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THE LAW WISHES TO HAVE A FORMAL EXISTENCE (excerpt)

Achieving Plain and Clear Meanings

The law wishes to have a formal existence. That means, first of all, that the law does not wish to be absorbedly, or declared subordinate to, some other—nonlegal—structure of concern; the law wishes, in a word, to be distinct, not something else. And second, the law wishes in its distinctness to be perspicuous; that is, it desires that the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse; for were it necessary for the law to have recourse to a supplementary discourse at crucial points, that discourse would be in the business of specifying what the law is, and, consequently, its autonomy would have been compromised indirectly. It matters little whether one simply announces that the principles and mechanisms of the law exist readymade in the articulations of another system or allows those principles and mechanisms to be determined by something they do not contain; in either case, the law as something independent and self-identifying will have disappeared.

In its long history, the law has perceived many threats to its autonomy, but two seem perennial: morality and interpretation. The dangers these two pose are, at least at first glance, different. Morality is something to which the law wishes to be related, but not too closely; a legal system whose conclusions clashed with our moral intuitions at every point so that the categories *legally valid* and *morally right* never (or almost never) coincided would immediately be suspect; but a legal system whose judgments perfectly meshed with our moral intuitions would be thereby rendered superfluous. The point is made concisely by the Supreme Court of Utah in a case where it was argued that the gratuitous payment by one party of the other party's mortgage legally obligated the beneficiary to repay. The court rejected the argument, saying "that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract that would practically erode to the vanishing point the necessity for finding a consideration." That is to say, if one can infer directly from one's moral obligation in a situation to one's legal obligation, there is no work for the legal system to do; the system of morality has already done it. Although it might seem (as it does to many natural law theorists) that such a collapsing of categories recommends itself if only on the basis of efficiency (why have two systems when you can make do with one?), the defender of a distinctly legal realm will quickly answer that since moral intuitions are notoriously various and contested, the identification of law with morality would leave every individual his or her own judge; in place of a single abiding standard to which disputing parties might have recourse, we would have many standards with no way adjudicating between them. In short, many moralities would make many laws, and the law would lack its most saliently desirable properties, generality and stability.

It is here that the danger posed by morality to law, or, more precisely, to the rule (in two senses) of law intersects with the danger posed by interpretation. The link is to be found in the desire to identify a perspective larger and more stable than the perspective of local and individual concerns. Morality frustrates that desire because, in a world of more than one church, recourse to morality will always be recourse to someone's or some group's challengeable moral vision. Interpretation frustrates that desire because, in the pejorative sense it usually bears in these discussions, interpretation is the name for what happens when the meanings embedded in an object or text are set aside in favor of the meanings demanded by some angled, partisan object. Interpretation, in this view, is the effort of a morality, of a

particular, interested agenda, to extend itself into the world by inscribing its message on every available space. It follows then that, in order to check the imperial ambitions of particular moralities, some point of resistance to interpretation must be found, and that is why the doctrine of formalism has proved so attractive. Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore; it is the thesis that one can devise procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents who might set them in motion. In the presence (in the strong Derridean sense) of such a mark or sentence procedure, the interpretive will is stopped short and is obliged to press its claims within the constraints provided by that which it cannot override. It must take the marks into account; it must respect the self-declaring reasons; it must follow the route laid down by the implacable procedures, and if it then wins it will have done so fairly, with justice, with reason.

Obviously then, formalism's appeal is a function of the number of problems it solves, or at least appears to solve: it provides the law with a palpable manifestation of its basic claim to be perdurable and general; that is, not shifting and changing, but standing as a point of reference in relation to which change can be assessed and controlled; it enables the law to hold contending substantive agendas at bay by establishing threshold requirements of procedure that force those agendas to assume a shape the system will recognize. The idea is that once a question has been posed as a *legal* question—has been put into the proper *form*—the answer to it will be generated by relations of entailment between that form and other forms in the system. As Hans Kelsen put it in a book aptly named *The Pure Theory of Law*, The law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.

Kelsen's last clause says it all: the realms of the ethical, the political, and of value in general are the threats to the law's integrity. They are what must be kept out if the law is to be something more than a misnomer for the local (and illegitimate) triumph of some particular point of view. There are at least two strong responses to this conception of law. The first, which we might call the "humanistic" response, objects that a legal system so conceived is impoverished, and that once you have severed procedures from value, it will prove enormously difficult, if not impossible, to relink them in particular cases. Since the answers generated by a purely formal system will be empty of content (that, after all, is the formalist claim), the reintroduction of content will always be arbitrary. The second response, which we might call "radical" or "critical," would simply declare that a purely formal system is not a possibility, and that any system pretending to that status is already informed by that which it purports to exclude. Value, of both an ethical and political kind, is already inside the gate, and the adherents of the system are either ignorant of its sources or are engaged in a political effort to obscure them in the course of laying claim to a spurious purity. In what follows, I shall be elaborating a version of the second response, and arguing that however much the law wishes to have a formal existence, it cannot succeed in doing so, because—at any level from the most highly abstract to the most particular and detailed—any specification of what the law is will already be infected by interpretation and will therefore be challengeable. Nevertheless, my conclusion will not be that the law fails to have a formal existence but that, in a sense I shall explain, it always succeeds, although the nature of that success—it is a political/rhetorical achievement—renders it bitter to the formalist taste.

We may see what is at stake in disputes about formalism by turning to a recent (July, 1988) opinion delivered by Judge Alex Kozinski of the United States Court of Appeals for

the Ninth Circuit.³ The case involved the desire of a construction partnership called Trident Center to refinance a loan at rates more favorable than those originally secured. Unfortunately (or so it seemed), language in the original agreement expressly blocked such an action, to wit that the "[m]aker shall not have the right to prepay the principal amount hereof in whole or in part' for the first 12 years." Trident's attorneys, however, pointed to another place in the writing where it is stipulated that "[i]n the event of a prepayment resulting from a default... prior to January 10, 1996 the prepayment fee will be ten percent" and argued that this clause gives Trident the option of prepaying the loan provided that it is willing to incur the penalty as stated. Kozinski is singularly unimpressed by this reasoning, and, as he himself says, dismisses it "out of hand," citing as his justification the clear and unambiguous language of the contract. Referring to Trident's contention that it is entitled to precipitate a default by tendering the balance plus the ten percent fee, Kozinski declares that "the contract language, cited above, leaves no room for this construction," a judgment belied by the fact that Trident's lawyers managed to make room for just that construction in their arguments. It is a feature of cases like this that turn on the issue of what is and is not "expressly" said that the proclamation of an undisputed meaning always occurs in the midst of a dispute about it. Given Kozinski's rhetorical stance, the mere citation (his word, and a very dangerous one for his position) of the contract language should be sufficient to end all argument, but what he himself immediately proceeds to do is argue, offering a succession of analyses designed to buttress his contention that "it is difficult to imagine language that more clearly or unambiguously expresses the idea that Trident may not unilaterally [more is given away by this word than Kozinski acknowledges] prepay the loan during its first 12 years." If this were in fact so, it would be difficult to imagine why Kozinski should feel compelled to elaborate his opinion again and again. I shall not take up his points except to say that, in general, they are not particularly persuasive and usually function to open up just the kind of interpretive room he declares unavailable. Thus, for example, he reasons that Trident's interpretation "would result in a contradiction between two clauses of the contract" whereas the "normal rule of construction... is that courts must interpret contracts, if possible, so as to avoid internal conflict." But it is no trick at all (or at least not a hard one) to treat the two clauses so that they refer to different anticipated situations and are not contradictory (indeed that is what Trident's lawyers do): in the ordinary course of things, as defined by the rate and schedule of payments set down in the contract, Trident will not have the option of prepaying; but in the extraordinary event of a default, the prepayment penalty clause will then kick in. To be sure, Kozinski is ready with objections to this line of argument, but those objections themselves trace out a line of argument and operate (no less than the interpretations he rejects) to fill out the language whose self-sufficiency he repeatedly invokes.

In short, Kozinski's assertion of ready-made, formal constraints is belied by his efforts to stabilize what he supposedly relies on, the plain meaning of absolutely clear language. The act of construction for which he says there is no room is one he is continually performing. Moreover, he performs it in a way no different from the performance he castigates. Trident, he complains, is attempting "to obtain judicial sterilization of its intended default,"¹⁰ and the reading its lawyers propose is an extension of that attempt rather than a faithful rendering of what the document says. The implication is that *his* reading is the extension of nothing, proceeds from no purpose except the purpose to be scrupulously literal. But his very next words reveal another, less disinterested purpose: "But defaults are messy things and they are supposed to be.... Fear of these repercussions is strong medicine that keeps debtors from shirking their obligations...." And he is, of course, now administering that strong medicine through his reading, a reading that is produced not by the agreement, but by his antecedent determination to enforce contracts whenever he can.

The contrast then is not (as he attempts to draw it) between a respect for what "the contract clearly does... provide" ¹² and the bending of the words to an antecedently held purpose, but between two bendings, one of which by virtue of its institutional positioning—Kozinski is after all the judge—wins the day.

Except that it doesn't. In the second half of the opinion there is a surprise turn, one that alerts us to the larger issue Kozinski sees in the case and explains the vehemence (often close to anger) of his language. The turn is that Kozinski rules for Trident, setting aside the district court's declaration that the clear and ambiguous nature of the document leaves Trident with no cause of action and setting aside, too, the same court's sanction of Trident for the filing of a frivolous lawsuit. In so doing Kozinski is responding to Trident's second argument, which is that "even if the language of the contract appears to be unambiguous, the deal the parties actually struck is in fact quite different" and that "extrinsic evidence" shows "that the parties had agreed Trident could prepay at any time within the first 12 years by tendering the full amount plus a 10 percent prepayment fee." ¹³ Kozinski makes it clear that he would like to reject this argument and rely on the traditional contract principle of the parol evidence rule, the rule (not of evidence but of law) by which "extrinsic evidence is inadmissible to interpret, vary or add to the terms of an unambiguous integrated written instrument." He concedes, however, that this rule has not been followed in California since *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, ¹⁵ a case in which the state supreme court famously declared that there is no such thing as a clear and unambiguous document because it is not "feasible to determine the meaning the parties gave to the words from the instrument alone." In other words (mine, not the court's), an instrument that seems clear and unambiguous on its face seems so because "extrinsic evidence" information about the conditions of its production including the situation and state of mind of the contracting parties, etc.—is already in place and assumed as a background; that which the parol evidence rule is designed to exclude is already, and necessarily, invoked the moment writing becomes intelligible. In a bravura gesture, Kozinski first expresses his horror at this doctrine ("it... chips away at the foundation of our legal system") and then flaunts it by complying with it.

While we have our doubts about the wisdom of *Pacific Gas*, we have no difficulty understanding its meaning, even without extrinsic evidence to guide us ... we must reverse and remand to the district court in order to give plaintiff an opportunity to present extrinsic evidence as to the intentions of the parties. That is, "you say that words cannot have clear and constant meanings and that, therefore, extrinsic evidence cannot be barred; I think you are wrong and I hereby refute you by adhering strictly to the rule your words have laid down."

But of course he hasn't. The entire history of the parol evidence rule—the purposes it supposedly serves, the fears to which it is a response, the hopes of which it is a repository—constitutes the extrinsic evidence within whose assumption the text of the case makes the sense Kozinski labels "literal." When he prefaces his final gesture (the judicial equivalent of "up yours") by saying "As we read the rule," he acknowledges that it is *reading* and not simply receiving that he is doing. ¹⁹ And to acknowledge as much is to acknowledge that *Pacific Gas* could be read differently. Nevertheless, the challenge Kozinski issues to the Traynor court is pertinent; for what he is saying is that the question of whether or not it is possible to produce "a perfect verbal expression"—an expression that will serve as a "meaningful constraint on public and private conduct"—will not be settled by the pronouncement of a court. Either it is or it isn't; either a court or a legislature or a constitutional convention can order words in such a way as to constrain what interpreters can then do with them or it cannot. The proof will be in the pudding, in what happens to texts or parts of texts that are the repository of that (formalist) hope. The parol evidence rule will not have the desired effect if no one could possibly follow it.

That this is, in fact, the case is indicated by the very attempt to formulate the rule. Consider, for example, the formulation found in section 2-202 of the Uniform Commercial Code. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- a. by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- b. by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

One could pause at almost any place to bring the troubles lying in wait for would-be users of this section to the surface, beginning perhaps with the juxtaposition of "writing" and "intended," which reproduces the conflict supposedly being adjudicated. (Is the writing to pronounce on its own meaning and completeness or are we to look beyond it to the intentions of the parties?) Let me focus, however, on the distinction between explaining or supplementing and contradicting or varying. The question is how can you tell whether a disputed piece of evidence is one or the other? And the answer is that you could only tell if the document in relation to which the evidence was to be labeled one or the other declared its own meaning; for only then could you look at "it" and then at the evidence and proclaim the evidence either explanatory or contradictory. But if the meaning and completeness of the document were self-evident (a wonderfully accurate phrase), explanatory evidence would be superfluous and the issue would never arise. And on the other hand, if the document's significance and state of integration are not self-evident—if "it" is not complete but must be pieced out in order to become what "it" is—then the relation to "it" of a piece of so-called extrinsic evidence can only be determined after the evidence has been admitted and is no longer extrinsic. Either there is no problem or it can only be solved by recourse to that which is in dispute.

Exactly the same fate awaits the distinction between "consistent additional terms" and additional terms that are inconsistent. "Consistent in relation to what?" is the question; the answer is "consistent in relation to the writing." But if the writing were clear enough to establish its own terms, additional terms would not be needed to explain it (subsection [b], you will remember, is an explanation of "explained or supplemented"), and if additional terms are needed there is not yet anything for them to be consistent or inconsistent with. The underlying point here has to do with the distinction—assumed but never examined in these contexts—between inside and outside, between what the document contains and what is external to it. What becomes clear is that the determination of what is "inside" will always be a function of whatever "outside" has already been assumed. (I use quotation marks to indicate that the distinction is interpretive, not absolute.) As one commentary puts it, "questions concerning the admissibility of parol evidence cannot be resolved without considering the nature and scope of the evidence which is being offered," and "thus the court must go beyond the writing to determine whether the writing should be held to be a final expression of the parties'... agreement."

Nowhere is this more obvious than in the matter of *trade usage*, the first body of knowledge authorized as properly explanatory by the code. Trade usage refers to conventions of meaning routinely employed by members of a trade or industry, and is contrasted to

ordinary usage, that is, to the meanings words ordinarily have by virtue of their place in the structure of English. The willingness of courts to regard trade usage as legitimately explanatory of contract language seems only a minor concession to the desire of the law to find a public—i.e., objective—linguistic basis, but in fact it is fatal, for it opens up a door that cannot be (and never has been) closed. In a typical trade usage case, one party is given the opportunity to "prove" that the words of an agreement don't mean what they seem to mean because they emerged from a special context, a context defined by the parties' expectations. Thus, for example, in one case it was held that, by virtue of trade usage, the shipment term "June-Aug." in an agreement was to be read as excluding delivery in August; and in another case the introduction of trade usage led the court to hold that an order for thirty-six-inch steel was satisfied by the delivery of steel measuring thirty-seven inches. But if "June-Aug." can, in certain persuasively established circumstances, be understood to exclude August, and "thirty-six" can be understood as meaning thirty-seven, then anything, once a sufficiently elaborated argument is in place, can mean anything: "thirty-six" could mean seventy-five, or, in relation to a code so firmly established that it governed the expectations of the parties, "thirty-six" could mean detonate the atomic bomb.

If this line of reasoning seems to slide down the slippery slope too precipitously, consider the oft cited case of *Columbia Nitrogen Corporation v. Royster Company*. The two firms had negotiated a contract by which Columbia would purchase from Royster 31,000 tons of phosphate each year for three years, with an option to extend the term. The agreement was marked by "detailed provisions regarding the base price, escalation, minimum tonnage and delivery schedules," but when phosphate prices fell, Columbia ordered and accepted only one-tenth of what was specified. Understandably, Royster sued for breach of contract, and was awarded a judgment of \$750,000 in district court. Columbia appealed, contending that, in the fertilizer industry, because of uncertain crop and weather conditions, farming practices, and government agricultural programs, express price and quantity terms in contracts... are mere projections to be adjusted according to market forces.

One would think that this argument would fail because it would amount to saying that the contract was not worth the paper it was printed on. If emerging circumstances could always be invoked as controlling, even in the face of carefully negotiated terms, why bother to negotiate? Royster does not make this point directly, but attempts to go the (apparently) narrower route of section 202. After all, even trade usage is inadmissible according to that section if it contradicts, rather than explains, the terms of the agreement, and as one authority observes, "it is hard to imagine a... 'trade usage' that contradicts a stated contractual term more directly than did the usage in *Columbia Nitrogen Corporation*." The court, however, doesn't see it that way. Although the opinion claims to reaffirm "the well established rule that evidence of usage of trade... should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract," the reaffirmation undoes itself; for by making the threshold of admissibility the production of a "reasonable construal" rather than an obvious inconsistency (as in 31,000 is inconsistent with 3,100), the court more or less admits that what is required to satisfy the section is not a demonstration of formal congruity but an exercise of rhetorical skill. As long as one party can tell a story sufficiently overarching so as to allow the terms of the contract and the evidence of trade usage to fit comfortably within its frame, that evidence will be found consistent rather than contradictory. What is and is not a "reasonable construal" will be a function of the persuasiveness of the construer and not of any formal fact that is perspicuous before some act of persuasion has been performed.

The extent to which this court is willing to give scope to the exercise of rhetorical ingenuity is indicated by its final dismissal of the contention by Royster that there is nothing in the contract about adjusting its terms to reflect a declining market. "Just so," says the court,

there is nothing in the contract about this and that is why its introduction is not a contradiction or inconsistency. Since "the contract is silent about adjusting prices and quantities... it neither permits or prohibits adjustment, and this neutrality provides a fitting occasion for recourse to usage of trade... to supplement the contract and explain its terms." Needless to say, as an interpretive strategy this could work to authorize almost anything, and it is itself authorized by the first of the official comments on section 202 (and why a section designed supposedly to establish the priority of completely integrated writings is itself in need of commentary is a question almost too obvious to ask): "This section definitely rejects (a) any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon." Or in other words, just because a writing says something doesn't mean that it says everything relevant to the matter; it may be silent on some things, and in relation to those things parol evidence is admissible. But of course the number of things on which a document (however interpreted) is silent is infinite, and consequently there is no end to the information that can be introduced if it can be linked narratively to a document that now becomes a mere component (albeit a significant one) in a larger contractual context.

One way of doing this is exemplified by the majority opinion in *Masterson v. Sine*, a case in which the attempt of a bankruptcy trustee to exercise an option to purchase a particular piece of property (on the grounds that the right of option belongs to the estate) was challenged by parol evidence tending to show that it was the intention of the drafting parties to keep the property in the family (Mr. Masterson and Mrs. Sine were brother and sister) and "that the option was therefore personal to the grantors and could not be exercised by the trustee." The trial court excluded the evidence, ruling that the written contract was a complete and final embodiment of the terms of the agreement and said nothing about the assignability of the option. The court, in the person of Chief Justice Traynor (the same Traynor who in Kozinski's eyes commits the villainy of *Pacific Gas*), responds by declaring that, yes, "the deed is silent on the question of assignability," but that this very silence was a reason for admitting the evidence, not as a gloss on the agreement as written, but as proof of a collateral agreement—an agreement made on a related, but adjoining matter—that was entered into orally. The beauty of this recharacterization of the situation is that it manages at once to save the integrity of the integrated agreement and to create another agreement whose honoring has the effect of setting aside what the integrated agreement seems to say. This is all managed by telling another story about the negotiations. The parties conducted not one, but two negotiations; in one, the question of the conveying of the land and the option of the conveyers to repurchase was settled; in another (orally conducted), the question of reserving the option to members of the family was settled. The demands of formalism are at once met and evaded, a result that led two dissenting justices to complain that the parol evidence rule had been eviscerated, that the decision rendered all instruments of conveyance, no matter how full and complete, suspect, and that the reliance one might previously have placed upon written agreements had been materially undermined.

This conclusion might seem to be the one I, myself, was moving toward in the course of presenting these examples, for surely the moral of *Columbia Nitrogen*, *Warren's Kiddie Shoppe*, *Dekker Steel*, *Pacific Gas*, and *Master son v. Sine* (and countless others that could be adduced) is that the parol evidence rule is wholly ineffective as a stay against interpretive assaults on the express language of contracts and statutes. But the moral I wish to draw goes in quite another direction, one that reaffirms (although not in a way formalists will find comforting) the power both of the parol evidence rule and of the language whose "rights" it would protect, to "provide a meaningful constraint on public and private conduct."³⁶ It is certainly the case that *Master son v. Sine*, like *Columbia Nitrogen* and the others, indicates

that no matter how carefully a contract is drafted it cannot resist incorporation into a persuasively told story in the course of whose unfolding its significance may be altered from what it had seemed to be. But the same cases also indicate that the story so told cannot be any old story; it must be one that fashions its coherence out of materials that it is required to take into account. The important fact about *Masterson* is not that in it the court succeeds in getting around the parol evidence rule, but that it is the parol evidence rule—and not the first chapter of Genesis or the first law of thermodynamics—that it feels obliged to get around. That is, given the constraints of the institutional setting—constraints that help shape the issue being adjudicated—the court could not proceed on its way without raising and dealing with the parol evidence rule (and this would be true even if the rule had not been invoked by the eager trustee); consequently, the *path* to the result it finally reaches is constrained, in part, by the very doctrine that result will fail to honor.

One sees this clearly in the route the court takes to the discovery that there are not one, but two agreements. It is not enough, the court acknowledges, to observe that if an agreement is silent on a matter, information pertaining to it is admissible, for the official comment to section 2-202 adds that "if the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."³⁷ In other words, the court must determine whether or not the additional terms that would make up a collateral agreement are such that persons contemplating the original agreement would certainly have considered including them; for if they were such and were not included, their exclusion was intentional and the original writing must be regarded as complete. In *Masterson*, the court reasons that the inexperience of the parties in land transactions made it unlikely that they would have been aware "of the disadvantages of failing to put the whole agreement in the deed" and rules that therefore "the case is not one in which the parties 'would certainly' have included the collateral agreement"³⁸ had they meant to enter into it. Again the point is not so much the persuasiveness of such reasoning (in another landmark case a New York court found the same reasoning unpersuasive), but the fact that it must be produced, and this requirement would have held even if the reasoning had been rejected. It was open to the court (as a note to the case indicates) to find that in a particular instance what the parties would naturally have done was, in fact, not done and that "the unnatural actually happened";⁴⁰ but had the court so found, the official comment would have been honored even as it was declared to be inapposite, for that finding (or some other in the same line of country) would have been rendered obligatory by the existence of the comment. It is always possible to "get around" the comment as it is always possible to get around the parol evidence rule—neither presents an absolute bar to reaching a particular result; there is always work that can be done—but the fact that it is the comment you are getting around renders it constraining even if it is not, in the strict sense, a constraint.

In short, the parol evidence rule is of more service to the law's wish to have a formal existence than one might think from these examples. The service it provides, however, is not (as is sometimes claimed) the service of safeguarding a formalism already in place, but the weaker (although more exacting) service of laying down the route by which a formalism can be fashioned. I am aware, of course, that this notion of the formal will seem strange to those for whom a formalism is what is "given" as opposed to something that is made. But, in fact, efficacious formalisms—marks and sounds that declare meanings to which all relevant parties attest—are always the product of the forces—desire, will, intentions, circumstances, interpretation—they are meant to hold in check. No one has seen this more clearly than Arthur Corbin who, noting that "sometimes it is said that 'the courts will not disregard the

plain language of a contract or interpolate something not contained in it,"⁴¹ offers for that dictum this substitute.

If, after a careful consideration of the words of a contract, in the light of all the relevant circumstances, and of all the tentative rules of interpretation based upon the experience of courts and linguists, a plain and definite meaning is achieved by the court, a meaning actually given by one party as the other party had reason to know, it will not disregard this plain and definite meaning and substitute another that is less convincing.

There are many words and phrases one might want to pause over in this remarkable sentence (*relevant, tentative, experience, actually*), but for our purposes the most significant word is achieved and, after that, *convincing*. *Achieved* is a surprise because, in most of the literature, a plain meaning is something that constrains or even precludes interpretation, while in Corbin's statement it is something that interpretation helps fashion; once it is fashioned, the parol evidence rule can then be invoked with genuine force: you must not disregard this meaning—that is, the meaning that has been established in the course of the interpretive process—for one that has not been so established. *Convincing* names the required (indeed the only) mode of establishing, the mode of persuasion, and what one is persuaded *to* is an account (story) of the circumstances ("relevant" not before, but as a result of, the account) in relation to which the words of the agreement could only mean one thing. Of course, if an alternative account were to become more rather than less convincing—perhaps in the course of appeal—then the meanings that followed from its establishment would be protected by the rule from the claims of meanings to which the court had not been persuaded. As Corbin puts it in another passage, "when a court says that it will enforce a contract in accordance with the 'plain and clear' meaning of its words... the losing party has merely urged the drawing of inferences ... that the court is unwilling to draw." That is, the losing party has told an unpersuasive story, and consequently the meanings it urges—i.e., the inferences it would draw—strike the court as strained and obscure rather than plain.

There are, then, two stages to the work done by the parol evidence rule: in the first its presence on the "interpretative scene" works to constrain the path interpreters must take on their way to telling a persuasive story (an account of all the "relevant" circumstances); then, once the story has been persuasively told, the rule is invoked to protect the meanings that flow from that story. The phrase that remains to be filled in is *persuasive story*. What is one and how is it, in Corbin's word, *achieved*? The persuasiveness of a story is not the product merely of the arguments it explicitly presents, but of the relationship between those arguments, and other, more tacit, arguments—tantamount to already-in-place beliefs—that are not so much being urged as they are being traded on. It is this second, recessed, tier of arguments—of beliefs so much a part of the background that they are partly determinative of what will be heard as an argument—that does much of the work of fashioning a persuasive story and, therefore, does much of the work of filling in the category of "plain and clear" meaning. What kinds of arguments or (deep) assumptions are these? It is difficult to generalize (and dangerous, since generalization would hold out the false promise of a *formal* account of persuasion), but one could say first of all that they will include, among other things, beliefs one might want to call "moral"-dispositions as to the way things are or should be as encoded in maxims and slogans like "order must be preserved" or "freedom of expression" or "the American way" or "the Judeo-Christian tradition" or "we must draw the line somewhere." It follows, then, that whenever there is a dispute about the plain meaning of a contract, at some level the dispute is between two (or more) visions of what life is or should be like.

Consider, for example, still another famous case in legal interpretation, *In Re Soper's Estate*. The facts are the stuff of soap opera. After ten years of marriage, Ira Soper faked his

suicide and resurfaced in another state under the name of John Young. There he married a widow who died three years later, whereupon he married another widow with whom he lived for five years when he again committed suicide, but this time for real. The litigation turns on an agreement Soper-Young made with a business partner according to which, upon the death of either, the proceeds of the insurance on the life of the deceased would be delivered to his wife. The question of course is who is the wife, Mrs. Young or the long-since deserted Mrs. Soper, who, to the surprise of everyone, appeared to claim her rightful inheritance.

The majority rides for the second wife, Gertrude, while a strong dissent is registered on behalf of the abandoned Adeline. There is a tendency in both opinions to present the case as if it were a textbook illustration of a classic conflict in contract law between the view (usually associated with Williston) that determinations of the degree of integration and of the meaning of an agreement are to be made by looking to the agreement itself and the view (later to be associated with Corbin) that such issues can only be decided by ascertaining the intentions of the drafting parties, that is, by going outside the agreement to something not in it but in the light of which it is to be read. But, in fact, what the case illustrates is the impossibility of this very distinction. It is the minority that raises the banner of literalism, arguing that since a man can have only one lawful wife and since Adeline was, at the time of the agreement, "the only wife of Soper then living," the word wife must refer to her. The majority replies that by the same standard of literalism, the agreement contains no mention of a Mr. Soper, referring only to a Mr. Young whose only possible wife was a lady named Gertrude; and indeed, observes Justice Olson, the document can only be read as referring to Adeline by bringing in the same kind of oral evidence her lawyers (and the dissent) now wish to exclude. An inquirer merely looking at the document might well conclude "that two different men are involved," for after all, in what manner may either establish relationship to the decedent as his "wife" except by means of oral testimony.... Adeline, to establish her relationship, was necessarily required to and did furnish proof, principally oral, that her husband, Ira Collins Soper, was in fact the same individual as John W. Young, [and] Gertrude by similar means sought to establish her claim.

The moral is clear even though the court does not quite draw it: rather than a dispute between a reading confining itself to the document and one that goes outside it to the circumstances from which it emerged, this is a dispute between two opposing accounts of the circumstances. Depending on which of these accounts is the more persuasive—that is, on which of the two stories about the world, responsibility, and wives is firmly in place—the document will acquire one of the two literal meanings being proposed for it. The majority finds itself persuaded by Gertrude's story and thus can quite sincerely declare that the "agreement points to no one else than Gertrude as Young's 'wife,'" and Justice Olsen with an *e* (I resist the temptation to inquire into the *differ once* of this difference) can declare with equal sincerity that "I am unable to construe this word to mean anyone else than the only wife of Soper then living." Indeed he is unable, since as someone who subscribes to the moral vision that underlies Adeline's claims—a vision in which responsibilities once entered into cannot be weakened by obligations subsequently incurred—*wife* can only refer to the first in what is, for him, a nonseries; just as, for Justice Olson with an *o*—in whose morality obligations in force at the time of agreement take precedence over obligations recognized by a legal formalism—*wife* can only refer to the person "all friends and acquaintances... recognized... as his wife."

The majority says that the "question is not just what words mean literally but how they are intended to operate practically on the subject matter,"⁵⁰ but its own arguments show that words *never* mean literally except in the context of the intention they are presumed to be effecting, and that rather than being determined by the meanings the words already (by right)

have, the intentional context—established when one or the other party succeeds in being convincing—determines the meaning of the words. In short, the issue is not nor could ever be the supposed choice between literal and contextual reading, but the relative persuasiveness of alternative contexts as they are set out in ideologically charged narratives. That is why it is no surprise to find Justice Olsen's confidence declaration of linguistic clarity ("I am unable to construe") preceded by a rehearsal of the moralizing story that produces that clarity.

Much is said in the opinion as to the wrong done to the innocent woman whom he purported to marry. Nothing is said about the wrong done to the lawful wife. To have her husband abandon her and then purport to marry another, and live in cohabitation with such other, was about as great a wrong as any man could inflict upon his wife.

The majority thinks that something else (setting aside as of no account the relationship between the deceased and Gertrude) is the greater wrong and therefore thinks, like the minority, that the meaning of the agreement is obvious and inescapable. Again, my point is not to discredit the reasoning of either party nor to dismiss the claim of each to have pointed to a formal linguistic fact; rather, I wish only to observe once again that such formal facts are always "achieved" and that they are achieved by the very means—the partisan urging of some ideological vision—to which they are then rhetorically (and not unreasonably) opposed.