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## The Gift of Language

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## THE GIFT OF LANGUAGE

*Joseph Vining\**

### I. THE SUBSTANCE OF LAW

Style and substance cross—are genetically related as we now might want to say. Each draws on and is implied by the other. One point at which they cross is our sense of the nature of human language, what language is and can be, what it is not and can never be.

The language of law is part of human language. Law is a distinctive form of thought, but it lives in human language. “Rule” might be thought synonymous with “law,” but for all its talk of rules, the practice of law does not begin with a descriptive statement, or a definition, or a rule, for debate about “its” meaning or “its” truth or correctness, and for use as a building block in moving to another statement, definition, or rule whose meaning or truth depends upon having done with the first, fixed and placed it. Words do not float free in that way. In law they are not detachable from a responsible decisionmaker facing action or the withholding of action, and they do not have a meaning of their own, a meaning apart, “literal” as opposed to “metaphorical.”

Law thus ultimately turns away from accepted forms of academic discourse—away from proposition isolated and stated first, its establishment as truth and its linkage to other propositions by bonds of incontestable logic. Observation of this difference, or reflection on it, would hardly startle a lawyer whose first introduction to law is almost always being handed a case to read. 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 in 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, is the foundation of lawyers’ instinctive understanding

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of the metaphorical quality of legal language. They know that whatever they may say or may hear being said about "rules," there is no locus for a rule but the responsible reader's and actor's mind. Impressed on lawyers from the first case they read is the responsibility of those speaking in the case 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.

## II. THE NATURE OF A LEGAL RULE

There is more in law's style than a mere difference. Law is a denial of the standard twentieth century view of language, whether in linguistics as it is generally taught (with notable exceptions<sup>1</sup>), or in cognitive science, or even in literary discourse that separates "metaphor" out 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.

This lies behind the widespread confidence within law that a quasi-scientific "positivism" tracing law back to an extra-legal sovereign, a "legislator" who orders as a master orders his servant, was and is still a form of academic play—dangerous play, indeed, after the experience of this century. Lawyers know that the "sovereign" is a product of legal thought and recognizable only through legal method. The general observation is made explicitly from time to time.<sup>2</sup> And in implicit form it is, again, almost routine for 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, are 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. 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

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1 See, e.g., A.L. BECKER, *BEYOND TRANSLATION: ESSAYS TOWARD A MODERN PHILOLOGY* (1995); ROY HARRIS, *THE LANGUAGE MACHINE* (1987); ROY HARRIS, *SIGNS, LANGUAGE, AND COMMUNICATION* (1996); RAYMOND TALLIS, *THE EXPLICIT ANIMAL* (1991); RAYMOND TALLIS, *NOT SAUSSURE* (1995).

2 See, e.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 46, 69 (1940).

thought of analysts' discussion, itself in propositional form, of an abstract "duty to obey" or "prima facie" duty, or absence thereof. A "realistic" view of law stood on no firmer footing when it emerged early in this century, and stands on no firmer footing today in pushing toward systems that in fundamental character would merge human affairs with a view of the world as ultimately a system of forces. Realists' "rules," derived from their reports of the effect of social, psychological, and biological forces on behavior official or individual, still are utterances that depend upon language.

It is a challenge to stay aware of language and its implications, and necessarily a delicate matter since the challenge is always as much to oneself as to others. Current searches for a "theory of law," that would see law in economic or more broadly in biological terms, can be read as academic play quite like the older "positivism" or "realism" to which they are related. Their vision depends too upon "rules" that interact with each other and interact with individuals' action 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 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 (all-embracing as it seeks to be) 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.<sup>3</sup> 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 there is any authority that can dictate change in 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 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 be-

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3 See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 64–65 (1979).

There is a conclusive reason for  $x$  to  $\emptyset$  or  $(R_c, x, \emptyset)$  for short. . . .

. . . .

A conclusive permission to act is the contradictory of a conclusive reason for refraining from that act. Hence the following is a logical truth: (24)

$\vdash (R_c, x, \emptyset) \leftrightarrow \neg (Per_c x, \emptyset)$ . . . .

. . . .

. . . Statements of the form  $LRx, \emptyset$ , i.e. there is a legal reason for  $x$  to  $\emptyset$  (which mean the same as 'Legally  $x$  ought to  $\emptyset$ ', 'It is the law that  $x$  ought to  $\emptyset$ '), are true, according to the sources thesis, because of the existence of . . . an appropriate social fact . . . .

*Id.*; see also JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 46–51 (1995) (“[T]he formula ‘X counts as Y in C’ . . . gives us a powerful tool.” The “X term” and the “Y term” have “features . . . .”); *infra* notes 6–9 and accompanying text.

cause 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.”

### III. WORLD VIEWS AND HUMAN LAW

Economics makes its contribution, which continues to unfold. Lawyers are as interested as any in autonomous forms of order in human society and the application of economic insight to the workings of systems. No one can be troubled by the ethical concerns, among them poverty and inequality, that in fact drive much interest in economics today. Where economics meets the problem of legal language is in the larger claims made for economic thought, 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.

In fact the grander claims for economic analysis 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 law presents its linguistic challenge most strikingly and with the broadest implication.

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."<sup>4</sup>

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.<sup>5</sup>

To others' views or doubts that challenge the total reach of his world view, he 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."<sup>6</sup>

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 formation of planets and of the collapse of the wave function in quantum mechanics."<sup>7</sup> "Culture," he concludes, "is the form that biology takes. There could not be an opposition between culture and biology, because if there were, biology would always win."<sup>8</sup> And so he asks,

How can there be an objective world of money, property, marriage, governments, elections, football games, cocktail parties and law courts in a world that consists entirely of physical particles in fields of force, and in which some of these particles are organized into systems that are conscious biological beasts, such as ourselves?<sup>9</sup>

His answer is that there are "constitutive rules" that "come in systems" in a "structure of hierarchies," which define activities, and "regulative rules" which regulate them, such as "the criminal law," and these "rules of the game" are the building blocks of social reality and institutional power.<sup>10</sup>

4 JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 85-86 (1992).

5 *Id.* at 89-91.

6 *Id.*

7 SEARLE, *supra* note 3, at 41, 120.

8 *Id.* at 227.

9 *Id.* at xi-xii.

10 *Id.* at 27-29, 49-51, 54-56, 103.

Searle is misinformed about law, as are many like him. A lawyer would have been of help to Searle. Attending to law's practice will help others from being misinformed. Work like Searle's toward a total theory is widely taught, and students are tested on it. A look at law 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 multi-member court, or a multi-member court to the legal world at large. "This" is put, said, in the form of a 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. In their work they do not lose sight of the active reader and decisionmaker. The unembodiedness of "the rule," the unembodiedness that is necessarily associated with continuous and responsible decisionmaking by many and that makes possible deference 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 Holmes called "the uni-



verse," to which the "subject of law" was to be "connected,"<sup>11</sup> and 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. In each the person is absent. There is no place for cruelty in either, just as there is no place for metaphor, 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 possible the very expression of world views.

#### IV. 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 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

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11 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465, 478 (1897).

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 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 lawyers' useful fictions, 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, 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. 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.

#### V. THE EXAMPLE OF "SUBTERFUGE"

In his *A Common Law for the Age of Statutes*,<sup>12</sup> 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 actually did so in practice, in *The Ages of the American Law*.<sup>13</sup> What is suggested is that courts give some statutes less weight than others against the background of a coherent whole, pressing the legislature to reconsider the subject matter of a statute, and otherwise reacting to the proliferation of statutes and growing bulk of statutory material and to the wide variation in statutes' connection to any deliberative or democratic process.<sup>14</sup>

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

12 GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

13 GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

14 Compare JOSEPH VINING, *THE AUTHORITATIVE AND AUTHORITARIAN* chs. 9, 10 (1986), and note Joseph Sax's "remand to the legislature" in environmental law, in JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

he presents for that purpose one of the hardest cases to think about in law, the sanctioning of torture.<sup>15</sup> 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 against "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 non-belief, 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

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15 See CALABRESI, *supra* note 12, at 172–77.

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."<sup>16</sup> 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 (or loaf) where we usually use head.<sup>17</sup> 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

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16 *Id.* at 175.

17 I was introduced to rhyming slang in 1961 as a student when I worked in a Borstal Institution, see BRENDAN BEHAN, *BORSTAL BOY* (1958), 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.

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 decisionmaker, 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 "one" can never, never, never be "two." And 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. Decisionmakers must sleep at night after terrible harm has been done to another human being by reason of their own statements.

## VI. 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 modern law of corporations and of substantive fields of law, such as the environmental or 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 decisionmaking 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 this that 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 thought to be able to see too 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 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 decisionmaker 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 decisionmaker 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—revealing 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 decisionmaker who is not being law-abiding.

## VII. 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 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 you have put all twenty-two men 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 four by two, you do this. If you do not do this, you have not divided four by two.

Law is not pretending. It is not imitating. Law is for real. And the decisionmaker 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 of 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 dissolution of any invitation to ignore what identifies as human the actor and the acted-upon.

### VIII. OBJECTIVITY AND INDIVIDUALITY IN LANGUAGE

Reading another closely who is speaking propositionally, in an effort to understand what is being said, is an exercise in self-awareness any of us might put ourselves through. The delicacy of it is constantly demonstrated 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 observation that we speak a "double language" might be made of any of us. I myself say, here,



"No word 'has' a meaning."<sup>18</sup> 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.

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 "So-and-so 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, to fix the meaning of words. 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 another can be seen to be asking when she 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. We imply a distinction between the literal and the non-literal, true use and false use, not just to steady ourselves, and not just because we do not wish to lose an audience for whom usual usage and special usage have 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, that 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 too much obscure the person speaking, largely flows from our looking at our words, our phrases and our con-

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18 See *supra* notes 16–17 and accompanying text.

structions, 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.<sup>19</sup>

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 notion of true and fictional, literal and 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 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.

#### IX. THE CONNECTION BETWEEN THE LINGUISTIC AND THE ETHICAL

None of us can escape 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

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19 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' discussion of recognition of truth or falsity in spoken language by global aphasiacs who have lost the capacity to understand words as such. The intelligent aphasiac, 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* 1–2 (1926); OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* 80–82 (1st Harper Perennial ed., 1990) (citing HEAD, *supra*).

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 not then 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 be even 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 plaything or crutch of thought and not believed—can there be any genuine respect for individuals, openness to them, valuing of their life, silence at their death, limitation on use of them, 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.