

**THE LANGUAGE OF LEGAL RULES  
SOME NOTES ABOUT PLAIN-MEANING IN LAW**

di

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***Abstract***

*This essay examines the common opinion that there is a close relationship between the indeterminacy of legal language and hard cases. The analysis begins with Frederick Schauer's conception of plain meaning in law in order to argue that the co-existence of hard and easy cases in a legal system is independent of the written or unwritten nature of the rules involved in each case and that the distinction between hard and easy cases depends much more on the pragmatic features of legal language and the specific context in which rules are applied. To sum up the main theses presented in the essay, first, legal disputes and, especially, litigation might be either encouraged or prevented by using, according to the circumstances, a determinate or an indeterminate lexicon. Moreover, the fact that in some cases legal meanings are equivalent to ordinary meanings, while in other cases they are not, is a pragmatic feature unrelated to the original linguistic field of the terms or the nature of legal concepts used in legal provisions. Finally, the similarities and differences existing in law between technical legal meanings and ordinary meanings is the outcome of the general conception of legal language implicit in the concept of law adopted by legal interpreters.*

**1. Easy cases and formal drafting**

In this essay, I will discuss some very general ideas about the nature of legal language and, in particular, about the controversial interplay between ordinary meaning and plain-meaning in law<sup>1</sup>.

My starting point is the same as Frederick Schauer's, that easy cases are not like unicorns<sup>2</sup>. Out of the metaphor, litigated cases are neither the only cases

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<sup>1</sup> An earlier draft of this essay has been delivered at Seminar "Legal Fictions Revisited" of Prof. Frederick Schauer held at University of Cagliari on 15<sup>th</sup> April 2013. I am grateful to Frederick Schauer, Anna Pintore and Mario Jori for their comments. I have also profited from the discussion of the other participants in this Seminar, especially of the remarks of Giovanni Tuzet and Gianmarco Gometz on Schauer's ideas. Of course, the responsibility of all faults is my own.

<sup>2</sup> See F. Schauer, *Easy Cases*, «S. Cal. L. Rev.», 58, 1985, 416.

representative of law, nor the most representative ones. This emphasis on hard cases is the outcome of the so-called “*selection effect*”, which leads to focus on the pathology rather than on the physiology of law<sup>3</sup>. But, once we become aware of this delusion we will see that most rules are just followed and are not disputed in front of a court or an arbitral tribunal. In this respect I agree with Scott Shapiro’s perspective according to which legal rules are planlike norms and legal activity is a kind of sophisticated social planning activity<sup>4</sup>.

Thus, using the distinction between hard cases and easy cases, it can be said that law consists of a number of hard cases that get disputed, but, first and foremost of a huge amount of easy cases, which are not disputed at all, or are smoothed over by the courts or rejected as baseless claims.

Now, legal practice—I refer both to the Italian case law and to the American one as described by Frederick Schauer— shows that such “*hardness*” is not produced by the cases are regulated by “*paper*” or “*formally written*” rules and “*easiness*” is not the consequence of the cases being regulated by “*effective*” but “*unwritten*” rules<sup>5</sup>.

It is perfectly conceivable to have a tricky rule that is at the same time unwritten and effective, on one side; or to have a plain rule formally written, on the other.

In point of fact, there are many such rules.

Let consider, for instance, the unwritten rule providing that “*if a provision is so unequivocal to the extent that there is no doubt about its meaning, then national courts of the Member States have no duty to make a preliminary reference to the European Court of Justice ex art. 234 of the Lisbon Treaty*”: this rule —labelled “*acte clair rule*”— has produced lots of hard cases since the *Cilfit* case, when it was originally stated by European Court of Justice<sup>6</sup>.

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<sup>3</sup> See F. Schauer, *Legal Realism Untamed*, «Public Law and Legal Theory Research Paper Series 2012-38. University of Virginia School of Law», 2012. Retrieved from <http://ssrn.com/abstract=2064837>.

<sup>4</sup> See S. Shapiro, *Legality*, 2011, Cambridge, Belknap press.

<sup>5</sup> Partially modifying Schauer’s lexicon, with “*paper*” rule I mean those rules that are written by the competent authorities in official legal documents (such as international treaties, Constitutions, statutes, and all general acts of legislators or other legal authorities), while with “*effective*” rule I intend those rules that are in reality applied by courts to solve cases, although they are *not* written in any official documents other than the judiciary sentences.

<sup>6</sup> See Judgment of the Court of 6th October 1982 in case 283/81 *CILFIT S.r.l. and Lanificio di Gavardo S.p.A. vs. Italian Ministry of Health*.

Conversely, let us consider, for instance, the rule written in Article 2 of Italian Civil Code according to which “*the age of majority is acquired at the eighteenth birthday*”. This rule is invariably considered plain and obvious in the Italian legal system and in the few cases where it has been examined by a court the opinion of the judges was that it does not raise any material doubt.

In this regard I agree with the general idea expressed by Schauer some years ago at the *Interpretation Symposium “Philosophy of Language and Legal Interpretation”*: “*the nature of the language is an important factor in separating the hard cases from the easy cases*”<sup>7</sup>.

Of course, many factors related not only to the political and social context, but also to legal culture and legal history concur to explain why some legal provisions are so often litigated, while others, seemingly equally important, come rarely before courts. In this respect, the activism of courts in relation to other political institutions in shaping public policies is surely an influential variable; by way of illustration, in Europe it is worthy of note the important role played by European Court of Justice<sup>8</sup>. Also fortuitous circumstances, such as occasional deviations from legal precedents or unexpected spot-checks made by officials, may impact on the frequency of litigation.

The distinction between hard cases and easy cases depends primarily on the general semiotic features of legal language, especially its macro-pragmatics features, and the specific linguistic features of each rule. This dependence of legal disputes and litigation on legal pragmatics far from being fortuitous is an inherent aspect of law. On the other hand, as I said, the co-existence of hard and easy cases within a legal system is fairly independent of the written or unwritten nature of the rules involved in each case. I do not deny that the existence or not of a “*paper*” rule may be an element that makes a case comparatively harder or easier, but this

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<sup>7</sup> See F. Schauer, *Easy Cases*, «S. Cal. L. Rev.», 58, 1985, 416 where he writes that his central claim is “*that language is significantly important in producing easy cases -- that language can and frequently does speak with a sufficiently clear voice such that linguistically articulated norms themselves leave little doubt as to which results are consistent with that command*”.

<sup>8</sup> See for instance J. Golub, *Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion*, paper prepared for the *Fourth Biennial International Conference of the European Community Studies Association*, Charleston, South Carolina, May 11-14, 1995; H. de Waele, *The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment*, «Hanse Law Review», Vol. 6, No. 1, 2010, 3-26.

circumstance is only an epiphenomenal variable. While the language of legal rules is the basic factor which makes a case easy or hard.

Of course, this is only a very general idea and the purpose of the rest this essay is to go into some details.

## 2. Hard cases and linguistic indeterminacy

A preliminary clarification is required. This emphasis upon the language of legal rules involves a conception of law as a fundamentally semiotic domain; and, hence it requires taking *seriously* the semantic and pragmatic sting<sup>9</sup>. In the current analytical jurisprudence this truism is not as obvious as it should be. Nowadays, to be engaged in semiotic inquiries into the legal language in general or in narrower analyses of legal concepts and the language of rules is fairly out of fashion in the eyes of many European and North-American legal philosophers<sup>10</sup>.

Accordingly, if we take into consideration the linguistic features of legal language, then it becomes clear that there is no systematic—and even less necessary—relationship between hard cases and indeterminacy of legal language, on one hand, and easy cases and determined legal language, on the other.

In this respect, I differ slightly from the common view. The close relationship between hard cases and indeterminacy of legal language is a leitmotif of post-Hartian debate. According to the common view, “[s]ignificant portions of the institutional legal system, especially courts at the appellate level and supreme courts, are for the most part concerned not with disentangling the facts of cases but with the indeterminacy of the law. Such highly developed institutional structures would not be needed if the law contained only clear-cut rules establishing precise legal duties and rights for each case. It is hard cases that lie at the heart of legal interpretation as a professional enterprise, and it is for this reason that penumbral cases are the

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<sup>9</sup> In my opinion this is what Ronald Dworkin did not, to the extent that his approach to law is not, contrary to appearances, a semiotic approach in the proper sense. I believe that Dworkin did not really investigate the nature of legal language from a linguistic perspective, but discussed some interpretative and justificatory models of adjudication and juristic styles of making law or policies under the Rule of Law principle.

<sup>10</sup> In the last decades the trend among legal philosophers is to make reference to the semiotic analyses of general philosophers and linguists. In particular, inquiring into the semantic and the pragmatic features of legal language and its relationships with ordinary language or the political and technical lexicon of other disciplines seems not to be very common in contemporary jurisprudence.

*'daily diet of the law schools'*<sup>11</sup>. Also F. Schauer is of the opinion that “[p]rototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case”<sup>12</sup>.

In my opinion, the assumption that vague terms or ambiguous legal drafting boosts litigation is conceptually debatable and empirically untested. It is incontestable that in many cases vagueness, ambiguities, and in general linguistic indeterminacy may equally prompt or discourage litigation; and this might occur even when legal language is technical and determinate and legal rules are specifically formulated. In both circumstances agreements and disagreements are related to the specific context in which rules have to be applied, rather than to the degree of legal language (in)determinacy. This is a general pragmatic feature of law.

In point of fact it is not true that litigation is forestalled by the use of a definite lexicon, that is a drafting with a sufficiently high degree of precision. A remarkable counterexample is represented by legislative definitions. In the common opinion, they are a linguistic strategy that makes legal language stringent and reduces interpretative discretion<sup>13</sup>. Yet, in many important cases, legislative definitions are a further cause of disputing. It is not unfamiliar that the presence of a long and meticulous definition in a statute results a self-defeating strategy that produces a vicious circle of arguments. For example, consider the drafting and the vexed application of the definition of international aggression under the Chapter VII of the Charter of the United Nations of 1945<sup>14</sup>.

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<sup>11</sup> See R. Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in P.M. Tiersma, L.M. Solan (eds.), *The Oxford Handbook of Language and Law*, 2012, Oxford UP, Oxford, 128.

<sup>12</sup> See e.g. F. Schauer, *Easy Cases*, «S. Cal. L. Rev.», 58, 1985, 406 and 415 and, in addition, Id., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning*, Cambridge (Mass.), Harvard UP, 2009, 157, where the Author outlines two different kinds of hard cases: the first type arises out of linguistic indeterminacy or vagueness (examples are the notorious vague term ‘vehicle’ and open and value-laden expressions such as ‘equal protection of the laws’, ‘reasonable efforts’, and ‘undue delay’); the second type of hard case “*is not a function of linguistic indeterminacy at all*”, “*because the language gives an answer, but the answer that the language gives appears to be the wrong answer*”.

<sup>13</sup> Legislative definitions share this virtue with definitions in general. In this respect Hobbes’s idea on this topic is still a milestone. In Hobbes’s eyes definitions are a source of significance and truth, “*the light of human minds is perspicuous words, but by exact definitions first stuffed, and purges from ambiguity*” (T. Hobbes, *Leviathan*, with an Essay by Pogson Smith W.G. [1651], 1909, *Ch. V Of Reason, and Science*).

<sup>14</sup> See D.K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, «Duke Journal of Comparative & International Law», 1991, 57-123; B.B. Ferencz,



In addition, indeterminacy may be a way to avoid controversies. To use broad, vague or equivocal terms and syntagmas is one of the main strategy to reach an agreement (at least initial) in private and public affairs. The most important international commercial contracts consist of clauses drafted around open concepts such as “best practices”, “reasonableness” and “material adverse exchange”<sup>15</sup>. The texts of Constitutions are typically full of indeterminate and open-texture concepts, normal result of a compromise between many different policies. Especially the impression to have reached an agreement upon fundamental rights depends in a great degree on the indeterminacy of constitutional provisions<sup>16</sup>.

Therefore, both precise definitions and indeterminate terms may equally encourage or prevent disputes. The possibility of such opposite outcomes is a pragmatic variable of legal language. In both cases we have to take into account the specific context in which the rules are going to be applied, and the double interest embedded in following a rule. Law is the domain of conflicts<sup>17</sup>, where there is not a *tertium quid* between the right (being successful) and the wrong (being defeated). But, to achieve our purpose by law we need also to follow legal rules together with and

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*Defining International Aggression: The Search for World Peace*, Vol. 2, 1975, Oceana Press, 493, 506. The Soviet Union was opposed to the U.S. proposal that indirect aggression should cover armed bands. The definition resulted from the *Special Committee on the Question of Defining Aggression*, 31 January-3 March 1971 (see *Twenty-Seventh Session, Suppl. No. 19, A/8719* repr. in Ferencz, above quoted at 501) was the following: “*The sending by a State of armed bands, irregulars or mercenaries which invade the territory of another State in such force and circumstances as to amount to armed attack as envisaged in Article 51 of the Charter. When a State is victim in its own territory of subversive and/or terrorist acts by armed bands, irregulars or mercenaries organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State*”.

<sup>15</sup> Some clauses are standard clauses invariably included in some kinds of contract, such as for instance Sale and Purchase Agreements. Therefore, some of them are fundamental clauses that rule the allocation of risks and uncertainty among the parties: for instance, this is the specific function of the so-called “MAC” (acronym of Material Adverse Clause) that usually states a long record of circumstances of adverse exchanges along with a general clause that gives relevance to any other material adverse exchange as well.

<sup>16</sup> This point is stressed for instance by Pintore, A. (2000), *Diritti insaziabili*, «Teoria politica», vol. XVI, n. 2, 3-20.

<sup>17</sup> On this topic see M. Jori, *Linguaggio giuridico*, in G. Pino, A. Schiavello, V. Villa (a cura di), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, 2013, Torino, Giappichelli, 257-288.

in cooperation with others<sup>18</sup>. In law there is a reciprocal and shared expectation of cooperation due to the fact that the participants in legal practice have a mutual interest in understanding each other and making themselves understood, but when a controversy arises the main purpose of every litigant is to win the litigation, bending the law to his own interests, rather than to understand what law says<sup>19</sup>.

This permanent and pervasive coexistence of conflict and cooperation explains why both linguistic determinacy and its opposite, linguistic indeterminacy, according to the circumstances may produce either transient or durable agreement in following legal rules.

This conclusion could seem unsatisfactory, because it does not give a clear-cut answer to the question to which extent linguistic determinacy and its opposite, linguistic indeterminacy, give rise to legal dispute and which of them is the chief ingredient of litigation. In my opinion, this imperfection is not in the answer but in the subject itself. No answer in black and white terms is true in such matter.

It is obvious that the ability of legal language to function depends on a set of rules that are context-dependent, continuously made and remade by the participants in the legal practise, again and again. As a result, in spite of all the efforts, no legal rule can be so unequivocal as to preclude the possibility of a disputed application. For the same reasons it is always possible that indeterminate laws will never or very seldom be discussed in front of a tribunal.

This observation is not true of legal language, but of language in general as it concerns the *open texture* of human languages<sup>20</sup>. Legal language inherits this feature

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<sup>18</sup> In this respect, it contains a grain of truth the picture of the good faith rule as the golden rule of contract law: according to the ideal model, acting in compliance with good faith would stimulate parties to attempt to a proactive cooperation for the sake not of an immediate self-interest, but of a greater mutual advantage in the long period. Of course, this is a caricature of the good faith rule respect to the effective one as usually applied by the parties.

<sup>19</sup> On this topic and, in particular, the pragmatic dimension of cooperation and disagreements in law see the analysis of F. Poggi, *Semantics, Pragmatics, and Interpretation. A Critical Reading of Some of Marmor's Theses*, «Analisi e diritto», 2007, 159-178 and Id., *Law and Conversational Implicatures*, «Int. J. Semiot. Law», 24, 2011, 21-40.

<sup>20</sup> In a technical sense, such open texture is never wholly eliminable and it refers to the possibility that *“even the least vague, the most precise, term will turn out to be vague as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future”*; it is the *“ineradicable contingency that (...) [n]o matter how carefully we may try to be maximally precise in our definitions, and therefore in the generalizations that those definitions both reflect and create, some unanticipated event may always confound us”*: see F. Schauer,

from the ordinary languages spoken by different peoples (*viz.*, mother languages). The uncertain interplay between (in)determinacy of legal rules and legal (dis)agreements and litigation depends on the general features of open texture.

Only in the Utopian World of Practical Reason where everybody is supposed to be wholly rational, aware and sincere, the language of the rules would be determinate as a calculus and as a consequence the rules would be faultlessly followed and applied<sup>21</sup>.

This counterfactual ideal shows that, in contrast with the prevalent opinion, linguistic indeterminacy, ambiguities and vagueness of legal rules are far from being always undesirable faults of legal language; they are rather an important remedy we may in certain occasions use as a guide to act under uncertainty.

### 3. Plain-meaning and legal pragmatics

Schauer warns us not to take judicial references to plain meaning on trust<sup>22</sup>. I think that this is a correct precaution because we have to separate what judges *actually do* and what they *say* about what they do. Judicial references in favour or against plain meaning do not prove much about the real relevance of plain meaning in the interpretative styles of the courts.

As this is not a comparative or a sociological study about plain-meaning in law, I will not attempt here to say anything about the state of things in European or in American case law. I will propose only one example taken from the Italian legal system.

Italian interpretative styles vary with respect to the different courts and fields of law. In case law, especially in litigations in front of tribunals and courts of appeal, explicit references to plain meaning are few and far between. They are fairly less infrequent in constitutional case law, as well as in the Court of Cassation's case law.

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*Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, 1991, repr. 2002, Oxford, Clarendon, 34 ss., spec. 36.

<sup>21</sup> An interesting historical picture of our real legal world is portrayed in the article *The Delays and Uncertainties of the Law* by C.C. Bonney L.L.D., Counsellor of the Supreme Court of the United States: *The Open Court, A Monthly Magazine Devoted to the Science of Religion, the Religion of Science, and the Extension of the Religious Parliament Idea*, Vol. XIII (No. 12), No. 523, 1899, 705-709.

<sup>22</sup> See F. Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 «Vand. L. Rev.», 1992, *sub* note 4.



The Italian Constitutional Court does not refer expressly to the traditional brocardo “*in claris non fit interpretatio*”, which is often found in the judgments of the Court of Cassation’s, of administrative courts and in the decisions of tribunals. References to plain meaning seem to be comparatively more copious in criminal case law. This difference in styles of legal interpretation between penal and civil judges is the product of the *strict interpretation principle* stated by art. 25 of the Italian Constitution with regard to matters of crimes and punishments. But it would be wrong to understand this reference to plain meaning made by penal judges as a sign that the actual interpretation of penal statutes is done verbatim. In fact, Italian penal judges when interpreting refer to purposes and principles no less than Italian civil judges, and this happens equally in the higher and in the lower courts.

All together, Italian courts do not refer much to plain meaning in their sentences and the brocardo “*in claris non fit interpretatio*”, notwithstanding its long history, plays a secondary role in legal interpretation. As we said, this does not mean that Italian judges do not normally take into account official documents, the texts of precedents and their meaning.

The discrepancy between what is said and what is done is due to several reasons.

*First*, the justification we read in a judgment is other than the (real) motivation of the judge, and of course not every part of the interpretative process is written down in the judgment.

According to pragmatics the first intuitive and most common assumptions about the meanings of signs are usually left *implicit*. In the real process of interpreting, interpreters are often unaware of such assumptions. Even when this is not the case, first meanings stay frequently in the backgrounds, even when the interpretative solution is grounded on them.

In other words, I am persuaded that the plain meaning is the basis and the first step of any interpretation and it is for the most part embedded in its justification.

*Second*, when many sources of interpretive guidance are at hand, such as interpretative canons and argumentative approaches, including the plain meaning, and everyone points at the same result, there is a strong incentive for judges to justify this result with the most persuasive sources of interpretation. Using the plain meaning canon might not always be considered the most persuasive strategy; this

may vary with the addressee. In this respect, the lesson of contemporary rhetoric is that the force of a (legal) justification depends on the features of the audience and the dispositions of the spectators. Nowadays in Italy it can be said that, in general, a reference to plain meaning has less force of persuasion than a direct reference to legal purposes and principles, even when the plain meaning is in accordance to said legal purposes and principles.

It makes an important difference if the addressee of the court is, in addition to the plaintiff and the defendant, the public in general or an agency or a similar authority. It also makes a difference how *courts*, *arbitral tribunals* and *agencies* are used to interpret statutes. Agencies seem to favour plain meaning comparatively more than courts, while arbitrators normally display an even freer approach<sup>23</sup>.

*Third*, pragmatics also teaches that plain meaning may represent an extreme of a spectrum of meanings that has on the other extreme absurdity; however, on the other hand, plain meaning may produce itself absurdity in some linguistic contexts.

In the legal domain it is certain that "*plain*" counts, sometimes it is clearly the same as "*obvious*" but at other times it becomes totally "*absurd*".

Let consider this example that I borrow from Cass R. Sunstein: in *American Mining Congress vs. EPA* case, "[c]ongress had not clearly dealt with the problem of how to handle materials held for recycling, and the relevant EPA regulation defined certain materials involved in recycling as "solid waste." In particular, it said that spent materials, sludges, scrap metal, and the like would be treated as solid waste if they were not directly reused but were instead held as part of an industry's ongoing production process. EPA reasoned that materials that were stored, transported, and held for recycling were associated with the same kinds of environmental harms as materials that were abandoned or disposed of in some final way. The court of appeals struck down EPA regulation on the ground that the governing statute defined solid waste as "garbage, refuse, sludge (...) and other discarded material"; for the court, material held for recycling was not "discarded." Citing the dictionary, the court thought that the "ordinary plain-English meaning" was decisive"<sup>24</sup>.

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<sup>23</sup> See e.g. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 2009, Oxford, Oxford UP, e-book; T.W. Merrill, *Textualism and the Future of the Chevron Doctrine*, «Wash. U. L. Q.», 72, 1994, 351-377.

<sup>24</sup> C.R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law (with Notes on Interpretive Theory)*, in *Chicago John M. Olin Law & Economics Working Paper No. 158 (2d Series)*, in <http://www.law.uchicago.edu/Lawecon/index.html>

On the other hand, for example, in some cases, American courts conclude, “*while interpreting the Class Action Fairness Act of 2005, that the word ‘less’ actually means ‘more.’ Other courts have found that the word ‘of’ means ‘or,’ and the word ‘unlawful’ means ‘lawful.’*”<sup>25</sup>.

Of course, in the latter situation the plain meaning will be avoided and corrected. Still, it is interesting to note that in the domain of law, even in the former situation, plain meaning does not produce invariably the final result. In other words in law the mere identity of plain meaning to what seems more obvious to the interpreter does not put an end to different interpretations on all occasions.

In this respect, borrowing Schauer terminology, in legal interpretation the possibility of “*erroneous identifications of absurdity*” (namely, “*false positives*”) and, vice versa, “*erroneous non-identifications of absurdity*” (namely, “*false negatives*”) is a pragmatic variable that concurs to explain the real uses of plain meaning by the courts. I do not know whether in Italy jurists, judges and legal authorities think that the former errors are significantly more numerous than the latter.

*Fourth*, in many cases the reference to plain meaning regards not a legal sentence as a whole but only some terms or expressions. This is not related to a specific nature of the single term or syntagma to be interpreted.

In Italian case law, for instance, the higher courts commonly examine the plain-meaning of a heterogeneous number of words that belong to:

- i) the ordinary vocabulary; referring to empirical and natural elements or artefacts, such as “*garden*”<sup>26</sup>, “*fishbing*”<sup>27</sup>, “*bird-hunting*”<sup>28</sup>, “*skein*”<sup>29</sup>, “*use for office*”<sup>30</sup>;
- ii) ordinary vocabulary related to technical discipline, as for instance “*spangled crystals*”<sup>31</sup>, and “*compressed air utensils*”<sup>32</sup>;
- iii) ordinary syntactical terms, like “*however*”<sup>33</sup>;

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<sup>25</sup> A.S. Gold, *Absurd Results, Scrivener’s Errors, And Statutory Interpretation*, in *Univ. of Cincinnati Law Review*, Vol. 75, 2006, 25.

<sup>26</sup> It. Cost. Court, 10-5-1999, n. 167.

<sup>27</sup> It. Cost. Court, 26-1-1957, n. 23.

<sup>28</sup> Pen. Court of Cass. Sec. III, 27-3-1996, n. 3090.

<sup>29</sup> Civ. Court of Cass. Sec. III, 20-10-2006, n. 22527.

<sup>30</sup> Civ. Court of Cass. Sec. VI, 12-6-2012, n. 9583.

<sup>31</sup> Civ. Court of Cass. Sec. I, 23-2-1998, n. 1929.

<sup>32</sup> Civ. Court of Cass. Labour Sec., 14-11-1986, n. 6724.

<sup>33</sup> Civ. Court of Cass. Labour Sec., 20-1-1992, n. 651.

- iv) ordinary vocabulary that involve human beliefs referring to the basic categories of time and space, as “*continuity*”<sup>34</sup>, “*in the current year*”<sup>35</sup>, and “*at hand*”<sup>36</sup>;
- v) ordinary institutional vocabulary related to the economy sphere, as “*price*”<sup>37</sup>, “*distribution*”<sup>38</sup>;
- vi) common verbs, like “*spread*”<sup>39</sup>;
- vii) evaluative or value-laden common vocabulary, as “*decency*”<sup>40</sup>, “*family*”<sup>41</sup>, “*accident*”<sup>42</sup>;
- viii) technical legal vocabulary, as for example “*credits for aliments*”<sup>43</sup>, “*territorial sea area*”<sup>44</sup>, “*transaction contract*”<sup>45</sup>, “*touristic organization*”<sup>46</sup>, “*total income*”<sup>47</sup>;
- ix) systematic legal vocabulary such as “*property*” and “*possession*”<sup>48</sup>.

Comparing these cases reveals that no systematic relationship exists between the linguistic field investigated by judges and the fact that words to be interpreted belong to the ordinary language, rather than legal technical usages or that they have a certain technical meaning in a specific domain. That is to say, the circumstance that plain meaning in law shall be equivalent or not to ordinary meaning is a pragmatic feature relying on each context in which the legal rules are applied.

As a further matter, the prevalence of ordinary meanings, rather than of legal technical meanings is not necessarily related to the original background of terms or syntagmas that have to be interpreted. Besides natural language—the current Italian— other domains frequently assessed by judges are the typical linguistic usages widespread in areas such as the business world or in technical disciplines

<sup>34</sup> Civ. Court of Cass. Labour Sec., 2-4-1990, n. 2638.

<sup>35</sup> Civ. Court of Cass. Sec. I, 26-4-1999, n. 4124.

<sup>36</sup> Civ. Court of Cass. Sec. III, 6-2-1998, n. 1289.

<sup>37</sup> Pen. Court of Cass. United Sec., 17-10-1996, n. 9149.

<sup>38</sup> Pen. Court of Cass. Sec. III, 1-10-1999, n. 11322.

<sup>39</sup> Pen. Court of Cass. Sec. III, 11-11-1999, n. 12820.

<sup>40</sup> It. Cost. Court, 5-3-2010, n. 91; Pen. Court of Cass. Sec. III, 8-5-2009, n. 19322.

<sup>41</sup> Civ. Court of Cass. Sec. III, 22-2-1991, n. 1910.

<sup>42</sup> Civ. Court of Cass. Labour Sec., 6-5-1995, n. 4940.

<sup>43</sup> It. Cost. Court, 21-1-2000, n. 17.

<sup>44</sup> It. Cost. Court, 26-1-1957, n. 23.

<sup>45</sup> Civ. Court of Cass. Sec. V, 29-10-2010, n. 22118.

<sup>46</sup> Civ. Court of Cass. Labour Sec., 20-2-2008, n. 4332.

<sup>47</sup> Civ. Court of Cass. Labour Sec., 11-11-1996, n. 9819.

<sup>48</sup> Civ. Court of Cass. Sec. II, 12-6-2008, n. 15836.

such as the natural sciences. In any event, we cannot say in advance whether legal meanings will be identical to those used in the various relevant background.

#### 4. Plain meaning: ordinary *vs.* legal linguistic usages

We have now reached the core of the plain meaning issue, whether plain meanings in law are identical to ordinary meanings or to legal linguistic usages.

This issue can be analysed from a descriptive or a prescriptive perspective.

From a *descriptive* point of view the question is whether certain judges tend toward ordinary meanings, rather than legal technical meanings. It is apparent that any answer to this question involves a certain conception of the legal language, as used by judges. We can rephrase the question above as a general alternative. In the opinion of (certain) judges, is legal language semantically dependent on ordinary language or is it a sort of independent language with an autonomous semantics?

From a *prescriptive* point of view the question is if judges *ought* to interpret legal texts, sentences and words by giving them the same meaning as in ordinary language or if they *ought* to interpret legal documents in terms of their legal technical meaning.

Clearly, a fundamental alternative about the nature of legal language lies behind this question. The choice is between a legal semantics directly accessible to everybody (the Enlightenment model<sup>49</sup> or the Clapham omnibus model<sup>50</sup>) and a legal semantics administered by , the jurists) (the Oligarchic model).

In my opinion this second model is the one commonly adopted by contemporary legal systems; however, this does not entail that plain meaning — relevant to law— must be always different from ordinary one. In such Oligarchic model the autonomy of legal semantics from ordinary language is rather a matter of degrees and is often governed by jurists<sup>51</sup>.

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<sup>49</sup> See C. Beccaria, *Dei delitti e delle pene*, ed. sesta di nuovo corretta ed accresciuta, 1766, Paris, Molini Libraire. See also the *Penal Code of the United States of Ionic Islands of 1841*, reprinted in S. Vinciguerra, *Codice penale degli Stati Uniti delle Isole Jonie (1841)*, 2008, Padova, Cedam.

<sup>50</sup> See A. Wierzbicka, *English: Meaning and Culture*, 2006, Oxford, Oxford UP, 118.

<sup>51</sup> Laws govern interpretation, first of all, providing rules on interpretation. But, insofar as also these rules must be interpreted and they are rudimentary from a semiotic perspective, it is well-known that they are all (generally viewed as rules of) thumb.



In Schauer's essays, we find several notions of plain meaning that are common among legal scholars and philosophers. In particular, it is useful to point out these five conceptions of plain meaning in law.

*First*, plain meaning is the result of the "convergence of extension of language" among its participants. In this perspective the plain meaning—relevant to law—is not simply the "lawyer's reading of the text"<sup>52</sup>, where lawyer's includes the entire corpus of jurists and officials, but a reading qualified by a *high* degree of concordance (to give a number, Schauer says about 90%). This would be a good field of survey for the sociology of law.

*Second*, plain-meanings—relevant to law—are those "technical meanings" created by the law that are "straightforward"<sup>53</sup>. By way of illustration, the plain meaning of the word "contract" comprehends all sales and purchase agreements. From this point of view, the plain meanings—relevant to law—are those *paradigmatic* or *prototypical*.

*Third*, plain-meanings—relevant to law—are those meanings used within the law and understandable by virtue of thinking in legal terms, that is like a legal actor. In this view, to determine the plain meaning of a legal document, every interpreter—it does not matter how actually expert about the law—should impersonate a legal actor legitimately empowered to correct legal meanings, if the outcome of interpretation is legally poor or wrong<sup>54</sup>.

*Fourth*, the plain-meanings—relevant to law—is "itself a creature of the law" and it is "itself entirely a legal matter". From this point of view, "the legal use of any language transforms that language into legal language", and each term used in the law is but "a legal term of art (...) with a characteristically legal meaning"<sup>55</sup>. This idea of plain meaning is more radical than the previous above, since it assumes that law has an autonomous *grammar*, in addition to an autonomous semantics. The assumption implicit in this view is not simply that legal concepts assume their own meaning in law, but that legal language has a deep structure based on its own functional rules.

<sup>52</sup> See F. Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, «Vand. L. Rev.», 45, 1992, 739.

<sup>53</sup> See F. Schauer, *Legal Realism Untamed*, «Public Law and Legal Theory Research Paper Series 2012-38. University of Virginia School of Law», 2012, quoted above, 36 note 12.

<sup>54</sup> See F. Schauer, *Legal Fictions Revisted*, inedited paper dated 21st November 2012, 25-26.

<sup>55</sup> See F. Schauer, *Legal Fictions Revisted*, inedited paper dated 21st November 2012, 26-27.

*Fifth*, the plain-meaning —relevant to law— is “*necessarily legal and not ordinary*”, albeit it may contingently be close to ordinary meanings, and it “*incorporates the norms and goals of the legal system*”<sup>56</sup>.

## 5. The *littera legis* and its “spirit”

The interpretative doctrine of Schauer can be summarized in the following two statements.

First, in particular circumstances we cannot exclude that the plain meaning of a legal sentence alone may produce a clear outcome (*i.e.* a rule) without need of searching the purposes of the law lying behind the text.

Second, apart from some exceptional circumstance, for the most part a frank description of the law —at least, in those legal systems where laws are mainly expressed in texts (the texts of judgments and of statutes and similar acts)— is that the plain meaning of a legal text represents a negative limit for interpretation, and although other interpretative arguments might indeed frequently prevail, a text and its words, phrases and sentences are at any rate the starting point to extract legal rules.

In this process of extraction, guiding lines are the purposes of a law, the principles or policies to which the law at hand is congruent and instrumental. From this point of view determining the meaning of a law requires a process of “*reflexive equilibrium*” between signs and purposes, the *littera legis* and its “*spirit*”.

It is a caricature to present the plain meaning approach merely as a doctrine that provides the means to interpret legal texts (statutes, general acts, contracts, and so forth) within the “*four corners*” of a document. A realistic plain meaning approach—which takes into account legal practice itself, both in civil law and in common law legal systems— must be a far more sophisticated doctrine and read legal texts by looking at units larger than single words or sentences and which takes into account the *practical reasons* lying behind regulations.

I agree with Schauer when he states that “*the reliance on plain meaning need not commit the interpreter to reading single words or even single sentences in isolation*”<sup>57</sup>. In my

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<sup>56</sup> See F. Schauer, *Legal Fictions Revisted*, inedited paper dated 21st November 2012, 28.

<sup>57</sup> See F. Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 «Vand. L. Rev.», 1992, 740.

opinion, the relevance of principles and policies, legislative purposes and intent are commonly and rightly so a matter of degree in each situation. What characterises the plain meaning approach is not that it takes into consideration exclusively single words or sentences, or solely texts, but that it prefers what can be gleaned from the official statements of the competent legal authorities, to what might be obtained from other sources. An inventory of these alternative sources, according to case law and the theories of legal philosophers, may include for instance conceptions of optimality and human well-being, natural laws, technical expertise, the cardinal and the teleological virtues of justice, prudence, faith, charity, social customs, and so on.

The doctrine of interpretation above sketched is close to that given by a branch of Italian legal positivism and precisely to Uberto Scarpelli's view of legal interpretation. Scarpelli describes legal interpretation in a legal system characterized by codifications in this way: "*the first interpretative canon is indeed never to forget that law has a practical function, and never to renounce to be guided by those principles that are oriented to this function*"; the interpreters should "*settle the provisions of a statute in a pragmatic frame of reference conceiving them as reasons for action with a certain practical function, in the light of those values —and principles— that are inherent to the systematic structure of law*"<sup>58</sup>.

It is a merely terminological point that this doctrine of interpretation be catalogued as a form of *qualified literalism/textualism* or rather as a *moderate teleological purposive doctrine*. Any quarrel on this seems to me pointless. Instead of the alternative between literalism and teleologism, it is more important to underline that this doctrine —whatever its name— is an *explicative* theory rather than a pure normative proposal. At its very bottom lies the value choice that candor in opinion-writing is desirable and that it is better that the "*reasons given in an opinion for a decision accurately reflect the reasons actually employed by the decision-maker*"<sup>59</sup>.

This doctrine provides a model of interpretation that suggests to judges, and to all of us, how to determine in each case the meanings of a general rule, in order to be in compliance with the Rule of Law.

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<sup>58</sup> See U. Scarpelli, inedited and untitled paper that should be delivered at the Congress "*La istituzione giudiziaria nel XXV anniversario dell'entrata in funzione del Consiglio Superiore della Magistratura Esperienze – Prospettive*", Parma, 6-9 June 1984, par. 8 "*L'interpretazione di un codice. Gli stili interpretativi*", 22-23.

<sup>59</sup> See F. Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 «Vand. L. Rev.», 1992, *sub* note 4.

It has indeed two cornerstones: the first one is, as we said above, a practical consideration about how legal language really functions; the second is a political choice in favour of the Rule of Law.

These two lights enlighten this doctrine of interpretation and—in my opinion—make it both feasible, from a semiotic perspective, and politically (ethically) acceptable.