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A CRITICISM OF CRITICISM: IN RE MEANING

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Philosophers and literary critics have long discussed the meaning of words—or, more exactly, whether words themselves have any real meaning. The argument, Mr. Henson suggests, is relevant also to legal criticism. "Words about words may generate and perpetuate arguments, but they do not solve problems involving people and things."

Between the idea
And the reality
. . .
Falls the Shadow.

—ELIOT, *The Hollow Men.*

BOOK reviews are sometimes more provocative than the books reviewed. A highly interesting problem was touched on recently in these pages by a very distinguished lawyer, Mr. James M. Landis, reviewing a book which he felt, for a variety of reasons, was misnamed.[1] Specifically, he thought the word "landmarks" was singularly inappropriate to describe a collection of essays, or at least this collection of legal essays. The "true" landmarks of the law "are generally to be found in the decisions of our courts. . . ."[2] Is this so? How do we determine the "true" usage of words?[3] How do we determine the meaning of words? And what does this have to do with law?

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1. Landis, Book Review, 29 Fordham L. Rev. 201 (1960). The book reviewed was Landmarks of Law (1960), edited by the author of this article.

2. Ibid. Mr. Landis concluded his review by discussing other collections of legal articles published during the past three decades, and he said, "But neither their authors nor editors have suggested that the articles so chosen were landmarks of the law. Rather, their belief seems to have been that these essays were cairns, some moss-covered, some newly built, which could lead judges through the fog of litigation to a decision which might in time deserve iteration and reiteration as a landmark of the law." Id. at 202. This usage of "cairn" would seem to be an imaginative one. The word is defined in Webster's New International Dictionary (2d ed. 1957) as a rounded or conical heap of stones, specifically "one heaped up as a landmark."

3. Wittgenstein states this case: "Given the two ideas 'fat' and 'lean,' would you be rather inclined to say that Wednesday was fat and Tuesday lean, or the other way round? (I incline to choose the former.) Now have 'fat' and 'lean' some different meaning here from their usual one?—They have a different use.—So ought I really to have used different words? Certainly not that.—I want to use these words (with their familiar meanings) here." Wittgenstein, Philosophical Investigations 216e (1953). A comparable situation with the word "philatelic" occurs in Landis, supra note 1, at 201, when he refers to "Mr. Justice Cardozo, who gave to private law a majesty far beyond the philatelic collection of authorities. . . ." If we wanted only the accepted standard usage of words, we might consult Evans, A Dictionary of Contemporary American Usage (1957), or if we wanted the extremely proper usage, we might consult Fowler, Modern English Usage (1937), but neither

I

Words in themselves "mean" nothing. This point is not grasped, of course, by primitive peoples who fancy a connection between a name and a person as something real, so that magic can as easily be performed through the use of a name as through physical contact.[4] Although we are more sophisticated in such matters, we still use such expressions as "In the name of the Law," and we apparently attach a magical significance to oaths.[5]

It has perhaps become trite to quote Humpty Dumpty's observation: "When *I* use a word, it means just what I choose it to mean—neither more nor less."[6] But this is usually quoted as an example of something ridiculous, not as a statement which is true in fact.

There is no completely satisfactory theory of meaning, but there are a number of theories which offer some valuable insights into the problem. In passing, the Platonic theory of ideas is worth noting.[7] The logical part of the theory deals with the meaning of general words, distinguishing between particular objects and their general names. What do we mean by "dog"? Something different from any particular animal, something eternal, existing whether Fido is dead or alive. On the metaphysical side, "dog" means an ideal, heavenly dog. The animals we see are imperfect copies; they are only apparent; the heavenly dog is real.

St. Augustine thought of language as a naming process.[8] This is, quite likely, how children learn language: they hear their parents name an object and come to associate the name and the thing. The words may be general or specific: "man" or "Daddy," for example. This view of language perhaps gave rise to the idea that all words have meanings. But in the sense of naming, all words do not have meanings. Many words do not name any *thing* at all. It is generally assumed that the more intellectual the discourse, the fewer the names that are used. Some years ago Bertrand Russell worked out a theory of "object words" which bears some resemblance to St. Augustine's views, although Russell's ideas are considerably more subtle.[9]

One of the most famous theories of meaning was set forth by C. K.

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of these books is or could be a guide to the imaginative, effective, and affective use of English.

4. Frazer, The Golden Bough 284-92 (1951).

5. Silving, The Oath (pts. 1-2), 68 Yale L.J. 1329, 1527 (1959).

6. Carroll, Complete Works 214 (Modern Library ed. 1936).

7. See Russell, A History of Western Philosophy 119-32 (1945).

8. Augustine, Confessions 11 (Modern Library ed. 1949).

9. See Russell, Words and Meaning, in Selected Papers 347 (1927); Russell, Human Knowledge: Its Scope and Limits 57-158 (1948); and Russell, My Philosophical Development 145-55 (1959).

Ogden and I. A. Richards in *The Meaning of Meaning*, first published in 1923. They used the term "symbol" in a restricted sense for words which referred to things or events or happenings, and so forth.[10] Other words were called "emotive." In their triangle of reference, at one base there was a symbol (say, the word "chair"), at the apex there was the thought or reference (the mental conception), and at the other base there was the referent (the actual chair referred to).[11] The relationship between the symbol and the referent was imputed, not real. The word "law" could not be a symbol in this terminology, except perhaps when used to refer to a particular statute. Words like "right" and "duty" have no referents. As Mr. Justice Holmes pointed out many years ago[12] and as Professor Alf Ross has shown recently,[13] those words are semantically void, they can refer to nothing, and they are merely shorthand expressions which act as bridges between sets of facts and their predicted legal consequences.

Professor Quine seems to feel that the theories of Ogden and Richards are too simple.[14] He does not admit the existence of meanings. He feels that people talk of meanings in two ways: the *having* of meanings ("significance") and the *sameness* of meaning ("synonomy").[15] It is not necessary to use "meaning" at all. But while practically all words have several or even many "definitions" and they can be used in significant sequence so far as a speaker or listener may be concerned, the fact is that in discourse of any consequence absolute identity of understanding between two people is probably impossible. There is a great deal of

10. The word is not necessarily so restricted in its usage by others. See, e.g., Sapir, Language 127-56 (1921). In Morris, Signs, Language, and Behavior (1946), the glossary defines symbol as "a sign that is produced by its interpreter and that acts as a substitute for some other sign with which it is synonymous; all signs not symbols are signals. Symbols may be pre-language, language, and post-language symbols." Sign is defined as "Roughly: something that directs behavior with respect to something that is not at the moment a stimulus. More accurately: If A is a preparatory-stimulus that, in the absence of stimulus-objects initiating response-sequences of a certain behavior-family, causes in some organism a disposition to respond by response-sequences of this behavior-family, then A is a sign. Anything that meets these conditions is a sign; it is left undecided whether there are signs that do not meet these conditions."

11. Ogden & Richards, The Meaning of Meaning 11 (6th ed. 1948).

12. See Holmes, The Path of the Law, in Collected Legal Papers 167, 174-75 (1920). As Mr. Justice Holmes told us in 1899, long before Ogden and Richards, "We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true." Holmes, Law in Science and Science in Law, in Collected Legal Papers 210, 238 (1920).

13. Ross, Tû-Tû, 70 Harv. L. Rev. 812 (1957).

14. Such seems to be a reasonable interpretation of Quine, From a Logical Point of View 48 (1953).

15. Id. at 47-64.

difference in result between saying, "Bring me that book," while pointing to a specific object, and saying, "Tell me what 'due process' means."[16]

Wittgenstein pointed out that "philosophy is a battle against the bewitchment of our intelligence by means of language."[17] (He was undoubtedly referring to his own particular philosophy.) He seemed to feel that an explanation of language in terms of naming objects was primitive, that the explanation of language lay in usage. We play language-games. "When I think in language, there aren't 'meanings' going through my mind in addition to the verbal expressions: the language is itself the vehicle of thought."[18]

In general, "meaning," if there is any, is probably determined largely by context. "Bookmaking" when used in connection with horse races is quite different from "bookmaking" at Harper and Brothers. But words in a sentence may be combined in good grammatical order and the most significant words may have referents, and still the sentence may make no "sense." It is pointless to argue over questions—or collections of words followed by question marks—like, "Which school is better, Oxford or Cambridge?" "Does the decision in the School Segregation Cases agree with Natural Law?" "Was Taney a greater Chief Justice than Hughes?" These questions are non-sense.[19] They are unanswerable. They are, however, not much more absurd than the *quodlibets* currently circulated by some of the Supreme Court's critics.[20]

16. If we would admit that "due process" could "mean" anything at all, we would surely recognize, for example, that what was due process in 1901 is not due process in 1961. The term cannot be defined satisfactorily in the abstract; it can only be meaningfully used with reference to adjudicated cases where, on the given facts, the standard of due process was said to be met or not to be met. On the general problem of abstractions see Hayakawa, Language in Thought and Action (1949); Korzybski, Science and Sanity 371-85 passim (4th ed. 1958); Weinberg, Levels of Knowing and Existence 48-76 passim (1959). With particular reference to legal problems, see Cairns, Language of Jurisprudence, in Language: An Enquiry Into its Meaning and Function 232 (Anshen ed. 1957); Ross, On Law and Justice 111-23 passim (1959); Voegelin, Yegerlehner & Robinette, Shawnee Laws: Perceptual Statements for the Language and for the Content, in Language in Culture 32 (Hoijer ed. 1954); Probert, Law, Logic, and Communication, 9 W. Res. L. Rev. 129 (1958).

17. Wittgenstein, Philosophical Investigations 47e (1953).

18. Id. at 107e.

19. On the problem generally, see Johnson, People in Quandaries 289-91 passim (1946); Weinberg, Levels of Knowing and Existence 212-54 (1959).

20. "The antagonism between mumpsimus and sumpsimus is the linguistic counterpart of the deep division to be found in all areas of life and in all disciplines. It appears in ethics as hedonism versus asceticism, in politics as the freedom of the individual versus the authority of the State, in jurisprudence as natural law versus positive law, in literature as the validity of the soul's inner experience versus the chastening influences of social discipline. The ultimate question in this eternal struggle is who is to be the master, who is to sit in the saddle and who is to crack the whip—man or law, deed or logos, life or language, experience or expression, the rebellious priest or society?" Jacobs, Naming-Day in Eden 140 (1958).

When we discuss problems in language which cannot refer to any *thing*, inherent ambiguity should be recognized. A great many legal problems are insoluble on a theoretical level. True, we must have theory, but it must have a basis in practice if it is to be worthy of serious consideration. Words about words may generate and perpetuate arguments, but they do not solve problems involving people and things. There are no absolutes in law, nor in any other intellectual discipline where the mode of language expression has a structure that corresponds with actuality.

Controversy over fixed meanings or the "original" meanings of vague constitutional provisions is a rather sterile pastime. In connection with a due process question, Mr. Justice Frankfurter has pointed out that

> Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.
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> . . . .
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> To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . . Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.[21]

Critics can argue over the actual exercise of judicial power in particular cases, but to be meaningful the criticism must be specific and not couched in emotive generalities.

As is well-recognized, probably unconsciously by many lawyers, we can often condition another's response to our arguments by the use of carefully chosen words.[22] But a primarily emotional response is nonetheless a response, and emotion and intellect are no more separable than heredity and environment.

II

When Professor Hart wrote his widely publicized article, "The Time Chart of the Justices,"[23] he undermined his possibly valid criticisms of the

21. Rochin v. California, 342 U.S. 165, 169-72 (1952).

22. See, Stevenson, Ethics and Language 139-51 (Yale Paperbound ed. 1960); Probert, Law and Persuasion: The Language-Behavior of Lawyers, 108 U. Pa. L. Rev. 35 (1959).

23. 73 Harv. L. Rev. 84 (1959).

Court by semantically empty, irritatingly pontifical expressions culminating in this way: "But the time must come when it is understood again, inside the profession as well as outside, that reason is the life of the law and not just votes for your side. When that time comes, and the country gathers its resources for the realization of this life principle, the principle will be more completely realized than it now seems to be."[24] What on earth does this *mean?* Or to take another example: "Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do."[25] It is fairly clear, in the context of the article, that "reason" is something the writer agrees with, and that is all it "means." And there has never been a judicial decision in the history of the world that was grounded on "mere fiat" or precedent alone; thinking processes do not work that way. We are products of the totality of our experiences, and our reactions to current problems must be conditioned, negatively or positively, in one degree or another, by what we have cumulatively experienced. To think otherwise is to imagine an ideal which does not conform to reality.

Of course, Judge Arnold demolished Professor Hart's article rather completely.[26] The author of *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937) can see through empty words.[27] Dean Griswold has now compared the articles of Hart and Arnold,[28] and apparently he feels that Hart came out ahead. Professor Hart referred to "the maturing of collective thought,"[29] and Judge Arnold said, "There is no such process as this, and there never has been. . . ."[30] Dean Griswold thinks Judge Arnold failed on this point.[31] The Judge won. There is no such *thing* as "the maturing of collective thought." It is difficult to imagine how the Dean could find it a "profound reality,"[32] and his only examples are instances where he was persuaded to change his mind after talking with others. Change is not necessarily maturation. In any event, the concept, if such it be, is too vague to spend much discussion on. It is perhaps accurate to say that every noun is an abstrac-

24. Id. at 125.

25. Id. at 99.

26. Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298 (1960).

27. Another brilliant lawyer who never lets words obscure what is really happening is A. A. Berle, Jr. See, e.g., Berle, Power Without Property (1959).

28. Griswold, Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81 (1960).

29. Hart, The Time Chart of the Justices, 74 Harv. L. Rev. 84, 100 (1959).

30. Arnold, supra note 26, at 1312.

31. Griswold, supra note 28, at 85.

32. Ibid.

tion in one degree or another, but some abstractions are too "abstract" for profitable thought.

Too much of the recent criticism of the Supreme Court is of this semantically empty variety. It is of no value to anyone. It is all too true that Thomas Reed Powell's critic's chair has not been filled.[33]

What does it "mean" to say that the Supreme Court's decisions are "sometimes more 'result oriented' than is ideal"?[34] What is "ideal"? How could a judge possibly decide a case without considering the result of his decision?[35] Judges are not passionless automatons, and an application of law to facts (or "evidence" as Justice Loevinger properly calls it[36]) is never an automatic process.[37] "Law" can be viewed from many angles, but it is a part of life and it cannot exist independently. It would seem to me pointless to look at legal principles as Platonic universals or anything of the sort. They are simply mental conceptions which cannot —satisfactorily—be analyzed too closely. In a practical address Mr. Justice Holmes once said, "When we study law we are not studying a mystery . . . ,"[38] but on a philosophical level law is a mystery. That is why eminent scholars, brilliant lawyers, and able judges can get lost in a "bog of logomachy," in the phrase of Mr. Justice Frankfurter.[39] Communication fails because the words so often refer to nothing, and we cannot reach agreement on "meaning."

We talk about "neutral principles of constitutional law,"[40] but principles cannot be neutral.

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33. An observation by Dean Griswold. Griswold, supra note 28, at 81-82.

34. Id. at 91. Professor Powell said, "If a precedent involving a black horse is applied to a case involving a white horse, we are not excited. If it were an elephant or an animal ferae naturae or a chose in action, then we would venture into thought. The difference might make a difference. We really are concerned about precedents chiefly when their facts differ somewhat from the facts in the case at bar. Then there is a gulf or hiatus that has to be bridged by a concern for principle and a concern for practical results and practical wisdom." Powell, Vagaries and Varieties in Constitutional Interpretation 36 (1956).

35. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (involving the redefining of the boundaries of Tuskegee, Alabama, to exclude Negro voters). See also Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057 (1958).

36. Loevinger, Facts, Evidence and Legal Proof, 9 W. Res. L. Rev. 154 (1958).

37. As Judge Learned Hand has pointed out, "All rules of law necessarily terminate in facts which contain no shred of law." Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in Association of the Bar of the City of New York, Lectures on Legal Topics 1921-1922, 89 at 91 (1926). See generally Frank, Courts on Trial (1950).

38. Holmes, The Path of the Law, in Collected Legal Papers 167 (1920).

39. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953).

40. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). But see Pollack, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

Adherence to neutral principles, in the sense of principles which do not refer to value choices, is impossible in the constitutional adjudicative process. . . . [N]eutrality of *principle,* as distinguished from neutrality of attitude, is an obviously fallacious way of characterizing the situation. Principles, whatever they might be, are abstractions, and it is the worst sort of anthropomorphism to attribute human characteristics to them. Neutrality, if it means anything, can only refer to the thought processes of identifiable human beings. Principles cannot be neutral or biased or prejudiced or impersonal—obviously.[41]

Wittgenstein puts this problem:

Compare *knowing* and *saying*:
how many feet high Mont Blanc is—
how the word "game" is used—
how a clarinet sounds.

If you are surprised that one can know something and not be able to say it, you are perhaps thinking of a case like the first. Certainly not of one like the third.[42]

Many of our criticisms of the Supreme Court are as difficult to put into meaningful words as a description of how a clarinet sounds. Perhaps that is because certain decisions do not appeal to our innate feelings, rather than because they offend our reasoned, "neutral principles."

It is time that someone, no matter how insignificant, voted to affirm the Court's decisions. I take my stand on the side of the Court. Over the course of a term, the Court's decisions make more "sense" to me than most of the criticisms. I would rather have our nine Justices with their varied, human, impassioned approaches to problem-solving than any nine critics of the Court that anyone could name.

41. Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 664 (1960). This article is replete with citations from eminent scholars in many fields (such as Bridgman, Polanyi, Myrdal, Berlin, Niebuhr) to the effect that neutrality or objectivity is not attainable in the social sciences or in the natural sciences. Bridgman is quoted as saying: "I will not attach as much importance as do apparently a good many professional lawyers to getting all law formulated into a verbally consistent edifice. No one who has been through the experience of modern physics . . . can believe that there can be such an edifice. . . ." Id. at 666 n.20.

42. Wittgenstein, Philosophical Investigations 36e (1953).