

## ASPECTS OF DECONSTRUCTION: THE FAILURE OF THE WORD "BIRD"\*

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Frederick Schauer has asserted a bedrock proposition in his defiant defense of doctrinalism against the barbaric onslaught of the deconstructionists: "When I say that pelicans are birds, the truth of the statement follows inexorably from the meaning of the term 'bird.' If someone disagrees, or points at a living, breathing, flying pelican and says 'That is not a bird,' she simply does not know what the word 'bird' means."<sup>1</sup> Professor Schauer's proposition is like the admonition of a judge who points his finger at an attorney and says, "Don't quibble with me about whether there technically was a breaking or entering. I know a burglary when I see one." Lawyers and judges often become impatient with those who dispute what they regard as the clear meaning of words. Schauer also reflects this kind of annoyance with "philosophical types." He adopts a condescending and impatient tone to help ward off challenges from the deconstructionist camp.

Professor Schauer's statement betrays dim awareness of the major proofs and propositions of twentieth-century philosophy, even as he cites that philosophy for support.<sup>2</sup> Nearly every word in his assertion is philosophically deconstructible. His first sentence is ambiguous: does he mean analytic or synthetic truth? Analytically, pelicans are birds only if pelicans are defined as birds; but then, of course, the statement is merely a tautology that has no "truth value" in the real world.

On the other hand, the statement may be read as a form of Alfred Tarski's famous equation: "'[S]now is white' is true if and only if snow is white."<sup>3</sup> Tarski was getting at the meaning of the word "true." The analytic truth of Tarski's sentence is realized if we substitute "red"

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\* Copyright 1989 by Anthony D'Amato. The title intentionally pays homage to Richard Weisberg's marvelous book, *THE FAILURE OF THE WORD* (1984).

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<sup>1</sup> Schauer, *Formalism*, 97 *YALE L.J.* 509, 512 (1988).

<sup>2</sup> For example, Schauer cites Wittgenstein and has firm and resolute views about the meaning of Wittgenstein's work. *See id.* at 525-27 nn.56-57. He correctly summarizes the mature Wittgenstein as holding that "the meaning of a word is a function of how that word is contingently used in an existing linguistic community," *id.* at 526 n.56, but does not seem to recognize the import of his own summary. Instead, Professor Schauer continues to assume that words have *definite* meanings, ignoring Wittgenstein's teaching that words merely represent conventional recurring utterances with no failsafe, intrinsic "meaning."

<sup>3</sup> A. TARSKI, *LOGIC, SEMANTICS AND METAMATHEMATICS* 156 (1956).

throughout for “white.” Analytic propositions are true as a matter of formal logic; they would be true even if the world did not exist.<sup>4</sup>

But we find Professor Schauer employing what he thinks is a self-evident notion of truth to win a debating point. His analytic phrase—“pelicans are birds”—is true only if, as a contingent matter, pelicans are in fact birds. But there is nothing *in nature* that provides an answer.<sup>5</sup> It all depends upon whether taxonomists agree that pelicans share enough of the feature of “birds” so as to be *called* birds. To be sure, pelicans share more of those features than some other animals called “birds”; for example, if we regard flying as a basic attribute of birds, we would have to rule out penguins, kiwi, and ostriches.<sup>6</sup> We might also find a population group whose language distinguishes between small and large flying animals, calling butterflies “birds,” but referring to pelicans by another name. A “bird” is a function of the degree of agreement among taxonomists as to what they “count” as a bird.<sup>7</sup>

Moreover, Professor Schauer’s second sentence—which of course does not follow logically from the first—can hardly be asserted after W.V. Quine’s demonstration of the impossibility of radical translation in 1960: “A rabbit scurries by, the native says ‘Gavagai,’ and the linguist notes down the sentence ‘Rabbit’ (or ‘Lo, a rabbit’) as tentative translation, subject to testing in further cases.”<sup>8</sup> Almost a decade later, Quine returned to the example: “If we are wondering whether to translate a

<sup>4</sup> Michael S. Moore is distressed by Tarski’s notion of truth; he cites with approval Michael Devitt’s comment that it is “anemic.” Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 893 n.75 (1989) (citing M. DEVITT, REALISM AND TRUTH 29 (1984)). What Professor Moore cannot bring himself to admit—although he comes close in many of his articles—is that *every rule of law* is analytic and thus “anemic” in precisely the sense that the deconstructionists claim!

<sup>5</sup> Cf. M. TWAIN, EXTRACTS FROM ADAM’S DIARY (1904).

Been examining the great waterfall. . . . The new creature calls it Niagara Falls—why, I am sure I do not know. Says it *looks* like Niagara Falls. That is not a reason; it is mere waywardness and imbecility. The new creature names everything that comes along, before I can get in a protest. An always the same pretext is offered—it *looks* like the thing. There is the dodo, for instance. Says the moment one looks at it one sees at a glance that it “looks like a dodo.” . . . Dodo! It looks no more like a dodo than I do.

*Id.* at 5 (emphasis in original); see also M. TWAIN, *Eve’s Diary* in 24 THE WRITINGS OF MARK TWAIN 287 (1907).

During the last day or two I have taken all the work of naming things off his hands, and this has been a great relief to him, for he has no gift in that line, and is evidentially very grateful. He can’t think of a rational name to save him, but I do not let him see that I am aware of his defect. Whenever a new creature comes along I name it before he has time to expose himself by an awkward silence. In this way I have saved him many embarrassments . . . .

When the dodo came along he thought it was a wild-cat—I saw it in his eye. But I saved him. . . . I just spoke up in a quite natural way of pleased surprise . . . and said, “Well, I do declare, if there isn’t the dodo!”

*Id.* at 293-94.

<sup>6</sup> It is harder to find a “bird” without feathers, although a kiwi’s “feathers” look like fur.

<sup>7</sup> Even what seems to be a fundamental distinction between animals and plants breaks down in the case of viruses.

<sup>8</sup> W.V. QUINE, WORD AND OBJECT 29 (1960).

native expression 'gavagai' as 'rabbit' or as 'undetached rabbit part' or as 'rabbit stage,' we can never settle the matter simply by ostension—that is, simply by repeatedly querying the expression 'gavagai' for the native's assent or dissent in the presence of assorted stimulations."<sup>9</sup> We can never know for sure what is in the native's mind—or anyone else's—when we talk about and point to things.<sup>10</sup>

Consider a radically different interpretation of Professor Schauer's assertion that, "[i]f someone . . . points at a living, breathing, flying pelican and says 'That is not a bird,' she simply does not know what the word 'bird' means."<sup>11</sup> The phrase "simply does not know" is quite strong. But Professor Schauer presumably would not have written it had the following possibility crossed his mind: the "that" in the speaker's sentence refers to her *finger*. It is only through his *interpretation* that Professor Schauer concludes that the speaker, by extending her finger, is "pointing" at a pelican. In fact, she may not have intended to point at anything; she may have been holding up an extended finger with the intent, perhaps, of teaching Professor Schauer the distinction between a part of her body and external flying objects. "That" is a finger, she is asserting, not a "bird."

Of course, Professor Schauer might make the following rejoinder: He *meant* to exclude "weird hypothetical cases [that] are wildly counterfactual."<sup>12</sup> Or more interestingly: "[S]omething we could not possibly have imagined is for that very reason outside the scope of what we had hitherto thought to be a precise and exhaustive definition of a term."<sup>13</sup> A most remarkable desire: Professor Schauer wants to exclude all interpretations he has not previously imagined! Even granting his wish, how could anyone ever know whether the stipulated exclusions exhausted the field of possible interpretations? Perhaps he might prefer another formulation: the interpretation of any text shall be confined to the limits of Professor Schauer's imagination.

Surely the interpretations that Professor Schauer "could not possibly have imagined" are different from those that someone else could not have imagined. In visualizing the suggested scene and taking from it all question-begging assumptions about the context, we are left simply with a woman holding up her finger and a pelican flying by in the background. Whether the woman was pointing at a pelican or simply calling attention

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<sup>9</sup> W.V. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 30-31 (1969). For later views that incorporate answers to his critics, see W.V. QUINE, *THEORIES AND THINGS* (1981); *THE PHILOSOPHY OF W.V. QUINE* (L. Hahn & P. Schelpp eds. 1986).

<sup>10</sup> "Our talk of external things, our very notion of things, is just a conceptual apparatus that helps us to foresee and control the triggering of our sensory receptors in the light of previous triggering of our sensory receptors. The triggering, first and last, is all we have to go on." W.V. QUINE, *THEORIES AND THINGS* 1 (1981).

<sup>11</sup> Schauer, *supra* note 1, at 512.

<sup>12</sup> Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985).

<sup>13</sup> *Id.* at 421-22.

to her finger is a question of interpretation. If Professor Schauer could not possibly have imagined that she might be calling attention to her finger, so be it. But he would be wrong to conclude that no one could possibly imagine it. After all, I have just imagined it!

Professor Schauer's effort to rule out any interpretation that he cannot imagine is tautologically empty. How can an interpretation not yet imagined become a *reason* for its exclusion as a possible interpretation? A definition cannot become exhaustive by claiming that everything that was not in the mind of the person who defined the word<sup>14</sup> is automatically ruled out.

Suppose Professor Schauer says, "All right, apart from the perfectly silly argument that she could have been referring to her finger, she had to have taken into account—by the very question asked of her—the external object to which the finger referred. Since she must have been referring to the pelican, she has made a mistake about the meaning of 'bird.'"

Even conceding this argument to Professor Schauer, has he finally made a determinate claim about the meaning of words? Is there any possible interpretation other than the two possibilities in which, first, the speaker is pointing to a pelican, or second, not pointing at all, but rather is referring to her own finger? If I offer a new one, will Professor Schauer simply absorb it and claim that there are now only *three* possible interpretations?

Consider the following: The speaker extends her finger and says, "That is not a bird. It is a unicorn." Then she bends her finger and makes a loose fist and says, "*This* is a bird." She *is* using her fingers and hands to reference external objects, but the use is pictographic and not directive. Such behavior is not necessarily "weird," but rather is used in many contexts by many people to communicate effectively. The system of sign language employed by the deaf permits unrestrained expression in the world of things and ideas. Scuba divers, too, use hand signals to communicate to each other underwater where attempts at verbal communication would be useless. Aborigines on animal hunts use elaborate symbolic hand and finger gestures to communicate with each other silently. When a light is projected against a wall in a dark room, shadow-pictures of animals can be made by hand and fingers. In fact, pictographic hand and body language occurs in all sorts of contexts by all sorts of people (e.g., children, dancers, fraternity brothers). None of these uses is necessarily "weird" or "wildly counterfactual." The only thing "weird" about them is that they did not cross Professor Schauer's mind.

The meaning of words derives from the contexts in which they are employed, and we can never be certain of the context because we cannot

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<sup>14</sup> Would a strict constructionist try to restrict all words to the confines of Noah Webster's or Samuel Johnson's "original intent"?

enter into the minds of other persons to see the contexts to which their minds are adverting. The speaker's ontological perspective might be radically different from Professor Schauer's. Following Quine, the speaker could be pointing at a momentary spacio-temporal manifestation of pelicanhood. Or she could be pointing at a pelican-shaped exception to the sky in the background. Or, by denying that the pelican is a bird, she might be engaging in the humor of incongruity—a species of humor from which children and primitive peoples especially seem to get enjoyment.

In some contexts, there could even be a good rhetorical reason to deny that the pelican is a bird. Consider Franklin D. Roosevelt's brilliant deconstruction of the doghood of his famous Scottie, Fala. Fala had a tendency to climb on both furniture and visitors in Roosevelt's Hyde Park home. One visitor whom Fala obviously distressed and who thought dogs should not be given such freedom was Secretary of State Cordell Hull. Calling upon his diplomatic skills, he said to the President, "A dog exists very well out in a yard." FDR replied smoothly, "Ah, my dear Hull, that is just the point; Fala is not a dog."<sup>15</sup>

Roosevelt's remark would certainly mystify positivist- and literal-minded persons. He was doing a lot more than choosing, in Humpty Dumpty fashion, precisely what a word will mean. Both Hull and FDR presumably shared a *denotation* of a "dog" as a four-legged canine animal. But, if we take him seriously, FDR was really communicating the proposition that, for purposes of playing around in the living room, Fala was more a family member than a dog. Since FDR knew that Secretary Hull was operating under a definition of "dog" that included a dominant *connotation* of an unruly animal not fit for indoor living, the President proceeded to attack *that* dominant connotation. From FDR's point of view, the term "dog" was doing too much work—it was prejudging the issue, blocking Hull's mind from reconceptualizing the situation. So it was necessary for FDR to deconstruct the connotation by seizing on the common word "dog"—a most efficient rhetorical thrust under the circumstances.<sup>16</sup>

Language is so wonderfully variable, and its nuances so infinitely rich, that the notion of omitting all interpretations not imagined by a

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<sup>15</sup> See F. SCHULER & R. MOORE, *THE PEARL HARBOR COVER-UP* 90-91 (1976).

<sup>16</sup> Professor Phillip Areeda plays Hull to an unnamed expert in Areeda, *Always a Borrower: Law and Other Disciplines*, 1988 DUKE L.J. 1029. He gives an example that, in his words, "require[s] little economic sophistication to ridicule": an expert witness persuaded a jury and judge that a shipper who contracted to pay a pipeline for the right to have its gas transported for twenty years was the "owner" of the pipeline "with a greater economic interest in it than the firm that wholly owned it." *Id.* at 1034. Professor Areeda's fixed notion of ownership is so firm that he regards the expert witness as a charlatan. *Id.* at 1036. This is precisely like Hull answering the President (and in the process completely missing the point): "Fala most certainly *is* a dog and you, sir, are a charlatan!" Obviously, Professor Areeda's jury and court did not want the word "owner" to block what they regarded as the just and fair result in the case, economic sophistication to the contrary notwithstanding.

given law professor is worse than incoherent and worse than impossible—it is uninteresting.