

# LEGAL REASONING

Collected Essays

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## INTRODUCTION

The four articles collected in this book present an account of legal reasoning, beginning with the practices of jurists in the American common law system. Throughout, I've tried to compare my version of American practice with alternative European and American theoretical positions and with European practice. The account is phenomenological. It describes the experience of legal reasoning while suspending or "bracketing" the question of the "essence," meaning, in the case of legal reasoning, the question what is "truly" the law that applies to any particular case.

As far as I know, "Freedom and Constraint in Adjudication: A Critical Phenomenology," the first of the pieces collected here, is the only extant attempt to apply this methodology, derived from Husserl via Sartre's *Being and Nothingness*, to the practices of jurists. This origin may make the account seem exotic in the context of the academic discipline of legal theory. It draws extensively, nonetheless, on the legal realist writings that were obsessed with the question of "what judges do." Karl Llewellyn, Felix Cohen and Edward Levi are important sources. The mode of presentation is novelistic rather than philosophical or technically legal.

While "Freedom and Constraint" is an overview, the second essay, "A Semiotics of Legal Argument," focuses in on one aspect of the reasoning process. It proposes that we understand the juristic practice of non-deductive legal argument about the proper interpretation of a rule, or about the choice of a rule where there is an acknowledged gap or conflict, through the analogy of the *langue/parole* distinction in Saussurian linguistics.

To this end, it presents a partial "lexicon" of the "argument bites," or stock non-deductive arguments, used by jurists in opinions, briefs and scholarly writing. For example, "your proposed rule is too vague to be administrable," or "your proposed rule is too

rigid to produce equitable outcomes.” Along with the lexicon, the article identifies the “operations” through which jurists generate whole arguments that are readily intelligible (“meaningful”) as instances (“parole”) of correct legal speech. This piece portrays these operations as having a peculiar dialectical or reversible character, as in the two argument bites above. As a consequence, skill in legal argument will often permit one to neutralize an opponent, or turn the tables, through the mechanical process of producing the paired opposite of his argument.

As with the phenomenological approach of the first essay, the semiotic approach of the second has both an extensive European genealogy and roots in legal realism, particularly in Llewellyn’s famous article “Canons on Statutes,” which did for the maxims of statutory interpretation what the first part of “A Semiotics of Legal Argument” tries to do for policy argument broadly understood. Unlike “Freedom and Constraint,” this second piece deals, in an appendix, with its Continental philosophical and American legal theoretical origins. A second appendix addresses four “European objections” to the approach of the article that I encountered quite frequently when I first began to present it at scholarly meetings over there.

The semiotic study is in a sense phenomenological. It is, after all, about the experience of legal reasoning. The claim that the practice of non-deductive legal argument proceeds in a manner that is well analogized to speech in a primary language, with a lexicon, rules of transformation, grammatical and syntactical rules, and so forth, is a claim about what legal argument feels like from the inside. It is an assertion about how jurists experience it, rather than a claim about what it is in essence.

But there is also an interesting analogy between the phenomenological methodology of the first piece and the semiotic methodology of the second. The second approach makes a bracketing move, just as the first does. The phenomenologist brackets the question of the essence of the legal norm: the question “what is the valid legal rule governing this case” is set aside as unanswer-

able. For the semiotician, the study of legal argument requires us to bracket the question of the correctness, or plausibility, or weight of non-deductive arguments while trying to figure out what they all share as instances of parole in the same langue.

All that counts is determining the lexicon and the operations the practitioners must deploy if the argument is to be a “correct legal” one. But “correct,” here, does not mean “legally correct,” only “correctly legal,” just as we can identify a sentence as in correct English without having an opinion as to its truth or falsity.

The effect of the two bracketing moves is supposed to be to change our understanding of what it is like to be compelled by legal reasoning, or for legal reasoning to “determine” the correct answer to the question what legal norm applies to a case. The phenomenological account is supposed to persuade the reader that jurists often destabilize their initial experience of legal compulsion by legal work. They work with that very intention, for one agenda or another, in the hopes of making the legally determined legally undetermined, or for that matter, in the other direction, to make an initial experience of undetermination turn into its opposite.

The semiotic account, in so much as it convinces that the effect of legal necessity produced by a legal argument is often reversible by a jurist skilled in the operations, is a case study of one of the specific kinds of legal work that can produce these results. It is an account of just how a jurist can go about making the determinate indeterminate and vice versa.

The two pieces together represent the experience of legal reasoning as an activity pursued in a medium that is at once plastic and resistant. They do *not* aim to show that legal reasoning is always indeterminate, or that there is always a good argument for whatever legal result the jurist wants to achieve. They are firmly positioned against “global indeterminacy” theses. They likewise reject the notion that we can meaningfully state that law is “most of the time” or “generally” determinate. Given the phenomenological bracketing already referred to and the ever present possibility of argumentative work, such statements are meaningless.

On this basis, the account has to do with politics in two senses. The first is that it presents political ideology as an important element in the interpretive activity of many jurists, particularly in cases where there are high political stakes of one kind or another. The second is that the account is itself part of my own particular left/modernist-postmodernist political project (as well as part of what I don't blush to call a "scientific" inquiry into the subject matter).

In "Freedom and Constraint," I try to imagine what it would be like to be a judge. The vehicle for the account is a novelistic presentation of what I imagine it would be like for me to be a judge in a United States District Court confronted with a case in which, according to my first impression, the obviously applicable legal rule will not permit me to decide the case the way my political convictions tell me it should be decided if there were no binding legal norm already applicable.

The goal is to describe convincingly the way in which the judge's personal convictions about justice enter into the decision process. They do so, in my account, as what orients the direction of the judge's work of interpretation, rather than as an external factor that simply determines it. They motivate work in the at once plastic and resistant medium of law. Moreover, in this account, the personal political views of the judge are in part caused by his prior exposure to the legal order he interprets, as well as an important influence on how he does that interpretation. The result is that the judge's work may end by reversing rather than allowing the realization of his personal agenda.

In other words, political ideology is no more an outside, external determinant, than it is an excluded irrelevance. Moreover, political ideology is no more a self-applying text than is the law. The judge will have to work to decide what his personal political convictions require in the case at hand. Like the work of legal interpretation, this will involve unsettling experiences of determinacy and indeterminacy, rather than the simple application of principle. Note that I am not claiming that all legal reasoning is

politically oriented, just that that is sometimes the case and sometimes with very high stakes.

This way of looking at the role of politics in legal reasoning struck me as worth developing at much greater length, and I did that in *A Critique of Adjudication [fin de siecle]*. I have summarized the argument of that book, and fitted it together with these phenomenological and semiotic pieces, in the very short, highly condensed "A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation."

That essay, as the title indicates, is also an attempt to situate the account in mainstream legal theory by contrasting it sharply with the "core/penumbra" understanding of legal reasoning. The last essay, "Thoughts on Coherence, Social Values and National Tradition in Private Law," does the same for the named conceptions as they figure in the current discourse on the Europeanization of private law. My hope is that the rather elaborate attempts throughout the book to figure out how my account resembles and differs from the more familiar American, Anglo-American and Continental European accounts will make it more intelligible, and easier to critique constructively, than it would be if presented as a tub on its own bottom, so to speak.

The second sense in which these essays have to do with politics concerns their objective rather than their content. They were conceived as part of a left/modernist-postmodernist ideological project. The left element means radical egalitarianism and participatory democracy. Modernism-postmodernism refers to cultural and aesthetic modernism and its critique, rather than to the Enlightenment. It is a project of avant garde experimentation aimed, always within a limiting context, at emotional/intellectual/aesthetic transcendence of convention.

For both the leftist and the modernist/post-modernist parts of the project, a critique of legal certainty of the type developed in this book seems liberatory. First of all, it seems clear to me, as a leftist contemplating the possibilities for radical social transformation, that one obstacle is the reification or fetishization of law. By

this I mean not that people wish to be governed by law, but that the intensity of the wish leads them to overestimate what law does or could do to explain or justify social practices. The point of the critique is that both the standard version of the rule of law and the standard version of liberal constitutionalism with judicial review, as purported descriptions of liberal reality and as ideals, lose plausibility, to put it modestly, when we take account of the under-determinate character of legal reasoning.

One might find this argument convincing even if one were a committed liberal, or a conservative or a libertarian. In other words, there is nothing inherently leftist about it. It is part of a left project not because it is inherently leftist but because in the current state of politics in the world, it seems to me that fetishized or reified belief in the rule of law is an obstacle to leftist conviction and activism. In this respect, I have the opposite assessment from those who see undermining legal fetishism as undermining leftist faith.

At a more abstract level, all of the essays operate in the anti-liberal tradition of Feuerbach and Marx, and also of rightist critics of the Rights of Man as the goal or *terminus ad quem* of the project of emancipation. In this tradition, liberal false necessity, including in particular legal necessity, is always an obstacle to emancipation, because belief is flight into fantasy, at the same time that it is an impediment to analysis.

The phenomenological/semiotic/ideological critique of legal reasoning fits into the modernist-postmodernist project in a somewhat different way. To the extent the account is convincing, it pushes toward a particular kind of thinking about the ethics of situations in which one has a duty to obey the law. One might call it an anarchist mode, because if the analysis is right, it puts actors who we normally think of as obligated to obey the law in the position of not being able to do that, or at least not being able to do it in a way that decisively or clearly subordinates them to a law maker other than themselves.

What law there is to obey, even granting a full commitment to obedience, will vary according to how much work, with what work

strategy, and what skill, they bring to bear on the initial perception that a particular legal norm clearly binds under the circumstances. This means that the jurist has to decide *in every case* how to orient his or her work or non-work. The jurist has to do this without being able to rely on the notion of fidelity to law to answer the question. This decision on a work orientation may (or, of course, may not) have important social, economic, political or cultural consequences.

That it may turn out to be an unimportant decision does not mean that the jurist can avoid it, or avoid responsibility if the consequences turn out to be significant. It is as though every case were at least initially within the category denominated in the first article of the Swiss Civil Code as requiring the judge to decide as he would if he were a legislator. Or as though the law has always already “run out” at the moment the jurist sets out to interpret.

So in what sense anarchist? First, because an enlightened jurist can't believe of himself that he does what he does because subject to the role constraint of obedience to law, that is to the state. It is true that there is such a role constraint and that it may or may not in the end determine his action. But it is also possible that the role constraint that he must seek justice will turn him into a law maker no matter how much he doesn't want that responsibility. It may require him to do at least a little potentially destabilizing legal work whenever his initial sense is that the obvious interpretation of the law makes it an instrument of injustice.

Anarchist also in the stronger sense that where the actor is playing a decision making role in a private institution, corporate in one sense or another (for profit or not, etc.), the same set of questions and dilemmas arise. The institution will have a mission and a mission statement, some claim to be ethically situated even if only as a profit maker for shareholders. Actors are agents, just as in the state context. The actor/agent will have to decide, according to his or her personal convictions, in which direction to work when interpreting the mission statement.

The notion is that all these decision makers who supposedly, in principle, are bound by the law or by the charter of the particular

private entity they are part of, are constantly exercising a denied discretion in choosing a work strategy. Once I've acknowledged this, my thought is that I have to start taking responsibility for the discretion. I can't lodge it outside myself. My political program as a legal reasoner becomes to do the reasoning in such a way that I advance the good.

My idea is that this decision has to be political in the strongest Weberian sense: the ethic is what Weber calls "the ethic of responsibility" meaning responsibility for all the consequences, without being able to appeal to a coherent and socially accepted set of criteria of justification for the decision. The role constraint is no more than "do your best under all the circumstances to do something politically good."

If I am to decide in full responsibility for all the consequences, I have to take into account the possibility of tacit or overt alliances with other legal reasoners, alliances that may require me to sacrifice what I'd like to see happen in a particular case of legal reasoning in the hope that the long run consequences will be more beneficial than those of sticking to my guns. Again, it seems plain to me that judges and other jurists already do this all the time. But they do it while systematically denying it.

I have, moreover, to take into account what others will likely do with *their* discretion. What I say about, first, my discretion, and, second, about how I propose to exercise it, should be influenced by the consequences for the legal order (and beyond) that I anticipate from their reaction to the way I describe what I am doing. So I may have to confront the classic problem of good faith in my description of what I'm doing—do I misrepresent myself as law following when I experience myself as law constituting? One way in which I think of this book is as an attempt to force this question.

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