1991

Our Meanings Can Never Be the Same: Reflections on Language and Law

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For me it is a starting point in all thought about language that, whatever I say or do with words, my expression will never mean exactly the same thing to you that it does to me; and of course yours will never mean exactly the same thing to me that it does to you. It cannot: each act of expression is a gesture against a context; it derives its meaning largely. perhaps entirely, from its relation to that context; and for each of us the context of every gesture is different, if only because one of us is doing it, the other observing. Think of the tennis game, and how differently the same shot is experienced by you and by me. From your point of view, having made the play, the ball disappears across the net into the larger scene from which it is about to be returned; for me, the ball emerges from such a scene to become increasingly the object of focus and potential action. For you the shot is something done; for me it constitutes a challenge: Can I respond?

This is to focus on the difference between the sender and the receiver, between the person who writes words in her study, on a pad, then sees them printed and sent forth into the world to merge with all the other books and articles out there, and the other person, who finds this book or article among the others, idly glances at it, or chooses to read it with care, and thus locates it within the world of the other texts that he has known. This is one difference, but not the only one, for our sense of context and action is different in many other ways as well: our sense of the words themselves is different, for they have different histories for each of us; our sense of the way words are related by syntax varies too, since. as any language teacher knows, we inhabit different syntactical worlds; and our experience of the natural world, of other people, of institutions, of other gestures on other occasions – all of which provide parts of the context against which the particular performance occurs-vary too. My meaning can never be your meaning; all writing is a way of addressing, or avoiding, that fact. It is this theme that I wish to pursue in responding to the various articles written about my work, beginning with that by Eugene Garver.

I.

Professor Garver's central point lies in his attempt to give new meaning to the language of deterrence by describing it in ordinary language terms as "making an example of someone." This is an important challenge, and I will deal with it below, but there are a few other matters that should be dealt with in a preliminary way.

First, the title of "When Words Lose Their Meaning." Professor Garver is not the only one to have been somewhat puzzled by it. Perhaps the fault is in the title itself, which may indeed seem to focus upon the ways in which language loses meaning; but my actual concern is rather with the ways in which great writers have managed to transform their languages and give them new kinds of meaning, that is with the ways in which language can gain meaning. The idea of the title – the key word of which is "when" – is not that the book is about the process by which

meaning is lost, but that it is about what happens next, how we can respond to that loss when we learn that it has occurred. The experience of such a loss often defines an important moment in the life of the person, and perhaps in the life of a culture as well – a moment when one suddenly realizes that language cannot work in the simple and unproblematic way one had theretofore imagined and, more deeply, that the sense of harmony between one's self and one's culture, the sense of belonging in a world in which you say and think what others do, is broken beyond repair. This is the experience of Achilles in the Iliad and, as I say, the experience of many of us as we become partly alienated from our culture and its languages. Perhaps it is, as Emerson suggests in "Experience," a kind of Fall of Man into consciousness of language. My title is meant, first, to focus attention on that moment and then to raise the question, What can be done on these conditions? It is with this question in mind that I turn to the texts discussed in that book, looking to them as offering a variety of responses.

Professor Garver says that the loss of language has a natural plot, its transformation or recovery not, and in one sense I think he is right: decay is a universal and comprehensible process, through which something known and understood becomes less than it was. Regeneration or invention, by contrast, are creative acts that in the nature of things cannot be predicted. On the other hand, we do have enough experience of works that have transformed our culture so that this plot too has some coherence. We can think of philosophy, for example, beginning say with Socrates, upon whom Plato builds, only in turn to be built upon by his student Aristotle, and so forth. Likewise the great achievements of the Elizabethan theater do not come from nowhere but, at least after the fact, can be seen to have their roots in earlier forms of art. Or think of the growth of a religion, say Christianity, from a single human life, to its retelling in the form of gospels, to the establishment of creeds and institutions, spread over the world in patterns of harmony and discord.

Professor Garver rightly says that one way in which words can lose their meaning is to become wholly instrumental, but that is not the only way: they can become clichés or platitudes too, uttered in mindless and unreflective ways by persons who have no interest in exploring the tensions within them. This, for me, is one of the important lessons of the essays of Samuel Johnson, which so often begin with the articulation of platitudinous truths and then transform them into complex statements that capture deep inconsistencies and uncertainties.

I like Professor Garver's way of putting it when he says that one question for me is how to talk back to those who speak in purely instrumental ways (though I would add in clichés or platitudes as well). One common problem is that speakers of both kinds – including the side of oneself that speaks that way, or wishes to do so – deeply resist the recognition that there is anything problematic in what they say or do with language; resist, that is, the fall into the consciousness that our meanings can never be perfectly shared. And speakers of this kind often have a great deal of power, whether in the family, in the school, in the larger legal or social world, or within the self, and this makes it all the more difficult to answer then in ways that wiIJ command attention. Answering these modes of thought and expression, speaking in ways that will render them for the moment problematic, is not something that can be done once and for all, but must be done again and again, much in the way a poet must write not one poem but a lifetime

of poems. What is called for is the perpetual exercise of an art that is beyond the capacity of most of us most of the time; this means that a part of our experience is sounding stupid, at least to others, and sometimes to ourselves.

One way in which I think about the matter of dead and living language is to say that whenever we use words, of any kind, we can do so on either of two assumptions. First, that the words themselves carry their own meanings; our task on this view is to arrange them in sequences that will have the same significance, whether uttered by us or by others, whether in one context or another. The other view – it is held by Ortega y Gassett in particular – assumes that our words have, as it were, only the potential of meaning, as they lie around us unused; and that it is our opportunity and our task to give them specific significances in the way in which we use them. The first view conceives of words as complete units of meaning, rather like automobile parts that can be picked up at the store and used just as they come off the shelf. The second view recognizes that much of the meaning of our words and phrases and gestures is given to them in the text which they are a part, which in tum means that the kind of text one produces cannot itself be reduced to a set of propositions cast in terms used "off the shelf." Much of its meaning lies in the way in which it works upon its language.

Now to the main point: Professor Garver argues that the language of deterrence can be recast by saying that when we punish "to deter" we are "making an example" of another. His idea is that this formulation in terms of a social practice will restore meaning to the act of punishment itself, by defining it not in instrumental but in social terms. I agree that to speak that way would make a large difference, but not quite in the way that Professor Garver does. For me the difference would be that this kind of formulation would invite a different kind of response, in the sense that it would be a somewhat more natural thing for the defendant to say, "Why me?"

But I think this formulation gives rather little help to one who is trying to answer this question, for the reason that the question is effectively unanswerable. If one is being punished in excess of the demands for punishment created by one's own wrong – doing and one's own demonstrated dangerousness – what I call "blaming" – there exists an incoherence both in the character of the law itself as an actor and the kind of relation it establishes with the defendant. To say "We shall use you against your will as an instrument of social control" is to undermine the ethical claims upon which the other grounds of punishment rest. I do not think that it saves the day to say, with Kant, that one is not to use another "solely" or "merely" as an instrument. I think the vice lies in the instrumental use of others at all. In the interesting case suggested ·by Professor Garver – of the two people jointly writing an article – I think it misstates the situation to say that one is using the other as an instrument. For one thing, the relation is continuously consensual; for another, at least in the usual case, the relationship itself would be far more important to the parties than the work – product, so that if there arose a tension between the right way to behave with each other and with the production of the paper, the paper would suffer.

There remains this point: Professor Garver says that when on my theory we punish by reference to the character of the defendant's conduct and his needs, we would at the same time hope that this punishment would affect the conduct of others. If we hope for deterrence are we not being hypocritical in not admitting it as a legitimate goal of punishment to start with? Indeed,

is deterrence not indisputedly a goal of punishment at the stage of legislation? Here I simply do not see the problem. Of course we hope that the existence of a criminal sanction will affect other people's behavior. But that is not to use them as instruments, if the sanction is imposed in the way I have described; that occurs only when the sanction exceeds the level called for by appropriate considerations.

II.

Professor Lewis's paper also raises a series of issues worth serious consideration. The first relates to the issue of power. I am glad that he sees that my analysis is not intended to be a way of drawing attention away from the fact that the law involves the exercise of power by some people over others. Indeed it is because the law is a system of power that it is so important that we learn to understand and to criticize the ·way it functions as a cultural and ethical system. There are perhaps those who would disagree with both Professor Lewis and me, and claim that the only thing worth saying about the law is that it is a system of power, but that position seems to me to require no refutation.

Professor Lewis's critique is a much more subtle one, namely that my way of thinking about law obscures the degree to which the law tends to confirm existing cultural and power arrangements and to resist their transformation. This position too could be phrased in a depreciated form under which it was assumed, for example, that something called the "status quo" is a bad thing and something called "change" is a good thing. I would assent neither to that claim nor to its opposite; the terms are too crude for serious thought. Obviously there is much that is good in the way we do things, including in the way that power is allocated among people; there is much that is bad in the way we do things, also including the way in which power is allocated among people. Professor Lewis's position accepts all this, but still asserts that there is a disproportion in my method that amounts to a partial blindness to the law's tendency to preserve whatever ways of thinking and talking we have, without regard to their merits.

I would begin my response by saying that no social or cultural system stays the same; that we are all engaged in processes of conservation and transformation whether we know it or like it or not; and that the activity of law is just such an activity. My effort is to try to identify questions that can usefully be pursued by those of us – all of us – engaged in this collective and uncertain process. l assume that little can be said a priori about the merits of social and cultural systems, and hence about the relative desirability of conservation and change, for we are made by the very systems we criticize. We are in a radically fluid and uncertain relation with ourselves and with the Of course the law has culturally conservative elements within it, resistances to change; so do the practices of art and music and poetry, so does the institution of the university or the symphony orchestra; so does the Constitution of the United States, indeed any system of social organization. I think such resistances are not only necessary for the functioning of a culture but inevitable. If a grand revolution were to occur, it too would be followed by a social system that resisted its own change. For me the question is less how resistant to change one should be, or how promoting of change, than how one ought to conceive of the problem of thinking about these things in particular cases. Thus the implicit judgment Professor Lewis makes – that the law is too resistant to change – is one I see no way to make in such a global way. To be really

helpful, the question has to be thought about in the context of a particular case, and then the question becomes the substantive one – how should we talk here? – not the global one about too much or too little change.

It is at this point that Mr. Lewis's talk about the romantic character of law becomes relevant. He says that the plot in the typical legal case is that there is a problem that cannot be solved by those who are suffering from it but which is indeed solved, and for the best, by our Hero, the law. This ingredient is indeed present in legal discourse, and it does present its dangers, which Mr. Lewis describes with considerable accuracy as well as humor. I had never thought of it quite this way and am grateful for the insight. On the other hand, I do not think it should be overstated. What Professor Lewis calls the "romantic narrative" of the law can be described as a version of something else as well, namely our commitment to deciding cases in accordance with justice as well as law. While it is sometimes the case that a judge will be forced to admit that the result to which she is compelled by the law is unjust, under our conventions of discourse that is rare. Normally she will claim that the result reached is dictated both by law and by justice. One danger inherent in this practice is that we might find ourselves perpetually claiming that our law is in all ways just. To say this would of course be false, and one of the tasks of the judge, therefore, is to undercut or resist that implication of her way of talking. I do not think, however, that the resistance should go all the way to the detachment of justice from law, the consequences of which would be disastrous. This is all a way of saying that the law does involve a romantic narrative of success but that this is not a bad thing, but a good one; what is called for here, as in all speech, is sensitivity to what this narrative obscures or belies. The judge should continue the quest for justice, continue to assert that justice is served in her decisions, yet at the same time recognize the force of arguments that cut the other way. A difficult art to say the least; but a narrative of perpetual failure would be no improvement.

If all this is thought to leave me more tolerant of, or blind to, the culturally conservative tendencies of law than I ought to be, I would ask: from what point of view, based on what knowledge, is one to make this judgment? There is no Archimedean point of perfect knowledge; we are all embedded in uncertainty; and the questions of conservation and transformation seem to me to have to be debated in the particular forms in which they arise, not in abstract or general terms. Of course the judges in the "Baby M" case use their inherited languages of the family, of property, of the judiciary, to talk about this case.

How else can they talk? My claim would be that they can use their languages with more or less consciousness of their limits, of their ethical and political implications; that they can even invent new ways of talking; but in any event the judgment must be made of the particular performance. We cannot ask of them what they cannot do.

At one point in his paper Professor Lewis attributes to me that the view of conceiving of law as literature "will have a liberating effect." That is actually not what I think; what I think is that conceiving of law as literature may have a liberating effect; whether it does or not depends on how we draw this comparison, and like everything else in the world, it can be done well or badly. The question is what further meaning is given to that gesture, and this is ultimately a question of one's own education and art. The same misunderstanding under lies the quotation

from Richard Rorty, who says that he "trembles at the thought of Barthian readings in law schools." Of course he does; who would recommend such a thing? To say that the law can be regarded as a literary activity is not to say that this will automatically solve everyone's problems nor to say that anything that passes for literary analysis, good or bad, has a place in legal thought, or that judicial opinions should be written in doggerel or that statutes should be read as post – modernist constructions. And it is certainly not to say that we should suspend our capacity for judgment. Quite the reverse: what I am talking about is itself a way of exercising judgment.

III.

Professor Nelson rightly sees that a great deal of my work is written in response to what he calls "the modern paradigm of communication," which "imagines a sender transmitting a message through a medium to some receiver capable of extracting the message undistorted." It is because it accepts this image of communication that in Justice as Translation I criticize the language of "concepts" in which most modem analytic philosophy is carried on. For me language is always present, not so much defeating our hopes and expectations as providing a field within which we must perpetually act, material upon which we must act. Instead of using words "off the shelf," that is, as writers or speakers we should recognize our obligation to give the words we use meaning in the text in which we use them. This is done partly by process of associative and contrastive definition, as one word is used with others, distinguished from some, affiliated with others, and the like, partly through · performance or enactment: as I talk about "liberty," for example, I am myself engaged in a relation with my reader in which liberty can be seen to be itself an issue. An authoritarian writer gives rather little liberty to his reader, a writer of another kind much more so, and so forth; and of course the liberties given by different writers may vary in quality as well as quantity.

For me the importance of translation is that this activity highlights and makes obvious elements of our experience that are features of all language use. It is not just a statement in another language that I cannot translate perfectly into my own words, but any verbal utterance or gesture, including those that take place in what I think of as "my" language. Our meanings can never be the same.

Professor Nelson's most substantial criticism is that I tend to “1eave the text as an unchallenged, central substance" and "keep the self, the subject, unified and centered." This I think is both true and not true. What is true is that I am not much interested in the processes of imagined dissolution by which texts and selves can be made to disappear.[1] But I also think that the issue Professor Nelson raises, as is true of many questions of modem theory, depends upon a false question, or rather a pair of them: namely, whether the text be "one" or "many," the self "one" or "many." Obviously, as the experience of translation will teach us, every version of

[1] While certain forms of literature that do this can be most valuable, law has a social function that must not be forgotten. In the law we can and must live on the assumption that our language gestures work fairly well most of the time. This is of course true not only in the law but elsewhere; true for the most committed deconstructionist, however he may write in his official voice.

every text is somewhat different, and often in important ways. There is no such thing as a pure, simple, objective reading of anything; everything we do – including whatever we think of as simple or obvious – is done from the perspective defined by our own culture and our own individual pasts, and the minute it is recontextualized it has very different significance. The Greek text has a different meaning to me as a twentieth century person from the meaning it would have to a contemporary figure, and these differences cannot be wholly erased by acts of the imagination. The meaning of the text is relative to its reader; yet this is not to say that our readings are impossibly various or incoherent. Readings of Lear are recognizably different from readings of the stock pages or the phone book.

Likewise, my image of the self is not as a single unit or integer, but neither is it as an incoherent jumble of fragments. The Legal Imagination, for example, is premised upon the conflict among various selves – those engaged in legal discourse, those engaged in literary discourse, those engaged in the discourse of ordinary life, and so on. Yet we are something more than collections of broken pieces; and, in any event, whenever you write you define a speaker for your text – in this sense "you" speak – and the question is how you should do that.

I like very much Professor Nelson's main supposition, which is that we should, so far as our talents allow us, be open to thinking of other forms in which to write and express ourselves. My own experience and training has led me to the particular forms I have used, especially the form of contrastive textual analysis: reading the Iliad and Jane Austen together with McCulloch v. Maryland, or a series of Supreme Court Opinions with a series of translations, or, again in The Legal Imagination, establishing an array of texts, from ancient Greek drama to Dick Gregory's autobiography, from slave law to prison law, from the annual report of the Boyertown Casket Company to modem statutes on the death penalty. But I certainly would not think of this as the only form, and welcome others when they occur: Norval Morris's fictions, a Patricia Williams's book on race, or the accounts of legal practice offered by Milner Ball and Clark Cunningham, just to take a few examples.

IV.

The paper of Professors Dellapenna and Farrell is for the most part a taxonomy of what they regard as three modes of thought in the law; I have little argument with this except at the most basic level. at which I would say that I find such accounts as these too general and theoretical, too removed from particulars, to be of much help. This description is simply too schematic to correspond with at least my own sense of the nature of human thought, though I know these are many who find such accounts useful.

These authors are critical of me largely on account of vagueness. "White provides us with only the vaguest notion of how to evaluate a particular translation, falling back on admonishing us that we must to learn to keep two antithetical thoughts in our minds at the same time." There is indeed a sense in which what I say is vague. namely. that I do not seek to elaborate in propositional form a list affirmative criteria of excellence in translation, any more than I would do for excellence in literature, excellence in t□inking, excellence in law or excellence in life. But I do this not by accident, or out of laziness, but deliberately. It seems to me that our central terms

can receive their definition. and our standards can receive meaningful articulation, not that way, but only through performance. My generalizations are not statements that I undertake to clarify through further exposition, as is the usual case with what I call theoretical discourse; it is against that expectation, in fact, that I write. I mean my general phrases in a different way, as gestures that may orient the reader towards what I regard to be my major effort, namely the work that is done with particular texts and particular problems. Here my hope is to exemplify the qualities that I recommend – a hope no doubt defeated more often than realized in the event.

Thus, for example, what I mean by "language" or "cliche" cannot be reduced t<? a definitional formula, but must be read as established, for good or ill, by the uses to which I put the terms. Likewise, when I speak as I often do of the virtue of "comprising contraries" in one's text or in one's mind. further specification is to be sought not at the level of propositional explanation but in example and performance, both in the texts that I analyze and in my own efforts to write in such a way as to meet these standards. My effort is to draw attention to the way in which our activities with language reconstitute our cultures and at the same time define characters for ourselves and constitute relations with others. These are forms of meaning that are inherently performative, not reducible to a message; to the extent this is not understood, what I say will indeed sound vague.

I do think, as the authors suggest. that "the best form of moral discourse" is one that is "democratic or builds community by including all actors"; I likewise agree that this perspective helps illuminate the degree to which the two sides in the McC/esky case fail to speak to each other's concerns. But I disagree with the author's claim that I believe that "there is only one proper form of legal discourse." Rather, I see the judge as faced with a question how to talk, with many possible answers available in every case. It is exactly that question, how to talk, that it is most important for her to address. It has been my aim to make that point apparent and to suggest some ways in which it might be addressed.

The authors' major claim is this:

> Understanding the forms of discourse used in this or other controversies will rarely resolve disputes over the proper ends to be pursued. Nor will describing the Court's function as to create community between those contending before the Court silence disputes. No judge, however stylistically clever, is likely to be able to craft an opinion which disputants polarized around diametrically opposed moral claims will recognize as respecting their views unless they win. Knowing the sort of problem we face, and the forms of discourse appropriate to such a problem at least will help us to recognize which arguments are truly germane to the debate. Yet, in the end, only a highly political choice of values which cannot be grounded in any purported reading of the text of the Constitution or other relevant texts will decide which side prevails.

I think this paragraph both misunderstands my own position, which I would never reduce to a matter of "stylistic cleverness," and advances a view of moral psychology that is not only descriptively wrong but politically and ethically dangerous. I do not think that most people have to "win" in order to feel that their perspective has been respected; I think most people see the difference between a judge who has a open mind, respects both sides, and makes a decision as well as $he can, and one who vindicates every claim of one side, repudiates every claim of the

other, in an ideological way. One proper object of the Court is to try to act in such a way as to respect the views and people that appear before it, and in doing so to try both to earn their respect and to demonstrate ways in which it might be possible for them to learn to respect each other. Of course at some point a choice must be made, and in most cases it is not rigidly dictated by the relevant texts. That is the fact upon which our entire profession is premised, and who would ever suggest otherwise? Indeed it is because this is true that attention to our modes of thought and expression and interaction with each other is so important. But to call this choice "highly political" is most problematic; as I understand that gesture, it really means either that this judgment cannot be talked about in the language of the law; or, that one is entitled to make one's choices whatever the law may say; or, that one is entitled to disregard what courts say and look instead at how their choices fit on some pre – existing grid of political disposition. This is to use the word "political" as a way of stopping thought and discussion. In another sense of the term entirely I do agree that the Court's decisions are "political"; but by that word I do not mean to call thought and argument to a halt, but to suggest that this is where a most important kind of discussion and analysis – that which I try to describe and exemplify in my own writing about judicial opinions – may begin.

V.

The paper by Professor Holmes is largely descriptive, and I have little to add to what he says. Insofar as he discusses Kant, I cannot really respond, for with the exception of a few very famous passages, I have never been a reader of Kant. Insofar as he discusses Kenneth Burke, I have to confess, with considerable embarrassment, that I have difficulty reading Burke as well, even though in some ways his mind is so obviously congenial. On all matters where we coincide he plainly has all the rights of priority. Still, for whatever reason, I have difficulty working with his prose, even where it most nearly connects to my own. On the other hand, I undoubtedly owe him an enormous debt, because of the degree to which he has influenced others whose work I do find more accessible, and it gives me pleasure to acknowledge that fact.

The point I wish to develop is the idea of freedom, as Professor Holmes uses the term. We are likely to think of freedom as absence of constraint, and to suppose that the less the constraint, the greater the freedom. As he suggests – and as Isiah Berlin so persuasively argued in another context – this is an impoverished conception of human action. It is the existence of institutions, languages, gestures, games, expectations, rules, and all the materials of social life, every one of which has within it implicit constraints, that enables us to think and talk and act in meaningful ways. It is not true that the less constraint means the greater freedom; if one thinks of freedom to achieve, or to become, or to act with meaning, it inherently requires a system of enablements, and enablements always entail constraints. Think, for example, of the simultaneous constraint and enablement offered to a musical performer by a musical text. Thus it is also with a Constitution: it is the creation of the highly defined roles of the constitutional actors, especially Congress, the President, and the Court, that enables a conversation among them, and among us about them, to proceed.

Freedom figures in another way in Professor Holmes's paper, namely the freedom of the interpreter. As he sees it, and quite rightly, it is not the function of legal rules, whether in statutes

or in constitutions, to lead remorselessly to particular conclusions, except at the margins of their meaning; rather, in all the cases that interest us, all that occasion argument and discussion, the interpreter is "free," within quite wide bounds, to give the text part of its meaning. The Constitution establishes the conditions, and many of the terms, in which the argument about its own meaning can go on. In the terms usefully suggested by Professor Holmes, law is in this sense a “heuristic," a way of finding things out – as Aristotle would have it, a way of finding out the means of persuasion available in a particular case. But these means of persuasion are not only the methods, and arguments, by which one person might persuade another; they are the modes of thought that ought to control our own minds when we are undecided what to do. This is one of the senses in which the law is a rhetorical system not only at the point of argument but at the point of deliberation as well.

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