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THE RELATION OF WORDS TO POWER

HON. JOHN T. NOONAN, JR.*

My theme is “The Relation Of Words To Power,” and I take my text from something that is inscribed on the wall of Langdell Library at Harvard. “To know the laws is not to know their words, but their power and force.”¹ It is inscribed in Latin at Langdell, and power and force are “*vim et potestatem*.” I think *vim* itself comes through showing the power of words; it is a stronger word than our English “power.” The power and force of words is my theme. Let me start with the power of metaphor.

I have always been puzzled by a famous line of Learned Hand’s putting down metaphor as invariably deceptive.² Metaphor is unavoidable. The law is honeycombed with metaphor and we could not live without it.³ This can be illustrated by examining two dead metaphors, line drawing and balancing, which perhaps do their work just because they are dead.

Judges are always talking about where to draw the line and about balancing values.⁴ I do not know how judges could func-

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¹ The quotation is from Celcus, a Consul in ancient Rome, and was originally printed in the 26th Digest of the Justinian. 1 THE DIGEST OF JUSTINIAN 20 (Charles Henry Monroe trans., 1904).

² See *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (“Much of the metaphor in the books merely impedes discourse, as Judge Cardozo well observes ... here, as elsewhere, it is ordinarily a symptom of confused thinking.”).

³ For example, evidence that is “fruit of the poisonous tree” is excluded at criminal trials; the First Amendment creates a “wall of separation” between church and state. See Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1054-56, 1064 (1989).

⁴ See, e.g., *O’Neal v. McAninch*, 115 S. Ct. 992, 1002 (1995) (Thomas, J., dissenting) (stating that courts “balanc[e] the costs and benefits associated with disturbing judgments when a court is in grave doubt about harm But [it] draws the line at grave doubt ...”); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 548 (1989) (“[T]he constitutional rights of individuals [are balanced] against the competing interests of government.”); *Pickering v. Board of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 568 (1968) (stating that state’s interest in regulating speech of its employees is balanced against right of citizen to comment upon matters of public concern).

tion if they could not use these two metaphors. Now, it may be that the deadness of the metaphors does have a somewhat deceptive effect. We do not go back to the roots and think of the linear world that is evoked by drawing lines. We somehow think of a flat plane and lose the sense of space.

Balancing is one of those terms that has an inherent ambiguity that is not very often examined. What kind of balance is intended? The image evoked is that of scales, the visual symbol of judgment. We think of putting weights on the scale. That is a quite static image of balancing and an unrealistic one when one thinks of the multiple values that are normally involved in judgment.

I would prefer a more dynamic image of balancing—the balance achieved biologically within a healthy human being. It is not simply a physical balance; it is a psychic, spiritual, and physical interaction of many processes that produce a functioning human being. That, I suppose, is what we really should have in mind when we talk about balancing values in a judicial opinion.

It may be that the dead metaphors, accompanied by a reluctance to examine what they mean, make the metaphors less helpful than they should be. We should focus less on the words and more on what they are intended to bring to mind. Line drawing and balancing values are examples where words have a power that gets its force from their customary repetition.

I move from these metaphors to the fictional use of words, a subject explored in great detail by Lon Fuller,⁵ but always worth reexamining. The fictional use of words can be seen in the *Mezei* case.⁶ Mezei was a Hungarian who had been a resident alien in Buffalo, New York for some twenty years. He went back to Hungary to visit his dying mother. On his return, he was detained on Ellis Island on the basis of an undisclosed informant's statement that he was a subversive.⁷

The Immigration Service refused to release him from Ellis Island and refused to disclose the source of the information used against him.⁸ He brought an action for a writ of habeas corpus in

⁵ See, e.g., Lon Fuller, *Legal Fictions*, 25 ILL. L. REV. 877 (1931).

⁶ *United States ex rel. Mezei v. Shaughnessy*, 101 F. Supp. 66 (S.D.N.Y. 1951), modified, 195 F.2d 964 (2d Cir. 1952), rev'd, 345 U.S. 206 (1953).

⁷ *Mezei*, 345 U.S. at 208.

⁸ *Id.* at 208-09.

the Southern District of New York which the district court granted.⁹ The Second Circuit affirmed,¹⁰ with Judge Learned Hand dissenting. Hand adopted the fiction put forth by the Immigration Service that Mezei had not entered the United States.¹¹

The case went to the Supreme Court of the United States which, in a five to four decision, adopted Hand's view of the case.¹² Justice Robert Jackson, dissenting, made the realistic observation that, on the Immigration Service's theory of the case, the Government could put Mezei in a boat and send him out to sea. Mezei was not here, and he might as well be on a boat, a row boat, going somewhere, anywhere. But since he was not in the United States, he had no rights, in the Government's theory, that the Government was bound to respect.¹³ Jackson's point was the *reductio ad absurdum* of a legal fiction. It penetrated the fiction.

We have had a similar case in the Ninth Circuit,¹⁴ with one of the Mariel Cubans, Alexis Barrera-Echaverria, who has been held in a "variety of prisons since 1985."¹⁵ The Ninth Circuit, however, adopted the fiction that Barrera has not entered the country.¹⁶ The Government's position is that they can detain him indefinitely because he is not here.¹⁷ Now, that is remarkable; the power of a verbal fiction to overcome the reality of physical facts.

Another closely related concept is the necessity of putting words in a larger context. We all recognize that words can be taken out of context. The accusation is made in various arguments that words have been removed from their larger context in

⁹ *Mezei*, 101 F. Supp. at 71. The decision to release Mezei was conditioned on the government's failure to come forward with evidence of Mezei's danger to the country. *Id.* at 70. The order was finalized after the government failed to produce such evidence. *Mezei*, 195 F.2d at 966.

¹⁰ *Mezei*, 195 F.2d at 970.

¹¹ *Id.* Judge Hand stated that Mezei's presence on Ellis Island did not change his legal rights because he had not technically "entered" the United States. *Id.* "[T]he order before us is one of 'exclusion' and not of 'deportation.'" *Id.*

¹² *Mezei*, 345 U.S. at 215.

¹³ *Id.* at 226-27 (Jackson, J., dissenting).

¹⁴ *Barrera-Echavarría v. Rison*, 44 F.3d 1441 (9th Cir. 1995).

¹⁵ *Id.* at 1444.

¹⁶ *Id.* at 1450 ("Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.")

¹⁷ *Id.* at 1445.

which they were used by a judge or a legislature. Words never have power except in contexts that are often, or at least sometimes, neglected.

Two examples from opposite ends of the social spectrum illustrate this point. One is from *United States v. Ballard*,¹⁸ the Government prosecution of the leaders of a religious movement because of their religious beliefs; a prosecution conducted by the New Deal administration in the 1940s, and sustained by the Supreme Court.

The words that the Government focused on in the trial as constituting mail fraud came from the scripture of the "I Am" religious movement contained in a book entitled *Unveiled Mysteries*¹⁹ by Guy Ballard. Ballard began the book by telling of his adventures on Mount Shasta, California, where he met a young man who tended him a cup of water and told him, "The cup is the cup of life," and added that he should drink deeply of it.²⁰ Ballard returned the next day and met a panther, and he overcame the panther with love. He was then transported back in time until he, Guy Ballard, was a vestal virgin at the temple in Luxor.²¹ Ballard stated in his book that these experiences "were as real and true as any human experience on earth."²²

After Ballard died, the Government prosecuted his wife, Edna, for circulating his statements. The Court stated that if Guy and Edna did not believe the ideas that he wrote, then to repeat them constituted a fraud on those to whom the ideas were repeated, and if the post office was involved, it was mail fraud.²³ Despite the First Amendment, the Supreme Court held that Edna could be criminally prosecuted on the ground of insincerity,²⁴ although there was nothing in the mail fraud statute that made insincere statements a crime.²⁵

In his dissent, Chief Justice Stone took the position that if Edna said that she shook hands with Jesus in San Francisco, the

¹⁸ 138 F.2d 540 (9th Cir. 1943), *rev'd*, 322 U.S. 78 (1944).

¹⁹ GODFREY RAY KING, *UNVEILED MYSTERIES* (1934). Ballard wrote this book under the pen-name Godfrey Ray King.

²⁰ KING, *supra* note 19, at xvii.

²¹ *Id.*

²² *Id.*

²³ *Ballard*, 322 U.S. at 82.

²⁴ *Id.* at 88.

²⁵ See 18 U.S.C. § 338; 18 U.S.C. § 88 (current version at 19 U.S.C. §§ 1341-43) (1988).

handshake was a fact that could be proved or disproved, and whether it happened could be put before a jury.²⁶ Justice Jackson, in his dissent, insisted that words uttered in a religious context should be understood in that context and not in some other context.²⁷ He wrote:

Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.²⁸

Jackson's words are a strong reminder of the difference between metaphorical context and a literal context. Confusion as to this distinction occurs quite often.

At the other end of the spectrum is a recent case heard by the Ninth Circuit, *United States v. Marsh*,²⁹ in which Marsh was prosecuted for extortion.³⁰ Over twenty years ago Marsh had been paid to act as a male prostitute by a much older man identified as "Doe" in the proceedings. Marsh and Doe developed a friendship and saw each other three to four times a year.³¹ Marsh often asked Doe for money and eventually became financially dependent on him.³² After sending Marsh money for several years, Doe ran out of money and began to borrow money from his family.³³ When Doe's family learned of the payments to Marsh they contacted the FBI.³⁴ After Doe had stopped sending Marsh money, Marsh left messages on Doe's answering machine, saying things such as, "I'll break into your place ... I'll find a way in," "I'm coming to San Francisco. When I get there you're gonna die," and "I will call every account you have."³⁵ Several of these messages were used as the basis for an indictment against

²⁶ *Ballard*, 322 U.S. at 87-88 (Stone, C.J., dissenting).

²⁷ *Id.* at 93 (Jackson, J., dissenting).

²⁸ *Id.* at 94.

²⁹ 26 F.3d 1496 (9th Cir. 1994).

³⁰ *Marsh*, 26 F.3d at 1498.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1499.

³⁵ *Marsh*, 26 F.3d at 1504-05 (Noonan, J., dissenting).

Marsh for extortion and attempted extortion.³⁶

Marsh was indicted for threatening bodily harm, for threatening to kill Doe, and for threatening economic harm.³⁷ The jury found him not guilty of all charges except the charges of economic extortion and attempted economic extortion.³⁸ The question on appeal was whether a rational jury could have interpreted Marsh's words about the customers as an extortion threat.³⁹

It was my view, and not the view of my colleagues, that no rational jury could have found an extortion threat. No rational person could have understood the threat to call on Doe's customers as a threat to disrupt Doe's business when the statements are placed in the appropriate context: a relationship that had gone on twenty years in which Doe had willingly given Marsh money, the whole emotional relationship was sustained by the constant payment of money, and the threat by Marsh to kill himself and Doe was obviously part of a pattern.⁴⁰ It seemed to me that the emotional context should have determined the meaning of the words.

I pass from this sad business to a case where the power of words is uplifting, where the words have an exhilarating effect. I come back to my favorite Supreme Court Justice, Robert Jackson. Jackson, who combined the ability to write with the ability to express a humanity resident in the community if a judge looks for it, not automatically accepting the overt community values, but inducing those underlying values that make us a people. I would like to quote from his most famous opinion, *West Virginia School Board v. Barnette*,⁴¹ where he upheld the right of the children of Jehovah's Witnesses not to salute the flag. In a climactic passage he wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁴²

Look at his use of words here. Consider, for example, his

³⁶ *Id.*

³⁷ *Id.* at 1500.

³⁸ *Id.* at 1500.

³⁹ *Id.* at 1504.

⁴⁰ *Marsh*, 26 F.3d at 1504-05 (Noonan, J., dissenting).

⁴¹ 319 U.S. 624 (1943).

⁴² *Barnette*, 319 U.S. at 642.

use of the words "high or petty," not "high or low." The word petty brings in the idea of pettiness as well as lowness.⁴³ The reference to the fixed star is an evocative image, whether or not it survives in the light of modern astrophysics. There is also the alliteration of "citizens" and "confess," "force" and "faith," and "prescribe" and "politics." The stroke that fixes the language in our minds is the conjunction of "constellation" with "constitutional," a triumph of both alliteration and meaning.

Appellate Differences of Opinion

I have said to myself, "Suppose by some miracle I had colleagues who thought the way I do to act with as a judicial panel. Agreement would be so easy." Yet I think within the course of a year we would eventually disagree. We would disagree on something because I have come to realize that there is no judge, living or dead, that I have found myself in agreement with in every case. There is something about the task of judging, that, when pushed far enough, one person's perspective will differ from another's.

We are frequently reminded of how rationality and even compassion do not always lead to the same conclusion. Essentially, each particular judgment becomes a personal judgment in the end, with all the rationality and all the compassion that each judge has being expressed. I do not believe my colleagues are irrational or lacking in compassion. But we do differ from time to time, even though we agree ninety percent of the time.

The first audience for a judge writing on an appellate court is comprised of the other judges on the court on his panel. A judge writing what may be a majority opinion does not want to include language that would alienate the other one or two judges needed to command a majority.⁴⁴ Practically, if one of the other

⁴³ Petty is defined as "[s]mall, minor, of less or inconsiderable importance." BLACK'S LAW DICTIONARY 1146 (6th ed. 1990). It is also commonly defined as "marked by or reflective of narrow interests and sympathies." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 869-870 (10th ed. 1993).

⁴⁴ See, e.g., WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS 495 (2d ed. 1974) ("[T]he desire to mass the Court, or at least a majority, behind a single expression of views can inhibit the power of the Court's spokesman.") Opinions are circulated for comments and substantive changes and the lead writer "must then reconcile these comments or risk the disintegration of the majority into concurring factions." *Id.*

members of the panel objects to language, that language will be eliminated. No judge will risk losing his majority by haggling over language. The veto power over the language also operates in advance when judges do not incorporate into the opinion language they believe will be too emotional or offensive to the other judges. There is a restraint imposed because, when writing for an appellate panel, a judge cannot imagine that everyone's emotions will be quite the same. Judges, however, sometimes let themselves go in expressing their views when they write a dissenting opinion. Holmes' dissents are as cherished as Brandeis' dissents because they spoke for themselves and were not the result of compromises over language.⁴⁵

Going a little beyond style to substance, I consider *Weems v. United States*⁴⁶ to be a seminal case in American criminal jurisprudence because it enunciated the principle that there is an evolving standard of decency that governs cruel and unusual punishment.⁴⁷ In *Weems*, the Supreme Court was confronted with a Filipino law which provided that an embezzler was to be held in prison in chains. The Supreme Court concluded that this was cruel and unusual punishment.⁴⁸ There were four dissenters, including Justices White and Holmes, one of them a wonderful representative of community values and the other a representative of realist legal theory. Essentially, they stated that imprisonment in chains was not cruel and unusual in the eighteenth century and so should not be cruel and unusual now.⁴⁹ Is there something fundamentally defective in each of their approaches that they should have ended up agreeing to dissent in this famous case?

Must Judges Write?

The Roman Rota⁵⁰ was one of the first courts ever to publish

⁴⁵ Although few in number, "it was the quality and thrust of Holmes's dissenting opinions that attracted public attention" GARY J. AICHELE, OLIVER WENDELL HOLMES, JR., SOLDIER, SCHOLAR, JUDGE 151 (1989). This remarkable trait earned him the title of "The Great Dissenter." HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 159 (1985).

⁴⁶ 217 U.S. 349 (1909).

⁴⁷ *Id.* at 378.

⁴⁸ The Court held that Weem's imprisonment in chains for an extended period of time was cruel and unusual because it exceeded the "spirit of constitutional limitations formed to establish justice." *Id.* at 381.

⁴⁹ See *Id.* at 410 (White, J., dissenting).

⁵⁰ The Roman Rota was the "regular papal court of appeal" during medieval

written opinions, well before English courts did. The Roman Rota would write down opinions delivered by individual judges. One judge was the *ponens* or spokesman for the panel, and he or his family published the opinions and derived an income from them. Obviously, there was a real financial incentive to publish your opinions.

The competing jurisdiction, as it developed near the end of the sixteenth century, was the Sacred Congregation of the Council for the Interpretation of the Council of Trent, or the SCC as it was commonly known. The SCC was composed of cardinals. As the axiom went, "Cardinals do not have to give reasons." So the cardinals just decided cases. Since many things could be brought within the decrees of the Council of Trent, the SCC had an abundant number of cases. It was not until the beginning of the eighteenth century that the SCC had a brilliant secretary, who decided, "I will publish the decisions, and I will also publish the arguments of counsel. In that way, the law professors and lawyers in the future can see what the reasons were. They will see how counsel expressed it. They can see what the result was. They can figure out what the rationale was."

That apparently worked as well as the method chosen by the Rota of publishing opinions. Those two ways of doing it persisted, side by side, until the nineteenth century. The experience does suggest that written opinions may not be necessary unless judges want to enjoy the power of words.

