

## Legality and Irony

The major shortcoming of contemporary legal theory is a consequence of its inattention to elementary social phenomena. It ignores the most salient characteristic of the legal system.

Law is something that is performed. Law is, above all, a spectacle.

Ask law students. On the evening of moot court arguments women find themselves wearing high heels while men have successfully forced their bellies into tight suits. This is part of the game. Students have to be able to enact the demeanor that is appropriate to appearing in court.

On a more elementary level, students are expected to learn how to “think like a lawyer”. This is not a natural way of thinking. It is rather something highly artificial.

This artificiality does not become second nature once students enter the world of legal practice. Outside the context of professional interaction, lawyers talk about law from an external point of view (which is not the case for ordinary moralizing). Indeed, the people who take the law seriously outside their professional setting strike one as somehow odd.



One may wonder why that should be a big deal. The legal system is replete with role-playing. But so is social life in general. Why should it be of any particular relevance to jurisprudence?



Role-playing permits one to establish distance. Distance means that one “is not” what one does or that one does not identify with it (at least not wholeheartedly).

At the same time, role-playing also makes it easier to perform things as though one identified with one’s actions. This reason is that the attention of the agent is di-

verted from the act's purpose and redirected at enacting the act well.

Paradoxically, the gap of non-identification can be thereby bridged. One can enjoy doing something because one enjoys playing it.

While any job can be done with an attitude of non-identification, this attitude is not accidental to the practice of law. We consider it perfectly legitimate to participate in the legal system without identifying with its demands. One can be a judge while remaining convinced, privately, that all law is, of course, baloney. But one can enjoy, and excel at, doing baloney from a theatrical point of view.

At any rate, this observation overlaps, partly, with a point that genuine legal positivists have been advancing all along: Nobody has to believe in the law's reasonableness in order to work with it as if it had authority.

Positivists, however, have never accounted for this as-if-attitude from the perspective of human action. They therefore also have been unable to explain why this attitude is part of the concept of law.



It is submitted, hence, that the authority of law can most reasonably be accounted for from a perspective on agency that is heeded of irony.

At first glance, this may appear disappointing, not least because “irony” can mean many things—which is, indeed, the irony of irony (de Man).

Doing one thing and meaning another is what we ordinarily call irony (“I thereby sentence you to death – ha, just teasing!”).

Irony can be theatrical in that the sheer act of performance extracts from action its seriousness. When staged, actions are relativized inasmuch as they can be perceived from the perspective of an author rather than the agent.

If Jonathan Lear is right, Socratic-Kierkegaardian irony means pursuing an ideal even if one does not know what

it takes to pursue it well. Apparently, being in a state of “ironic disruption” is prerequisite to being good at what one does without having a conception of it. Lear would have us believe that this is the best understanding of irony.

Irony can be romantic in the Schlegelian sense. When we are exposed to Schlegelian irony, we find ourselves dispossessed of all meaning, including the meaning of irony itself. We look around, and all we see is masks wearing masks.

Serious people notoriously mistake all irony for Schlegelian irony. This is why they dismiss it as dangerous. When it comes to law, I surmise that theatrical irony provides the key to understanding its authority. It introduces, roughly speaking, the perspective of a playwright who aspires her characters to be cast well.



But why is irony relevant to law?

The explanation is as straightforward as it is invariably intricate.

The first part of the explanation is linked to the fact that when confronted with legal demands we encounter our reason in the form of the reason of others. The consequence is that we can accept it only by bracketing its claim to be taken at face value. We need to ironize the law in order to find it acceptable. A simple example might help to elucidate the point. Assume that “originalism” is the jurisprudence predominating a country’s Supreme Court. Consequently, the legal system expects everyone to cast arguments in “originalist” terms even if most find the position absolutely nonsensical.

The other part of the explanation is enveloped in the first. Once it becomes developed, it can be realized that the most important contention of modern natural law theory, namely, that there is a right answer to every legal question, is—while indispensable for signaling the law’s

justificatory appeal—terribly mistaken. It is terribly mistaken for if the right answer thesis were right, the world as it appears in fiction, opera or drama could not exist. Bad people would be simply bad and innocent people simply innocent. What a false world! By contrast, it is the hallmark of aesthetic experience to reveal us the world as it is without right answers. It brings us thereby closer to the enigmas of our existence, for examples, that the meaning of actions is anything but straightforward and that the righteous are pretty annoying because of their very righteousness.

Hence, the right answer thesis could only be right if it denied aesthetics a place in the realm of human experience. In fact, this explains why the believers in right answers are disturbingly philistine.

Conversely, the right answer thesis can leave room for aesthetic experience only by crossing itself out. It can be sustained only in bracketed form. This is the work of irony. Law can be seriously only by approaching it as something theatrical, a spectacle in the creation of which one participates.

Legality implies irony. This is remarkably congruent with Kant's conception of the authority of law. It has moral appeal, but it may be obeyed for any reason. Any application may be pure performance.

The irony of law does not suggest that performing the law is not a serious business. Justice Scalia's opinions are grand theatrical gestures. They are not mere instruments in the service of ideology. The theatrical authority of law does not permit one to pursue any end at the expense of the artful enactment of the routines of thinking like a lawyer.

There is nothing more, and nothing less, to the authority of law.

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