1 The Unspoken Language of the Law

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EDITORS' NOTE TO CHAPTER 1

Laura Nader draws attention in this chapter to how voices that could contribute to a genuine achievement of social justice may be drowned out by the influence of an idealized terminology of which a great deal of legal discourse consists. Discourse about law, she argues, has been dominated by core terms which are abstract, highly positive in connotation, and (or but) idealistic. Among such terms Nader focuses especially on the word *justice*, which she suggests conjures up imagery of well-functioning social institutions, an orderly and properly scrutinized system, and efficient procedures – all in contrast with its antonym *injustice*, which evokes a sense of immediacy, exclusion, and urgent need for further action. It is not coincidence, she contends, that the word *justice* attracts far more attention, and has in fact been consistently used more frequently (at least in published writing) than its opposite.

Widening an argument prefigured in this respect in the thinking of General Semanticists such as Chase (1938) and Hayakawa (1939), Nader argues that people's ability to perceive injustice is hindered by the familiarity of abstract words used to convey legal concepts that should help prevent such injustice. Familiar words, she suggests, carry unexamined ideological meaning, suppress the scope of our imagination, and perpetuate the status quo. In claiming that there is to this extent a risk of deception inherent in the core terminology of legal discourse, Nader's opening essay to the volume argues that justice is denied on numerous occasions in the United States because what needs to be said is left unsaid. Developing this claim, she suggests that actual justice may be frustrated by the use of key legal terminology, including the word *justice* itself, or the phrase *the rule of law*, as well as by the use of highly valorized terms such as *harmony*. Through the use of such language, she says, law can be turned into merely a means of social control.

Challenging conventional assumptions surrounding core legal values, she asks: what is it that makes alternative dispute resolution (ADR) more "harmonious" than litigation, and whose interest does that apparent "harmony" serve? Is *the rule of law*, as actually practised, always legal? Why is it often

possible to litigate corporate crimes as "civil" rather than "criminal" cases? What in detail is the difference between a *terrorist* and a *criminal*? By questioning complacency surrounding familiar but difficult words that mix legal content with political symbolism, Nader presents a vigorous critique of double standards in the behaviour of those in power.

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Writing this essay made me realize that I have been writing on law and language for many years but have not had the opportunity to pull my thoughts together. Having studied the spoken language of the law elsewhere for many years, what I present here is a brief synthesis of my current position on what might be called in contrast the "unspokenness" of law in the United States. Anthropological experience in more than one locale commonly inspires comparison with one's home country, whether implicit or explicit.

In researching law here and elsewhere, comparison of the language of law in different places commonly directs attention to process in courts as opposed to more generalized contexts like moots or informal settings, although a few anthropologists have dealt specifically with law or litigation and language. One non-Western example is Charles Frake's "Litigation in Lipay: A study in Subanum Law," in which Frake describes litigation as a contest of skill, "in this case of verbal skill, accompanied by social merry-making, in which the loser pays a forfeit . . . along with drinking, feasting, and ceremonializing" (ibid.: 221). The Subanum, he notes, had a view of litigation centered on verbal performance. Robert Hayden in writing on the style of speaking in an Indian caste panchayat (or council), comments on the disorderly style of overlapping speech as contrasted with the ordering of speaking turns in Western legal settings. Language takes central place in my PBS film on *Little Injustices* in Mexican Zapotec courts where, as with the Indian situation Hayden describes, there is little turn-taking and much overlap. In these examples we are describing settings which have evolved *without* writing and *without* the institutional and written formality of, for example, Western courts.

When anthropologists find themselves in their own society, however, the focus in studies of language and the law may shift from spontaneous speech to written texts. Elizabeth Mertz, for example, analyzes "social voices" by examining the U.S. Supreme Court's decisions in two famous cases in order to understand "the semiotic features of these narratives. Legal opinions are analysed as

narratives" (1988). William O'Barr and John Conley, an anthropologist and a law professor respectively, analyze transcripts of small claims court sessions in six U.S. cities (1990), identifying contrasting types of legal discourse within the context of sociolinguistic variables. But if you don't broaden your scope, if you don't study up, down, and sideways at the same time, law and language studies get focused too narrowly on linguistic details without looking at the social context, which would normally include the victims of law or the defendants. James Spradley however, did focus on what he called "urban nomads" in his book *You Owe Yourself a Drunk*, in which he quoted verbatim the observations and reflections of the people jailed for drunkenness. His analysis suggests that, after being arrested for drunkenness and used as free jail labor, when you are free you feel like you owe yourself a drink and so the cycle continues, and once again you are arrested on charges of drunkenness.

Thus, as I think about future studies I am not inclined to pursue narrow avenues of law and language because they have the color of "done deals" rather than the discovery of broader social contexts of law language which lend themselves to understanding root causes. What interests me now is what is *not* said and why: the unspoken language of the law, a subject I have been publishing on for some time. In what follows, I describe the use and abuse of key words such as *justice* and *injustice*, crime as a category, key beliefs like the concept of lack, legal concepts such as *terra nullius* (empty lands) to create rule of law after the fact, selective uses of courts in The Hague, and the abuse of words like *harmony* or *terrorism* that shatter any notions of evolution of the law from barbarism to civilization as proposed by the likes of Oliver Wendell Holmes, Jr. in 1881. All of my efforts, although inspired by comparison with non-state society materials, focus on American law in its broadest context.

During the fall of 1981, while teaching at the Yale Law School I received a letter from a Canadian social scientist inviting me to a conference on injustice; not justice, but injustice. That was intriguing, for in the back of my mind I remembered Edmund Cahn's seminal work *The Sense of Injustice* (1964 [1949]). Injustice for Cahn is "live with movement and warmth in the human organism" (ibid.: 13–14). In contrast, Cahn notes that the concept of justice is contemplative and "contemplation bakes no loaves." Cahn was not really interested in concepts themselves. Rather, he was interested in the consequence of concepts: that justice is static and injustice is active. Imagine a Department of Injustice rather than a Department of Justice. I published an article (Nader 2010) about the bias in favor of the concept of justice over injustice. In our library at UC Berkeley we found something like 667 titles using the word *injustice* as compared with 8,800 items using the word *justice*. Anthropology titles were no different: 44 items for *injustice*, 912 *justice* entries. Needless to say, Cahn's work did not spawn an academic industry of those who wanted to do something about injustice.

In 1999 John Rawls published his book *A Theory of Justice*. Unlike Cahn, his book garnered much attention and spawned an industry. The words we use tell a good deal about both ideology and priorities. Rawls is a philosopher and his influence was primarily intellectual and academic. In a word, he was abstract and contemplative; but as Cahn said, "contemplation bakes no loaves." I must confess that upon first reading Rawls I felt repulsion. Where are the concrete instances? Only "realistic utopias"? Apparently academic interest in justice provides hope for the present by celebrating an ideal: justice. In this way, myths of a just society are perpetuated through abstract reason. But as Cahn argues, without emotion in addition to reason we never address injustices (Nader 2010). My article, "The Words We Use: Justice, Human Rights, and the Sense of Injustice," (Nader 2010) was itself a reaction to attending a conference on "Mirrors of Justice" during which the word *injustice* was rarely spoken. Justice is positivity, a mirage, while injustice is in the present reality.

My interests went further than the words we use to include the rhetoric to be found at the top of our legal hierarchy in relation to the Alternative Dispute Movement. The Alternative Dispute Resolution (ADR) explosion in the United States, which then extended globally, was launched at the Pound Revisited Conference in 1976 by the Chief Justice of the U.S. Supreme Court, Warren Burger. Chief Justice Burger, both at the conference I attended and many times after, launched the movement with rhetoric that made possible the shift from adversarial modes to ADR in the handling of disputes in America, from facts and legal rights to feelings and relationships (Nader 1989). It was a movement against lawyers and the legal rights movement, a movement against the contentious, a movement to control litigation spawned by the rights movements of the 1960s.

The Chief Justice delivered speeches all over the country, and because of his authoritative position he set the tone for the language that characterized the speeches and writings of others. He warned that adversarial modes of conflict resolution were tearing the society apart, and claimed that Americans were inherently litigious and that alternative forms were more civilized. He followed the peremptory style of assertive rhetoric: common sense was mingled with unsubstantiated statements about "a litigation explosion," lawsuits and war as opposed to arbitration and peace. In my analysis of his speeches I noted that major parts of his speech were unsubstantiated, and that he ignored scholarly arguments such as those of Professor Lon Fuller of Harvard Law School: arguments that distinguished ADR's psychotherapy-influenced forums from "traditional" legal mediations. However, in a brief time privatization and psychologisms took hold; and by 1985 Burger was attacking his critics, again with assertive rhetoric. His anti-litigation rhetoric took hold and became ubiquitous in news media, in the therapeutic community, in schools and universities, and in churches.

The Chief Justice had successfully set the tone in spite of excellent corrective analyses by Marc Galanter (1983) of Wisconsin Law in "Reading the Landscape of Disputes," Owen Fiss (1984 of Yale Law) in "Against Settlement," and others who questioned the veracity of the anti-law movement's claims. Private lawmaking makes it hard to get discovery, limits appeals, and precludes decisions from leading to precedents. However, the use of language in fueling a harmony ideology worked. A few of us began to examine the consequences of a movement to control the rights movements of the 1960s – civil rights, consumer rights, women's rights, environmental rights, Native American rights – "the garbage cases" as Robert Bork, a conservative judge, called them. Post-confrontational Democrats were emerging. Tort "deform" flourished to eviscerate the best tort system in the world; the civil justice system sank. And the ADR movement, now called by various names, went global, covering all but countries like those in Asia where harmony was already a mode of control. In Asia, by contrast, the U.S. pushed for Rule of Law courts. Rhetoric from the top is powerful; in the U.S. case rhetoric is a means to pacification, moving the country from legal process to mind processing, a movement to control the legal rights movement.

In 2008, my colleague Ugo Mattei and I published *Plunder – When the Rule of Law is Illegal*. In this work we examined the uses made of the phrase *Rule of Law*. Both of us had been attentive to the increasing use of the phrase to justify illegalities such as the war on Iraq, and had written papers independent of each other. In my case, I was alerted to *Rule of Law* as a controlling process, specifically when used as a justification for the invasion of Iraq once it was realized that Saddam Hussein's government did not have weapons of mass destruction (Nader 2009), the original excuse for invasion. *Plunder* was preceded by "Law and the Frontiers of Illegalities" (Nader 2009), an early analysis of rule of law discourse in the service of political, military, and economic power using Iraq as my primary example. I asked what if, under conditions of rapid change or rupture such as the war in Iraq, illegalities from above become the law? What if systems of legalities and systems of illegalities have come to be not two domains but one? In Iraq lawlessness and plunder appeared to be supported by "rule of law" and by democracy discourse both nationally and internationally. Two decades earlier John Gardner (1980) was among the first to document the use of legal development as a process that came to be exploited in his insightful book *Legal Imperialism*. Gardner saw firsthand that an instrumental, imported law can result in the undemocratic concentration of legal power in the state or in large multinational corporations. Patterns of law have been exported by colonial or imperial powers within a variety of contexts, in Gardner's case under the rubric of law and development that went mostly unnoticed as imperialism. Under colonialism and empire of the American sort, imported legal systems operate predominantly to subvert local law and universalize American

legal concepts, thus enhancing the globalization of American law, whether it be Rule of Law or Alternative Dispute Resolution policies.

The example of the invasion of Iraq was a prime example of an old pattern among Western colonial powers, at least since the coming of Columbus to America (Mattei and Nader 2008). In the case of Iraq, an unelected Paul Bremer and his Governing Council passed edicts, closed newspapers, outlawed unions, destroyed Iraqi indigenous culture under "rule of law" discourse. What was interesting about this pattern were the headlines that began to appear simultaneously in U.S. newspapers (and on television, radio, etc.). Examples of such stories appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, plus of course many local newspapers such as the *San Francisco Chronicle*: IRAQ'S JUDICIAL SYSTEM LACKS PRACTITIONERS, SCHOLARS SAY; U.S. SEEKS SOLID CORE TO FIX IRAQ'S BROKEN LEGAL SYSTEM; TEAM TO REBUILD IRAQ'S COURTS INCLUDES THREE FEDERAL JUDGES; ISLAMIC JUSTICE TAKING HOLD IN BAGHDAD; AMERICAN WILL ADVISE IRAQIS ON WRITING NEW CONSTITUTION; IN IRAQ, A JUSTICE SYSTEM WORTH SAVING; WITH IRAQI COURTS GONE YOUNG CLERICS JUDGE; OCCUPIERS AND THE LAW; WOMEN IN IRAQ DECRY DECISION TO CURB RIGHTS, and so on. The invaders were going to civilize the Iraqis and spread democracy. Never mind that international law (both according to the Hague regulations of 1907 and under the 1949 Geneva Convention, both ratified by the United States) prohibits an occupying nation from transforming a defeated society into its own likeness. In fact, the Iraqis already had Rule of Law: "The Iraqi Civil Code of 1953 was one of the most innovative and meticulously systematic codes of the Middle East. Iraqi jurists [. . .] drafted a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems" (Abou El Fadl 2003).

According to Khaled Abou El Fadl (a professor at UCLA School of Law), when the Ba'ath Party came to power in 1968 Saddam declared a constant state of emergency and as a result was able to rule mostly by executive order. What Paul Bremer accomplished was the creation of an efficient neoliberal market that gave preference to U.S. corporations over the development of the Iraqi economy and that served to change Iraq from a centrally planned economy to a market economy. In this case rule of law was said to fulfill what was in fact a non-existent lack.

A Euro-American configuration of institutions and belief systems has normalized and powered a Euro-American use of "rule of law" and "lack": ideologies key to the colonial and imperial project whether it was being exercised by the British, French, Americans . . . in pursuit of their own enrichment (Nader 2005). My paper "Law and the Theory of Lack" (ibid.) was about

rhetoric, about the rule of law or lack of it, as a form of ethnocentrism recently described as legal orientalism by law professor Teemu Ruskola (2002). Ruskola wants to challenge the historic claim by Western observers that China lacks an indigenous tradition of "law." After all, Ruskola notes, China boasts dynastic legal codes going back to the Tang dynasty. Despite much effort to debunk the view of China as lacking in law, we still have scholars arguing that Chinese law is not even worthy of the word *jurisprudence*. But beyond lacking law, the Chinese are now charged with ignoring the law they had. Many scholars exhibit an inability to make reference to Western law in anything but the most idealized representations.

So what may be called the "unspoken" language of the law includes positive words and phrases like *justice*, *rule of law*, or *harmony*, which stand in opposition to words like *lack*: and words that facilitate the take such as *terra nullius*, a concept related to lack indicating an emptiness, as in a land without people for people without lands. *Terra nullius* was elaborated by philosophers interested in property rights, most famously by John Locke in the eighteenth century, whose justifications for entitlement improvements led to alterations in legal administrative practices. Daniel Boorstin (1941) notes, "'Locke' became the pseudonym for everyman's theory of property" (ibid.: 165). Swiss philosopher Emmerich de Vattel was more explicit in his 1758 *The Law of Nations*. His arguments about land were congenial to the colonizing nations of the eighteenth century because he gave legal justification for the colonial appropriations of lands, thereby lending moral authority to what First North American Peoples might describe as theft:

> The earth belongs to all mankind. . . . All men have a natural right to inhabit it . . . all men have an equal right to things which have not yet come into the possession of anyone. When Therefore a Nation finds a country uninhabited and without an owner, it may forcefully take possession of it. In connection to the discovery of the new World, it is asked whether a nation may peacefully occupy any part of a vast territory in which are found only wandering tribes whose small numbers cannot populate the whole country. (see Williams 1986: 127–29)

Land that was occupied by indigenous nations was brushed aside since Native Americans were viewed as "lacking," for example, they were not legally capable of holding territorial title or property rights. The meaning of the term *terra nullius* was popular even though challenged by thinkers in and outside the legal profession. Along with the rights of conquest, John Locke's 1689 arguments in *Treatises of Government* were used to promote the idea that Native American properties could be appropriated by command of the Christian god – to make best use of land, something the pagans did not have the wherewithal to accomplish.

In the same vein, extant legal categories are often remade by powerful forces to fit new conditions. Labeling a case as civil or criminal goes mostly unnoticed, but has important effects (Nader 2001). One example is the effort made by wrongdoers to categorize criminogenic acts as civil cases. A nine-year legal saga began in 1982 in Woburn, Massachusetts. It dealt with a serious health problem that started with a series of childhood leukemia cases. The clustering of the cancer cases stimulated the search for the cause of the sickness and deaths of the children. The children's families suspected that two Woburn plants belonging to two corporations – W. R. Grace and Co. of New York and Beatrice Foods Company of Chicago – had contaminated two municipal drinking wells. The families retained a Boston personal injury attorney, and the story was chronicled in the context of the workings of toxic tort litigation by Jonathan Harr in his book, *A Civil Action* (1995), and later made into a Hollywood movie of the same name. The point here is that the families filed a *civil* suit against Grace and Beatrice. But why was this a civil complaint? There is an easier burden of proof than a criminal complaint under current law. It could have been criminal: an offense against the state of Massachusetts. Indeed in later cases, for example *Masschusetts v. Feingold* in 1997, the defendants were charged with the criminal act of exposing company employees to hazardous chemicals. And there was a string of such criminal toxic cases following Woburn. Occupational health and safety laws make it easier for employees to file a criminal complaint. Yet overall it has been observed that those who commit corporate misdeeds are commonly those who, unlike all other criminal groups in the United States, have the power to define the law under which they operate. In the Woburn case two powerful corporations got off, with Beatrice winning and W. R. Grace settling for 8 million dollars. Crime is a category that may be applied arbitrarily. In this case, a civil action, rather than a criminal action, only exacerbated the sense that Beatrice Foods and W. R. Grace had literally gotten away with murder.

Such corporate cases can also stimulate pushback, causing new words or concepts to be created. In the 1960s and 1970s there appeared the notion of "corporate crime," not used prior, and now we also have a weekly newsletter "Corporate Crime Reporter." *Terra nullius* cases eventually spawned an American Indian movement. The Native American rights movement wanted observance of existing laws, that is, their treaties. And the ADR movements, still in their heyday, are already stimulating response about the demise of the civil justice system for ordinary peoples. There is a dialogue happening between the powerful and the many although it is not always visible in public places.

Two more examples will suffice before I discuss the wider meaning of an unspoken language of law. The first deals with the metamorphoses of the word *criminal*. The Unabomber was a serial killer in the United States. Timothy McVeigh was a domestic criminal who saw himself as a patriot. Does it become

easier to understand criminal behavior by using the term *terrorist* rather than *criminal*? The Italian mafia was composed of a network of criminals. They were not labeled terrorists even during World War II when the United States was at war with Italy. The Mexicans refer to the Mexican drug cartel as a criminal network even though it is part of an international cartel. What is a *terrorist* anyway, and how did the label become so ubiquitous and why?

Efforts to define what a terrorist is result in a series of dismal failures. Yesterday's terrorist is today's hero; Nelson Mandela is often cited as an example. The politics of labeling have infected academic reasoning, especially in the case of those who make a living in terrorism studies. The selectivity is staggering. An overt example of "terrorism" was the Israeli military attack on the USS Liberty – a Navy communications ship not a warship – in 1967, killing thirty-four Americans and wounding 171 others. The act was basically dealt with by our government by turning the other way, being complicit.

In *Terror and Taboo: The Follies, Fables, and Faces of Terrorism*, Joseba Zulaika and William Douglass make clear the arbitrariness in one of their many examples: "a Pentagon report in 1988 listed Mandela's African National Congress as one of the world's 'more notorious terrorist groups,' whereas pro-South African government RENAMO, which the same report admits killed over 100,000 civilians between 1986 and 1988, is identified merely as an 'indigenous insurgent group'" (1996: 12). The authors continued, citing CIA director William Casey, who stated that 109 definitions of "terrorist" were too narrow and ordered a new draft that "went whole hog, took every kind of national liberation movement, every left-wing movement that used violence, and called them terrorists." There were some protests because, under such a broad brush, George Washington and Simon Bolivar would be considered "terrorists"; but Zulaika and Douglass make the observation that reports of terrorist attacks are assembled based on the definitions used. In a 1979 CIA report the claim was made that 3,336 terrorist attacks had been reported since 1968, but in a 1980 report covering the same period the number was 6,714. The increase was definitional. Terrorism is a concept so open to abuse that the government can promote it at will; to wit, President Obama's drone wars, targeting terrorists while including civilians as collateral damage. It would seem that the politics of labeling might require minimally stable categories. Absent an agreed-upon meaning, however, terrorism is a subject taken seriously in everything from the media to university courses in political science. In search of meaning, specific targets receive ethnic labels: Muslims, Arabs, and so on. In this case linguistic categories have life and death consequences decided outside the law.

At this point it is important to return to a distinction increasingly made between state terrorism and non-state terrorism. World War II should be remembered as the war that violated the international laws that defined war as between

enemy combatants. The attacks on Dresden civilians in Germany and Nagasaki and Hiroshima in Japan are often cited as violations of international law. It is now apparent that both armies and terrorists kill civilians. Nowhere to my knowledge of government definitions of *terrorism* or *terrorists* is the idea of state terrorism institutionalized. When 9/11 happened, we had a departmental meeting at Berkeley to discuss the events. I argued that what happened was criminal, and that the criminals should be found and tried. That was not to happen. Compare the War on Terror and the War on Crime. If we do so, we realize that when billions are spent on the National Security industry and terrorism deaths as opposed to deaths by homicide, the latter shrink in importance. Every day is 9/11 in Afghanistan, one Pakistani medical doctor noted. Both non-state and state terrorists see the world in black and white; they desire revenge, and the justification is the state of exception (Agamben 2005). In President Obama's address to the nation on June 23, 2011, he says the world should be reminded that "[w]e don't forget." After the targeted assassination of Osama Bin Laden, he declared that such killing was justice. Obama is a constitutional lawyer; so is Biden. They were aware of the legal ramifications of such killing, but the state of exception paradigm allows suspension of the law, a permanent state of emergency that erases the legal status of a person (ibid.: 3), resulting in "indefinite detention" and trial by "military commissions."

Since lawyers have a monopoly on law matters, in this country it is up to them to provide an education for all those law professionals who are determining the direction of law or lawlessness in our country. Language is key to understanding the fictions.

Courts protect the lawless with doctrines like "no standing to see," "state secrets" and "it's a political question." The United States portrays the War on Terror as rational, a permanent state of exception. If one accepts this portrayal, it becomes difficult to see connections between increasing centralization of power, a permanent war economy, causes of blowback, and other consequences of the controlling processes of empire. Countering the terrorism myth's false conceptions of cause, threat, and definition opens the possibilities for a more pragmatic reflection of the distinctions between barbarism, savagery, and civilization as defined by our most distinguished legal thinkers.

One last example, before I sum up, deals with the work of anthropologist Kamari Clarke on the International Criminal Court concerning African indictees (Clarke 2009). Clarke is interested in the meaning of the Court's arrest warrants – all African – in relation to colonialism, inequality, and violence. The politics of extradition is tied to the African Union's response to develop an African court with criminal jurisdiction. Clarke's subject is complex, and as we will see best summarized by her inclusion of the words used when referring to the International Court's apparent "targeting Africa and Africans": nineteen ICC cases, all in African countries. Jean Ping, then President of the African