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Fuller and Language

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1. Introduction

His style made him distinctive. His substance made him distinctive. The two crossed, were genetically related as we now say. Style and substance each drew on and was implied by the other. One point of their crossing was his sense of the nature of human language; what language was and could be, what it was not and could never be.

In 1930, early in his work, Fuller took up the problem of language in a series of articles. Toward the end of his time he republished this initial ground-establishing effort as the little book we now have, Legal Fictions,\textsuperscript{1} and wrote a new introduction to it. His concern with language as such, and with what a lawyer might be able to say to a linguist or a scientist about it, thus brackets his work. I propose to return to Legal Fictions, treating as something of a supplement to it The Law in Quest of Itself,\textsuperscript{2} which he also reissued in the mid-1960s and in which he pursued the problem of language into the jurisprudential arguments of the day. The rediscovery of the linguistic part of Fuller's contribution and of Fuller's challenge to look at language and see what it tells – if rediscovery it be rather than acknowledgment of influence – bears on current issues in law and beyond law, the importance of which lies not surprisingly in their connection to Fuller's substantive concerns.

Legal Fictions and The Law in Quest of Itself were written as the totalitarian experiments of the twentieth century were gathering force. The reissue of Fictions and Quest was some thirty years later, and we are now some thirty years from their reissue. What becomes more apparent with the passage of time is how different Fuller was in the seriousness with which he took the atrocities of our era. There was a warmth about

\textsuperscript{1} Lon L. Fuller, Legal Fictions (Stanford, Calif.: Stanford University Press, 1967; hereafter referred to as LF).

\textsuperscript{2} Lon L. Fuller, The Law in Quest of Itself (Boston, Mass.: Beacon Press, [1940] 1966; hereafter referred to as LQI).
him that stands in increasing contrast to the coolness of his contemporaries, for whom such engagement—though they themselves might slip into it also—was fundamentally out of place in any objective legal science.

The contrast may become more apparent still in the years to come, as there develops in Europe and in the United States, in Germany and in Russia, a capacity and willingness to face the Holocaust and the Gulag as revelatory events. There may be felt even something close to a necessity to do so, in order to move on. I think here especially of George Steiner’s prophetic In Bluebeard’s Castle. This is of course more the province of discussion today of Fuller’s late work, The Morality of Law and the Fuller–Hart debate, for which he is best known. But Fuller’s warmth was there before, at the time of the revelatory events themselves. Others were pushing toward social science and “realism,” toward psychiatry in its explanatory forms, or toward systems that in fundamental character would merge human affairs with a view of the world as a system of forces, a process, and, ultimately, no more than a process. Fuller proceeded in a different direction by a different path.

In the 1950s and 1960s at the Harvard Law School, Fuller’s offering “The Problems of Jurisprudence” was the alternative to Henry Hart and Albert Sacks’s “Legal Process.” A few attended Fuller. Most were drawn to “process.” As Holmes had said at the beginning of the century, law was “like everything else” in the universe, and “[t]he postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents.”

2. Fuller’s language

Those who attended Fuller’s classes in jurisprudence and (perhaps more importantly) the large numbers who found themselves in his contracts classes met a style and way of proceeding that was metaphorical, that used stories and resisted definitions and summaries. It has been observed before how nonpropositional Fuller was. He did not set out a descriptive statement, or a definition, or a rule, for debate about “its” meaning or “its” truth or correctness, or for use as a building block in moving to another

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3 George Steiner, In Bluebeard’s Castle: Some Notes towards the Redefinition of Culture (New Haven, Conn.: Yale University Press, 1971).
statement, definition, rule, whose meaning or truth depended upon having done with the first, fixed and placed it. Words did not float free in that way. In law, certainly, they were not detachable from a responsible decision-maker facing “the rather serious business of interfering in the lives of others, and the necessity of justifying that interference at every step.”

Fuller’s turning away from the accepted forms of academic discourse – proposition isolated and stated first, its establishment as truth, and its linkage to other propositions by bonds of incontestable logic – did not in itself surprise law students. The decided case was then the primary material of legal analysis, with legislative language being brought in as appropriate to the case. The case in law is a story. The case is also the particular and the concrete, in constant tension with the statistical and the generalizing and those various and highly developed modes of thought that cannot admit the importance of what is only an individual instance. And the case is a merging of something said and something done, in which what is done is evidence of the meaning of what is said, and what is said does not direct what is done before it is done but is said with the doing of it. This last, this routine merger of doing and saying without losing sight of either – without indeed being able to lose sight of either – is what especially pushed Fuller’s own interest in “legal fictions,” as it had pushed the lawyer Owen Barfield’s interest in metaphor in his seminal Poetic Diction: A Study in Meaning.

In most law schools then as now, reading substantive law preceded reading about the nature of substantive law and consideration whether it was “process” or something that could not be wholly captured by “process.” To work day after day on the law of contracts with Fuller and his Basic Contract Law,8 which was a series of texts essentially without commentary, was to be pulled and tugged until one’s mind was able to maintain in consciousness different considerations, different presences, together – rather like an administrative officer making a decision while seeking in good faith to remain true to his substantive authorization. To work with Fuller was to learn that, whatever he might be heard saying about “rules,” there was no locus for a rule but the responsible reader’s and actor’s mind, and that what was affecting us in reading and acting, what was outside and in the interval between us as individuals, was alive.

6 LF, p. 86.
8 Lon L. Fuller, Basic Contract Law (St. Paul, Minn.: West Publishing Co., 1947).
A taste of Fuller’s teaching is to be found in *Legal Fictions*, where he explores the source of an example of a “bold fiction,” the notion of “attractive nuisance” taught and discussed in tort, and invites his reader to enter “the mental processes of the judge” working with “trespass” and “invitation” when the case presents a child who has been injured on railroad property. The judge is pulled back and forth until he is inclined to say: “For reasons that are essentially inarticulate and not wholly understood even by myself, I decide for the plaintiff.” But Fuller does not allow him to do that any more than he would a student being trained into the law. He has his judge speak. The judge is articulate, to make his reasons better understood by himself as well as by others who must understand them in some way even to repeat what the judge has said, thinking the repetition is what the judge has said.

But the words the judge speaks are his own, that were (and are) to be listened to with an ear like Fuller’s, sensitive to the metaphorical nature of legal language. Turning from teaching substantive law to the question what it was he was teaching, Fuller uses a story (he self-consciously calls his use of such stories “similes”), indeed a story about a story, to convey the linguistic quality of a statement of law. Three times in *The Law in Quest of Itself*, at the beginning, again in the middle, and in the last paragraph, he likens it to a retelling. “If the story as I heard it was, in my opinion, badly told, I am guided largely by my conception of the story as it ought to be, though through inertia or imperfect insight I shall probably repeat turns of phrase which have stuck in my memory from the former telling. On the other hand, if I had the story from a master raconteur, I may exert myself to reproduce his exact words, though my own conception of the way the story ought to be told will have to fill in the gaps left by faulty memory.” The “growth” of law, Fuller observes (and if there were fixed points of measurement over time, as there are not, we might also say “change” in law), “remains as obvious, and as mysterious, as the process by which an anecdote changes and generally improves in the course of being retold.” The judge or legal writer “ought to be proud that his contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story.”

And the student who moved from reading statements of law to Fuller’s

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9 *LF*, pp. 66-68.
10 *LF*, pp. 45, 64.
11 *LQI*, p. 8.
12 *LQI*, p. 114.
13 *LQI*, p. 140.
bound but “unpublished” The Problems of Jurisprudence found those teaching materials full of stories, for which Fuller became famous and much loved – the Case of the Speluncean Explorers, eventually published, the Case of the Grudge Informer, the Case of the Interrupted Whambler, the Case of the Contract Signed on Book Day, and the Story of Webster and Pointer. So did the theorist, who came directly to The Problems of Jurisprudence without having read or made statements of law, meet there the metaphorical quality of legal language in the most engaging way. Fuller’s cases at once impress upon the reader the responsibility of those speaking in the story for their own conclusions, and the reader’s own responsibility for his or her conclusions. There are no free-floating words purporting to have a meaning in themselves.

3. The nature of a legal rule

Law is a denial of the standard twentieth-century view of language, whether in linguistics as it is generally taught (with notable exceptions\(^{15}\)), or in cognitive science, or even in literary discourse that separates “metaphor” to be analyzed apart. The legal form of thought daily practiced is a continual denial of literalness in meaning and of the reducibility of language to rules. Fuller perceived this, and his willingness to live and grapple with it was one foundation for his confidence that positivism tracing law back to an extralegal sovereign, a “legislator” who ordered as a master ordered his servant, was a form of academic play and a dangerous one in its celebration of command and assumption of obedience.

Fuller was led early to see a distinct form of thought in law.\(^{16}\) He knew and said that the sovereign was a product of legal thought and recogniza-

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14 Lon L. Fuller, The Problems of Jurisprudence: A Selection of Readings Supplemented by Comments Prepared by the Editor, temp. ed. (Brooklyn: Foundation Press, 1949), though bound and sold was mimeographed rather than printed. In the 1960s it came with unbound mimeographed “Supplementary Readings.” The “cases” were circulated despite Fuller’s various Editor’s Notes, “In its present form the book is not intended for review . . . reproduced for private circulation and for use in the author’s classes . . . not to be considered as being published for any other purpose.”


16 E.g., LF, p. 132.
ble only through legal method. The observation is familiar enough to practicing lawyers, who perceive and construct in their everyday work the legal identity of administrative agencies whose personnel purport to be speaking on their behalf. No formula guides such recognition, nor the deference and good faith that follow such recognition. But there is more to the linguistic aspect than this pulling of the sovereign inside law. The commands of the sovereign, in positivistic view, were to be in the form of definitions and categorizations, propositions, with mechanical application as the ultimate ideal that an underling in a hierarchy might undertake without thought, and therefore without responsibility – in the same way he might fill out a form for the transport of Jews to extermination camps. Fuller saw this in the 1930s, and it energized him. He knew that such propositions, such “rules,” depend upon language. They are not mathematical linkages of empty symbols. And language does not support them or the edifice they are meant to comprise, whatever may be thought of analysts’ discussion, itself in propositional form, of an abstract “duty to obey” or “prima facie” duty, or the absence thereof. “Realists” stood on no firmer footing. Their “rules” were propositions derived from their reports of the effect of social, psychological, or biological forces on official behavior, but still these were utterances that depended upon language.

And though the jurisprudential schools Fuller addressed when he turned from Legal Fictions to The Law in Quest of Itself are no longer at the center of academic discussion, his underlying challenge retains its vitality, that everyone involved in discussion of law, and lawyers especially, become aware of language and the implications of views of language. Fuller would consider current searches for a “theory of law” that would see law in economic or biological terms equally as a form of academic play. Their vision also depends upon “rules” that interact with each other and with individuals’ actions as a boundary, fence, or wall, officials’ function being to maintain these boundaries by introducing pain into individuals’ calculations of pleasure and pain, and law as a whole being characterized as a structure of channels or a mosaic of boundaries inside which individuals make their choices. In the economic theory of law in its fullest form, the postulated legal structure – often called “the rules of the game” – is itself a product of economic action, action by individuals behaving no differently from economic actors generally, in drafting, voting, or deciding. This is known now as “public-choice theory,” and is related in its rather self-swallowing quality to postmodern views of the ultimacy of process, historicizing science (and indeed history), and seeing scientists and science itself (including its vision of evolutionary processes) as temporary products of evolutionary processes.
But these rules, these boundaries, these sources of pricks of cost or pain in utilitarian calculus, are put forth as in law's language. They might in all-embracing view be considered a subsidiary product of economic "laws," which might ideally be stated in equational or quasi-mathematical notation. But "the rules" themselves are in language. From time to time the theorist, economic or otherwise, disguises this from himself or his discussants by designating what he has in mind as \( R_1, R_2, \) or other indicator of a discrete and graspable unit. This is done as much for the purpose of disguising the troubling composition of what the analyst has in mind, it would seem, as for any economy of argument. For whatever their nature, the rules to which lawyers refer are not discrete and graspable units. They are lawyers' own utterances, put out in justification of their actions and as additional material from which lawyers in the future will construct their own utterances.

The rules of the theorist of rules, or of the economist, or the biological or physical scientist speaking of human law, are of a different order in any event. They are not uttered taking responsibility for their utterance, after reading legal texts including statutes and hearing and searching out what is relevant in making a good-faith effort to utter a statement of law. Nor are they associated with agonizing action and often violent consequence. But again, even without that fundamental difference, the rules of the theorist of rules or of the economist or biologist speaking of human law are propositions that depend upon language, and language itself dissolves the edifice, the machine, the wall or boundary, back into the human mix from which it came. There is no authority, legislative, social, or academic, dictating or controlling the usage of words, controlling even syntax, any more than (as Fuller noted) there is any authority that can dictate change in the usage of words. Discussants continue to talk as if they had this rule or that rule, or a set of rules that, if they could only reach so far and tap it with their fingernail, would give out a metallic sound – they talk in

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17 See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983), pp. 64-65: "There is a conclusive reason for x to \( \rightarrow \) or \( (R, x, \downarrow) \) for short. . . . A conclusive permission to act is the contradictory of a conclusive reason for refraining from that act. Hence the following is logical truth: \( (24) \rightarrow (R, x, \downarrow) ") = (Perx, \downarrow). . . . Statements of the form \( LRx, \downarrow \), i.e. there is a legal reason for x to \( \rightarrow \) (which mean the same as 'Legally x ought to \( \rightarrow \)' or is the law that x ought to \( \rightarrow \)), are true, according to the sources thesis, because of the existence of . . . an appropriate social fact . . . .", John Searle, *The Construction of Social Reality* (New York: Free Press, 1995), pp. 46-51: "[T]he formula 'X counts as Y in C' . . . gives us a powerful tool. The "X term" and the "Y term" have "features."

18 LF, p. 21.
these ways though they have done nothing that would enable them themselves to utter a rule of law or put them in a position to be listened to if they did claim they were uttering a rule of law. And lawyers cannot help them because lawyers cannot package what they say, tear it from its context of responsible action and consequence, and hand it over.

These ways of talking are primarily ways of talking about how the human being should be viewed – cosmological discussion, if you will, fitting the human being to the nature of things as the nature of things is conceived, making the nature of things include the human being. But the phenomenon, the claim of possession, is itself a rather ordinary and daily thing, a way of talking each of us can hear and catch ourselves slipping into. In daily discourse there is something of an automatic correction by listeners. That has not been so true in academic or theoretical discourse. Someone – anthropologist, sociobiologist – says: “There are six levels of empathy,” and goes on to order, explain, or refute with references to these “six levels.” But these are his words. The experience that he seeks thus to grasp is ours, the experience of empathy, what we talk about in various ways using sometimes the word “empathy.” Lawyers are among those who are trained professionally to remain aware of the personal and linguistic nature of “six levels of empathy.”

4. World views and human law

Fuller was always interested in autonomous forms of order and the application of economic insight to the workings of systems. He would not have been troubled by the ethical concerns, among them poverty and inequality, that in fact drive much interest in economics today (as he was troubled, for instance, by the concern with obedience for the sake of order that he saw driving Holmes’s earlier positivism). His eye would have been drawn to the larger claims made for economics in law, to the transformation of its deliberately limited view of the human being into positive belief, its use in promotion and defense of self-aggrandizement by self-isolated selves. Toward the end of Legal Fictions, he himself treated economics as based on a “neglective fiction” of great utility, which like other “neglective fictions” was “highly dangerous” if transferred to a “field in which the factors neglected by the assumption assume a primary importance.”

In fact the grander claims of this joinder and extension today of the

19 LF, pp. 106-7.
“realism” and “positivism” which Fuller addressed are associated with large efforts across a range of fields to pull human affairs finally and totally into current accounts of material processes. It is to these confident assertions of what may be called total theory at the end of this century—in their confidence and totality so reminiscent of the racial, mechanical, and economic constructs at the end of the last century—that Fuller speaks directly from the experience of the 1930s and 1940s, and it is here that Fuller’s linguistic legacy and challenge are most important.

A representative example of theorizing of a total kind, one of many that could be chosen from many disciplines, is the contemporary work of the well-known and distinguished American philosopher John Searle. In *The Rediscovery of the Mind*, Searle speaks of “what sort of place the universe is and how it works” and a world view that is “so well established as to be no longer optional for reasonably well-educated citizens of the present era.” Basic to our world view is the idea that human beings and other higher animals are part of the biological order like any other organisms. . . . [T]he biologically specific characteristics of these animals—. . . . their capacity for language. . . . their capacity for rational thought, etc.—are biological phenomena like any other biological phenomena . . . [L]ike it or not, it is the world view we have. Given what we know about the details of the world. . . . this world view is not an option.22

To others’ views or doubts that challenge the total reach of his world view, Searle acknowledges his “insensitivity.” They are “in the grip of faith” or “have not heard the news” and in our deepest reflections we cannot take such opinions seriously.” After lecturing to educated Hindus in India, his conclusion was, “Given what I know about how the world works I could not regard their views as serious candidates for truth.”23

In *The Construction of Social Reality*, Searle takes up law. “Our aim is to assimilate social reality to our basic ontology of physics, chemistry, and biology. . . . The world of Supreme Court decisions . . . is the same world as the world of the formation of planets and of the collapse of the wave function in quantum mechanics.”24 “Culture,” he concludes, “is the form that biology takes. There could not be an opposition between culture and

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Searle is misinformed about law, as are many like him. Rediscovering Fuller would have been of help to Searle. It will help others from being misinformed. Work like Searle’s toward a total theory is widely taught, and students are tested on it. Attending to Fuller might in its own way be helpfully economic and efficient, with less waste of the time of youth set to read and learn what they only have to unlearn in life.

Of course, we do speak of legal rules and argue in the language of rules. It is useful to do so, an important part of mutual persuasion, a way of offering not just a vague suggestion but a finished product for serious consideration. “Suppose we all said this,” says a lawyer, or a scholar, or a judge to a judge on a multimember court, or a multimember court to the legal world at large. “This” is put, said, in the form of a rule. Fuller speaks of “the rule” even as he observes that “at any given point it is difficult to say whether the court is announcing a new rule or only making explicit assumptions which lay implicit in the old rule.”

But practicing lawyers and working judges know in their bones that while texts can be closely read, including texts setting out “a rule,” “the rule” cannot. Fuller does not let us lose sight of the active reader and decision-maker. Speaking of absolute presumptions in law as “fictions” if they are presented “as ‘directing an inference’ or as commanding an ‘act of reasoning,’” he notes: “If I am merely accepting someone else’s ready-made inference, I am not ‘inferring.’” The unembodiedness of “the rule” – the unembodiedness that is necessarily associated with continuous and responsible decision-making by many and that makes possible deference

28 Searle, *Construction of Social Reality*, e.g. pp. 27-29, 50-51, 54-56, 103, 228.
29 *LQI*, p. 133.
30 *LF*, p. 44.
by many to decisions made – is brought out and underscored when there is criminal prosecution for noncompliance with the law, for “violating” the law (a common image, read as violating a person, a trust, a sacred place, rather than “violating a rule”). Condemnation of a person for an event in the world, without associating the person as a person with the event, raises a constitutional question, in both the United States and in civil-law jurisdictions in Europe. There is inquiry into the “mind of the accused,” *mens rea*. In determining whether there is the “element” of *mens rea* in the case, the question is how far the accused’s “ignorance of the law” is to be ignored in condemnation, and how much instead it prevents true condemnation. “Ignorance of the law is no defense,” it is said. What is the ignorance of, that is ignored by the law? It may be only the words of some particular text. What “knowledge” of the law is required, by interpretation of a requirement of *mens rea*, or constitutionally? What is the knowledge of, which, if found in the evidence, meets the *mens rea* requirement? It need not be the words of any particular text. It is rather knowledge of living value, purpose, mind, intent.

Again, the importance of this is not clarity in descriptive thought, the satisfaction of having gotten it right. The great consequence, the issue of fundamental importance, is the vision of the human being held and acted upon. This touches what Fuller shyly called the “cosmic” in his 1967 introduction to *Legal Fictions*, what Holmes called “the universe” to which the “subject of law” was to be “connected,” Searle’s “what sort of place the universe is and how it works,” “our world view,” “what we know about the details of the world,” “what I know about how the world works.” The view of human beings as things, the ingredients of systems, fungible units, is the crossing point of total theory of a cosmological kind, and the earth-bound totalitarian in social and political thought and action to which Fuller was responding in the 1930s and 1940s. In each, the person is absent. The *American Bar Association Journal* recently highlighted a symposium of experts brought together to discuss “a pair of questions: Is human behavior and more specifically, criminal behavior, the result of social factors, biological factors or a combination of the two? And if it’s the latter what combination of factors makes up the mix, and in what proportion?” The answer, the journal reported, was that “What we do know is

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31 *LF*, p. xii.
that human behavior appears to be governed by a complicated and ever changing mix of biological and environmental factors . . ."

There is no third participant in this government. The person is missing from the analysis. The person may be assumed or implied, for there are references to "we" elsewhere in the report. But where this absence is made explicit in theoretical analysis that is meant to be exclusive, a world view is proffered, and in that world view including all, there is an invitation to see law as system and those in law as systems, rather in the way administrators working in harsh and desperate conditions see offenders whom they deem sociopathic – which is the same way the sociopath is seen to view his victims – as subjects for manipulation and intervention, systems all, the manipulation of which is itself part of the workings of a system. There is no place for cruelty in this world view, just as there is no place for metaphor in it, or for authority. The question of cruelty, like the question of respect, does not arise, cannot enter the mind, when what is seen is ultimately only a system. There is no one speaking and no one listening – only "governance" by forces operating.

But the support of law for this world view dissolves, for this as a view including all and for this as a view of human beings. That the presuppositions, practices, and beliefs of a sect or tribe are inconsistent with a world view might be of no concern to those who present it. But the phenomenon of law is not so dismissable. It is too pervasive, and it is what makes the very expression of world views possible.

5. The nature of reading in law

The dissolution of law's support, its denial of the cosmic picture of ultimate reality as a system of systems, begins at the point of reading itself, and spreads out from it.

Reading a paragraph of a legal text, or reading the text as a whole, or reading the law of a subject-matter area, is not a matter of finding a proposition, moving to some derivation from it, and then examining the validity of the logical path between them. Reading is like a light ranging over a text, picking up this, picking out that, moving up and down, back and forth – like looking at a face speaking, like reading a letter. The constant question is, What is meant? There is no assumption that what the light ranging over the text or mass of texts picks out here or there is what is meant, even if it is in declaratory or summary form.

Nor is there any assumption that what is repeated takes one closer to the meaning (unlike programs designed to shorten and summarize a
written text by counting the number of times a word, phrase, or sentence appears in the text and weighting it accordingly). Repetition may. Then again it may not, as in the case of a person caught in meaningless repetition, endlessly washing hands, repeating a word over and over. In speaking, the experience is common enough that much repetition of a word or phrase drains it of all meaning and leaves it a sound strange to the ear in which it was once familiar.

The reading of a legal text is like the reading of a person, not like the reading of a logical demonstration. It is not, as in applied mathematics or experimentation, a test of the usefulness of a summary definition, any more than reading a person is a test of a summary definition. A summary is another text the reader may produce after reading. Then that summary, and all that surrounds it, will have a light ranging over it when another picks it up to read.

But again, lawyers speak as if human law were a set of rules, knowing that law can never be a set of rules that a computer scientist, a cook, or a chess player might recognize as such, and that there is no one who can take you by the hand and say: “Come, I will show it to you.” It is one of the useful fictions of lawyers as Fuller might say, one they perhaps cannot help because simple and brief alternatives are not at hand, if a fiction uttered knowing it is a fiction and without concealment is still a fiction. Or, as Fuller might also say, like any other statement it is to be read in its context. In view of this it may be useful, for lawyers as well as nonlawyers, to take up two different contexts where the nature of a lawyer’s rule can be seen, contexts that will not lead us far from Fuller’s own use of the phenomenon he called “fiction” as a lens to look at legal language, and through language at law. Guido Calabresi’s exploration of the uses of judicial “subterfuge” will serve as an example in the particular, and the claim and acceptance of the claim that there can be “evasion of the law” by citizens that violates the law will serve as an example of a more general kind.

5.1. The example of “subterfuge”
In his A Common Law for the Age of Statutes, Calabresi argues in favor of courts’ treating legislative materials much like common-law materials. Grant Gilmore before him had argued that courts should do so and actual-

34 Guido Calabresi, A Common Law for the Age of Statutes (Cambridge, Mass.: Harvard University Press, 1982).
ly did so in practice, in *The Ages of American Law*. What is suggested is that courts give some statutes less weight than others against the background of a coherent whole, press the legislature to reconsider the subject matter of a statute, and otherwise react to the growing bulk of statutory material and to the wide variation in statutes' connection to any deliberative or democratic process. The suggestion is not inconsistent with Fuller's reservations about the place of statutory material in legal reasoning.

To explore a difference between courts' using "subterfuge" in handling legislative "command" in this way, and being "explicit" or "candid" about doing so, Calabresi must set up such a difference, and he presents for that purpose one of the hardest cases to think about in law, the sanctioning of torture. He uses Charles Black's example, an "absolute prohibition" against torture (that is, Black's absolute prohibition) and a hypothetical case in which a judge is faced on the one hand with a claim on behalf of a prisoner that he is being tortured and, on the other, with a demonstration by the police "beyond a doubt" that the prisoner has hidden a hydrogen bomb in a major city, set to explode in one hour, and that the only thing the prisoner fears is hideous pain. No one, it is suggested, would enforce the supposed absolute rule against torture and let the city be destroyed. Rather than this, anyone and everyone would find some way to avoid it, would manipulate procedure, adjourn the court for a time, would possibly even resign. The question then is whether there is a "rule against torture" which is an "absolute" rule.

Calabresi's discussion of the matter contrasts a rule in which there is a balancing of the need for torture against its harm, and he concludes that an "absolute" rule has in practice the more desired result, which is the elimination of torture as much as possible. This is taken to be one example and justification of "subterfuge" or "fiction" in legal language and practice, as opposed to "candor" in the use of language. What the example together with the discussion of it underlines is how easy it is to assume there is a choice between a "literal" use of words in law, and some other use. Of course there is a choice between inauthenticity and authenticity (if it is

within our capacities to work hard enough to be truly inauthentic): there is truth and falsehood within the person – falsehood in nonbelief, hypocrisy, manipulation, inauthenticity; absence of truth in making an utterance “without meaning it”; strange truth that surprises in irony, jokes, and laughter. But there is no truth or falsehood with regard to what meaning might be attached to words’ straight and curving lines and dots. There is a usual use. There is no profit in being perverse. People crave to be understood. The usual use may possibly be apprehended statistically, except that the statistical categories would have to be couched in words. But “absolute” has no meaning apart from the speaker of it when it is spoken and apart from its concrete use.

One might well not have anything to do with torture at all – with doing it, ordering it, permitting it. One might feel obliged to intervene to stop it, and put the fate of the city in the hands of providence if one believed in providence. But if, under someone’s “absolute rule against torture” (“under” being a very figurative word when we use it thus), torture is permitted in some cases, then the rule is not “absolute” in the sense in which the term absolute might be used in other situations or outside law. What would be read before making a responsible decision would be the justifications of other responsible decisions in which sentences in the form of rules like this one could be found, the reading of such other decisions including both what was done and what was said about what was done.

“Speech, like torture, does have a meaning,” Calabresi goes on to say, “and it would not be forthright to say that Charles Black’s absolutist can get out of the dilemma, honestly, by interpreting the excruciating pain inflicted on the hypothetical prisoner as not being torture.” Again, this nice example is revealing at more than one level. “Charles Black’s absolutist” has concluded for himself what absolute is to mean. The “rule” is an utterance of an academic lawyer. Calabresi’s own comment is certainly understandable, particularly with its references to “forthrightness” and “honesty” that point where meaning lies. Words can be given meanings within one’s own mind and deliberately played off against one another, and they can be seen by others to be playing off against each other within the intent of the speaker. In Cockney rhyming slang, loaf means head because “loaf of bread” rhymes with “head.” “Loaf” would not give pleasure unless bread, for the speaker, did not mean head. And the pleasure extends to us who, without thinking very hard, do not usually use bread.

38 Calabresi, A Common Law, p. 175.
(or loaf) where we usually use head. We are constantly trying to tie down words, and we do so partly by looking at them through the eyes of others. But no word “has” a meaning. The question in law and in much of life is what to do and how to think, and how to express to others what is done and how it was considered. Language is in service of this, and does not itself “govern.” It cannot. It is only sounds and marks – unless we are willing to enter realms of possibility that rather few in the West would find comfortable.

If one would not want, for all the reasons one would not want it, to say that excruciating pain was not torture (and the very great difficulties in “defining” genocide in the international convention against genocide should give anyone pause before “torture” is assumed to have an utterly definable content from which no one but the mad or the irrational could dissent), still there are no grounds for asserting that “absolute” does not have the practical meaning that emerges from its use. Emerging here, “absolute” would be taken to mean “never, never, never unless you absolutely have to” and “think, think, think before you do approve torture.” There are in fact a number of other contexts in law in which something of the same thing is said, or attempted to be said, as in British and American administrative law, where reviewing courts are admonished with a limited repertoire of statutory or common-law statements of “standards of review” expanding or contracting their jurisdiction – the degree of their inquiry and action – and always there is a question what is meant for each case by the words used.

You never know, as a responsible decision-maker, what the rule of law is until the decision is made. In the text that accompanies the decision, the justification is then called and sometimes linguistically cast in the form of a rule for presentation to the future, and it takes its place along with all the other “rules” in other texts that might be brought to bear on a situation. This is a source of the excitement when young and first entering into legal language, not unlike the excitement of the discovery of poetic diction. Legal language is different from mathematics, which is deliberately tautological so that it can be precise, empty so that it can be precise, empty so that it can be said that “1” can never, never, never be “2.” And

39 I was introduced to rhyming slang in 1961 as a student when I worked in a Borstal institution (see Brendan Behan, Borstal Boy, London: Corgi Books, 1961), and the house newspaper referred to me as China Joe. “China” is “china plate,” which rhymes with “mate.” Part of the fascination of rhyming slang is the ordinariness of its context. So many are doing it that the whiff of rare talent is not in the air, which makes language itself all the more an object of amazement.
legal language is different from literary language, though like literary language it is expressive. Legal language is different from both the mathematical and the literary because of its connection with action. Consequences in the world ride on the statements made. Orders are given that are enforced at the point of a gun. Decision-makers must sleep at night after terrible harm has been done to another human being by reason of their own statements.

5.2 The example of "evasion"

From the illustration of this case that no one would want to have to decide, and Calabresi's illustrative discussion of it, we may turn to the equally revealing and more general phenomenon of evasion of law that is recognized as violation of law, a distinctive feature of the law of corporations and of substantive fields of law new since Fuller's early work - environmental, drug, or worker safety - where there is an administrative agency in action. Even outside criminal law (which is often also made applicable in these fields) there is no mere price put on private choices, as in the old Holmesian view of contract remedies and some modern views of tort remedies. The terms of discussion are violation and law-abidingness, compliance and noncompliance, with sanctions and remedies that may include injunctions and guardianships that reverse transactions, unravel arrangements, and replace decision-making individuals in private organizations. Evasion is recognized as violation both as a matter of common law and in explicit regulatory and statutory language.

When there is expression of the rule violated, it goes beyond the words of any particular formulation. You do not use the word "evasion" without moving beyond the words of any particular text you may be pointing to when you say there has been "evasion" of the law. You are not saying that the words themselves prohibit or require what is presented to you for your judgment. That you cannot say so is one reason why you are moved to see or claim an "evasion" rather than a "direct violation." (The person active in the field, to whom the law speaks as much as to an administrator or prosecutor especially interested in the field, is also thought to be able to see what is "evasion": the question of surprise rapidly becomes the question how much the expressed surprise is feigned.)

You must add words, build on the words which are there, before you can reach a "prohibition" that matches what a clever person has done (or, if you are the clever person, what you are thinking about doing) or a requirement that is not fulfilled by what she has done (or you are thinking about doing). To add to those words, build on what is there in the text you have in hand, you must look to the mind, to what is sometimes called
“intent,” to purpose. If there is no mind to move to, no intent, no purpose, then there are no words to add. And there is no evasion, no violation of law, no noncompliance with the rule (if the language of rules is still to be used), no failure in law-abidingness.

But it seems to be a curious, almost technical fact about the working of language, that if more words are added – not by you thinking, but by the prior drafter of a particular text – and more words, and more words, so that a “direct” violation of a “rule” can be claimed pointing to the words of that particular text, the opportunities for manipulation increase as fast or faster than words can be added. “Loopholes” arise for the clever, the determined, the well-advised, “gaps” open up that can be slipped through as if Wall’s fingers in *A Midsummer Night’s Dream* kept opening to supply new chinks. And to say that “slipping through” and “finding a way around” is noncompliance, one must return to pointing beyond the words, and face the consequences of being unable to point beyond the words if one should take the position that there is not in the case presented (or there is never) anything to point to.

And on the other hand, if there is a mind behind the words of the text, and a purpose, and intent, it might be an adversarial mind and a hostile intent, the mind attributed to the pathological manipulator, or the profit-maximizing corporation, or the tyrannous organ of government, all of whom may purport to lay down “rules” to be followed. Then that mind and intent and purpose cannot be internalized by the decision-maker facing the words of the text. Such an internalization eliminates the person – twentieth-century literature explores the void that would be there.

Then there can be no claim that the actor, the decision-maker in the field who is not an administrator or a prosecutor, *should* have added to the words in his own mind. There is no noncompliance, no evasion, just a game of sorts, each side playing with words as far as words can go, if “play” or a “game” can be seen at all: certainly, the fingering of words then is unlike the poet’s wordplay, which is a show of caring for the listener he is trying to provoke or delight. The lawyer, responsible for saying what the law is and whether there is compliance, cannot look merely to parrot words, for when evasion is in question the words are not there. The lawyer – it is an aspect of priestly character – must look to see whether there is mind, and then caring mind, before he or she can say there is law with which there has been noncompliance and that there is an actor and decision-maker who is not being law-abiding.
6. Rules of law and rules of games

So often, in pushing toward a sense of law, the question is heard whether seeing a game in it should not be enough for practical purposes. The difference is emphasized between satisfaction with something described in rough detail and an academic thirst for a thorough understanding, and the proposition that statements of law are rules of a game is offered as a pragmatic truth.

For all the many functions of games, and the intrinsic pleasure in them akin to the pleasure of dance, there is a little hole of emptiness at the center of games. The point of a game is playing, or the point of playing is the game itself. Games are play, they are not real, what happens does not really matter. But (for that very reason) life is not a game, and law which is part of life is not a game. What is said and done does matter and (for that very reason also) the “rules” of law, or the various texts that are variously pointed to and called rules, are not like the rules of a game. If you want to play the game of football you do this. As the economist Frank Knight observed, you do not win in getting the ball over the goal line if all twenty-two men have been put on the same side. You have not played the game of football. Games are understandably intertwined with rules, unless “breaking the rules and getting away with it” is part of the game, in which case the game escapes into an attitude. Playing, if that is the point of the game and the game itself is not the point, is intertwined with rules: pretending, as on a stage, requires a script to follow, just as imitation requires something to imitate. Nor are rules of law like rules of mundane cooking. If you wish to make a cake, you do this; if you do not do this, you do not make a cake. Nor are they like rules of ordinary calculation. If you would divide 4 by 2, you do this. If you do not do this, you have not divided 4 by 2.

Law is not pretending. It is not imitating. Law is for real. And the decision-maker facing law is not in a situation of if-then. If-then rules come into consideration only if one wants to proceed. There is an element of voluntary invocation, in cooking, or a game, that is not part of facing the law. In life you must go on, you must proceed, into the new where imitation, repetition, is not enough. And there are the questions of law when you do, with you and against you and around you. Moreover, in life your object is not fixed; it changes as you proceed. You must go forward but it is not or is no longer a cake you wish to make. And there is law, still with you as you grope your way along.

Generalizations about law based upon the actualities of its practice and method leave the person at the center of thought. Where differences
between the real and the less-real or the not-real are being contemplated, observation of law is a "rediscovery" of the reality of the person, the person individual and the person behind and beyond the individual, rediscovery if forms of thought that have no place for the person have occupied the mind. Observation of legal language at work leads further – for law, though a field with special practitioners, is not separate from ordinary life – to the fundamental fact that there is no literal meaning in human language, that meaning is not there without the person there. Since total and closed systems offered as a picture of the world are in language and contemplate interrelated parts made of language, the observation of legal language can lead to the largest practical consequence for human affairs, the one that would be closest to Fuller's ultimate concern, a dissolution of any invitation to ignore what identifies as human the actor and the acted-upon.

7. Reading Fuller as an exercise

*Legal Fictions* itself is something of a demonstration of the delicacy of the self-awareness toward which Fuller points, an exercise any of us might put ourselves through as we talk in a propositional way all the while assuming people will read us as a whole and try to understand what we are saying – read us, as it were, metaphorically.

The first sentence of the book speaks of judges and writers on law making "statements they know to be false," immediately setting up a contrast between a true and a false use of words. But by page 5 he has come to ask what a "fiction" is, since "the word 'fiction,' like most words, may not always mean the same thing." On page 8 he speaks of the hope that a "defect" in our expression "could be shown not to affect the validity of the statement in its context. We trust that our statement is at least metaphorically true" – setting up a distinction between the metaphorical and the literal. And from "defect," he moves to: "... the fiction is 'a disease or affection of language,'"40 But the "literal connotations" of breaking a contract or the ripening of an obligation are "inappropriate,"41 and "change takes place in the meaning of the words or phrases involved," "a process

40 *LF*, p. 11.
41 *LF*, p. 12.
that is going on all the time,” and “this process is not confined to the law – it takes place in the whole of our language.”

Where does this change take place? Fuller does not say – the implication of a “true” meaning limits his own expression – but, after acknowledging that there is no fiat with respect to usage, he indicates where change takes place by turning to the “motive” of the author, to an understanding of “what actuated” the users of “fictions” if “we are to understand what is meant by their fictions.” Moreover, “eliminate metaphor from the law” – the implication being that the elimination of metaphor is possible – “and you have reduced its power to convince and convert.” Fuller begins to move quietly to conviction – responsible belief by an active decision-maker – and to authenticity within the person, as gauge of truth or falsehood in the use of words. The strike against the “conclusive presumption,” what makes a statement containing this “fiction” false, is that it “attributes to the facts an artificial effect beyond their natural tendency to produce belief.” By page 94, where he begins his exposition of the late-nineteenth-century work of Hans Vaihinger, Fuller is observing that, with fictions, “we are in contact with a fundamental trait of human reason. To understand the function of the legal fiction we must undertake an examination of the processes of human thought generally.”

There he enters what he later was to call the “cosmic,” abashedly and so differently from Holmes, who was not at all bashful about doing so. He notes that “metaphorical contamination is at a minimum in mathematical symbols” and also that mathematical symbols have a “colorless quality.” “Tautological and fictitious” is the “notion of the Thing and its Properties, fundamental as it is for thought,” and he notes what the legally trained can see perhaps most easily, that the tendency in scientific and philosophical discourse to speak of “properties” is a transference, back from law, of the world of “ownership,” as is indeed the mental picture of “the ‘laws’ of nature . . . ‘ruling the universe’” a transference back from law, when the laws of nature are instead – Fuller quotes Ernst Mach – “limitations which, under the guidance of experience, we impose on our expecta-

43 LF, p. 21.
44 LF, pp. 49-50.
45 LF, p. 24.
46 LF, p. 42.
47 LF, p. 116.
49 LF, p. 114.
We might add today what Fuller especially could be heard adding, that the transferred use of “property” leaves behind, forgets or must forget, that in the world of “ownership” each exclusion, each taking, each holding on, each order enforced on the basis of a claim to exclude or take or hold is, if challenged, a consequence of a responsible decision after argument.

At the end, Fuller faces the question of truth and falsehood directly: “We say we reach ‘right’ results by proceeding upon ‘false’ ideas. But why do we believe these ideas to be ‘false’? . . . Is it not clear, on reflection, that we have been determining ‘truth’ or ‘falsity’ by the inquiry: Has the idea in question a counterpart in the world of reality external to us?” This is “an erroneous theory of truth, a theory that we may call ‘the picture theory of truth.’”51 From law and legal thought he reintroduces purpose as inextricably woven into any human statement of truth and any human action. While maintaining that “law was the first of the sciences” if “we define science as the conscious generalization of experience,”52 he has arrived, through his effort to grapple with the nature of language, at the position that there can be no categorical distinction between the “is” and the “ought” in human affairs, which he pursued in The Law in Quest of Itself a decade later and was to maintain throughout his later work. It is not surprising that, given the connection between truth and person and the necessity of reading the whole to read for meaning, Fuller should decline to engage in propositional discourse in his conclusion: “It might be expected that in closing our discussion of the legal fiction we should attempt a summary of the views that have been developed in the course of this rather lengthy study. But the reader who has followed the discussion thus far will perhaps be willing to forgive the omission of such a summary. The matter is not simple enough to permit reduction to a compact formula.”53

Fuller observes of Vaihinger’s The Philosophy of As If, which he uses to organize his final observations in Legal Fictions, that “there runs through the whole book a curious double language. He speaks of the ‘illusion of knowledge’ produced by the fiction and at the same time recognizes that this knowledge is real in the sense that it enables us to deal with reality and is in fact the only knowledge we ever knew or can know.”54 The same might be said of Fuller. In his 1967 Introduction to the reissue of Legal

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50 LF, p. 116.
51 LF, pp. 103-4.
52 LF, p. 132.
53 LF, p. 133.
54 LF, p. 124.
Fictions he does not enter into the reduction to propositions he refused thirty-seven years before. His treatment is much the same: “The fiction,” he says, “represents the pathology of the law,” or, “changing the figure,” it is “an awkward patch.” But then he refers to the “problem the fiction is intended to solve,” which is “bridging a gap” between “understanding and the thing sought to be understood.” The last sentence of his Introduction asks “of the reader that he regard as allegorical anything he encounters in this book (including The Philosophy of As If) that seems to him to bear too plainly the marks of its age.”

8. Objectivity and individuality in language

The observation of “double language” might be made about any of us. I myself say, here, “No word ‘has’ a meaning.” I put “has” in quotation marks to point to its real meaning and its special use in a sentence by Calabresi, who moves (and in the very same sentence) to authenticity, “honesty,” as the measure of meaning – as did Fuller.

I put quotation marks around Calabresi’s possessory verb in his sentence. But this is my writing which you will read. The word’s “real meaning” is its meaning for me, which I hope you will understand and which I think is also likely to be its meaning for you in your usage. I say “Fuller changes” as you move through his book, or that he necessarily must be read as a whole,” or that theorists like Searle “are misinformed.” To do this at all, I fix words in my own utterance. But that is not my object, any more than it was Fuller’s object in discussing what he called “fictions” to fix the meaning of words, even the word “fiction.” I am seeking to be understood. I fix the meaning of words well or badly when I speak, with an eye to others’ view of what I say as a whole; and I am open to the same question, from a reader, that I ask when I read or that Fuller can be seen to be asking when he reads, “What does this word really mean for him, even when he is quoting the word from another?” You scour deliberately or unconsciously what I say for inconsistencies, which you do to understand the whole. Something must be fixed for this. You assume meanings when you see inconsistency, even when you reconcile inconsistency by dropping out what you conclude is not meant. But it must be remembered that it is you and I who are doing this, that, again, our object is to understand, not to fix. At the very moment we understand, we each will speak again, and present a whole again, which will be examined again – by others and by ourselves who speak – through its parts, which are then fixed for the purpose.
With that object, perversity is self-defeating. Idiosyncrasy perhaps refreshes and maintains attention and thus contributes as such. But in general, we try to look at what we say through others’ eyes if we want to be understood. Fuller himself perhaps began *Legal Fictions* implying a distinction between the literal and the nonliteral, true use and false use, not just to steady himself, and not just because he did not wish to lose an audience for whom usual usage and special usage had become the “literal” or “true” on the one hand and the “metaphorical” or “false” on the other. There is comfort any of us can feel in averting the eyes from responsibility for the meaning of words and in supposing that words, those straight and curving lines and dots, had meanings attached like feathers to a bird, which could gradually strangely change over time. And in fact, in our experience there is stability in language. But its stability, what might be called its “objectivity” if that did not obscure too much the person speaking, largely flows from our looking at our words, our phrases and our constructions, through others’ eyes. Will “‘Twas brillig, and the slithy toves” delight our particular listener and be understood in its own way? Then we will say it, though the words are new-minted.55

As I write, the Martian Rover has rolled down its ramp into the red dust of Mars, and the mission manager has said: “All the scientists are in heaven.” I think, “What can he mean by that?” And then I think, “Perhaps they are in heaven, a little bit.” The notions of the true and the fictional, the literal and the metaphorical, play back and forth. But they play back and forth in my mind, and in the mission manager’s. The two of us could argue what was literal and what was metaphorical, what was real, and what imaginary, but there would be no arbiter to declare a winner. How we talk affects each of us and what we each of us pass on and teach to the

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55 In law we work largely with written texts. In spoken language, words are in a context that goes beyond other words. But even written language conveys a voice and has color, echoes, cadence, and other indications of authenticity that may possibly not depend upon fixing the meanings of words for determinations of inconsistency or deciding relative degrees of “not meaning it.” Explicit attention in discussions of the nature of human language to these aspects (of both the spoken and the written) opens questions—including the question what is a “word” — that are raised in neurologists’ discussions of recognition of truth or falsity in spoken language by global aphasics who have lost the capacity to understand words as such. The intelligent aphasic — the person within whom is not in doubt — is reported to understand so much of what is said that extraordinarily delicate tests are necessary to demonstrate aphasia. The phenomenon is a fascinating reminder of how easy it is, when language is the subject, to come too soon to final conclusions about it. See Henry Head, *Aphasia and Kindred Disorders of Speech* (Cambridge: Cambridge University Press, 1926) and Oliver Sacks, *The Man Who Mistook His Wife for a Hat* (New York: HarperCollins, 1990), pp. 80-82 (citing Head).
users of language coming after us. If we stay talking to one another there will be an observable generality of usage. But generality of usage is just generality of usage, a statistical figure or a figurative statistic, a number if a number could be obtained, itself without meaning. Value may live between us and without us, like the world: what we speak about may have meaning. But unless language draws on the Sanskrit of the Gods or the Kabbalistic Hebrew — and of course it may, and itself speak to us: language’s music, like the beauty of Nature, is still a mystery — the words we use, even the syntactical forms we use, take their meaning from the person in us.

9. The connection between the linguistic and the ethical

But we would not be true to Fuller’s legacy if we did not revisit and reemphasize the connection between a larger sense of things — a sense of the nature of what is and the way the world works — and what we ourselves do and what our contribution is to the way the world will be. Arguments over the nature of human language cannot be separated from political, moral, or ethical questions, and conclusions about the nature of human language are pertinent to human action. To see the individual as other than a source of the meaning of language (in the use of language by all) is to see him as subject to rules (I will not call them laws) which he must obey. He must obey in the strictest and most authoritarian sense, except that if he does not obey, he is then not merely defiant, and a challenge to the rule, but defective, and subject to elimination or correction to the point where he is no longer defective. Language is the crossing point of the total reign of system in cosmological view — our sense of the very nature of things including ourselves — and the totalitarian in social and political thought and action.

The connection can be evoked most succinctly in the negative, awkward and inadequate as statements in the negative are. Only if there is ultimately no literal meaning can democracy even be thought of, or the trusteeship that is alternative and supplement to democracy be contemplated, including trusteeship for those to be born in the future who do not yet have a voice. Only if there is ultimately nothing but the heart of the speaker as gauge of the meaning of a statement, nothing but the heart of the individual and the person, can democratic aspirations or responsible government even be approached. Only if the meaning of human language rests in the person’s purpose and use, only if the nature of human language is that it is not ultimately a system of units “governed” by rules like
any other system and not a “property” of a system of units governed by rules, neither a system innate nor a system emerging that forms at “birth” and develops in an environmental “culture” and dissolves at “death,” will constraints on force be real.

Or, less negatively, only if the linguistic proposition that language is a system among systems remains a plaything of thought, or something like a piton in mountain climbing that the human hand removes when its usefulness is past – remains a plaything or crutch of thought and is not believed – can there be any genuine respect for individuals, openness to them, valuing of their life, silence at their death, limitation on the use of them, and protection of each of them as each a source of meaning.

Politics and ethics, and what we say (afterwards) is atrocity, are never far from the steps we take toward or away from a cosmology. Denial of the individual and the person as each a source of meaning, denial for reasons having to do with a sense of the nature of things, steps us into those total social and political views – racial, economic, sociological – of which we have had such experience this century. Denial of that denial, despite the perhaps surprising implication for what is actually believed about the nature of things, steps out of and away from the totalitarian in thought, and back from the totalitarian in action.