" (or water, or a dog, et cetera). Although no examples exist that could be called, with certainty, *normal* members of any class,[296] it may seem that there must be some things that are members of that class (even if they later turn out to be abnormal) if the idea of fixing the extension of words indexically rather than by descriptions is to make sense. Put even more strongly, it may seem that if a word's meaning is discovered by looking to paradigmatic examples, then there must be paradigmatic examples.

Unfortunately for the formalist, although the arguments used against the criterial theory of meaning imply an extensional theory of meaning, they do not imply paradigms in the strong sense used by Urmson, Wittgenstein, and others. The strong sense of "paradigm" is one in which any item said to be a paradigm of some predicate is *necessarily* in the extension of that predicate. One must distinguish a weak sense of "paradigm" in which any item is a paradigm if the linguistic community, or any speaker or listener in it, *believes* the item is in the

295. *See* articles by Watkins, *supra* note 292.

296. *See* H. PUTNAM, *supra* note 113, at 143:

> Even if cats turn out to be robots remotely controlled by Mars we will still call them "cats"; even if it turns out that the stripes on tigers are painted on to deceive us, we will still call them "tigers"; even if normal lemons are blue (we have been buying and raising very atypical lemons, but don't know it), they are still lemons (and so are the yellow ones).

Id.

extension of the predicate. Whether the item actually *is* in the extension of the predicate is not necessary in this sense of "paradigm."

The only kind of paradigms presupposed by the extensional theory of meaning of natural kind words are paradigms in the weak sense of the word. On the extensional theory of meaning of natural kind words, one will need to have some things around that are generally believed to be in the extension of the predicate being used, in order to have indexical intensions with regard to *those things*. The extensional theory of meaning does not require that an individual item be in the extension of the predicate whose application is in question. In other words, a paradigm in the strong sense is not required.

The reason for this is again due to our metaphysical faith in the hidden nature of natural kinds. For example, just as we will give up any (and even all) ordinary indicators of an item being gold, if the hidden nature which he believes gold to have requires that he does so, so he will give up any particular item *being* gold if it fails to share the hidden nature of gold. He will do this even if, by accident, the item has long been thought to be gold (it has perhaps been kept in Paris, along with iridium rods and standard negligence units), and even if the item shares all the gross features, such as color, he normally thinks gold has. A piece of fool's gold is not gold, no matter how closely it resembles gold in appearance and no matter how many people have been fooled into thinking so.[297]

As a result, the extensional theory of meaning of natural kind words that has been adopted here does not require that any individual objects, events, or qualities in the world be necessarily included in the extension of any particular legal predicate. This result obtains even with regard to that subclass of natural kind words sometimes called "simple" words. A simple word is one whose meaning can only be taught ostensively, that is, by pointing at the thing or quality and simultaneously uttering the word. Whether there are any simple words has long been debated in philosophy, but in the present context the correct outcome of that debate need not be determined. Assuming the exist-

297. This "being-at-sea" about any item being in the extension of natural kind words leaves some so uncomfortable that they reject Putnam's theory out of hand. *See, e.g.*, Zeinach, *Putnam's Theory on the Reference of Substance Terms*, 73 J. PHILOSOPHY 116, 123 (1976): "Any theory which has a result that we do not and cannot know what is the correct reference of the word 'water,' or any other English substance-term, cannot be right." Zeinach's argument presupposes the point at issue, namely, that at some time there must have been some particular thing that was referred to as water and that gives "water" its extension (and thus its meaning). Language can be learned and can function without any strongly paradigmatic examples.

ence of simple words, and that all natural kind words were simple words, the paradigms required to teach the meaning of such words would not have to be paradigms in the strong sense. One can teach the meaning of "red" ostensively by items that are not in fact red, but only look red.[298] One could teach the meaning of "flat" by pointing to things that are not actually flat, but only appear to be so, *e.g.,* the earth's surface. In fact neither the teacher nor his linguistic community need even *believe* that the items are red or flat; the paradigm can still be suitable for teaching the meaning of the word.

A philosophical or legal proponent of using paradigms as being determinative of meaning in the strong sense of "paradigm" has one rejoinder to all this. He would argue that some words exist whose meaning is such that the speaker's belief that they describe some item, guarantees that they *do* truly describe that item; for such words the relation between paradigm in the weak sense and paradigm in the strong sense would be a tautology: the belief that an item is in the extension would guarantee that the item is in the extension. The meaning of "pain," for example, is often thought to be such that the belief by an individual that he is in pain guarantees that he is in fact in pain. Thus, any sensations thought to be painful by the individual involved are not only weakly paradigmatic of "pain" (because believed painful), but also are strongly paradigmatic of "pain" because such sensations would necessarily be in the extension of "pain."

The limited scope of this rejoinder's application is the most pertinent problem here. There are very few words in our language where the utterer's belief in the validity of their application on some occasion, is a guarantee of their applicability on that occasion. The only plausible instances of such words are mental words, *e.g.,* "pain," "imagine," or "perceive." Thus, first person, present tense statements describing the speaker's state of mind are the only arguable instances of statements that are true because they are believed to be true. Any attempt to so construe statements using natural kind words (with which the world is described) would grant to speakers a general authority that they are granted only over their own minds (if there). No belief by any speaker or community of speakers that a particular item is gold, red, or flat, can possibly be self-certifying in this way.

298. Richman, *On the Argument of the Paradigm Case,* 39 AUSTRALASIAN J. PHILOSOPHY 75 (1961). *Contra,* Williams, *More on the Paradigm Case Argument,* 39 AUSTRALASIAN J. PHILOSOPHY 276 (1961); *but see* Richman, *Still More on the Argument of the Paradigm Case,* 40 AUSTRALASIAN J. PHILOSOPHY 204 (1962).

Thus, if this rejoinder has any scope at all, it is very narrow. It remains to be shown, however, that no legal case could come within it. The kind of case a formalist would need would be one in which the judge is charged by the relevant rule to base his decision on the applicability of some mental predicate to his own mental state at the time of the decision. Imagine, for example, a rule enjoining a decision against the party whose presence causes the judge pain. The simple statement of such an example shows that no system of *adjudication* will raise issues where such predicates and their strongly paradigmatic instances can be involved.

The result of this discussion is the realization that Hart's "core of meaning" cannot have paradigmatic or standard instances, in the strong sense sketched earlier. There are standard examples or paradigms only in the weak sense; a sense that gives no guarantees that any item *is* an instance of some predicate.

There is an epistemological question about this "core" that merits examination in closing. This question harks back to the kind of negative reaction Justice Stewart's assertion, "I know it when I see it," engendered. What is disturbing about an extensional theory of meaning (even one using paradigms in the weak sense, or as heuristic devices in ostensive definitions) is the seemingly limited amount one can say about *how* one knows whether a paradigm is in the extension of the predicate one is charged by rule to apply. "I know it when I see it" seems such a premature end to questioning about *how* one knows, that it sounds more like a rude refusal to answer than an answer in itself. Even if the question of correctness is left aside, can one say nothing about how a native speaker comes to his intuitions of when to apply some general predicate?

One of the defects of the paradigm case argument just discussed, using "paradigm" in the strong sense, is that it requires that there be no answer to this "how do you know?" question. For recall, the argument can only succeed when non-inferential knowledge about the application of the predicate to the paradigm is claimed. But non-inferential knowledge, such as one's knowledge that one is currently in pain, means there can be no answer to the epistemological question of how one knows. "How do you know you are in pain?" is an odd thing to say, as ordinary language philosophers were so fond of pointing out.

That there is no more to be said about how one comes to his intuitions about when to apply predicates flies in the face of everyday experience. With the exception of first person, present tense mental

statements, answers are expected and received from a native speaker of English in response to what it is about some thing x that makes him call it an F. This linguistic practice is reflected in the law's allowance of cross-examination of a witness to test the accuracy of his narration as well as the accuracy of his perception and his memory. If a witness testifies that the plaintiff was hit on the head by a coconut belonging to the defendant, the witness may be asked what it is that entitles him to describe the thing that hit the plaintiff as a coconut; the witness is not struck dumb by such an "inappropriate" question as he would be if the thing he saw were a strongly paradigmatic coconut.

An extensional theory committed only to weak paradigms of coconuts or other natural kinds will not suffer a similar epistemological embarrassment. For it can allow a speaker to say—as a witness surely would—that the thing was round, brown, had a white inside, grew on a tree of a certain sort, et cetera. These are elements of what Putnam would call the "core facts," or the "stereotype," of a coconut that native speakers mention when cross-examined about the correctness of their descriptions.[299] Whether such core facts or stereotypes should be included as part of the *meaning* of natural kind words, or relegated to being a part of a speaker's linguistic competence, is a matter of some debate.[300] Whatever their semantic status, some room must be found for the way people respond when called upon to justify their descriptions. The only thing denied is that such "core facts" are "core" in the sense earlier examined: either as properties that individually or collectively serve as necessary and sufficient conditions, or as things that serve as strong paradigms.

The third and final construction of Hart's "core" that this makes plausible should be obvious. Included in the core of any natural kind predicate are both descriptions (Putman's "core facts" or stereotypes) and weak paradigms. The descriptions are usually fairly good indicators that the predicate is being accurately applied; the paradigms are usually fairly good examples of the type of thing the predicate describes. The core, however, is never a secure bastion within which a formalist can say, "anything with these properties is an F," or "if anything is an F, this is." On no theory of meaning is Hart's core that kind of secure bastion which, formalism requires this type of absolute cer-

299. *See generally* H. PUTNAM, *supra* note 113, at 247-52.

300. *Compare* Goosens, *supra* note 151, at 151-54, *with* H. PUTNAM, *supra* note 113. Goosens argues that the stereotype is not part of the meaning of a natural kind word, but only part of the linguistic competence of a speaker.

tainty to make the decisions in *any* cases deducible. In short, there are no easy applications of rules to facts, and hence, no easy cases.

CONCLUSION

The problems confronting formalism discussed in this Article do not stem from the theory's reliance on logic. Judges should be logical; their decisions should follow logically from their premises. This much is surely correct about formalism, however much the Legal Realists may have mocked it. The problem confronting formalism lies instead in semantics. There is no plausible theory of meaning that allows a judge to be unoriginal in his decision in any case, for to have a decision that follows logically from its premises *he* must create what he cannot discover, *i.e.,* the premise that connects the law to the facts.

One way of summarizing these problems of meaning is by J.L. Austin's fetching aphorism that "fact is richer than diction."[301] The language of everyday life, science, and law is open to factual contingencies in a way that renders impossible the realization of the ideal for language held out by legal formalism, logical positivism, operationism, or behaviorism. One can view ambiguity, vagueness, metaphor, open texture, the indexical nature of natural kind words, the criteriological nature of nominal kind words, the only partial reductions of dispositional terms, and the total lack of reductions for theoretical terms in science, as so many expressions of the richness and diversity of fact. Similarly, the indeterminancy of any speaker's intention can be seen as due to the richness and diversity of facts, which exceed the unexpressed proposition that is the object of that speaker's intention no less than they exceed the actual sentence uttered. Such richness and diversity precludes every actual and possible particular from having a niche in some classification scheme, and precludes *any* particular (even a "paradigmatic" one) from being analytically guaranteed any particular niche. The closed and static classification system that is the formalist/positivist ideal for language cannot survive this insight into the nature of how complex things really are. Language could not conform to such an ideal and still be useful in dealing with the real world.

The result is that a judge must always construct what he cannot discover as a matter meaning, namely, the crucial third premise connecting legal predicates to factual descriptions. He cannot discover such a premise as an analytic truth or as the object of a legislature's

301. Austin, *A Plea for Excuses,* 57 PROC. ARISTOTELEAN SOC'Y 1, 21 (1956), *reprinted in* ORDINARY LANGUAGE 41, 56 (V. Chappel ed. 1964).

intention; nor can he avoid the need for such a premise by calling the facts paradigms of the legal predicates he will apply. Paradoxically, he must be creative in order to render a decision that truly follows from its premises.

Allowing this much is not to subscribe to the Realist thesis that a judge is free to do what he wants. He may be "free" as a matter of power, but not as a matter of obligation. His obligation is to apply the statutory language and, moreover, to take into account in his decision his intuitions about what that language ordinarily means. This is the second valid directive of formalism. If the political ideals referred to by the "rule of law" are to be realized at all, neither the rules, the legislative issues, nor the ordinary meaning of the words they contain can be ignored.

But the judge's linguistic intuitions are only one ingredient in his activity of creating the necessary third premise. Equally important are the judge's ethical intuitions about what the words ought to mean in a legal rule of this sort. A theory of adjudication requires that the meaning of words in legal rules be constructed by supplementing linguistic intuitions with ethical intuitions. A judge who knows the Oxford English Dictionary by memory does not know nearly enough to resolve cases. He must also know what is fair, just, and right.

This Article has at least sketched some of the ways in which the mixing of linguistic and moral intuitions should take place. First, the ethical intuitions of a judge need to be directed to his finding of intentions *in* the rule. "Purposive interpretation" of a statute does not mean ignorance of that statute, but rather an application of it to the facts of the case in a way that promotes the intention the judge sees "in" the statute. This is, as outlined earlier,[302] a value judgment by the judge, who should eliminate possible results that are *per se* unintelligible, or that are unintelligible in light of any rational beliefs he could ascribe to the legislature. Second, among all the intelligible ends for which the statute could have been a rational means, a judge must choose one, or a limited set, as *the* purpose(s) of the statute; as set forth earlier,[303] this can only be done on the basis of the judge's theory of the nature of an ideally good and just society.

A judge's linguistic intuitions are necessary in selecting such purposes; for it is the statute as he proposes to interpret it that is the

302. *See* notes 235-38 and accompanying text *supra*.
303. *See* notes 239-46 and accompanying text *supra*.

(speech) act for which he is seeking an intelligible purpose. His linguistic intuitions provide him with provisional interpretations of the nature of the speech act about which he is endeavoring to discover some purpose.[304] The less satisfactory he finds the purposes of an act under its provisional interpretations, the broader he should be willing to stretch his linguistic intuitions about those interpretations in order to "discover" purposes he likes better. In this way he trades off his two sets of intuitions against each other; he uses a less ordinary interpretation of a term to further a more morally justifiable purpose.

There may be no set of acceptable purposes for a particular statute that a judge could find intelligibly promoted by it unless he greatly stretches his linguistic intuitions. Only then does he become self-conscious of his necessarily creative role. He may, for example, find himself saying: "a Chinese person is an Indian," "a truck on a pedestal is not a vehicle," "the arresting of a mail carrier is not an interference with the mail," or, "a murdering heir is not a devisee even though named as one in the will." In such cases he self-consciously balances his moral intuitions against his linguistic intuitions and thus creates a new metaphor. What is generally not perceived is that a judge makes this tradeoff in all cases; his very job could be described as the manufacture of metaphor.

A judge may think that he abjures using his moral intuitions in easy cases, using them only in hard cases. Yet as we have seen, there is no such distinction. While there are cases where his linguistic intuitions are clearer than others, there are no cases where he can abjure from his creative role as the manufacturer of legal metaphor. The necessity of the third premise prevents it. Whether he likes it or not, he must "make a little law" in every case, and while he *can* claim to ignore his moral intuitions when he does so, what motive does he have for doing so? Exposed to his own necessarily creative role, as a rational creature he presumably will, and in any event should, supplement his linguistic intuitions with his moral intuitions about what is fair, just, or right.

304. This reverses the subjectivist slogan that one can only know what the words mean if one knows with what purpose they are being used.