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# Excursions into the Nature of Legal Language

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# EXCURSIONS INTO THE NATURE OF LEGAL LANGUAGE

MARY JANE MORRISON\*

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Holmes's favorite topic of the language of the law<sup>1</sup> has been moving from the back burner to the front burner during the last few years. There are arguments between interpretivists and noninterpretivists about how to treat the language of the Constitution<sup>2</sup> and there are symposia on "law and literature."<sup>3</sup> There also are nascent discussions of whether the language of the law is a technical language. One scholar has described the law as being "a language activity," saying what legal scholars have uniquely to contribute is "our special familiarity with the legal language."<sup>4</sup> He then found himself accused of having joined the "law as language movement," which "is aimed principally at reasserting the autonomy of law — at returning law to lawyers by claiming that law is a specialized language that only lawyers can speak."<sup>5</sup>

\* Professor of Law, Hamline University. B.A., University of Florida 1965; A.M., University of Illinois 1971; J.D., College of William and Mary 1981; Ph.D., University of Illinois 1981. I have been indebted for many years to Fred Schauer for long hours of conversation about this topic and for his comments on an earlier draft of this article. All the mistakes, of course, are mine.

<sup>1</sup> O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920); see also *The Theory of Legal Interpretation*, in *id.* at 203.

<sup>2</sup> The dispute is over the extent to which the text of the Constitution is open or closed. See Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, n.1 (1982) (citing works of Ely, Brest, Grey, Linde, Monaghan, Perry, and Richards) [hereinafter Schauer, *Essay*]. See also Morris, *Interpretive and Non-interpretive Constitutional Theory*, 94 ETHICS 501 (1984).

<sup>3</sup> See, e.g., *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982); *Symposium: Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981); *Symposium: Law and Literature*, 32 BUFFALO L. REV. 603 (1979).

<sup>4</sup> Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981).

<sup>5</sup> Shapiro, *On the Regrettable Decline of Law French: Or Shapiro Jettit Le Brickbat*, 90 YALE L.J. 1198, 1200 (1981) (emphasis in original) (commenting on Stone, *supra* note 4). One of Professor Shapiro's primary concerns is that Professor Stone's thesis will encourage persons of less able minds than Professor Stone's to conclude that legal language belongs only to those trained in the law and will return us to "the jurisprudence of concepts." *Id.* at 1200.

The tone of that criticism suggests that no one can say, in one and the same breath, that the language of the law is a technical language accessible to all speakers of English, lawyers and laymen alike. Yet, another scholar has asked for an inquiry into the ways ordinary English and the language "in legal culture" are related to one another and the ways the language of the "law must simultaneously function for professionals [who work] within the legal system and for citizens [who] live within it."<sup>6</sup> He notes that "legal language, as a technical language, often operates in a context that makes legal terms have meanings different from those they bear"<sup>7</sup> in nonlegal contexts of use; but, he says, "the law speaks largely if not exclusively in English,"<sup>8</sup> and "legal English must remain attached to ordinary English"<sup>9</sup> because the former is "parasitic" on the latter.

In this article, I explore some of the truths on each side of the issue of whether the language of the law is a technical language and whether lawyers speak in a technical language when they speak with each other about the law. I try to make sense of saying "lawyers make technical uses of language" without falling into the dangerously false thesis of "only lawyers know what the law is because only they speak the language of the law." For theorists who would like to say the language of the law is technical, I develop several definitions that allow for such claims. But I also set out the consequences and limitations of those claims.

In Part I of this article, I examine the due process limitations on the thesis that the law is in a technical language and I draw distinctions between speaking carefully and speaking technically. The points I draw in the latter section are independent of any view we might decide to take about technical languages and about whether the language of the law is technical, but they will aid us in avoiding a too-provincial view of the language of the law. In Part II, I set out the technical language views of H.L.A. Hart and Charles Caton. By taking back-bearings on the views of Hart and Caton, I then develop a third view of technical terms. With that view in hand, I investigate the language of the law in Part III. I conclude that although Hart's and Caton's views will allow us to say the language of the law is technical, its technicality is not interesting or illuminating under these views and is in danger of being an "experts only" language. Under my view we may not say the language of the law is technical, although some of the most interesting terms are ones surrounded by theory and although lawyers may speak technically by making technical uses of ordinary English. I also explain, however, how a word that is central to a prescriptive institution sometimes may require

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<sup>6</sup> Schauer, *Precedent*, 39 STAN. L. REV. 571, 586 n.35 (1987) [hereinafter Schauer, *Precedent*]. Literally, he notes a dearth of inquiry into the ways "in which *law* must simultaneously function for professionals within the legal system and for citizens *outside* it . . ." (emphasis added), but I take this to be a two-fold slip of the pen.

<sup>7</sup> *Id.* (citing Schauer, *Speech and "Speech" – Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979)).

<sup>8</sup> *Id.* at 586.

<sup>9</sup> *Id.* at 586 n.35 (citing C. CATON, *PHILOSOPHY AND ORDINARY LANGUAGE* vii-viii (C. Caton ed. 1963)).

interpretation that runs slightly ahead of settled ordinary use, and I use as an example "speech" of the first amendment. In contrast to this phenomenon is the more usual legal phenomenon of terms that have exactly the same meaning in legal use as they have in ordinary use. My example here is "promise," and I relate the theory surrounding "speech" to the one ordinary language itself provides for "promise."

Much of what I will say is obvious; with luck, it also will be, as the curse goes, interesting. With great good fortune, it will strike a responsive chord with persons who have wondered about what "thinking like a lawyer" means<sup>10</sup> and who have been concerned by some of the subterranean undercurrents in recent attacks on the jury system.<sup>11</sup> I will also, however, be speaking of the meanings of words in ways that, in one sense, sometimes may appear to cut against the "meaning is use" grain of contemporary philosophy.<sup>12</sup> Under some formulations of that received view, I ought not to be speaking of the meanings of words themselves, but of speakers' uses of words in sentences,<sup>13</sup> or in speech acts,<sup>14</sup> or of speakers' uses of strings of words to be taken by someone to mean something,<sup>15</sup> and so on. In short-circuiting to speak of the meanings of words, I sometimes may be short-changing some of the richness of our linguistic practices. Even more problematic, however, is my use of "language of": I use the phrase in a very loose way only moderately abstracted from an identification with the linguistic practices of enthusiasts in or participants of a

<sup>10</sup> Each fall, as deans welcome first-year students, the phrase "thinking like a lawyer" wafts from the windows of law schools across the land. Both Professors Stone and Shapiro view this incantation of "thinking like a lawyer" as an "institutional conceit." Stone, *supra* note 4, at 1150; Shapiro, *supra* note 5, at 1199-1200, 1204.

*But see* Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer"*, 30 STAN. L. REV. 1071 (1978) (review of R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977)). He says that, instead of dismissing notions of thinking like a lawyer as "ritual cant," it should be recognized "as central to the ideology of legal education." *Id.* The phrase implies at least "(1) that there is a particular way lawyers think; and (2) that this particular way is also a desirable way . . . Both of these propositions are debatable." *Id.* For example, not all law professors, who teach budding lawyers to think, themselves think alike, and similarly for judges, who write the cases these students study. *Id.* at 1071-73. More importantly, "thinking like a lawyer" and "thinking like a morally acute individual" can cut in radically different directions." *Id.* at 1104. Conversely, he argues, in agreement with Professor Dworkin, "all citizens in a constitutional democracy have the capacity, and indeed the right, to engage in legal analysis." *Id.* at 1101 (footnote omitted).

<sup>11</sup> *See, e.g.*, B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (arguing for lawyers to redeem the promise of the New Deal in part by putting law into the hands of experts at agencies). *But see* Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761 (1986) (analyzing the current view of the relationship between jury power and free speech).

<sup>12</sup> In another sense, I clearly will not; for nothing I say here fairly could be taken to be a form of essentialism. That is, I clearly am talking about meanings of words, not "the" meaning and, indeed, not the meaning.

<sup>13</sup> *See, e.g.*, Alston, *The Quest for Meaning*, 72 MIND 79 (1963).

<sup>14</sup> *See, e.g.*, J. SEARLE, *SPEECH ACTS* (1969).

<sup>15</sup> *See, e.g.*, Grice, *Meaning*, 66 PHIL. REV. 377 (1957).

subject, discipline, or activity. What I say, therefore, is more nearly like an impressionist's charcoal of a landscape than it is a color photograph or a cartographer's topological map, and I do not wish anyone to be misled by my unqualified assertional tone. My tone is sometimes misleading in that I do not finish with any line of argument until I have uncovered and developed all lines of argument, and each point is subject to critical re-putation and reformulation.

## I. LOCAL AND GLOBAL FEATURES OF THE LANGUAGE OF THE LAW

### A. *The Problem: Anti-Reductionism and Reductionism*

The bald contention that legal language is a language that only lawyers can speak is one of several forms of an anti-reductionist thesis. This view is that legal language differs from English, cannot be reduced to English — or, at least, cannot be reduced to ordinary English. But the expression of that view tends to crop up in the contexts of some other point, so that determining whether a theorist intends to advance an anti-reductionist view is difficult.

For example, someone may say innocently that “it is a commonplace that that which gives the language of the law its distinctive flavor is something other than the King’s or the commoner’s English.”<sup>16</sup> To say that the “great mass of the language used by lawyers is ordinary English”<sup>17</sup> still is innocent because it does not itself indicate a position with respect to the rest of the language lawyers use. It does not even necessarily draw a distinction of ordinariness for the “great mass” and nonordinariness for the rest; for someone may make, as shall I, the great-mass-ordinariness point to clear-away noncontroversial areas of the language of the law in order to facilitate analysis of the rest. With saying “[o]nly the lawyer can exploit the capabilities of the language of the law, he alone even recognize[s] some of its limitations,”<sup>18</sup> however, the innocence begins to fade; and it pales entirely in the rhetorical excess of a statement that “the language of the law depends for survival upon those it unites in priesthood — the lawyers.”<sup>19</sup> For here we arrive at the bud of a claim that there is something lawyers know about the language of the law and do with it that nonlawyers do not do exactly because non-lawyers are nonlawyers. Even then, determining whether the theorist intends to convey an anti-reductionist message is difficult.<sup>20</sup>

<sup>16</sup> D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 10 (1963).

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 454.

<sup>19</sup> *Id.* at 453.

<sup>20</sup> The last of Professor Mellinkoff's remarks quoted in the text, for example, itself is in the context of his saying, “Law language is no longer — as lawyers once wanted it — bottled in bond, that their discipline might not be made common among the vulgar.” *Id.* at 453.

On the other side of the coin, what are we to think when someone compares learning the language of the law to learning a foreign language and says that "it is useful to treat common-law mens rea terms, and indeed much of the language of the law, as words that must be translated into ordinary language before one can learn what they mean and how to use them"?<sup>21</sup> That sort of statement certainly is not anti-reductionist, but just how innocent is it? It suggests that the legal language can be reduced to English, but only in translation, and that in turn is to deny that the language of the law is already part of English. It also does not tell us whether the result of the translation leaves any cognitive dissonance between the original law and the English translation. Are there any shades of the Innuits' distinctions among snows left over, any niches in the German's *gemutliche Ecke* left unilluminated, and so on? That is, are there any translation failures, and do lawyers come to see things differently than nonlawyers? If not, why? Nor does the view suggest how a translation failure is possible, given that men and women make the law. More pointedly, if law students need to carry around a translation manual until they have learned the foreign words of the language of the law, are all the commentators who argue that Shakespeare may have been a lawyer themselves lawyers, and did all his playgoers go to law school, or did they sit mutely in the audience not understanding some of the words and phrases of his plays?<sup>22</sup>

A dispute about the nature of legal language is not unique to jurisprudence. Philosophers and mathematicians long have argued about whether mathematical propositions are reducible to empirical generalizations (for example, " $2 + 2 = 4$ " to propositions about counting objects) or to symbol-manipulation rules (" $2 + 2 = 4$ " to propositions about the conventional uses educated people make of certain symbols) or are not reducible at all because they are *sui generis*, in a language unique unto itself and cut off from other languages. One philosopher, who characterized the former two views as "radical" and the latter view as "conservative," argued that the conservative view that mathematical propositions are *sui generis* is "perfectly correct, but rather unsatisfactory and unilluminating, whereas opinions of the 'radical' type are untrue, but interesting and illuminating."<sup>23</sup> The theory I ultimately will be presenting is of the radical kind. My thesis is that statements of our law and the central, substantive legal words, rather than being *sui generis*, are ordinary English, albeit perhaps not always in the ordinary language sense in which J.L. Austin and others may speak of ordinary language.<sup>24</sup> This thesis thus

<sup>21</sup> P. LOW, J. JEFFERIES, JR., & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 198 (2d ed. 1986).

<sup>22</sup> To be sure, the commentators argue not only on the basis of Shakespeare's adept usages of legal terms and legal maxims, but also his apparently autobiographical remarks — such as "I am a wise fellow, and one that knows the law" from *Much Ado About Nothing*, act iv, scene 2 — to fill some otherwise unaccounted years in his life. See W. KNIGHT, *SHAKESPEARE'S HIDDEN LIFE: SHAKESPEARE AT THE LAW 1585-95* (1973); W. RUSHTON, *SHAKESPEARE'S LEGAL MAXIMS* 9, 60-61 (1907; 1973); F. HEARD, *SHAKESPEARE AS A LAWYER* 7, 10-11, 13 (1883; 1977).

<sup>23</sup> Gasking, *Mathematics and the World* (1940), reprinted in *LOGIC AND LANGUAGE (First and Second Series)* 204 (A. Flew ed. (1965)).

<sup>24</sup> See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

is more radical than even the radical thesis that legal language can be reduced to English, because the thesis is that the law already is in English, and my view, therefore, runs even greater risk of being "untrue."

Examples of views that take a fully conscious position on the nature of legal language are hard to find, and this is no less true of anti-reductionism (or reductionism or translationism). With two notable exceptions, few scholars have paid attention to the nature of legal language.<sup>25</sup> One of the notable exceptions is legal theorist H.L.A. Hart; and the other is philosopher Charles Caton, who practices analytic philosophy within the ordinary language tradition. Caton's view is that the language of the law is a technical language that, like all technical languages, is an "adjunct" of or "parasitic" on ordinary languages such as ordinary English or ordinary French.<sup>26</sup> Caton's view is not anti-reductionist although the reasons it is not are complex. Hart's view, however, is anti-reductionist. That Hart is an anti-reductionist comes as no surprise to students of his works in one sense, for he rejected the view that legal concepts and rules can be reduced to moral and political concepts and rules.<sup>27</sup> Yet Hart is an anti-reductionist about the language of the law although he also practices analytical jurisprudence within a tradition of ordinary language philosophy.<sup>28</sup>

This disagreement between two scholars who practice within the same tradition alone is enough to make the thesis that the language of the law may not be reduced to English worth investigating. There is another reason that is even more compelling, however, and it is that the anti-reductionist thesis is false.

### *B. The Due Process Limits for Anti-Reductionism*

One of the basic propositions of Anglo-American law is that each individual will be accorded due process of law, or due process under the law. As part of that enforming proposition, we presume each person knows the law. This, of course, is a myth, if we take "each person knows the law" to mean each person does know the law. That is, it is empirically false. When we say the law presumes each person knows the law, we do not even mean each person is able to know the law, with or without the

<sup>25</sup> There are exceptions, all of which build within and on the tradition begun by J. AUSTIN, *supra* note 24, in which Austin gives an extensive examination of "promise" and promising. See, e.g., Hancher, *Speech Acts and the Law in LANGUAGE USE AND THE USES OF LANGUAGE* 245 (R. Shuy & A. Shnukal eds. 1980); Samek, *Performative Utterances and the Concept of Contract*, 43 AUSTRALASIAN J. PHIL. 196 (1965); Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CALIF. L. REV. 189 (1986).

<sup>26</sup> C. CATON, *PHILOSOPHY AND ORDINARY LANGUAGE* v, viii (C. Caton ed. 1963). See also section II B, *infra*, for full discussion of his views. The description of the relationship of technical language to ordinary language as "parasitic" comes from Schauer, *Precedent*, *supra* note 6, at 586 n.35.

<sup>27</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961). See also N. MACCORMICK, H.L.A. HART 20-28 (1981).

<sup>28</sup> N. MACCORMICK, *supra* note 27, at 12-19.

weasel "*ceteris paribus*." We may try to say that what we mean is something more nearly like the proposition that there are no surprises in the law, that the law fits within standards of behavior and general moral precepts members of society recognize; but that will not do either. We must give up the empiricist and dispositional claims for the presumption.<sup>29</sup>

When we say the law presumes — that is, we presume — each person knows the law, we are setting the limits of the law and setting a prescriptive standard for the law to meet for both law-making and law-enforcing. We are constructing a myth<sup>30</sup> not in the sense of falsity, but in the sense of a story that is part of the fabric of our lives and of our society and that we are to give solid reality, although there never will be a universal empirical truth in "each person knows the law." And we have made a good start, after centuries of different practice, in giving it reality by establishing legal aid societies, by understanding the Constitution to require that poor persons accused of crime have a lawyer, and so on. We have more solid reality than these recent developments on which to rely, however; and that reality is solid because the myth is a truth. It is the truth that the law is ours, not lawyers', and is in our tongue, not in argot. We mark this truth in due process clauses although the truth hinges into a deeper sense of due process than merely those clauses. And we enforce due process requirements that the law be in our language and be ours. If only lawyers could "speak the law," then only lawyers could be prosecuted for crimes or held in contempt or sued in tort or held to administrative regulations.

In criminal law, our legal system imposes due process limitations against the law's not being comprehensible to ordinary persons. No one may be convicted of a crime absent fair notice that the act is punishable. The Supreme Court, under the "principle of criminal law" that only statutory offenses are punishable, has established that there are no federal

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<sup>29</sup> This presumption is one of the many presumptions or constituting-propositions through which the law increasingly has become "objectivized" over the centuries but particularly since around the time of the industrial revolution, although forms of this particular presumption have a more ancient history in criminal law. All of these objectivizations of the law probably are related to controlling juries, to dealing with an increasingly complex and large society, and to the rise of the middle class, who came to court in ever increasing numbers as the ranks of lawyers also swelled. Consider, as just one example, the objectivizational shift in English law that came with *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854) (limiting contract damages to those that are foreseeable because they naturally or usually arise from breaches of this type of contract and those that are foreseeable because, although they are unusual, they were within the contemplation of the parties at the contracting) compared to *Black v. Baxendale*, 1 Exch. 410 (1847) (allowing the jury to award "reasonable" contract damages); and think of the ways that *Hadley* has been further objectivized today.

<sup>30</sup> This myth, then, is part of our narrative and sets a range of meaning for legal discourse. See generally Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).



common law crimes.<sup>31</sup> Most states agree.<sup>32</sup> Even those states that purport to recognize common law crimes mean only that crimes existing at common law continue to exist without specific individual positive enactment.<sup>33</sup> They do not mean that courts may create brand new felonies out of whole cloth;<sup>34</sup> and, were a court to claim the power to do so, it would run afoul of the constitutional requirement of due process.<sup>35</sup>

The due process requirement for criminal law is thus two-fold at one level. There must be notice that the act is prohibited and is punishable, for which shared notions of blameworthiness are not sufficient.<sup>36</sup> At another level, due process requires that the people be the source of the criminal law. The former requirement entails the language of the criminal law be in a language that is comprehensible to the people to whom it applies, and the latter requirement ensures the satisfaction of the former.

The fair notice due process criminal cases are replete with arguments about whether the criminal statute is in words and phrases that long

<sup>31</sup> *United States v. Eaton*, 144 U.S. 677, 687-88 (1892); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). As will become clear in this section, I am in fundamental and abiding disagreement with statements such as: "As an original proposition, *United States v. Hudson and Goodwin* was probably wrong. . . . But the proposition is too well settled now for argument." W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* § 9, at 60 n.17 (1972) (citing 1923 and 1933 law review articles and notes).

<sup>32</sup> *See, e.g.*, ALA. CODE § 13A-1-4 (1982); *State v. Bowling*, 5 Ariz. App. 436, 427 P.2d 920 (1967); GA. CODE ANN. § 26-201 (1988); ILL. REV. STAT. ch. 38, para. 1-3 (1961); *State v. Campbell*, 217 Iowa 848, 251 N.W. 717 (1933); KAN. STAT. ANN. § 21-3102 (1984 Supp.); *State v. Heymann*, 256 La. 18, 235 So. 2d 78 (1970); MINN. STAT. ANN. § 609.015 (West 1987); *Mitchell v. State*, 42 Ohio St. 383 (1884); 18 PA. CONS. STAT. ANN. § 107 (Purdon 1973); *Lund v. Commonwealth*, 217 Va. 688, 232 S.E.2d 745 (1977); WIS. STAT. ANN. § 939.01 (West 1988). *See also* MODEL PENAL CODE § 1.05(1) (1962).

<sup>33</sup> *See, e.g.*, *State v. Egan*, 287 So. 2d 1 (Fla. 1973); *Pope v. State*, 38 Md. App. 520, 382 A.2d 880 (1978); *Commonwealth v. Chapman*, 54 Mass. 68 (1847); N.M. STAT. ANN. § 30-1-3 (1984). *See also* *United States v. Davis*, 167 F.2d 228 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948).

<sup>34</sup> Authorities continue to insist that:  
in the absence of statute [depriving courts of the power to create new crimes, a] majority of jurisdictions still recognize the power of courts to create common law crimes. . . . [although] [t]he trend today is in the direction of abolishing such crimes, so that conduct not forbidden and punished by a statute is not a crime. W. LAFAVE & A. SCOTT, *supra* note 31, § 9, at 57. *See also* R. PERKINS & R. BOYCE, *CRIMINAL LAW* § 2, at 37-38 (3d ed. 1982).

<sup>35</sup> U.S. CONST. amend. V, amend. XIV § 1. Arguments to the contrary are based on cases decrepit with age. *See, e.g.*, the dates of the cases cited in W. LAFAVE & A. SCOTT, *supra* note 31, at 66 nn.66-67. Moreover, the arguments ignore that ours is a legislative age and that our view of constitutional due process has broadened and deepened in the last 200 years.

<sup>36</sup> There must be a statute that declares the prohibition, in terms that meet conditions I will discuss in the text following this note, and that sets the penalty. *See, e.g.*, *United States v. Evans*, 333 U.S. 483 (1948) (federal statute prohibited concealing an alien, but did not create a crime because the penalty prescribed was too vague); *Commonwealth v. Cunningham*, 365 Pa. 68, 73 A.2d 705 (1950) (statute prohibited driving overweight trucks, defined "overweight" four ways but set penalty for only one; the other three are not crimes). *But see* *State v. Bishop*, 228 N.C. 371, 45 S.E.2d 858 (1947) (treating statutorily prohibited conduct for which there was no statutory penalty as a misdemeanor).

have been in use among speakers of English, or whether an ordinary-English speaker would understand the words in the statute to have the particular meaning in question. Consider *Rose v. Locke*,<sup>37</sup> in which the Supreme Court upheld a conviction for cunnilingus under a "crime against nature" statute on grounds that due process requires only that "the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."<sup>38</sup> That requirement was met in *Rose*, the Court said, because "crime against nature" "has been in use among English-speaking people for many centuries," with a meaning anyone could determine, in a state in which the highest state court nearly twenty years earlier had rejected a contention that "crime against nature" did not include fellatio.<sup>39</sup> Now, *Rose* is perhaps the most difficult case on many levels for a claim that criminal statutes are valid under the due process clause only if the meaning is within the common understanding of the words of the statute. Critics could charge, of course, that the *Rose* Court twisted the history of the common law because centuries ago "crime against nature" covered only bestiality and sodomy, with the latter taken in its narrowest sense of penis-anus sexual acts between human beings, i.e., buggery.<sup>40</sup>

The relevance of the earlier state case then was two-fold: First, it took the broader view of "sodomy" as including penis-mouth sexual acts, thereby breaking the connection of "crimes against nature" to its most conservatively narrow possible historical meaning by saying an anus is not necessary to a sodomous act, i.e., that it includes fellatio. This in turn made possible and foreseeable the further interpretation of "sodomy" as including sexual acts in which a penis is not involved, i.e., that it includes cunnilingus; and the defendant therefore had notice that satisfies due process. Second, the earlier case was relevant because the defendant was giving a narrow linguistic attack on the interpretation of the statute as applying to him on the basis of citations to common law cases and commentary. To the latter, the Court's due process reply essentially is, "Cite cases to us, and we'll cite cases right back to you." That is, a defendant cannot have things both ways in a due process argument about the meaning of a statute. He or she cannot pick and choose among meanings when all of them are available meanings under common usage and decided cases or are natural rationalizations and implications of common usage or decided cases.

That point in turn takes us back to the first reason the earlier case was relevant on the issue of due process notice. There always are natural extensions of one case to the next by way of "theory-construction" that rests in the nature of language itself, and perhaps particularly in the English language, and that is compounded in the nature of judicial review on the basis of precedent. Language is elastic, i.e., open textured, and this especially is true of English in part because English often has more than one word for a thing. With "sodomy," for example, the English word

<sup>37</sup> 423 U.S. 48 (1975).

<sup>38</sup> *Id.* at 50.

<sup>39</sup> *Id.* at 50, 52.

<sup>40</sup> See R. PERKINS & R. BOYCE, *supra* note 34, at 465-69.

was and is both the generic word and the particular-act word. Even when words start out their lives as particular-instance words, they can become generic over time through the common use of the words by speakers' not marking distinctions because these distinctions do not matter to the speakers most of the time. In the absence of a court's clearly limiting a particular-instance word to its particular-instance meaning, a word that hovers on the edge of being a generic word may in the next case be applied on the generic basis rather than on the particular-instance basis.<sup>41</sup> This is especially likely to happen to men who enter next-door neighbors' apartments by pretext and wield butcher knives to force sexual relations with their unwilling neighbors, even if the acts are cunnilingus and the state's cases heretofore have dealt with sodomy and fellatio in the narrowest sense and have held both of the latter to be covered by the meaning of "crime against nature" but never have rejected coverage of cunnilingus.<sup>42</sup>

The interesting due process question thus is not the one in *Rose* itself, but in the earlier state case or, rather, the first case to have departed from the narrowest meaning of "sodomy" and hence of "crime against nature." Assuming arguendo that when sodomy became an English crime after the demise of ecclesiastic courts,<sup>43</sup> the extant sodomy convictions were for only penis-anus sexual acts between human beings, was the first person convicted under a sodomy statute or crime-against-nature statute for having engaged in fellatio afforded due process?<sup>44</sup> There would be legitimate grounds for arguing for the court to take a narrow view. If a court were to refuse the prosecution on grounds of denial of due process, the court would slow the elastic development of the word "sodomy" or phrase "crime against nature" for a time, perhaps forever. In that event, forces in society, were the need sufficient, would find a way around by stretching some other word or by changing the statute.

Whether this conservatism was a necessity in the first nonnarrow sodomy prosecution is none too certain, however. After all, the ecclesiastic wrong could be equally and legitimately viewed as any nonprocreative sexual act, not merely penis-anus sodomy. If, then, a defendant were to object to being prosecuted under the crime-against-nature statute on the ground that his sexual act did not involve sodomy in its narrowest sense, but involved fellatio, a court could reject that argument and, if the ecclesiastic understanding were within the collective recent memory of the populace, probably would reject it.

The brutal fact of the matter is that crime-against-nature statutes had and have been vehicles for prosecuting homosexuals. In one sense, then,

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<sup>41</sup> See generally Schauer, *Precedent*, *supra* note 6. See also Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579 (1988).

<sup>42</sup> See, e.g., *Rose v. Locke*, 423 U.S. 48, 48-49 (1975).

<sup>43</sup> R. PERKINS & R. BOYCE, *supra* note 34, at 466.

<sup>44</sup> Nothing turns, here, on my using fellatio as the first case; it equally could have been cunnilingus. I am assuming, however, that the statutory terms are "sodomy" (or "sodomy and bestiality") or "crime against nature" and not "buggery and bestiality."

the defendant's argument basically would be an appeal to the court to limit "crime against nature" or "sodomy" to homosexual acts. As an argument about the public's common understanding of "crime against nature" or "perverse sexual act" or "sodomy," this argument would be well-taken in the sense that this limited-to-homosexuals meaning probably once was and still might be the common understanding. Cast in this light, however, the common-understanding argument is hoist by its own petard equally with an argument that cites some but not all cases and law that are arguably and equally on point. Ecclesiastic courts, not constrained by notions of either due process or equal justice for all, can get away with viewing "crime against nature" as applying only to homosexual acts on grounds that homosexuality is an abomination in the eyes of God. When the people's courts take over interpretation of "crime against nature," however, the court cannot interpret general words of a statute to save them from a common-understanding due process challenge by imposing a narrowing construction that makes the clause violate basic notions of equal protection of the laws. (Or so any reasonable person would have believed until *Bowers v. Hardwick*,<sup>45</sup> which may be every bit as dreadful a decision as the one that took a Civil War to overturn.)<sup>46</sup>

Other fair notice due process cases provide easier lessons than the message in *Rose* because their lessons are more on the surface of the decisions. Thus, in *McBoyle v. United States*,<sup>47</sup> Justice Holmes noted that although a criminal is unlikely to consider "the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."<sup>48</sup> A criminal statute that defines "motor vehicle" as "an automobile . . . truck . . . wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails" does not cover an aircraft, although an aircraft is self-propelled, is a vehicle,

<sup>45</sup> 478 U.S. 186 (1986). *Hardwick*, of course, was a due process case of a different sort, namely privacy due process. But a full understanding of that kind of privacy links privacy to the source-of-the-law point I made earlier in the text about due process because, on one view, at that level the question is whether, in agreeing to be governed under law, the minority agreed that the majority may outlaw the minority's morally respectable views by taking a narrower view on moral grounds. See, e.g., Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (interventions of courts during periods of moral flux allows new consensus to form); Tribe, *Foreword: Toward a Model of Roles in Due Process of Life and Law*, 87 HARV. L. REV. 1, 32 (1973) ("some types of choices ought to be remanded, on principle, to private decision-makers unchecked by substantive governmental control"). For a slightly different account of privacy due process, see Morrison, *Constitutional Reasoning for Rights*, 54 MO. L. REV. 29 (1989).

<sup>46</sup> *Hardwick* merely shows what we have known all along. First, we cannot limit our notions of due process or justice to what any court is willing to dispense because courts do not have a monopoly on perceptions of justice. They are not constituted of Plato's philosopher kings. Moreover, the justice they are to dispense is ours, not theirs, where "our justice" paradoxically is both majoritarian and nonmajoritarian. Finally, persecuted minorities in the long run are better off having their persecution out of the closet so that we all may do battle with devils in daylight rather than box at shadows who hide in the darkness of night.

<sup>47</sup> 283 U.S. 25 (1931) (Holmes, J.).

<sup>48</sup> *Id.* at 27.

and is not designed to run on rails.<sup>49</sup> “[I]n everyday speech, ‘vehicle’ calls up the popular picture of a thing moving on land,” and the “theme” of the statutory definition here was of “a vehicle that runs, not something, not commonly called a vehicle, that flies.”<sup>50</sup>

Although the individual words must be comprehensible to the persons to whom they apply, these words do not always have to be comprehensible to all English speakers. There is no due process impropriety in using “trade” words in a statute that applies only to persons who know the meanings of those words. New York meat dealers, for example, are not deprived of proper notice by a statute that prohibits them from falsely representing nonkosher meat as kosher when the dealers sell both kinds of meat. Similarly, sheepherders have proper notice when a statute prohibits them from grazing sheep on a “cattle range” in an area in which there are both sheep ranchers and cattle ranchers.<sup>51</sup> Further, a law is not unconstitutionally vague simply because it throws upon people the risk of “estimating rightly . . . some matter of degree.”<sup>52</sup> Yet when the law fails to indicate what normative standard people must meet, the law fails to give due process notice even if the statute consists of simple words even children know, such as a prohibition against “annoying” others on a sidewalk.<sup>53</sup>

Thus criminal statutes must give fair warning to all those to whom the statutes apply. The more universal the class, the more nonspecialized the language of the statute must be. But the statute cannot be so inexact and general that each person must guess as to its meaning because each of us legitimately could construe the words in significantly different normative ways.

This due process standard also is the theme of the criminal and civil contempt due process cases. No defendant can be held in contempt of an order stated in terms that are not comprehensible to her. Enjoined de-

<sup>49</sup> *Id.* at 26.

<sup>50</sup> *Id.*

<sup>51</sup> *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 498-502 (1925) (Sutherland, J.). *Omaechevarria v. Idaho*, 246 U.S. 343, 345 n.3, 348 (1918) (Brandeis, J.). See also *Connally v. General Construction Co.*, 269 U.S. 385, 391-92 (1926) (Sutherland, J.). Cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 452-55, 458 (1939) (Butler, J.) (“gangster” and “gang” had no common law meanings and have varied dictionary and scholarly meanings). Notice, then, that a criminal statute written in technical legal terms would be enforceable under *Hygrade* against all and only lawyers or persons who happened to know these technical legal terms. To a certain extent the same would be true, then, for civil actions and for administrative regulations, hence the statement in the text at the beginning of this section. See also text following note 58, *infra*.

<sup>52</sup> *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.) (“undue restraint of trade” in Sherman Act). Cf. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 219, 221-23 (1914) (Holmes, J.) (“real market value” for manufacturers in a market already disrupted by lawful combinations of farmers).

<sup>53</sup> *Coates v. City of Cincinnati*, 402 U.S. 611, 611 n.1, 614 (1971) (“men of common intelligence must necessarily guess at its meaning”); cf. *Colten v. Kentucky*, 407 U.S. 104, 108-11 (1972) (similar sidewalk statute upheld when it had been construed by state courts as not prohibiting the lawful exercise of constitutional rights).

fendants, as Justice Holmes has said, "ought to be informed as accurately as the case permits what they are forbidden to do."<sup>54</sup> The "paramount interests of liberty and due process make it indispensable for the chancellor . . . to speak clearly, explicitly, and specifically . . ."<sup>55</sup> This is because of the risks of both civil and criminal contempt proceedings, namely that the contemnor may be sent to jail or be fined. Federal orders, for example, must set forth the reasons for issuance, be specific in terms, and describe the act to be enjoined in reasonable detail in the order itself, rather than by cross reference to, or incorporation of, some other document.<sup>56</sup> The standard of comprehensibility and completeness is not whether the judge who wrote the order understands it, nor whether lawyers would understand it. The proto-typical ordinary person for these contempt cases is a person who is not trained in the law:

[T]he language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of injunction.<sup>57</sup>

The same general theme runs through our civil common law, but here the connection between the law and its language is less obvious and the connection between the ordinary person and her knowledge of the law is more obvious. Because of this difference in obviousness with respect to our common law of torts, contracts, restitution, and so on, we might be inclined to say there essentially is no due process bar to having these areas of the law "conducted" in some other language that one learns only by going to law school. For, aside from a *pro se* limitation, which requires only that anyone be *allowed* to represent herself in court,<sup>58</sup> we might believe we could say that ultimately the only limitation on private law

<sup>54</sup> *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905) (Holmes, J.).

<sup>55</sup> *H.K. Porter Co. v. National Friction Products*, 568 F.2d 24, 27 (7th Cir. 1977).

<sup>56</sup> FED. R. CIV. P. 65(d). State procedural rules are similar.

<sup>57</sup> *Laurie v. Laurie*, 9 Paige ch. 234 (1841) (Walworth, C.) (ex parte order in a separation suit, enjoining the husband from "annoying, following," etc., his wife or children; modified after he was charged with contempt for sending her an annoying letter).

<sup>58</sup> Adult natural persons have a common law right to appear personally or by counsel. *Osborn v. United States Bank*, 22 U.S. 738, 828 (1824) (Marshall, C.J.); *Hightower v. Hawthorn*, 12 F. Cas. 142 (Super. Ct. Ark. 1826) (No. 6,478b). This right is an alternative one. *Talbot v. Talbot's Representatives*, 25 Ky. (2 J.J. Marsh.) 3, 4 (1829). It is distinct from the privilege of practicing law, *i.e.*, from the privilege of appearing on behalf of others, which privilege is limited by statute to active members of the bar. *Gray v. Justice's Court of Williams Judicial Township*, 18 Cal. App. 2d 420, 63 P.2d 1160 (1937). The right to proceed *pro se* or *in propria persona* partly is a consequence of the liability to be sued, *Werckman v. Werckman*, 4 Civ. Proc. Rep. 146, 147 (N.Y. Sup. Ct. 1883); and, in criminal cases, is a right guaranteed by the sixth amendment, *Faretta v. California*, 422 U.S. 806, 819, 821-36, 834-35 n.46 (1975). The *pro se* right often today is codified. *See, e.g.*, 28 U.S.C. § 1654 (1976); N.Y. CIV. PROC. L. & R § 321(a) (McKinney Supp. 1983).

is that the *principles* of the law be in, so to speak, "English concepts." That is, someone could believe that, theoretically, the statements of the rules of law in civil statutes and in civil cases could be in any language whatever, including a language that all and only lawyers speak when they are speaking qua lawyers, as long as the rules thusly stated contained no surprises in terms of normative standards for tortfeasors, tort plaintiffs, contracting parties, etc., once these people come to court.<sup>59</sup>

This view, however, is founded on two mistakes. First, if the pro se limitation has any real meaning as a limitation on the law, the person who must be allowed to represent herself must not be met with an inexorable "catch 22" when she exercises her right. That is, she must not be told that she may represent herself without a lawyer, only to find that she herself must be a lawyer to represent herself. Second, and vastly more important, there is no such thing as an "English concept" that cannot be embodied in the English language. Were we to say that the only ultimate limitation on private law is that the principles of that law must comport with our shared understandings of proper conduct, and thus with our "shared concepts," so that ordinary persons not trained in the law are not met with surprise when they come to court, we would be advancing a thesis that contravenes what gives the law both its origin and its continuing-existence legitimacy, namely ourselves. Of course, the civil common law is grounded in the fabric of our daily lives — shared values, problems, distinctions, and solutions. But that truth cannot be turned upon its head to justify using some language other than the language of our daily lives for the language of the law.

The only reasons to try to use some language in the law other than the ordinary language of the people are to generate income for lawyers or to enhance the mystery of the law, much as Latin came to enhance the mystery of the Trinity. To say the language of the law is one only lawyers can understand because it is a technical language is to cloak ourselves in the modern mystique of the sciences, much as we once may have cloaked ourselves in each of the twin images of Stendal's *The Red and the Black* by our descriptions of ourselves as "champions of justice."

Thus our shift from French Law was, in a sense, one of our greatest democratic revolutions because it made statements of the law accessible to us, even if we are not lawyers. That revolution further is built into our legal system through the right to trial by jury made up of ordinary men and women.<sup>60</sup> Each accused and each defendant is entitled to be held

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<sup>59</sup> But the political clout of Parti Quebecois is *not* the explanation for the facts that French and English are the official languages of Canada; that statutes, records, and journals of Canada's Parliament are required to be in both French and English; and that either French or English may be used in courts established by Parliament. Canada, Constitution Act, *Canadian Charter of Rights and Freedom*, § 16-20 (1982).

<sup>60</sup> U.S. CONST. amend. VI (all criminal trials), amend. VII (federal trials at law). State constitutions have similar guarantees. See, e.g., VA. CONST. art I, § 8 (criminal trials), § 11 (civil trials).

responsible in accordance with the law;<sup>61</sup> and, unless the men and women who decide the pivotal issues in criminal and civil cases have been instructed in terms that are comprehensible to them, we cannot be certain the jurors have decided in accordance with the law. Instructions are to guide the jurors in their decisionmaking, and instructions that require a law degree to understand simply fail to guide laypersons.<sup>62</sup> Jury instructions necessarily are supposed to be in English, not in some language only lawyers understand, and are not to be replete with legal jargon or "legal niceties."

Our legal system simply does not operate under an assumption that each person has a lawyer on retainer to translate the law into English.<sup>63</sup> Rather, we can engage in and live the myth that each person knows the law because it is in English, whether statute or common law rule.

For the judiciary, then, to say to the sovereign that only judges know what the law is, is one thing. When Coke addressed the King, the issue

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<sup>61</sup> *Screws v. United States*, 325 U.S. 91, 106-07, 113 (1945) (question of intent not submitted to jury with proper instructions; noted *sua sponte* and new trial ordered because error was fundamental: "Even those guilty of the most heinous offenses are entitled to a fair trial"); *Sheppard Fed. Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967) (error in placing burden).

<sup>62</sup> Jury instructions "couched in such lawyerly cant as 'prima facie case' and 'shifting the burden of proof,' would only . . . confuse [ ] the jury" and are properly refused by the court. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2nd Cir. 1983). An instruction ought to be tailored to the jurors' common sense and give them adequate guidance. *Id.* at 85-86. See also *Rangel v. Badolato*, 133 Cal. App. 2d 254, 284 P.2d 138 (1955); *Wekman v. Howard Zink Corp.*, 97 Cal. App. 2d 418, 428-31, 218 P.2d 43 (1950) (concurring opinion).

<sup>63</sup> For arguments based on the fact that, for example, even nonlawyer Presidents are sworn to uphold the law and must then have a duty and ability to interpret the law, see P. BREST, *PROCESS OF CONSTITUTIONAL DECISIONMAKING* 15-44 (1975); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). On the right and duty of citizens to interpret the Constitution, see Levinson, *supra* note 10, at 1074 n.12, 1101-04. The role the people play as the source of law *may* be uniquely American on the northern part of this continent in the most ultimate form of that role. We long have thought of ourselves as being the source of our Constitution and the powers of our government. U.S. CONST. preamble ("We the People . . . do ordain and establish this Constitution . . ."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.) (the people, not the states, adopted the Constitution and created the federal government). See also U.S. CONST. art. V (allowing for amendment to the Constitution by constitutional conventions). Compare Canada, Constitution Act 1982, Part V (allowing for amendments only by resolutions of the Senate and House of Commons and of two-thirds of the provincial legislatures having at least fifty percent of the population, etc. and providing certain matters — e.g. the French/English requirement and composition of Supreme Court of Canada — may be amended only by unanimous agreement of Senate, House of Commons, and all provincial legislatures).



was an institutional conflict, a dispute about balance of power.<sup>64</sup> For the judiciary to say this to a man in the docket or to a woman sued in tort is quite another. When a court officer told Penn that Penn could not understand the common law because he had not spent a lifetime studying law,<sup>65</sup> the heart of the court's message was an "expert's only" message, a message that only lawyers know the law and only lawyers speak the law. Coke may have intended that same message; but if he did, he was no less misguided and false-speaking than was the court officer who addressed Penn. For the law is ours, yours, theirs and mine, whatever our station in life and whatever our training. This principle has been a formal part of our Anglo-American legal tradition since at least 1215 A.D., when our noble ancestors met King John under the trees at Runnymede, and was renewed in 1791, when the fifth, sixth, and seventh amendments became part of our Constitution and renewed again with the passage of the fourteenth amendment.

The bald contention that only lawyers speak the law, or that the law is in a language only lawyers can speak, is false — patently, historically, legally, and dangerously false. There is no question of whether legal language can be reduced to English because the law already is in English.

Is there, then, *no* truth in some form of the "expert's only" thesis? The answer is, there is some truth. There is something distinctive about how lawyers speak, although this feature is not distinctive to only legal language; and there is something distinctive about the meanings of some

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<sup>64</sup> It was a dispute about whether common law courts were interfering with ecclesiastic courts. James inclined to side with the archbishop and claimed the right to decide to which court cases should go.

Then (this is Coke's account) the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had allowed His Majesty excellent science and great endowments of nature; but His Majesty was not learned in the law of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects; they are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects, and which protected His Majesty in safety and peace. With which the king was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said. To which I said that Bracton saith *quod Rex non debet esse sub homine set sub deo et lege*.

F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND 268-69* (1913) (citing Coke, *Reports*, XII, 65).

<sup>65</sup> William Penn and William Mead were indicted for causing a tumultuous assembly. Penn demanded to know upon what ground they were indicted and the Recorder, a court official, replied "Upon the common-law."

*Penn.* Where is that common-law?

*Rec.* You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.

*Penn.* . . . if it be common, it should not be so hard to produce.

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*Rec.* You are an impertinent fellow, will you teach the court what law is? It is *Lex non scripta*, that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?

Trial of Penn, 6 How. St. TRIALS 951, 958-59 (1670) (report written by Penn and Mead).

“legal” words although this distinctive feature falls short of turning the language of the law into a technical language that only lawyers speak and falls short of being unique to legal language.

### *C. Speaking Carefully and Speaking Technically*

Lawyers who speak carefully draw distinctions between “verdict” and “judgment,” “accused” and “defendant,” “plaintiff” and “libelant,” “summons” and “subpoena in chancery.” In this, lawyers do not essentially differ from painters who distinguish between “China black” and “lamp-black,” or from stockmen who chuckle at hearing a steer called a “cow,” or from kennelwomen who do not use the word “dog” to describe a puppy even if the puppy is a male. In each of these latter cases the speakers mark a preference for one of several ordinary English meanings of a word. Independent of whether “accused” and “defendant” are ordinary English words or are technical legal words of a different order, lawyers also are marking a preference among ranges of meanings when they call persons sued civilly “defendants” but persons sued criminally “accuseds.”

This preference-among-meanings phenomenon is a function of a more narrowly focused interest than usually shows up in ordinary conversation, and it sometimes inhibits ordinary conversation. Speaking with a colorist, whether a painter or a paint seller, about color, for example, can be a painful experience because the colorist can divide and redivide blues from blues and reds from reds, with words for each. Not everyone knows the variety of words for individual colors, and some people simply cannot *visually* distinguish between certain shades of red-orange and red. Constant reminders from a colorist to a neophyte that the name of this blue is “Persian turquoise” but the name of that one is “American turquoise,” especially when a number of other words for other shades of blue have cropped up in the conversation, eventually leads one of the conversationalists to pique or to despair. This especially is true when the neophyte merely wanted to buy some paint for the den — she is not always interested in noticing nice distinctions between very near shades of turquoise, let alone between the words for these shades. (Even colorists speaking among themselves find using “this” and “that,” together with numbered paint chips, easier and more accurate than using names for the colors.)

Conversations between lawyers and laypersons are subject to the same difficulties, for the same reasons, as those between the colorist and the neophyte. In neither kind of conversation need anyone be speaking a technical language and in each, usually, the conversationalists strike some balance about how fine-tuned they will make their use of “plaintiff” or “turquoise,” and so on. The question here may be only how much or how little jargon or “trade talk” the conversationalists can endure. The potential jargon level of the average lawyer’s conversations qua lawyer, however, is not what makes talking to lawyers painful for ordinary desultory conversationalists.

The painfulness of talking with lawyers rests on something else. Even lawyers who considerably eschew legal terms in speaking with layper-

sons make those persons uneasy because (good) lawyers speak carefully, listen well, and ask questions. Careful speakers say what they mean and mean what they say. They are aware of their speech and of the speech of others. They know, for example, the difference between what a person knows and what she merely believes, and they recognize when a person implies knowledge in her speech and how to probe linguistically to determine whether she intends to claim knowledge or merely is being careless or colloquial in her speech in expressing belief. Careful speakers similarly hear the difference between "Only rollerskaters may use these lanes" and "Rollerskaters may use only these lanes," and they are apt to query the speaker to discover whether the speaker means what she says and says what she means — or, indeed what she means if she says, "Rollerskaters may only use these lanes."

The painfulness of talking to lawyers rests on their being careful speakers in this say-mean/mean-say sense and on their being apt and able to be careful speakers at all times in all conversations with all persons about all subjects. This is not something unique to lawyers. Any moderately educated speaker of ordinary English (or German or Swahili) can be a say-mean/mean-say careful speaker. Nor are only lawyers systematically trained to be such careful speakers or regularly and pervasively inclined to be such careful speakers. Philosophers, perhaps particularly those who work in the contemporary analytic tradition, similarly are systematically trained to be, and are inclined pervasively to be, careful say-mean/mean-say speakers. There are, of course, a great many more lawyers than there are philosophers in our society, and few philosophically trained people become lawyers. Perhaps this accounts for our particularly noticing lawyers' speech abilities and proclivities. If we are to make any headway in analyzing the "language of the law," however, we need to remember not to take a provincial view of the (good) lawyer's mastery of the tools readily at hand to any thoughtful and careful person through careful uses of an ordinary language. Some bricklayers are more careful speakers of English than are some lawyers, who consequently are poor lawyers.

Sometimes, bricklayers, lawyers, and the rest of us make technical uses of language. Our speaking technically in this sense makes us particular instances of careful speakers. A technical use of language is the issue central to, for example, *Frigalment Importing Co. v. B.N.S. International Sales Corp.*<sup>66</sup> An American firm had ordered chickens from a Swiss firm. Although the communications between the firms were in German, there was no dispute about whether the key word "*Hunner*" translated to "chicken." The only dispute was about whether in the context of these communications, "chicken" meant only young chickens suitable for broiling or frying or also included older chickens suitable only for stewing. Certainly, the ordinary English word "chicken" (like the ordinary German word "*Hunner*") has a generic meaning that includes all the meanings the two parties in *Frigalment* ascribed to the word. Among the ordinary

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<sup>66</sup> 190 F. Supp. 116 (S.D.N.Y. 1960).

English meanings of "chicken" are the broad generic meaning "a domestic fowl" and the narrower particular-instance meaning "a domestic fowl of less than one year old." Only the latter chickens are suitable for broiling or frying.

The problem in *Frigiliment* thus was whether, among these many ordinary language meanings, the trade usage was sufficiently standard to distinguish broilers and fryers from stewers, i.e., to distinguish young chickens from old chickens. If it was, then "chicken" was a term for which there was a technical *use* among persons in the poultry trade. But "chicken" would not itself be a technical *term*<sup>67</sup> even among members of the poultry trade. In the trade "chicken" would be an ordinary English word with an ordinary English meaning but with a technical *use*, i.e., with a settled convention for its use by poultry people in that they had a settled preference for one among many ordinary English meanings of the word. Two physicists may engage in an argument over unified field theory, on the other hand, using the technical language of physics as well as making technical uses of language. One of the interesting features of such a discussion among physicists, speaking as physicists, is that their interesting technical terms are theoretical terms, i.e., are from the general and special theories of relativity, the theory of gravitational fields, and so on as I shall explain later. Yet the *most* interesting feature of physicists' talk as physicists is that, as I also explain later, overwhelmingly, what they say is in ordinary English or ordinary French, etc.<sup>68</sup>

Sometimes, perhaps not very often, a word starts out life as a technical word, itself suggested through associations with ordinary words; but speakers get careless in using the word until it no longer is a technical word. That is, in speakers' failing to make technical distinctions in speaking, the word loses its usefulness as a technical word, thereby losing its status. This appears to have happened to "neurosis." Freud and others took to using "neurosis" because of its associations (in German, French, and English by way of Greek) with "nerve" and "nervous." They used it to describe a particular psychological condition. Trouble for the technicality of the word came, however, when ordinary language speakers went around calling every minor eccentricity or emotional problem a "neurosis" and referring to other people as "neurotic" without paying attention to distinctions theoretical and clinical psychiatrists and psychologists would make. Worse yet, psychiatrists and psychologists began using the word in contexts that did not fit the original context in which the pioneers in the field introduced the term. A few years ago, professional associations of psychiatry and psychology abandoned "neurosis" as being no longer

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<sup>67</sup> Whether "chicken" is a technical term in the poultry trade, or merely is an ordinary English word with a technical use in the poultry trade, turns on whether the term has one or more relational properties I describe in the next section. I am content here simply to say flatly that "chicken" has a technical use, but is not a technical term in the poultry trade, and make the case during the rest of the article.

<sup>68</sup> C. CATON, *supra* note 26, at vii-viii. The anchor for all my views is his point in the text to which this note attaches.

technically useful.<sup>69</sup> Today it is a word of ordinary English for which there are no technical uses, and it also no longer is a technical term.

Learning to make technical uses of words — whether the words are of an ordinary language or of a technical language — is crucial to learning to speak as do members of the trade, players of the game, professionals in the field, or masters of the discipline. And making technical uses of words needs to be distinguished from speaking carefully in some of the say-mean/mean-say senses. There is, for example, no “technical use” of “only,” but a speaker who says what she means and means what she says does not throw that word just anywhere into a sentence. Similarly, I do not say I will call a friend if I intend to write; and I do not say I will write a letter if I intend to write a note; nor do I ask to borrow a little sugar and then take a pound. Yet, if I do say and then do these things, we are entitled to say that, technically, I did not mean what I said or say what I meant. That is, sometimes “technical” and, especially, “technically” mean the same as “exact” or “exactly”; and the contextual standards for exactness sometimes vary with the circumstances. If I have no intention or ability to repay, I may ask to “borrow” a stamp from a friend, because our social and linguistic conventions allow this, but I better ask to “have” a stamp of a stranger.

When lawyers correct the speech of their nonlawyer friends by saying, “You mean ‘manslaughter,’ not ‘murder’ ” or correct the speech of law students by saying, “You mean ‘justifiable homicide,’ not ‘excusable homicide,’ ” the lawyers are not necessarily using technical terms or teaching others to use technical terms. They are, however, trying to teach word usages that go with distinctions in meaning, and sometimes the distinctions are technical in the sense that they involve niceties of use. To most of us, a dog is a dog; to a kennelwoman, a dog is an adult male of that species. Similarly, lawyers distinguish between “contracts supported by consideration” and “contracts supported by a consideration-substitute.” Making technical uses of these legal phrases, however, need be nothing more technical than the kennelwoman’s “dog.”

## II. THREE VIEWS OF TECHNICAL LANGUAGE

### A. Hart’s Thesis

In his Oxford Inaugural Lecture of 1953,<sup>70</sup> H.L.A. Hart argues that legal theorists have gone awry because they have neglected four distinctive characteristics of legal language and have been misled by the apparent similarity of “What is a corporation” to “What is a dog.”<sup>71</sup> They

<sup>69</sup> See, e.g., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 9 (1980) (DSM-III) (“At the present time . . . there is no consensus . . . as to how to define ‘neurosis.’”).

<sup>70</sup> Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954) [hereinafter Hart, *Definition*].

<sup>71</sup> *Id.* at 39-41.

therefore have failed to see that legal language is *sui generis*, is unique unto itself.

When someone asks, "What is a dog?" we can answer by pointing to a dog or by giving a verbal definition by noting its genus and its differentiating features.<sup>72</sup> But these modes of definition are inappropriate to the crucial words of legal language, Hart argues, because there are no ordinary factual counterparts to these words.<sup>73</sup> That is, questions about the meanings of legal words cannot be answered in the ways that we can answer questions about the meanings of ordinary English words because, although we can point to a dog, we cannot point to a right or a duty or a corporation; therefore, we cannot *define* the words "right," "duty," or "corporation."<sup>74</sup> Rather, he says we must "elucidate" the sentences "She has a right to be paid by him" or "He has a duty to pay her" or "Smith & Co., Ltd. has a contract with you."<sup>75</sup> These elucidations will show that "the use of these sentences silently assumes . . . the existence of a legal system . . . [but . . . do]es not *state* that it exists."<sup>76</sup> Legal language thus presupposes, but does not assert, the existence of a legal system, a system of rules of law; and this presupposition is one of "four distinctive features"<sup>77</sup> or "distinctive characteristics of legal language."<sup>78</sup> The second distinctive feature is related to the first and concerns the use of legal terms. Those uses presuppose the related rules of law that give the words contextual meaning, and the statements we make using those legal terms are conclusions of law we derive from applying the presupposed rules of law to the unstated but presupposed facts.<sup>79</sup> To explain to Jones the meaning of "Smith & Co., Ltd. owes \$10 to White," we have to introduce Jones to the English law of limited companies.<sup>80</sup>

Hart does not term these "elucidations" "contextual definitions," but the notion aptly captures his central thesis that the legal terms have meaning only in the context of the existence of a legal system and only through particular rules of law. Putting his thesis in terms of "contextual definitions" also allows us to fit Hart's work into the tradition of Jeremy Bentham, Bertrand Russell, and P.F. Strawson in such a way that we can see exactly what, and how much, is at stake in his treatment of legal language as being *sui generis*.

In 1905 Russell argued that we cannot define "the present King of France" in terms of some object of denotation because there is no present King of France, yet "The present King of France is bald" is not meaningless.<sup>81</sup> Russell secured meaning for "the present King of France" by

<sup>72</sup> *Id.* at 46.

<sup>73</sup> *Id.* at 38, 42, 45-47.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 47-49.

<sup>76</sup> *Id.* at 42 (emphasis in original).

<sup>77</sup> *Id.* at 42.

<sup>78</sup> *Id.* at 41, 45.

<sup>79</sup> *Id.* at 42-43.

<sup>80</sup> *Id.* at 50, 52-53. Hart imagines Jones is a "lawyer innocent of theories of corporate personality because he was educated in a legal Arcadia where rights and duties were ascribed only to individuals and all legal theory is banned." *Id.* at 50.

<sup>81</sup> Russell, *On Denoting* (1905), in B. RUSSELL, *LOGIC AND KNOWLEDGE* 39 (R.

laying down the meaning of "The present King of France is bald" as a whole, i.e., by specifying the conditions under which the proposition is true or false. Those conditions are that (1) there is at least one present King of France, (2) there is at most one present King of France, and (3) there is nothing that is presently King of France and not bald. Because (1) is false, the whole proposition is false and, having a truth value, is not meaningless. Russell also applied this mode of definition — or analysis — to "King" and "France" until these, too, disappear and what is left are words and phrases that denote things in the world or that are such logical particles as "and." The "things" turn out to be sense data, whose names are "this" and "that," although Russell is willing to allow "this table" to denote this table as long as we understand that the table is a fiction, i.e., a constructed entity.<sup>82</sup>

Hart rejects the fictional approach to the issue of what corresponds to "company" or "right," and he rejects the idea that "company" can be defined mediately through existing things.<sup>83</sup> He therefore gives an account of the meaning of "company" more closely aligned with Strawson's 1950 account of "The present King of France is bald." Strawson suggested that Russell had confused referring to an entity with asserting the existence of an entity. According to Strawson, a speaker who says, "The present King of France is bald" refers to the present King of France and presupposes there is such an entity; i.e., the speaker assumes, but does not assert or state, that there is a present King of France. Because this presupposition is false, the purported reference fails; the statement the speaker makes, therefore, is neither true nor false, although Strawson says the sentence the speaker uses to make this statement is meaningful.<sup>84</sup> The similarity between Hart's "elucidations" to Strawson's notion of presuppositions then is apparent in the way Hart sets out the elucidation of "a legal right."<sup>85</sup>

The Russell-Strawson enterprise is a *meaning* enterprise and one that struggles with epistemological and metaphysical questions. Hart's strug-

<sup>82</sup> See generally B. RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD (1960); B. RUSSELL, THE PROBLEMS OF PHILOSOPHY (1968).

<sup>83</sup> Hart, *Definition*, *supra* note 70, at 39, 45, 57-58. His primary target is Bentham, however, not Russell.

<sup>84</sup> See generally Strawson, *On Referring*, 59 MIND 320 (1950), reprinted in C. CATON, *supra* note 26, at 162.

<sup>85</sup> Hart, *Definition*, *supra* note 70, at 50, 52-53.

I would, therefore, tender the following as an elucidation of the expression "a legal right": (1) A statement of the form "X has a right" is true if the following conditions are satisfied:

- (a) There is in existence a legal system.
  - (b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.
  - (c) This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise.
- (2) A statement of the form "X has a right" is used to draw a conclusion of law in a particular case which falls under such rules.

gle is with the nature of the law, but it also is a *meaning* enterprise. Having identified two kinds of presuppositional relations for legal statements, he then sets out the other two distinguishing features of legal language. Hart's third distinguishing general characteristic of legal language is that sentences of legal language differ in meaning, import or effect (or all three) depending upon who utters them, where, and when.<sup>86</sup> For example, a judge's saying from the bench, "Smith has a right to be paid \$10 by White" has the effect of making White legally liable to Smith. But when a bus driver or a judge who is not on the bench utters the same sentence, there is no legal effect at all although the bus driver and the nonsitting judge are expressing conclusions of law.<sup>87</sup> Actually, Hart's view is even more complicated than this; for, said by a judge in a case, "Smith has a right" is not meaningless, although it is neither true nor false, because it is "official, authoritative and . . . final." What the judge says may be "wrong," but if so its wrongness does not lie in falsity and does not arise in the same sort of way that the wrongness of "This ball is red" arises when said of a blue ball. Moreover, whereas any of us may correct the person who says "This ball is red" of a blue ball, none of us may correct the judge who says wrongly "Smith has a right." There is no remedy when the umpire wrongly calls a player out.<sup>88</sup>

What accounts for part of the complexity of Hart's view here is a sub-rosa speech act analysis, and particularly a performative-verb analysis of the sort for which J.L. Austin is famous.<sup>89</sup> Hart's view also appears to be an early version of Paul Grice's extreme view that a difference in speech acts of the order of the difference between the umpire's saying "You're out!" and a Red Sox fan's saying "You're out!" is sufficient to yield a difference in meaning in the two cases.<sup>90</sup> This view in *Definitions* is intermediate between the view Hart developed in his 1948 essay<sup>91</sup> and in his 1968 book,<sup>92</sup> where he repudiated a totally ascriptional view of legal language, and I therefore will omit further reference to this aspect of Hart's view.

The fourth characteristic of legal language rests on a distinctive feature of a universal function of any rules, which function is to apply to more than one fact. Rules are general. Empirical rules are generalizations across different facts; for example, the rule of the effects of gravity on unsupported bodies is a generalization across the facts of falling leaves, falling feathers, and falling stones.<sup>93</sup> Hence, a rule conversely can apply

<sup>86</sup> *Id.* at 43-44.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See § II. B., *infra*.

<sup>90</sup> See generally Grice, *supra* note 15.

<sup>91</sup> Hart, *The Ascription of Responsibility and Rights*, reprinted in A. FLEW, LOGIC AND LANGUAGE 151 (First and Second Series) (A. Flew ed. 1965).

<sup>92</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

<sup>93</sup> The popular version of the generality of laws of science is that they are inductions from facts or data; in truth, they usually are deductions from theories which explain the data, although the data may "prompt" the theories. Experiments of the last two years may eventually show to everyone's satisfaction that there is a fifth force in nature that can affect the rate of fall of objects of different composition.



to different facts to yield the same conclusion, for example, that different objects, irrespective of their weights, each will take so many seconds to fall so many feet in a vacuum. Similarly, the same legal rule may make Smith liable in negligence for leaving roller skates on the path and Jones liable in negligence for leaving tennis balls on the sidewalk.<sup>94</sup> For rules of law, however, Hart claims that the variation among fact patterns is an essential element in the application of legal rules<sup>95</sup> because the same pattern of facts can be unified under different rules to yield the same or different legal conclusions.<sup>96</sup>

Hart begins by noting that any rule may “attach identical consequences to . . . very different facts.”<sup>97</sup> The same consequence flows in baseball after the batter has three strikes or fails to reach first base before the ball gets there, etc. (Hart’s example is in terms of cricket.) In each case the batter is out, and “no one of these different ways of being out is more essentially what the word means than the others, and . . . there need be nothing common to all these ways of being out than their falling under the same rule . . . .”<sup>98</sup> But one of “the essential elements of the language of legal corporations” shows that separate rules of law may apply to the facts to yield conclusions about separate individual rights and duties of “the lives of the men that overlap but do not coincide,” thus treating the men as “a collection of individuals . . . but their actions may fall under rules of a different kind . . . [so that] we may speak in appropriately unified ways . . . using a terminology . . . of corporate law which will show that it is *this* sort of rule we are applying to the facts.”<sup>99</sup>

This phenomenon of multiplicity-of-applicable-rules, he says, is apt to lead us to look for a way to give unity to the facts and thus lead us to look for a continuing, identifiable, definable thing to anchor the various facts.<sup>100</sup> For example, if Smith and Jones break White’s finger, we can subsume this fact under a rule of law that makes Smith and Jones individually liable to White — or jointly and individually liable. But we also could subsume the same action of breaking White’s finger under a different rule of law that makes Smith & Co., Ltd. liable to White. The possibility of these two different subsumptions — one to natural persons and one to a corporation — may lead us to look for a way of distinguishing them by saying that the facts differ and that in the latter case there is a “fact” that Smith & Co., Ltd. broke White’s finger, as if there were something to correspond to “Smith & Co., Ltd.” of the same sort, and in the same way as, Smith corresponds to “Smith.” We are prompted to this view, Hart contends, because of the similarity of “Smith & Co., Ltd. is liable to White” to “Smith is liable to White.”

Because there is nothing corresponding to “Smith & Co., Ltd.” and because “Smith & Co., Ltd.” has meaning only insofar as the law of

<sup>94</sup> Hart, *Definition*, *supra* note 70, at 44. The particular extrapolations and examples I give here are mine, not Hart’s.

<sup>95</sup> *Id.* at 45.

<sup>96</sup> *See id.* at 44-45.

<sup>97</sup> *Id.* at 44.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 45.

<sup>100</sup> *Id.* at 45.

English limited companies gives it meaning, Hart says, we must account for the similarity between "Smith is liable to White" and "Smith & Co., Ltd. is liable to White" by saying that different rules apply to the same facts, instead of saying the facts differ. To account for the similarity between the two liability judgments by saying the facts differ is to make the conceptual mistake of treating Smith & Co., Ltd. as if it would be a something-in-the-world even if there were no English law of limited companies.

The gist of Hart's view then is the following. Legal language is distinctive because it presupposes the existence of a legal system and presupposes particular rules of law, against the background of which legal language obtains its meaningfulness and particular meaning, and because of the distinctive feature of rules of law as rules. There are such things as dogs apart from law, apart from society, and apart from all language (including English). "A rose by any other name would smell as sweet." The word "dog" is part of ordinary English, and its meaning can be given verbally by naming the genus and differentiating features or by pointing to one and saying, "That is a dog." In contrast, because there is nothing to which we can point and say, "That is a company," there are no such things as companies apart from the law. The word "company" is a legal word (a law word) whose meaning is given only by and accessible only through the law. In using "company" we "speak the law" and know what we are saying only insofar as we know the law of companies.

There are a number of points on which to criticize what Hart says. Whether Hart seriously intends to say that only legal rules have the multiplicity-of-applicable-rules feature, i.e., that different rules can apply to the same facts, is not entirely clear. He says it is one of "four distinctive features" of legal language.<sup>101</sup> But, of course, this phenomenon is *not* distinctive. Two different laws of physics can apply to the same facts and each yield true conclusions. For example, the different rules of Newtonian mechanics and Einsteinian physics can apply to the same facts to yield, within certain limits, the same conclusions or to yield, within other limits, different conclusions (although certainly, at some point, the Newtonian rule will "break down.") We simply cannot explain the differences between Newtonian results and Einsteinian results by saying the facts differ in the two cases; what differ are the rules, not the facts.

This is not to deny, of course, that in some areas of physics we do distinguish by saying the facts differ — or, better, by saying the views of the facts differ, for we do not have theory-independent ways of assessing what "the facts" are. For example, under certain measurement-rules light exhibits particle behavior, but under other rules it exhibits wave behavior, yet we cannot say that light *is* made of particles (or is waves) independent of the particle-measuring rules, etc. And under some rules, light is "wavical," i.e., these rules are neutral as to what light "is" on the particle-wave continuum. Similarly, we have a Euclidean theory of space,

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<sup>101</sup> *Id.* at 42, 45.

which fits Newtonian physics, and a Riemannian theory of space, which fits the general theory of relativity; but we have considerable difficulty in “deciding” whether parallel lines converge in “real space.”

Thus, there is a level of Hart’s discussion of legal rules that is exactly correct. Different rules of law can apply to the same facts, and we err if we try to distinguish the rules by distinguishing the facts. But this feature of legal rules is not distinctive of legal rules. It is not unique to them. Nor is this the only one of the four distinctive features he identifies for legal language that fails to be distinctive in any fundamental sense. As to his point about the presupposition of legal statements, we could point out that any use of language, short of “The universe exists,” presupposes, but does not assert or state, that a universe exists. Similarly, any use of language presupposes there is a point to using language. Speech, after all, is other-regarding. Why stop, then, with the presupposition that a legal system exists? Why not add as a presupposition that the universe exists or that there are other persons in the world? Even supposing Hart could give sound reasons for limiting the most general presupposition of legal language to the presuppositions that a legal system exists, wherein lies the distinctiveness of legal language if biological language or baseball language, for example, presupposes a taxonomic system exists or that baseball exists? What is special about legal language, if the same kind of point can be made about moral language, or political language, or scientific language, or metaphysical language, or even, *mirabile dictu*, ordinary language?

What is important in Hart’s view, is that he is attempting to tell us how we can use the word “company” or the word “right” without there being any *thing* that corresponds to these terms. But this project itself puts him in deeper trouble. His answer is that the meanings of these words are given by the system of the rules of law, that this system carves out a category of “objects,” albeit not in any ordinary sense of “object,” for there is not now and never will be anything to which we can *point*. Rather, the rules of law about limited companies or the rules of law about rights not only give the meanings of these words, but also denominate — constitute — what counts as a company or a right. They lay down the criteria for something’s counting as a company by laying down, in a sense, the proper modes of speaking; in so laying down the criteria, they effectuate a categorization. Further, he says, when we use these legal words whose meanings are constituted under rules of law in connection with other words that do have corresponding objects (either directly or mediately), the other words shift in meaning and become legal words, too. Thus, the word “will” shifts its meaning when we use it of a company . . . .<sup>102</sup> We then do not mean the same things by these words when we say “Lee Iacocca wills himself to greatness” and “The Chrysler Corporation wills itself to greatness,” or when we say “Iacocca can pay a bill” and “The Chrysler Corporation can pay a bill.” On Hart’s view, therefore, all of legal language ultimately would be *sui generis* because even such

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<sup>102</sup> *Id.* at 59.

apparently ordinary English words as “can” take on a special legal meaning when we use them with words such as “company” that have meaning only in and through rules of law.

Indeed, he does qualify his view here, by saying that these words — e.g., “will” and “can” — retain their ordinary connections to the facts, but also then carry the legal connections: “[A]ny ordinary words or phrases when conjoined with the names of corporations take on a special legal use, for the words are correlated with the facts, *not solely by the rules of ordinary English* but also by the rules of *English law . . .*”; but he really cannot carry this qualification out fully as is evident in the full context of this quote.<sup>103</sup>

Hart need not have gone to these extremes with respect to the meanings of ordinary language words. What he needs is a method of anchoring statements involving certain fundamental legal terms to the world, by securing meanings for these terms without invention, because these terms are not meaningless yet, on his view, do not directly or mediately correspond to entities in the world. Having secured meanings for these fundamental legal terms, he need not have secured *legal* meanings for terms of ordinary language, which already have meanings. He need not have given “can” or “will” legal meaning,<sup>104</sup> any more than he would need to give “red” or “round,” “dollars” or “English pounds” legal meaning. Further, if he insists on making “will” or “can” into a legal word when used in connection with “company,” he cannot explain why he does not similarly need to give a legal meaning for “and” or “&” when used in “Smith & Co., Ltd.” Hart’s legal language ends up being completely a language unto itself, and that is a mistake. What stood in need of elucidation was not everything, but only that which played a central role in legal talk but for which there was not something to which we could point and say “That is a so-and-so.”

Charles Caton fares better than Hart in defining technical languages, among which he also numbers the language of the law. In particular, his views expressly reject the possibility that technical language users use “and” or “hardly” any differently than ordinary language users do.

<sup>103</sup> *Id.* at 58 (emphasis added).

It was once said that a corporation has no real will but a fictitious will imputed by law, and that since such a will so imputed could effect only lawful ends, we cannot, if we are logically consistent, say that it could commit a crime, or even perhaps a tort. Of course this use of the fiction theory does conjure up an allegorical picture . . . . But the picture is more misleading than even an allegory should be, because it conceals the fact that the word “will” shifts its meaning when we use it of a company: the sense in which a company has a will is not that it wants to do legal or illegal actions but that certain expressions used to describe voluntary actions of individuals may be used of it under conditions prescribed by legal rules. And from the bare fact that the law does prescribe such conditions for a wide range of expressions (which is all that imputing a will to a company can mean) it cannot be deduced that these conditions do not include the commission of a criminal or tortious act. *Analogy with a living person and shift of meaning are therefore of the essence of the mode of legal statement* which refers to corporate bodies. But these are just what they are. Analogy is not identity . . . and shift in meaning is not fiction . . . .

*Id.* at 58-59 (emphasis added).

<sup>104</sup> Hart, *Definition*, *supra* note 70, at 56-58 (“can”), 58-59 (“will”).

*B. Caton's view*

Almost twenty-five years ago, Charles Caton wrote a five-page sketch of technical language,<sup>105</sup> and no one appears to have done more or better in the intervening years. The point Caton emphasizes is that "technical language is always an adjunct of ordinary language," whether ordinary English, ordinary French, or ordinary Swahili.<sup>106</sup> Technical languages have the same syntax as ordinary language, and speech acts performable in ordinary discourse are performable in technical contexts; for example, "requests, assertions, questions, explanations of what one was referring to, etc."<sup>107</sup> Further, clarifications are made in the same ways in technical languages as they are in ordinary languages, and "the presuppositions, implications, suggestions, etc. of technical language seem to be of the same sorts and achieved by the same means as in ordinary language . . ." <sup>108</sup> The substantial part of these latter similarities is that words and phrases such as "the," "a," "is," "all," "two," "at least," "and," "or," "if . . . then," "hardly," "very," and so on, "occur in technical contexts in the same senses [as] in everyday contexts."<sup>109</sup>

There may be a very few speech acts, he says, that are performable in technical languages that are not ordinary speech acts, "perhaps, things like deposing, sentencing a prisoner, and saying 'J'adoube.'" <sup>110</sup> But a technical language may be "defined only by reference to some particular discipline or occupation or activity among the practitioners of which it is current . . . [and] consists largely, if not entirely, of vocabulary items . . ." <sup>111</sup> He then describes these vocabulary items and gives an example for each type, "i.e., words and phrases not part of the related ordinary language at all (e.g., 'meson') or not having in ordinary language the senses given them in the discipline in question (e.g., 'ring' in algebra)." <sup>112</sup>

We learn technical languages "against the background of ordinary language" because the technical languages are adjuncts to the ordinary language.<sup>113</sup> Some technical languages we learn as we grow up, and others we learn by study, because we come to know, develop interest in, and do things "that not everyone or even most people do . . . and thus [acquire]

<sup>105</sup> C. CATON, *supra* note 26, at v., vi-xi.

<sup>106</sup> *Id.* at viii.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* To say that the syntax of technical and ordinary languages is the same and that the inferences, suggestions, etc. of the former are of the same sorts and by the same means as the latter is not necessarily to deny that there may be some transformational differences. For example, "red roses" and "roses that are red" in English are transformational equivalents but "punitive damages" and "damages that are punitive" are not fully transformational equivalents in legal language in every context of use. Morrison, *Getting A Rule Right and Writing a Wrong Rule: The IRS Demands a Return on all Punitive Damages*, 17 CONN. L. REV. 39, 41-42 (1984).

<sup>109</sup> C. CATON, *supra* note 26, at vii (examples from original).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at vii. I will refer to this as "the practitioners' definition."

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

the technical language that accompanies knowing, learning about, and doing these things."<sup>114</sup> Allowing for differences in intelligence and interest, however, technical languages are "as available . . . as ordinary language."<sup>115</sup>

Caton's comments and examples make plain that he counts the languages of physics, mathematics, farming, chess, and the law as among technical languages; and three of the several examples he gives of technical terms are "meson" from physics, "ring" from algebra, and "J'adoube" of chess.<sup>116</sup>

As is true of dispositional definitions, defining technical languages by cross-reference to how members of a discipline, occupation, or activity talk with one another raises some questions. Certainly, if someone who speaks a technical language uses that language in speaking with someone who does not know the language, the conversation may never get off the ground. The other may not understand at all or may misunderstand and so on. But there are other problems. What shall we say, for example, about the phenomenon of a nonparticipant's correctly using a technical term, or a participant's using an expression from the technical language in a conversation with someone who does not know the technical language but who does *not* misunderstand?

For example, I am neither in the position to dub knights nor do I have any interest in or know how to play chess; but I can and do say "J'adoube" in speaking to a colleague as I adjust his or her hood just before the graduation procession. Moreover, as a matter of my own linguistic history, I am none too sure I knew "J'adoube" had royal or chess uses until well after I had taken to using it. Someone may have told me about the chess use, but the first time I remember hearing the expression was one day in Paris as a Frenchman removed a leaf from my hair as we stood on the corner while he gave me a miniature French lesson in "right," "left," and

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<sup>114</sup> *Id.* at ix. Caton clearly is right about this. For example, in these days of mass media, everyone has an opportunity to learn bits of biology and its language simply by reading the newspaper. An Associated Press wire service story in 1984 taught a biology lesson (that the snail darter is a member of the perch family), a linguistic lesson (that *Percina tanais* is "snail darter" "in English"), gave legal information (that the snail darter had been moved from the endangered species list to the threatened species list), recounted an item of history (that construction of a dam had been halted for two years because it threatened the existence of the tiny fish) and, in the headline, made a biological pun on a legal matter: "Snail darter taken off special perch." St. Paul Pioneer Press/Dispatch, Saturday, July 7, 1984, 10A col. 1. Consider also, then, the phenomena of Lewis Thomas and Stephen Jay Gould, who are prize winning, best selling writers. L. THOMAS, *THE LIVES OF A CELL* (1974); S.J. GOULD, *THE PANDA'S THUMB* (1980). Only adults with mental blinders today can keep from learning some of the facts and theories of the vast and exploding horizons of knowledge in the sciences and the arts. And only they can avoid having some familiarity with a variety of the languages of these areas of expertise. On the other hand, only those persons who have studied these areas of expertise have become fully conversant in the related languages. These are the sorts of points Caton has in mind.

<sup>116</sup> C. CATON, *supra* note 26, at viii.

<sup>116</sup> Caton may have intended "J'adoube" in its knight-dubbing ceremonial use, but the rest of his discussions suggest he had the chess use in mind.

“two blocks” so that I could find my way to a museum. I could not speak or read French at the time, and he did not speak English. Did I learn French, or did I learn a technical expression of the language of chess that he borrowed for the nonchess occasion? Now that I know there is a chess use, do I borrow the technical term, or am I speaking French as I adjust a colleague’s hood? If we both played chess, would that affect the nature of the expression when I use it as I adjust the hood?

Similarly, what shall we say of the following conversation between the politically conservative horseman-farmer father of a college student and the student’s friend. Father: “Jim tells me you two are learning about rings and fields and learning right ideals.” Jim’s friend: “Well, our rings and fields are hardly the kind you could keep a horse in, sir, and we’re learning about left ideals and two-sided ideals, too.” In Jim’s previous conversation with his father, he may have made puns on “ring,” “field,” and “ideal” by playing off the algebraic words; and the father now is doing that, too. Or Jim may have misdirected his father by playing off those algebraic words — he is supposed to be studying agriculture and staying away from those pinko-liberals in the math department, and now his friend has given the game away. Or possibly the father, having caught only the surface of Jim’s explanation of his abstract algebra course, is making puns by playing off the ordinary English words “field” and “ideal.” Is, then, his pun on “ring” a horseman’s pun or an English speaker’s pun? That is, which of the three — ordinary English, farmer/horseman’s language, or algebraist’s language — is his “ring” from and against which one does it play?

Consider some of the immense varieties of ways — noun, verb, etc., and idiom — any of us may use “ring”: We say that we wear wedding rings, kiss bishops’ rings, wear button earrings, remove napkin rings, count rings of trees, bemoan rings around our eyes, beware rings around the moon, open ring binders, make rings around others, sit in groups in rings, hear the ring at the door or the ringing telephone, hear a speech that does not ring true or that rings a bell or that rings with emotion; curtains ring up at theaters and down on life, we have ringing headaches and our ears ring, and we ring in the new year while shots ring out in the dark. After all this, is the farmer/horseman’s “ring” or the circus performer’s or dressage learner’s “ringmaster” a technical word of the language of farmers or horsemen or of circuses or dressage?

Of course, these uses of “ring” and “ringmaster” do not fit either of the two descriptions Caton gives of the “vocabulary items” that make up a technical language. These are words that have a use in ordinary language, unlike the physicists’s “meson”; and they are not words “not having in ordinary language the senses given them in the discipline in question.” But then neither does “J’adoube” fit Caton’s descriptions as far as I can see. The question then is, what wears the skirt in this description of technical languages — the definition that can be given “only by reference to some particular discipline or occupation or activity,” or the two descriptions of technical terms?

If the participants’ definition of technical languages is the controlling factor, then the horseman’s “ring” is a technical term. That goes too far.

It allows any term that practitioners of any art use with some regularity among themselves to be a technical term. What, then, makes the mathematician's "ring" a technical term must be inextricably tied up with not only the "participants" factor but also with its having one of the two characteristics Caton describes for technical terms. Caton suggests that what makes "ring" technical in algebra is that its ordinary use does not have the senses it has in mathematics. That *looks* right:

Definition: A *ring*  $(R, *, ")$  is a nonempty set  $R$ , together with two binary operations (compositions)  $*$  and  $"$ , such that  $R$  is a commutative group with respect to  $*$  and a semi-group with respect to  $"$ , and such that the right and left distributive laws of  $"$  over  $*$  hold . . . [where  $*$  is addition and  $"$  is multiplication].<sup>117</sup>

But, of course, it is not quite right. After all, mathematicians did not name these things "rings" for no reason, otherwise they might just as well have called them "shelves," "sofas," or "exxadexxes." Noticing this is the converse of noticing that the physicist's "meson" or "quark" is "not part of . . . ordinary" English. That is, even if we agree the mathematician's "ring" has a sense that is not part of the everyday sense of "ring" that does not mean the mathematician's "ring" is *as arbitrary* as the physicist's "quark."

There are two advantages of Caton's view over Hart's, however. First, Caton does not have to provide a technical-meaning explanation for each word physicists, farmers, and chess players use in speaking among themselves about, respectively, matters of physics, farming, or chess. This is because Caton's technical language is an adjunct of — parasitic on — ordinary language, and most of the words technical language users will use in everything they say is in ordinary English or ordinary French and so on, even when they speak the technical language of physics, farming, or chess. Hart's deepest trouble is that, under his view, technical terms affect the meaning of each other word used in connection with the technical word, and that is too large a project for his view to handle. Far from being parasitic on ordinary language, Hart's technical language is cut off from ordinary English at each turn. Whatever is intuitively correct about Hart's view with respect to how difficult technical language sentences are to comprehend for those who do not know the discipline, occupation, or activity and consequently do not know the associated language, he goes too far in spreading that comprehension-difficulty to each element of the whole sentence.

The second advantage of Caton's view over Hart's is that the former's definitions and descriptions allow us to say the languages of physics and of mathematics are technical languages, where that means again that

<sup>117</sup> W. BARNES, INTRODUCTION TO ABSTRACT ALGEBRA 77 (1963). For an  $a$ ,  $b$ , and  $c$  members of  $R$ , then

$$(b * c) " a = (b " a) * (c " a), \text{ and}$$

$$a " (b * c) = (a " b) * (a " c).$$

*Id.*



the users thereof mostly use ordinary language words but also use technical terms of one of the two types Caton describes. One of our basic intuitions about technical languages is that, however we characterize them, the languages of mathematics and of the physical sciences are technical languages. As to the languages of farming or the law or chess, we may have no intuitions; at least, we may have different views among ourselves about the technicality of these languages.

Under Hart's view, however, although the languages of the law and of chess or of baseball are technical languages, the languages of mathematics and of the physical sciences essentially are not. This is because of the way Hart's rose-is-a-rose-is-a-rose principle works in conjunction with the heart of his anti-reductionist, technical language view, namely constitutive meanings. What makes his "corporation" a technical word is that it has meaning only in and through the rules of law, which lay down the conditions under which a corporation exists and under which we correctly may use "corporation." The word "dog," on the other hand, is not such a constitutive noun; this word has meaning we can determine by pointing to a dog or by naming its genus and differentiating features. Moreover, irrespective of what we *say*, dogs exist and are what they are; but corporations and knights of chess exist only because and as we say they do. This is Hart's rose-principle. That very principle then prevents almost all of the interesting words of physics from being technical words. We can point to some of them, although we need special equipment sometimes to do so; more importantly, the other interesting words are for things that exist even if we do not, but are at least as hard to point to as corporations. For example, gravity exists and is what it is independent of us every bit as much as is true of a dog; and the same is true of the fundamental constituents of matter, which physicists call "quarks." Indeed, the only words of the languages of science that are technical in Hart's constitutive sense are the procedural words, i.e., the words for doing things in a physics or chemistry laboratory and so on.

This looks like a mistake. Whatever a technical language is, we are sure the languages of physics, chemistry, biology, etc., are such languages; and we are sure their technicality does not rest on words as marginally related to physics, etc., as procedural (i.e., doing) words are. If this is the price of explaining the technicality of the language of the law, it is too high a price because it is too deeply counter-intuitive.

In the next two sections I will be developing a third view of technical languages. That theory importantly is related to both Caton's view and Hart's view. My view rests on Caton's insight that technicality rests on a few words technical language users use while they concurrently are using words of ordinary language in the same ways any of us uses these ordinary language words. It also expands upon the definitions of these few, special words, the characterizations of which Caton began with his two descriptions of technical terms, i.e., the ones of which "meson" of physics and "ring" of algebra are examples.

I also draw on two of Hart's insights. We may give very adequate explanations of the technicality of procedural terms using his constitutive

approach; and that approach will strike most people as being intellectually more satisfying for the procedural terms of the language of the law than is Caton's, although I will construct an explanation under my version of Caton's view that some of us will find sufficiently decent. The second of Hart's insights is the one we obtain by looking at his constitutive approach at an angle or without our analytic glasses, so to speak. The word "quark," for example, is a word that gets its meaning only against and through particular theories of physics. Only with reference to those theories can we use the physicist's word, and this view vaguely echoes Hart's constitutive view of the meaning of "corporation."

Once I have set out these points in detail, I will turn to the nonprocedural terms of the language of the law and investigate whether it is a technical language in the sense I have developed.

### *C. Familiar Terms and Theoretical Terms*

What makes the physicist's language a technical language? The short answer is, she speaks a technical language of physics insofar as when she is speaking as a physicist, she uses words or terms that are not familiar to those of us who have an excellent grasp of English but do not know physics. As answers go, however, this one is not yet helpful, and I need to flesh it out.

Familiar words are part of the ordinary English language, and a word is familiar when speakers of English from all stations of life use the word in much the same ways specialists do. That is, when the specialist's meaning, even if it deviates slightly from our own, is available to us because we speak English already, then the word is familiar and is not a technical term. A physicist, for example, might say a table is not solid and might confuse us for a moment because we both know a 65 lb. rock is resting on top of it. But the physicist just means the table is made up of matter that is "scattered" — "That is," she says, "the thing has holes in it." We understand that use of "not solid"; we use the phrase the same way when describing slices of Swiss cheese. Of course, *we* also talk of tables as being solid and thus talk about the phenomenon of a table's being able to bear some object without collapsing or having the object fall through the table. This may lead us to doubt the physicist's "factual" claim, until we understand she is not talking about that phenomenon in using "solid" as she does. The physicist's "solid" is just as much a part of our English language as is our "solid," although there is a difference between her use and our everyday uses. That difference is a difference of deployment or emphasis. She emphasizes the existences of spaces that we ignore or do not notice and thus counts fewer things as being solid than do we. But she does this only while she is "speaking physics"; when she buys furniture, she ignores those very same spaces. And the word "solid" is not a technical word at all, even when a physicist uses it with an emphasis that differs from ours. Words with deployment or emphasis differences are like the technical-use words that are fixed to one-among-many meanings, such as the poultry tradist's "chicken." The physicist's

“not solid,” then, applied to a sturdy wooden table would be a technical use of the ordinary English word “solid.” The technical use is in English, however, just as the poultry tradist’s technical use of “chicken” is, although this happens to be true of “solid” for a different reason than for “chicken”: In English we use “solid” with different deployments; it is only superficially a one-placed predicate, and that is at bottom what accounts for our using “solid” of different things not all of which are solid in the same way. That is, our English “solid” always is comparative or always has deployment-differences built into or undergirding it. When an astro-physicist uses “solid fuel,” for example, there is no special emphasis-difference from our use of “solid table” and “solid block of Swiss cheese.” No wonder “solid” is not a technical term in physics. It is “in” physics, if at all, only to the extent that ordinary English words are part of the linguistic scene in physics, and its deployment-difference potentials already are built in from ordinary English.

Similarly, the word “cell” is English, is part of our ordinary language, and is a familiar word although the architect uses it to speak of part of a vaulted ceiling; the beekeeper, of a honey comb; the biologist, of a living organism; the botanist, of an anther; the chemist, of a battery; the entomologist, of an insect’s wing; the policeman, of a jail; the mathematician, of a table; the monk, of a monastery; the politician, of a party; etc. The architect and the mechanic use the chemist’s “cell” to talk about why the architect’s car did not start this morning; the prisoner, the lawyer, and the journalist use the policeman’s “cell” to talk about where the prisoner will spend the night; and we all use the biologist’s “cell” to talk about the basic structural unit of plant and animal life. Further, the monk’s use of “cell” may create an ambiguity. He may be speaking about a small room in his monastery, or he may be speaking of his monastery’s relation to his religious house, which is not a building. In either case, the ambiguity is in English not in some technical language. One who is not an ecclesiastic can create the same ambiguity in the course of writing a romance novel. In short, the word “cell” is not a technical term even when it occurs in a technical language such as the language of biology.

In this, the biologist’s “cell” significantly differs from the physicist’s “quark.” For, although the former’s “cell” means “basic structural unit of plant and animal life” and the latter’s “quark” means “fundamental constituent of matter,” “cell” already is part of English whereas “quark” is not, and may never become, part of English. One, but not the sole, reason for this difference is that we can see the biologist’s cells (sometimes even without the aid of a microscope), but we cannot see the physicist’s quarks. Another, more important reason for this difference is that all of the varieties of meanings or uses of “cell” are undergirded by our familiar concepts of bounded spaces, whereas the meaning or use of “quark” is undergirded by sophisticated concepts of contemporary theoretical physics, a point to which I shall return. “Cell” is ordinary English, but “quark” is a technical term and, moreover, is a theoretical term. With the exception of the occasional reference to one sentence in James Joyce’s *Finne-*

*gans Wake*,<sup>118</sup> speakers of English who use the word “quark”<sup>119</sup> today use a theoretical and technical term of physics.<sup>120</sup> Their sentences are meaningful because the words, in this order, are; and “quark” is meaningful because certain theories of physics give it meaning. The speakers may fully know the meaning of the sentences in which they and others use “quark”; if so, they know contemporary theoretical physics fully. On the other hand, the speakers may have some lesser grasp of physics and a consequently less full understanding of the meaning of “quark.” In any event, speakers either attempt to use the physicist’s meaning or else do not use the physicist’s word, even if they utter or write a sound or symbol that appears to be the same as the physicist’s “quark.” *Only* with reference to the theory of physics can we test the proper use of the technical predicate “. . . is a quark.”

Just because the individual words in a sentence are familiar, however, does not mean that there is not a technical language related in some way to that sentence. Thus, compare “This is a catenary curve” with “ $y = k \cos h(x/k)$ ” — the former is in ordinary English, but the latter is in the language of mathematics, which contains some English words such as “equals” although its symbol often is “=” and although it never occurs in the past tense, etc. The mathematician and the telephone linecrew both use “catenary” to describe the curve of the telephone line between two poles, and they utter English sentences in so doing, for example, “This catenary curve is too deep; we’d better raise the ends of the line or put the poles further apart.” If there are a canary and a cat around, they may make a joke, and so on. Yet when the mathematician writes “ $y = k \cos h(x/k)$ ” on the blackboard or utters it in teaching, she writes or utters a sentence of mathematics, not of English. You and I will understand what she writes or says when we learn some mathematics (and vice versa). We cannot survive here on even an excellent command of English.

Further, when next she writes, “ $x^2a^2 - y^2b^2 = 1$ ” on the board, she has stated another sentence of mathematics, namely of geometry. Suppose she then says, “This equation written on the board describes a hyperbola, which is a set of points in a plane whose distances to two fixed points in the plane have a constant difference. That is,” she says, “a hyperbola is a curve consisting of two distinct and similar branches, formed by the intersection of a plane with a right circular cone when the plane makes a greater angle with the base than does the generator of a cone.” Although each of her words, including “hyperbola,” is an ordinary English word —

<sup>118</sup> J. JOYCE, *FINNEGANS WAKE* 383 (1939) (“Three Quarks for Muster Mark!”).

<sup>119</sup> Compare the “non-English, non-German” “quark” of physics with the German word that sounds like “quark” and is the name of a food.

<sup>120</sup> Or perhaps the word is just a theoretical term. In any event, such things as answers to questions about the word do not count because then the word is being mentioned to talk about the word, not being used to talk about the fundamental constituent of matter. (For example: “The way to spell ‘quark’ . . .”; “The word he missed on the test was ‘quark’”; “What does ‘quark’ mean?”) Similarly, nonsense and misspeakings/mistypings do not count. (For example: “Bring me a quark of stars” or “Bring me a quark of milk.”)

i.e., is a familiar word — and although the grammatical form of what she says is that of English grammar, if this is English, most of us would prefer to “speak Mathematics,” i.e.,  $x^2a^2 - y^2b^2 = 1$ , especially if we recognize a hyperbola when we see one.

The language of mathematics is a technical language, and it supremely embodies one of the hallmarks of technical languages: One of the primary utility features of a technical language is that it enables those of us who speak it to say more in a more comprehensible, thorough, and exact way, using less time and fewer words than would using ordinary English or German or Swahili. The mathematician’s “ $x^2a^2 - y^2b^2 = 1$ ” is not *simply* shorter. It is more easily comprehensible, to those who know mathematics, than is the English equivalent. Conversely we have the ability to restate a mathematical sentence in English; but, although we can make such restatements, they are not worth the effort in the long run, except for teaching purposes and even then only in small doses, because the restatements are too dense for comprehension. We can make the restatements because we used English in learning the technical language. Think of our old high school geometry textbook. Except for the diagrams and the “proofs,” virtually every sentence in each paragraph was in ordinary, everyday, garden variety English. Think, too, of how many such sentences there were and how, now that you and I know plane geometry, we would not need for the textbook to contain anything more than the axioms and theorems. Why, then, did we once have to read all those English sentences and paragraphs? The answer is, they helped us pick up the notions of geometry and the language of geometry. They also are the sentences we would use to teach someone else that language; and for that purpose, for example, we might now ourselves use forty or so, patiently uttered, English sentences initially for the theorem about the hypotenuse.

Except for these teaching purposes, there is little point, however, in attempting to “analyze” the technical language of mathematics back into English because the restated sentences either will be too dense for easy comprehension (the definition of hyperbola) or the restatements will require an entire book for even the simplest set of technical language sentences to be comprehensible to the ordinary English speaker (the axioms and theorems of plane geometry), and the very complex sentences will take volumes (for example, topology). Of course, there are such books or volumes of books if we think, for example, of each book on topology as “including” the first grader’s arithmetic book, etc., the ninth grader’s algebra book, the tenth grader’s geometry book, and so on.

Further, just as the language of mathematics is a technical language, so too is the language of physics; indeed, there is a substantial sense in which mathematics *is* the language of physics.<sup>121</sup> Yet, here, there is an

<sup>121</sup> Similarly with respect to musical notation, the notation may be the — or a substantial part of a — language of music. People who can read the notation can read a symphony the way you and I can read a poem. Composers quote one another, and they write what other readers of the notation recognize as something like a question-and-answer sequence in the unresolved chord and its consequent passage (which may not be immediate). They call Mahler’s 6th symphony, for example, “tragic” because it ends in a minor key and an “unrelieved mood.” On

odd phenomenon; for a physicist can explain to us one of physics' most theoretical notions, that of a quark, in one book of modest length written in English.<sup>122</sup> After reading such a book we come closer to being able to understand the physicist who speaks of quarks (even if we skipped past the occasional mathematical sentence) than we (if we are not learned in mathematics) ever will come to understanding the mathematician's solution to the four-color problem, which is the problem of proving that four colors are adequate to the task of coloring a map without having distinguishable areas become indistinguishable because they are of the same color. If we are cartographers or painters in the style of Mondrian (but without his black division lines), we will be happy to know *that* we safely can use four colors rather than five, but we would have to be mathematicians to understand *why* this is true. The difference between the four-color problem and the quark, in part, is that the heart of the four-color problem is one of proof, hence of mathematics and of a sophisticated sort,<sup>123</sup> whereas the quark is part of a general theory of the universe and, in a way, there is more "room" for us to have a modest explanation of that theory couched in a language that vastly, overwhelmingly is ordinary English. For all that, "quark" is a technical term of the technical language of physics, and the substantial aspect of its technicality rests in its being given meaning in a theory.

Perhaps most terms central to theories are technical terms, but not all of them are. For example, "cell" is part of the theory (or theories) of biology, but it is not a technical term. We do not have to learn the biologist's theories to learn the meaning of "cell" even as the biologist uses it. Her theory is that a cell is the basic structure of plant and animal life, but she can teach us to use "cell" of the same thing she does by pointing them out to us under a microscope. Her pointing method of teaching works here because we already know about using "cell" of jails, of batteries, and of the Communist party.<sup>124</sup> We may make sense of saying "cell" is a theoretical term in biology; however, it is not a technical term.

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the other hand, although readers of music can "hear" what they read, good cooks can "taste" a recipe they read. And on this unresolved chord, let me just say that I have not come close to giving an adequate description of language or of technical language in this article. Some of the things an adequate description would have to take into account are what to say about bridge codes and musical notation and perhaps even about the pictorial messages of art. Here, too, there seems to be something very close to theoretical terms, and that may indicate there is a technical language of art.

<sup>122</sup> H. FRITZSCH, *QUARKS* (Eng. trans. 1983). Actually, he wrote in German.

<sup>123</sup> Indeed, the proof in this particular case has raised substantial metatheoretic questions because of its style — it essentially is a computer print-out of all possible variations and permutations. Thus, this proof is something like a truth table and does not comport with traditional notions of mathematical proof.

<sup>124</sup> Philosophers have queried whether we can teach the meanings of words by pointing: (To *what* do we point? The shape? color? texture? use?) These philosophers, however, are talking about a different level of instruction via pointing as being problematic; my biologist will round out her pointing by saying things such as "Do you see these walls or wall-like membranes?" and will be talking to someone who already speaks English.

Not only are not all of the central terms in the sciences not technical terms, although they need to be connected to theory in that science to be central terms, but also not all theoretical terms are in the sciences. Further, some words appear to present difficulties for “translation” into everyday English that are of a different order than the “mathematical restatements” problem and for an entirely different reason. Think, for example, of how we learn religious language. I say “I made this chair”; you say “God made this rainbow.” We learn your use after we learn mine, and the “standardness” of my use creates some puzzles about your use. For example, if we both understand God to be outside of time, yet agree this rainbow is in the here and now, and if you really mean to be speaking of this rainbow itself (rather than of its archetype, so to speak), then there is a puzzle about how something that is outside of time can act in time. We might develop a complex theory to explain or solve the puzzle. When we do we will create a language of theology.<sup>125</sup>

Similarly, if I say, “Pharaoh spoke to Moses,” you can ask, “In what language did Pharaoh speak?” and I can answer (falsely) “In English” or (truly) “In some form of ancient Egyptian.” But if you say “God spoke to Moses,” there is no clearly true answer to my question, “In what language did God speak?” Indeed, the question is “wrongheaded” and shows that I have not fully understood the effect that the word “God” has on the remainder of the words in “God spoke to Moses.” We could say you are using “spoke” metaphorically or anthropomorphically; but if we mean to be fully fair, we would say you are speaking the language of religion, i.e., are making a religious use of the ordinary English word “spoke.” That may appear to be equivalent in effect to saying that “translating” the “religious” sentence “God spoke to Moses” into English ultimately is impossible because the word “God” always carries religious-language ties, even for nonbelievers. That appears to be a mistake, however, as I shall explain below.

This sort of phenomenon is one that lies within ordinary English. When we begin a story by saying, “Once upon a time . . .” all of us know that we cannot treat what follows as having a truth value, but we also know there are canonical restrictions on what we may say. A child does not speak nonsense if she says, “Daddy, the little girl with the three bears was Goldilocks, not Cinderella; you’ve mixed up the stories.” Similarly, some things “fit” Hamlet and others do not: that he might have worn earrings fits, that he might have wanted to have become an Australian shepherd does not.

Do words in the language of the law work the way “God” and “once upon a time” do? Hart essentially says “corporation” does.<sup>126</sup> That is what he means when he says “will,” “can,” etc. suffer a “shift in meaning” when we use them in conjunction with “corporation.” Hence, when a caterer says, “The Chrysler Corporation ordered three vegetarian dinners for the

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<sup>125</sup> I will distinguish this from the language of religion.

<sup>126</sup> See § II. A., *supra*.

banquet, so reduce the steak dinners by three," all of a sudden each word after "corporation" has shifted in meaning. As I explained earlier, this is a mistake. Someone might think to avoid the mistake by saying that, just as "God" "blocks" certain questions about how God spoke, the word "corporation" at least "blocks" a sentence such as "The Chrysler Corporation had three vegetarian dinners last night" and explain that a corporation's being a person is a legal construct, a legal fiction; hence corporations do not eat, do not swallow, do not die, and so on.

I have news. Out in the hinterland, away from lawyers and law schools, corporations swallow each other up, sometimes eating them alive, only to find they have swallowed undigestible poison pills, which sometimes kill them off, and they are then dead and buried. This is the way we talk. Do not say, "Ah, that's metaphorical." It is not, although sometimes it may be idiomatic. If you and I are lucky, our quarrels will be dead and buried, and we may merge our lives into one by marrying.

Consider again, then, "God spoke to Moses." In what sense is this sentence not in English? In what sense is it part of a technical language? Of course it is English, ordinary English, as is the rest of the Bible (or the Koran or Mao's Little Red Book, and so on). There is no "translation failure" in getting "God spoke to Moses" "into" English; it is English. That of course does not mean its meaning should be crystal clear and without mystery; nor does it mean *theologians* do not speak technically among themselves when they are talking about religious matters. Nor does it mean we do not need to surround "God made this rainbow" with theories. Nor, most emphatically, does it mean we cannot fall into disagreement about the meaning of "God" or of "God made this rainbow."<sup>127</sup> When we do give theories we will construct theoretical terms that we will use with some precision. The language of religion itself, however, is ordinary English or ordinary Hebrew or ordinary Greek, and so on.

Armed with these insights and clarifications, I am now ready to describe technical languages in greater detail and to begin the analysis of the language of the law. The shortest gloss of my view is that the language of the law is like the language of religion and unlike the language of physics.

#### *D. Critical Recapitulation and a Third View*

Hart's constitutive approach, taken as a mode of defining technical languages, is too counter-intuitive because it is not sufficiently expansive. The languages of the law and of baseball turn out to be technical under that approach; but, under the principle of a rose-is-a-rose-is-a-rose, the languages of mathematics, physics, and the other sciences are not technical languages, except insofar as these latter languages involve procedural terms for doing the sciences. That does not fit the way we talk at

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<sup>127</sup> If our disagreements are sufficiently great and strongly held, we may fall into different religious practices.



all. That is, the languages we pre-analytically are most sure are technical languages are those of physics, chemistry, astronomy, and so on.

Hart's view does suggest, however, albeit obliquely, what makes scientific procedural terms technical, namely that they lay down what counts as, for example, and to speak very loosely, an experiment. Scientists use "experiment" in a much more confined way than ordinary language users do, and their rules for conducting experiments — requiring verifiability through independent confirmation and repetition, and so on — specify the meaning of "experiment" for science or for their particular sciences. Further, the laws of gravity, red shifts, etc. exist even if we do not (the rose-principle), but experiments do not exist unless we do exist and do lay down the procedures for conducting them. Scientists' procedural terms thus are constitutive terms in Hart's sense and, therefore, are technical terms in his sense.<sup>128</sup> Of course, scientists cannot lay down just any old rules for conducting experiments and still produce the scientific *truths* we know, whereas we may lay down whatever rules for baseball we like and have baseball or some other game.

On this range, law's procedural terms are in between those of science and of baseball. Scientist's procedural terms are dictated by something into having particular contours. That something may be the nature of our minds or the limits of our understanding, or it may be the nature of natural laws or of mathematico-scientific truth. We cannot come to, cannot find and know we have found, mathematical or scientific truth by talking among ourselves and laying down the laws. Rather, these truths are independent of us in some fundamental sense that even the Copenhagen school of quantum physics would recognize; and to ensure that we have arrived at them, we must conduct proofs or experiments that meet certain conditions. The procedural terms of any game, however, may be anything we like, e.g., how many referees or umpires, where they stand, who has what jurisdiction, etc. Which procedures we lay down affect "what game" we play, just as what other rules we lay down affects what the game is. Because there is no thing any game is independent of what we say the game is, however, nothing constrains us in laying down the terms unless we want to construct *the* baseball game, *the* chess game, and so on. Even here, we know we can change the rules and still have the game; we can move the pitcher's mound up and out, change the ball, change the third-base line, and so on.

For the procedural terms of the law there appear to be some constraints, given that substantive laws are what they are. Having created substantive law that recognizes a right to exclude others from real property to

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<sup>128</sup> I am explaining here how we may adapt Hart's technical language view so as to make some terms of the sciences be technical terms, namely by focusing on his constitutive-definition view. I ultimately am dissatisfied with his view, because it still is too under-and-over-inclusive, and I prefer to describe physicists' and psychologists' uses of "experiment" as technical uses of the ordinary English word "experiment." My preference here stems in part from the view of technical terms I develop later in this section, however; and I here am trying to make plain how and how far Hart's view can take us. I set out Hart's view in § II. A. and the notion of making technical uses of language in § I. C.

which someone holds title, for example, we need a mode of protecting that right and, therefore, need something like an ejectment action, which is nothing more than one procedure among many possible procedures for protecting the right. The right also is a qualified right, and we therefore also need ways to cut it off through, for example, statutes of limitations and so on. We did not have to have the substantive rules we do have; had we not created them, we would be a different sort of society and a different people. But that is a phenomenon like the one with games. There still would be a game if we created game rules and called it "baseball" even if it were not baseball as we now know it, and vice versa if we called it something else, etc. For the law, as long as we hold a particular theory of rights and recognize certain rights, we have to have modes of protecting those rights, i.e., procedures of a certain sort. Within the sort we still have choices, however, in a more ample sense than physicists have. We may not be able to choose to protect life and property rights by hue-and-cry methods today (because our views have changed), but we may choose between having certain rules of evidence and other rules of evidence and still stay within the parameters set by the rights we recognize in crime victims and the ones we recognize in crime defendants. This is even more clearly true in, for example, tort. We need not have a trial tort system. Rather, we could redress all tortious wrongs through government largess or insurance. The latter two procedures change some of our substantive views, but not much more than changing the third-base line changes baseball.

Hart's constitutive view thus allows us to be clear about how the procedural words of the law may be described as technical. We cannot get more for the law than that out of his view, however, and the languages of mathematics and the sciences are not technical, except for their procedural, i.e., doing, words. We need to look further for a theory for the language of the law.

Caton's mode of defining technical languages — by cross-reference to participants in a discipline, occupation, or activity and to words that do not have an ordinary language meaning (use) at all or have a different one than the ordinary ones — however, either has something missing or is too broad. His examples of technical languages include the languages of chess, as would Hart's, and, unlike Hart's, Caton's approach captures as technical the languages of mathematics and physics.<sup>129</sup> This list better fits our intuitions in including the latter as technical languages, and their terms initially appear to fit the two types of technical terms he identifies. But the terms of chess are not so obviously of either type.<sup>130</sup> Moreover, Caton includes the language of farming as a technical language; and, although our intuitions about whether the language of farming is a technical language give out at this point (as they always do in middle cases), we find we are in some trouble if we say the dressage "ring" or the farmer's "field" is a technical term in either of his two senses.<sup>131</sup> Too much becomes

<sup>129</sup> See § II. B., *supra*.

<sup>130</sup> See § II. B., *supra*.

<sup>131</sup> Only the second sense is even a possibility of course.

technical, and part of the problem here stems from his having defined technical languages by cross-reference to participants of a "discipline or occupation or activity."

We know what prompts him to use this cross-reference; we all have had the experience of hearing a conversation among enthusiasts of something about which we know little and having that conversation go around us or over our heads. Moreover, Caton's enterprise-point is to de-mystify technical languages by getting us to see that we ourselves know a lot of technical languages: ways of talking about activities, for example, that not everyone knows because they know little or nothing about those activities. He would not be concerned, then, that "too much" becomes technical *because* being technical merely is a part-relational property between words and certain people, not something about the words themselves. The other part-relational property is between the way these certain people use those words and the way the rest of us use those words.

Here he identifies two they-we configurations: First, they use a word that we do not use at all; for example, physicists use "quark," but we do not use "quark" *unless* we are "speaking physics." That is, "quark" has no ordinary English uses; it is, so to speak, an arbitrary word from the view of ordinary English and, as I have explained earlier,<sup>132</sup> is a theoretical word, i.e., is the word for a theoretical entity. (This, of course, does not mean such entities are not "real" entities. Rather, it means they are known through theory.) The same is true of "quasar;" the Motorola television people are not using an astrophysicist's word, although the TV people wish subliminally to make that connection. The second they-we configuration Caton identifies is the one in which they use a word that we also use, but the way they use it is not the way we use it in ordinary language. Their use, then, is cut off from ours. Here he gives the example of algebra's "ring."

Yet algebra's "ring" does not seem to be an example of a word "not having in ordinary language the senses given them in the discipline in question" because the substantial sense of algebra's "ring" is one our "ring" has in ordinary language. The ordinary "ring" perhaps does not have *all* the senses algebra's "ring" has (and vice versa);<sup>133</sup> but they share a fundamental sense although this may not be obvious. The algebraist's "ring" started out its life in mathematics in connection with solving problems of transformations of vector space by transforming the problems into linear equations instead of continuing with the Cartesian method of representing numbers geometrically and carrying out operations geometrically or instead of using matrix rectangular arrays of numbers, and so on. Once von Neumann introduced rings of operators, algebra became the tool for quantum physics and is continuous with geometry in a sense Descartes might recognize. In short and more clearly, mathematicians

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<sup>132</sup> See § II. C., *supra*.

<sup>133</sup> Caton's text is not clear as to whether this is his point or whether he means to say our sense and the mathematician's sense are wholly different although we each use words that *look* the same.

used and still use "ring" instead of "sofa" or "shelf" because the geometric curve for the set of integers is a 360 degree curve, which in plane geometry is like the age-rings of a tree if we allow for geometry's curve's not having any width. Hence, the mathematician's "ring" in substantial part is one of the senses of our "ring." This is something like the poultry tradist's "chicken" vis-a-vis our "chicken,"<sup>134</sup> although there is an important difference I shall explain in a moment.

Nor is this story of the mathematicians' "ring" unique; the relation of their "group" to our "group" is even plainer. They use "group" for the set of natural numbers taken together with an associative binary operation, such that the result of applying the operation to an element of the set with the unity element is the first element and to an element of the set and its inverse element of the set is the unity element.<sup>135</sup> Put this way, we might easily miss that they use "group" in a sense that is fundamental to the way we use it. To use "group" of something in English there must be an associative relation of *some* sort for the members of the group — group of people, group of people in the room, group of shouting people in the room, group of shouting people in the room having their picture taken, and so on.<sup>136</sup> This does *not* mean the mathematician's "group" is not a technical term; it most emphatically is. They use that word in sentences that Horatio would never dream of using and would not grasp without learning mathematics. But their use is connected at this level with the way we use it. (The same is true, of course, with their uses of "associative relation" and ours.) When they get to the "outer perimeters" of their uses of "group," their uses may well be cut off from ours in the sense that only by understanding mathematics could we trace back from these outer-

<sup>134</sup> See § I. C., *supra*.

<sup>135</sup> That is, a group is the set of natural numbers together with a binary operation (one that operates on two numbers at a time) that is associative (i.e., the equation reads with any pairings), such that the result of an operation on any element in the set with the unity element  $e$  in the set is the original element [as in  $6 \times 1 = 6$  or  $-6 \times 1 = -6$ ] and such that the result of operating any element in the set by its inverse element in the set is equal to the unity element  $e$  [as in  $6 \times 1/6 = 1$  or  $-6 \times 1/-6 = 1$ ]. That is, for natural numbers  $a, b, c, \dots$  and binary operation  $O$ , with unity element  $e$  and an inverse element  $a^{-1}$  for each element  $a$ , a group  $G$  is defined as follows:

$$G = \{a, b, c, \dots\} \text{ with } (a, b) O = a * b \text{ such that}$$

$$(1) a * (b * c) = (a * b) * c$$

$$(2) a * e = a$$

$$(3) a * a^{-1} = e$$

See, e.g., W. BARNES, *supra* note 117, at 17. Of course, this definition not only defines this group; here it specifies the operation in such a way as to specify multiplication as the meaning of " $*$ ". What this group  $G$  is, is a set of numbers that group together under multiplication in a certain (here, the usual) way. More importantly, any set of anything that functions *this* way under any operation is a group, and this is the reason abstract algebra is valuable to physics.

<sup>136</sup> I find using "group" easier than using "ring" and herewith switch to it. I will use it to draw some distinctions Caton did not draw and, more importantly, to rectify what I have suggested are defects in his view. He, of course, may be more nearly right than I; and those who prefer his definitions to mine may be able to construct a sense for "technical language of the law" more nearly to their liking than mine may be for them.

perimeter uses to the algebraic “group” I have just described and make a connection between our “group” and theirs. When their uses are that far out, are cut off, the term is technical in the sense of “not having in ordinary language the senses given them in the discipline in question” because the word will have picked up new, nonordinary meanings and attenuated further its ordinary-language connection on its outward journey.

In the meantime, however, we have three types of technical terms: (1) terms that never have had ordinary uses because they are not from ordinary language at all and instead are from theories (physics’ “quark”); (2) terms that once were connected to ordinary words at least marginally by using one among many of the meanings of the ordinary word but today function in theories that undergird the other uses (algebra’s “group” today in its most extreme uses); and (3) terms that have uses in the discipline that are fixed to one among the many uses of the ordinary word, i.e., that are fixed on one out of the many meanings of the ordinary language word (algebra’s “group” at its lowest level). Now the question is whether, for example, the poultry tradist’s “chicken” is such a technical word. It is fixed on one among many of the meanings of the ordinary word “chicken.” If this word is a technical word, then all of the language of the law is open to being technical.

Some theorists appear to be willing to allow that definition (3) of technical terms is sufficiently complete,<sup>137</sup> and I myself have taken that view once,<sup>138</sup> but I no longer am convinced it is not subject to an infelicity of the “too much becomes technical” sort, as well as other sorts of problems.<sup>139</sup> When I keep the mathematician’s abstract algebra uses of “group” in view and close my eyes for the moment to the ways in which that term can move from a category (3) technical term to a category (2) technical term, one of the things that strikes me about all three categories of technical terms is that they are associated with theories of mathematics, physics, chemistry, and so on. Not all the theoretical terms of these disciplines fall into one of these three categories, of course, because not all of their theoretical terms are technical;<sup>140</sup> but, apart from their procedural “doing” terms, their technical terms are theoretical, too. The poultry tradist’s use of “chicken,” on the other hand, is so ordinary, so intuitively nontechnical, that we should be reluctant to include it in a group with the mathematician’s “group” even of type (3). One way of separating “group” from “chicken” along principled lines, then, is to require that a category (3) technical term also be a theoretical term. Unless it functions as part of a theory, as algebra is a theory about numbers as well as of other things, or unless a theory undergirds the fixing on one-among-many meanings, the term is not category (3) technical.

<sup>137</sup> See, e.g., Schauer, *Precedent*, *supra* note 6, at 586 n.35.

<sup>138</sup> See Schauer, *Essay*, *supra* note 2, at 804 n.26 (citing Morrison, *Technical Language (and the Law)*, 10 *COLONIAL LAW* 18 (1980) (out of print)).

<sup>139</sup> See text following note 116, *supra*, discussing “J’adoube.”

<sup>140</sup> See discussion of the biologist’s “cell”: nontechnical but theoretical term in § II. C., *supra*.

Yet someone may say this will not separate "group" and "chicken" because the poultry tradist does have a "theory" undergirding the meaning-fixation, namely that young birds are better for broiling and frying than old birds, which are suitable only for stewing. The answer to that point is that this is too loose a use of "theory;" for there is only fact or explanation here, not theory at all in any sense in which we regularly use the word "theory." Theories do explain; moreover, they explain facts (or, rather, truths and laws), but they also embody laws or themselves are laws or make recourse to law. Of course, this reply appears to depend on making a fixed-meaning use of "theory;" for some people do say, "I have a theory about why she always comes late to class; she does not have a watch." That is an explanation of one fact through another fact by way of an unstated premise about a causal connection, and even that unstated premise does not leave the factual realm. But, this overlooks the distinction we mark in English by the difference between "theory" and "explanation." What we should say about this so-called "theory" that she is late because she has no watch is that the speaker ought to have said, "I have an explanation for her lateness."<sup>141</sup>

Similarly, the objection that the poultry tradist's "chicken" is undergirded by theory ineluctably overlooks that the very fact upon which the argument trades itself is bound up in the meaning of the poultry tradist's "chicken." Words have networks of meaning, and some aspects of these networks are facts.<sup>142</sup> Of the two sense of "chicken," generic and young-versus-old, the latter has "meaning facts" that are not *simply* temporal. That is, "(young) chicken" is not simply equivalent to "'chicken' (generic) plus 'less than a year old.'" Rather, we also use "chicken" for ordering a broiler or fryer from the butcher. One of the facts about young chickens is that these are the uses to which we regularly put them. To pretend that the meaning of "young chicken" or of "chicken" does not "network" into that regular-purpose fact is to ignore how we use "chicken." If mean-

<sup>141</sup> That is, a careful speaker would not have used "theory" at all. If that is correct, then my point that "theory" cannot occur only with facts stands, and I have not used a technical term in using "theory" as I do. In that event, I do not need the second, controversial argument in the text. I give both arguments because I have discovered, first, that some people believe an ordinary-language argument/philosophy is "stuck" with how *everyone* talks, including the dim-witted; second, that my uses of English sometimes deviate from those of my learned colleagues who, for example, believe they can promise me that they will publish an unsolicited-yet-to-be-written article in the Harvard Law Review (evidently by writing an article so brilliant that it overbears the independent judgment of the Review's editors); and third, that lawyers never are content with just one argument to establish a point unless it is writ in an official report they have read and can cross-check now. I make no apology for drawing the theory/explanation distinction — it is a distinction that is there in ordinary English to use when we need it as I do now. I return to this last point in §§ III. B. and III. C., *infra*.

<sup>142</sup> See generally Morrison, *From Logical Atoms to Language Networks: An Examination of Part Russell's Philosophy of Logical Atomism* (Ph.D. dissertation, University of Illinois, Urbana) (1981). I argued there, for example, that someone who does not know unicorns are mythical creatures does not understand how the rest of us use "unicorn," i.e. does not know our meaning of "unicorn." This, obviously, is a controversial view, for it ultimately *really* threatens the analytic-synthetic distinction.

ing is use, then we cannot ignore what I shall call here the network meaning-fact; and that in turn means the argument that the poultry tradist's use of "chicken" is undergirded by theory is mistaken. The mistake is in using "theory" for an explanation that never leaves the realm of facts; i.e., the mistake is in thinking the fact of broiler/fryer regular-purpose for a young chicken is news of anything *more* than the definition, the meaning of, "chicken" for poultry tradists and for ourselves when we want to buy a broiler or fryer.

Hence, the poultry tradist's "chicken" is not a technical term under category (3) because it is not a theoretical term. When the poultry tradist uses "chicken" for broilers and fryers, however, the poultry tradist does put the ordinary language word "chicken" to a technical use, in the "settled preference for one among many meanings" sense I explored earlier.<sup>143</sup> If the trades people maintain this use by insisting upon exactness among themselves, the word will continue to have a useful life as a word put to a technical use.<sup>144</sup> Its technicality, however, should not lead anyone into thinking that nonparticipants are or can be cut-off from the meaning of the word even in the poultry tradist's mouth. That cannot happen because, even when put to technical use, the word *as so used* is an ordinary language word.

This final point allows us to recast the one with which I began this section, namely the nature of procedural (i.e., "doing") terms. We do not have to be content with using Hart's constitutive approach as an explanation for the technicality of these words, yet we will be able to leave the words in the control of the participant-users of the words, i.e., the chemist for laboratory procedure words, the lawyer for law's procedure words. We may say that, just as the poultry tradist makes a technical use of "chicken," so too the lawyer makes a technical use of "collateral

<sup>143</sup> See § I. C., *supra*.

<sup>144</sup> As I noted earlier, see § I. C., *supra*, words can move off the technical-term list; they also may move off a technical-use list. They do when the word no longer is useful as a technical word because ordinary people have adopted the word as their own, taking all or some of its technical meaning as the primary meaning for everyday purposes. This has happened to "neurosis," and someone may wonder why it has not happened to, for example, "electron." There are at least four reasons. First, "electron" in the mouths of physicists is protected by a very solid theory, whereas the theory surrounding "neurosis" not only was not universally accepted but also was not itself solid. Part of the trouble with Freudian theory is that it has an answer for each question. That is, it is not open to falsification, but the hallmark of science is exactly that its truths are falsifiable, although that strikes oddly on the ear to hear. See generally K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966). Second, when we use words such as "electronic ignition" we are coming linguistically from "electricity" at a time when no one knew about the flow of electrons; hence, physicists can treat our uses of "electro[ ]" as not threatening their uses. Third, "electron" is the word for something we know exists. And, fourth, all of us know this much science today: that "electron" is a scientific term for a particular part of an atom. In sum, just because "everyone" is a "participant" in some sense for the use of a word does not mean democracy rules and ordinary people get to dictate the meaning of the term. Rather, we can use the physicist's "electron" but it belongs to the physicist, who controls it through well developed theories of physics. Or, we can use our own "electro[ ]," but then we are not "speaking physics."

estoppel" or "interpleader" or "quiet title," as well as of "abatement" or "trespass" or "nuisance."

Consider "trespass," "nuisance," and "abatement." Most of us learned those words when we were very young children when, for example, our parents taught us the Lord's Prayer ("And forgive those who trespass against us"), told us to stop pestering them with questions when they were trying to do something else ("Stop making a nuisance of yourself"), or shouted to us to cut out the noise ("Abate that racket!"). Lawyers have more refined or more exact uses of "trespass," "nuisance," and "abatement," but the core of their meaning is available to all speakers of ordinary English. They make a technical use of an ordinary English word by taking care in their deployment to pick up some, but not all, the ordinary meanings.

With words of procedure, lawyers have a more open hand because ordinary language users do not have occasion to use the procedural words of the law unless they come to court. When they then return to "civilian" life and use those words, they tend to be less exact than lawyers are and their expansions now work to put the lawyer's use in a technical light.

This will strike some people as highly counter-intuitive. For them I offer as two cases-in-point the words "appeal" and "guilty." How often have all of us heard nonlawyer friends speak of a tort defendant's having been found guilty? With "appeal" the looseness with which nonlawyers talk is even more apparent. They talk about appealing to the Supreme Court when there is no federal question, or to the state supreme court when the trial is not over, and so on. They use "appeal" without distinguishing, for example, between a writ of certiorari and an appeal-of-right. There is nothing improper about that; "appeal" is to "appeal" and "certiorari" as "chicken" is to "chicken" and "young chicken" or as "umpire" is to "umpire" and "referee."

Even if procedural terms of any discipline, occupation, or activity constitute a fourth category of technical terms, that does not leave the law with much on which to hang a technical-language hat. We can use Hart's constitutive view to justify saying the procedural terms of the language of the law are technical, but we cannot extend that view to more of legal language without admitting the view is inadequate because the central terms of the languages of the physical sciences and mathematics are not technical under that view. Alternatively, we can say the procedural terms of the law are ordinary language terms put to technical uses and mean by this nothing more mysterious than that there are niceties of use for "appeal" in talking about the law that lawyers need to and do mark in their careful speech. Others safely can use "appeal" in a more-or-less way until they need to participate closely with the law. Then they, too, will need to be more exact, i.e., will need better to mark those nice distinctions and to put "appeal" to technical use, which they can learn to do without having to learn anything about, for example, justiciability.

This also is true of many "substantive" terms, such as "trespass," "nuisance," or "abatement." One of the crucial terms of contract law, on the other hand, does not have even the technical-use technicality in the language of the law. For "promise" is an ordinary English word bench and



bar use *exactly* as do ordinary-English speakers. This may strike some lawyers as news, and they consequently may doubt my claim. I, therefore, sketch why “promise” is a “fully ordinary word used fully ordinarily” in the law in the next part of this article. I will also examine the nature of law’s use of “speech” in first amendment cases. This word appears to be not only put to a technical use in either the different-deployment sense or the fixed-on-one-among-many-meanings sense, but also to be a term that is part of a theory. I attempt to explain, however, that this appearance is deceptive in that even those uses of words that do not qualify as “speech” under the first amendment also are not speech in ordinary English. Upon completing these further analyses I give of “promise” and “speech,” I will rest my case on the nature of legal language. I then will conclude this article with some general comments about how lawyers may talk to other lawyers.

### III. THE LANGUAGE OF THE LAW

#### *A. Due Process Revisited*

Under the views of Hart and Caton, the language of the law is a technical language. Without regard to any of the problems I have uncovered for their views — and I have found a number of significant ones — this gives reason to believe the language of the law is technical in a sense more interesting than that the procedural terms are technical. In particular, under each view, the technicality they identify is of the “experts only” sort I railed against at the beginning of this article. Hart and Caton get to this “experts only” point by significantly different routes, but they fundamentally agree that to understand how lawyers talk to each other, including how judges talk to lawyers and vice versa, the rest of us have to go to law school in some sense or other. That is, we have to learn the law, just as we have to learn (some) chess or (some) physics if we are to “speak (some) chess” or “speak (some) physics.”<sup>145</sup>

In the last section I conceded that the procedural terms of the language of the law may be technical terms in Hart’s constitutive sense or in Caton’s participants’ sense. I opted, however, in favor of saying these terms are

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<sup>145</sup> I may have taken some liberties with Caton’s view; his five pages is not sufficient for me to tell whether my analytic extrapolations of his views fail to do him justice. The problem, again, fundamentally, is the problem of knowing whether the two kinds of technical terms he describes form the boundary on the participants’ definition and, if so, what we are to say about some of the examples he gives of technical languages that do not fit within that boundary. In any event, the “go to law school” sense for him clearly need not be strong. Rather, he would say each of us absorbs this much law as part of being on the scene while we grow up and as we participate in society as adults. In the long run, he and I do not disagree about that ultimate point, but our explanations of the phenomenon differ. That is, he appears to believe we cannot but help learning this much of the technical language of the law, while I am arguing we cannot help but understand the law because it is in ordinary English and cannot help but learn the law because we read widely and because the law stems from ourselves, including the ways we talk.

ordinary language terms put to technical use either in the form of different deployment or in the form of one-among-many meanings. Under my view, "appeal" or "interpleader" is no more a technical term than is the poultry tradists' "chicken." I further argued the same is true of such more substantive terms as "trespass," "nuisance," and "abatement;" and the meanings with which the law uses these terms consequently are vastly more available to any ordinary speaker of ordinary English than are terms such as physics' "quark" or algebra's "ring" because the legal terms entirely are in ordinary English.

But, of course, saying this much does not test all of legal language. If I looked further I might find "real" technical legal terms. Moreover, my argument depends upon saying that a term is not a technical term if it is only a technical-use term in the different-deployment or one-among-many senses; and *ipse dixit* never is a substitute for analytic truth.

Why not say that technical-use terms are technical terms? My answer for the language of the law is that due process constrains us because technical terms can become cut off from ordinary language, hence from ordinary speakers of ordinary language, but due process requires that the law be available to each of us without the intercessional aid of someone who is trained in the law.

This due process consideration is of no concern for poultry tradists because they have their own natural constraint against having their technical-use terms become cut off from ordinary language and ordinary folk. There are so many overlapping participants' groups — from supplier to farmer to retailer to customer — that needs of commerce themselves constrain against towers of Babel. The same commercial constraints exist in commercial law. The courts and the lawyers are not the only participants' groupings. If anything, the shoe is on the other foot here. Business men and women and corporations and their consumer customers outnumber and "out vote" lawyers of bench and bar concerning the discourse. The commercial groups further are in competition, hence their groups subdivide; and they sometimes are in one subgroup (buyers), sometimes in the other (sellers). This atmosphere prevents any one subgroup from capturing the word and removing it from its one-among-many connections to the ordinary language word or from making the "different deployment" into a different word. Further, because the practitioners' groups in business must deal with consumer-customers or deal with groups that do so deal, and because each business man and woman and each corporate employee ultimately also is a consumer customer, the consumer customers are the engine that drives the machine of language. They are the ordinary language users, who may individually know some of these technical uses and who may concertedly adopt a technical use as their standard use, and so on; but they also are the group with whom the other participants' groups must remain in linguistic contact on pain of losing the customers.<sup>146</sup> These groups, and primarily the consuming public, dictate the

<sup>146</sup> This, of course, raises flip-side problems for business in the area of intellectual property. The business must take care to make sure that its trade name or trade mark does not become the generic term for the thing — e.g., "Kleenex" for facial tissues, "Coke" for colas; and some companies have lost this battle by failing to provide ordinary English alternatives for their trade name or mark, e.g., "aspirin."

terms of the law for lawyers. Indeed, they do more. They dictate the law itself.<sup>147</sup> The immediate consequence is that, for example, "promise" is not a technical term of the law. Rather, it is an ordinary language term the meaning of which is determined by extra-law forces in society, particularly in commercial society. The same is true of "reasonable" in tort. Here there are insurance companies on both sides; and there is the consuming public, which individually may end up on either side of a tort dispute. As the public's notions of what is reasonable change, the legal meaning of "reasonable" changes.

Not all of the law operates under these constraining conditions, however; and in some areas, there is danger that one participants' group will move the technical-use word, which had been connected to the ordinary word by the different-deployment relation or the one-among-many-meanings relation, to something that is more remote, the way the mathematician's "ring" is more remote, or to something that completely is cut off, as (but not the way) the physicist's "quark" is cut off from ordinary English. There is no danger when mathematicians and physicists use those kinds of technical terms for at least two reasons; seeing why will give us insight to remaining areas of legal language.

First, and most basically, the way mathematicians and physicists talk among themselves has no bearing on the lives of the public except insofar as we bear the financial and moral costs of their work and thus need to know what they are doing. Yet that is not much of a constraint. They may talk scientific Yiddish in the back of their laboratories as long as they talk English out front when they come to us with funding requests. This would be like saying lawyers may talk Law French or LawSpeak in court as long as they speak English in their offices to clients. But there is an obvious difference, which destroys the analogy of the language of the law to those of physics and mathematics. In court, the very same sort of people sit in the jury box as sit on the client's side of the office desk. And there is more. The whole point of "lawyers' law" is to lay down standards that apprise the persons subject to those standards of what the standards are. This particularly is true in criminal law for obvious practical reasons even if we had no due process clause. But, due process does require the law to stay in linguistic contact with ordinary language speakers. Further, the people are the source of the law; that is not true of physics or mathematics. The law better not be in Law French or LawSpeak then.

Second, mathematicians' and physicists' technical terms are parts of theories, well-articulated theories, and the most general and most central of the technical terms may be "unpacked and repackaged" for the general (and often inexact) consumption of nonmathematicians and nonphysicists. Using the technical terms allows mathematicians and physicists to speak in more precise, more comprehensible (for them) ways using fewer

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<sup>147</sup> There is a fundamental sense in which Judge (formerly professor) Posner has the role of courts backwards when he says that their role in contracts cases, for example, is to normalize terms. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

words and taking less time. Most importantly, they also have independent constraints on their theories through the requirements of proof and experiment, of coherence and completeness. That their technical words are cut off from ours, then, presents no issue of moment to society.

May the law similarly develop technical terms that are cut off from ordinary language, by being very remote or by being completely arbitrary or may it have technical terms that only obliquely connect to our uses, as long as the law surrounds the term with theory? And does the law do this? The answer is, the law may not and does not, although there are terms in the law that are surrounded by theory. Being a theoretical term in the law is not like being one of Hart's constitutive terms, however; rather, the theory for the term comes from ordinary language itself and *sometimes* from a prescriptive view of society, the general contours of which we ourselves have laid down. This is the topic of the next sections.

### *B. Ordinary Language as a Source of Theory: "Promise"*

There are distinctions within ordinary language that govern the proper use of the word "promise." These distinctions also are the ones lawyers and the law mark with "promise" — all legal promises are ordinary promises. Yet "promise" functions in some unusual ways in ordinary English compared to the noun "table" or to the verb "walk," and there is a mode of describing these unusual features of "promise" that will give us a notion of how ordinary English itself embodies distinctions that appear to be theory-laden distinctions when these same points arise in connection with the law's use of "speech" in first amendment cases. When the Supreme Court and commentators try to explain, for example, why burning a draft card to protest the war in Viet Nam is not speech but wearing an armband is, they find themselves making recourse to a notion about "symbolic speech."<sup>148</sup> That smacks immediately of theory-construction; and this impression deepens when we notice that the law draws distinctions between obscene speech and merely-dirty speech by saying the former is not speech at all, and so on. My aim in this section and the next one is to make plain that the theory at stake in the so-called "symbolic speech" cases is not the Court's theory but that of ordinary English itself. The Court, however, sometimes finds itself on the cutting-edge of societal problems and thus at a point that is slightly ahead of ordinary English and ordinary people. The Court cannot wait for our language to catch up and solve the problem; it must decide the case. In resolving the issue before it, the Court then points the way for future development of ordinary English; and, if the Court is successful, the way the Court uses "speech" never is cut-off from ordinary English because ordinary members of our society internalize the Court's cutting-edge use. Further, the Court's resolution turns on the Court's role as prescriptive interpreter of the first amendment, and the role we have set for the Court then is to tell us where we are going as it interprets "speech" under first-amendment guarantees.

But this is the end of the story, and I need to begin at the beginning. That is the point at which a court plays a descriptive-institutional role and where ordinary English and the ordinary practices our linguistic distinctions mark reign by being fully adequate to the questions before a court by already embodying the distinctions for resolving the dispute.<sup>149</sup>

More than a generation ago, J.L. Austin described the ways in which "promise" in some of its uses differs from all of our uses of "walk."<sup>150</sup> When we use the verb "promise" in the nonhabitual, noncontinuous, first-person singular, present tense, to say "I promise that p" or "I hereby promise that p"<sup>151</sup> is to promise that p, where p is a proposition or nominalized sentence although there are constraints on the propositional content of p, as we shall see. To say "I walk to the store" is not thereby to walk, but to describe truly or falsely; "I did promise" is not to promise, but to report; and "I see that you are happy" is not to see, and so on. To say "I promise to pay" is to promise to pay. Nor is "promise" the only verb with this feature in this use. Other such verbs include "bet," "swear," "name," "demand," "order," "declare" (as to customs officials). Austin calls the verbs that have this feature "performative verbs" and their featured uses "performative verb speech acts." He also identifies two kinds of conditions that surround these verbs; if the conditions are not met, the speech act is "unhappy" or it "misfires." The reason for using "is unhappy" or "misfires" is that performative verb speech acts are neither true nor false. This is an important feature of their nature as a distinct class of uses of language.

For example, a sergeant usually has authority to order troops to fire during battle. She does this by saying "Fire!" or "I order you to fire." Consider the situations in which she says "I order you to fire!" to a civilian or to troops who have no firearms. We say there is no order in the former situation, even if she believed the civilian to be a trooper; her speech act "misfires." There is an order to the troopers, as long as she does not know the troopers have no firearms, but the order is "unhappy," i.e., we would say it is an ineffective order, which differs from being ineffective *as* an order. All of these distinctions flow straight out of the way we would talk about the situations and are undergirded by our shared understandings. Societal issues loom large on certain situations, of course, and may exceed our shared understandings. If the sergeant orders troops to fire upon women and babies, for example, we may fall into disagreement among ourselves as to whether there is an order.<sup>152</sup>

We mark similar sorts of distinctions with regard to "I promise." More-

<sup>149</sup> I am talking of a particular kind of problem here, not all legal issues.

<sup>150</sup> J. AUSTIN, *supra* note 24. See also Austin, *Other Minds*, PROC. ARISTOTELIAN SOC., Supp. Vol. (1964), reprinted in J. AUSTIN, *PHILOSOPHICAL PAPERS* (1961).

<sup>151</sup> The word "hereby" functions as a double-check for a performative use of a verb.

<sup>152</sup> This was especially pressing in Vietnam. The sticking point is over whether and when reasonable troops may view people who are not clad in conventional mufti as likely to be carrying concealed explosives. That we do not have a settled description on the misfire-unhappy spectrum for this sort of case is the result of and a sign of our not having settled yet the political and moral issues.

over, those distinctions control our uses of "She promised" and related words in ways that exactly comport with how lawyers talk about promises, and the following is a partial ordinary-language map of contract law: We do not say there was a promise unless we can drive a temporal wedge between apparently promising words and keeping the promise; lawyers say this by saying there is no promise in a present barter-and-exchange.<sup>153</sup> In order to speak of express or implied promises such as express or implied warranties, lawyers and the rest of us adhere to this temporal-wedge rule by expanding the time-frame.<sup>154</sup> Similarly, ordinary English users mark the distinction between failing to keep a promise out of negligence or deliberate choice, on the one hand, and failing to keep it for unavoidable reasons, on the other hand, by saying an apology is due for the former but only an explanation is due for the latter. We also say explanations are due if there is a misunderstanding and, if the misunderstanding is legitimate, the explanation functions to excuse failing to keep the promise; if not, we say there is an apology due. We describe someone who promises without intending to keep her word as having given an insincere promise but, because there is a promise, we can demand an apology when she fails to keep the promise.

Further there are uses of "I promise" that we, as speakers of ordinary English, say are not promises at all. One is the use of apparently promising words in circumstances when there cannot be a promise because the speaker cannot be giving her word. For example, to say "I promise to buy you a new collar" to a dog or "I promise to pay Sally" to the air is not to promise because the speaker cannot intend her words to be taken by another to be the giving of an assurance that she will do as she says. These may be resolutions, but they are not promises. The same is true when one says "I promise" to oneself. We also all know that when someone accepts a dinner invitation by saying, "I promise to come," there is no promise. We do not surround social situations with the seriousness necessary for us to say there is a giving of an assurance here, hence we do not take the words to be promising words even if she uses "promise." (Repeatedly saying "I'll be there" in response to requests for assurance, however, is promising in ordinary English, even if she never uses the word "promise.")

There are many other similar ways in which we assess words among ourselves without the help of lawyers as being or as not being promising words. If I say, "I promise to steal from you" we all say this is no promise because I cannot promise to do something we both know is bad for you; we say the same if I say, "I promise *not* to steal from you" because we expect no less. Further, we say someone misuses "promise" in saying she promises to do something she and we know she cannot do or cannot bring

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<sup>153</sup> See, e.g., A. CORBIN, CORBIN ON CONTRACTS § 4 (1952).

<sup>154</sup> This may (often does) come as news that smacks of legal truth or legal rule to law students; but they simply somehow have been left out of the shared conventional understandings of the rest of us about how to talk, perhaps because of their inexperienced youth or because they are reading the wrong things in high school and college.

about on her own; all she can promise here is to try her best. We also do not treat promising words on the stage as part of a play as a promise, and so on.

Another use of "I promise" in which ordinary-English speakers would say there is no promise arises when the "promised" act is so venal that society expands its understanding that I cannot promise you I will do something we both know is harmful to you to include a regard for third parties. Hence, we refuse to describe "I promise to murder Smith" as a promise. Courts may express this point by saying there is an unenforceable promise because the subject matter of the promise is an illegal act, but courts would be better off talking like the rest of us do and saying there is no promise at all. There are after all some promises that are unenforceable about which no one has the slightest hesitation in saying there is a promise — for example, where I promised but unforeseen circumstances prevent me from keeping the promise, or in the law when a statute of limitations has run (the ordinary language equivalent here is "You're too late; too much time has passed and I reasonably thought you were not going to ask me to keep that promise"). These situations differ substantially from "I promise to murder Smith."

I now come to the situation that appears to refute my claim that all legal promises are ordinary language promises. There are cases in which the law recognizes promises-by-behavior. Upon explaining how even these cases fit our ordinary language uses of "promise," I will have completed dressing the stage to turn to "speech" in the first amendment.

The hard case is exemplified in *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*<sup>155</sup> In 1955 Ford contracted with Allied to purchase some machinery for Ford's employees to install at one of Ford's plants. In 1956 Ford submitted another contract proposal to Allied to purchase more of such machinery, but with the change that Allied's employees would install this machinery. Under the first contract, Allied did not indemnify Ford for acts of negligence by Ford's employees; but under the second proposed contract, a broad indemnity clause would have made Allied indemnify Ford for acts of negligence by Allied's employees and by Ford's employees arising in connection with Allied's installation of the machinery. At least two months before Allied signed this second contract, Allied began the installation called for in the second contract. During that installation, and before the signing of that contract, some of Ford's employees negligently injured one of Allied's employees. The Allied employee sued Ford and won.

Ford, in the course of this suit, sought to bring Allied in as a third-party defendant, on the grounds of the broad indemnity clause of the second contract. Allied resisted, arguing that there had been no such contract at the time of the injury to the Allied employee, and that in any event both Ford and Allied had intended to void the broad indemnity clause before Allied signed the contract, thus leaving only the indemnity clause of the first contract to indemnify acts of negligence by Allied's employees.

<sup>155</sup> 277 F.2d 907 (6th Cir. 1960).

The court found for Ford on the grounds that Allied's beginning the performance called for under the second contract operated as an acceptance of Ford's offer to contract and operated as a promise to complete the performance on those terms. That is, the court found that Allied's beginning of performance was a ratification of the second contract every bit as effective as Allied's signature would have been, and that therefore, Allied was bound to all the terms of the second contract, including the broad indemnity clause. To the argument that Ford was not similarly bound, absent Allied's signature, the court said that Ford indeed also was bound through its acquiescence in Allied's beginning of performance. Thus, Ford would have been estopped from claiming there had been no contract absent Allied's signature because Ford has acquiesced in Allied's performance. What happens, then, is that behavior — actually performing on Allied's side, acquiescing in that performance on Ford's side — results in a contract and promises to complete performance on either side (finish the installation, pay for the work, respectively).

Now, it appears highly counter-intuitive to say that there is any behavior, however finely tuned, that could amount to a promise to indemnify someone's employees for accidents on the job. If anything ever appeared to need language of the promising sort, this does. Moreover, how could any behavior be so unambiguous as to be a promise to indemnify for negligence of employees of both companies, but not be behavior that promises to indemnify for only one company's employees? It cannot. No nonverbal behavior can speak as clearly as words, except when the behavior arises against a certain kind of background. That background is one of shared conventions. The conventions can be widespread throughout the country, or in the community, or between Ford and Allied.

What happens in *Allied* is that the behavior occurs against the background of an unsigned contract in which a promise is specified. Were Allied to do exactly what it did without this background, the court could never have found the particular indemnity promise. There might have been some way of making Allied indemnify Ford in that event, but this could not have been on the basis of Allied's behavior as amounting to this particular promise of indemnity. There would have been no such promise. As it is, the contractual background makes Allied a promisor by behavior. Because of this background, Allied's behavior is "promising speech." (This last gloss wants explaining of course.)

Still, the question is not so much whether we can make sense of the court's reasoning in deciding that there was a promise in Allied's behavior, but whether there are any ordinary life examples in which behavior is of this promising sort. The truly clear cases, however, are also cases that have been in court, such as Allied's promise. The reason for that is that only in such cases is there a possibility of finding an agreed conventional procedure that turns behavior into such finely tuned promises. Or, at least, these are the only ones of which we are likely publicly to hear. But family members and close friends often over the years manage to work out such procedures among themselves; hence, such cases as *Allied* do not embody counter-examples to my claim that all promises the law recognizes as promises are ones ordinary speakers of ordinary English will say are promises.



Moreover, I can offer analysis that bolsters this analysis. Usually when we engage in a performative verb speech act we do something more than utter words. At christenings, we sprinkle babies and smash champagne bottles on ships' hulls. When we bet, we put money down or throw a chip into the pot. When we order someone to do something or order food at a restaurant, we often point to something.<sup>156</sup> When we swear to something, whether officially or unofficially, we usually hold up a hand, fingers and thumb straight and together, and palm facing out.<sup>157</sup> These nonoral, non-written elements of the performative verb speech act are not always essential to the act; but, as Austin says, sometimes the act seems somehow incomplete without them.<sup>158</sup>

Just as some performative verb speech acts can be effectuated without any nonoral or nonwritten act elements, yet sometimes seem to need those latter elements, so too sometimes these latter elements can be complete replacements for the oral or written elements. For example, usually when we bet we say we are betting and put money down at the same time. Yet we may call or write our bookies and say we bet \$50 on Stowaway to win. If our credit is good with the bookie, the oral or written speech alone is sufficient to perform the act.<sup>159</sup> Conversely, we may bet \$5 on red 21 at the gaming table by putting money down in a certain place at a certain time. In order for words alone to accomplish the act of which the verb is the name, there has to be a lot of stage setting or shared conventions of a very particular sort. Our most general shared conventions, which give words meaning, will not be sufficient here. This context operates to make performative uses of the verb effective for the act, and they are determinative of whether there is such an act. Saying "I bet \$5 I can beat you to the corner" while showing a \$5 bill is not effective to bet if I am speaking to a dog, any more than placing \$5 on the dresser at night results in a bet, because that is not how we bet. Within these convention-contexts, the word-elements of the act can drop out entirely for some, but not all, of the performative verbs. The more highly parti-

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<sup>156</sup> Did you think you were merely "holding your place" in the unfamiliar menu text?

<sup>157</sup> Notice that this is exactly opposite to how we reach a hand out to an dog or a strange or injured animal; here, showing a palm (especially with stiff fingers held together) leads to bites because showing palms in this fashion to animals universally is a threatening gesture, particularly if we are reaching straight-on for the animal's head.

<sup>158</sup> J. AUSTIN, *supra* note 24, at 37. He is speaking particularly of christenings. To this point, my account of these speech acts essentially is his. From here on, he probably would not agree with what I say because my view is highly controversial or, as some people would have it, wrong. I do, however, borrow his notion of "accepted conventional procedures" but expand upon it greatly.

<sup>159</sup> There are consequences to this act, of course. If Stowaway does not win, I must pay my bookie \$50. If Stowaway does win, my bookie must pay me. This is just like a judge's saying, "I sentence you to 20 years." There are cuffs to be snapped, cells to be locked, entries in records to be made as consequences of the judge's speech act. But none is requisite to performing the speech act itself. If, on the other hand, our credit with the bookie is not good, a telephone call alone will not result in a bet.

cularized the potentially performative speech act, the greater the need not only for words but for particular words, usually for performative uses of the verb for which the verb is the name. At the other end of the spectrum, the more general the act the less the need for any words at all because the potential speech act verb is so nonspecific that our shared conventions can become clearly what is determinative of the accomplishment of the act.

For example, to propose that the city council adopt this budget, instead of merely considering or studying it, I need to say somewhere and somehow that this is the proposal. One of the least ambiguous ways to do that is for me to say "I propose the council adopt this budget." To christen, I need to say "I christen" or "I name;" nothing else will do except some locution that includes some form of the words "christen" or "name" or, at least, some *words* (such as "Henceforth you shall be known as 'Mary'"). Yet we may question with a rising inflection on our words or command with a very emphatic tone on our words without saying "I question" or "I order," and we may question or deny or assent without words from ourselves at all: raise an eyebrow, shake our heads, nod our heads. The reason these body languages are effective as complete replacements for oral or written words is that our shared conventions so make them.

Where along the spectrum a potentially performative speech act falls — from no words at all to words-plus-particular-nonword-behavior to only-these-particular-words-are-sufficient — depends on our shared conventions. If we were Moslems, a husband could divorce a wife by saying "I repudiate you" three times. If we were a dueling society, one person could challenge another to a duel by slapping the other in a highly ceremonial way without words at all. Or we might make saying "I insult you" or "I slap you on the face," without accompanying gestures such as spitting or making hand contact, performatively operative. This would be to substitute one ceremony for another. Again, then, what makes Allied's beginning the installation of the equipment at Ford's plant a promise to indemnify Ford for acts of negligence by either Allied's or Ford's employees is that there was a highly particularized and specific background between them that functioned locally the way our standard conventional procedures function nationally. This very same ordinary-language basis marks the distinction between the Court's two most famous "symbolic speech" cases, as well as some related cases.

### *C. When Ordinary-Language Theory Gives Out: "Speech"*

When Mary Beth Tinker wore a black armband to school one day to protest the Vietnam war, the school sent her home as punishment; and the Court held that this violated her first amendment rights.<sup>160</sup> But when David Paul O'Brien burned his draft card to protest the Viet Nam war and was convicted for violating a federal statute, the Court held that this did not violate his first amendment rights.<sup>161</sup> There are a lot of ways to

<sup>160</sup> *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

<sup>161</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

distinguish the two cases, of course. We could note, for example, that his case came to the Court earlier than hers or we could note the gender difference, and we then could go on to draw political or social inferences. The true differences between the cases, however, is that her act was a speech act within the meaning of associated ordinary language words ("speech," "speak," "say"), whereas his was not. That is, we would say she said something by wearing the armband, but we would not say he said something by burning his draft card.

In our society, we recognize wearing a black armband just above the left elbow as signalling grief. It says, "Someone I know has died." It is akin to the German's hand signal that says someone "has a bird in his head" (meaning he is crazy) or the Italian's hand signal that says a husband has been cuckolded, or our most prosaic flipping-the-bird signal. This last signal, raised in the faces of the local draft board or to an army recruiting team during the 1960's says, exactly as plainly as does Paul Robert Cohen's lettered jacket,<sup>162</sup> what many people thought about the draft or about the war. It, however, usually is more purely emotive and less clearly truth-functional than are the German's and Italian's signals. The German says this person is crazy, and the Italian says the husband is cuckolded; but our finger signal does not truth-functionally say the draft is fucked. What the German and Italian say may be true or may be false; not so, usually, with our sign. (Cohen's jacket, however, did convey a truth-functional message, and I return to that point later.)

We understand the black armband wearing to say "I am mourning," "Someone I cared for has died," and so forth, and these are truth-functional statements, even if there are also emotive overtones. By donning the armband in the turbulent years of the Viet Nam war, in a community in which people have discussed this very act as a method of protesting the war, Tinker makes a more particularized statement than we normally do in wearing black armbands. The context in which she acts disambiguates her statement, crystallizes it, until what she does is *this* speech. But the general conventional background about wearing armbands already makes wearing one *some* speech.

Compare this to O'Brien's act. We have no convention for making the burning of a piece of paper a speech act of any sort, except for such *legal* conventions as revoking a will by intentional burning.<sup>163</sup> Ordinary language speakers would therefore say he did not say anything by burning his card. There was a lot of talk among the group in whose midst he burned the card, of course; and that talk was like the talk Tinker and her community engaged in before the armband wearing. In both groups, they all said they were doing these acts in order to protest the war and

<sup>162</sup> Cohen v. California, 403 U.S. 15 (1971). ("Fuck the Draft" on back of his jacket, which he wore to the courthouse to protest the war; convicting him of "willfully disturb[ing] the peace . . . by . . . offensive conduct" violates his first amendment rights).

<sup>163</sup> This is only a legal convention, not a "community convention" at all, in the same sense that "legal convention" merely is legal short-talk for distinguishing between intentional and accidental destructions of a copy of a will.

the draft. In Tinker's case that conversation turned her speech into particular speech, but our shared conventions already underlay the existence of some speech in armband wearing.

In O'Brien's case, the very same kind of conversation could work to disambiguate his card burning to particular war/draft protest speech if and only if our shared conventions already made intentional burnings of papers some speech. We have no such convention in our community, and a sub-group of the community (the rally group) cannot create such an understanding instantaneously that binds the rest of *us*. Compare, then, the sub-group of Allied and Ford and their special, shared understanding.<sup>164</sup> We as a society have no quarrel with sub-groups of whatever size working out shared understandings and conventions that bind only *them*.<sup>165</sup>

In the absence of a shared conventional procedure for making burning his draft card into some speech, O'Brien alternately needed a shared conventional understanding about the meaning of the draft card. He did not have that from *us* either. Had he, however, altered or burned an American flag (*cf.* perhaps a Soviet flag, a Girl Scout flag), his intentional burning or other manipulation of the flag would be speech because of our shared understanding about the meaning of this flag.<sup>166</sup>

With Cohen's jacket, of course, there was no similar problem at all on either side because his jacket had words we all give meaning through our shared understanding. He did not put "X rotsexl Ts" on the back of his jacket and then claim these symbols expressed his protest against the war and the draft. Had he so done and claimed, we would say he had said

<sup>164</sup> See § III. B., *supra*.

<sup>165</sup> Actually, of course, one of our conventions also functions in the background of Allied and Ford's understanding. Our view is that if you act to do part of what you and I have talked about as a "package deal" you imply you accept the entire deal because I did not agree to give you the right unilaterally to break the package up and take only those parts you want. This may sound like "Law," but it is not. The next time a friend suggests that she will do *x* if you will do *y* and *z*, try making a moral collection on *x* by doing only *y* in a circumstance in which there was no reason for you to do *y* unless you were intending to be taken to trigger her doing of *x*. But, as she said, her trigger-point is *y* and *z*, not *y* alone.

<sup>166</sup> See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (conviction for affixing peace symbol to American flag violates first amendment); *Stromberg v. California*, 283 U.S. 359 (1931) (statute prohibiting displaying any flag in "opposition to organized government" is unconstitutional; flag flown here was a red flag). The Court's statement in *Spence*, 418 U.S. at 409, that "governments constitutionally may forbid anyone from mishandling in any manner a flag that is *public property*" (emphasis added) is not contrary. The Court's speculations in *Spence*, 418 U.S. at 412-15, on governments' interests in preserving a national symbol by prohibiting destruction or mutilation of an individual's *own* American flag, however, indicates the Court might have a difficult time deciding the question of validity; but the Court has no doubt that such burning or mutilation itself is speech. In *Stromberg*, of course, the statute itself announced the community understanding. In *Street v. New York*, 394 U.S. 576 (1969), the Court overturned a conviction under a statute that prohibited mutilation or destruction of a flag or "cast[ing] contempt . . . by words" on grounds that the last clause was unconstitutional, without deciding whether the defendant's burning of the flag would be punishable, because the officer's testimony that he heard the defendant's words ("We don't need no damn flag") was enough for the Court to presume the defendant was arrested and convicted for his words alone.

nothing at all, let alone anything of that kind. When he puts "Fuck the Draft" on the back of his jacket, we know this is English. Our conventions make it speech. When he says, during the turbulent years of the war in Vietnam, he is wearing that sentence to protest the war and the draft, to say *that* he protests the war and the draft, we do not respond by saying "No, you said nothing at all." Rather our shared understandings are exactly that these words in this order form an English-language sentence and that we sometimes use "fuck" to express displeasure, to say that we are displeased, but put in scurrilous terminology. In Cohen's case, wearing the sentence said more; he, like Tinker said, "The war is wrong" or "We should get out of Vietnam" and so on. This is truth-functional propositional political and moral expression, not merely emotive discourse, arising in the political upheaval of the 1960's.

In short, then, the way ordinary language users talk in ordinary language about these incidents undergirds and justifies and dictates, with one exception, the Court's decisions in these cases. The exception is the so-called "symbolic speech" doctrine, which is no doctrine at all for two reasons: All speech is symbolic, i.e., is by way of symbols of one sort or another — usually by words, but sometimes by words and other signs, and sometimes by nonword acts alone (e.g., nodding heads). Moreover, all speech involves conduct or action of one sort or another — it always involves at a minimum either vocal-cord/tongue-mouth movements or finger-writing or finger-signing movements or handing written materials to someone, and so on; or else the speech requires a shared understanding that particular movements of the body (nod head) or manipulation of symbols, about which society already has a shared understanding of the meaning of the symbol (the American flag), are modes of expressing our propositional thoughts. Similarly, marching in a group of demonstrators is ordinary-language speech in at least the sense that ordinary speakers will say the marchers are saying something by marching. Sleeping in a park is not, and the difference is exactly one of shared notions about how to express propositional attitudes without using words, i.e., what we would say about these two positionings of our bodies.<sup>167</sup>

The "symbolic speech" doctrine is deep-seated philosophical nonsense from the vantage of the nature of ordinary language's "speech" itself. But neither that nor any of the other points I have sketched means the Court needs to engage in either philosophy of language or linguistics. Indeed, to believe I have suggested or implied such a view here is entirely to miss my point. The Court arrived at the proper results in each of these cases

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<sup>167</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (federal ban on camping in park does not violate first amendment), thus reaches the right result but could have used an easier ground of no-speech. One reason the Court did not is that it is fond of the "symbolic speech" doctrine, and scholars have not done their jobs in disabusing the Court and each other of this doctrine. Another reason the Court did not use a no-speech approach was that the Court knew how to apply the rest of the tests of *O'Brien*, 391 U.S. 367, to reach the same no-infirmary result. The interesting questions for scholars, then, are whether the *O'Brien* protection analyses ever can lead to a result of constitutional-infirmary when there is no speech and whether the Court should avoid the no-speech analyses.

and gave reasons that were all-but-exactly the right ones to give, not because the Court is accomplished in philosophy or political theory or socio-psycho linguistics, but because the Court is made up of men and women who speak ordinary English, which already embodies these very distinctions on the basis of our shared understandings and vice versa.

Relatedly, every now and then I meet someone who insists that "the freedom of speech" is a technical language phrase because "speech" is a technical term under the Court's interpretation in that the Court applies the first amendment to nonoral, i.e., written, uses of language. These people imagine that the ordinary language meaning of "speech" is limited to oral communications from the stump, so to speak, and they point to "Did you read the President's speech" as being elliptical for "Did you read the text of the President's speech." We indeed do have both locutions, and the former may well be the elliptical form of the latter; but that does not prove their point. Nor does the pattern of the following exchange: I ask, "Did you speak to her?" You answer, "No, but I left her a note." The reason examples such as these (and they can be multiplied) do not establish that the Court's use of "speech" is a technical term in covering nonoral linguistic behavior is exactly the same sort of reason the Court's use of "speech" covers certain nonword behaviors that say something. This reason is that ordinary English speakers use the words "say," "speak" and "speech" both broadly and narrowly, i.e., both as generic words and as particular-instance words, just as we similarly use "chicken" as a generic word and as a particular-instance word.<sup>168</sup>

Nor is the Court's use deviant in the other direction, although this is decidedly harder to see, in failing to count certain speech acts as speech for first amendment purposes. Perjury, for example, and solicitation for sex are not first amendment speech. Solicitation for votes is, but not because of the speech act. Speech acts of the performative verb sort — "I promise," "I christen," etc. — are not first amendment speech because they are not speech but acts in the sense that the way to do these acts is to use words. Just as the only way to shoot someone is to shoot him or her, the only way to perjure is to lie under oath; the performative verb here is "I swear" and the oath is "to tell the truth, the whole truth, and nothing but the truth." We give that oath in circumstances in which *all* we can do is speak out loud or hold our tongues. We are not even able to use head nods or head shakes, because our questioner will say, "Answer the question, please, out loud so that the court reporter and the jury may hear it." This is not speech, but an act done through words.<sup>169</sup>

I have no doubt, of course, that if a court were required to rule on a first amendment freedom of speech challenge to a perjury prosecution, the court would reject the first amendment challenge by saying that provision of the Constitution protects truth; that falsity receives protec-

<sup>168</sup> See § I. C., *supra*.

<sup>169</sup> This is far from being Emerson's speech/conduct distinction, both in basis and in method, although it goes to one of his purposes, viz., to make plain that the first amendment is not about what glue carpenters use to join surfaces or about carpenters using glue to join surfaces.

tion only insofar as that is necessary in order to give breathing room for truthful speech and to avoid a chilling effect on truthful speech; and that the deliberate, knowing, injurious making of false statements under oath is not protected under "the freedom of speech."<sup>170</sup> But just as beating someone over the head with a hammer is not speech, we sometimes use certain words in certain ways to *do*, instead of using words to describe, ask, or say. I probably more safely would put my claim about performative verb speech acts by saying that, because in ordinary English they are different from other speech acts, i.e., are a special case differing from our other uses of words, they equally may be treated as a special case under "speech" in the first amendment.

But consider when we say, "She said she promised that p" instead of "She promised that p." We use the latter more naturally to report her speech act, and we reserve the former for occasions when we wish to cast doubt on her sincerity or to clarify what her words were without departing from indirect-quotation usages. I ask, "What did she do while I was away?" when I have no hint of her acts. If she said "I promise I will pay you" to Peter, you will report by saying "She promised to pay Peter;" but if she said "The governor may run a favorite-son campaign," you will report by saying "She said the governor will run a favorite-son campaign." In the latter case, you also may say, "She didn't do anything; she just talked about the governor's running a favorite-son campaign." But in the former case, no one would say, "She didn't do anything; she just promised Peter she would pay him."<sup>171</sup>

Of course, perhaps my discussion from my perjury point to here is wrong. My ear for ordinary English already may have been bent by the law's view; that performative verbs for committing perjury, for ordering, promising, betting, etc. do not raise a first amendment speech issue on their own and that, if there is one, it arises from the nominalized sentence or propositional content embedded behind the performative verb.<sup>172</sup> If that is true, then scholars who say the Court's use of "speech" in first amendment analysis picks up some, but not all, of what the ordinary English

<sup>170</sup> What the court *should* say, of course, is that perjury is not speech, rather than that it is not protected speech.

<sup>171</sup> I am contrasting two of her speech acts and the two reporting locutions; note, then, the similarity between "She promised to pay Peter" and "She kicked the dog."

<sup>172</sup> To carry out the details of my claim about performative uses of performative verbs I would need to do some trimming on the membership of that category. Austin, for example, once identified "I assert that p" and "I state that p" as performative verb speech acts, yet they obviously differ significantly from "I promise that p." They are, to speak loosely, more like "I say that p." That is, they may be put in front of virtually anything we utter or write. They also raise some of the same problems that the predicates "... is true" and "... is false" raise. See, e.g., Tarski, *The Semantic Conception of Truth and the Foundations of Semantics*, 4 J. PHIL. & PHENOMENOLOGICAL RES. 341 (1944), reprinted in READINGS IN PHILOSOPHICAL ANALYSIS (H. Feigl & W. Sellars eds. 1949) at 52 ("... is true" as a metalinguistic predicate of sentences); Strawson, *Truth*, 9 ANALYSIS (1949), reprinted in E. NAGEL & R. BRANDT, MEANING AND KNOWLEDGE 160 (1965) (performative theory of "... is true").

word "speech" covers are right,<sup>173</sup> although for different reasons than they may believe. In any event, it allows me to enter, by the backdoor, the other point I wish to make about the Court's use of "speech." Sometimes ordinary language, taken in the broad sense of how we talk about things, gives out as a source of information about what we think about them or what they are. When the Court faces a first amendment issue under "the freedom of speech" in these circumstances, the Court is at the cutting-edge of our language and of our societal beliefs.

Here the Court must rely on and must construct a theory in interpreting "the freedom of speech" and must treat the first amendment as one of our prescriptive institutions that is to function as one of the foundations of our free society. The Court uses a number of different theories, drawing strands from each: Mill's marketplace of ideas,<sup>174</sup> Meiklejohn's informed electorate,<sup>175</sup> Rawl's veil-of-ignorance contract,<sup>176</sup> Scanlon's personal autonomy,<sup>177</sup> Schauer's governmental ineptness,<sup>178</sup> and so on. When the Court is successful in fulfilling its role as prescriptive interpreter, society will follow to where the Court is leading by internalizing the values the Court identifies under the first amendment and the uses to which the

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Further refinements would be necessary to deal with "I solicit," as in "I solicit you for sex" and "I solicit your vote." Austin's double-checking "hereby" does not sound right to my ear with "solicit," and I cannot "hear" speakers using "I solicit your vote for candidate Smith" — rather, here I hear "I am soliciting votes for candidate Smith; may we count on yours?" That is, "I solicit" from non-Smith persons sounds to my ear like canvassing voters and as not being noncontinuous. But Smith may stand on the stump and *may* say, "I solicit your votes in next Tuesday's election." Or so Sandy Levinson recently suggested to me in conversation. I never have heard that use of "solicit" from a politician; what I have heard them say using "solicit" is, "I am here to solicit your votes" or "I am soliciting votes," etc. Similarly, what I hear people saying is, "I would like to solicit a favor from you," not "I hereby solicit a favor from you." Relatedly, a prostitute's solicitation and solicitation of a prostitute "sounds" to me in someone's saying "I am soliciting you for sex," and not in "I hereby solicit you for sex," assuming "solicit" "sounds" in either locution. (That is, both of these locutions strike my ear as unnatural.) As far as I can hear, "solicit" does not as a matter of fact function performatively the way "promise," "christen," "order," etc. do. That is, it could have, but it does not: We do not use it performatively.

In short, if Sandy Levinson is correct in claiming "solicit" does have a performative use of the sort that "promise" does, at least one of the performative verb speech acts, which are "doings" via words and not speech in ordinary English according to my view, is speech under the first amendment, albeit perhaps not always protected. In that event, the Court's use of "speech" captures some, but not all, of ordinary language "speech" in another sense than the one I discuss for "obscenity" in the text following this note, for I will have taken too seriously the title of Austin's book: "How to do things with words."

<sup>173</sup> See, e.g., Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

<sup>174</sup> J. MILL, *ON LIBERTY* (D. Spitz ed. 1975).

<sup>175</sup> A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), reprinted in part I of his *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1979).

<sup>176</sup> J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>177</sup> Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204 (1972).

<sup>178</sup> F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).



Court puts "speech." We have authorized the Court to do this by adopting the first amendment and creating the Court; and as we internalize the Court's uses of "speech," we will change our own ordinary uses of "speech." As long as that happens, we never can be cut off from the language of the first amendment because we will have the Court's opinion and its statement of theory for "stretching" "speech" to bide us over until we can internalize the cutting-edge use. Having to give an explanation that will hold up in the light of day in turn constrains the Court from jumping too far ahead of the rest of us.

The Court is at a cutting-edge point on "obscenity," for example. Obscene books and obscene nonmime plays involve words. Obscene movies often do involve words, but obviously need not, any more than artist's drawings need to involve words. The Court says obscenity is not first amendment speech,<sup>179</sup> and that looks counter-intuitive. That is, it looks contrary to the ordinary language word "speech" insofar as the Court is saying, for example, a book does not qualify under "speech" of the first amendment. To say this of artist's drawings is not similarly counter-intuitive, and it is even less counter-intuitive to deny speech status to sexual acts performed at high noon in Times Square. In saying obscenity is not speech under "the freedom of speech" and including books and nonmime plays and talking pictures along with artist's drawings when these all have certain characteristics in common with sexual acts in Times Square, the Court is building a theoretical stretch into "speech" for "the freedom of speech" and shaping the ordinary language words "obscenity" and "obscene." These theoretical stretches are difficult ones because sexual acts between human beings are not themselves obscene, and this means describing what the "certain characteristics in common" are is difficult.

A society that does not have a written first amendment stated in terms of "the freedom of speech" does not have to resolve the exact contours of meaning for "obscene" or "obscenity" with special reference to "speech." Our society does, however; and some of the difficulties of resolution are compounded by mass marketing of talking pictures. Over time, the Court's resolutions will affect the ways all of us talk about obscenity and speech and will affect our views of a just and free society. Contracts courts describe where we already are, but free-speech courts sometimes tell us where we are going. The former move with us and the way we talk in ordinary ways, but we sometimes move with the latter and learn to talk in new ordinary ways.

#### *D. Speaking Entre Nous: Lawyers and Law Professors*

None of my arguments tell us how lawyers talk with each other about the law when clients are not around, nor how they may need to talk in

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<sup>179</sup> *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

that circumstance. If technical languages are useful in the sciences to enable clearer and faster communication from scientist to scientist and technical uses are similarly useful for trades people, lawyers have no less need for clarity and for efficiently quick modes of communicating with one another.

Lawyers certainly may and do make different-deployment and one-among-many-meanings technical uses of ordinary English. This kind of short or exact speaking goes with the territory of any fairly regular, fairly compartmented discipline, occupation, or activity. This, of course, does not get lawyers into speaking a technical language because these terms are ordinary English put to technical uses. The question is whether among themselves lawyers use technical terms in some more interesting sense. Do lawyers, speaking among themselves, have terms that are completely cut off from English and that obtain their meaning from theory; or terms that have meanings only part of which are marginally related to same-sounding, same-looking ordinary English words and that are central terms in a theory; or terms that are fixed to one among many ordinary language meanings but also are theoretical terms? Due process constrains the language of the law and constrains the language of lawyers in court, but due process does not constrain the language of lawyers among themselves away from clients and juries. Do they then have a technical language?

No. They do have jargon and argot. Some of these modes of short-talking are specific to a particular law firm or to divisions in the firm to the point that they almost are not even remotely English, but some kind of code. When lawyers go outside those groups and forget to switch out of code or short-talk, they sound inarticulate to the rest of us or, worse, incomprehensible. Usually someone in the group asks these lawyers to repeat themselves; and, as the joke's mark hits home, the smart ones then switch into English, and the others repeat themselves. Sometimes, of course, lawyers refuse to use ordinary English in order to impress or intimidate. That often backfires. Aside from whether some lawyers are making the rest of the profession look bad by being inarticulate or intimidating, I see no reason to worry about their jargon or argot or codes.

There is reason, however, to be concerned about some occasions of using ordinary English words with a technical use. Lawyers do not run into trouble talking among themselves using "consideration," for example; nor do they run into trouble using it with clients or before juries as long as they remember somewhere along the line to say that what they are talking about is bargained exchange. Even if they do not remember, probably nothing untoward happens because most ordinary-English speakers are familiar with this technical use of "consideration." But lawyers sometimes do worse than this. Not long ago, in a state that shall go unnamed, a jury-instruction-guidelines panel considered writing an instruction for the jury to answer "Is there consideration for the contract," as part of determining contract-formation issues. What, exactly, would a jury do with an instruction of this sort stated in *just* these words? The panel seems to me to have confused a legal-conclusion label that summarizes certain findings of facts with a factual finding, and I suspect the

culprit here is that not enough of lawyers' audiences make lawyers speak plainly and drop road signs for their technical uses, until lawyers forget their technical use is technical.

Ordinary people who do not speak up and force candor from lawyers are at their mercy. With courts the matter is a bit otherwise because there are scholars who make their livings out of analyzing courts' opinions and assessing what the courts said or should have said. And, of course, these same scholars do the same to the analyses of other scholars. If lawyers make their livings on words, legal scholars make their livings on other people's words.

Scholars have a role to play, however, that is as important as the roles of lawyers for clients and judges for parties. For in critically analyzing and theorizing about the law, decided and yet-to-come, scholars help courts bridge the gap when settled conventions and ordinary language give out. Not only are judges not philosopher kings, they also are not psychologists, sociologists, engineers, linguists and so on. Even if they had the inclination, they do not have the luxury of time for the reflective study and thought that goes into theory-construction. When judges construct theories, then, they do not do so out of the air, but out of articles and books, as well as out of what they already know because they have grown up in our society. If scholars fail to do the spade work in preparation for the difficult issues courts will face or if they fail to be intellectually honest, the law may end up taking a blind turn. That may be more dangerous to freedom than a technical language of the law that only lawyers can speak.