Vincent Luizzi, San Marcos (TX)

Law as Acts of Citizens

*Abstract:*This paper shifts the focus of traditional conceptions of law from norms to norm-guided conduct of citizens and explores the viability of re-thinking law in this fashion. The project may be seen as an extension of the approach of the American Legal Realists who conceived law's essence as the activity of judges.

If we are ever to capture law's place in human experience, we should conceive its essence as nothing other than acts of citizens guided by norms of the legal order. Most views on law's essence focus on law as an object, usually some sort of norm, whether it be a statute, a rule in a judicial opinion, or some rule deeply rooted in custom. The attempt here is to shift the focus to the conduct of citizens, conceiving law's essence primarily as activity much like other thinkers have had us move from thinking about art and knowledge as objects to conceiving them as activities. This shift of focus is not meant to account for all of the phenomena commonly associated with law ranging from the purpose and nature of legal norms to the relationship they have with other social norms especially moral ones. All of these are important issues which can and should be addressed, but the primary purpose of this essay is to re-align our thinking about what is essential to law by featuring the conduct of citizens.

All other alternatives bloat such variables as normativity and judicial activity to the point that this activity of citizens is squeezed out of the concept as irrelevant, set aside as a matter of lesser importance, or incorporated in so diffuse a fashion as to make this activity almost undetectable. An exploration of this comparison is a good starting point for elucidating this thesis on law and beginning to establish it, which are the two goals of this essay. Further efforts to clarify the thesis include a discussion of analyses similar in their approach of connecting common experience with some entity like art or language and a comparison of this theory of law with similar theories. One effort to establish it features its explanatory power.

Later in the essay, I will discuss in detail an analogy between language and law. I offer it here to explain the basic insight of the thesis about law and to assist with establishing its initial plausibility. The idea is that we can think of language, like law, as consisting of many rules. We can also recognize that the essence of language is not the rules themselves but people using them to communicate. Thought of in this way, the essence of language is an activity of people guided by linguistic norms. I suggest we think of law in this way, that we recognize that its essence is not the legal norms themselves but people using these norms to guide their conduct. In this view, the essence of law is rule-guided conduct much like the essence of language is.

Initial Comparison with Other Theories and Common Sense

Consider some of the major theses about the nature of law and how the activity of citizens figures in, if at all. If law is a prophecy of what some court will do, it excludes the citizen's activity in favor of a judge's acts. If law is an ordinance of reason promulgated by him who must care for the community, it addresses the nature, purpose, and origin of law excluding the citizen's activity as much as law conceived as an order backed by a threat does. Law as an instrument for securing social interests likewise is devoid of this conduct, as satisfaction of interests becomes of paramount importance.

There is a hint of the citizen's activity in the formulation of law as a command which governs those who are in the habit of obedience to a sovereign, or, in its more evolved form, where a citizen's general acceptance replaces habit of obedience. Attention does appear to be paid to citizens in these formulations but the attention is to their mental states – habit or acceptance – and the connection of these states to norms. Whether any further acts are ever performed again by any citizen seems of no significance for these major theories of law. But this activity is crucial for capturing the essence of law, since, for one thing, it allows for the introduction of a variable upon which almost every feature of law depends. There is no decision making in the absence of this activity, no legal process from the onset of litigation to the final appeal, no purpose to a system of punishment. Far from being what sets the legal system in motion, the norm-guided conduct itself is law.

Once set on this course of thinking of law which highlights a citizen's activity, common sense appears as both friend and foe. This appeal to common experience surely is agreeable to common sense which probably regards as obvious and in need of no analysis the nature of all matters that philosophers ponder whether it be law, art, reality, religion, society, or knowledge. In this view, people as concert-goers and gallery visitors, as citizens voting and assembling, as active parishioners, as learners of new things, in short, as people right in the midst of these subjects, these people have special access to the nature of these phenomena, since their nature, in large measure, is a function of people's active engagement in them.

Our thesis' affinity with common sense, however, is not sufficient to halt philosophical inquiry. Rather, the overlap of this thesis with common sense can be seen as a strength while at the same time realizing that common sense and experience simply have not offered the insights which philosophy has about matters like law, art, and religion. The analysis which omits or gives short shrift to this experience seem always to be deficient in having us conceive these phenomena separate from their complex connections with human experience; this sort of analysis seem to rest on a false assumption: because there are entities essentially associated with major phenomena and these entities are physically separable from human conduct, entities like a painting, a legal code, a book of sacred teachings and ceremonies, or the artifacts of a culture, we may thereby understand the phenomena to which they are connected with little or no reference to human experience.

On the other hand, philosophy has posited and mapped out the ramifications of many insights about each of these phenomena – art as a communication of feeling, an expression of feeling, a vehicle for conveying knowledge, for furthering the goals of society, for creating beautiful, untrue things, for purging us of violent emotions, and for prompting us to reform society. The careful thought which surrounds these insights, not to mention the insights themselves, resulted from no labors of people of general experience. So an affirmation of the significance of general experience does not pre-empt philosophy.

Similar Approaches

This approach of conceiving law as norm-guided activity of a citizen is very much akin to Tolstoy's treatment of art. For one thing, he makes the perceiver's experience not just an element of art but a necessary component. And art for Tolstoy is an activity essentially involving a communication of feeling whereby an artist first has a feeling and then, by way of the creation, transmits the feeling to the perceiver: "To evoke in oneself

a feeling one has experienced, and, having evoked it in oneself, then, by means of movements, lines, colors, sounds, or forms expressed in words, so to transmit that feeling that others may experience the same feeling – this is the activity of art."[1]

Tolstoy captures the same thought in the sentence that follows, this time even more directly equating art with activity: "Art is a human activity consisting in this, that one man consciously, by means of certain external signs, hands on to others feelings he has lived through, and that other people are infected by these feelings and also experience them."[2] An analysis of this sort is quite different from other studies of art; while they may gauge the effect of art on the perceiver, whether it conveys knowledge or stimulates certain feelings, they raise these issues independently of the question of what art is and capture nothing of its essence as an activity. John Dewey's work, both with regard to his general approach to philosophical issues and to his specific studies, is another case in point. Dewey was committed to realigning human institutions with human experience and conduct. Sometimes he diagnosed the problem as our having separated the actual and the ideal. He wanted us to understand generally that ethics, religion, politics, knowledge, and art sprung from attempts to address genuine human needs. Thinking about values, for example, as ideals to embrace independent of human striving is faulty thinking. Rather, we should think about values as ideals we affirm which guide us in attaining satisfying experiences. Dewey's pragmatic conception of knowledge is an especially good example of thinking of what we commonly conceive as an entity in terms of activity. Dewey is critical of the conception of knowledge which depicts knowledge as an accurate correspondence between the subject and object and opts for capturing the dynamic nature of the phenomenon by speaking of know*ing*: "For the static, cross-sectional, non-temporal relation of subject and object, the pragmatic hypothesis substitutes apprehension of a thing in terms of the results in other things it is tending to effect ... . Knowing is the act, stimulated by this foresight, of securing and averting consequences."[3]

It is ironic that Dewey did not extend this thinking about knowledge as an activity to law and instead stressed the need to see judges as experimenters in understanding law's essence. Still it is worth noting specifically the features his view of knowledge have in common with our conception of law. First, the focus is on the individual engaged in an activity and not on some independently existing, objective entity separate from this acting individual. Second, both views put the individual in a position where his or her agency can make a difference in experience as it forms, transforms, and reforms it.

Still another attempt to define as activity what we usually think of as an object is Mead's thinking about the object itself. Our sensations are products of our movements and we conjure up images of our responses, so it makes sense, for Mead, to define the physical object in terms of conduct. Says Mead,

> "Insofar as our physical conduct involves movements toward or away from distant objects and their being handled when we come in contact with them, we perceive all things in terms of distance sensation – color, sound, odor – which stand for hard or soft, big or little, objects of varying forms which actual conduct will reveal... . Percepts – physical objects – are compounds of the experience of immediate stimulation and the imagery of the response to which this stimulation will lead. The object can properly be stated in terms of conduct."[4]

1 Leo Tolstoy, *What Is Art*, 1898.
2 Tolstoy, (note 1).
3 John Dewey, The Need for a Recovery in Philosophy, in John Dewey *et al.*, *Creative Intelligence: Essays in the Pragmatic Attitude*, 1917.
4 George Mead, The Mechanism of Social Consciousness, *The Journal of Philosophy, Psychology, and Scientific Method*, vol. 9, (1912), 401.

One way of thinking about the nature of language is useful in elucidating the thesis about law under consideration. This line of thought is captured in part by an adage to which some lexicographers subscribe, that spoken English is the English. It comes up in a debate about whether dictionaries should be descriptive or prescriptive. Those lexicographers endorsing the maxim are the descriptivists. They see meanings as evolving and hence see their task as one of recording how people use words rather than one of telling them how words should be used. The point is that, in this one dimension of language, the meaning of words, we see that some thinkers turn to what is actually spoken as the essence of this realm of language as opposed to seeing a set of definitions or rules assigning meanings to words as the essence of meaning.

As we look at language in a broader way, we see how our understanding it primarily as an activity of people rather than a set of rules bears strong resemblance to our thesis about the nature of law. Consider all of the rules of a language – rules of phonetics, syntax, and semantics. In one view, the phenomenon of language is something more than these sets of rules; its essence is the activity of communicating guided by these rules or these rules in action or these rules put to use. it seems we endorse such a view when we refer to languages no longer being spoken as "dead" languages. Further, we seem to endorse the view of language as essentially activity rather than rules when we have no expectation that people speaking the language be able to recite these rules. This type of thinking is operative in our conception of law which acknowledges that there are identifiable rules connected with law's essence but turns to the conduct guided by them as what is essential.

The analogy with language is useful further in bringing out that people participate in language and law in a variety of ways and levels all of which we can speak of in a uniform way. Consider children learning to talk, students using the language as they study it, teachers evaluating what these students do, people engaged in discourse about quotidial concerns, authors – poets, novelists, and journalists – writing manuscripts, people reviewing the work of these authors, people arguing, chatting, contracting, purchasing, sentencing, and borrowing. We might think of some of them as novices, some experts but of all of them as engaged in the activity of language.

In this manner we can think about law comprehending a broad range of people acting in many ways and capacities – children following rules about crossing at cross-walks, people respecting property boundaries, sheltering money from taxes, extending equal rights to other people, legislating, judging, executing, imprisoning, drafting wills, taking caution with alcohol consumption when driving, and conducting a search under a warrant. All of these people become key players in our conception of law as we see each of these citizen's acts as guided by legal norms.

The Thesis Distinguished from Similar Theses of Law as Activity

Various contributions of the American legal realists are among the views closest to the position advanced here in that many of them depict law as judicial activity or define it such that judicial activity is of paramount importance. Jerome Frank, for example, concludes, "Law, then, as to any given situation is either (a) actual law, that is, a specific past decision, as to that situation, or (b) probable law, that is, a guess as to a specific future decision."[5] Oliver Wendell Holmes adopts what Frank sees as probable law as

5 Jerome Frank, *Law and the Modern Mind*, 1963, 52.

his view of law itself. "The prophesies of what courts will do in fact, and nothing more pretentious, are what I mean by the law."[6] So the notion of law's being a type of activity is not new to jurisprudence. The novelty of my thesis is its reaching beyond judicial acts to the acts of all citizens to conceive law.

More recently, Richard Posner endorses the notion that "law is an activity rather than a concept or group of concepts."[7] But as his discussion unfolds, we find he is working with a concept not nearly as broad as the view urged here and hardly distinguishable from a realist's conception. The activity we find in Posner's definition is nothing more than judicial activity, and he makes this explicit as he adopts Holmes's view. Says Posner, "Holmes was on the right track in proposing the prediction theory of law which is an activity theory; his critics have been too quick to dismiss it."[8] It is true that Posner's notion of law as activity is but one feature of eight that he packs into his overall conception of law, but none of these other features bear essentially on broadening the notion of activity beyond that of the judiciary.

Vico's theory of law depicts law as human reasoning and as such is a variant of the notion of law as activity. He defines natural law in the final historical stage of jurisprudence as "the human law dictated by fully developed human reason."[9] In this stage, called "human jurisprudence," one "looks to the facts themselves and benignly bends the rule of law to all the requirements of the equity of the causes."[10] Now it seems that the positive law (the rule of law) will always be applied or bent by a human reason and in this sense the positive law always carries with it the rider "as dictated by human reason." The outcome of reasoning about a positive norm's applicability in a specific situation is natural law, and to the extent that the outcome is an application reached through the activity of reasoning, natural law is an activity. This merging or blurring of natural and positive law is part of his project of eschewing the dualism of natural and positive law, the ideal and the historical, or the *verum* and *certum* of the law. As one commentator put it, Vico establishes the convertibility of the *verum* and the *certum* of the law.[11]

What might the counterparts to Vico's thinking be in our account of Law? One might see Vico's positive law as our norm, Vico's reasoning about the application as our understanding of how the norm is guiding us, and Vico's outcome of reasoning or act of applying or natural law as our act of the citizen or law itself. Although there are analogues between our view and Vico's, there is a point where the analogy breaks down. Human jurisprudence is the activity of reasoning but is not within the purview of the conduct of any citizen but only activity of the jurists. So Vico's view also lacks the generality of the view urged here which comprehends the activity of the entire citizenry as part of the phenomenon of law.

Explanatory Power of the Thesis

In closing, I offer the thesis about law as activity of a citizens as a useful alternative to how we explain varying perceptions of the law. Consider the citizen who has a general

6 Oliver Wendell Holmes, The Path of the Law, *Harvard Law Review* X (1897).
7 Richard Posner, *The Problems of Jurisprudence,* 1990.
8 Posner (note 6).
9 Giambattista Vico, *Scienza Nuova,* third edition 1744, in *The New Science of Giambattista Vico,* revised translation by Thomas Goddard Bergin and Max Harold Fisch, 1988, 338.
10 Vico (note 8), 343–344.
11 A. Robert Caponigri, *Time and Idea,* 1953, 50.

sense of a rule urging that one should not drink and drive and conforms to it. This activity I wish to assert is the essence of what law is. Consider another citizen who has a more refined sense of the rule in that this citizen realizes that only when a certain per-cent of alcohol is in one's blood is one obligated to refrain from driving and this citizen so guides his or her activity. This too is law. Or consider too a citizen who can quote the the statute on "Driving While Intoxicated" (DWI) and draws on it to guide his or her activity. This is law. Another citizen is aware of the range of punishments for being convicted of DWI and guides his or her activity with them. Law. Think of citizens who are guided by varying combinations of these elements comprising the social norm concerning DWI. All law. Consider lawyers arguing DWI cases drawing on their understanding of the statute and its applicability to the case. Law. Consider judges deciding cases guided by their perception of the norm. Law. Just as language, art, and knowledge can be seen as phenomena essentially involving the activity of people at varying levels of the activity in question, so too are these examples above showing law to be of this nature. These considerations suggest something of the explanatory power of this thesis and are part of the case I am developing for it.

Author's Address: Vincent Luizzi, Department of Philosophy, Southwest Texas State University, 601 University Drive, San Marcos, Texas 78666, USA