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Words Consciousness: Law and the Control of Language

Walter Probert

The author believes that language, as "the major instrument of social control," should be thoroughly understood by attorneys. But he doubts that many lawyers are aware of the complexities and subtleties of language. Here, and in much of his other work, the author tries to increase the reader's sensitivity and appreciation of the communication process. To accomplish this end he believes it is necessary in part to eschew conventional styles of writing and depend on a method that forces the reader to become more involved with words.

LEWIS CARROLL took Alice through the mirror of language, casting light on words and life generally. How do it for lawyers? Add Alice to the curriculum. Fantasy may be a good way to crack through the shells into language, to expose the actors and observers of law to the interplay of law with language. In there, through that mirror, into the play of words in communication, in there lies a key which opens the mind, blows it open.

The profession is not generally well tutored in the ways of words. Many are over-trained as advocates, not enhanced with a wider and balanced sensitivity to words, wily but not therefore wise, two-dimensional masters of a six-dimensional process. Manipulation is skill and power, but at what cost and loss to other values. Generally ignored are the risks of entrapment in rhetoric, as one is in turn manipulated with mind closed and vision blocked.

Language is the major instrument of social control. Thus it is eminently suited to abuse and corruption precisely as much as its inner workings are unlighted. The snare is laid in the "nursery" and tightened in the process of acculturation. Since language is indis-

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1 See generally J. Fodor & J. Katz, THE STRUCTURE OF LANGUAGE (1964); J. Hertzler, A SOCIOLOGY OF LANGUAGE (1965); D. Hymes, LANGUAGE IN CULTURE AND SOCIETY (1964); A. Smith, COMMUNICATION AND CULTURE (1965). These and other footnote references and commentaries are not meant to be exhaustive. One interested in an elaboration and underlying communication theory and pertinent references may see Probert, Law Through the Looking Glass of Language and Communicative Behavior, 20 J. LEGAL ED. 253 (1968).
pensable to the child as he learns to cope with his environment and himself, naturally he becomes particularly dependent upon it. He becomes subject to domination by specific others, yes, but more subtly by the invisible holds of language itself, in the mesh of forms which helped in his humanization. Those very requirements of language necessary to acculturation, continuing communication, and psychic and intellectual growth, are silent media for all sorts of subliminal messages, for major and minor forms of propaganda as well. Most significant and resistant to detection or cure is the hold of language on the mind. Thought, after all, is very much if not completely dependent on words.

The relevancies of words consciousness can be sketched more specifically in various directions, for instance regarding the skills of practices, including advocacy, but also interviewing, counseling, drafting, interpreting, analyzing, and so on. Our present brief, however, is merely for creative freedom. Those who have influence with law, whether practitioner or academic, should be free and independent spirits, available as agents and champions for all manner of persons and causes. A trip through the mirror practically guarantees some measure of a new consciousness which goes beyond words, when the restraints of words are loosened.

Jurisprudential analysts can most afford a social conscience. Still most of them have done little more than look at reflections in the mirror rather than through it. Their preference too is advocacy, verbalizing to move the audience, rationalizing that "legal semantics" is of minimal importance. We go beyond semantics through that mirror, where talking of talking enriches talking and makes for other interesting insights as well, when words become visible, as part of the action, not just words.

Those who direct the play of music control its sounds. Why should the leaders, or the first fiddlers either, risk seeming discord, subversive influence? The lag in education and in theoretical analysis may be instinct-measured. For that matter, the route to words consciousness often arouses apprehension even in those whose urge is toward intellectual and psychological freedom. Man's view of his world and himself is carried and reinforced in what he says and thinks. The almost universal longing for security together with the

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2 Cf. C REICH, THE GREENING OF AMERICA (1971), discussing a "new consciousness" coming out of what is now generally referred to as the "counter-culture." Culturally, words-consciousness is on the upswing, although Reich makes no mention of it. He adheres to traditional rhetorical ploys as is still most common but regrettable.
widespread drive for power and influence make familiar constraints comfortable. The fledgeling most often prefers to hear not so much what but as he has been prepared to hear, in the ways, the forms and structure he has absorbed.

The mirror is double strengthed and protected, especially as it reflects law from law talk. The forms and styles of law talk and legal theory, "traditional" and "accepted" ways of talking and thinking, are the very traps in front. They make it most difficult even to say what words consciousness is, because one has to go through the mirror to see.

So the powers have decreed, the powers that be, the power of language we inherit, the styles that co-opt. Having walked in the jungle, attempted therapy in the classroom, this yet quasi-minion of those powers is convinced that Carroll and Alice were right all along. No usual way will do it. A way and comparatively quick to words consciousness is through heuristic play. See it not as cynicism at all but one kind of realistic idealism. Play and fantasy are ways of getting in touch with the invisible and the unknown.

Background in Theory

Fundamentals of communication theory are incorporated in the following exploration, as are teaching experiment and study of law student intolerance to ambiguity. The current counter-culture dramatizes the camouflage of surface forms and styles by "ripping off." Scholarly exploration does it less dramatically: In communication theory are the likes of Wittgenstein, J. L. Austin, McLuhan, Whorf, Korzybski, and studies in the theory of rhetoric. Anthropology and contemporary depth psychology have contributed much to communication theory, especially to the mirror-solvent skills of participant-observation central to words consciousness.

Legal theory has contributed too. The legal realists demonstrated one sort of words consciousness, but stopped short, fragmented by a different war. H. L. A. Hart explored there too but with an approach directed by concern for the power of law(s) rather than of words. Neither approach actually promotes words consciousness as a humanizing influence.

Our approach goes beyond "semantics" or "linguistic analysis" as those approaches presently sit in the popular domain. Even they, perhaps any approach in the printed medium, cannot be appreciated

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3 Studies referred to were supported partially by grants from the Educational Testing Service, The National Foundation for the Humanities, and the University of Florida.
for their potential when seen talked on paper because there they are trapped in flatness, in the very beguilements they seek to escape. Words cannot be fully appreciated through their marks on paper, but only where they live, in the living and breathing, visible, fully feelable acts of communication. There is where the real play can be seen, where the levels of their involvement can be viewed. It is in this same interplay that law lives.

We now know that all communication is a multi-media experience, including analysis and interpretation, even of written words in private, when vivified against the experience of live communication, say in the actual dynamics of thinking which puts words on or takes them off paper. The only lasting proof is in individual discovery. The only lasting proof is in individual discovery. Serious-minded scholars may reject an invitation to play in the "real" world, perhaps reenforcing a myth: Semantics is just playing with words, as is linguistic analysis, or merely pedantic or quibbling. Only a germ of truth there. The play does not start in semantics or linguistic analysis but in the material analyzed. It is counter-play, but in the open. Manipulators rely on insensitivity to their play. Whether a particular piece of legalism be manipulative or self-deceptive, if it works, it reflects someone's inhibition against the free play of words potential in the creative use of language. Conceptualism is legalism writ large, reflecting a similar sort of inhibition often based on someone's confusion or misconception as to which "rules" of word use are or ought to be operant. Both forms of ruleism involve suppression of role differentiation. The antidote is play and/or counter-play.

Down to basics: A word-form, its particular letter or sound combination, is a counter, to be moved about in various plays in accordance with but not controlled by surface rules. So it is with an even less visible surface form, that of whole assertions. We look at the best example, the declarative sentence, the master form for law talk. Style of assertion lets the forms do their work, in the rhetoric of assurance.

A games model has heuristic function, freeing from surface en-

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4 Sensitivity training in communication is yet novel in legal education. It requires a balance of disciplined attention to the forms and media of oral and written communication with unstructured "play" to facilitate the "discovery" of their interplay in more usual communication situations.

5 These premises as well as the entire "counter-analysis" that follows is an extrapolation in synthesis of a number of explorations in communication. See, e.g., A. Korzybski, Science and Sanity (4th ed. 1958); M. McLuhan, Understanding Media: The Extension of Man (1964); L. Wittgenstein, Philosophical Investigations (1953).
trapments, revealing the multiple levels of communication, even in the uni-dimensional written forms of lawyers and legal theorists. To play requires consideration of "rules," even those which are not articulated. It requires role identification for the various players. The significance of any word or assertion in actual communication situations is dependent upon the roles of the participants. Role analysis is underplayed in both legal education and legal theory, in favor of muddlement if not confusion. The proof is simple when one considers, for instance, that law(s) is supposed to be the same for all. Yet those who analyze it assume by choice unique relationships to law(s). Legal theorists and lawyers too are free and could be freer yet to play many "real life" roles not generally available to the average citizen.

Counter-Analysis

Word forms and declarative assertions have many communicative functions, among others, to transmit information concerning facts and law. However, these forms, the rhetoric of informing, if you will, are actually used in many other ways as well. There follows a counter-analysis, somewhat in the approach of semantics and linguistic analysis, designed to throw light on the uses of declarative assertions, the word-form "is," and word forms generally. As a side-product, the dependence of law talk (a kind of analysis) on everyday language forms is illustrated.7

Suppose an ordinance, "All vehicles are prohibited from municipal parks . . . ," and providing penalties for violations. We are strolling through a park and come to two men arguing loudly, a policeman and a man apparently in his early twenties. We inquire what is happening. The policeman makes the following statements (declarative analysis).

"This is John Smith. That is his bicycle. A bicycle is a vehicle. It is a fact that Smith brought the vehicle into the park and rode it. The law is clear that vehicles are not to be ridden in the park. Smith is a law breaker and must be punished."

Depending who John really is, this might become a cause célèbre,

6 See especially L. WITTGENSTEIN, supra note 5, for his provocative theory of language games presented in the style of a socratic monologue.

7 The expression "counter-analysis" is used deliberately in response to those who would reject "semantics," "conceptual analysis," and "communications analysis" generally as merely analysis. No matter how complete or purely descriptive an assertion, it is analytic in the sense that it is some sort of verbal slicing and slanting with respect to the non-verbal matters it "represents."
but much more controversial situations are and ought to be imagined. For this reason, some liberties are taken with the way a policeman would talk, to project the example into situations which are more volatile.

(1) This is John Smith: Naming, identifying, saying little more about the person than calling him A. "Is" attaches the name.

(2) That is his bicycle: By itself seems only identification again, but also serves to classify into a familiar, seemingly unnoteworthy category. Taken with later statements, the classifying function of "is" take on a logical significance, a rhetoric of reason. "Is" is persuasive!

(3) A bicycle is a vehicle: Continuing the logic of classification, but also moving out of relating what is observable to what is not there. Comes close to being purely verbal, relating words to words, rather than things to words. Sounds like an equation, or as if synonyms involved; i.e., bicycle=vehicle; as if refutation not possible, as with 2+3=5. Actually, the "rules" of word usage do not require but merely permit the move from one level of categorization to another. Finally, if we look at the total set of assertions, we see a typical example of the way everyday "facts" become law facts. Compare: "I am free to treat the bicycle as a vehicle and hereby do so."

(4) It is a fact that Smith brought the vehicle into the park and rode it: In a live situation, given the status and roles of the parties, the forms are not apparent, giving special status to the words that ensue. Compare: "It is my belief . . . .," or "my fantasy . . . ." Especially significant is the evaluation of the object as a vehicle, named as a fact, perhaps more obvious than usual here because of the progression in the set of assertions and the accompanying counter-analysis. This evaluation is an analysis, both in the world of facts and the world of law, given the context of the other statements. They cannot be ignored in a valid counter-analysis, in seeing what is being done with words. Finally see that the form of information-giving may make it seem as if the only test of legitimacy of the assertions is akin to fact verification, i.e., visual observation and common experience.

(5) The law is clear that vehicles are not to be ridden in the park: The logic of classifying continues into the evaluation. We are purely at the verbal level now. "Is" now comes the closest yet to equivalency significance, camouflaging an interpretation. What is presented as an almost self-evident piece of information seems
further, via "the law," to refer to the whole machinery, some finished product, rather than the raw material of an uninterpreted ordinance.

(6) Smith is a law breaker and must be punished: A conceptualistic use of "is," a rolling of its various functions into one. The logic-rhetoric hides the evaluations and the socio-legal discretions that are common in interpretation and implementation of all law(s). Laws do not operate automatically in the real world. Of course authority and apparent knowledge-ability play their parts. If someone else had uttered the hypothetical assertions to the policeman, rather than in the way it actually occurred, then his options were several, even if "the law is clear." 8

Name Game

One of the earliest word games is the name game: This is a cup. That is a marble. Here is a cookie. Names serve many functions in various other games where the rule is that you cannot change the name. Later there comes another level of complexity. A marble may fit into the mouth, but it does not belong to the food family. Thus the naming game serves the purpose of indicating what games can be played with the things that are named. (Compare: This is a battery.)

He who provides names controls the games that can be played!

Fact Game

A variation on the name game and much more a word game than is generally appreciated. Name words are learned when one is playing games with things or people. They can be moved about in the fact game when one wants to play the game of talking about games that have been previously played, or to talk about things, people, and situations that are not at hand. Consequently, there is no way to play except with words. A minimum of equipment is needed. One is permitted free play in imagination to act almost as if the named things were right there.

Later on disputes arise, especially on how to name things that are not there or maybe not anywhere. He who would control must have some sort of dominant power or influence. Sometimes it is enough to have skill with the fact game itself. High honors go to him who

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8 This simplified counter-analysis is but a primitive model applicable to any proffered piece of legal analysis, wherever. One of the controversial areas of application concerns "civil disobedience," but any traditional legal analysis is revealed as potentially controversial.
plays other games while seeming to play only the fact game. The most skillful later on become reporters, lawyers, or sociologists. Experts in jurisprudence tend to skip over the fact game in favor of the information game.

**Feelings-Emotions Game**

Early play is non-verbal, in the primitive forms of crying, smiling, giggling, and that sort of thing. Then one learns to put names to this or that pain, emotion, or feeling.

While "bodily language" is in many ways superior in certain situations, it is not allowed in most. The rules can be most perplexing for the novice because he has also learned how to achieve certain gains by working for sympathy or appreciation through a free play of emotion, to get others to feel for him or with him or to share his emotions and feelings.

Somehow he learns to put his feelings into words that hide them, a considerable achievement not accessible to all. A laggard will not do well in law school and certainly cannot cut much of a mark as a legal theorist. Special training in rhetorical skills helps. The surest technique is for the player to pretend that everyone feels just as he does and then to move quickly and quietly into the fact or information game.

**Semantics Game**

This sort of play is still disquieting and best rebuffed as subversive. It is particularly troublesome to those who have mastered all variations of the name and fact games. The victory cry is, "I know what you're doing!" The palm may go to the player who proves it is the other who is playing games with words.

There are many examples of games within games, but this is one of the few where a player tries to make it explicit. It is still not "in" to do that. A variation on the semantics game is to say simply, "that's just rhetoric." This should be called as a foul because really that is just another way of saying "You're playing games."

Another more disarming variation is as follows: Player \( A \) names and/or facts. \( B \) plays semantics by saying "loaded words," or "You're giving me feeling instead of facts," or in sophisticated circles, "That's a value judgment." The reply, most popular in the counter-culture, is "Of course," implying, "No other way, man." Such candor will probably not spread or be long-lived. The old-
fashioned liberal has a ploy of his own. As an A he simply expresses disdain of the semantics game as being archaic, like diagramming sentences.

The semantics game is generally limited to informal conversation situations, hardly ever being seen in scholarly writings, nor in lawyer analysis or legal theory commentary. The skillful semantics player is pretty well confined to play behind closed doors, making his rejoinders by the rules of the more traditional game, say by arguing about facts, following the general rule that the real rules are to remain covert.

**Information Game**

This may be the most important intermediate game, stemming from the basic name and fact plays. Of course the sharpest plays are made by professionals, especially those skilled in the even more complicated law-information game.

Any fact-appearing sort of information can be used in a great variety of other games. To illustrate, suppose a Father and young Son who has just now walked through an open door: "The door is open." Son, being a mere mortal, is doubtless in some way aware the door must be open. Father's obvious word game is actually ancillary to another communication game, and no particular subtlety is involved wherever it is used as a move. Those games analysts known as students of rhetoric discovered this sort of move at least as long ago as Aristotle. They maintain that most verbal communication is designed to move the person(s) addressed. It is worked most successfully when the moving force is not apparent, for instance in traditional forms of law talk and legal theory.

As we have noted, semantics and rhetoric counter-plays are most often used to make explicit subsurface games. We are engaged in related counter-analysis. Naturally counter-play is not always rhetorically appropriate, although the counter-play may itself move beneath the surface. Thus suppose that Wife says to Husband, "Did you see that Maria just got married?" Yes he did, and he knows she knows that he knows, realizing instantly he is being twitted or worse. "Yes, of course. Why do you ask?" he replies in the innocent-question counter-play. "Oh, just thought you'd be interested," should end the match in the more restrained family.

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9 There is a sense in which all verbal analysis is a study in rhetoric, as this essay attempts to suggest. See generally L. CROCKER, READINGS IN RHETORIC (1965); and on specific relevance for legal theory, J. STONE, LEGAL SYSTEM AND LAWYERS' REASONING 325-27 (1964).
Yet the counter-player has gained secondary information, a little noted advantage of the subsurface semantics game, incidentally. One may give away his position by the use of loaded words, all the better because the counter-player appears oblivious. We must remember that not everyone plays these games well. Those who enroll for the advanced course will discuss how any piece of information is a give-away. The proof is easy. Every move in an information game, including law variations, is a move in a word game as well as some other. There is rarely any way of avoiding the taking of a position of some sort if one is going to make this sort of move. Detection is difficult against the skillful law-information player because he will stress that he is only saying "what the law is," or that he does not "make the rules."

**Definition Game**

This is clearly a verbal game at the intermediate level, indispensable to mastery of the more advanced game of law talk. Counter-play brings the definitions into the open. This skill is basic to all forms of counter-play. The novice must be warned against moving too fast or too often because he may lose his bearings, getting dizzy when he stops, as he must, with a sickening feeling that everybody really is only playing games after all. There is a limit even to words consciousness. One must be able at least to turn it down even if he cannot shut it off, else it will obstruct more important moves.

The success of the definition player is largely dependent on the counter-player’s being stuck back at the novice level of "meanings" and dictionaries. The player who refers to the meanings of his own words is engaged in explicit definition. This is fun when one then goes on to use the defined words in some other way. The more usual approach is somewhat sneaky too because the less skillful opponent assumes that the key terms are being used "in the ordinary way," and that by and large words have set meanings.

The most delightful examples of definition play can be found in legal theory. For many years the most popular variant was "What is law?" Each player would say what it was, more or less subtly actually defining "law" while appearing only to be giving self-evident information. His goal was to try to set the rules for all manner of other games, not only in legal theory but law talk as well, even for those out of the profession, the amateurs.

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Oliver Wendell Holmes provided an apt and provocative example some years ago, claiming that law was a prediction of judicial behavior: Any time a person said what the law was, whether generally as in legal theory, or specifically as in law talk, Holmes would have it he was really predicting what a court would do. Holmes was legislating. Thus, if you said you had a legal right of some sort, he had already ruled that you were saying a court would protect you in your claim. Explaining Holmes’ move takes us afield, but it was one of the most successful in the history of legal theory. Its greatest significance was for counter-play. Even so, skillful law-talkers continue to play the law-talk definition game under the cover of supposed purely legal terms, the very technique Holmes was most concerned to prevent.

Still, one interesting consequence of Holmes’ and other moves is that the “What is law?” question is now considered camp at best. Once again, the best technique known to legal theorists, including sociologists who pretend not to be legal theorists, is simply to bull one’s way ahead by just using “law.” This way the reader is not put on notice so that the writer’s definition may well slip by unnoticed. A familiar example with many variations comes in response to innocent inquiry as to how one should behave: “It’s against the law.” This response may not seem to involve definition at all, but remember the player is depending upon the other player to fill in whatever definition will make the assertion most acceptable. Most law talk and a preponderance of legal theory is dependent upon this technique! Since there are numerous plays available for “law,” the odds favor this approach.

Consider an everyday example of the definition game. $A$ and $B$ are driving cars which collide. $A$ says to the policeman, “He hit me.” Little boys play a similar game. In one play of “hit,” each car hit the other, but in the sense of who is to blame, it may well be that it was $B$ who hit $A$, meaning that $A$ did not hit $B$. If put to admission that “in fact” $A$ did hit $B$, then $A$ may try for lesser odds to argue that $B$ was responsible.

All words, legal terms included, are subject to this and other kinds of play. Take the name game as further illustration. Suppose Mother sends Son to the kitchen to obtain ashtrays for the guests. He comes back without any, whereupon Mother scolds him for not bringing in saucers which were all over the kitchen. Natur-

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ally he misapprehends the limits of this new game later on in life, say when he was about to snuff out a cigarette in a fine china saucer at dinner, or worse, in a cup. (After all, a cup is a cup.) “My dear, here is an ashtray,” soon alerts him to the way to behave. While to the counter-player expert words like “ashtray” or “saucer” are not merely moves in a verbal game, he has to be aware of the interplay of verbal rules and social rules. In these examples, whether or not a saucer is also an ashtray involves a position. These games are analogous to that played by Holmes in defining law as a prediction of judicial behavior.

The basic move, remember, is that the definition player seems to be relying on something approaching fact. Again, open counter-play is not always advisable, counter-definition often being more strategic. If stuck for ideas, one may play word consciousness with the door closed.

Law Talk

All of the other games are prerequisite to this advance play, much to the despair of sticklers and other Utopians who prefer to have law talked to very special rules. They confuse two different kinds of rules, doing innocently what the master player does deliberately. He is most difficult to uncover because he looks legalistic and everyone realizes that legalists are practically uncurable short of therapy, a game they particularly resist.

The legalist, real or pretend, puts forth so-called legal rules as entirely controlling, leaving unspoken and even undetected the rules of words and assertions. He is backed by the similarity in appearance of the fact game where there are no explicit rules to discuss. Thus freedom, yea the requirement, to refer to legal rules (or laws) provides further cover in law talk.

The technique is most evident where there is some sort of formal or official set of words which clearly is a legal rule. Fairly simple statutes or ordinances illustrate. Nonetheless, even when one “applies” such a complex set of words, he is unavoidably involved in a word game.

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12 This and the next section distinguish the rhetoric, for instance of advocates in court (law talk), from the rhetoric of commentaries in legal theory. To move from one to the other actually requires translation. For instance, the very word “law” tends to have quite distinctive meanings in the two generalized contexts. Further, law talk, as a communicative phenomenon, moves the observer from law on the books (what law talk purports to describe) to law in action, in which the talker is actually usually a participant. Cf. J. EHLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936).
First, compare another situation having articulated rules. When one is playing a card game, if he has mastered the explicit rules, he need not refer to them except in a dispute. When a rule is then invoked, the card play ceases and the word game appropriate to that situation begins. This is a rule game, parallel to name, fact, and information games. It is a game within, ancillary to, the card game. There are usually rules for the rule game, just as in other word games, but they are usually not articulated, sometimes being created on the spot.

There are similar unspoken rules for invoking or “applying” or “interpreting” statutes and ordinances. The master player makes it appear that the statute or ordinance is controlling even when he is playing according to some private word-game rules. In the old days, this sort of word game had something close to explicit “rules” which made the players’ moves virtually undetectable.

Thus, suppose the ordinance prohibiting all vehicles from public parks. The legalist’s ploy, in accordance with his explicit rules for this sort of game, is that “the meaning of the words is clear.” So, if he decides that bicycles should be excluded, bicycles clearly are vehicles, as any dictionary will show. Contemporary linguistic sophistication puts this approach in doubt, but it is still good sport elsewhere. The modern judicial approach is to “look for the purpose,” either of the legislative body or of the statute or ordinance itself. Such search promotes consideration of “appropriate” rules for the ancillary game, but correspondingly subtle moves remain so that one need not be discouraged from reference to his own preferred stock.

The game is freer when the legal rules themselves are not formally fixed as is the case in pure common law. One interested in the full details of those plays need merely consult the considerable literature constituting the counter-play of the legal realists. Remember they were playing their own games, so discount their value about 20 per cent.

While there are thus at a minimum two sets of rules in law talk situations, the master legalist makes play more difficult by omitting all reference to rules. He moves in the name-fact-information patterns. Sizing up things, he says, “That’s a battery,” or “What you have here is income rather than a gift.” When pushed, he will produce the relevant legal rules, by which time the counter-player is completely diverted from focusing on the rules of the word game which is being played.
The super-master legalist is practically unplayable since he resorts almost entirely to the fact game. Opposing players are pulled off balance in misreading the signals to mean it is the fact game they learned as children. While the professional legalist is good at that game, his real advantage accrues from subtle movement back and forth from that game into law facts, so that he rarely need do more than wave his hand in the direction of legal rules somewhere “out there.”

Recalcitrant law students should now appreciate why it does take three years to learn to play the complex of games which are involved in putting together law talk (legal rules plus ancillary word rules), law fact, and everyday fact games. It takes one year alone to learn to roll it all up, keep a straight face, and say, “The law in this case clearly is . . .” (law information).

Theory Games

We are about out of playing room, but the best is yet to come. Remember, this is not super-cynicism. We are playing. Still, nothing has been said in this games analysis that is not supported by credible literature from either or both legal and communication theories. In this connection, take a bit of a further look at this whole business of rules. It will help if you will remember that “rules” is merely a word form, as you see it here. In the world of live communication, it is used in a great variety of ways.

At the level of theory (i.e., in the parlance of games analysis, when you are playing a legal theory game), it is quite legitimate to say that what are called legal rules at the level of law talk are “not really rules at all.” From our vantage point, we can even agree with the theorist because we appreciate his perspective (see his game situation), and yet realize that it is quite legitimate at the level of law talk (e.g., a lawyer in court) to say, “In this case, the rule of law is . . . (thus and so) . . . .”

Play at the level of legal theory is one thing, that at the level of law talk quite another, as we can see possibly only from our particular here and now level of engagement. From our level we can see further that it is not legitimate at the level of law talk even to raise the question whether legal rules really exist. That never has been and still is not a permissible ploy when really talking law. Actually, there is a rule against saying that sort of thing. Realize, however, that the law talker is free to say that the opposing player has put
forth some particular assertion which is not really a rule (maybe a mere principle) or not the correct rule.

The legal theorist who says there are no legal rules, or hardly any, is playing a different game from the law talker in court or the one in the construction project, one actually permitted in the total playability of the word-form "rule." We have already seen justification for this sort of theoretical (theory level game) assertion. By one definition, a rule is the ultimate binding assertion. But if no so-called legal rule is applicable without other, albeit comparatively invisible rules, the rules for playing with the words in the rule (remember bicycle=vehicle?), then either those word-rules are the ultimate rules or at least they can prevent the so-called legal rules from being ultimate.

Someone may say, "Well, rules do not have to be all that binding to be legal rules." That is simply a move to legitimize the way people talk when they talk law, but it is not needed because they are going to continue to talk that way anyway. They are the ones who determine the rules for talking (legal) rules. Our interest at the moment is not to say that law talk should be outlawed, nor is it to say that legal theory talk is phony, although both kinds of talk are different games. Nor is it to say they are always mutually exclusive games, except for the sort of illustration given about the existence or non-existence of rules.

However, there is really no person who talks about law who always plays the law-talk game. After all, anyone is free to (play) law talk in one room and then go next door and engage in (playing at) legal theorizing. There are a few privileged souls allowed to play both games at once, like judges writing opinions in hopefully landmark cases, or jurisprudence teachers in torts classes. Even lawyers are not always playing by the rules of law talk! From our perspective, above both fields of play, we might wish we had the power to prohibit lawyers from being bound by the rules of law talk, at least when they are engaged in the solitaire word-games of just thinking, analyzing, interpreting, and so on. Indeed this whole counter-analysis is an invitation to them to come up here and play our games with the thought they could go back and play their games even better and maybe introduce some exciting new games when they get back home.

Consider just one of many moves open to a law-talk oriented individual. It stems from the works of Hans Kelsen, a noted legal
theorist. He worked out what he called the "pure theory of law." In his model of law, it is made up not of rules but of norms. From our vantage point we should applaud this move when we see the sort of counter-play it is.

It is a refinement of an older counter-play that would say that every assertion of law "is really an ought." Were this rule of gamesmanship adopted, the entire preceding analysis would be obsolete. How so? Simply because our stress has been on the declarative is assertion which grounds the information and definition games which are vital to law talk and legal theory alike. Just stop to think how the power of the law talker is sapped if he has to say, not, the law is clear in this case that the rule is thus and so, but "The legal ought is . . .," or better if he were reduced to saying, "The legal ought ought to be viewed as . . . ." Legalism would be slowed down at least.

But there is more to Kelsen's move than that. It goes to the matter of role-differentiation. Most legal theorists fail to take account of socio-legal roles, although slowly the significance of this aspect of analysis is making its way. The chief problem is that the legal theorist tends to write as if he were writing for all possible readers and it becomes most difficult to say, "Well, law is this way for this group of readers, that way for another, and yet this for a third, and so on." The advantage of a games analysis is that it leaves the matter open enough so that this or that reader can work it out for himself as he wishes. But Kelsen's move allows that too. The reason why it has not been appreciated more than it has in this country is because we are hung up on the conceptualism of LAW, both in law talk and legal theory.

Consider the practising lawyer, just for instance. Alright, so he plays law talk most of the time in court and other occasions. In those situations he must talk rules, whatever he may privately think. But when he is in the role of analyst, prior to any commitment as advocate, he quite definitely would be better off not to think rules but norms. This is just one example but important of a way to avoid entrapment in someone else's word-games. How he talks to clients varies with the needs of each client. Lawyers simply cannot afford

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to think law talk. Remember that law talk does not require any mention of rules at all. Its basic play is with the declarative assertion and some unqualified form of the "be" verb.

Anyone who has followed this analysis to this point might raise a point in protest, that law and order, or whatever, is impossible without a concept of law that stresses rules and the associated declarative assertions. Equivocation is not a way to persuade citizens to comply. Agreed, but we have not been involved in the analysis that determines when we ought to restrict ourselves to the rules of law talk games! This is plainly and simply an insider's analysis.

Language is the major instrument of social control. This analysis is but a first step toward the proof. Somehow or other one has to step outside of the powerful hold of language forms in order to see its grasp, later on to feel its pull when inside again. This pull works even with the comparatively non-inflammatory examples chosen for the analysis. It is even stronger when the heat increases, although the pull is not the same in all directions. It is when the heat is highest that words consciousness is most needed but naturally when it is least tolerated.

One final query for the philosophically inclined. On which side of the mirror is reality?