

INTRODUCTION

"To imagine a language means to imagine a form of life," said Wittgenstein, and that famous sentence may be taken as the text to which all that follows is addressed.

It means that our acts of language are actions in the world, not just in our minds. Even when we think we are simply communicating information, or being rigorously and exclusively intellectual, or just talking, we are in fact engaged in performances, in relation to others, that are ethical and political in character and that can be judged as such. This is true in the private world, as we talk with our friends in ways that promote or defeat our friendships, but it is true in the public world as well, as we know when we hear political campaign speeches that dignify, or demean, the process of election. It is especially true in the law, which is above all the creation of a world of meaning: a world with its own actors, its own forms and occasions of speech, and its own language. Whenever we talk we create a character for ourselves and a relation with others: we offer to constitute a community of a certain kind, for good or ill, and this is often the most important part of what we do.

How are our languages, our acts of language, and the characters and communities we create in our expressions to be understood and judged, in the law and elsewhere? That is the question to which this book is addressed.

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To look at language in such a way is to work against the grain of our experience, for one of the deepest habits of our culture is to talk about language not as a field of action but as if it were transparent or neutral, merely a way of pointing to something outside of itself. In this mode we speak of language as a vehicle or container, as a technology, or as a code for the transmission of messages. What really counts, we seem to think, is external to language: in the mind as an idea or a feeling, or out there in the real world. In either case

the function of language is to point to something, or label it, or, in the modern jargon, to signify it. As for us, we talk as if we lived for the most part outside of language and used it, as we might a telephone, to achieve our purposes, which are also outside language and do not have language as their object.

The habit of mind I am describing assumes that our most important uses of language are fundamentally propositional in character, indeed that any meaningful piece of discourse asserts (or denies) that such and such is the case; it is a statement that depends for its acceptance on chains of reasoning, deductive or inductive in character, that are external to itself and its context. It follows that any text can be recast into the propositions it affirms, indeed that rationality itself often requires such recasting. These propositions are not language-bound but are in principle translatable into any language whatever; this is in fact necessary if we are to claim, as so many want to do, that our knowledge is universal.

This is the image that is at work in most of our customary talk about thought and language; it is certainly the understanding out of which the great majority of academic books and articles are written. Perhaps it has its first modern manifestation in Hobbes, who told us that words are but names, that discourse is the joining together of names, and that all reason consists of adding and subtracting.¹ We see it at work in the way courts talk about the first amendment as protecting the expression of "ideas," in courses that define excellence in writing as "clarity," in works of analytic philosophy that assume that all meaning is conceptual and propositional, in the way scientific linguistics imagines language as a code for the transfer of information, and so on. This image is built at a deep level into all social science of the positivist kind—one thinks especially of economics, and of quantitative political science, psychology, and sociology—for the very operations of these disciplines require both reader and writer to pretend that language is transparent or neutral, able to describe without distortion what is out there in the world or in here in the reasoning mind. The fact that these commitments may be unconscious does not lessen, in fact it may intensify, their force.

What we call "logic" actually depends upon the view that language is a set of names: our idea of rational coherence requires that, for any state of affairs described as "X," it either be the case or not be the case that "X" exists; for this to work, "X" must have the same meaning across the discourse, and a meaning determined by something external to the discourse itself. "You can define 'raining' any way you want, but it must be the case, at any point in space and time,

either that it is 'raining' or that it is not. The rule of noncontradiction requires no less." This kind of reason works algorithmically, by a series of binary choices.

When we talk this way—and no one among us can entirely avoid doing so—we talk as if it does not much matter what particular language we use, or what form of language, because whatever we want to say can be said, more or less efficiently, in any language at all. Once our auditors perceive the objects we are naming in the real or conceptual world, language has done its job and can—and should—disappear.

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But we have another way of thinking about language, drawn from our experience of ordinary life and from our reading of literature. Here we find uses of language, and a sense of language, that deny virtually everything that has been said in the preceding paragraphs. For language can be seen not as transparent or neutral but as a real force of its own.² Language does much to shape both who we are—our very selves—and the ways in which we observe and construe the world. There is no nonlinguistic observer, no nonlinguistic observed. "The man is only half himself," said Emerson (in *The Poet*); "the other half is his expression."

This is a way of imagining language not as a set of propositions, but as a repertoire of forms of action and of life. Every utterance has meanings beyond the purely intellectual—meanings that are, just to begin the list of possibilities, political, ethical, cultural, aesthetic, social, and psychological in character—for, whether we know it or not, our every utterance is a way of being and acting in the world. Our purposes, like our observations, have no prelingual reality, but are constituted in language—in this sense they too are lingual in nature. Nothing human is free of language. As for logic and rationality, this sense of language denies that our words must mean the same thing every time they are used, indeed it denies that they can, for our words get much of their meaning from the gesture of which they are a part, which in turn gets its meaning largely from the context against which it is a performance.

Think of it this way: how little of what happens in any real utterance is reducible to the words uttered, let alone to the "propositions" they are supposed to express, and how much lies in the gesture, in the relations between speaker and auditor, in their material context, in the understandings they share—understandings about the natural world, about human motives and capacities and dangers,

about what needs to be said and what does not. The meaning of a sentence lies not only in what we tend to think of as the sentence itself, in the words, but in the context, verbal and nonverbal, out of which it is constructed. Instead of thinking of language as a code into which nonlinguistic material is translated, or of language use as the manipulation of that medium for the expression of ideas, we can imagine languaging as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context.

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The two views of language I have sketched out above do not exist in pure form, I suppose, for anyone in the world, but are at work in each of us all the time, in shifting and imperfect relation. It is no doubt sometimes right and helpful, indeed sometimes necessary, to act as if our language were transparent, merely a system of names, and so forth. We do it all the time, including, at moments, in the writing and reading of this book. It may even be useful to pretend for a moment that this is the right or only view of language, for to do this may permit a kind of analysis, of text-building, that has a value. But such a view is inherently reductive—it requires the repression of what, in another state of mind, we know—and like all reductive systems it will ultimately be pathological unless we can find a way to respond to what it leaves out. One could not found a life upon it.

What is required is to learn to shift the focus of our attention so that we come to see language as a reality of its own and its forms as forms of life, with all that entails. Not that we would, or could, ever come to see only language and nothing else; but we can hope that while we remain conscious of what we discern and desire in the world, and what we fear, we may become conscious as well of the languages through which we see these things, by which we act, in which we are ourselves embedded. To teach us how to do this has been one of the great tasks of imaginative literature from its beginnings. To do this completely is I think impossible, at least at the present stage of our intellectual development; but to try to do it is to move in the direction of completeness and inclusion, or what in the first chapter I shall call “integration.” The writing of this book is itself meant to enact at least the beginnings of such a movement.

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As this book is written out of a view of language so it is written out of a view of law, and they are related. At least until recently the image of law most widely accepted among legal academics, and es-

pecially students of jurisprudence, was that of a set of rules issuing from a political sovereign, and rules for the most part conceived of as plainly established and plainly accessible. Such are the rules passed by the legislature or articulated in judicial opinions; they (perhaps coupled with the more general rules called "principles" that inform the lesser ones) are the law itself. Even among those who would now no longer assert such a view as a theoretical matter, the law is often thought of as a means of social control—as a set of incentives, enablements, or punishments that will affect human behavior in such a way as to produce a state of affairs the lawmaker is thought to desire—and this can work, in the way imagined, only if the law is seen as a set of rules or directives, adequately plain. The view of "law as rules" is in fact an inescapable part of our own discourse as lawyers, for in talking about the choice of one rule over another we necessarily talk as if this choice really mattered, and we usually do so on the assumption that it will work as a means of social control.

But another strain in our thinking regards this view as simplistic and naive—as "formalist"—and instead looks through the tissue of laws and opinions and arguments, through the whole world of legal language, to what "really happens" in the world; here, in what officials actually do, or in the exercise of power by one group in society over others, is where the law is. The function of legal discourse, which purports to be neutral, to seek only the public good, to be concerned with justice, and so on, is actually to mask or obscure these realities, clouding them with high-minded talk; perhaps it does this accidentally or unconsciously, perhaps more malevolently, with the aim of inducing those most injured by the political process to acquiesce in it.

For me it is more valuable to think of law in a third way, as a culture—as a "culture of argument"—or, what is much the same thing, as a language, as a set of ways of making sense of things and acting in the world. So regarded, it is far more complex than the "law as rules" (or "law as rules plus principles") theory can begin to allow and far more substantial in its effects, actual and potential, than the "law as facade" theory would have it. The law is a set of ways of thinking and talking, which means, as Wittgenstein would tell us, a set of ways of acting in the world (and with each other) that has its own configurations and qualities, its own consequences. Its life is a life of art. This is, after all, how we learn law, not as a set of rules nor as the art of unmasking, as Swift might put it, but by participation in a culture, learning its language and how to live within it; and this is how we practice law too.

This culture is characterized, among other things, by its atten-

tion to the authoritative text—the rule, the case, the contract—which exists outside of and prior to the present dispute and is called upon by one side or the other, and sometimes both, to resolve it. The parties will argue about which texts count, about the nature of the facts upon which they bear, and about the meanings of both texts and facts. The law indeed works by argument, and does so under circumstances where agreement cannot be compelled by resort to logic or to data. It is thus a branch of rhetoric, conceived of both as the art of persuasion—necessary when intellectual or other compulsion is impossible—and as the art of deliberation, that is, as the art of thinking well about what ought to be done when reasonable people disagree. It can also be seen as a branch of rhetoric in a third sense, which can be called constitutive, for through its forms of language and of life the law constitutes a world of meaning and action: it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community, defined by its practices of language. At every stage the law is in this sense an ethical and political activity and should be understood and judged as such.

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As its subtitle suggests, this book is meant as an essay in both cultural and legal criticism. Its aim is to work out a way of examining texts and languages (including legal ones) as forms of life, not merely as systems or instances of communication: to see discourses, that is, as ethical and political systems, as cultures in fact, and to see individual acts of expression as having meaning of these kinds as well. In doing this I build on the method of rhetorical and cultural criticism worked out in *When Words Lose Their Meaning*, to which this book can be taken as a sequel. Like that book, this one engages in the kind of philosophy that focuses on the meaning of our texts, languages, and practices; and it ultimately finds that meaning—as it finds justice and injustice—in the relations we establish with our languages and with each other, in our characters and our communities.

Part One—“Looking at our Languages”—is general in its scope. The aim of the opening chapter is to establish a theme for the whole by suggesting that what is called for in our life with language, and with each other, is an art of composition for which my name is “intellectual integration”: the heart of it lies in making texts (and communities) in which place is given not merely to one, but to a variety of languages and voices. In the next chapter I pursue this theme by turning to the way of imagining language first referred to above, as a

code or system of names, which I think obscures the variousness of our ways of being and acting in the world. I focus especially on our customary and easy talk about “concepts,” which function as a set of names for intellectual entities that are assumed to exist apart from language. The idea is to work out a way of criticizing not only those familiar locutions but also the whole sense of language they imply, a sense of language that lies at the heart of most contemporary political and moral philosophy, and most academic talk more generally, and to contrast to it another sense of language, roughly sketched above, that is literary in character.

The following chapter turns to the discourse of economics, especially the form of neoclassical microeconomics associated with the “Chicago School” that has recently been so influential both in the law-and-economics movement and in the larger political arena. Here I focus upon the political and ethical implications of this discourse, the way it works as a culture, as well as upon the arts of language by which it might be more adequately controlled. But once again I wish this to serve as an example of something more general, namely certain mechanistic tendencies of thought that run very deep in our culture, forming many of our habitual ways of talking about the public world and the choices made within it. Against economics I pose the law, which—though it is now in danger of being swallowed up by economics—when properly understood seems to me to work on quite different principles to promise a different and far more admirable public culture.

Part Two, “Judicial Criticism,” consists of a series of chapters on legal texts, specifically a set of Supreme Court opinions. The obvious reason for choosing judicial opinions is that they are central texts in our law. In them legal power is exercised before our eyes, through a decision that the writer seeks to explain and justify. The terms in which she does this become the terms in which other cases are thought about and argued out, not only in formal proceedings but in negotiations, planning sessions, and the like. They are the stuff of legal education, and from such opinions the culture of the law receives much, though not all, of its shape. My hope is to work out a way of talking about what we should admire and condemn in judicial opinions, which is also a way of asking more generally how we should criticize—how understand and judge—what judges do.

One way to criticize judicial opinions, natural for us, is to ask what we think of the result reached, that is, to approve or disapprove the outcome as we understand it in light of the relevant cases, statutes, constitutional provisions, and general understandings that gov-

ern it. "I would have decided it the same way (or differently)," one is saying. But we discover that we often find much to admire in an opinion with the result of which we disagree, and much to condemn in an opinion that "comes out" the way we would. To think of it in terms of the character of the judge, we can imagine ourselves having respect, admiration, and affection for a judge with whose votes we regularly differ, and contempt for one with whom we find ourselves often concurring.

What, then, are the excellences that we find ourselves admiring in judicial opinions with whose result we disagree, and perhaps strongly so? What do we condemn in an opinion that comes to the disposition of the case that we think proper but which we nonetheless regard as bad work? Our language for talking about these matters is extremely reduced and conclusory—bad opinions omit "relevant considerations," or "weigh them wrongly"; good opinions "marshal arguments impressively," and so forth. My hope is to work out a way of talking that is more responsive to what is actually at stake in our judgments of judicial excellence and the reverse. This is a question of some urgency, for it has become common for lawyers to feel that over the past twenty years there has been a serious deterioration in the quality of the work of the courts, especially the Supreme Court, yet common also to feel that our ways of defining both that deterioration and the excellence by which it can be seen as such are inadequate.

The cases I discuss are chosen from quite a wide historical range, but they all deal with one of two questions: the meaning of the language of the fourth amendment (which prohibits the government from engaging in "unreasonable searches and seizures") and the treatment of racial minorities. Both bodies of law deal with the disempowered and my hope is that this commonality of interest and concern will make more fruitful the comparison of one opinion with another.

I read these opinions as cultural and rhetorical texts, that is, with an eye to the kind of political and ethical community they build with their readers and to the contribution they make to the discourse of the law. My idea is not to make an exhaustive study of the judicial opinion in all of its manifestations, nor to analyze the whole field of law built upon the fourth amendment, but to read a series of opinions in such a way as to reflect, at least in outline and by performance, a way of thinking about judicial opinions more generally that can lead us to a fuller and more adequate criticism of this form of language and of life.

In all of this I find myself turning again and again to translation

as a way of thinking about what we do with language in the law and elsewhere. Part Three, "The Activity of Translation," develops that thought at length. There is a sense, I believe, in which translation is the central practice of linguistic and social life; reflection upon its nature—its impossibilities and the arts they call for, the attitudes it engenders and requires—can lead to a useful way of thinking and talking about excellence in law, and excellence beyond it as well.

While there are some situations where translation seems as a practical matter to work well enough, there are others where it is in any full sense plainly impossible: think of translating a poem, for example, or a political speech, or an expression of love, from one language to another. In such cases the very activity of translation brings us again and again to face that which is particular or unique to the language and its context, to the speaker himself, and therefore cannot be translated, cannot be "set over," into another. Even to attempt to translate is to experience necessary but instructive failure. In this sense translation forces us to respect the other—the other language, the other person, the other text—yet it nonetheless requires us to assert ourselves, and our own languages, in relation to it. It requires us to create a frame that includes both self and other, both familiar and strange; in this I believe it can serve as a model for all ethical and political thought.

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The quotation from Wittgenstein with which this book begins is to be found in *Philosophical Investigations*, paragraph 19.

Earlier versions of several of the chapters have been published separately, in a somewhat different form, in the following journals, which have granted permission to reprint here. Chapter 1 appeared in 82 *Northwestern Law Review* 1 (1987); chapter 2 in 96 *Yale Law Journal*

1960 (1987) (Reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company); chapter 3 in 54 *Tennessee Law Review* 161 (1987) (reprinted by permission of the Tennessee Law Review Association, Inc.); parts of chapters 4 and 5 in 20 *Georgia Law Review* 837 (1986); chapter 6 in 47 *Maryland Law Review* 239 (1987); chapter 8 in 1974 *The Supreme Court Review* 164 (© 1975 by The University of Chicago); and chapter 9 in 81 *Michigan Law Review* 1273 (1983). I am grateful for the permission to reprint. In addition scattered passages have appeared in the following pieces: "A Response to 'The Rhetoric of Powell's *Bakke*,'" 38 *Washington and the Law Review* 73 (1981); "Is Cultural Criticism Possible?" 84 *Michigan Law Review* 1373 (1986); and "What Can a Lawyer Learn from Literature?" 102 *Harvard Law Review* 2014 (1989). This is not, however, intended to be a collection of essays but a book with a shape of its own.

While I hope what I say will be of interest to specialists in law, linguistics, and philosophy, I have tried in this book to speak mainly to the general reader, and for that reason have kept the apparatus of scholarship to a minimum. For similar reasons I have, without particular indication, omitted footnotes in quotations taken from judicial opinions.