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## LAW AS METAPHOR: A STRUCTURAL ANALYSIS OF LEGAL PROCESS

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*Perhaps the most significant contribution to the conception of law as process was Henry Hart's 1953 article on congressional control over federal jurisdiction, which was subtitled An Exercise in Dialectic.\*\* Utilizing the same format, Professor Deutsch analyzes the creation and function of precedent within the legal system.*

- Q. Given the number and length of the opinions in the *Bakke* case,<sup>1</sup> and the extent to which its meaning as a precedent is restricted to the personal views of Justice Powell, I fail to see how one can approve of the Supreme Court's action.
- A. I agree that the factors on which you focus are disturbing, but whether one can approve what has been done—and what the nature of the precedent in fact will be—obviously depends upon the effect of the Supreme Court's decision on the implementation of affirmative action programs.
- Q. Aren't you ignoring the fact that all the Supreme Court decided was how the legal system should treat the action taken by the University of California at Davis?
- A. It is, of course, always possible that *Bakke* will remain authority only for the facts of the particular dispute that was adjudicated. But

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\*\*Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

1. 98 S. Ct. 2733 (1978).

whether that decision in fact attains precedential significance is something only the future can reveal.

Q. Are you saying that decisions adjudicating events that occurred in the past must say something applicable to the future in order to become precedents? If so, how do we know which judicial opinions will attain precedential significance?

A. Yes, I am arguing that knowledge about how to act in the future is what a successfully operating legal process produces. Effective judicial decisions, in other words, are moral judgments rooted in descriptions of past events. Sufficiently persuasive precedents, however, are either voluntarily followed in the future or are applied again to situations that are different at least in the sense that time has passed and that different parties are involved.

Q. Surely more will have changed than that?

A. I was only describing the facts that prevent *any* judicial opinion from being a precedent *per se*, in that the determination will at least have to be made that the passage of time has not so altered the situation that the earlier opinion is inapplicable. In almost all cases, or at least in almost all cases that reach the appellate level, there are other elements to justify the applicability of some precedent other than that being urged by one's opponent. It is precisely this complexity—the richness of factual detail in the judicial opinions enunciating governing legal principles—that restricts the number of times earlier opinions must be overruled and thus permits the legal system to appear to represent a stable set of coherent, logically consistent rules.

Q. But both you and I know that is not the way the legal process operates. We know that the applicability of an appellate court's rule of law is severely limited by the trial judge's findings of fact and that what a trial judge finds in any given case, even assuming that the contesting parties are represented by lawyers of equal ability, is very likely to be a matter governed, in the end, by considerations personal to the individual serving as judge.

A. I agree with the accuracy of your description, but suggest that you are confusing the politics of the legal process with the reality of the legal system. The legal system is real insofar as it controls human behavior, which means that people think they should do what the

law requires. To argue that that effect may be undermined insofar as the law becomes identified with the personal idiosyncracies of individual judges is to state the obvious; but to argue that the system cannot work at all because such idiosyncracies must play some part in the process is also to argue that religious beliefs cannot satisfactorily explain the behavior of any Roman Catholic because Papal elections may well be influenced by considerations personal to some of the electors.

- Q. Although I agree with your description, that description strikes me as uncomfortably close to a resigned acceptance of any current status quo. I agree with your view that the concrete factual detail in which a governing precedent is embedded is what makes precedent such a successful system. I also agree that the social context of the dispute being adjudicated serves as a limit on the meaning of any given precedent and that a failure to acknowledge shifts in that context runs the risk of making the legal system irrelevant.

The danger I see, however, is that such shifts only occur over long periods of time. For me, therefore, the greater risk is not that judges fail to recognize shifts in social context but that they are too aware that any limitation of the meaning of a precedent can be viewed as casting doubt on the image of law as a stable body of rules. Whenever a judge feels that a just decision requires a precedent to be limited, in other words, he must weigh the end of achieving justice against the damage he will do to the image that makes law effective as a control device. My fear is that too often he will decide that the possible damage to the system's image outweighs the demands of justice.

- A. Again, I fear you are confusing law with politics. First, even your description recognizes that a system of precedents each of which is confined to its own facts—a system in which every judge in every case is totally free to reach any result he feels is just—represents a totally ineffective system of social control. Second, and more important, every case represents a dispute about which litigants feel strongly enough to incur the expense of entry into the legal system. Whatever the resolution of the dispute, therefore, those expenditures constitute a difference in the situation before and after adjudication. The entry into the legal process itself, in other words, represents *some* change in the system.

- Q. And I once again accept your description but fail to see how it demonstrates that I have confused law with politics.

- A. Because one crucial difference between law and politics is that the former is focused on concrete instances rather than on general principles, I shall rest my case on the extent to which I can successfully elucidate what it is we find disturbing about Justice Stewart's concurrence in *Jacobellis v. Ohio*:<sup>2</sup> "I shall not . . . attempt . . . to define the kinds of material I understand to be [obscene]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that."<sup>3</sup> In systemic terms, I think it important to note that unlike a politician—who can appeal to constituents simply by delineating why his opponents are inadequate—a judge must justify his resolution of the controversy before him. In this sense, it is the dissent that is the judicial statement most likely to be political.
- Q. Are you arguing that a concurrence can be characterized as taking the political liberties of a dissent while participating in the judicial responsibility of the adjudication?
- A. Yes, but the particular concurrence on which we are focusing makes my point more explicitly. It openly states a purely personal standard of judgment. Such a standard accurately describes the basis on which some politicians create the networks of personal obligations that constitute sources of political power. What is disturbing, however, is to see such a standard enunciated in connection with a judicial determination of constitutionality.
- Q. If law is real only insofar as it affects human behavior, how can any particular opinion be disturbing—apart from the fact that it requires certain behavior from the losing party?
- A. If members of society behave toward each other in the way they think the law of that society requires them to behave, members of that society would be disturbed if a judicial opinion announced a standard so personal that there was no reason for it to be persuasive to people other than the opinion's author.
- Q. I accept your analysis, but it is presented in terms too general to persuade me about the particular opinion we are discussing. My own view is that Justice Stewart's concurring opinion in *Jacobellis* is wholly explicable in terms of its subject matter and historical

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2. 378 U.S. 184 (1964).

3. *Id.* at 197 (Stewart, J., concurring).

setting. Thus, I think attitudes toward sex are such personal things that Justice Stewart is simply being candid. As to the historical setting, I think it is important to remember that Justice Harlan dissented in *Roth v. United States*<sup>4</sup> on the ground that federal statutes could not be constitutionally construed to reach other than "hard core" pornography.<sup>5</sup> It seems, however, that he was able to reach this result only because he was willing to apply a less stringent standard to state statutes under the fourteenth amendment. But the majority of the Court during those years was oriented toward strict application of constitutional standards to state legislation, in order to prevent attempts to block implementation of the principles derived from *Brown v. Board of Education*.<sup>6</sup> Given that this orientation seeped indiscriminately into the obscenity area, with the result that principled decisions based on established standards were rare, my view is that the level of candor represented by Justice Stewart in *Jacobellis* could not honestly have been avoided.

- A. If we were discussing an opinion for the Court rather than a concurrence, I admit I would be forced to agree with you unless the Court were willing to distinguish state statutes affecting the implementation of *Brown v. Board of Education* from other legislation. But because what we are discussing *was* a concurrence, there were alternatives—joining the majority or noting the concurrence without opinion—either of which would have been preferable in that it would have preserved the appearance of law as a stable system of coherent rules. The issue is whether obscenity is so personal a matter that no honest judge could in candor be implementing a standard other than the one delineated in the *Jacobellis* concurrence.

Certainly you could cite Freud for the proposition that an individual's sexual attitudes determine or reflect much of what an individual is. Nevertheless, sex is still to a very considerable degree an interpersonal phenomenon because another human being is usually involved, if only in fantasy. The least interpersonal human phenomenon of which I am aware is called anorexia nervosa, a malady in which attempts are made to control the one need more fundamental to any individual than sex—food. This phenomenon usually occurs in middle class females who, after they have begun dieting, are unable to stop even when dangerously underweight.

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4. 354 U.S. 476, 485 (1957) (holding that obscenity is not within area of constitutionally protected speech or press).

5. *Id.* at 496 (Harlan, J., dissenting).

6. 347 U.S. 483 (1954).

The way experts describe it is that patients afflicted by anorexia nervosa "make themselves almost completely independent of food and of their environment by their negativism and unawareness of illness, that is, by their refusal to be sick and in need of help."<sup>7</sup> They seem to have no more needs, and every offer of help is experienced as a danger that could threaten the perfection and security they have achieved through partial disavowal of reality. They appear unmoved by their own physical deterioration.<sup>8</sup>

Q. Surely there are explanations for this phenomenon?

A. The first major study of this psychiatric disorder, published a decade ago, spent much of its energy demonstrating that physical explanations of the malady are inadequate.<sup>9</sup> A more recent study, *Psychosomatic Families: Anorexia Nervosa in Context*,<sup>10</sup> points out that accepted psychiatric doctrine is also incapable of accounting for the phenomena revealed by meticulous clinical observation.

As the subtitle indicates, the only pattern that seems to have emerged is that the dynamics of family interaction provide the context for the individual attempt to control reality. It seems often true, moreover, that the personal emotions that constitute the wellsprings of those dynamics operate beneath a family surface of ostensible civility. Thus, even anorexia nervosa sufferers respond to the need to keep up interpersonal appearances of civility in a family context. To that extent, at least, they are playing a public role.

Q. Because we are discussing judicial opinions rather than behavior, I fail to see the relevance of this phenomenon of anorexia nervosa.

A. An effective judicial opinion is a persuasive description of how we want each other to behave. To be effective, therefore, it must be public in the sense that it communicates to persons other than its author.

Much of what makes a judicial opinion persuasive—much of what

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7. H. THOMA, ANOREXIA NERVOSA 249 (1967).

8. *Id.*

9. "During this time, however, Simmonds' publications, which had won almost instantaneous approval, were setting all previous hypotheses to nought, so that for several decades the classification and pathogenesis of anorexia nervosa were completely obscured theories of pituitary malfunction." *Id.* at 15.

10. S. MINUCHIN, B. ROSMAN & L. BAKER, *PSYCHOSOMATIC FAMILIES: ANOREXIA NERVOSA IN CONTEXT* (1978).

enables it to attain precedential significance—is connected with the attempt to control the external reality that we see in so exaggerated a form in anorexia nervosa. The significance attached to a promise in contract law, for example, must in the end be justified by a human desire to believe that humans can to some extent foresee and therefore control the future. Similarly, what we treat as an accident—the subject of tort law rather than a matter to be left to an administrative tribunal—can be defined as something whose occurrence and impact can neither be foreseen nor reduced to a formula.

Q. I grant you that anorexia nervosa appears to be a phenomenon in which so personal an attempt is made to control external reality that its individual manifestations cannot effectively be summarized in doctrinal formulae. Having established that, however, you have the burden of demonstrating to me how judicial statements escape that fate and how any opinion can attain precedential significance.

A. Judicial opinions attain precedential significance, and are not restricted to their precise facts, in much the same way that words may have more than one meaning. Either the social context in which the dispute arose has changed so significantly that what was treated in the opinion as a matter of substantive law can be characterized as a mere formality, or a general principle applied to or derived from the facts recounted in the opinion can be regarded as so obvious as to permit its application to slightly different facts.

Q. But you yourself said that law is real only insofar as it controls human behavior, and it only accomplishes that end insofar as human beings think they should do what the law requires. Because, in these terms, what we are debating is whether people believe that law governs responses based on sexual attitudes, I still fail to see the relevance of the phenomenon of anorexia nervosa.

A. I submit that you are stating the issue far too broadly. I understand neither how you would select the statistical population that adequately represents “people,” nor what polling techniques would provide sufficiently reliable and accurate results. More to the point, however, we have already defined the more precise issue, which is the propriety of Justice Stewart’s concurring opinion in *Jacobellis*.

I am not arguing that the act of joining a majority opinion necessarily signifies a belief that the legal standard it states will be

successful in the future in controlling human behavior. Indeed, a desire that behavior should conform to that standard, if matched by a belief that successful attempts will be made to evade that standard in the future, represents precisely a state of mind that justifies a separate concurrence without opinion.

An adequate concurring opinion, however, must either demonstrate why the damage done by the majority's standard will outweigh its beneficial effects, or enunciate a communicable standard different from that of the majority.

Q. As I now understand your argument, you are saying that law is a process that produces devices called precedents that communicate interpersonally but cannot be reduced to objectively verifiable doctrinal formulae. You further argue that precedents can be defined as constituting moral injunctions persuasive because of the factual descriptions from which they are derived. If I understand you correctly, you have the burden of explaining to me what makes those descriptions and those injunctions compelling.

A. I submit that the answer to your question is that a judicial opinion works the way a metaphor works.

Q. Although I agree that there are ways in which you can analogize judicial opinions to works of art, I have two problems with your argument. First, I doubt that judges think of themselves as producing works of art. Second, whether an opinion becomes a precedent depends on whether other judges cite it.

A. Nothing in my argument requires or postulates self-conscious artistry. Indeed, it seems to me significant that you used the word "embedded"—which to some extent implies deliberate activity—whereas I used the word "rooted" to describe the relationship between moral judgment and factual description in a judicial opinion.

As to the relationship between the text of the opinion and the propositions for which it is cited by other judges, I suggest that there are cycles in literary criticism in which the "true meaning" of a literary work is rescued from the prior cycle's "erroneous" interpretations by refocusing attention on the original text.

Q. I remain unconvinced that, even in literary terms, law is as fundamentally ambiguous as a metaphor. Thus, in a recent article, entitled *Law as Order*,<sup>11</sup> the author defined law as explicable in

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11. Weinreb, *Law as Order*, 91 HARV. L. REV. 909 (1978).

terms of the contrast between the descriptive function of the conceptual framework known as positivism and the normative framework known as natural law. He justified his identification of law with order, moreover, by noting that "the best expression of positivism is Camus' play *Caligula*, as the best expression of natural law is the Greek tragedies."<sup>12</sup>

A. I agree that if the Greek tragedies are the best expression of the system of moral injunctions known as law, then order is a more appropriate referent than is metaphor. In analyzing those tragedies, however, the author argues that "Creon, not Antigone, is the central figure of the final tragedy."<sup>13</sup> Because Creon was the powerholder, such a view of the normative framework of law seems to me to be subject of your concern about the legal system representing "a resigned acceptance of any current status quo."

Q. That may well be, but to justify the applicability of your metaphor referent, you must at least describe a work of art as significant as Greek tragedy that can serve as a model for the system of precedent.

A. I would define a precedent for these purposes as a judge's individual perceptions realized in effective social actions, and I would cite *Hamlet* to you as a more appropriate model. In that play Polonius represents the chorus in a Greek tragedy, whose observations delineate the order in terms of which the conflicts of the individuals are resolved.

The maxims that characterize Polonius' speeches, however, are not reliable guides to action because the standards they embody are presented as social values, which may or may not—at any given point—be congruent with individual perceptions of reality. In this sense, the devastating preoccupation with self revealed in Hamlet's monologues signifies the crucial fact that behavior to which social norms are directed represents a response to the reality perceived by the given individual; and that such perceptions therefore represent necessary limitations on the applicability of social norms.

What justifies the attention devoted in the play to the subjective views of Hamlet is that the social maxims enunciated by Polonius are too vague and general to constitute a system whose rules we can accept as justifiably binding on individuals. Polonius, in other words, cannot tell Hamlet what to do. The individual Hamlet must

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12. *Id.* at 958.

13. *Id.* at 945 (footnote omitted).

perform a social action and take responsibility for it.

Hamlet kills and is killed. The play that tells this story is a tragedy; but it is not Greek. What makes it compelling, I submit, is the ambiguity of Hamlet's acceptance of responsibility.