

1984

Hart's Definition and Theory in Jurisprudence Again

Robert Birmingham

University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers



Part of the [Jurisprudence Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

Birmingham, Robert, "Hart's Definition and Theory in Jurisprudence Again" (1984). *Faculty Articles and Papers*. 67.
https://opencommons.uconn.edu/law_papers/67

HEINONLINE

Citation: 16 Conn. L. Rev. 775 1983-1984



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Aug 15 16:44:04 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0010-6151](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-6151)

HART'S *DEFINITION AND THEORY IN JURISPRUDENCE* AGAIN

by Robert Birmingham*

I will say what Hart's classic paper¹ means in, or translate it into, contemporary philosophical discourse. But to give a context for it, I start by talking about MacCormick's recent book, *H.L.A. Hart*.² We come away from reading its introductory chapter, a chapter Summers calls "fascinating,"³ having learned that Hart was trained not as a legal philosopher or jurisprude as such but as a lawyer and separately as a philosopher. MacCormick's respect for or awe of Hart's training appears in what I will quote. Regarding Hart's career at the bar, MacCormick tells us Hart was a barrister from 1932 to 1940, litigating "such complicated matters as trusts, family settlements and succession."⁴ World War II terminated Hart's legal career. Before becoming a barrister Hart had studied philosophy with Joseph at Oxford, graduating in 1929, having "performed brilliantly."⁵ Hart "became a civil servant in military intelligence"⁶ in the war, hence he survived it.⁷ Having talked to Ryle and Hampshire, who were also in intelligence, Hart decided not to return to practice law but became "a respected member of the new school of post-war Oxford philosophers."⁸ Legal philosophy is not prestigious like contracts or metaphysics. Until recently, its prac-

* Professor of Law, University of Connecticut School of Law. A.B., J.D., Ph.D. University of Pittsburgh; LL.M. Harvard University. Professor Birmingham teaches Contracts and Jurisprudence.

1. H.L.A. HART, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1983) [hereinafter cited as *Definition and Theory*], reprinted from Hart, *Definition and Theory in Jurisprudence*, 70 *LAW. Q. REV.* 37 (1954).

2. N. MACCORMICK, *H.L.A. HART* (1981).

3. Summers, *Professor MacCormick on H.L.A. Hart's Legal Theory*, 31 *AM. J. COMP. L.* 481, 481 (1983).

4. N. MACCORMICK, *supra* note 2, at 2.

5. *Id.*

6. *Id.*

7. For example, he did not cease to serve, as many others did, by failing to exit from a falling bomber by a hatch too small to accommodate him together with his parachute. *Cf.* F. DYSON, *DISTURBING THE UNIVERSE* 26-28 (1979).

8. N. MACCORMICK, *supra* note 2, at 2-3.

titioners would likely have been academics having formal training mainly in law but lacking extensive practical legal experience and intensive formal training in philosophy. Hart, when Oxford appointed him Professor of Jurisprudence in 1952, had not studied jurisprudence but had studied its ingredient disciplines.

This much by page three. Then MacCormick tells us Hart's "inaugural lecture on 'Definition and Theory in Jurisprudence' [*Definition and Theory*] put him at once in controversy when he announced the relevance of the new philosophy to long-standing juristic controversies over the nature of legal concepts."⁹ MacCormick has used the word 'new' to modify both 'philosophy' and 'school of philosophy' but has told us little of what was new. What Hart did was apply then contemporary philosophy to legal problems. We learn "Hart is one of the leading proponents of what is sometimes called 'linguistic analysis' or 'ordinary language philosophy.'"¹⁰ To celebrate his status we next rapidly tour the work of some philosophers who influenced Hart including Austin, Ryle, and late Wittgenstein. MacCormick writes lightly: "A famous text illustrating this approach is"; "An even more influential colleague of Hart's was"; "Among the questions raised by"¹¹

I am not going to address what was new about Hart's jurisprudence.¹² Neither it nor the ordinary language philosophy on which it is parasitic is now new. Ordinary language philosophy is an episode in the history of philosophy. Ordinary language philosophers, like other philosophers having strongly defined commitments, have thought of earlier philosophers as imperfect precursors: "[T]he Analysts of Oxford have succeeded to their own satisfaction in reading the [Platonic] dialogues that they call 'critical' as primitive essays in their own philosophical method."¹³ Both Platonic and contemporary philosophy differ from philosophy thirty years ago, although the latter difference is largely unreflected in legal philosophy. I will examine the lecture that put Hart in controversy in terms of philosophy today.

9. *Id.* at 3.

10. *Id.* at 13.

11. *Id.* at 13, 14, 16.

12. Compare Hart, *Symposium: Is There Knowledge by Acquaintance?*, in 23 *POLITICS, PSYCHOLOGY AND ART* 69 (Aristotelian Soc'y Supp. vol. 23, 1949), with Findlay, *id.* at 111. See B. MAGEE, *The Philosophy of Language: Dialogue with John Searle*, in *MEN OF IDEAS* 194-95 (1978).

13. H. CHERNISS, *The Relation of the Timaeus to Plato's Later Dialogues*, in *SELECTED PAPERS* 307 (L. Tàran ed. 1977).

Basically, *Definition and Theory* discusses legal objects such as rights and corporations and decides that there are not any. Then the lecture tries to explain what the word 'right', for instance, is doing in sentences like:

Jones has the right.

The right may be any right, for example, the right of free exercise or the right to be paid ten dollars by Smith. I use this sentence as a paradigm, although as a piece of actual legal discourse it is schematic. I will use 'Jones has the cow' as a corresponding paradigmatic sentence from ordinary language. In 'Jones has the cow', I intend 'has' to be a physical predicate in the neighborhood of 'has his arm around the neck of', or 'has control over'. I do not intend it to be equivalent to 'owns' or 'has the ownership of'. I get the name of a piece of language by putting it in single quotation marks: 'cow'.

(*Thesis*) It used to be said (mostly by Germans) that we can do serious philosophy only in ancient Greek or modern German.¹⁴ Ordinary language philosophy relates to *Definition and Theory* less as its methodology than as a vehicle, like German, for its ideas: we can do various philosophical things using it. Underlying *Definition and Theory* is the idea that legal expressions such as 'the right' do not refer. McCormick teaches us to inspect Austin, Ryle, and Wittgenstein for the origin of this idea. We find it in Ryle's *Systematically Misleading Expressions*, which says that each of the misleading expressions it identifies "is misconstrued as a denoting expression which in fact does not denote, but only looks grammatically like expressions which are used to denote."¹⁵

I

(*Truth*) Hart says "[a] statement of the form 'X has a right' is true if"¹⁶ Then he gives complicated truth conditions.¹⁷ The passage is at the core of *Definition and Theory*. Apparently Hart thinks that truth is a property of pieces of language and that he may explain linguistic behavior in terms of it. That is, if he were asked, 'Why did Jones say 'Rose is a cow'?', he would probably respond *inter alia*, 'Be-

14. M. GRENE, *PHILOSOPHY IN AND OUT OF EUROPE* 30 (1976).

15. Ryle, *Systematically Misleading Expressions*, in *ESSAYS ON LOGIC AND LANGUAGE* 32 (A. Flew ed. 1951).

16. *Definition and Theory*, *supra* note 1, at 35.

17. *Id.*

cause 'Rose is a cow' is true'.

(*Reference: ordinary language*) Hart says that 'right' does "not have the straightforward connection with counterparts in the world of fact which most ordinary words have."¹⁸ The straightforward connection is reference. For Hart, most ordinary words refer to things. 'the cow' in 'Jones has the cow' refers to a cow: Rose. The adjective 'straightforward' suggests reference is a transparent relation to Hart. We understand pre-analytically what it is for the linguistic item 'the cow' and the cow itself to be related by the first referring to the second.

(*Reference: legal language*) Hart says: "There is nothing that simply 'corresponds' to these legal words"¹⁹ Hart is contrasting ordinary words like 'cow' with legal words like 'right'. Here Hart is saying maybe no more than: if everything goes well, if Rose does not expire unexpectedly, 'the cow' in 'Jones has the cow' refers to (stands for; denotes) Rose, a physical object, a particular cow; but there is not a bovine or equally evident entity for 'the right' to refer to.

Then Hart asks, if not exactly this plainly, 'What is the word 'right' doing there?'. We want to get the question correct; Hart advises us that other philosophers get it wrong: They ask in the material mode, 'What is a right?'. They ask in the formal mode, 'What does the word 'right' mean?', read as, 'What does 'right' refer to?'. Hart says these other philosophers assume rights exist, they assume 'right' refers. Then they predictably answer their question in its material and formal versions by finding or making up something that 'right' refers to.

Hart says that an "older type of theory,"²⁰ one "now unfashionable,"²¹ tells us "a right is an 'objective reality'—an invisible entity existing apart from the behaviour of men."²² A right is therefore like a cow in all respects save that we cannot see it, feel it, hear it, or otherwise sense it. It is hard to imagine what a right might be then. Inscrutability is a bad quality for a thing to have, but it is not necessarily an insuperable handicap to it.

Hart, quoting Olivecrona, says that according to the Scandinavian legal realists "a right is nothing real at all but an ideal or fictitious or imaginary power."²³ To other Scandinavian legal realists it is just noth-

18. *Id.* at 23.

19. *Id.*

20. *Id.* at 24.

21. *Id.* at 23 n.2.

22. *Id.* at 24.

23. *Id.*

ing at all.²⁴ The older theory, that a right is an invisible entity, is philosophically unsophisticated. The theory of the Scandinavian legal realists is sophisticated but old-fashioned; it is the instrumentalism of the logical positivists.

Hart also tells us the American legal realists thought "a right is a term by which we describe the prophecies we make of the probable behaviour of courts or officials."²⁵ They did; but Hart is probably wrong to assume that, like the others, the American legal realists were trying to discover what, if anything, 'right' refers to. In their view 'right' seems not itself to refer, but is used syncategorematically in a sentence describing the prophecies.

The three kinds of responses are not peculiar to law but usual in philosophy of science. In terms of distinctions drawn by Quinton: American legal realists are reductionists; Scandinavian legal realists are instrumentalists; the older analysts are philosophical realists. Then exactly those philosophers who are not legal realists are realists in that they believe in theoretical entities in law.²⁶

Hart does not wholly persuade us that the legal philosophical positions he rejects cannot be defended. He argues from the insight that rights are not cows. But this insight does not establish that rights are not other things, although it perhaps suggests this.

(Exercise) Holmes realized that legal theory is methodologically closely connected to other scientific theory. He compared positing rights with positing gravity:

So we prophesy that the earth and sun will act towards each other in a certain way. Then as we pretend to account for that mode of action by the hypothetical cause, the force of gravitation, . . . we get up the empty substratum, a *right*, to pretend to account for the fact that the courts will act in a certain way. . . . I should like to write a first book of the law keeping to hard fact and using no images.²⁷

Holmes here is acting like an American legal realist/reductionist, pro-

24. See Ross, *Tū-tū*, 70 HARV. L. REV. 812, 814 (1957); Wedberg, *Some Problems in the Logical Analysis of Legal Science*, 17 THEORIA 246 (1951), reprinted in CONTEMPORARY PHILOSOPHY IN SCANDINAVIA 237 (R. Olson & A. Paul eds. 1972).

25. *Definition and Theory*, *supra* note 1, at 23-24.

26. A. QUINTON, *THE NATURE OF THINGS* 288-89 (1973).

27. Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 19, 1928), reprinted in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 212-13 (M. Howe ed. 1941).

spectively criticizing the legal analogue of the philosophical realist. Is it *perfectly* clear that gravity or rights are fictitious?

MacCormick states: "Perhaps the gravest deficiency in Hart's *Concept of Law* is the extent to which he gave his hand to perpetuating the caricature picture of the realist teachings and concerns."²⁸ According to MacCormick, Hart goes wrong by interpreting the American legal realists to believe—rather than merely say enthusiastically—that law is not a set of rules but rather what judges do. By focusing on the realist attitude toward legal entities, *Definition and Theory* omits other aspects of realist thought—mostly empiricist. For example, Llewellyn complained that Moore

"tested out" whether law has mystical operation by an elaborate observation, metering and statisticking of the noneffect on the parking practices of New Haveners of a change in the official traffic regulations, which he had arranged to keep carefully from coming to the knowledge of any trafficker.²⁹

Llewellyn liked to overstate things. Anyway he thereby situated Moore alongside those extreme empiricist psychologists studying perception of color, who, as Waismann remarked to Wittgenstein, "believed so firmly that this was a matter of empirical states of affairs that they even performed empirical investigations whether two colours could not be at the same place."³⁰ The American legal realists not only taught an ontology but practiced an epistemology.

It will be important later that Hart's world of fact—the world Hart says legal language problematically fails to refer into—approximates Sellars's manifest image, "the framework in terms of which man came to be aware of himself as man-in-the-world."³¹ This is the world as we take it to be if we do not reflect on it. Sellars opposes the manifest image to a scientific image, "derived from the fruits of postulational theory construction."³² The juxtaposed images suggest a legal image, a world of law. But the manifest image will matter to us. Signif-

28. N. MACCORMICK, *supra* note 2, at 124 (discussing H.L.A. HART, *CONCEPT OF LAW* (1961)).

29. Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL EDUC. 399, 401 (1956).

30. WITTGENSTEIN AND THE VIENNA CIRCLE: CONVERSATIONS RECORDED BY FRIEDRICH WAIMANN 79 (B. McGuinness ed., J. Schulte & B. McGuinness trans. 1979).

31. W. SELLARS, *Philosophy and the Scientific Image of Man*, in *SCIENCE, PERCEPTION AND REALITY* 6 (1963).

32. *Id.* at 19.

icantly, its source is an "original image" which posits persons as primitive, that is, Sellars tells us, "*originally*, to be a tree was a way of being a person."³³

Frege (1848-1925) became important to contemporary philosophical thought beginning about 1950. English editions of his work—*The Foundations of Arithmetic*³⁴ [*Foundations*] and *Translations from the Philosophical Writings of Gottlob Frege*³⁵ [*Translations*—were published in 1950 and 1952. Hart perhaps read them before delivering *Definition and Theory*. Hart's teacher and colleague, J.L. Austin, translated *Foundations*. We understand Hart better by attending to Frege because they said related things.

Baker and Hacker translate Frege's term *Bedeutung* 'reference'; Long and White translate it 'meaning'. The former claim they "deviate systematically from very recent translations";³⁶ the latter say they "have parted company with all previous English translators."³⁷ Assimilating 'means' to 'refers to' was usual when Frege was first being translated. Despite what Long and White say, *Foundations* adopts 'meaning' for *Bedeutung*; so too does the most recent edition of *Translations*,³⁸ although previous editions use 'reference'.³⁹ With it translated 'meaning', Frege says "[t]he meaning of a proper name is the object itself which we designate by using it."⁴⁰ If we begin examining *Definition and Theory* by reading 'meaning' as 'reference', we understand how Hart finds the meaning of 'right' problematic because he thinks 'right' refers to nothing ordinary.

Hart could not have read Frege attentively. Hart appears to confuse use and mention. While discussing the American legal realists, he says, "a right is a term by which we describe"⁴¹ Here, either he

33. *Id.* at 10. Searle, in ordinary language philosophy, makes a similar distinction between brute and institutional facts. See J. SEARLE, *SPEECH ACTS* 50-53 (1969).

34. G. FREGE, *THE FOUNDATIONS OF ARITHMETIC* (J. Austin trans. 2d rev. ed. 1968) (1st ed. Breslau 1884).

35. G. FREGE, *TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLÖB FREGE* (P. Geach & M. Black eds. 1952) [hereinafter cited as *TRANSLATIONS*].

36. G. BAKER & P. HACKER, *FREGE: LOGICAL EXCAVATIONS* at ix (1984).

37. Long & White, *Translators' Preface* to G. FREGE, *POSTHUMOUS WRITINGS* at vi (H. Hermes, F. Kambartel & F. Kaulbach eds., P. Long & R. White trans. 1979).

38. G. FREGE, *On Sense and Meaning*, in *TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLÖB FREGE* 56 (P. Geach & M. Black eds., 3d ed. 1980) [hereinafter cited as 1980 *TRANSLATIONS*].

39. G. FREGE, *On Sense and Reference*, in *TRANSLATIONS*, *supra* note 35, at 60.

40. G. FREGE, *On Sense and Meaning*, in 1980 *TRANSLATIONS*, *supra* note 38, at 60.

41. *Definition and Theory*, *supra* note 1, at 23-24.

fails to recognize that he has stopped talking about rights and started talking about 'right' or he is using 'term' obsoletely. Frege, in *Translations*, criticized equivocating this way forcefully enough to discourage a reader from doing it.⁴² As the next section demonstrates, if Hart knew *Foundations*, he could hardly have written as he did without citing or distinguishing it.

II

Hart says that expressions like 'the right' do not refer, and that we must define or explain them contextually. We are going to examine these propositions in the opposite order. An economist finds it easier to think things up than to look them up and does not cite much. A lawyer instead relies on precedent. Hart attributes these propositions to Bentham. We must first ask what Hart adopts from Bentham; then if Hart interprets Bentham correctly. Hart is an authority on Bentham, having written "the most extensive and incisive discussion of the major aspects of Bentham's general theory of law."⁴³ We expect Hart to get Bentham right.

Hart begins: "Long ago Bentham issued a warning that legal words demanded a special method of elucidation, and he enunciated a principle that is the beginning of wisdom in this matter, though it is not the end."⁴⁴ The passage has too many words and we might substitute: 'Bentham said'. According to Hart, what Bentham said is "we must never take [legal] words alone, but consider whole sentences in which they play their characteristic role."⁴⁵

Hart reads Bentham's warning/principle to be: Take not words but sentences. The word 'take' abbreviates 'take as semantically primitive'. Semantical primitives are the smallest units of meaning. A piece of language is semantically primitive if taken together it has meaning

42. G. FREGE, *Frege Against the Formalists*, in *TRANSLATIONS*, *supra* note 35, at 193.

Hart, in confusing use and mention, is in good company (Russell's). See Quine, *Introduction* to Russell, *Mathematical Logic as Based on the Theory of Types*, in *FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC, 1879-1931*, at 150-52 (J. van Heijenoort ed. 1967) [hereinafter cited as *FROM FREGE TO GÖDEL*]. See also Letter from Gottlob Frege to Philip E.B. Jourdain (Jan. 28, 1914), reprinted in G. FREGE, *PHILOSOPHICAL AND MATHEMATICAL CORRESPONDENCE* 81-84 (G. Gabriel, H. Hermes, F. Kambartel, C. Thiel & A. Veraart eds., abr. by B. McGuinness, H. Kaal trans. 1980).

43. Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123, 123 (1984) (referring to H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982) [hereinafter cited as *ESSAYS ON BENTHAM*]).

44. *Definition and Theory*, *supra* note 1, at 26.

45. *Id.*

but no proper part of it has meaning. The principle applied to the particular jurisprudential context directs that we "take not the word 'right' but the sentence 'You have a right'."⁴⁶ According to Hart, then, legal sentences—not parts of them—are semantically primitive. Anyway, this is the way things look so far.

Quine celebrates the "idea of defining a symbol in use" as "an advance over the impossible term-by-term empiricism of Locke and Hume."⁴⁷ He cites Bentham as the source of the advance, saying "[t]he statement, rather than the term, came with Bentham to be recognized as the unit accountable to an empiricist critique."⁴⁸ Quine says we should not stop at the statement; "even in taking the statement as unit we have drawn our grid too finely," since "[t]he unit of empirical significance is the whole of science."⁴⁹ Quine's warning/principle, therefore, is: Take not sentences but languages. Languages of course cannot be the smallest units of meaning or else we could not say anything meaningful briefly. Therefore, 'take' here does not mean 'take as semantically primitive' as it does in *Definition and Theory*.

We must find the minimal properties of Bentham's principle to separate what belongs to him from what properly belongs to Hart or Quine. Bentham thought that legal words could not be defined, but he did not think they had then just to sit there uninterpreted. He called the operation on them that is the surrogate for defining 'paraphrasis'. Quine and Hart think rightly that, using paraphrasis, "we need only show, by whatever means, how to translate all the whole sentences in which the term is to be used."⁵⁰ They are right: we need not show more than this. However, we need not show even this much. Bentham more typically or fundamentally spoke of paraphrasis operating subsententially. He said it "consists in taking the word that requires to be expounded"; "making it up into a *phrase*"; then interpreting the phrase.⁵¹ More explicitly, Bentham said: "In a *definition*, a phrase is employed for the exposition of a single word: in a *paraphrasis*, a phrase is employed for the exposition of an entire phrase"⁵² Therefore, Ben-

46. *Id.*

47. W. QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 42 (2d ed. rev. 1961).

48. *Id.*

49. *Id.*

50. Quine, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 72 (1969).

51. C. OGDEN, *BENTHAM'S THEORY OF FICTIONS* 139 (1932).

52. *See Id.*

tham's actual warning/principle was: Take not words but phrases. Hart recognizes that Bentham was "giving phrase for phrase, not word for word,"⁵³ but rejects or seems to reject doing this in favor of giving sentence for sentence.

Hart instructs us that "the primary function" of 'right' "is not to stand for or describe anything,"⁵⁴ but he does not identify a secondary referential or other function. That legal words do not refer is why we cannot define them but must paraphrase them. We tentatively interpret Hart to say: Proper parts of legal sentences are meaningless; they do not refer. According to Hart, it is lack of reference that "makes it vital to attend to Bentham's warning that we should not . . . abstract words like 'right' . . . from the sentences in which alone their full function can be seen, and then demand of them so abstracted their genus and differentia."⁵⁵ The model by which we define, 'cow: A big mammal that says 'moo'', does not work for rights. Nothing exists that is plausibly a right and comparable to a cow.

Hart finds authority in Bentham for this proposition about reference. Bentham remarked that it would be just as futile to define the preposition 'through' by 'A through is a ___ that ___'. Bentham was talking not just about legal language but also about names of fictitious entities generally. Concrete particulars, "this man, this beast, this bird, this fish, this star," and kinds, that is, classes of concrete particulars, were the only entities not fictitious for Bentham.⁵⁶ So Bentham said: Names of fictitious entities are meaningless; they do not refer. Bentham was being broader than Hart by talking about legal *and* non-legal language. But Bentham talked about names whereas (tentatively) we have Hart talking about *all* subsentential linguistic items.

Bentham also said, a man's right to a thing is "the relation a man is in with respect to a thing."⁵⁷ It *looks like* Bentham is defining 'right' *per genus et differentiam*: a right is the relation (*genus*) a man is in with respect to a thing (*differentia*). We ought not be greatly unsettled by his having done this. Hart says Bentham published "very nearly 6,000,000 words,"⁵⁸ so he must have said most things once. We today

53. *Definition and Theory*, *supra* note 1, at 34.

54. *Id.* at 31.

55. *Id.*

56. C. OGDEN, *supra* note 51, at 139.

57. J. BENTHAM, *A Comment on the Commentaries or An Introduction to the Introductions*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 87 (J. Burns & H.L.A. Hart eds. 1977) (1st ed. London 1776).

58. H.L.A. HART, *Bentham and Beccaria*, in *ESSAYS ON BENTHAM*, *supra* note 43, at 41.

prestigiously interpret apparent names of philosophical entities as referring to properties or relations. Montague thus defined pains, tasks, events, obligations, etc.⁵⁹

In *Foundations*, Frege gave his own "fundamental principle" four times.⁶⁰ His third version was: "*Nur im Zusammenhange eines Satzes bedeuten die Wörter etwas.*"⁶¹ ("It is only in the context of a sentence that words have any meaning."⁶²) *Definition and Theory* did not distinguish or cite any passage from *Foundations*. But Hart quotes this third version in the introduction to his recent *Essays on Bentham*. He does so in the context of his review of good things, "things of great speculative importance," that Bentham says.⁶³ One good thing is that "sentences not words are the unit of meaning."⁶⁴ According to Hart, this idea "was not to appear again in philosophy for fifty years," when it was "asserted by Frege and stressed in Wittgenstein's *Tractatus Logico-Philosophicus*."⁶⁵

In informal conversation, where logical precision is not important, Frege said, "it is not at all necessary that the individual words should have a sense and meaning of their own, provided only that the whole proposition has a sense."⁶⁶ But reference is required for inference. Thus Frege said that in scientific discourse, "[w]here inferences are to be drawn, . . . it is essential that the same expression should occur in two propositions and should have exactly the same meaning in both cases."⁶⁷ Frege believed that jurisprudence is like mathematics, and mathematics Frege characterized as being more entirely about inference than is anything else.⁶⁸ Law then is plausibly scientific discourse in Frege's sense.

59. See R. MONTAGUE, *On the Nature of Certain Philosophical Entities*, in *FORMAL PHILOSOPHY: SELECTED PAPERS OF RICHARD MONTAGUE* 148 (R. Thomason ed. 1974), reprinted from 53 *MONIST* 159 (1960).

60. See G. FREGE, *supra* note 34, at xe, 71e, 73e, 116e.

61. *Id.* at 73e.

62. G. BAKER & P. HACKER, *supra* note 36, at 202.

63. H.L.A. HART, *Introduction*, in *ESSAYS ON BENTHAM*, *supra* note 43, at 10.

64. *Id.*

65. *Id.* (footnotes omitted). The interpretation is generally conceded. See Diamond, *What Nonsense Might Be*, 56 *PHILOSOPHY* 5, 17-18 (1981); Dummett, *The Significance of Quine's Indeterminacy Thesis*, 27 *SYNTHESE* 351, 359 (1974). See also M. DUMMETT, *THE INTERPRETATION OF FREGE'S PHILOSOPHY* 360-427 (1981).

66. Letter from Gottlob Frege to Giuseppe Peano (Sept. 29, 1896), reprinted in G. FREGE, *PHILOSOPHICAL AND MATHEMATICAL CORRESPONDENCE*, *supra* note 42, at 115.

67. *Id.* See M. RESNIK, *FREGE AND THE PHILOSOPHY OF MATHEMATICS* 161-71 (1980); Bell, *The Place of the Grundlagen in Frege's Development*, 31 *PHIL. Q.* 209 (1981).

68. G. FREGE, *Logic in Mathematics*, in *POSTHUMOUS WRITINGS*, *supra* note 37, at 203.

Hart evidently thinks Frege is saying the same thing Hart is; however, Frege is not. Corresponding to Hart's question, 'What is 'right' doing there?', Frege asked, 'what is '37' doing there?'. Hart would respond: 'Anyway, not referring to a number'. For Hart, numbers would be like rights, unbovine and indistinct. But Frege was certain numerals refer and investigated what they refer to. The difference is between Frege's taking words to refer but inspecting sentences to find out what they refer to, and Hart's taking words not to refer at all.

Listen to Frege, sounding outraged as if he had already read Hart. "I find it extraordinary some linguists have recently viewed a '*Satzwort*' (sentence-word), a word expressing a whole judgement, as the primitive form of speech and ascribe no independent existence to the roots, as mere abstractions."⁶⁹ The adjective 'primitive' abbreviates 'semantically primitive'. Frege was outraged because he said true things but nobody listened.

For Hart, 'the right' in 'Jones has the right' functions as does 'in' in 'bovine'. If we do not attend to his purpose we might mistakenly interpret the language of *Definition and Theory* so that it accords with Frege's. We read Hart correctly by seeing that Frege's principle does not help Hart explain 'the right'. If terms such as 'the right' get their referents from the sentences they are embedded in, then the referents would be rights. But it is Hart's idea that there are not rights, so 'the right' must not refer at all.

Wittgenstein's principle went: "*Nur der Satz hat Sinn; nur im Zusammenhange des Satzes hat ein Name Bedeutung.*" ("Only propositions have sense; only in the nexus of a proposition does a name have meaning."⁷⁰) In the *Tractatus*, which is what Hart is citing, Wittgenstein just repeated Frege's principle.⁷¹

III

Frege was really happy about the idea of reference. Ordinarily the most important thing we can say about a name is what it refers to, while the most important thing we can say about a sentence is whether it is true or false. But Frege used the idea of reference to talk about sentential truth too, assimilating sentence meaning to name meaning.

69. G. FREGE, *Boole's Logical Calculus and the Concept-script*, in POSTHUMOUS WRITINGS, *supra* note 37, at 17 n.**.

70. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 3.3 (D. Pears & B. McGuinness trans. 1961).

71. G. BAKER & P. HACKER, *supra* note 36, at 199.

Frege said: "All true propositions have the same meaning: the true; and all false propositions have the same meaning: the false."⁷² Here 'proposition' translates *Satz* but 'sentence' would do better. Explaining sentence meaning using reference requires not merely confidence in reference but also comfort in the company of abstract entities—the True and the False. Hart and Bentham achieved confidence not comfort. It is said, maybe on bad evidence, that Frege thought discovering the True and the False is pretty much like discovering "two new chemical elements."⁷³ But not everybody thinks this way.

Hart applauds Bentham's getting rid of rights, but Hart and Bentham part company over what is left. Bentham said there need be no legal language. We may reduce legal language to ordinary language; we "find a *translation* of it into what we should call factual terms."⁷⁴ Hart, in contrast, says there must be legal sentences. These sentences persist, having a right is not just the possibility of a pattern of physical objects. A right's content is not exhausted by locking up somebody who does not perform the duty correlated with that right. But words like 'right' are not names of legal entities. Nevertheless, Hart likes some of the things Bentham says: "These, though defective, are on the right lines. They are not paraphrases but they specify some of the conditions necessary for the truth of a sentence of the form 'You have a right'."⁷⁵

Hart is providing a theory of meaning of legal language that we may interpret as a theory of truth. Preeminently, Davidson interprets a theory of meaning as a theory of truth. Davidson's philosophy is superficially antithetical to Hart's ordinary language philosophy, born at Oxford. *The Philosophical Lexicon* defines 'davidsonic boom' as "the sound made by a research program when it hits Oxford."⁷⁶ Davidson's research program is disapproved even by Oxford philosophers such as Ayer, who are not wholly sympathetic to ordinary language philosophy. "Semantics rules the roost," Ayer complains. "The younger philosophers, seduced by Donald Davidson, devote their energy . . . to the Sisyphean task of teasing a theory of meaning out of Tarski's theory of truth."⁷⁷ Nevertheless, Ayer ill-humoredly indicates the significance of this part of Davidson's program. I will talk about Tarski

72. Letter from Gottlob Frege to Bertrand Russell (Oct. 20, 1902), *reprinted in* G. FREGE, PHILOSOPHICAL AND MATHEMATICAL CORRESPONDENCE, *supra* note 42, at 149.

73. G. BAKER & P. HACKER, *supra* note 36, at 17.

74. *Definition and Theory*, *supra* note 1, at 34.

75. *Id.*

76. THE PHILOSOPHICAL LEXICON 3 (D. Dennett & K. Lambert eds. 1978).

77. Ayer, *Pyrrhonic Victory* (Book Review), 1975 TIMES LITERARY SUPP. 992, 992.

below.

Watch how Davidson does it.⁷⁸ We let 's' name a sentence and 'm' name its meaning. Then we write 's means m'. That is, 'Jones has a right' means _____. Frege would put either 'the True' or 'the False' in the blank. There are two troubles with Frege's approach. First, all sentences could then only mean one of two things. 'Snow is white' means the same thing as 'Grass is green', that is, the True. Second, the meanings are themselves obscure. Instead we should write 'Jones has a right' means that Jones has a right'. We may parse this so that 'that Jones has a right' replaces 'm'. That Jones has a right is a proposition. This eliminates the first trouble, because there being many propositions, sentences can mean many things. What is causing the trouble now is that the form 's means m' requires us to speak in terms of a relation between a sentence and a proposition, most likely obscure. We could write 's means that p', p being the sentence named. Thus, 'Jones has a right' means that Jones has a right'. Referring is not a trouble if we thus divide the sentence between 'that' and 'Jones', not between 'means' and 'that', because by doing this we dispose of 'that Jones has a right', the linguistic entity that seems to refer. The expression 'means that' is obscure. We keep the structure 's _____ p', but replace 'means that' by 'is *T* if and only if'. Thus, we obtain 'Jones has a right' is *T* if and only if Jones has a right'.

According to Davidson, the sentences like 'Jones has a right' is *T* if and only if Jones has a right' should be consequences of a theory of meaning. But it does not need to have other consequences. A predicate is a linguistic function taking lists of names or descriptions as arguments, returning sentences as values. The predicate 'is feminine' taken at the argument 'the cow' returns the value 'The cow is feminine'.⁷⁹ Davidson says 'is *T*' (equivalently: '*x* is *T*'; '_____ is *T*'⁸⁰) is the truth predicate. Thus, truth is the property that 'The cow is feminine' has if and only if the cow is feminine. If we know the truth conditions of a sentence we know all there is to know about its meaning. For Davidson, a theory of meaning is a theory of truth.

The condition we want to put on the truth predicate is that which

78. Davidson, *Truth and Meaning*, in *PHILOSOPHICAL LOGIC* 1 (J. Davis, D. Hockney & W. Wilson eds. 1969).

79. I A. ANDERSON & N. BELNAP, *ENTAILMENT: THE LOGIC OF RELEVANCE AND NECESSITY* 473-92 (1975). About the femininity of cows, consider Mydans, *Promoters Are Bullish Over Cows*, N.Y. Times, Nov. 23, 1983, at B3, col. 1 (morning ed.).

80. I D. ARMSTRONG, *UNIVERSALS AND SCIENTIFIC REALISM: NOMINALISM AND REALISM* 3 (1978).

Tarski imposed on the symbol '*Tr*'. Tarski directed:

A formally correct definition of the symbol '*Tr*' . . . will be called an *adequate definition of truth* if it has the following consequences:

(α) all sentences which are obtained from the expression ' $x \in Tr$ if and only if p ' by substituting for the symbol ' x ' a structural-descriptive name of any sentence of the language in question and for the symbol ' p ' the expression which forms the translation of this sentence into the metalanguage . . . ⁸¹

Read ' ϵTr ' as 'is true' or as 'belongs to the class of true sentences'. A metalanguage is what we talk in about an object language. 'Jones has a cow' is true' is a metalinguistic sentence containing an object language sentence. We have been getting structural-descriptive names by putting pieces of language in single quotation marks. Tarski's condition looks trivial but is not because theories of truth must generate the infinitely many biconditionals required by it.

Davidson puts the same condition on a theory of meaning that Tarski puts on a theory of truth. We imagine that Hart agrees with Davidson that the idea of meaning is obscure, nevertheless the idea of truth is sufficiently clear to interpret meaning in terms of it.

IV

In parts I-III, I have chronicled good things Hart does. Basically, there are two good things. First, Hart investigates sentences, not isolated words, to obtain meanings (approved qualifiedly by Bentham, Quine, and Frege). Second, Hart interprets meaning by truth (approved by Davidson). But doing these things together generates difficulty for Hart.

We obtain a legal language by augmenting ordinary English with technical legal terms like 'right'. If we break compounds like 'thirty-seven' into their components, the language has only finitely many words; the Oxford English Dictionary is big, but it ends. Nevertheless, the number of sentences is not finite. An illustration by Hart suggests this infinite sequence of sentences: 'Jones has a right'; 'The friend of Jones has a right'; 'The friend of the friend of Jones has a right'; and so on.

A legal language or other natural language is learnable. We may

81. A. TARSKI, *The Concept of Truth in Formalized Languages*, in LOGIC, SEMANTICS, METAMATHEMATICS 187-88 (J. Woodger trans. 2d ed. 1969) (emphasis altered).

look up words we do not know. Because there are only finitely many words, we can look all or at least any of them up. We cannot look up sentences. Ordinarily, we do not confront a sentence more than once. But usually we know what it means if we know what its words mean. Most of the sentences in this paper are intelligible, but few besides those quoted have been produced before.

Frege also recognized this phenomenon. He said that "even a thought grasped by a human being for the very first time can be put into a form of words which will be understood by someone to whom the thought is entirely new."⁸² One for whom this thought is new understands it because he or she is "able to distinguish parts in the thought corresponding to the parts of a sentence."⁸³ Consequently "construction of the sentence out of parts of a sentence corresponds to the construction of a thought out of parts of a thought."⁸⁴

A theory of meaning for a learnable language ought to manifest its finite or recursive character. Otherwise, the theory is disassociated from practice. The following theories do not manifest this character: (1) Quotation marks make structureless names of pieces of language from these pieces. For example, 'Jones has a right' is a structureless name of 'Jones has a right'. Therefore quotations are semantical primitives. (2) Sentences like 'Smith believes that Jones has a right' consist of a name and a predicate: 'Smith' and 'x believes that Jones has a right' respectively. The names *and* the predicates are semantically primitive. Theories (1) and (2) are not adequate because they provide infinitely many semantical primitives. There are infinitely many pieces of language to be quoted and things to be believed.⁸⁵

The difficulty then is that *Definition and Theory* does not let legal sentences have parts. For Hart, sentences containing legal terms are semantically primitive. 'Jones has a right' means something, 'Smith has a right' means something else, unrelated for all we can tell. Infinitely many sentences contain legal terms ('Jones has a right', 'The friend of Jones has a right', 'The friend of the friend of Jones has a right', etc.); therefore a legal language has infinitely many semantical primitives and is unlearnable. Or at least the theory of it does not display how we may learn it and thus this theory is inadequate by Davidson's test. It

82. Frege, *Compound Thoughts*, 72 MIND 1, 1 (1963).

83. *Id.*

84. G. FREGE, *Logic in Mathematics*, in POSTHUMOUS WRITINGS, *supra* note 37, at 225.

85. Davidson, *Theories of Meaning and Learnable Languages*, in LOGIC, METHODOLOGY AND PHILOSOPHY OF SCIENCE 383 (Y. Bar-Hillel ed. 1965).

"actually postulates each sentence," as Kripke complains about somebody else's theory; such a theory is "precisely the *bête noire* of the Davidsonian approach."⁸⁶

Definition and Theory gets out of this difficulty by not having been talking about sentences all along. To generate the sentences his adequacy condition requires, Tarski talked of "satisfaction of a given sentential function by given objects."⁸⁷ Read 'predicate' for 'sentential function'. Objects are things like cows. Satisfaction is the relation a cow (Rose) bears to the predicate 'is feminine' if Rose is feminine. But we will let Tarski tell it. Tarski's "simplest and clearest case" of satisfaction is that where "the given sentential function contains only *one* free variable";⁸⁸ in this case we can "significantly say of every single object that it does or does not satisfy the given function."⁸⁹ Tarski continued

In order to explain the sense of this phrase we consider the following scheme:

for all a , a satisfies the sentential function x if and only if
 p
 and substitute in this scheme for ' p ' the given sentential function (after first replacing the free variable occurring in it by ' a ') and for ' x ' some individual name of this function.⁹⁰

Substituting as Tarski requested, we obtain, 'For all a , a satisfies the sentential function ' x is feminine' if and only if a is feminine'. Tarski illustrates:

Within colloquial language, we can in this way obtain, for example, the following formulation:

for every a , we have a satisfies the sentential function ' x is white' if and only if a is white

(and from this conclude, in particular, that snow satisfies the function ' x is white').⁹¹

86. Kripke, *Is There a Problem About Substitutional Quantification?*, in *TRUTH AND MEANING* 340 (G. Evans & J. McDowell eds. 1976).

87. A. TARSKI, *supra* note 81, at 189.

88. *Id.*

89. *Id.* at 190 (footnotes omitted).

90. *Id.* (emphasis altered).

91. *Id.* (emphasis altered).

Return now to Hart, climaxing and concluding his talk of 'right'. Hart says:

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)⁹²

It is difficult to read conditions (a)-(c) attentively, so disregard them for now. What matters is that Hart does exactly what Tarski does. Hart *talks* as if sentences like 'Jones has a right' are semantical primitives. Then it should be only these he may assign meanings to individually. But 'X has a right', to which Hart assigns a meaning when he gets down to business, is not a sentence but a predicate—the kind of thing Tarski called a 'sentential function'. 'X' merely identifies where in the predicate we may insert a name or other term to get a sentence: 'x' or '___' (just a space) do equally well. Or we may just write the predicate without indicating where we want a name. Frege told us in *Translations*, talking about predicates of numbers, that 'x' "only serves to keep places open for a numerical symbol to be put in and complete the expression; . . . it enables us to recognize the . . . need for completion" ⁹³ Because Hart is attributing structure to sentences, he is not taking the sentences as semantical primitives.

What are Hart's semantical primitives? Names ('Jones' etc.), of course, understood to include definite descriptions ('the cow'), and

92. *Definition and Theory*, *supra* note 1, at 35.

93. G. FREGE, *Translation of Parts of Frege's Grundgesetze der Arithmetik*, in 1980 TRANSLATIONS, *supra* note 38, at 132. See generally M. DUMMETT, FREGE: PHILOSOPHY OF LANGUAGE 8-33 (1973).

"For Frege a function is something incomplete, 'unsaturated.' When it is written $f(x)$, x is something extraneous that merely serves to indicate the kind of supplementation that is needed; we might just as well write $f(_)$." van Heijenoort, *Introduction to Frege, Letter to Russell*, in FROM FREGE TO GÖDEL, *supra* note 42, at 126.

predicates (' x has a right'), as we have just found out. We may generate an infinite sequence of sentences 'Jones has a right', . . . , 'The friend of . . . the friend of Jones has a right', . . . , with

name: Jones

predicate: x has a right

operator: the friend of x

An operator is a linguistic function taking lists of terms as arguments and giving back terms as values.⁹⁴ We reiterate the operator.

V

The scholarly contribution of *Definition and Theory* resides in how Hart parses 'Jones has a/the right'. We write 'Jones has a cow' perspicuously,

(1) $\exists x$ (x is a cow & Jones has x).

Read (1) as 'There is an x such that x is a cow and Jones has x ', or 'There is something that is a cow and Jones has it'.

(2) $\exists x$ (x is a person & x has Rose).

Read (2) as 'There is an x such that x is a person and x has Rose', or 'Somebody has Rose'. ' $\exists x$ ' is a quantifier binding the individual variable ' x '. From 'Jones has (the cow) Rose' we may infer both (1) and (2). The predicate of 'Jones has a cow' is a two-place predicate: '___ has ___'. It is relating a person to a thing.

The semantic realist sees the idea underlying *Definition and Theory* as that we cannot write 'Jones has a right' in a form paralleling (1). From 'Jones has *the* right', for example, the right of free exercise, we can infer *only*

(3) $\exists x$ (x is a person & x has a right)

that is, *not*

(4) $\exists x$ (x is a right & Jones has x).

Thus, the predicate of 'Jones has the right' is a one-place predicate: '___ has the right'.

That 'Jones has a right' seems to share the predicate '___ has ___' with 'Jones has a cow' results from a grammatical misunderstanding. We must take the words of '___ has a right' together. Also 'the right'

94. See 1 A. ANDERSON & N. BELNAP, *supra* note 79, at 473-92.

in 'Jones has the right' is merely a syncategorematic fragment of the predicate '___ has the right'. In this it is no different from the letters 'in' in 'bovine'; the letters do not themselves constitute a word but are only part of one. A legal language, including Hart's, has infinitely many sentences but is learnable because it has only finitely many predicates. We do things like make contracts and commit torts, but there are not many kinds of ostensible legal things.

Talk of specific legal things is probably adverbial. Adverbs might as well be functions from predicates to predicates. Paradigmatically: '___ quickly', in 'Spot runs quickly', is an adverb taking the predicate '___ runs' into the predicate '___ runs quickly'. We get a sentence by putting 'Spot' in the blank. Inspect Justice Douglas's discovery in *Griswold v. Connecticut*, which I, with some license, will simplify to 'Jones has the right that Jones is let alone'.⁹⁵ The adverb '___ that Jones is let alone' takes the predicate '___ has the right' into '___ has the right that Jones is let alone'. We get a sentence from this predicate by adding the argument 'Jones'.

We may also make this point by talking directly about ontological commitment: what we take there to be by speaking as we do. Quine tells us that "a given theory or form of discourse . . . is committed to those and only those entities to which the bound variables of the theory must be capable of referring in order that the affirmations made in the theory be true."⁹⁶ Quine also says less ponderously that "[t]o be assumed as an entity is, purely and simply, to be reckoned as the value of a variable."⁹⁷ We have been using ' $\exists x$ ' to bind variables. For instance ' $\exists x$ (x is a person)' commits us to persons. A legal theory will ordinarily contain something equivalent to 'Jones has a right'. The idea of *Definition and Theory* is that because we cannot infer ' $\exists x$ (x is a right and Jones has x)' from 'Jones has a right', we are not ontologically committed to rights.

Hart's move is ordinary in nonlegal philosophy. Frege made it by not reading 'The number of men who . . . is five' as predicating the relation of identity of two numbers.⁹⁸ Using ' Φ ' as a place-holder for a one-place predicate and 'R' as a place-holder for a relation word, Sellars, explaining mental predicates, similarly says "'Jones has an im-

95. 381 U.S. 479, 485-86 (1965).

96. W. QUINE, *On What There Is*, in FROM A LOGICAL POINT OF VIEW, *supra* note 47, at 13-14.

97. *Id.* at 13.

98. M. RESNIK, *supra* note 67, at 193.

pression' has the form ' Φ Jones' *rather than* 'Jones R x'," exactly as "'Jones wore a smile' has the form ' Φ Jones' *rather than* 'Jones R x'." ⁹⁹ Evidently "persons who smile, but not their smiles," are "particulars." ¹⁰⁰

Predicates, if they refer, refer to properties. We may understand properties most simply as sets. They are at least that. If ' x has a right' refers, it refers to the property of having a right. Therefore, it refers to the set of entities that have rights—the set of persons. If trees have rights they are persons. A first-order language contains only variables ranging over individuals like cows and persons. A second-order language contains variables ranging over properties as well as individuals. Properties, even as sets, are problematic and we want to avoid committing ourselves to them. 'Jones has a right' as part of a first-order language does not commit us to the property of having a right. Just as we cannot infer ' $\exists(x$ is a right and 'Jones' has x)' from 'Jones has a right', we can not infer

(5) $\exists F$ (Jones F)

from it. Read (5) as 'There is a property Jones has'. Here ' F ' is a predicate variable.

Recall from Part II that Bentham defined a man's right to (property right in) a thing *per genus et differentiam* as a relation between the man and the thing. Bentham was talking in the material mode (ostensibly about extralinguistic things). But saying something is a relation is equivalent to saying in the formal mode (about language) that the piece of language that seems to name the relation is a predicate with at least two places. Bentham was characterizing the predicate of a sentence like 'Jones has a right to Rose' not as a three-place predicate, ' has to ', but as a two-place predicate, ' has a right to '. Returning to the material mode we should read Bentham to have said that the owning relation is between a person and a thing not among a person and two things.

'Jones has a right' commits us only to persons, not to rights, or havings of rights, because variables do not range over rights, or, in a first-order language, havings. We must begin somewhere; and ordinary language commits us, in Quine's sense, to some things. But if we begin with Sellars's manifest image mentioned in Part I—which Sellars con-

99. Sellars, *Rejoinder*, in *INTENTIONALITY, MINDS, AND PERCEPTION: DISCUSSIONS ON CONTEMPORARY PHILOSOPHY* 286 (H. Castañeda ed. 1967).

100. *Id.* at 288.

siders a sort of "groundfloor observation language"¹⁰¹—we have already committed ourselves to persons. As Hart interprets legal language it does not commit us to entities other than the entities ordinary language commits us to.

VI

Hart said, "A statement of the form 'X has a right' is true if the following conditions are satisfied"¹⁰² Truth figures inessentially in Hart's theory. We start to see this by attending to oddities in his coming to deploy '___ is true'. Hart disparages Bentham's program of paraphrasing expressions like '___ has a right'. Then a page later he sets out his own truth conditions. The expository pace of *Definition and Theory* elsewhere is not this fast.

I will inspect Hart's shift from paraphrasing to giving truth conditions. Its *terminus a quo* is in Bentham's teaching and is suspect. Hart attributes the insight that we ought to explain 'means' by 'true' to Bentham. He quotes just two passages by Bentham representative of passages "not paraphrases" that instead "specify some of the conditions necessary for the truth of a sentence of the form 'You have a right'."¹⁰³ Bentham said: "What you have a right to have me made do, is that which I am liable according to law upon a requisition made on your behalf to be punished for not doing."¹⁰⁴ He also said: "To know how to expound a right carry your eye to the act which in the circumstances in question would be a violation of that right; the law creates the right by forbidding that act."¹⁰⁵

The quoted passages are (contain, specify) paraphrases. They go approximately 'The law will punish you if you do not do ___' paraphrases 'I have the right to make you do ___'. The form is 'p' paraphrases 'q'. But it is obscured because Bentham used the material mode not the formal mode. Going between the two modes is going, for instance, from 'Cows are things' to 'cow' is a common noun'. As 'true' does not appear in the quoted passages, they give truth conditions implicitly if at all. We recognize that paraphrasing is defining (away). If paraphrasing is successful, the definiens ('The law will punish . . .') and the definiendum ('I have a right . . .') have the same truth condi-

101. Sellars, *Reply to Alan Donagan*, 27 *PHIL. STUD.* 149, 181 (1975).

102. *Definition and Theory*, *supra* note 1, at 35.

103. *Id.* at 34.

104. *Id.*

105. *Id.*

tions. 'p' paraphrases 'q' if and only if 'p' and 'q' are true and false concurrently. 'Rose has a fine leg' does not adequately paraphrase 'Rose is feminine' because the first may be true while the second is false; e.g., if Rose has a fine leg but a bull-like countenance. Then 'p' is true if and only if 'q' is true' says roughly what 'q' paraphrases 'p' says. The redundancy theory of truth, to the effect that saying something is true is the same thing as saying it, licenses replacing 'q' is true' to the right of 'if and only if' by 'q' to get 'p' is true if and only if q'.¹⁰⁶ Bentham's sentence:

. . . paraphrases 'I have the right to make you do ____'

and Hart's sentence:

'I have the right to make you do ____' is true if and only if . . .

say pretty much or exactly the same thing. Paraphrasing and giving truth conditions are alike so the termini are close together.

The *terminus ad quem* of the shift from paraphrasing to giving truth and conditions is also unsettling. When I quoted Hart's truth conditions I omitted what Hart puts after them but signalled he puts *something*. Thus we quoted, "(1) A statement of the form 'X has a right' is true" etc.; however, we stopped with "(2) . . ." leaving the analysis uncompleted. The omitted part gives us an idea of what Hart is doing now: ". . . 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."¹⁰⁷ This condition is not obviously about truth.

Frege, in section three of *Begriffsschrift*, said that what he called the 'conceptual content of judgments' is what 'the Greeks defeated the Persians at Plataea' and 'the Persians were defeated by the Greeks at Plataea' share.¹⁰⁸ Substitute 'meaning' for 'conceptual content' and 'asserted sentence' for 'judgment'. Frege said judgments have the same conceptual contents (asserted sentences have the same meanings) if and only if "all inferences that can be drawn from the first judgment when combined with certain other ones can always also be drawn from the second when combined with the same other judgments."¹⁰⁹ We may restate this, 'Sentences mean the same thing if and only if they license

106. F. RAMSEY, *Facts and Propositions*, in *FOUNDATIONS: ESSAYS IN PHILOSOPHY, LOGIC, MATHEMATICS AND ECONOMICS* 44-45 (D. Mellor ed. 1978).

107. *Definition and Theory*, *supra* note 1, at 35.

108. G. FREGE, *Begriffsschrift: a formalized Language of pure Thought modelled upon the Language of Arithmetic*, in *TRANSLATIONS*, *supra* note 35, at 3.

109. *Id.* at 2-3. See Brandom, *Asserting*, 17 *NOÛS* 637 (1983).

the same inferences'. Conceptual contents mattered to Frege. The *Begriffsschrift* says that in its "formalized language . . . only that part of judgments which affects the *possible inferences* is taken into consideration."¹¹⁰ Therefore what "is needed for a valid inference is fully expressed; what is not needed is for the most part not indicated."¹¹¹

It may not explain much to say a sentence is true. At least it is not clear what its being true comes to. To explain linguistic behavior we might, in place of truth, speak of inference among sentences and of assertibility. The idea is that truth is just "a compliment paid to sentences that seem to be paying their way"¹¹² and so "not a profitable topic."¹¹³ *Definition and Theory* sometimes interprets legal sentences by inferences to and from them. Inferences *to*: the "answer" to questions like 'Why does Jones have a right?' "could only consist in two things"—a "statement of some rule or rules of law" or "a statement that these facts were here the case."¹¹⁴ Inferences *from*: 'Jones has a right' is "an expression used to appeal to rules, to make claims, or give decisions under them."¹¹⁵

We might then rewrite the passage in which Hart gives the truth conditions¹¹⁶ as:

I elucidate 'a (legal) right': (1) We may assert, e.g., 'Jones has a right' if the following conditions are satisfied:

(a) We often use sentences containing legal words in an orderly way.

(b) We have said, 'Smith has an obligation'.

(c) Jones is authorized to say, 'Smith must fulfill the obligation'. (2) From 'Jones has a right' and certain other sentences we are licensed to infer 'Smith is to pay Jones \$10', etc.

We have substituted talk of assertibility for talk of truth. (1) and (2) authorize inferences to and from the sentences with 'a right'. Regarding (1) we have recast (a)-(c) to address language not aspects of the nonlinguistic world. Consequently, 'true' has dropped out of *Definition and Theory*. Hart's truth conditions give inferential relations among

110. FREGE, *supra* note 108, at 3.

111. *Id.*

112. R. RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980) xxv (1982).

113. *Id.* at xliii.

114. *Definition and Theory*, *supra* note 1, at 28.

115. *Id.* at 27.

116. See *supra* text accompanying note 92.

sentences. Look at law as a set of sentences together with relations among them; or as a set of rules for (game about) constructing and manipulating sentences.

Definition and Theory denies 'the right' refers but is solicitous of reference in saying why it does not. Implicitly rejected explanations include 'Nothing refers' and 'the right' is grammatically a referring phrase but because legal objects do not exist it lacks a referent'. But *Definition and Theory* says only that 'the right' is part of the predicate '___ has the right'; therefore, it is not independently a piece of language at all; therefore, it is not a referring phrase.

Hart's analogues of the legal process are cricket matches and card games. But 'Jones is out' and 'Jones has taken a trick' differ from 'Jones has a right' because they are less embedded in language. We say the former sentences after having watched a ball being caught or cards displayed. If we say them authoritatively, Jones retires from batting or gets points. 'Jones has a right' and its less schematic counterparts are used technically by or before a judge. They come between other sayings like 'Smith said to Jones, 'I promise . . .'' or 'Smith is to pay Jones ten dollars'. The judge, even the advocate (barrister), is not acquainted with Jones, just with documents. She speaks referring to the record in *Jones v. Smith*. It is less evident at law than at cricket or cards that we ought to parse 'Jones has a right' into the predicate '___ has a right' and the referring expression 'Jones' so the latter refers to Jones.

At the beginning of the legal process, where we enter legal language, events outside law make Jones's attorney begin actions, which we may describe as inscribing 'Jones' on pieces of paper. At the other end of the legal process, where we exit from legal language, papers inscribed 'Jones' or events tied to them make Smith do something. The intermediate moves are intralinguistic. We infer between inscriptions. Again, Frege told us, in situations "[w]here inferences are to be drawn, . . . it is essential that the same expression should occur in two propositions and should have exactly the same meaning in both cases."¹¹⁷

117. See *supra* note 67.

For example, we would not be inferring correctly from

Jones said, 'I offer to sell Rose for \$10'

and

Smith said, 'I accept'

to

Jones and Smith have contracted

unless the tokens 'Jones' and 'Smith' in all the sentences referred to Jones and Smith respectively.

But this analysis is too strong. We do not need to satisfy '___ and ___ refer to ___'. In other words we do not need to show that two pieces of language refer to a particular extralinguistic thing. We need only satisfy '___ and ___ corefer'. Coreference relates one word to another word; it does not relate a word to the world. It holds *only* among pieces of language. It is syntactical just as a case name or a docket number put on documents to index them is syntactical.

Legal language interacts causally with other things. We may use expressions such as 'Jones' refers to Jones' to explain this causal interaction. But maybe we do not need to appeal to reference; even if it is best that we do so, 'refers' might still be intralinguistic.¹¹⁸

By explaining 'Jones has a right' by having 'Jones' refer to Jones we presuppose there are persons analytically prior or external to the law for 'Jones' to refer to. Recall that Sellars said originally a tree was a way of being a person.¹¹⁹ Holmes at the beginning of *The Common Law* also treated trees as persons. He imagined a tree that has fallen upon (another) person and is retributively "chopped to pieces for the gratification of a real or simulated passion";¹²⁰ and he said that without "personification" in these circumstances our "anger towards" it or other "lifeless things would have been transitory, at most."¹²¹ Commonly we constitute a person by its legal relations—"a person simply is any being having legal rights and duties."¹²² Consequently we cannot explain 'Jones has a right' by positing 'Jones' refers to Jones. We would

118. Brandom, *Reference Explained Away: Anaphoric Reference and Indirect Description* 81 J. PHIL. 469 (1984).

119. See *supra* note 33 and accompanying text.

120. O.W. HOLMES, *THE COMMON LAW* 12-13 (M. Howe ed. 1963).

121. *Id.* at 12.

122. Danto, *Persons*, in 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 110 (P. Edwards ed. 1967).

be assuming what we are trying to explain.

CONCLUSION

(*Hart as semantic realist*) We have taken Hart to tell us to talk not about the reference of legal words, but rather about the truth conditions of legal sentences. We read him as intending to take predicates—not sentences—as semantical primitives to obtain these truth conditions. Legal theory analyzes '___ has a right' instead of 'a right'. (*Hart as neopragmatist*) We interpret Hart most productively if we disregard talk of truth conditions and replace talk of reference by talk of coreference. *Definition and Theory* interpreted this way is about inferential relations among legal sentences. It is striking that the text bears these readings.

