Meaning and reference: a linguistic approach to general terms and definite descriptions in legal interpretation

Ross Charnock - University of Paris

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1. INTRODUCTION

It is often assumed, following the traditional, “common sense” view that words have fixed, literal meanings, which can be defined independently of the context of use. Judges tend to make similar assumptions. Although they aim to give effect to the intention of the legislature, the contractor or the testator, they have good reasons to avoid pragmatic interpretations based on a supposed subjective intention. Such an approach would lead to case-by-case interpretation, in which case, the judges could no longer be said to be following a rule at all. They claim instead, following the so-called literal rule, to be collecting the intention from the words used. Unfortunately, this cannot be possible. It is a basic principle of linguistic pragmatics that, since the context always affects understanding, the communicative intention cannot be identical with the purely semantic sense of the words.

On closer inspection, the idea of a “true and correct” literal meaning turns out to be a layman’s illusion. Not only does it fail to account for subjective, abstract meanings, it does

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1 Ross Charnock is Maître de Conférences in the University of Paris, specialising in the language of the law. Email: <charnock AT dauphine fr>
not even work for substantive terms, referring to individuals or natural kinds. It turns out that even proper names and definite descriptions must be interpreted relative to the speaker’s intention in context.

2. NAMES AND DEFINITE DESCRIPTIONS

If the function of names or definite descriptions was simply to denote the relevant individuals, then expressions which fail to refer, that is those to which no referent corresponds, would have no meaning. Yet it seems obvious that, if ‘Excalibur’ is the name of an object, it should not cease to have meaning if that object is broken into pieces (Wittgenstein, 1953: 40). Further, if the meaning of referential expressions depended on the existence of the relevant individual, then it would not be possible to refer to imaginary, non-existent or fictional characters. Common expressions like ‘Harry Potter’ or ‘the baby we never had’ would have to be classed as meaningless. In that case, statements claiming, uncontroversially, that “Harry Potter does not exist” would then appear as paradoxical (if true, they would be meaningless, and if meaningful, they would be false).

Furthermore, statements of identity, where different names or descriptions relate to the same individual, would be simple tautologies. Thus to say that “Brett MR is Lord Esher” or “William Murray is Lord Mansfield”; would be to say no more than “Brett is Brett”, or “Murray is Murray”. Similarly with definite descriptions, as to enquire whether “Gordon Brown is the present PM”, or indeed whether “Scott is the author of Waverley” (Russell, 1905), would be simply to ask whether ‘Brown’ was Brown or ‘Scott’ was Scott. Frege’s (1892) solution to this problem was to distinguish between meaning and denotation. However, this has the unfortunate effect of presenting the “meaning” as a private, purely mental entity rather than as a public property which could be grasped and communicated by different speakers.

Nor is it possible to understand proper names as standing for an exhaustive set of descriptions, as then the meaning would then vary according to different speakers’ knowledge or interests. This problem was pointed out by Wittgenstein (1953):

“We may say, following Russell: the name ‘Moses’ can be defined by means of various descriptions. For example, as ‘the man who led the Israelites through the wilderness’, ‘the man who lived at that time and place and was then called ‘Moses’. [...] And according as we assume one definition or another the proposition ‘Moses did not exist’ acquires a different sense, and so does every other proposition about Moses.” (Wittgenstein 1953: 79)

Although the question of the meaning of names has long been a subject of philosophical debate, few genuine problems arise in practice either in ordinary conversation or in the interpretation of wills. It is true that in ordinary language, some meanings which may be intuitively grasped may be difficult to define. For example, someone may claim to have known Tony Blair for many years, indeed since before he was ‘Tony Blair’ (that is before acquired his public persona). For obvious reasons, such problems tend to be excluded from legal debate.

In the interpretation of wills, however, proper names are occasionally problematic, for example when testatators are mistaken regarding the names of the objects of their generosity. The existence of the Latin maxim veritas demonstrationis tollit errorem nominis leads us to suppose that such difficulties were not unknown to Roman lawyers. Yet the problems raised are usually restricted to the question of identification, that to that designation rather than denomination.

In Re Smalley (1929), the testator left a gift to “my wife Eliza Ann Smalley”. His

2 Following current conventions in linguistics journals, complete case references are given, like bibliographical
wife's name was in fact Mary Ann. He had left her to live with Eliza Ann Mercer, the widow of a publican. The court, required to discover the intention of the testator, and unwilling to suppose that he had deliberately made a meaningless will, admitted evidence to show that during the latter part of his life, the testator did habitually use the word 'wife' as implying Eliza Ann Mercer. Hanworth MR held that the name was less important than the definite description:

“The word 'Smalley' added to the words ‘Eliza Ann’ meant nothing at all, because it was simply linked with the word 'wife'.” (Re Smalley 1929, per Hanworth MR)

In NSPCC v SNSPCC HL (1915), it was claimed that a Scottish testator who had left £500 to the “National Society for the Prevention of Cruelty to Children”, really meant to leave the money to the equivalent Scottish society. Again, the problem was one of identification rather than meaning. The Scottish court thought the money should remain in Scotland, but the House of Lords decided unanimously that, as the two societies had similar aims, it was unnecessary to create such an unfortunate precedent. The gift therefore went to the London society, the unspoken assumption being that the testator would probably not have objected.

2.1 The presupposition of existence

For Russell (1905), the successful use of names or definite descriptions must depend on the existence of the individual referred to. They are thus said to presuppose the existence of the referent. Where the presupposition fails, the resulting expression fails to refer, and must be seen as meaningless. This was the case in Russell’s famous example sentence “The present King of France is bald”, which could not be said to be either true or false. It is clearly unacceptable as it stands, yet, if it was false, then a logician would expect its negation to be true. However, “the present King of France is not bald” remains equally unacceptable. Russell’s purely logical conclusion, that the sentence is therefore meaningless, now appears as an oversimplification.

On the linguistic level, Strawson (1950) showed that a sentence like “Among the people I met yesterday was the present King of France” could be seen as false, rather than meaningless. More generally, this seems to be the case where the definite description figures in the predicate rather than as the subject of the sentence. Strawson’s solution was to propose a more pragmatic definition of presupposition. On the new view, speakers, and not linguistic expressions, are said to refer; and reference “is something that someone can use an expression to do”. This means that interpretation must depend on the communicative intention in context. Thus, contrary to judicial assumption, meaning depends on contextual intention, and there can be no purely literal understanding.

Problems arise when definite descriptions are wrongly mistakeny used in wills, so that the description fails to refer to the intended individual. Yet, to consider definite descriptions which fail to refer as systematically meaningless rather than false would be to risk creating new difficulties.³

In Wagstaff ChD (1907), for example, a testator left the use of his house to: “My dear wife, D.J. Wagstaff; if she shall so long continue my widow, for her own use and benefit, and upon her decease or second marriage, then over.” However, although he had gone through a marriage ceremony with her in 1884, the lady in question was in fact already married at that time to one A.G. Jalland, who was still living. As she was never truly his wife, she could not

³ Misrepresentation would be hard to prove, for example, if a reference to a “Stradivarius violin of 1738” was considered as referring to nothing at all (experts are aware that the maker had died the previous year). It may also be difficult to secure a conviction for ‘breach of the peace’, if the non existence of the ‘peace’ was accepted as a defence.
be his widow. Strictly speaking therefore, the definite description had no referent, and on the logical view should be considered meaningless. Kekewich J considered this possibility (he may have been reading contemporary philosophy), but preferred to rely on what he called a “secondary” meaning:

“I must find some way out of it. I am not at liberty to say that he meant nothing. If he does use the word ‘widow’ in a secondary sense, my duty is to find out what is the secondary sense.” (Re Wagstaff ChD 1907, per Kekewich J)

Kekewich J’s judgment was later confirmed by Cozens-Hardy MR, who gave more importance to the name than to the (false) description:

“The testator first of all gives certain furniture and effects to 'my dear wife, Dorothy Josephine Wagstaff, for her own absolute use and benefit.' Now there is not a moment's doubt as to who is meant by that. The testator means beyond all doubt, and it has not been disputed, the lady with whom he went through the form of marriage at St. George's, Hanover Square.” (Re Wagstaff ChD 1908, per Cozens-Hardy MR)

2.2 The causal theory

The fact that referential expressions usually function unproblematically suggests that a theory which predicts unavoidable metaphysical difficulties is probably inadequate. Kripke (1972) proposes a more realistic theory, in which the use of proper names is seen as linguistic practice (in the sense of Wittgenstein, 1953), depending ultimately on a kind of original baptism. In this theory, reference depends neither on facts in the real world, nor on individual perceptions, but rather on shared beliefs in the linguistic community. Names are associated with characteristics which are neither necessary, nor analytic. The name will therefore continue to function even where particular beliefs are abandoned.

In extreme cases, according to the causal theory, names may continue to refer to a relevant individual, even where no information is available apart from the name itself. Aldous Huxley pointed out the circularity involved in this approach, with the somewhat paradoxical aphorism: “The author of the Iliad is either Homer or, if not Homer, somebody else of the same name.” Yet in spite of its apparently fragile basis, the causal theory still seems intuitively satisfactory. Everyone understands references to the Biblical character of Jonah, for example, even though nothing supposedly known about him is in fact true. The ‘Dud and Pete’ dialogues provide a more contemporary example, where the two characters discuss the affairs of one “Roger Braintree”, unknown to either of them. Their discussion could not be said to be meaningless, although it was certainly pointless, as it was based on a name found in the telephone directory.

The causal theory thus shows how proper names can unproblematically denote particular individuals even in conditions of imperfect knowledge. However, it is a consequence of the theory that definite descriptions do not function in the same way. Instead, they must take their sense from the description given.

2.3 Rigid reference

Kripke’s causal theory predicts that while proper names refer rigidly to the same individual in all possible worlds, definite descriptions will appear ambiguous in modal contexts.

This distinction may be illustrated as follows. Although 'Gordon Brown' and 'the present Prime Minister' refer to the same individual, the sentences “Gordon Brown could have been English” and “the present PM could have been English” are not synonymous. The former evokes a possible world in which the same individual was born south of the border.
But the latter has a second possible reading. While it may evoke the same possible world in which Gordon Brown was born south of the border, it may also evoke another world in which a different individual, an Englishman, has been elected to the post of Prime Minister. The same is true for sentences like: “The PM could have been a Conservative” (though this last example would have been more plausible with ‘Tony Blair’).

This distinction between proper names and definite descriptions is an obvious exception to the substitution principle stated by Kant, according to which, if two expressions denote the same referent, it should be possible to substitute one for the other in a sentence without changing its the truth value. Similar exceptions are seen with the de dicto / de facto distinction, which appears with verbs of propositional attitude. Few people are omniscient; some may not be aware of the recent change of Prime Minister. It is quite possible for such people to believe that the PM is English, even though they know that Gordon Brown is Scottish. Thus, “My mother believes that the Prime Minister is English” may be true, even though “My mother believes that Gordon Brown is English” would then be false. This distinction is accounted for by philosophers like Quine (1956) in terms of opacity. He gives the example: “Ralph believes that someone is a spy” which has several possible interpretations. Ralph almost certainly believes that there is some (at least one) spy, but he may not agree that some particular person is a spy.

It is sometimes tempting to apply the idea of rigid reference to the analysis of legal terms, in order to define the “true and correct” meaning of concepts like 'cruelty' in the context of “cruel and unusual punishments” (Stavropoulos 1996: 2). Unfortunately, such attempts must fail, if only because 'cruelty' is an abstract expression, rather than a substantive term, and cannot be said to refer to anything in the external world.

3. THE AMBIGUITY OF DEFINITE DESCRIPTIONS

Donnellan (1966) showed that definite descriptions are also ambiguous between their referential and attributive uses. This means that they may still refer to particular individuals, even where no individual corresponds to the given description. His example is: “Smith's murderer is insane”.

In referring to ‘Smith's murderer’, the speaker may have intended to refer to Jones, perhaps because Jones has been arrested and charged. Of course, as Jones has not yet been found guilty, he should not technically be considered a murderer. But in ordinary conversation, those who are aware of the legal developments will probably grasp the speaker’s communicative intention, even if they do not agree that Jones is likely to be found guilty. Indeed, as Donnellan points out, even if we later discover that Smith committed suicide, and that no murder has in fact been committed, the speaker may still be clearly understood as having intended to refer to Jones. Thus:

“Using the definite description referentially, the speaker may have said something true even though the description correctly applies to nothing.” (Donnellan 1966: 374)

This is the referential use. In this sense: “there is a right thing to be picked out by the audience and its being the right thing is not simply a function of its fitting the description” (Donnellan 1966: 374).

However, if the speaker has no idea who the murderer is, then, although he uses the same expression, he cannot be understood as referring to anyone in particular. The expression no longer denotes Jones, but is intended to apply to whoever turns out to fulfil the description. This is the attributive use.
It should be noted that the correct interpretation of the definite description does not depend on the literal meaning of the words. It can only be discovered by pragmatic interpretation in context. Donnellan himself points out that the communicative intention cannot be discovered by the application of any linguistic rule:

“It does not seem possible to say categorically of a definite description in a particular sentence that it is a referring expression [...]. In general, whether or not a definite description is used referentially or attributively is a function of the speaker's intentions in a particular case. [...] It does not appear plausible to account for this, either, as an ambiguity in the sentence (neither syntactic nor semantic - perhaps pragmatically).” (Donnellan 1966: 373)

The need to take account of the speaker’s intention in interpreting definite descriptions is in direct contradiction with the judicial insistence on the literal rule.

3.1 Referential and attributive interpretations in wills

It would no doubt be difficult to draft a will allowing someone to inherit on the basis that he was a murderer, especially if the supposed victim had in fact committed suicide. However, in less extreme cases, the referential / attributive distinction may still be a source of ambiguity in wills.

In Re Whorwood (1887), a valuable silver cup was left to Lord Sherborne:

“To Lord Sherborne and his heirs my ‘Oliver Cromwell’ cup presented to our common ancestor, Dame Ursula Whorwood, for an heirloom.” (Re Whorwood, 1887)

Lord Shelborne died, to the knowledge of the testator, after the will was made, but before the last codicil was added to it. Yet no emendation was made. The linguistic problem arose because the eldest son of Lord Shelborne had automatically acceded to his father’s title. The court therefore had to decide whether the new Lord Shelborne should inherit. Internal evidence suggested that the bequest was probably intended attributively, that is to whoever fulfilled the given description at the appropriate time. References to all the other beneficiaries included the first name. It was also explicitly stated that the cup was intended as an heirloom. Yet the court refused the attributive interpretation, insisting that the bequest must have been made referentially. The reasoning, such as it is, was given as follows:

“At the time the will was made there was no doubt as to who was Lord Sherborne. There was only one person entitled to that appellation. Nobody could have had any hesitation in saying who Lord Sherborne was. No doubt the bequest did contain terms that shewed the testator intended that the cup should continue in the family of Lord Sherborne as an heirloom. But that fact does not alter the construction of the gift, which was intended for the then Lord Sherborne.” (Re Whorwood 1887, per North J)

This view was confirmed on appeal, the court again preferring to ignore the probable intention of the testator in order to preserve a supposedly literal interpretation of his words:

“The first question is whether the Court can admit evidence as to the intention of the testator. I am of opinion that it cannot do so. Evidence has been rightly admitted to shew that the testator knew at the time when he made his last codicil that the late Lord Sherborne was dead, but I do not think that fact has any effect at all upon the construction of this clause in the will. [...] If properly advised he would have drawn his will differently.” (Re Whorwood 1887, per Cotton LJ)

This apparently perverse decision may possibly be explained pragmatically. As the testator...
had already left “all his silver and plated articles” to his “faithful friend and servant, Charles Rixon”, it would have been a source of administrative inconvenience if Lord Sherborne had been allowed to take the cup.

In *Re Boddington* (1888), the definite description again failed to refer. The testator made his will on the mistaken assumption that he was married. Although he had gone through the appropriate ceremony and reasonably believed his marriage to be valid, it was later declared void *ab initio* for impotency. This amounts to a retrospective declaration that he had in fact never been married at all. He died some years later, but without altering his will, leaving a gift of £200, and an annuity to be paid to his “said wife, so long as she shall continue my widow and unmarried.” Regarding the gift, Fry J assumed that the definite description was intended referentially, and allowed the lady in question to inherit. But regarding the annuity, the same description had to be interpreted attributively, so that she could not take. His reasoning was as follows:

“It appears to me that the annuity is given to her for a period which can never come into existence. She never was the testator’s widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed.” (*Re Boddington* ChD 1884, *per* Fry J)

This result was confirmed on appeal. Although the testator clearly intended one particular lady to benefit, the description he had given failed to refer to her. According to Lord Selborne:

“De facto she was his wife when the will was made, so there is no ground for imagining that he intended to do more than describe her as at that time she would be naturally and commonly described. But the annuity is given in terms which express a condition that she should continue his widow, and that the annuity should be paid only so long as she continued such, and we cannot depart from those words.” (*Re Boddington* CA 1884, *per* Lord Selborne LC)

Cotton LJ, concurring, also found himself obliged to interpret the same definite description differently when dealing with the gift and the annuity:

“In the case of the gift of the legacy to her qua wife there is only a *falsa demonstratio*; the description of wife being intended merely to point out the individual. That is not so and cannot be so as regards the reference to the widowhood. The reference to widowhood is not made merely to point out the person, but it is to point to that which will fix the duration, the beginning, and the ending of this annuity.” (*Re Boddington* CA 1884, *per* Lord Cotton LJ)

This was the authority followed by Farwell J when he refused to allow a ‘common-law’ wife to inherit in *Re Gale* (1941). Although the couple had lived as man and wife for an extended period, they had never been officially married. As the inheritance was not a gift but a benefit “during widowhood”, Farwell J felt obliged to interpret the description attributively, rather than rely on the name given:

“The benefit given to her in respect of the house in Leeds is ‘the use and enjoyment thereof during her widowhood’ and that the payment of £1. 5s. per week is ‘during her widowhood for a period of twelve years’. It is said that neither of those gifts can take effect because the period named in the will is ‘during her widowhood’; and that that is a period which has never come into existence, she never having been married.” (*Re Gale* ChD 1941, *per* Farwell J)

Similar problems occur with (unsurprising) frequency. In *Re Amyot* (1904), the will referred to “the eldest son of my sister Frances McLean Gibney and his heirs for ever.” The son in question predeceased the testator, and the question arose as to whether the surviving son
should take. Lord MacNaghton assumed that the “ordinary meaning” of the words implied a referential intention, and considered that there was no reason to displace this assumption. He therefore refused to allow the surviving son to inherit:

“There being then a person in existence at the time answering the description in the will, their Lordships are of opinion that that person, though he died afterwards in the testator's lifetime, was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.” (Re Amyot HL 1904, per Lord MacNaghton)

It was incidentally pointed out that the single surviving son would not normally be referred to as “the eldest”, but this overly grammatical approach was abandoned when it became apparent that even the deceased first son should more correctly have been described as “the elder” (of two sons). That objection was said to “savour of hypercriticism”.

In the cases discussed above, we observe a clear judicial preference for the referential interpretation, which appears to be adopted by default in cases of doubt. This was the case in Re Hickman’s Will Trusts (1948), in which the testator left a necklace “to the wife of my grandson”. At the date of the will and indeed at the date of death in 1914, the grandson in question was still unmarried and so no individual answered the description. By the time of the hearing, however, Harman J was driven to describe the proceedings as a “contest between two ladies”, as the grandson had married and divorced Lilian Williams, and was already married again, to Dame Nancy Hickman. The judge again assumed that the testator intended to refer to an individual (on the dubious grounds that the necklace could not have been meant to be “stretched round the collective neck of personal representatives”). However, as he could not indulge in speculation as to the intention of the testatrix “if she had been able to foresee the future”, he followed the principle suggested in Jarman on Wills:

“I think the principle must apply that the first person who answers the description of being the wife of the grandson is the one who takes the jewel and that there is nothing that can divest her of it”. (Re Hickman’s Will Trusts ChD 1948, per Harman J)

In view of this apparently arbitrary rule, it appears difficult to draft a will so as to impose the attributive interpretation. William Thompson managed nevertheless to make the attributive reading explicit. He intended to marry before going to sea as a sub-lieutenant in 1942, and found the time to make a will in favour of his future wife without referring to any potential partner in particular:

“I, William Gilmour Thomson [...] do hereby in the event of my being married bequeath everything that I possess to my wife whoever she may be even if I leave children to be held under this will in trust.” (Thomson’s Trustees v Thomson 1946)

He did marry, but was lost at sea only three months later. There were no problems about identifying his widow. However, the remaining provisions, concerning the valuation of the stocks and shares and the effect of remarriage, turned out to be so complex that the case, first heard in 1946, as Thomson’s Trustees v Thomson, came up again in 1969, under the name Thomson’s Trustees v Keddie.

4. GENERAL TERMS

4 Presumably a Scottish gentleman, to judge from the case references.
Reference to classes and natural kinds is necessarily more complex than reference to specific objects or individuals, not just because there is no direct reference to anything in particular, but because reference is made to concepts rather than to empirical objects. Both lawyers and linguists have found definitions based on fixed criteria to be unsatisfactory. The interpretation of general terms has been considered problematic since at least *Heydon's case* 1584.

In linguistics, related concepts are commonly distinguished through an analysis of semantic features. Thus (in the structuralist tradition) chairs are distinguished from armchairs or stools through the presence or absence of ‘backs’ and ‘arms’, while (in generative linguistics) young fur seals, young knights, university graduates and unmarried men, all referred to as ‘bachelors’, have in common markers like ‘animate’, ‘human’, ‘male’ or ‘lowest degree’ (Katz / Fodor, 1963). Such markers supply an approximate definition of a given word, and play an obvious role in *ejusdem generis* interpretation; however, the relevant common features are rarely sufficient for legal purposes. New problems may also arise in everyday speech (the Pope is both male and unmarried, but even if he was young, he would still not normally be considered a ‘bachelor’.)

In order to reduce reliance on personal intuition, and to ensure objectivity, lawyers tend to give more and more elaborate definitions, multiplying the applicable criteria as necessary, in order to take account of the new problems. Unfortunately, as was pointed out by Waismann (1951), this enterprise is doomed to failure, as no definition can be complete. The reason is that things are associated with an indefinite number of semantic features, some of which have not yet been noticed, while others may never be noticed by anyone.

The examples Waismann proposes are admittedly somewhat extreme. They involve, amongst other things, a new kind of gold which emits radiation, or cats which speak Latin. He admits (1951, 120) that such things do not occur in real life, but answers:

“[...] We can never exclude altogether the possibility of some unforeseen situation arising in which we shall have to modify our definition.” (Waismann 1951: 120)

As it is not possible to envisage all possible situations, or every new discovery, all definitions must remain uncertain and unreliable. Waismann (1951: 123) concludes:

“Every definition stretches into an open horizon. Can you foresee all the facts which would turn a putative fact into a delusion?” (Waismann 1951: 123)

This was his problem of “open texture”.

It is often assumed that the concepts associated with general terms must have at least one feature in common. This claim was made explicitly by Lord Atkin in *Donoghue v Stevenson* (1932):

“And yet the duty which is common to all cases where liability is established must logically be based upon some element common to the cases where it is found to exist.” (*Donoghue v Stevenson* HL 1932, *per* Lord Atkin)

This idea seems initially plausible, yet it is logically mistaken. This point was made by Wittgenstein (1953: 66) in his discussion of family resemblances:

“Consider for example the proceedings that we call ‘games’. I mean board-games, card-games, ball-games, Olympic games, and so on. [...] if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that.” (Wittgenstein, 1953:66)

Given that the number of possible semantic features is indeterminate, no member of a family
can be assumed to possess them all. It follows logically that no feature will necessarily be shared by all the members. Wittgenstein described as “naive” the assumption that different games have in common the disjunction of their common properties. This corresponds well with Lord Macmillan’s prescient warning in *Donoghue* (1932): “the categories of negligence are never closed”.

4.1 Criterial definitions

On the traditional view, the extension of a general term, the set of things to which the term applies, is defined by reference to fixed criteria. However the extension cannot exhaust the meaning of a given expression. If it did, then different expressions used to refer to identical sets would be synonymous. Quine gave the example of a “creature with a heart”, which on the purely referential view would have the same meaning as “creature with a kidney”, simply because the two expressions denote precisely the same set of creatures. Yet, although these two expressions have the same extension, the connotation or intended meaning may still vary. This shows that there must be a fundamental distinction between meaning and reference (also referred to in semantics as extension vs. intension, or in Fregean terms, as *Sinn* vs. *Bedeutung*). On this view, the intension is the subjective element of meaning, a private mental entity rather than a shared, public property.

Putnam (1970) rejects the traditional view, pointing out that criterial definitions falsify the properties of words. He reminds us that members of a natural kind may have abnormal members (‘green lemons’ or ‘three-legged tigers’). He points out (1975: 216-17) that while the extension can only be a fixed set of things, a ‘yes/no’ object, a tree, for example, is in fact a “fuzzy” concept.

It is generally accepted that two terms can have same extension yet differ in intension. Putnam (1975) goes further, establishing that the converse is also true. In a celebrated thought experiment, he supposes a twin earth (Twearth), exactly like Earth except that water is not H₂O but XYZ. A spaceship from Earth will report: “On Twearth the word ‘water’ means XYZ”. Symmetrically, a Twearthian spaceship will report “On Earth, ‘water’ means H₂O”. So far this is just a question of ambiguity, the word having one extension on Earth and another on Twearth. However, if communications with Twearth had taken place in 1750, when there was no knowledge of chemistry on either planet, then no one would have known that the word ‘water’ was ambiguous. Yet the extensions were in fact different, as we now know.

Putnam goes on to point out that even on Earth at the present time, pots and pans may be made out of molybdenum rather than aluminium. To non experts, these two metals appear indistinguishable. For ordinary people using these words, there is therefore no difference in intension or psychological state, yet the extensions of the terms are in fact different. Putnam himself famously claimed not to know the difference between an elm and a beech tree. For him the concepts were identical, even though the words in fact have different extensions. The inevitable conclusion is that meaning must vary according to the knowledge and beliefs of the speaker (or indeed of the legislature). This means that it cannot be fixed by description.

This explains why references to dictionary definitions in legal judgments are rarely dispositive. Take the definition of ‘male’ given by Lord Hope his exclusion of transsexual marriage, in *Bellinger v Bellinger* (2003):

“The definition of “male” in the *New Shorter Oxford English Dictionary* (1993) tells us that its primary meaning when used as an adjective is ‘of, pertaining to, or designating the sex which can

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5 It is similarly unclear what the different torts may have in common, apart from the fact that they are ‘torts’. In the same way, in view of the great variety of possible uses and functions, it is not obvious what feature may be common to different types of contract or trust.
beget offspring.’” *Bellinger v Bellinger* HL 2003, *per* Lord Hope)

If this capacity were made obligatory, not only would it exclude transsexual marriage, it would also invalidate numerous more conventional marriages.

Note also the definition of ‘appropriates’ cited by Lord Lowry (dissenting) in *DPP v Gomez* (1993):

“The primary dictionary meaning is ‘take possession of, or take to oneself, especially without authority’, and that is in my opinion the meaning which the word bears in s1(1) [of the *Theft Act* 1968].” (*DPP v Gomez* HL 1993, *per* Lord Lowry)

This observation failed to dispose of the case, and was actually rejected by the majority.

5. STEREOTYPICAL MEANING

Putnam (1970) rejects definitions of natural kinds which depend on conjunctions of properties. While he agrees that lemons are usually yellow and taste bitter, he refuses to accept that all lemons must necessarily have those properties. On the contrary:

“To say that something is a lemon is to say that it belongs to a natural kind whose normal members have certain properties; but not to say that it necessarily has those properties itself.” (Putnam 1970: 141)

His (1970: 141) conclusion is that: “There are no analytic truths of the form “Every lemon has $p$”.

What we call ‘water’ does not usually correspond to H$_2$O, as the word is more likely to refer to what is found in lakes or what comes out of the tap. It is an empirical (and open) question how we will refer to pencils, if in the future we discover that they are (and have always been) organisms; or to ‘cats’ if they turn out to be robots remotely controlled from Mars. More prosaically, although a cup is distinguished from a beaker through the presence of a handle, we do not know in advance whether we will still call it by that name if its handle falls off (Labov, 1973: 340). In the legal field, we remember that, although ‘Jif’ lemons were plastic, they were still called ‘lemons’.

Putnam (1975) therefore developed a theory of reference to natural kinds in terms of “stereotypes”. The stereotype corresponds to the conventional idea of the kind under consideration (stereotypical tigers are striped, and stereotypical gold is yellow); but the basic features evoked are never analytically necessary. Thus albino tigers need not be considered logically contradictory, and we can accept without incoherence that chemically pure gold is in fact white. Clearly, stereotypes are reasonably accurate for normal purposes; otherwise there would be no communication. Whether they suffice for legal purposes is another question.

5.1 Stereotypes in the law

The concept of stereotypes was originally introduced as an account of everyday communication. However, they also feature in legal argument. In *Mandla v Dowell Lee* (1982), for example, a Sikh claimed that the refusal to admit his son to a private school unless he wore the school uniform (instead of his turban) constituted indirect racial discrimination under the *RRA* 1976. The CA held unanimously that the Sikhs did not constitute a ‘race’ as defined in the OED. It was recognised that the term was problematic. Indeed some scientists
and social anthropologists denied that it had any meaning at all.\(^6\)

In the RRA 1976, an alternative definition is given in terms of ‘ethnic origin’. However, this was also problematic. Denning LJ adopted the definition of ‘ethnic’ given in the Concise Oxford Dictionary, 1934:

“That was the meaning given which I - acquiring my vocabulary in 1934 - have always myself attached to the word ‘ethnic’. It is, to my mind, the correct meaning. It means ‘pertaining to race’.” (\textit{Mandla v Dowell Lee CA 1982, per Denning LJ})

The definitions given in more recent dictionaries were even less helpful. The latest edition of the OED gave: “foreign or exotic; un-American or plain quaint”, while Collins’s English Dictionary 1979 unhelpfully gave “Bosnian ethnic dances” as an illustration. The CA determined that the term should not be taken to apply to any characteristic which could be assumed or rejected as a matter of choice, Oliver LJ pointing out that:

“No one, for instance, in ordinary speech, would describe a member of the Church of England or the Conservative Party as a member of an ethnic group.” (\textit{Mandla v Dowell Lee CA 1982, per Oliver LJ})

Using the criterial approach to definition, they could find no justification for assimilating religion to race, or for including religion as a racial characteristic. However, when the case reached the HL the following year, their Lordships adopted a different, stereotypical theory of meaning. Lord Fraser of Tullybelton proposed a number of “essential conditions” for consideration as a race (a long shared history, a cultural tradition, a common geographical origin, a common language, a common literature, a common religion and being a minority within a larger community). However these (essential) conditions were not considered necessary. They were thought of instead as part of the relevant stereotype. Thus, for the purposes of the Act, a group defined by reference to “enough of these characteristics” should be accepted as a ‘race’. Lord Templeman took a similar approach to the definition of ‘ethnic’:

“[...] a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race [...]. The evidence shows that the Sikhs satisfy these tests. They are more than a religious sect, they are almost a race and almost a nation.” (\textit{Mandla v Dowell Lee HL 1983, per Lord Templeman})

Having adopted this different, “stereotypical” approach to definition, the Lords unanimously reversed the decision given by the CA.

6. PROTOTYPES

An alternative approach to the interpretation of general terms is found in the theory of prototypes (Rosch 1983). In this cognitive model of understanding, the idea of definition is rejected altogether. Instead, the meaning is supplied through examples. The best instances of the type referred to by a given general term are said to be prototypical, while others are classed as peripheral. In this theory, as with stereotypes, there is no true or false test for the use of a word. Rather, examples are evaluated as more or less appropriate.

Prototype theory was originally applied to nouns, especially natural kind words. However, the notion of “core meaning” also extends to verbs. Thus the verb ‘to break’ is thought to be used more prototypically in ‘breaking a cup’ than in ‘a wave breaking.

\(^6\) As Parliament must have meant something, Lord Kerr considered the term should be judicially defined by reference to colour.
Similarly, the core meaning of ‘to run’ is more likely to be associated with running a race than with running a risk (or a company).

This model has proved productive in psycholinguistics, and has led to testable hypotheses concerning language acquisition. It also works well as an account of natural language understanding, to the extent that we have shared ideas of best instances. It is generally agreed, for example, that an oak is a prototypical tree, while (in England and America) a robin may be the best instance of a bird. Similarly, although an ostrich is technically a bird, speakers agree that it is a less central example of that category. Again, for particular purposes, whales may be classed as fish, or tomatoes as vegetables. Clearly, although it may correspond well to ordinary language use, the absence of fixed definition may be a source of problems in legal interpretation.

6.1 Prototypes in legal adjudication

Legal adjudication is often based on prototypical reasoning. A convenient example is found in the American case *Nix v Heddon* (1893). The American Tariff Act 1883 imposed a duty on ‘vegetables’ at “ten per centum ad valorem”. When the authorities attempted to charge the 10% duty on tomatoes, it was pointed out, reasonably enough, that a tomato was not a vegetable but a fruit. At trial, counsel for the plaintiff read in evidence definitions of the words ‘fruit’, ‘vegetables’ and ‘tomato’ from Webster’s Dictionary, and called witnesses to show that the words had no special meaning in trade or commerce, different from those read. The defendant’s counsel then read the definitions of the words ‘pea’, ‘egg plant’, ‘cucumber’, ‘squash’ and ‘pepper’. No other evidence was offered by either party.

Justice Gray cited as authority Justice Bradley’s earlier opinion in *Robertson v Salomon* (1889), according to which, scientific definitions notwithstanding, ‘beans’ should not be classed as seeds but rather, following “common parlance”, as vegetables. Following this precedent Justice Gray considered that tomatoes should also be classed as vegetables:

“In the common language of the people [...] all these are vegetables, which are [...] like potatoes, carrots, parsnips, [...] usually served at dinner with the fish or meats [...], and not, like fruits generally, as dessert.” (*Nix v Heddon* 1893, per Justice Gray)

Thus the ordinary, “prototypical” meaning prevailed.

Note that while stereotypes and prototypes are alternative accounts of the cognitive processes involved in natural language understanding, they are not mutually exclusive. Indeed, dictionary definitions commonly include both criterial definitions and examples. Further, an intuition based on prototypes may be reinforced or justified where necessary by reference to stereotypical features, as is frequently observed in legal argument.

In *United Biscuits v Customs and Excise VAT Tribunal* (1991), the Tribunal had to decide whether ‘Jaffa Cakes’ were cakes or biscuits. If they were in fact cakes, they would be zero rated for VAT. Chocolate-covered biscuits, however, would be classed as confectionary, and would be liable for the normal rate. Clearly Jaffa Cakes are not prototypical cakes; the court therefore had to decide whether they should be nevertheless be accepted as peripheral examples.

Although the case depended mainly on the judge’s intuitive recognition of the relevant kind, legal argument was based not on prototypes, but on stereotypical semantic features. The Customs authorities argued that Jaffa Cakes are the size of biscuits, packaged as biscuits, eaten with fingers like biscuits, and kept on the biscuit shelf at the supermarket. United Biscuits pointed out other unsuspected characteristics, more favourable to their case (a biscuit goes soft when stale, whereas a Jaffa Cake, like a cake, goes hard). The company

managed to convince the judge that the criterion of size was of secondary importance, apparently by offering him a specially prepared 12-inch Jaffa Cake. No doubt HM Customs lacked the facilities to rebut this argument with a 12-inch chocolate-covered biscuit. Potter QC concluded that:

“Jaffa cakes have sufficient characteristics of cakes to qualify as cakes within the meaning of item number 1 in group 1 of the fifth schedule. If it be relevant, I also determine that the Jaffa Cakes are not biscuits.” (United Biscuits v Customs and Excise VAT Tribunal (1991)

6.2 Open texture

Hart (1961), introduced his concept of ‘open texture’ as follows: “There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable (“If anything is a vehicle a motor-car is one”), but there will also be cases where it is not clear whether they apply or not:

“(Does ‘vehicle’ used here include bicycles, airplanes, roller-skates?)” (Hart 1961: 126).

As presented here, almost as an afterthought, in parentheses, the linguistic problem appears to correspond closely to the theory of prototypes. The ‘motor car’ is prototypical, whereas the other examples of what may be classed as ‘vehicles’ are peripheral - or in Hart’s terms, part of the penumbra associated with the concept. Yet Hart presents this problem as that of “open texture”, and refers explicitly in his famous endnotes to Waismann, even though Waismann (1951) theory of was concerned not with vagueness, or peripheral features, but with the indeterminacy of the central concepts themselves. Hart thus appears to have misused the term ‘open texture’. He may have failed to appreciate the philosophical problem of indeterminacy raised by Waismann (he continued to suppose, contrary to Waismann’s theory, that judicial discretion is required only in “hard cases”). Alternatively, he may be considered to have invented the notion of prototypes (under another name) more than 20 years before the concept was introduced into linguistics.

The fact remains that Hart raised new theoretical problems concerning the semantics of general terms in the law, which still have practical consequences. Significantly, the definition of ‘vehicle’ was itself the subject of Garner v Burr (1951). A farmer had strapped wheels to his chicken coop and towed it along the road with his tractor, contrary to a rule in the Road Traffic Act 1930, forbidding the use of vehicles without rubber tyres on the public highway. When prosecuted, his successful defence was that his chicken coop was not a vehicle. On appeal, Goddard CJ accepted that a ‘vehicle’ is primarily a means of conveyance with wheels or runners used for the carriage of persons or goods, and noted that neither persons or goods were being carried in the poultry shed at the relevant time. He nevertheless held that an offence had been committed, and considered that the magistrates:

“[..] ought to have found that this poultry shed was a vehicle within the meaning of s1 of the Road Traffic Act of 1930”. (Garner v Burr KB 1951, per Goddard CJ)

However, the theory of prototypes does not provide any convincing account of chicken coops as vehicles. They cannot realistically be thought of as peripheral examples of the concept, as they go far beyond any periphery - perhaps even beyond the Staines by-pass. Nor, alternatively, can chicken coops be said to correspond to any stereotypical definition of ‘vehicle. Lord Goddard’s understanding depended crucially on the specific purpose in a particular situation. A better explanation is provided by the contextualist theory of “what is

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8 This case is included in Hart’s first reading list for his Oxford law students.
7. CONTEXTUALISM

Meanings are said to be ambiguous where contextual knowledge is required to supply the deictic references and to select the appropriate sense. Where this information is unavailable, possibly because the words must be interpreted in a context which was never envisaged by the speaker, the meaning is pragmatically indeterminate. This is commonly the case in statute construction. The role of the background context in legal interpretation was debated at length in a series of American cases concerning the interpretation of a Federal law providing for severe minimum sentences where a firearm is “used or carried” during the commission of “any felony” related to drugs (18 U.S.C. § 924(c)(1)). In Smith v US (1993), it appeared that, after some negotiation with an undercover police officer, Smith had misguided offered to trade his automatic weapon for four ounces of cocaine. The Supreme Court had to decide whether this constituted ‘use’ of the firearm.

Justice O’Connor admitted that the relevant phrase would normally evoke an image of “use for shooting”. However, having considered the definitions given in a number of dictionaries, including Webster’s (“to convert to one’s service” or “to employ”), she considered that other uses could not be excluded, and therefore accepted “use for barter” as being within the statute. The minimum sentence, in this case thirty years’ imprisonment, was therefore imposed. Justice Scalia, dissenting, protested that: “The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used.” He claimed that: “the plain meaning of the word must be drawn from the context in which it is used.”

Following this decision, an article was published giving the linguistic perspective on the debate (Cunningham/Fillmore, 1995). It was pointed out that the meaning of a word may differ even within a single sentence. Thus in: “I use a gun to protect my house, but I’ve never had to use it”, the first occurrence is related to “use for reassurance” while the other refers to “use as a weapon”. This insight appeared relevant in Bailey v United States (1995), in which the same statute was reinterpreted. This time, the accused was said to have “used” a gun by keeping it in the car boot while transporting marijuana. The USSC now found that the statute did not apply, citing in argument Cunningham/Fillmore’s (1995) invented example (though without referring to the original article).

In a third case, Muscarello v US (1998), the accused was found instead to have “carried” the gun in the glove compartment of his car. In support of this interpretation, Justice Breyer cited a statistical analysis of an electronic newspaper corpus: “Random sampling suggests that many, perhaps more than one third, are sentences used to convey the meaning at issue here.” He noted, reassuringly, that the Bible refers repeatedly to goods being “carried” on chariots or young asses, and considered that other possible meanings were not relevant. In dissent, Justice Ginsberg wondered pointedly what other meanings may have “showed up some two thirds of the time”.

Recurrent difficulties of this kind show that it would be it would be more satisfactory to abandon the assumption that meanings can be fixed by authoritative definition, and to recognise instead the importance of background context in the understanding of communicative intention. On this view, the natural or plain meaning is no longer taken to be equivalent to “literal meaning”. Instead, interpretation is based on “what is said”.

7.1 Literal meaning and “what is said”
Many, if not most theories of linguistic pragmatics are based on a fundamental, binary distinction between an invariant semantic meaning, associated with the sentence-type, and a pragmatic, intentional meaning, associated with the utterance (or sentence-token). Given this distinction, it becomes necessary to show how the communicative intention can be derived from the postulated literal meaning. Grice (1957) famously proposed a set of maxims intended to formalise the principles required for pragmatic interpretation in ordinary conversation. These work well where understanding depends on conversational implicature in specific contexts, for example where an utterance like “It’s warm in here” is taken as a request to open the window, or “I have seen that film” as indicating a preference for a different film. Unfortunately the situation is more difficult where the intended meaning depends not on the particular circumstances but on more general linguistic conventions.

In such cases, it soon becomes clear that the postulated literal meaning cannot be empirically verified. As all utterances are made in specific situations, and as by definition the context must always have an effect on interpretation, the literal sense from which the pragmatic meaning is supposedly derived remains in practice unobservable. Further, the literal sense postulated for abstract theoretical reasons often appears intuitively implausible. Problems appear where speakers mistakenly suppose themselves to be using words literally, whereas in fact they are making a logical mistake. Obvious examples are sentences like “Mary has drunk two glasses of wine”, or “Odette has three children”, which are logically equivalent to “Mary has drunk ‘at least’ two glasses of wine”, or “Odette has ‘at least’ three children”. Contrary to most speakers’ intuitions, the understanding that Mary has consumed ‘only’ two glasses, or that Odette has ‘only’ three children must therefore be explained through the machinery of conversational implicature.9

Similar problems arise where speakers are unaware of possible ambiguities, as with “Mary had a little lamb” (possibly referring to meat-eating, rather than to pet-keeping) or “I have had a lovely evening” (where the speaker may very well be referring to an evening in the distant past, spent in different company). For examples like these, in order to account for the natural understanding, the literalist theory implausibly predicts a form of mental processing which remains persistently unavailable to introspection. In any case, conversational analysis is unlikely to be accepted as a valid technique in statute construction, if only because legislatures are collectivities, and cannot therefore be said to have any specific intention waiting to be discovered.

Travis (1989) proposes a more realistic account, which shows how basic meanings and even truth-values vary according to context. To take just one of his many examples, a simple affirmative sentence including the natural kind term ‘milk’ may appear true or false on different sayings, according to purpose, even in similar situations where the term is used to refer to the same natural kind. Thus, “There is milk in the fridge” will be considered true by someone about to prepare breakfast, if the fridge contains a carton of milk, but false if there is just a puddle of milk on the shelf. However, for someone checking on whether her husband has cleaned the kitchen properly, the opposite would be the case. Yet the milk referred to in both cases is the same natural kind. Neither interpretation could be derived from a putative literal meaning, which would involve something like a fridge full of (wall-to-wall) milk.

In the same way, a sentence like “The water’s blue today” would be true for someone admiring the view of a lake in midsummer; yet the same sentence, spoken on the same day, and referring to the water in the very same lake, may be evaluated differently by someone investigating pollution levels. Again, a literal interpretation would be rejected as self-contradictory, for it is well known that water is not in fact blue, but colourless. In this

9 Policemen commonly make this mistake, when they persist in counting as false a statement like :”I have drunk one glass of wine”, made by a driver who has drunk a whole bottle. Yet it must be a fortiori true that anyone who has drunk a bottle must have drunk (at least) one glass. Similar considerations are often raised in deciding questions of perjury.
contextualist model, the meaning of ‘what is said’ depends on the domain of discourse. This observation brings into question the basic binary distinction between sentence and utterance, and between semantic and pragmatic meanings.

The contextualist account of natural understanding also brings into question the traditional judicial assumptions regarding literal interpretation. Indeed, on this view there is no purely literal meaning, even on an abstract, purely theoretical level. The discourse context does not merely provide a basis for disambiguation, but actually establishes the sense. This does not of course exclude recourse to conversational implicature in particular circumstances, as a specific pragmatic understanding may unproblematically be derived from the general semantic sense. Thus one sense of “there is milk in the fridge” may implicate an invitation to prepare cornflakes, while the other may carry a suggestion that the fridge should be cleaned again. In the latter example, regarding the observation that the water in the lake is blue, one understanding may implicate a desire to go swimming, while the other may suggest an interdiction.

In spite of these objections, the contextualist hypothesis does not necessarily imply the rejection of the judicial model. Indeed, although English judges often claim to be basing their interpretation on the ‘literal’ meaning of the words, rather than making hypotheses concerning legislative intention, they nevertheless recognise that in practice no understanding is possible without reference to the supposed purpose in the given situation. They even go so far as to speak of the “literal meaning in context”. As literal meaning is by definition acontextual, this phrase appears at first sight to be a simple contradiction in terms. However, it should perhaps be interpreted more charitably, as corresponding to the linguistic concept of ‘what is said’. Judicial practice may thus be seen as a partial corroboration of the modern contextualist theory, as developed in the philosophy of language.

7.2 Contextualism in legal interpretation

In statute construction, (English) judges still often claim to be basing their interpretation purely on the meaning of the words. However, in the interpretation of wills, they frequently accept what amounts in practice to a contextualist approach. It has long been accepted, at least since the judgment of James LJ in *Boyces v Cook* (1880), that in this field, the judge may place himself in the testator’s armchair and consider the surrounding circumstances in order to discover his intention.

In this field, it is often admitted that linguistic usage depends not on objective definition but on agreement and shared knowledge within a particular community. In *Doe v Hiscocks* (1839), for example, Lord Abinger suggested, albeit with some exaggeration, that within the testator’s particular linguistic community, words may habitually be associated with meanings unavailable to outsiders. He therefore took “all the facts and circumstances respecting persons or property to which the will relates” as legitimate and necessary evidence for the understanding of the will.

“Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language.” (*Doe v Hiscocks* HL (1839), *per* Lord Abinger)

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10 Notice in support of this view that English judges seem to have adopted the word ‘colour’ as a grammatical term, when referring to context in the interpretation of general terms. In *AG v Prince Ernest-Augustus* (1957), Viscount Simonds stated that “Words, and particularly general words, cannot be read in isolation, their colour and content are derived from their context.” Similarly, in *Bourne v Norwich Crematorium* (1967), Stamp J pointed out that: “English words derive colour from those which surround them.” In *Bromley LBC v GLC* (1982, Lord Scarman used the same term in pointing out that “[Economic] is a very useful word, chameleon-like, taking its colour from its surroundings.”
This corresponds well with the observation that people use language differently in different contexts. Thus similar words may be understood differently in social, professional and familial interactions, for example. This should not be seen as a case of pragmatic implicature but rather as a matter of linguistic convention. To the extent that the linguistic consensus varies according to context, we are all bi- or plurilingual.

This point is accepted and apparently taken for granted in *Thorn v Dickens* (1906), regarding the interpretation of what is probably the shortest will ever to be held valid. The day before his death in 1905, the testator executed a document revoking his earlier will of 1896. The new document, witnessed by his sons, now contained only the three words “All for mother.” However, the testator’s mother could not inherit as she had not only predeceased the testator, but was already deceased at the date of the (new) will. The court accepted evidence to show that in family affairs, the testator habitually used the word ‘mother’ to refer to his wife. Significantly, no argument or explanation was given. It is simply stated in the headnote that: “It was ‘proved and admitted’ that ‘mother’ meant the widow.”

Contextual interpretation may thus be considered uncontroversial in wills, even as regards direct reference. It may however be expected to raise more difficult problems in statute construction, insofar as the judge is required to determine the meaning of general terms denoting natural kinds in contexts which may never have been envisaged by the legislature. In such cases, as no particular intention can be attributed to a collectivity, the words alone may appear not just ambiguous but indeterminate.

8. CONCLUSION - SEMANTICS AND PRECEDENT

When deciding cases, judges are obliged for practical reasons to take one interpretation as correct, and by implication to reject any other possible interpretations as unacceptable. Linguists, on the contrary, avoid making such judgments, and instead aim to describe the relations between the different possible meanings observed in context. They do not attempt to decide questions of grammaticality or interpretation independently of speakers’ intuitions, but instead take these intuitions as the data to be explained. Whatever meaning appears in any particular situation is accepted as the natural meaning in that context. It follows that no linguistic theory can be expected to provide a justification for legal decisions.

Nevertheless, jurists may find an awareness of linguistics useful, as even a basic knowledge of the linguistic metalanguage may facilitate discussion and reduce reliance on personal intuition.

The problems raised in this discussion of referential expressions principally concern the nature of literal meaning. The contextualists claim that there is no purely literal, or acontextual, meaning, even at the most abstract level. This view is corroborated to some extent by the observation that whenever literal meaning is mentioned in legal judgments, the judge finds himself unsure what to decide.11

Hart (1961: 124) famously rejected the popular but simplistic distinction between the “certainties of communication by authoritative general language (legislation) and the uncertainties of communication by authoritative example”. His invented example is: “Every man and boy must take his hat off when entering a church.”, as opposed to: “Look, this is the right way to behave on such occasions.” Although he is reluctant to accept sceptical claims of radical indeterminacy, he considers the distinction between written rules and common law precedents to be less clear than is commonly assumed. He shows that “authoritative general

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11 Although this provocative formulation may involve a certain confusion of cause and effect, the fact of the correlation remains.
language” fails to provide the hoped for “certainties of communication”, and suggests that the rules given in statutes may be no more determinate than the instructions implicit in precedents. Hart’s parallel should be taken further.

In prototype theory, the meanings of general terms depend not on definition, but rather on representative examples. Uncertainties are likely to arise in peripheral cases. The same is true of legal precedents, the application of which depends on the extent to which the case is considered representative, or “in point”. In the theory of stereotypes, on the other hand, the sense of general terms depends on generally accepted ideas about which properties or semantic features are fundamental.

In Waissmann’s theory of open texture, problems arise where hitherto undiscovered semantic features turn out to be relevant to the question of definition. In the same way, certain aspects of a well known precedent may remain unnoticed until a new situation arises.12

In contextual semantics, the parallel with the rule of precedent is even clearer. On this view, meaning depends on shared knowledge in a given context. This tacit knowledge can only be derived from previous usage in similar situations. In his extended discussion of the contextualist debate, Recanati (2004: 143) summarises the point in this way:

“The applicability of a term to novel situations depends on its similarity to the source situations. The target situation must be similar to the source situations not only with respect to the ‘explicit’ definition of the term, but also with respect to the hidden background. If the two situations diverge, it will be unclear whether the term will be applicable.” (Recanati 2004: 143)

This corresponds closely to questions regularly raised in legal argument concerning precedents.

In his theory of “Meaning Eliminativism”, Recanati (2004: 146) thus rejects the concept of literal meaning and refers instead to “semantic potential”. A similar notion is often evoked in statute construction, when meanings are said to be “wide enough” to extend to a new use. A single example should suffice to illustrate this point. In Julius v Oxford (Bishop) (1880), the HL had to decide the meaning of the deontic may and similar power-conferring expressions like ‘it shall be lawful’ in the Church Discipline Act 1889. It was held that such expressions could be interpreted in particular circumstances as referring not just to a power but also to a duty. Yet, although the meaning of may was said to be wide enough to include the coercive sense normally associated with must or shall, the court refused to consider it as ambiguous. The meaning of power-conferring expressions was declared to be the same “whether there is or is not a duty or obligation to use the powers which they confer.” Like Recanati (2004), Lord Selbourne described the coercive meaning as merely “potential”.

Just as linguistic understanding depends on shared knowledge of previous usage, the law depends on interpretations decided in relevant precedents. The processes of development of language and law are therefore interrelated. Both new linguistic uses and new legal precedents cumulatively affect the semantics of general terms in similar ways. For this reason, the sense of such terms can never be fixed. In spite of the perpetual search for the Holy Grail of a determinate meaning, based on objective definition, the reference of general terms thus remains an empirical question, to be decided in all the circumstances as cases arise.

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12 A new interpretation of Le Lièvre v Gould (1893) was proposed in Candler v Crane Christmas KB (1951), and finally accepted in Hedley Byrne HL (1963). Similarly, Hughes v Metropolitan Ry (1876) was famously reinterpreted to justify the finding in High Trees (1947).


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