1992

Law as Discourse

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Legal theory has traditionally taken the use of sanctions to be a characteristic feature of any legal order. Positivists like John Austin take the notion of commands backed by threats to be the essence of law.[1] Yet even those who scorn positivism, like Immanuel Kant, are equally committed to the view that the sovereign must enforce positive legal rules by punishing those who violate them.[2]

This emphasis on sanctions has always struck me as a bit curious. It is not irrelevant to the understanding of legal phenomena, but it does seem to have been exaggerated in philosophical efforts to understand the nature of law. It does not capture our everyday experience of living under a legal order. As lawyers and as citizens, we rarely experience bailiffs' laying hands on us, jailers' slamming shut steel doors or sheriffs' seizing our property. What we do experience as participants in the legal order is incessant argument, verbal thrusts, ripostes, and parries. We receive warnings and traffic tickets from police officers, notices from the IRS, and occasional letters from credit agencies telling us to pay up. We argue back to the police officers and traffic judges by quoting words in statute books and case reports. We respond to the IRS by invoking the language of tax regulations. We tell our creditors that if they understood the subtleties of contract law, they would realize that we did not really owe the sum alleged. All of this is talk. It is interaction, and sometimes play, in a restricted mode of discourse.

The rules of the discourse are clearly understood by those who engage in law talk. You are entitled to make certain kinds of arguments and not others. You can refer to statutes, cases, and regulations, but you cannot invoke poems, novels, art history, or the racing form—just to name a few of the items treated as irrelevant to serious law talk. The discourse is further facilitated by agreed upon rules for

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1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 89-94 (Robert Campbell ed., 5th ed. 1885).

2 *See, e.g.*, FRITZ BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES 187 (Rachel Szold Jastrow trans., 1968) summarizing this aspect of Kant's theory of punishment. The discourse is based on IMMANUEL KANT, METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (1838).

proving—more or less—that a particular proposition is or is not the law.

There are other modes of discourse that compete with the law. In our own time, we are inclined in many contexts to speak in the idiom of morality or of psychology. Yet for certain purposes—in the world of commerce and interpersonal injuries—the gambits of the law are indispensable in seeking to negotiate the resolution of a dispute.

My thesis that law is discourse is stimulated by reading and thinking about Niklas Luhmann's work, or at least some of his work.[3] I cannot claim to have mastered the nuances of his system. Yet in coming across the ideas of autopoesis and the idea of a self-contained, self-reproducing legal system, I found a set of ideas that lend themselves to the thesis that law is a mode of self-sustaining discourse.

The most magnificent example of law as discourse is the Jewish tradition, beginning with the Bible, blending into the oral law, finding refinement in the Talmud, and continuing to this day not as a system that coerces anyone to do anything, but as a mode of study in which argument and analysis become religious activities; ends in themselves, the use of mind as Divine commandment. Referring to the Talmud puts into perspective my reading or creative misreading of Luhmann. The story is told of Moses returning to a *yeshiva* to hear latter day students arguing about the law as received by Moses at Sinai. Moses could not comprehend the argument.[4] And so it might be with the framers of the American Constitution if they read a Supreme Court decision today. This might also be the experience of Luhmann as he finds in these pages the spinoff of thoughts that he might have intended to a different purpose.

Writing in this vein liberates me from the usual canons of historical rigor. Consider the following speculative thesis about why legal thought became attached to the idea that law consists of rules and that these must be backed up by sanctions.

The notion of laws governing human activities bears a close resemblance to laws explicating the necessary causal connections between natural phenomena. In a quick review of the major language families of the West, one notes that the term used for the laws laid down by lawgivers (*Gesetze, lois, zakony, hokim*) is almost the same as the term for scientific laws. This is a curious connection suggesting that human laws are supposed to describe how humans in fact behave rather than how they ought to behave. Today we perceive the differ-

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[3] I have benefitted, in particular, from a careful reading of NIKLAS LUHMANN, RECHTSSYSTEM UND RECHTSDOGMATIK (1973).

[4] Babylonian Talmud, Menahoth 29b.

ence between the two kinds of laws as obvious, but the etymology suggests that human deviations from prescribed norms was originally conceived of as a serious disturbance of the natural order. This disturbance is captured in the idea that humans do not simply deviate from the laws, as natural phenomena might under special circumstances. Human behavior bears the special quality of *violating* the laws (one is reminded in this context of the meaning of *violation* in French: it is though the violator "rapes" the legal order).[5]

Those in charge of keeping and sustaining the human laws must respond to these violations. They represent an intolerable gap between the world of norms and the world of behavior. Thus we witness the extraordinary cruelty invested in criminal punishment in the course of history. In Hegelian terms, the punishment negates the wrong represented by the violation, and as a practical objective, punishment seeks to insure absolute compliance with the norms.[6]

For good or ill, our attitudes toward absolute compliance have changed. We no longer expect that sanctions will induce everyone to comply with the norms of proper conduct. We have come to accept prosecutorial discretion as an inevitable feature of the criminal process. The implication is that not all wrongs can or should be punished and that not all violations need be negated. Also, the economists have brought about a paradigmatic shift in thinking about full enforcement. The economic principle, informed by utilitarian balancing, is that the proper standard should not be full, but rather optimal enforcement. Enforcement is less than optimal if the costs of sanctioning are greater than the benefits of inducing greater compliance. In the field of accidents, the policy of tort law is suboptimal if the costs of deterrence exceed the benefits of accident reduction. The same calculus applies to investing resources in criminal law enforcement.

H.L.A. Hart's jurisprudence brought about two major departures from the model of scientific laws as the proper mode of thinking about law.[7] First, Hart introduced the idea of secondary rules—rules that differ radically in their structure from primary rules that carry sanctions.[8] Secondary rules of law do not represent the necessary order of things; they are not backed up by threats or punishment or other sanctions for disobedience. Secondary rules are mechanisms for doing things—for legislating laws, for making contracts, for convey-

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[5] The French verb "to violate" is "violer." This word is defined by LANGENSCHEIDT'S STANDARD FRENCH DICTIONARY 532 (1988) to mean "violate" or "rape, ravish (*a woman*)."

[6] GEORG W.F. HEGEL, THE PHILOSOPHY OF RIGHT 73 (T.M. Knox trans., 1952).

[7] *See generally*, H.L.A. HART, THE CONCEPT OF LAW (1961).

[8] *Id.* at 77-96.

ing title. If you follow the rule correctly, you achieve the desired result; if you fail to comply with the necessary requirements, you fail to realize your legal objective. Thus the secondary rules are means at the disposal of voluntary legal actors. They are not formulae for treating legal actors as though they were akin to natural objects expected to conform to laws about the way the world was supposed to be.

Hart's second innovation was conceptualizing the distinction between the external and internal points of view in thinking about law.[9] The external point represents the customary perspective stressing the connection between sanctions and departures from rules. The internal point of view captures—for the first time, so far as I know—the role of discourse in legal life. In the internal point of view, we use the formulae of the legal systems as gambits in discourse about our behavior and the behavior of others. We use the rules, principles, and policies of the law in order to criticize the behavior of others and to justify our own actions in the face of criticism. The background assumption is that unlawful behavior is worthy of criticism; lawful behavior is immune from legal attack.

Despite these galactic shifts in thinking about the law, we still find a vast segment of the literature reiterating tiresome claims about the indeterminacy of legal rules. Significantly, some writers still think it is interesting to address the nexus between norms and individuals and to teach us that this relationship is not as precise as it is in the world of explaining natural phenomena.[10] This claim in the idiom of indeterminacy and deconstruction, though novel a half century ago, is generally accepted today. That it is still asserted testifies to a lingering preoccupation with the way in which norms bear down on individual decisionmakers. It is time to shift our focus away from the "norm-actor" relationship and begin to think about the law as an expression of negotiations and interactions between actors. The norms are important only so far as they enter into attempts to explain, criticize, and justify human conduct.

To put my claim about law as discourse in the context of Hart's thesis, try to imagine that the internal point of view is the exclusive perspective. There is no external point of view—no applications of force secure compliance with rules. Law is about talking to other people either to induce transactions or to engage in the evaluation of

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[9] *Id.* at 86.

[10] *See, e.g.*, Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

someone's conduct. Even the force-inducing behavior of courts, bailiffs, and police officers can be understood as a certain mode of talking. What distinguishes the brute use of force from the application of legal force are the rituals and verbal cues that inform us that the force is exercised in the name of the law. Without the signs of uniforms, badges, pieces of paper called tickets and warrants, police officers would appear to us as roughnecks encroaching upon our freedom. They would be indistinguishable from muggers.

To test whether law should be understood as communication and discourse, let us engage in the following thought experiment. Suppose Robinson Crusoe contemplates the areas of intellectual life that he should cultivate in his solitary existence. What books should he read? He would certainly be interested in morality (Should he commit suicide? Should he develop his musical talents?) and economics (How should he use his resources efficiently?). Psychology and theology would obviously be relevant to his desire to maintain his equilibrium. Virtually every area of knowledge would be relevant, but there would be one glaring exception. He would have no need for the law.

The domain of the law is human interactions. One person living in isolation has no need to know about contracts, torts, property, and crimes. Perhaps he would follow religious laws. But presumably this would make sense only if he saw himself standing in a relationship with another person; namely his god. Secular law as we know it would be irrelevant.

To say that law is about human interactions, however, does not establish that discourse is the mode of that interaction. The law could conceivably consist exclusively of rules and principles designed to resolve disputes between people. The notion of a "dispute" seems to be indispensable: without disputes why would anyone need the law? Yet a dispute does not exist unless people engage in verbal charges, word thrusts, and linguistic parries. The medium for this word play is the law. The dispute acquires its contours from the claims that people make in legal language.

To understand these disputes, we should borrow a page from Luhmann's methodology; in particular, his underscoring of verbal dichotomies as foundational to the law's structure.[11] The basic dichotomy in legal discourse is between assertion and denial along the axis of lawfulness and unlawfulness. The shape of the debate conforms to these alternatives. There is no middle ground of semi-unlawfulness.

The splitting of the world into opposing categories runs through

[11] *See generally* Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

the discourse of the law. All the basic terms of private and criminal law are set off against their opposites. Is it my property or is it not? Is there a contract or is there not? Did she commit a crime or tort or did she not? Of course, there are some expressions that have entered into twentieth century legal thought. A good example is discretion, which is typically discussed as though agencies possess it in degrees, sometimes more, sometimes less. On the whole, however, the lines of legal discourse divide the world into affirmative and negative spheres.

These categorical claims of the law carry implicit messages. If you say that conduct is lawful, the implication is that no one should bother you about it. If in fact it is unlawful, you should stop doing it. Here are messages associated with other categorical claims in the law:

It is my property: stay off!

You are bound by contract: do it!

You committed a tort: pay up!

He committed a crime: punish him!

Other oppositions hold similarly precise messages. The line between the voluntary and the involuntary carries implications for criminal responsibility. Labelling conduct as aggression entails the legitimacy of defensive force in response. The edifice of the law is built on these dichotomies that bear messages of "do's" and "don't's."

My stressing these on and off positions in legal discourse finds its stimulus in Luhmann's work. The feature of Luhmann's work that still eludes me, however, is precisely how the law becomes a self-replicating phenomenon. It seems too easy just to say that an affirmation or a denial entails further affirmations and denials. This might be true, but it is not clear why legal standards of degree, such as discretion and the amount of damages, could not similarly generate ongoing variations on the same markings of degrees. In the end, Luhmann's innovative systemic theory of law provides at best indirect support for my thesis about law as discourse.

Could one defend the argument that law consists entirely of discourse, and that there is no need to back up the discourse with the plausible threat of sanctions? There are some arenas of legal discourse—for example, customary law and international law—that can be best understood as forms of stylized discourse. There is no harm in conceding that in many domestic legal systems, the background assumption of the discourse is that when communication breaks down, forcible action becomes an option.

The more serious problem raised by the thesis that law is discourse is that the argument verges on surrender to a purely conven-

tional or positivist theory of law. The criterion for a valid proposition becomes whatever is conventionally acceptable in the particular legal culture. But what is the basis for the discourse? What are the values incorporated in the gambits of criticism and justification? There is nothing in the argument that requires a surrender to purely conventional criteria of value. Yet, to admit the weakness of the thesis, there is nothing in the focus on discourse that precludes a conventionalist turn. Thinking about law as discourse hardly solves all problems—or any problems—in the debate about positivism; but it does, I submit, generate a more accurate picture of legal life and thus it may further our understanding of legal phenomena.