THE LEGAL PERSPECTIVE ON PERSONS: LAW AS A MORAL PRECEPTOR

The endebtedness of law to morality has been continuously and instructively explored from the days of ancient Greece up to the present time; much less has been said in western jurisprudence about the debt of morality to law, and even less about the power of law to provide moral instruction. To be sure, the notion that law possesses the quality of normativity, and cannot, therefore, be described simply as a fact-complex of some kind, is thoroughly familiar through the labors of Hans Kelsen. But in speaking of the dependence of morality upon law, and of the power of the law to provide moral instruction, I have in mind something at once less abstract and less value-neutral than Kelsen's *normativity*. On the other hand, I am not interested here in the possibility that, e.g., a body of legislators might make of a piece of legislation an intrument of moralistic purposes. Although I shall not deal with the law's morality, which has been so effectively uncovered and explicated by Lon Fuller, my argument that the law can function as a moral preceptor is akin to Fullers's outlook in emphasizing certain inherent potentialities possessed by law on the strength of what it inherently and neccesarily *is*.

Perhaps I can best express the quality of law that interests me by first mentioning several other perspectives from which we tend to view ourselves and others, and then going on to indicate the additional perspective which law makes possible. In the process, the importance of what I call «the legal perspective on persons» will become evident.

No doubt the most common and less human perspective on ourselves and others is that provided by inmediate sensuous perception. From this perspective, I perceive myself or the other as a more or less attractive or repellant complex of sensuous qualities. *She* is blond, *his* body exudes the odors that tell of manual labor, *their* skin is black, I am blue-eyed. In short, in immediate sensuous perception persons *are* simply what our senses report them to be; it is the perspective from which black and whi-

te are realities, and it is around the perceived differences observed from this perspective that emotions of fear, shame, pride and self-admiration powerfully focus themselves.

Of course, immediate sensuous perception seldom if ever provides the total or exclusive modality of our perspective on persons. Sex, culture, religion, profession, familial ties - all these provide in differing degrees additional elements in the standpoint we assume toward self and others, so that, typically, any person's perspective on another or self will be a rich, complicated and somewhat shifting one, depending on numerous factors in the situation and the elements that seem to call for emphasis in the light of that situation. Sometimes, the peculiar stress of the situation is so great as to result in our narrowing our perspective dramatically, to the point where we perceive self or other, not as a full, many-dimensioned person, but as wholly subsumed under a special aspect which interests or preoccupies us: the suffering patient doesn't care about the doctor's looks or his taste in poetry; he is interested only in the doctor's success record in the treatment of the kind of illness which brings the patient to him. Every combat soldier must, as a matter of survival, learn to look at those he is fighting simply as «the enemy» - someone to be killed or be killed by. These examples perhaps afford a sufficient illustration of some of the kinds of narrowed focus through which we can and do on occasion look upon ourselves and others. Additionally, reflection assures us that not only do sensuous perception, cultural identity, sex, profession and numerous other factors typically operate simultaneously in influencing our perspective on others, but that, furthermore, these elements are *interpenetrating* as well, so that we never *simply* perceive the other (and notoriously not ourselves). The perceptual data are already in some degree invaded by extraperceptual addenda supplied by such factors as cultural prejudices and sympathies, Thus, the racist never sees before him *just* a black person (or a white person); rather, he sees the contemptible, the inferior, the second-rate person. In this way, the perceptual data are charged, often irreversibly, with meanings foreign to the field of simple perceptual experience, sometimes for good, and sometimes for evil.

The sketch I've offered can be increased in fidelity by taking into account the many ways in which the person upon whom I am taking a perspective can and does attempt, through various initiatives, to influence the perspective I assume. I want to think well of myself, and therefore I offer myself excuses designed to blur the flaws which would otherwise be sharply evident in a process of self-examination. The other wants to

make sure that I realize he is an Important Person, and proceeds, accordingly to make me aware of his distinguished professional record, of his good family, of the excellent schools he attended. Evidently, the topic of perspectives on persons is far too rich and subtle to be satisfactorily treated or even adequately adumbrated within the confines of a short paper, and I have only sketched the factors operating to the extent I have in order to provide the contrasting background for what I would like to say about the legal perspective on persons.

It is familiar that law ought to be obedient to the ideal of impartiality, treating all members of a class alike in the absence of reasons which would justify different treatment. (The *kinds* of differences that are relevant to the process of justifying differences in treatment are well worth investigation; I have attempted to do so elsewhere (1). But this ideal of impartiality is one that we look to see served especially in the *actual administration* of public and private law in such areas as the drafting of legislation, the adjudication of disputes, the sentencing of offenders and so on. In other words, we look to the public or private *officials* charged with the enforcement of a body of rules as the primary persons responsible for realizing impartiality. Meanwhile, that impartiality may or may not be valued by those non-official persons on whose behalf a body of rules is being administered. But it is precisely this possibility which interests me, namely, the power of law to provide persons with a perspective on themselves and others which actually can come to operate in personal consciousness in the form of the dual recognition that the other is, for the purposes of the law or rule in question, my equal and I am - incredibly - nothing more than his equal.

Such a recognition has an enormous weight of disposition and inclination running against it, and yet it is one which any body of law, with its universality, invites us to make.

Let me start the next phase of my discussion by stating at once that, so far from being an unproblematic achievement, I think it both remarkable and somewhat perplexing that any such dual recognition as I have described *could* come to operate in personal consciousness to the extent of actually defining my perspective on myself and others. The self-centeredness of my existence and consciousness (of which perhaps *both self*-love and self-despair are modalities) would seem to militate against my ever fully embracing the fact of my interchangeability with any number

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(1) I have explored this question at length in my paper, *The Legal Classification of Persons: A Search for Standards*, The American Journal of Jurisprudence, vol. 18, pp. 18-37 (1973).

of randomly chosen members of the class to which the law or rule in question is addressed. Thus, no matter how fully I grasp the fact that operators of motor vehicles in the state of Connecticut are prohibited from driving at speeds in excess of 60 mph, and no matter how often I've seen speeders stopped by a state trooper, the day that *I* am stopped, and the state trooper leans in the window of *my* automobile to request *my* driver's licence provides me with an astonishing and somewhat disorienting experience, because through these events, I am brought face-to-face with the legal perspective on persons. I must somehow grapple with the fact that I am a fungible entity (2) — the operator of a motor vehicle in the state of Connecticut — enjoying the very same privileges and liabilities as other persons engaging in the activity, and indistinguishable from them in the absence of any showing to the contrary. A similar kind of disorientation and astonishment is always part of the subterranean excitement of the election day drama in a democracy. I arrive at the polls clothed in the rich garments of the irrepeatable,, concrete, wholly distinctive person I know as «I», and I depart minutes later strangely naked, having been transmuted into what is called simply an «Elector», indistinguishable as such from the plumber ahead of me in the line, and one of the local Brahmins, just behind. The eerieness of such experiences, in which I find myself dealing and dealt with as a generic «one», is such as to prompt me to hide them away in the recesses of mind; they suggest a kind of surd or lump which promises not to blend satisfactorily with the life of my «I», a life in which I am the zero-point from which the world is observed and for which it unrolls (3).

I shall devote the concluding phase of my discussion to the questions which naturally pose themselves once it is granted that the legal perspective on persons is one actually encountered, however fleetinkly and reluctantly, in ordinary experience. First, Can the legal perspective on persons become a steady and influential theme in personal consciousness, and, if it can, then, second, ought it to? I will start by saying that I think the answer to both questions is *yes,* and then state my reasons as briefly as possible.

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(2) I am endebted to Edmund N. Cahn for the felicitous expressions, «fungible member of a genus», and for «generic man», both of which I have adapted to my use in the present paper. See EDMUND N. CAHN: «Ego and Equality», *Yale Law Journal,* volume 60 (1951), p. 61, p. 64.

(3) I adapt the expression «zero-point» from Ricoeur, although I use it differently. Speaking of the body, he asks: «How can I observe that my body is the center of orientation, the zero origin the here from where I see all that I can see?» PAUL RICOEUR: *Fallible Man,* p. 33 (Gateway edition).

I have suggested above that the legal perspective on persons requires me to grasp and absorb the *fungible* dimension of my life and being, and thus to appropriate my simple and strict equality with other randomly chosen individuals over wide areas of human activity. I have suggested that the foreignness of this perspective coupled with the egocentricity of my situation, militate against my achieving a satisfactory appropriation of the legal perspective. I must now add that I believe other powèrful factors militate in favor of my embracing and coming to «practise» the legal perspective on myself and others. The factor which most concerns me is reason- a reason, however, which is not imposed from on high and from without, but a reason which operates very much within the arena constituted by the self-centeredness of my existence. It is a very much engaged rationality which finally persuades me that only by appropriating the fungible dimension of my personal being can I successfully assert the claims I want to make on behalf of that non-fungible, thoroughly unique personal I for whom I am so concerned.

The way this recongnition takes hold in individual consciouness is most typically when an occasion arises in which I am the object of some injustice which deprives me of the rights or privileges enjoyed by all other members of the class of which I am a member. Thus for example, *I alone,* arbitrarily and *without cause,* am deprived of my right to operate my automobile in the state of Connecticut; I *alone* of all the electors in the town where I reside am arbitrarily and without cause denied the exercise of my franchise. My response is to become aggrieved and angry, to point to the arbitrariness of the measures which have deprived me of my rights and finally, to sue for restoration to the class of persons who still enjoy the rights I find myself denied - the class of licenced automobile operators, the class of electors. My strategy is straight forward: there is *no reason,* I point out, for treating me differently from any of the other members of these classes. For the purposes of the law addressed to that class, I am indistinguishable from others whose rights and privileges have not been denied. *I am indistinguishable from the others-* and they from me. In the respect in which the law regulates our conduct, one randomly chosen individual member of the class is interchangeable with any other. But now this perspective, which I had earlier found foreign and disorienting, and had therefore thrust to the back of my consciousness, is brought into its foreground and insisted upon to the persons who wrong me. *That* they wrong me I am quite sure. Their wrong in this case consists in denying me rights arbitrarily and without reason, and thereby treating me as unique - that is, as an utterly non-fungible entity. To the extent that I am rational, the meaning of this experience will be

appropriated into my conciousness in the form of a steady and influential recognition that I can only fully be «I» (including enjoying the rights and privileges essential to full personal existence) if I insist upon being, at the same time and in important areas of my life, *the generic one* whom we all are.

That this recognition ought to be achieved by persons, and come to influence our perspective on self and others, is equivalent to saying that self-interest ought to be fully rational, and that in becoming fully rational, it also sees the identity of its own interests with those of others; it thereby necessarily ceases to be self-interest alone. A system of laws causes us to encounter and helps us to appropriate the generic dimension of our being, and thereby acts as a valuable moral preceptor.

SUSAN MINOT WOODY
Associate Professor of Philosophy. Connecticut College. New London, Connecticut, U.S.A.