

Agon

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More than most, Arthur Leff struggled with a single problem throughout his scholarly life. This was the problem of legal meaning. On one level, he was intensely interested in the way particular words gained particular legal meanings. Eventually this led him to embark upon the first serious dictionary of modern American law ever attempted. While Leff's extraordinary effort to impress his will upon the legal language was cut off prematurely, the fragments that remain reveal the character of the man's mind: playful yet sympathetic, irreverent yet erudite, clever yet thorough, incisive yet balanced. The hard truth is that American law has lost its Samuel Johnson. While the unfinished dictionary will, I am sure, help form the language Leff loved, it will also serve to remind us of the words we shall never come to know.

I should like to concentrate here, though, on a second aspect of Leff's struggle with legal meaning. Apart from his interest in the significance of particular words, Leff was also concerned with the more general problem of how *any* legal utterance can gain *any* kind of credible legal meaning. His question was simply this: is a credible legal discourse possible in the kind of society we presently inhabit?

The problem, it should be emphasized, is hardly new. Indeed, it has, more than any other, provided the Yale Law School with its energy for the past half-century. This law school first rose to prominence as the center of the Realist critique of traditional legal discourse; it has remained important because its faculty has tried to fill the gap it helped create by proposing one language after another to serve as the new foundation for legal analysis: law and psychoanalysis, law and policy science, law and economics, law and philosophy, law and

Amidst all this busy-ness, Leff made a fundamental contribution—both to our understanding of the problem, and the possibility of its solution. For Leff, the task was not merely to explain how legal discourse differed from political rhetoric, or ethical intuition, or the base self-interest of the governing classes. The problem, so far as Leff was concerned, was posed by God; or rather, the fact that a secular society could not, by definition, ground its legal meanings on God's revealed Word. While Leff could understand how divine grounding might render legal discourse credible, it

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was not obvious to him how the lawyer was to be taken seriously without divine assistance.

Only one thing *was* clear. We should not wish the problem of God away by imagining, as he put it, that we have “successfully traversed the three discontinuities of Copernicus, Darwin, and Freud, and are no longer seriously troubled at having learned that we are inconsequential in the universe, unexceptional among animals, and non-autonomous as rational beings. . . .”¹ It is only by looking into this void that the legal scholar could even hope for a new form of credibility.

For only then might he have the courage to avoid the cheap and easy road to legal meaning. It is tempting, but wrong, for the lawyer-scholar to take advantage of God’s absence to play the role himself: declaring, once and for all, that he himself was the Final Judge authorized to inscribe the answer to all questions of Good and Evil onto the enduring tablets of the Law. According to Leff, legal writers of this sort begged the question-in-chief: “*who* ultimately gets to play the role of ultimately unquestionable evaluator, a role played in supernaturally based systems by God? Who among us, that is, *ought* to be able to declare ‘law’ that *ought* to be obeyed?”²

Leff was a past master in posing this question in concrete criticism of the legal system-builders of his day. Whether they were reactionary apologists for the legal *status quo*, or prophets of a brave new world, Leff tracked them to the moment of truth: the point at which they imposed their law on dissenters in the name of their favorite God—be it called Efficiency³ or Human Nature.⁴ Yet these critical triumphs only served to deepen Leff’s question: if one could not achieve legal credibility by playing God, how *was* one to gain legal meaning? Did Leff’s formulation of the problem leave no possible salvation for legal discourse?

There was, it was clear to him, only one direction in which a solution might be found. Rather than grounding legal meaning on something beyond itself, Leff looked to the very process of legal disputation to generate its own distinctive kind of credibility. In looking to the legal process, however, Leff was the last to idealize it. He emphatically rejected all attempts to portray the lawyer as possessing a special insight into the “higher law.” In his view:

Most lawyers are free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureau-

1. Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 548 (1976).

2. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233.

3. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 467-68 (1974).

4. Leff, *Memorandum*, 29 STAN. L. REV. 873, 883 (1977).

cratic setting, bureaucratic skills—delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost genuine passion—on behalf of someone unable or unwilling to do all that for himself.⁵

For Leff, lawyers were no more—if no less—moral than the general run of humanity. If they were to speak with special authority, it was not because they had gained a special exemption from the weaknesses of ordinary mortals. Instead, the challenge was to show how the dynamic of conflict itself led lawyers and their clients to create a universe of meaning larger than themselves.

To describe this process with a minimum of mystery, Leff turned to an area of life that he considered of remarkable importance in American society:

[E]ven the most casual observer . . . cannot help but note that [Americans] take part . . . in a vast array of activities that they call “sports” or “games.” They have “baseball,” “football,” “basketball,” “tennis,” and . . . “Monopoly” Indeed, . . . it would not appear laughable to suggest that [Americans] expend more time, energy, and interest on their sports and games than on any other kind of activity, notably more than they spend in their more directly “economic” activities, like “working” or “trading.”⁶

For Leff, this enormous investment of time and energy was not to be dismissed as some grand aberration; instead, it represented a fact of great significance. Apparently, Americans were not content to struggle on with the business of life in hope of learning the ultimate Meaning of It All on the day of Final Judgment. To make life tolerable for themselves in the here and now, they were constantly organizing their lives within competitive, game-like structures in an effort to give their struggle a determinate, if not a final, meaning. Leff called these competitive exercises agonistic games. What was the secret of their attraction?

Here is Leff's answer:

Although as a psychological matter, it is perhaps perceived by most [Americans] as better to win than to lose [a game], it seems that, given how hard it is in the ordinary “playing” of “real life” . . . to determine how one came out, it is a joy independent of victory to be engaged in an activity that allows for a determinate result. Even

5. Dauer & Leff, *The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

6. Leff, *Law and*, 87 YALE L.J. 989, 998 (1978).

clearly losing may, at least some of the time, be a pleasant alternative to a lifetime of never knowing.⁷

And the greatest of these agonistic games, according to Leff, was nothing other than the law itself. While the game-like rituals of the law will invariably disappoint those who come to them in search of ultimate answers, they nonetheless generate the *only* kind of legal meaning that human beings can ever know without the aid of God. It was this insight that served as the beginning of Leff's solution to the problem of legal meaning in a secular society. While it remains for each of us to discover his own ultimate answer to the mysteries of the Universe, the law yields a very different form of consolation. It provides men and women with agonistic rituals by which they can impress some passing meaning upon their ongoing struggles with the ambiguities and uncertainties of worldly life.

Given this view, it is no wonder that Leff first made his mark as a scholar of the law of contracts. No better example of agonistic ordering is known to our law. Here we are, you and I, coveting each others' goods. Yet we suppress the urge simply to grab at one another; instead we convert the competitive struggle into a structure with a meaning of its own: I'll give you this, if you give me that; if you keep your promise, I'll keep mine; if not, I'll see you in court. It is this process of reciprocal meaning creation that Leff saw as the heart of contract. He rebelled whenever contract language was used to describe non-agonistic behavior. Thus, in his important article, *Contract as Thing*,⁸ he insisted that the standard form consumer agreement, though it be called a Contract-with-a-Capital-C, should be regulated as if it were just another inert thing no different in kind from tables or television sets. Only contracts based on bargaining were worthy of the name. In a series of brilliant studies,⁹ culminating in his book *Swindling and Selling*,¹⁰ Leff developed the agonistic dimension of contract as no scholar had done before him.

And so matters stood as Leff approached middle age. On the three levels of philosophical understanding, doctrinal analysis, and linguistic mastery, he had made great advances in his struggle with the problem of legal meaning. Yet his last major work made it plain that Leff had not finished. *Law and*¹¹ —that's all he called it, depriving the law of an ulti-

7. *Id.* at 1001.

8. 19 AM. U.L. REV. 131 (1970).

9. In addition to *Contract as Thing*, *supra* note 8, the most important of these are Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967), and Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

10. A. LEFF, *SWINDLING AND SELLING* (1976).

11. See Leff, *supra* note 6. *Law and* was followed in time by *Unspeakable Ethics, Unnatural Law*, *supra* note 2. This essay, however, represents an elaboration of themes first presented in *Law and Technology: On Shoring Up a Void*, *supra* note 1.

mate ground, yet raising the possibility of its enduring meaning. In this essay, Leff moved beyond contract to explore an even more fundamental structure by which American law generates meaning: the ritualized struggle we call the jury trial. Leff's multifaceted, almost jewel-like work will take its place among the very few classics that American academics have managed to produce. Even more remarkable than its substance, however, is the way the essay tries to transcend itself. After powerfully dissecting the ritualistic features of trial by jury, Leff struggles with an even deeper truth—that his categories, like all the others, are somehow unequal to the reality they hope to describe:

[The American trial] is like a game of chess in which, when the King is mated, a real king dies. The meaning of each [legal] move is . . . not defined wholly in terms of any game, but simultaneously in terms of that real world the complexity and uncertainty of which may be the source of the . . . game impulse [indulged by so many Americans] in the first place.

If, however, the [American] Trial is not a game, it is not not a game either. It is . . . an amphibian cultural artifact that embodies, simultaneously, . . . the causal and metaphoric universes, both integral parts of [American] life but neither dominant over the other.¹²

The essay called *Law and* ends with the image of legal ritual overleaping the very conditions that give rise to its spiritual necessity. Born of the human need to escape the ambiguity and uncertainty of the world, the law's secular ritual nonetheless seeks to remake the world in its own image. And it is with *this* image of self-transcendence that Arthur Leff's struggle with the meaning of law comes to an abrupt, utterly unaccountable, end.

Law and. We who loved him can never say what we have lost. We may console ourselves, perhaps, in reflecting that Leff's predicament is our own; and that his struggle for meaning should not, cannot, be forgotten by any lawyer who seeks to understand himself.

12. Leff, *supra* note 6, at 1005.