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Do we use law as an instrument of constraint to keep people from evil or damaging behavior, or do we, through rules of law, provide for our citizens a framework within which they can organize their relations with one another in such a manner as to make possible a peaceful and profitable coexistence? This question asks whether law, on the one hand, is assigned the purpose of achieving social control over the behavior of human beings; or whether, on the other hand, its function is to provide a means for facilitating human interaction.

The aim of pitting these two quite distinct conceptions of the function of law against each other is not to pronounce which is "right." Neither is the purpose to dismiss the whole problem simply by accepting both as "right." Each conception does present perfectly meaningful ways of perceiving what human beings attempt to accomplish through law. As we examine the different branches of law, we perceive that in one area one of these views of the function of law may be more apt and helpful than the other, though at times the two become so intertwined it is difficult to pull them apart. There are contexts in which they fit together so closely that they seem to merge; there are, on the other hand, contexts in which they stand in sharp and meaningful contrast to one another. My objective here is to suggest some of the interrelations that may exist between the two ways of perceiving the function of the law. These interrelations run all the way from open conflict to an indispensable reciprocal reinforcement.

The reciprocal reinforcement achieved by combining the two functions of law may perhaps best be illustrated by the related social phenomenon, language. Surely the primary function of language is to facilitate a particular kind of interaction, that involving a two-way communication of meaning. At the same time there are rules of grammar and of word-meaning that control linguistic behavior. We must respect those rules if we are to be understood at all. In a very real sense language sets us free by imposing limits on how we express what we intend to say. Both a dictionary and a grammar have a finite number of pages. At times in

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the history of language under the pressure of new conditions the rules of grammar and the existing limitations of vocabulary may undergo significant change. But a language that imposed no limitations at all on what is expressed or how something is said would be unable to function. Effective communication depends upon orderly means of communication; order, of necessity, implies limits and an acceptance of constraints.

The laws relating to murder and other forms of physical violence seem to fit very neatly the conception assigning to law the function of effecting a control over human behavior. On the surface of things, the rules concerning violence inflicted by one human being on another seem very remote from anything like a facilitation of human interaction. The man who sneaks up behind a fellow human being and plunges a knife into his back can scarcely be described as engaged in an interaction with his victim. The whole interactional perspective on law may seem, therefore, irrelevant to the rule prohibiting murder and acts of physical violence toward one's fellows.

Yet, even in the law dealing with murder, situations can arise in which the interactional perspective becomes basic and essential. *A* threatens *B* with his fist and appears to be reaching for something in his pocket. *B* at once draws a revolver and kills *A*. Charged with crime, *B* pleads that his act was done in self-defense. Situations of this sort are very difficult for the courts, both in securing reliable evidence as to just what happened and in judging the reasonableness of *B*'s actions in the circumstances confronting him. Needless to say, these problems become aggravated when it is a policeman who does the killing and who pleads that he did what he had to do to protect himself or to prevent *A* from committing a serious crime. As in other interactional situations, we are here concerned with interpreting the meanings reciprocally conveyed by the behavior of men in interaction with one another.

Again, a rule against murder, effectively enforced, serves to enlarge the scope of the individual's interactions with others. In many of our cities are areas that strangers cannot enter without some risk to their physical safety. Here a failure of legal control results in a restriction on interaction, an interaction that in the long run might promote reciprocal understanding and, with it, a reduction in the risks that now aggravate distrust.

Finally, it is worthy of note that in many societies the law against murder took its origin in a regulated and restricted interactional process. In a tribal society a member of *Family A* kills a member of *Family B*. This act, if unredressed, may lead to an all-out war between the two families. To forestall this disaster, many societies developed a rule that *Family B* was entitled, as of right, to kill one member of *Family A*. Plainly this was a rule channeling and defining the limits of interaction, though it served essentially the same general purpose as a criminal statute enacted by the state and imposing the death penalty on a person

found guilty of an unprovoked murder.

The body of laws regulating traffic, including the rule that one passes the oncoming vehicle on the right, plainly serves the primary purpose of facilitating interaction. This it does by creating shared reciprocal expectations between motorists so that they may with confidence shape their conduct toward one another.

In furtherance of this general goal of an ordered interaction, stop signs may be installed where a side road enters a main highway. Suppose that a motorist, driving at an early hour, where there is virtually no traffic on the streets, drives through a stop sign without coming to a full stop. He is arrested. In court the motorist defends himself by asserting that he looked carefully up and down the highway before crossing and that it was clear that there were no vehicles approaching from either direction. Coming to a full stop, under the circumstances, would have been pointless. Should the motorist be excused because his action harmed no one and, under the circumstances, could have harmed no one?

In answer to this argument, we might suggest the case of a student in a course in literary composition who receives a failing grade on one paper because it contained a sentence written in atrocious grammar. The student insists that he has been unjustly treated because his sentence, though it departed from the usual rules of grammar, was perfectly intelligible. I doubt that this plea would be received with much favor by his teacher. And so it may be with our trespassing motorist. As with the student, we want the motorist to get into the habit of respecting the basic grammar of traffic, even in cases where disregarding that grammar will, under special circumstances, inflict no real damage on anyone.

One of the functions of fixed rules of interaction — whether in traffic or in literary composition — is to relieve the actor of the burden, and the risks, involved in attempting to appraise the peculiar qualities of each separate situation in which he finds himself. What we call "rules of thumb" set us free to use our more flexible fingers in the solution of the more subtle kinds of tasks.

The law of contracts, on its face, seems obviously aimed at producing a facilitation of interaction. When two parties have entered a contract, the terms of their legal relationship, their rights and duties toward one another, are to be found, not in law books, but in a document they have themselves drafted and agreed upon.[1] Yet adherents of the view that law consists essentially in an exercise of social control over human behavior may point out that the law of contracts itself of necessity contains a coercive element. If that law is to function effectively, the party who breaks the contract must, at the suit of his opposite number, be made to pay the

[1]It is worth noting here that sometimes the very success of a contractual relation has the effect of supplanting it by something akin to a two-party customary law. Fuller, *Human Interaction and the Law*, 14 AM. J. JURISPRUDENCE 30 (1969).

price of his default by being ordered to perform his agreement or by being made to pay damages. So, it may be said, the law of contracts is, after all, an instrument of social control directed toward those who may be inclined to ignore their contractual obligations.

Yet so easy a dismissal of the issues ignores the fact that the capacity to bind oneself legally is itself facilitative. The young man not yet old enough to enter a binding contract may find himself unable to buy goods on credit, something his older brother can do as a matter of course. Not uncommonly it is all on the same birthday that a young person will acquire the rights to vote, to bind himself by contract, and to operate an automobile. There is in this connection an interesting English word that derives from the French, though it is no longer in active use in the country of its origin. This is the verb *to enfranchise*. This word may mean, depending upon the context, to be freed from slavery, to acquire the right to vote, or to become vested with the capacity to bind oneself legally by a contractual arrangement.

I have tried to show, in each of three areas of law, the importance of that perspective which sees law as also serving the function of facilitating human interactions.[2] The rules concerning murder and violent assault, while apparently only effecting control over human behavior, do also in fact facilitate human interaction. The rules of traffic plainly serve the primary purpose of facilitating interaction, and contract law both facilitates interaction and acts as an instrument of social control. While philosophers concerned with the general theory of law have given inadequate attention to law's function of facilitating human interaction, this neglect has not caused any serious damage in the branches of law so far considered. In these areas judges and legislative draftsmen go about their business of performing what Karl Llewellyn used to call "the law job." They do what that job seems to require of them, without too much concern as to whether what they do coincides with the teachings of general legal theory.

As we turn now to another branch, "customary law," we will find that it has suffered seriously from the conventional notion that law is essentially an instrument of "social control." "Customary law," as used here, does not include such things as food taboos, rules prohibiting acts of impiety toward supernatural beings, or traditional rules which define kinship with its rights and responsibilities. Rather, it refers to rules of conduct that arise directly out of the interaction of human beings, rules that enable men to anticipate the interactional behavior of their fellows in future encounters.[3] The most obvious example of such a rule is the

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[2] I have also discussed the interactional foundations of enacted law in another context. *Id.* at 20–26.

[3] I have tried to show the necessary interdependence of society-enacted law and the organizational principles implicit in customary law in another article. *Id.* at 33–36.

one, already mentioned, by which one passes the oncoming vehicle on the right — a rule that existed in many societies long before it was incorporated in statutory law.

It is my contention that the phenomenon called "customary law" has been grossly neglected by writers on general legal theory and that, when they have given attention to it, they have generally shown little understanding of its significance and have often grossly distorted the nature of the processes that give rise to it.[4] One much-esteemed writer in the field of general legal theory has asserted, "Custom is not in the modern world a very important 'source' of law."[5] I assert, on the contrary, that custom — in the sense of a pattern of reciprocal expectations arising out of past interactions — is not only an important direct source of law in modern society, but that our conceptions and misconceptions of it silently shape in many ways our attitudes toward the meaning of enacted law.

Certainly one cannot dismiss the field of commercial law as being unimportant in the present world. In this field the significance of custom — in the sense of stabilized expectancies that arise from past interactions — receives explicit recognition in the Uniform Commercial Code. This code speaks of "a usage of trade" as "any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed" in the future.[6] The code recognizes, in other words, that patterns of interaction may crystallize into firm expectations having the force of law. The code also recognizes something that might be called two-party customary law. In this case, instead of speaking of a "usage of trade," the code speaks of "a course of dealing" which it describes as "a sequence of previous conduct between the parties . . . which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[7]

It is interesting to observe that the descriptions of customary law contained in the Uniform Commercial Code can be applied without qualification to quite a different area of human interaction, i.e., international law. In the course of repeated interactions between or among nations, discernible patterns may emerge. When the expectations generated by these patterned interactions have become sufficiently crystallized, they may enter into and become integral parts of what is generally accepted as international law.

The reason that legal theorists have difficulty in dealing with customary law derives from the fact that it does not emanate from some identifiable center of authority. The participants in the interactions that give

[4]For a comparison of the conflicting anthropological views of Malinowski and Gluckman as to the nature of customary law see *id.* at 31–33.

[5]H.L.A. HART, THE CONCEPT OF LAW 44 (1961).

[6]UNIFORM COMMERCIAL CODE § 1–205(2).

[7]UNIFORM COMMERCIAL CODE § 1–205(1).

rise to customary law do not consult the books to see how they should conduct themselves toward one another; they shape their conduct by the patterns that have arisen tacitly out of their past dealings with one another or that they discern in the interactions of others engaged in transactions similar to those in which they are themselves involved.

So, we have to say of customary law not simply that it serves to facilitate interaction, but that it derives tacitly *from* interaction. This makes it a subject difficult to reconcile with the usual presuppositions underlying general theories of law. These theories, whatever their differences in matters of detail, seem all to share the view that law is a species of control imposed from above; it derives from, and is dependent upon, some established center of authority. The notion that human subjects of law can, through their interactions, generate rules of law is something that legal theory has never felt comfortable with. The result has been that customary law remains for legal theorists an anomaly and is generally passed over as quickly and quietly as possible, often being dismissed with an observation, such as that already quoted, that is has ceased to play any important role in modern social systems.

In confronting the dilemma presented by customary law, sociologists have proved themselves somewhat less timid and perplexed than their counterparts among legal theorists. This difference comes about, I believe, because sociologists, in comparison with legal philosophers, have a greater tolerance for broad metaphorical explanations of social phenomena. When sociologists are asked, "Whence comes the sense of compulsion that lies behind customary law?" some of them, at least, have an answer that lies in some such concept as Durkheim's *collective consciousness*.[8] The compulsions imposed by customary law are not, according to this view, anomalous or radically different from those imposed by statutes; they possess, indeed, the same kind of compulsive force as enacted laws. The only difference is that in one case the compulsive force is derived from explicit enactment by a legislative body charged with making law; in the other it represents a tacit expression of the will of society.

A passage from a recent French treatise on the sociology of law suggests the need for attention to social processes that may produce law. The following translation of the original is my own.

> From what source does the law derive? For sociological theory . . . that question permits of only one answer . . . the law derives from the social group; legal rules express the way in which the group considers that social relations ought to be ordered. This point of view is quite different from that generally taught. The current doctrine . . . does not bring to clear articulation the question of the origin of the force of law generally, though that question is basic and fundamental. Instead the current doc-

[8]For a discussion of Durkheim's concept see Catlin, *Introduction* to E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD at xiv (Solovay & Mueller transl. 1938).

> trine applies its efforts to the different modalities in which the law appears (legislation, custom, judicial decisions, expert opinion), thus giving the impression that these modalities are radically different from one another. On the contrary, from a sociological point of view, these formal sources of law, which the jurists are concerned to distinguish, are simply different varieties of one single and unique source: the will of the social group. . . . Statutory law is not essentially different from custom: both are the expressions of the will of the group.[9]

I do not offer this rather startling quotation to imply that sociologists generally would find it acceptable as an explanation for the origin and binding force of "customary law." It can, however, serve to remind both sociologists and legal theorists that they need to give more attention than they have in the past to the social processes from which rules can emerge and become effective as law without receiving the imprimatur of any explicitly legislative organ of government. As previously suggested, this law definitely cannot be dismissed as being largely an attribute of primitive preliterate societies and retaining only a marginal significance in modern society.

In reality, a modern system of written statutory law depends for its successful functioning on what may be called a form of customary law, in the sense of a system of stabilized interactional expectancies.[10] Statutes are put into textual form by legislatures; their meaning and application to specific situations of fact are authoritatively determined by the judiciary. When a legislator drafts a statute, he takes into account, tacitly or explicitly, the established attitudes that courts have displayed toward the task of interpreting legislative enactments. If the courts have displayed a clear tendency toward a strict and literal interpretation, the legislative draftsman will take this judicial inclination into account in wording his enactment. A sudden shift by the judiciary toward a looser standard of interpretation may be disruptive and can work serious injustice to those who have viewed the meaning of the statute in the light of past judicial practice.

In the same way much of the living law of judicial procedure is to be found, not in printed paragraphs contained in statute books, but in the continuing patterns of interaction that have developed between judges and the advocates who appear before them in the actual process of trial. To understand what is going on in a trial, one has to be initiated into the "law" that governs the conduct of the trial and assigns to judge and advocate their respective roles. That "law" lies partly in the established patterns and reciprocal expectations that give sense and direction to the

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[9]L. LÉVY-BRUHL, SOCIOLOGIE DU DROIT 39–40 (1964).

[10]It is a curious fact that rules need be both generally expressed and followed by the government in order that the legal system may function. A persistent disregard of the rules can undermine the moral foundation of a legal order, both for those subject to it and for those who administer it. For a discussion of my position on the internal morality of law see Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 84 ETHICS 307 (1974).

whole process of trial.

Finally, I suggest that the study of customary law, in its multiform varieties, has been handicapped by the circumstance that many of its rules — including the most central and significant — are often tacit and do not come to clear articulate expression until they have been violated or ignored. In his *Geist des römischen Rechts*[11] Rudolph von Jhering speaks of "latent" rules. He then asks how a rule can be "latent." Rules are injunctions that are obeyed or observed; how can one observe a rule that remains tacit and unverbalized? Jhering's answer is to invoke the analogy of language. He reminds us that rules of grammar often first come to articulation when they have been conspicuously violated. So it is with the basic grammar of law and of human interaction generally. The tacit or latent quality of the anticipations that grow out of human interactions has tended to remove from the concerns of legal scholarship an analysis of the manner in which these tacit anticipations shape and govern the ongoing processes of a functioning society. It is in part through these tacit anticipations that accompany and shape it that law can become — in a meaningful sense — an instrument for facilitating human interaction.

[11] 1 R. VON JHERING, GEIST DES RÖMISCHEN RECHTS 29–30 (8th ed. 1924).