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## **In the Eyes of the Law: Reflections on the Authority of Legal Discourse**

How do judicial opinions gain their authority? Sanford Levinson invites us to consider the following paradox: judicial opinions gain authority by persuasion *and* by force. To illustrate this dynamic, Levinson directs our attention to certain distinguishing features of the judicial opinion.

To begin with, the authority of the judicial opinion flows from the ascribed authority of its author. Only judges who have been duly appointed can write opinions that bind litigants before them. As important, a judge's opinion functions as precedent that controls the decisions of "inferior courts" (by exercise of "vertical" authority) as well as future decisions of the judge and the judge's successors (by exercise of "horizontal" authority).<sup>1</sup> Considered from this standpoint, the judge's exercise of authority bears much in common with the exercise of brute force. It operates on the model of command and control, like a sovereign ordering us to do something we wouldn't otherwise do by the light of our reason. Thus, the judge of an appellate court is bound to follow the law as interpreted by the Supreme Court, even if she would interpret it differently. And, under doctrines of *stare decisis*, the Supreme Court is bound to follow its own precedent, even if the Court would decide the question differently if presented with it as an issue of first impression.

Levinson draws our attention to these features of the legal system precisely

because they are at odds with conventional assumptions about the legal system. We do not ordinarily view the rule of law as a system of command and control. Nor would it be wholly accurate to do so. In diverse ways, law draws its authority from the gentler forces of reason. Judges do not merely issue orders; they write opinions giving reasons to justify their orders. Indeed, much of the rhetoric of the judicial opinion is designed to persuade the reader that the opinion does not merely reflect the judge's personal opinion or wishes but is instead a faithful account of "what the law requires." In this society, we say that we live under a government of laws, not men; we *expect* judges to write opinions that will persuade us, time and again, that this is so. And judges oblige us. Given our legal culture, this rhetorical strategy makes sense. Judges do not have forces at their disposal to enforce the orders they give; they must persuade those whom they would order to comply.

Thus, Levinson argues, judicial opinions derive their power from two kinds of authority. Judicial opinions have authority both because they command and because they persuade. While this framework casts light on some distinguishing features of the judicial opinion, I would like to consider certain features of the framework itself. Levinson counterposes authority-as-command and authority-as-persuasion, brute force and reason, as antithetical social phenomena. But much current critical theory—often loosely dubbed postmodernist—suggests that power and knowledge are mutually constitutive.<sup>2</sup> Considered from this vantage point, power and knowledge may be intimately intertwined, working to reinforce each other in ways that easily escape notice.

This essay will explore some ways in which judicial opinions exert authority that do not conform to the dichotomous understanding of power and knowledge on which Levinson's account rests. As I will show, we are not always conscious of how legal discourse exerts authority in our lives, for the simple reason that we understand important aspects of our social universe through the language of the law. Because the language of the law structures fundamental aspects of our social experience, it plays a more pervasive and less perceptible role in ordering social relationships than Levinson suggests.

We might begin our analysis of legal discourse with John Hollander's observation that "poetry, theology, and law all involve systems of tropes." In a striking passage of his essay, Hollander invites us to consider the following proposition. An act, for example, sodomy, performed in state A may be a crime when it is performed in state B because "the act will enter a web of metaphors called statutes. . . . Literally, it would be the same act; only figuratively—its commission has been interdicted and metaphorically designated a crime—is it different."<sup>3</sup>

In this account, the law operates upon a substratum of "literal" or physical

reality, adding figurative meaning to it; thus, in Hollander's example, the language of the law ensnares a simple physical act and transforms it into a "crime." But the language of the law plays a greater role in structuring social experience than this account suggests. *Many of the acts law regulates do not exist apart from the language that defines them.* Consider the example of rape: the physical act of sexual penetration is a rape only in circumstances where there is no "consent." As we attempt to determine whether A has injured B, we sometimes ask whether A reasonably believes that B "consented," or, in other circumstances, what A "intended" to do to B, or, in yet other circumstances, whether A proximately "caused" B's predicament or took B's "property." It is through tropes such as consent, intent, causation, and property that we define certain physical acts as legally cognizable injuries. Such tropes play an important role in deliberations about how the law should respond to some event that has happened. But often "what happens" occurs in a domain of social meaning inseparable from language itself. Was the man denied a job because of his qualifications or because of race? Was an invitation to participate in this conference distributed on the basis of qualifications or race? In this society the distinction matters terribly. Yet in such cases can we determine what happened outside language? The language of the law mediates our understanding of social relationships: a boss may grope his secretary; her capacity to utter the words "sexual harassment" pushes back.

Sometimes law is self-conscious about its own lingual resources and the power to order social relations they entail, as in the case of tropes it denominates legal fictions. Under the Fourteenth Amendment, a corporation is a "person" but the unborn are not. The personhood of corporations is a clear case of a legal fiction, but what about *Roe v. Wade*'s declaration that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"?<sup>4</sup> When we say that "the state has an interest in protecting potential life" is this just a fancy way of saying that the state has an interest in compelling women who are resisting motherhood to bring a pregnancy to term? Most would immediately reply that the state's interest in protecting potential life has nothing to do with making pregnant women act like good mothers should. Does *that* make the state's interest in protecting potential life a legal fiction?<sup>5</sup> Consider another example. The doctrine of marital unity is classically understood as a legal fiction, to wit: "In the eyes of the law, husband and wife are one."<sup>6</sup> Today, by contrast, courts construing common law and the Constitution tell us that husband and wife are "equal" in the eyes of the law.<sup>7</sup> What does it mean to say that husband and wife are equal in the eyes of the law? Is this relationship also a legal fiction? Along similar lines, we might ask: How do we know when we are in the "private sphere"—the place where work and battery are regulated, not as work or battery, but as love? Are husband and wife equal in the eyes of the law *there*?

While it is conventionally assumed that the category of legal fictions is sparsely populated by a few quaint counterfactuals, it seems instead that the category of legal fictions is quite large—the figural terrain on which we fight some of the major social conflicts of our day.

Owen Fiss recently offered me an ad hoc definition of a legal fiction as something that can't possibly be true.<sup>8</sup> But this definition does little to restrict the class of assertions that might count as legal fictions. For by what criterion of truth are we to test claims about social meaning of the sort law is always making? When we are discussing assertions about consent, intent, causation, property, personhood, the structure of marriage, or the scope of the private sphere, correspondence with empirical reality is not sufficient—and coherence theories of truth do not lift us out of the domain of the figural. “Legal fiction” may itself be a figure of speech that naturalizes the rich variety of ways that the language of the law constructs the social world we inhabit.

From this standpoint, it is easier to appreciate some of the more subtle ways in which the language of the law exerts authority. Tropes such as property, personhood, marriage, equality, and privacy structure important dimensions of our social experience, both individual and collective. In this conceptual field, where social facts are inseparable from social values, where the descriptive is entangled with the normative, and knowledge is entwined with power, the language of the law organizes social relationships, exerting authority in ways that often escape our notice.

To explore one instance of this dynamic, we might consider how the concept of citizenship shapes understandings of race relations in the United States. In the aftermath of the Civil War, when the Supreme Court upheld Jim Crow laws in *Plessy v. Ferguson*, Justice Harlan wrote a dissenting opinion arguing that the Constitution does not distinguish citizens by race.<sup>9</sup> A passage in that dissent has since become orthodoxy on the question:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and power. So, I doubt not, will it continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. *But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.* In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>10</sup>

Let us consider the familiar language of Justice Harlan's dissent a bit more closely. What or where is "in the eye of the law"—the social standpoint from which it can be claimed that "there is in this country no superior, dominant, ruling class of citizens"? Was this proposition a legal fiction in 1896? Is it in 1995? Quite plainly, in 1896 Justice Harlan was advancing a counterfactual—a vision of the Constitution at odds with the regime of apartheid upheld in *Plessy*. But the color-blind constitution that Harlan exhorted his Brethren to embrace was counterfactual in yet a deeper sense: Harlan argued that law should refuse to recognize the regime of racial caste that in fact prevailed in American society. He advocated a radical separation in legal and social discourses about race as the foundational feature of a postslavery jurisprudence. Harlan did not suggest that adopting a color-blind constitutional regime would cause social relationships to evolve toward the norm espoused by law and so lead to a classless society. To the contrary, when Harlan asserted that "[o]ur Constitution is color-blind," he was proposing that law blind itself to the *continuing* racial stratification of American society, assuring his readers that the white race "is [and] will . . . continue to be for all time" the "dominant race in this country, . . . in prestige, in achievement, in education, in wealth and in power."

In 1896, Justice Harlan argued that the nation should disestablish racial hierarchy in formal political discourse, but not in social fact. To accomplish this, he proposed a new mode of talking about citizenship centered on the trope of color blindness. Considered from this vantage point, the trope of color blindness is of ambiguous political valence: although Harlan advanced the discourse of color blindness as a basis for criticizing the regime of segregation upheld in *Plessy*, he also demonstrated how the discourse of color blindness might be used to legitimate diverse manifestations of racial hierarchy in American society. As Harlan explained it, by modifying the rule structure and rhetoric of citizenship, the nation could repudiate a regime of racial caste *in the eyes of the law* while continuing a regime of racial caste in social fact.

What is the sociopolitical logic of color-blindness talk today? When I read Justice Harlan's dissent with my first-year constitutional law class, the group unanimously endorsed it as a correct understanding of the equal protection clause but immediately divided over its meaning. Few students were willing to read Harlan too "literally." Surely, they argued, when Justice Harlan endorsed color blindness, he advocated legal formalism in the service of social change. Yet scarcely anyone in the class had the patience to consider whether color-blind constitutionalism in fact promoted the elimination of racial caste. Instead, as properly socialized members of our legal culture, the students predictably launched into a debate over affirmative action. For them, the discourse of color blindness was *about* affirmative action.<sup>11</sup>

But how, we might ask ourselves, has this passage in a dissenting opinion from the late nineteenth century come to have such specialized racial meaning today—central in the disposition of the Court’s most recent affirmative action case<sup>12</sup>—while seemingly irrelevant to the welfare reform debate prompted by the proposed Personal Responsibility Act of 1995?<sup>13</sup> In the decades after World War II, the color-blindness trope was invoked for the purpose of disestablishing a regime of caste. Today, by a process that Jack Balkin has termed ideological drift, its redistributive valence has switched, and it is invoked as a *constraint* on caste-disestablishing reform with equal moral fervor (along with civil rights idiom like “quotas” and “special rights”).<sup>14</sup> But this is not all. The color-blindness trope invites us to scrutinize affirmative action while allowing the race talk of the Personal Responsibility Act to proceed with impunity, if not equal moral fervor:<sup>15</sup> today one can ardently endorse color blindness while heartily denouncing the “lazy welfare queen.” In short, the ascendancy of the color-blindness trope marks a shift in the rule structure and justificatory discourse of racial status. In 1995 it is no longer constitutionally acceptable to distribute entitlements explicitly by race, but it is acceptable to distribute entitlements by racially coded norms.<sup>16</sup> “Welfare” is one of those racially coded norms.<sup>17</sup> This is the thinly veiled racial text of current political orthodoxy, which calls for imposing deep cuts in “welfare” while protecting social security payments and the deduction for home mortgages.

To repeat my question: Just where is “in the eye of the law”—the social standpoint from which it can be claimed that “*there is in this country no superior, dominant, ruling class of citizens. . . . Our Constitution is color-blind*”? As we have seen, the discourse of color blindness today supports an explosive conversation about race, about protecting the entitlements of white citizens from redistribution to people of color.<sup>18</sup> Contemporary proponents of color blindness can advance their arguments against racial redistribution with all the moral fervor of the crusade against Jim Crow and with considerably less candor than Justice Harlan, who at least was forthright about the regime of racial stratification that such constitutional formalism could support.<sup>19</sup> Indeed, it is striking testimony to the power of color-blindness talk that its contemporary proponents generally need not address these matters. Color blindness is a coherent and self-contained symbolic discourse, of such ethical and constitutional legitimacy that its proponents are rarely called upon to justify the assertion that color blindness is racial equality or to substantiate the claim that color blindness will bring about racial equality.

Indeed, Justice O’Connor made neither of these claims when she justified her commitment to color blindness in the recent case of *J.E.B. v. Alabama ex rel. T.B.* In *J.E.B.*, the Court held that the use of gender-based peremptory strikes during jury selection violates the equal protection clause, following its decision in *Batson v.*

*Kentucky*, which outlawed peremptory strikes based on race.<sup>20</sup> Justice O'Connor explained why she found gender-based peremptory strikes violative of the equal protection clause:

We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. . . . Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. . . .

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to *Batson*: "*That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.*"<sup>21</sup>

From the 1890s to the 1990s, this disjunction in legal and social discourses about race has created an imaginary domain in which America has projected a vision of citizenship never realized in social practice. But how does this ritualized renunciation of social knowledge create a domain of symbolic meaning in which we believe ourselves capable of transcending the gap between what this nation *is* and what it *stands for*? And why does this turn from social experience create a social experience of law as that which has the power to redeem the social experience of American life—even as we recognize that it is law *in just this symbolic sense* that legitimates the distributive inequities it is always summoning us to transcend? In the figure of color blindness, or blind justice, the aspirational and legitimating functions of law fuse in maddening consort. It is on this figural terrain—where we fight some of the major social conflicts of our time—that we must reckon with the authority of legal discourse, both as it is expressed in the judicial opinion and as it circulates in everyday conversation of the sort conventionally referred to as “outside” law.

