

FIRST AID FOR LAWYERS.

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I.

In an examination of styles of judicial utterances, Mr. Justice Cardozo described one style as "the tonsorial or agglutinative."¹ This article falls into such a class. Scissors and paste have been used extensively; my purpose is not to offer any original views, however, but to direct attention to the available literature in a field of study of great and increasing importance to lawyers and students of jurisprudence.

The lawyer spends his life dealing in words. He defines them; he explains them; he piles them high upon each other; he performs marvels of verbal juggling. His activities in this connection expose him at once to the suspicion and derision of the rest of the community and all the time, it seems, he has been engaged in a task which is likely only to make confusion worse confounded. Such indeed is the conclusion to which the growing literature upon the subject of semantics would seem to lead.

Dr. Glanville Williams has recently discussed the relationship of semantics to the study and practice of law in a series of articles (not yet concluded) published in the *Law Quarterly Review* during 1945.² In these articles, expressed with the clarity and enriched by the wide learning which distinguish everything that comes from his pen, Dr. Williams explains the modern theory of the function of language.

"Semantics," he observes, "studies the meaning of words,—not, indeed, the meaning of this or that particular word, but the nature of meaning in general. It also considers the general conditions that must be satisfied before the word can have meaning; the influence of words upon thought; and the non-symbolic (emotive) function of words."

In Thurman Arnold's view,³ the major reason why the social sciences have not developed a technique comparable with the physical sciences is that the former are largely concerned with "principles," the latter with experiments.

Law is one of the social sciences, and it is necessary always for lawyers to remind themselves that it is an auxiliary science; its purpose is to ensure the order which the forces in control of Society desire to impose.⁴

"Law . . . is not the embodiment of justice, or the voice of reason, in a simple and satisfactory way. There is justice in law, there is reason in law, but they are not and never have been, inter-changeable terms. What the Courts do day by day is to apply rules the object of which is to protect the interests of the existing order. The maxims they invent, the principles they discover, are those which will satisfy the requirements of the dominant class in the society in which they function . . . Law, seeking order as its highest end, attains that order by satisfying the requirements of the stronger part of Society."⁵

Once accepted and fitted into the social structure a legal "principle" is used to support and sanctify existing institutions. Sir Henry Maine considered that

1. "Law and Literature," 52 Harv. L.R., 485.
2. "Language and the Law," 61 L.Q.R., pp. 71, 179, 293, 384. His delightful satire should not be missed.
3. *The Symbols of Government* (Yale University Press (1935), p. 4).
4. Cf. W. R. Wade, "The Concept of Legal Certainty," (1940-41), 4 Mod. L.R., 183, at p. 185.
5. H. J. Laski, Essay, "Justice and the Law," in *Studies in Law and Politics* (George Allen, London, (1932)), at p. 278.

“with respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language and entertain, as would appear, a double and inconsistent set of ideas.”⁶

Jerome Frank holds the view that Maine’s statement is inescapably correct; semanticists have no doubt that it is.

II.

The birth of semantics as a distinct science is ascribed to *The Meaning of Meaning*, by C. K. Ogden and I. A. Richards. This work was published in 1923, and it has already gone through six editions. Ogden, however, credits Jeremy Bentham with the inspiration which led him to undertake the studies which resulted in *The Meaning of Meaning*. His introduction to *Bentham’s Theory of Fictions*⁷ is a brilliant examination of Bentham’s linguistic studies. How close Bentham was to the modern writers on semantics can be shown by some extracts from his writings.⁸

As is well known, Bentham was greatly irritated by “legal jargon” as he called it. Readers of Thurman Arnold’s *The Symbols of Government* and *The Folklore of Capitalism*⁹ and Jerome Frank’s *Law and the Modern Mind*, will find familiar the thought which led him to write:¹⁰

“Among the instruments of delusion employed for reconciling the people to the dominion of the one and the few, is the device of employing for the designations of persons, and classes of persons, instead of the ordinary and appropriate denominations, the names of so many abstract fictitious entities, contrived for the purpose. Take the following examples:—

Instead of Kings, or the King—the Crown and the Throne.

Instead of a Churchman—The Church, and sometimes the Altar.

Instead of Lawyers—the Law.

Instead of Judges, or a Judge—the Court.

Instead of Rich men, or the Rich—Property.

Of this device, the object and effect is, that any unpleasant idea that is in the mind of the hearer or reader might happen to stand associated with the idea of the person or the class, is disengaged from it: and in the stead of the more or less obnoxious individual or individuals, the object presented is a creature of the fancy, by the idea of which, as in poetry, the imagination is tickled—a phantom which, by means of the power with which the individual or class is clothed, is constituted an object of respect or veneration.

In the first four cases just mentioned, the nature of the device is comparatively obvious.

In the last case, it seems scarcely to have been observed. But perceived or not perceived, such, by the speakers in question, has been the motive and efficient cause of the prodigious importance attached by so many to the term property: as if the value of it were intrinsic, and nothing else had any value: as if man were made for property, not property for man. Many, indeed, have gravely asserted, that the maintenance of property was the only end of government.”

Dr. Williams briefly summarises the theory of Ogden and Richards as follows:¹¹

“In themselves words are nothing; or at least they are (as an old-time lawyer expressed it) ‘no other than the verberation of the air.’ Their

6. Quoted, Jerome Frank, *Law and the Modern Mind*, (Tudor Co., New York, (1935)), p. 27.

7. Kegan Paul & Co., London, (1932).

8. Bentham’s Works, Volume 10, pp. 74-5, Bentham’s Theory of Fictions, Ed. Ogden, p. xx.

9. Yale University Press, 1937, 10th Printing, 1943.

10. Works, Vol. 10, pp. 74-5, *Bentham’s Theory of Fictions*, Ed. Ogden, p. cxviii.-ix.

11. 61 L.Q.R. 73.

importance consists in the fact that they are a kind of symbol, which is itself a kind of sign. Sign is the genus, symbol the species, and word the sub-species. Let us consider first signs in general. Skating over the difficulties of definition, the nature of a sign can best be explained by an example. Suppose a person sees smoke coming from a chimney: he promptly thinks 'There is no smoke without fire,' and so concludes that a fire is burning underneath. Here the smoke is a sign of the fire. The ability of any particular person to interpret a sign that comes into his consciousness—i.e., to find meaning in it—depends upon his past experience, in this case his past experience that smoke is a consequence of fire.

Symbols are a special class of signs. These are other signs than symbols; thus smoke is a sign, but it is not a symbol. A symbol is a conventional sign; it is a sign that is consciously designed to stand for something.

Words are a special class of symbols. These are other symbols than words, such as a traffic sign, a wink, and a numeral. But the words are much the most important kinds of signs used in ordinary thinking and communication.

A word or other symbol is generally used to refer to an object or situation in the real world. It is convenient to have a technical term for this object or situation and Ogden and Richards coin the term 'referent' to indicate it. Words and phrases, then, are symbols that stimulate mental references to referents. The referent is that which is signified. The relation between a symbol and its referent is always indirect; between them there always intervenes the thought of some person. If there were no minds there would be no symbols and so no words."

III.

The most sprightly account of the science of semantics is to be found in Stuart Chase's *The Tyranny of Words*, first published in Great Britain in 1938. Chase insists that when people can agree upon the thing to which their words refer, minds meet, but that otherwise people, though they imagine they are communicating with each other, in fact do no such thing. The two besetting sins of language are identification of words with things and the misuse of abstract words.

"This is a dog. Is it? The thing that is called 'dog' is a non-verbal object. It can be observed by the senses, it can be described, and then, for convenience, the label 'dog' can be attached to it, or the label 'hund' or 'chien' or 'perro.' *But the label is not the animal.* . . . We are continually confusing the label with the non-verbal object, and so giving a spurious validity to the word, as something alive and barking in its own right. When this tendency to identify expands from dogs to higher abstractions such as 'liberty,' 'justice,' 'the eternal' and imputes living, breathing entity to them, almost nobody knows what anybody else means."¹²

Therefore, says Chase, the goal of semantics is find the *referent*, referent, as he uses it, meaning the object or situation in the real world to which the word or label refers. Discussing labels, he says:¹³

"Labels as names for things may be roughly divided into three classes on an ascending scale:

1. Labels for common objects, such as 'dog,' 'chair,' 'pencil.' Here difficulty is at a minimum.

2. Labels for clusters and collections of things, such as 'mankind,' 'consumers' goods,' 'Germany,' 'the white race,' 'the courts.' These are abstractions of a higher order, and confusion in their use is widespread. There is no entity 'white race' in the world outside our heads, but only some millions of individuals with skins of an obvious or dubious whiteness.

12. *Tyranny of Words*, (Methuen & Co., London, 3rd Ed. (1939)), p. 5.

13. *Tyranny of Words* (*supra*), p. 6.

3. Labels for essences and qualities, such as 'the sublime,' 'freedom,' 'individualism,' 'truth.' For such terms, there are no discoverable referents in the outside world, and by mistaking them for substantial entities somewhere at large in the environment, we create a fantastic wonderland. This zone is the especial domain of philosophy, politics, and economics."

He gives an illustration of the use of words which are semantically meaningless in the following amusing passage:—

"A typical speech by an aspiring Hitler would be translated into its intrinsic meaning, if any. Abstract words and phrases without discoverable referents would register a semantic blank, noises without meaning. For instance:

'The aryan Fatherland, which has nursed the souls of heroes, calls upon you for the supreme sacrifice which you, in whom flows heroic blood, will not fail, and which will echo forever down the corridors of history.'

This would be translated:

'The blab, blab, which has nursed the blabs of blabs, calls upon you for the blab blab which you, in whom flows blab blood, will not fail, and which, will echo blab down the blabs of blab.'

"The 'blab' is not an attempt to be funny; it is a semantic blank. Nothing comes through. The hearer, versed in reducing high-order abstractions, to either nil or a series of roughly similar events in the real world of experience, and protected from emotive associations with such words, simply hears nothing comprehensible. The demagogue might as well have used Sanskrit."¹⁴

I permit myself a final quotation, with a suggestion that readers should adapt it to the Australian scene.

"Endless political and economic difficulties in America have arisen and thriven on bad language. The Supreme Court crisis of 1937 was due chiefly to the creation by judges and lawyers of verbal monsters in the interpretation of the Constitution. They gave objective, rigid values to vague phrases like "due process" and 'interstate commerce.' Once these monsters get into the zoo, no one knows how to get them out again, and they proceed to eat us out of house and home.

"Judges and lawyers furthermore have granted to a legal abstraction the rights, privileges, and protection vouchsafed to a living, breathing human being. It is thus that corporations, as well as you or I, are entitled to life, liberty and the pursuit of happiness. It would surely be a rollicking sight to see the Standard Oil Company of New Jersey in pursuit of happiness at a dance hall. It would be a sight to see United States Smelting and Refining being brought back to consciousness by a squad of coastguardsmen armed with a respirator, to see the Atlas Corporation enjoying its constitutional freedom at a nudist camp. This gross animism has permitted a relatively small number of individuals to throw the economic mechanism seriously out of gear. By economic mechanism, I mean the operation of factories, stores, machines, whereby men, women, and children are fed, sheltered, and clothed. If people were armed with semantic understanding, such fabulous concepts could not arise. Corporations would not be interpreted as tender persons.

"Corporations fill but one case in a large menagerie. Let us glance at some of the other queer creatures created by personifying abstractions in America. Here in the centre is a vast figure called the Nation—majestic and wrapped in the Flag. When it sternly raises its arm, we are ready to die for it. Close behind rears a sinister shape, the Government. Following it is one even more sinister, Bureaucracy. Both are festooned with the writhing serpents of Red Tape. High in the heavens is the Constitution, a kind of chalice like the Holy Grail, suffused with ethereal light. It must never be joggled. Below floats the Supreme Court, a black-robed priesthood tending the eternal fire. The Supreme Court must be addressed with respect

14. *Tyranny of Words*, (*supra*), p. 14

or it will neglect the fire and the Constitution will go out. This is synonymous with the end of the world."

. . . Looming along the coasts are two horrid monsters, with scaly paws outstretched: Fascism and Communism. Confronting them, shield in hand and a little cross-eyed from trying to watch both at once, is the colossal figure of Democracy. Will he fend them off? We wring our hands in supplication, while admonishing the young that governments, especially democratic governments, are incapable of sensible action. From Atlantic to Pacific a huge, corpulent shape entitled Business pursues a slim, elusive Confidence, with a singular lack of success. The little trembling ghost down in the corner of Massachusetts, enclosed in a barrel, is the Taxpayer. Liberty, in diaphanous draperies, leaps from cloud to cloud, lovely and unapproachable.

Here are the Masses, thick, black, and squirming. This demon must be firmly sat upon; if it gets up, terrible things will happen; the Constitution may be joggled—anything."¹⁵

Students of Constitutional Law may reflect upon Mr. Chase's observations when they are applying themselves to the mastery of the High Court decisions on the defence power, and of the expositions of Section 92 by that Court and the Privy Council. One gathers from *James v. Cowan*¹⁶ that Rich J. felt some regret that the framers of the Constitution had not been trained in semantic discipline; for in that case he observed:

"The rhetorical affirmation of sec. 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words 'absolutely free,' the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution."

IV.

There would seem to be room for the application of semantics in a field of the law which lately has been brought to the attention of the public by prosecutions for the sale of allegedly obscene books. As is known to all students, the test of obscenity at common law is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the kind challenged may fall.¹⁷

15. *Tyranny of Words*, pp. 15-17.

16. (1929-30), 43 C.L.R., at pp. 422-3.

17. *R. v. Hickin*, (1868), L.R. 3 Q.B. 360, per Cockburn C.J., at p. 371.

In Victoria, statutory recognition has been given to this conception by the Police Offences (Obscene Publications) Act 1938,¹⁸ which provides that "obscene" (without limiting the generality of the meaning thereof) includes—

- (a) tending to deprave and corrupt persons whose minds are open to immoral influences; and
- (b) unduly emphasizing matters of sex or crimes of 'violence.'

How far this definition clarifies the matter may be left for discussion at some other time; the general idea underlying the law as to obscene (which cannot be said to be the happiest of the lawyers' contributions to the apparatus for preserving social morality) seems to be that anything published which is in the nature of an incitement to illicit sexual activity is obscene.¹⁹

But from the semantic viewpoint some observations of Leo M. Alpert in his article, *The Judicial Censorship of Obscene Literature*,²⁰ are of interest:

"It is of prime importance, first, to detect a piece of bad reasoning which has clouded the issue. When one in vindictive mood tears a bit of paper to shreds, the shreds do not thereby become 'vindictive' shreds of paper; the actor in the transaction is vindictive. Similarly many bits of paper bound together in the form of a book cannot be made vindictive, or pleasant, moral or immoral, by the acts of persons who have read the book. Once it is perceived that people are moral or immoral—not books—the real issue comes to light, the real issue being the effect of a book upon that sum total of peculiarities known as the human being. It is amazing to realize that regarding this actual connection very little is known—hardly that there is or is not such a connection. Yet it is this untested, preconceived, perhaps groundless theory of a cause and effect which forms the basis for the censorship statutes and the myriads of essays by judges.

"Over ten years ago the Bureau of Social Hygiene of New York City sent questionnaires to ten thousand college and normal school women graduates. Twelve hundred answers were received; and of those seventy-two persons who replied that the source of their sex information came from books, mentioning specific volumes, not one specified a 'dirty' book as the source. Instead, the books listed were: the Bible, the Dictionary, the Encyclopaedia, novels from Dickens to Henry James, Shakespeare, circulars for venereal diseases, medical books, and Motley's Rise of the Dutch Republic. In answer to the question of what were most stimulating sexually, of the 408 replies, 9 said "Music," 18 said "Pictures," 29 said "Dancing," 40 said "Drama," 95 said "Books," and 219 noted very simply, "Man."

"The American Youth Commission's study of the conditions and attitudes of young people in Maryland between the ages of sixteen and twenty-four, which has recently come off the press under the title *Youth Tell Their Story*, is even more enlightening. For this study Maryland was deliberately picked as a 'typical' state, and according to the Commission, the 13,528 young people personally interviewed in Maryland can speak for the two hundred and fifty thousand young people in Maryland and the twenty millions in the United States.

"The chief source of sex 'education' for the youth of all ages and all religious groups was found to be the youth's contemporaries. . . . Sixty six per cent of the boys and forty per cent of the girls reported that what they knew about sex was more or less limited to what their friends of their own age had told them.

"After 'contemporaries' and the youth's home, the source next in importance is the school, from which about 8 per cent of the young people

18. Act No. 4575.

19. Cf. "*Offences Contra Bonos Mores*," (1938) 8 Jo. Crim. Law, 609.

20. (1938-1939) 52 Harv. L.R. 40, 73.

reported they had received most of their sex information. A few, about 4 per cent, reported they owed most to books, while less than 1 per cent asserted that they had acquired most of their information from movies. Exactly the same proportion specified the church as the chief source of their sex information.

"These statistical results are not offered as conclusive; but that they do more than cast doubt upon the assertion that 'immoral' books corrupt and deprave must be admitted. These statistical results placed in the scale against the weight of the dogma upon which the law is founded lift the counterpan high.

"Add this: that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labour, barren lives, starved emotions, and unreasoning minds are far more dangerous to morals than any so-called obscene literature. True, this attack is tangential, but a social problem is here involved and the weight of this approach should be felt. The counterpan is lifted a trifle higher."

James Branch Cabell's *Jurgen*, a very wise and urbane book, once fell under the ban of the law of obscenity in U.S.A., and attained the distinction of being placed upon the list of prohibited imports by the Commonwealth Customs authorities. It is difficult to discover the reason for the ban, but perhaps it was because no male could read *Jurgen* with understanding and wistful appreciation until he had passed the age of 40, and no female could understand or appreciate it at all!

It may not be inappropriate, therefore, to conclude this collection of quotations with a snippet from *Jurgen*.²¹

"There is no weapon like words, no armour against words, and with words the Master Philologist has conquered me. It is not at all equitable; but the man showed me a huge book wherein were the names of everything in the world, and justice was not among them. It develops that, instead, justice is merely a common noun, vaguely denoting an ethical idea of conduct proper to the circumstances, whether of individuals or communities. It is, you observe, just a grammarian's notion."

21. *Jurgen*, (John Lane, The Bodley Head, London, 1932), 157.