Case Western Reserve Law Review

Volume 9 | Issue 2

1958

The Value Analysis of Legal Discourse

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By Harold D. Lasswell

MODERN advances in the study of language and communication have provided new or greatly improved tools for the study of the legal process. The progress of legal research and ultimately of legal instruction and practice is intimately bound up with whatever innovations are made in the study of signs and symbols. After all, language is perhaps the most obvious feature of the legal process, whether we have in mind statutes and regulations, contractual and testamentary instruments, writs, briefs or pleadings, or the response of the court.

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There is, however, some distortion of perspective if language is examined apart from the context in which it occurs. Speaking or writing is *more* than communication. It is a *total act;* and an act occurs in a context of interaction. It affects the position of the communicator, or the audience, in society. In a word the use of language is an operation that does something to people. They are better, or worse off than they were before (or they have held their own). They are better or worse informed. They are more or less respected. Or their position is affected in terms of some other value.

That an act primarily specialized to communication is also an act of value indulgence or deprivation is very obvious in the legal process. What happens in litigation? A court, acting as a decision maker in the name of the body politic, indulges or deprives the *claims* of the parties who appear before it. More than that; the community decision makers accept or reject — that is, they indulge or deprive — the *justifications* that have been put forward on behalf of rival claims. Not only people but prescriptive propositions are affected. Claims are justified by invoking the propositions found in statutes or other sources held to be authoritative, and by factual propositions supported by exhibits and witnesses. When the judges decide for or against plaintiff or defendant the potential influence of several kinds of propositions is strengthened or weakened.

VALUES: INDULGENCE OR DEPRIVATION

A moment's reflection will convince anyone that more values are at stake in litigation than are made explicit in the claims advanced by the parties. Legal counsellors presumably receive fees. Hence some economic values are involved for other participants than plaintiffs or defendants. If a witness is caught in a lie the moral status of the individual is impaired, (the witness is deprived in terms of the "rectitude" value). The witness who is looked upon as a friend by one of the parties and who testifies to something that damages the party's claim may very well lose a friend (incurring a deprivation of "affection"). Should a young attorney fail to interpose objections at the proper moment he may learn a lesson of enduring importance for his subsequent career thereby overcoming a self-deprivation in terms of "skill." The attorney who does what is regarded as a masterful job may gain in stature at the bar thereby obtaining "respect" indulgences. Should the litigation attract general notice it may provide public instruction in the working of the legal system thus contributing to "enlightenment." A tempestuous clash of personalities throughout the proceedings may have an obvious and adverse effect upon the physical and mental condition of the judge (upon his "well-being"). If the result alienates important politicians there may be adverse implications for the advancement of the judge to the Supreme Court. A loss of political support is a loss of "power."

I have been referring to value changes involving the immediate parties to litigation. It is important to keep in mind the fact that much wider contexts may be at once affected by the outcome. This is most evident when public attention is riveted on a case. The significance of the conviction of Alger Hiss was undeniable. It was a formidable deprivation inflicted upon the "Liberal" forces of the nation, compromising their moral position and self-esteem ("rectitude" and "respect"), and increasing their vulnerability in the arenas of politics at every level. The school segregation cases have great political importance. It is clear that "respect," "skill" and "enlightenment" are also at stake. An exhaustive analysis of those who become in a sense co-parties to a litigation demonstrates the point that they too are better or worse off as a result of the decision, and that all values are in varying degree at stake.

The same point applies to the longer-range impact of legal outcomes. Looking at the history of the legal system we think of decisions that have become "leading cases" and have contributed to the value changes that have occurred in this country and hence in the world community. Some of these cases have fostered or blocked the growth of giant business monopolies, thereby affecting the production and distribution of wealth. Some cases have protected the integrity of majority rule or actually ex-

tended the sharing of political power. Others have profoundly influenced the caste or class structure of American society (the "respect" value). Here again an exhaustive analysis would show that the shaping and sharing of all social values have been affected by the outcome of litigation.[1]

LANGUAGE AND VALUES

Having sketched the significant context in which legal communication takes place we can now subject the role of language to direct examination. One major point instantly suggests itself. Many value indulgences and deprivations are peculiarly bound up with words and gestures. This is notably clear when respect is given or withheld. We give "respect" by employing deferential words, tones of voice, and gestures; we inflict deprivations when we refrain from invoking the patterns appropriate to the granting of respect, or express contempt overtly. The giving or receiving of "enlightenment" is another sphere in which words play a stellar part, since "enlightenment" is typically conveyed as information. The same observation can be made about "rectitude" and "affection." We characterize one another (and ourselves privately) as "good" or "bad"; and a large part of "congenial" or "uncongenial" human relations hinges upon words and gestures. Although discourse plays a prominent part in the giving or receiving of values of every kind it is obvious that more than language is typically implicated in transactions that involve wealth, well-being, power and many special skills. Wealth includes a producing or consuming relationship to resources and commodities. Well-being is affected by physical assault or care. Power involves the sanctioning measures at the disposal of the community; and technical skill usually is acquired or exercised in connection with physical facilities.

We are now in a position to ask why the study of language is important for the scientfic observer and the practitioner. Although results are not exclusively influenced by language, there can be no doubt that discourse is one of the prime instruments by which outcomes can be affected. Since the language "act" is only partly described when it is called an "act of communication" it is necessary to consider the nature of the "total act" of which any given word or gesture is a part.

I have been calling attention to the fact that all acts are significant in social interaction as value indulgences or deprivations. When values are used primarily to influence other values, as when litigants are attempting

[1] With my colleague Professor Myres S. McDougal at Yale, I have been engaged in the application of value analysis to the study of legal processes. See especially McDougal, *International Law, Power, and Policy*, 82 HAGUE ACADEMIE DE DROIT INTERNATIONAL: RECUEIL DES COURS 137-259 (1953); McDougal, *The Comparative Study of Law: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915-46 (1952).

to affect the decision of a court, values are employed as *bases* to affect *scope* values. The management of litigation is a sequence of operations in which the participants make use of the base values at their disposal to affect outcomes.

THE VALUE CONTEXT

It may be worth while to provide a few reminders of the total acts in which the language of litigation is embedded. The most distinctive activity of an advocate is the justification of his client's claims by invoking authoritative prescriptions. The typical prescriptions are statutes, legal doctrines, and opinions; these formulations are held to be authoritative because they are uttered by the competent decision makers of the community, or by interpreters who have been accepted by the decision makers. The advocate seeks to utilize the authority of past decision makers as a base for influencing the response of the present court. Arguments in terms of authority are part of the process of enlightening the judge; they afford an opportunity for the exercise of skill, and for influencing the flow of respect, affection and evaluations of rectitude received by the court.

Authority is a form of *power;* but it is not the only form. The representatives of a client may try to line up political bosses to influence the court. This is not a matter of authority, but of control. Since it is in defiance of the rules of the formal code, it is naked power. This sort of thing seldom gets into a transcript, but is often made use of. It should serve as a reminder of the difference between what is routinely recorded and what may be crucially significant.

Wealth is another base value which may leave no explicit mark in a transcript. If a client is well-to-do he may be able to engage the services of expensive counsel and to hire intelligence services to round up witnesses and exhibits. The observer may be able to infer that in a given litigation wealth was a significant base value even in the absence of a "receipted bill."

The stereotyped idioms of the court room — "Your Honor," "My learned colleague," and so on — are *respect* giving and receiving instrumentalities. Here again the typed transcript is of limited help, since it does not reproduce the tone of voice or the gestures that accompany the words; nor does the record necessarily show how the parties, witnesses, and counsel conduct themselves when not talking.

Many statements that appear in the record convey information about the past or future. *Enlightenment* is unmistakably involved. The scientific observer may conduct the research necessary to show that a given series of statements are negative rather than positive in terms of enlight-

enment; that is, statements may be deliberate or inadvertent distortions of what went on, or what competent and unprejudiced minds regard as probable in the future. It is well known that a cloud of witnesses may let fall no raindrops of truth.

The tactics of seduction are among the most favored instruments at the disposal of counsel in a jury trial. Experienced advocates do what they can to make themselves and their clients likeable, and to benefit from a positive flow of *affection.* Much of this is attempted by exploiting the language of posture and gesture, and is poorly reflected in stenographic or even tape recordings.

Some language can only be explained as part of a deliberate effort to undermine the physical and even the mental integrity of judges or witnesses. The sheer length of the proceedings may be designed to fatigue the judge and increase the likelihood of reversible error. Thus the state of *well-being* is adapted as a base of operations to affect the outcome.

Inseparable from litigation in which witnesses appear is the building up or tearing down of reputations for veracity and in general for moral character. The language of ethical opprobrium or encomium is an indulgence or deprivation of *rectitude* designed to influence the court's response.

The employment of *skill* is the final base value to be examined in this list. Skill is a matter of operating clumsily or expertly within the situation. Advocacy is a learnable, and to a considerable degree, a teachable activity. Brilliant lawyers may lose cases. The test of skill is not "whether the patient died" but whether all that was professionally possible was done to save him. Laymen are likely to confuse the box score with the excellence of counsel. Since skill is "intrinsic," it depends upon the internal arrangement of the distinctive elements of the litigating process.

Words in Context

The foregoing analysis has correctly implied that acts are interconnected, and that the same sequence of words may be properly classified in several value contexts. After all, words are not bricks occupying independent physical space. There is, of course, a "bricklike" aspect of language. It includes the sounds emitted by the vocal apparatus. But the "non-brick" dimensions of words are events of "interpretation" and they overlap in time and space. Interpretations are "subjective" events including, among other elements, the perception of what is referred to by the sounds. It may be perceived that the events of reference belong to many outcome, pre-outcome, and post-outcome events. The subjective event of perception is therefore multiple and not one-valued, though it is often convenient to classify it according to dominant references, rather than

exhaustively.[2] When we analyze a statement found in the opinion of a court according to the usual meaning of the words employed, it may be obvious that several deprivations are imposed upon the value position of the losing side. The statement may reject a principal justification put forward by the counsel for the loser. This is a deprivation in terms of authority which is a component of power. Perhaps the statement heaps some ridicule upon the argument. This may be taken in a double sense, one as a respect deprivation imposed upon the counsel, the other as a low evaluation of counsel's competence (skill) as a lawyer. The statement simultaneously reflects against the good judgment of the losing party in engaging the services of counsel. Without carrying the analysis any further, it is enough to indicate the multiple-context in which any specific item can be relevantly placed.

As legal scholars begin to draw upon the tools available for studying the legal process, language occupies a central position. Research can be cumulative if it proceeds within a frame of reference that takes into full account the social context in which any use of language is a "part-act," not a "total act," of value indulgence and deprivation.

It is quite apparent that much can be done to provide a more usable system of case reporting than we have now. Existing methods use relatively primitive modes of "content analysis"; they refer to printed reports with the key symbols current in the vernacular of legal instruction and practice.[3] For the most part these key words (or phrases) are employed to index abstracts based on decisions, opinions or full transcripts. Cases are also reported according to the jurisdiction of the "final" decision maker. There is little breakdown by factual situation which is unfortunate because the factual terms in general are highly ambiguous.

The account of the facts given in a judicial opinion is in the nature of a self-serving declaration. The court always purports to act within the framework of authoritative prescription. Any legal "formula" is compounded of two kinds of statements, one of which refers to a "contin-

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[2] See H. D. LASSWELL and A. KAPLAN, POWER AND SOCIETY; A FRAMEWORK FOR POLITICAL INQUIRY, 1950. Professor Lounsbury has made the important point that the forms studied by traditional linguists do not vary as culture varies. Semantic instruments do. See Lounsbury, *A Semantic Analysis of the Pawnee Kinship Usage*, 32 LANGUAGE 158-94 (1956). See Cairns, *Language of Jurisprudence*, and Lasswell, *Language of Politics*, in LANGUAGE: AN ENQUIRY INTO ITS MEANING AND FUNCTION, c. XIV and XV, (Anshen Ed. 1957).

[3] Concerning content analysis: LASSWELL, LEITES AND ASSOC., LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS, (1949); LASSWELL, LERNER, DE SOLA POOL, THE COMPARATIVE STUDY OF SYMBOLS; AN INTRODUCTION, (1952). On current methods and theories in general; MILLER, LANGUAGE AND COMMUNICATION, (1951).

gency" which is a factual state of affairs, another to a "norm" that specifies the decision maker's response. Thus:

Legal Formula

contingency	c^1 . . .
norm	n^1 . . .

The formula says that "If c^1 . . . , then n^1"; and the court in applying the norm affirms the contingency. A scientific observer might have solid grounds for doubting that the proposition c^1 is an accurate statement of fact. He might be able to demonstrate that the court decided whom to indulge or deprive before choosing a norm and completed the selection of a "contingency" even later.

It is now commonplace to observe that the justifications advanced by the parties in support of a claim may have little to do with the original circumstances of the controversy. The fundamental structure of litigation can be set forth concisely:

Claims advanced by the parties:
- Demand statements (DEMAND STATEMENT^1 . . . ; e.g., I ask the court to turn the assets of the deceased over to me.)

Justifications advanced by the parties:
- Fact-form statements[4]
  - Identification statements (IDENTIFICATION STATEMENT^1 . . . ; e.g., I am the lawful heir of x)
  - Expectation statements[5] (EXPECTATION STATEMENT^1 . . . ; x died on January 15, 1956)
- Demand statements (d^1 . . . ; e.g., my claim is more consistent than any opposing claim with the relevant norms [especially the legal formulas] and the evidence [the weight of the fact-form statements]).

Response of the court (indulges or deprives):
- Claims advanced by the parties.
  - Demand statements (e.g., the court directs the assets of the deceased to be turned over to the plaintiff or defendant.)
- Justifications advanced by the parties:
  - Fact-form statements
    - Identification statements (e.g., the court identifies the plaintiff [defendant] as the lawful heir of x)

[4] All statements are divided into "demand" and "non-demand" categories. "Fact-form" is a synonym for "non-demand."

[5] This category includes past and present as well as future references.

Expectation statements (e.g., the court accepts the statements of the plaintiff [defendant] as factual.)

Demand statements

The claims advanced by the plaintiff [defendant] are more consistent than opposing claims with the relevant norms [especially the legal formula]

First, a comment about the terminology employed in distinguishing among various kinds of communications. The essential difference is between utterances in which the statement maker commits himself to a preference or a determination and other utterances. The former are labelled "demand" statements and the latter are simply "non-demand."

The latter is split into two categories. The first includes the express declarations that mark the boundary of the "self" of the statement maker. When I say that I am an "American," or a "Southerner," I am saying that my ego — the primary "I," "me" symbol — is included with all other "Americans" or "Southerners" to constitute part of my "self." These are my "identifications" (or "identities"). I identify "non-self others" when I refer to "Germans" or "Westerners."

The second "non-demand" category can be residually defined as "non-demand" and "non-identification." More affirmatively, this includes all matter of fact references to past, present or future events. Economists speak of "expectations *post*" and "expectations *ante*" in describing factual references to the past and future. Paralleling this usage we keep the term "expectation" to cover both. The expression "fact form" is a synonym indicating what is meant.

The claims put forward by the parties are value claims. The community decision maker is asked, for example, to direct that wealth be turned over to the plaintiff.

The justifications advanced by the parties are divisible into fact-form statements and demands. A party refers to himself in terms that are borrowed from the terminology of legal formulas as a means of influencing the court to agree to this designation ("the lawful heir"). A party also makes a number of expectation statements which are corroborated in some cases by more than communicated material (objects exhibited in evidence). The demand statements (or arguments) that are asserted on behalf of a litigant do not always restrict themselves to a legal formula. Often the norms that are employed concern expediency rather than legality, or ethics (rectitude). Expedient considerations may be asserted in regard to wealth or naked power, irrespective of accepted authority.

A litigation, plainly, is not a situation in which the dominant value is enlightenment or skill. Litigations are power situations in which the parties strive to capture the decision makers of the community as allies,

and the court responds by indulging or depriving the value claims that have been put before it. In so doing judges also indulge or deprive all participants, not only the plaintiff or the defendant, plus all statements that have been used to justify the winning or losing claims. Thus the tactical gambit of "pre-labelling" the self according to the response desired from the court may possibly succeed. One may actually be accepted as the "lawful heir." A comprehensive placing of a litigation in context would include the *indirect* as well as the *direct* participants in it (such, for instance, as those who follow the news of the case or contribute to defense funds). The study of the ensuing *effects* of the decision calls for the consideration of all values in any way influenced by the outcome.

CONTEMPLATIVE AND MANIPULATIVE ANALYSIS

When we examine a case in order to explain the response of a court, it is necessary to describe the factors that appear to have conditioned the decision. The form of such *explanation* is:

> Court Response (RESPONSE X^1 . . .) was more probable than other responses on account of
>
> Environmental Factors (FACTOR Y^1 . . .) which are the events at the focus of attention of the court in the courtroom and outside the courtroom during the same period. Included are the claims (c^1 . . .) and justifications (j^1 . . .) advanced by the parties (p^1 . . .), who have characteristics (k^1 . . .).
>
> Predispositional factors (FACTOR Y^1 . . .) can be described by examining the responses that have been displayed in the most similar recent cases, plus the resulting indulgences or deprivations experienced by the court (e.g., professional disapproval or approval).

When we shift from explanation to *forecasting or prediction* the general form is to say that court response x^1 . . . will be more probable than other responses *if* environmental factors y^1 . . . and predispositional factors z^1 . . . are present; and the probability of such occurrences is so and so.

The *contemplative* mode of referring to past or future is illustrated by the explanatory and predictive statements made above. They follow the general form of scientific generalizations: "If . . . then . . . ." The *manipulative* mode states principles of action which are valid to the extent that they are consonant with scientific generalizations. "In order to increase the probability of response x^1 . . . , manage environmental factors y^1 . . . by strategy y^a . . . , and adapt to predispositions z^1 . . . by strategy z^a . . . ." Partial example: "In order to win over Mr. Justice X, justify claims as far as possible in terms of the Bill of Rights."

THE TOTAL FORMULA OF A LEGAL SYSTEM

The point has not yet been made that individual formulas are part of a total system of formulas within which litigation proceeds at any given time. We all know that it is common to assume that the entire corpus of legal prescriptions is a logical whole. If contradictions exist they are expected to be resolved by interpretation unless they are unescapably inscribed in constitutional charters.

CRYPTO-LOGICAL SYSTEMS

Modern students of jurisprudence, at least, are very much alive to the fact that legal systems are more accurately called "crypto-logical" than logical. The term emphasizes the fact that while in some schools of jurisprudence they are widely assumed to be self-consistent, there are flagrant exceptions. We are well acquainted with some of the intellectual devices by which judges have sought to legitimize the inconsistencies of courts. There is, for instance, the presumption of a natural legal order which is self-consistent and superior to any source of inconsistency which might arise from judicial interpretations. A less far-reaching device is the presumption of consistent intention on the part of the framers of the fundamental principles of the legal order. This enables many seeming errors to be righted by the judicial organ.

Undoubtedly there are important factors aligned for and against the "logicalization" of a legal system. The result is an unsteady state reflecting the relative strength of all factors. The modern study of communication has made us more aware than ever of why and how formulas come to be employed in ways that flagrantly contradict their manifest meaning, as viewed by an unprejudiced analyst of language.

Power calculations work both ways; that is, some parties and decision makers expect to be better off by adhering to current usage than by "re-interpreting" usage. Others expect to be better off by "re-interpretation" whether the variation is admitted to be a re-interpretation or not. There is no valid ground for believing that these influences will be of precisely equal weight. On the contrary they probably vary through time. In a changing context re-interpretation wins out, since a changed situation opens the door to novel perceptions of "reality." The older consensus, once stabilized within an unchanging context, is relatively invulnerable.

Another point is perhaps worthy of emphasis. Three categories of statement have been compared:

> (1) Legal formulas comprising the legal system of a public order.
> (2) Fact-form statements (supplemented by demands and identifications) accepted by the courts as constituting specific indexes for the terms that occur in the legal formula.

(3) Statements by qualified and unprejudiced scientific observers of the relations between (1) and (2) during specified periods.

I am saying that the top formulas of a legal system float through time much like a captive balloon that is continually retethered and which gradually reverses its original position in the air. The tie-lines are the fact-form (and co-ordinate) statements that constitute a shifting bond with the social context as a whole. The statement that the relationship between the balloon and the context tends through time to reverse is, of course, an hypothesis. I may remark that the balloon image is not to be interpreted too literally. I take no position on whether the movement is generated by the pressure of judicial gas inside the balloon or by currents of hot air from below.

The inference is not that since they are open to eventual frustration efforts at logical consistency are futile. It can be forcefully affirmed that in a body politic whose aspiration is toward freedom, it is particularly important to share enlightenment, and therefore to disclose inconsistencies that occure within the legal system. Under these circumstances, deviations can be relatively more "advertent" than "inadvertent."[6]

CONCLUSION

Modern tools of analysis, and especially of communication analysis, have put many new or sharpened instruments in our hands for the study and control of legal processes. It is now practicable to explore the value significance of language at any stage. Pre-litigation events can be examined for the purpose of discovering the conditions under which litigation is resorted to (that is, the original state of deprivation or indulgence). It is entirely feasible to analyze the value claims of the parties, and the justifications (value standards) invoked to justify the claims. We can explain past responses with more certainty and clarify the bases of prediction. It is also within the range of possibility to improve the strategies of counsel. Finally we can improve our estimate of the subsequent impact of the flow of decision upon value shaping and sharing throughout society.

[6] See the important article by Layman E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents,* 66 YALE L.J. 833 (1957). The author undertakes to show how logic is useful in the legal process by examining a section of the Uniform Sales Act.