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An Alphabet Book (Incomplete), or: Elements of a Legal Philosophy

WARREN LEHMAN*

A: *Animals*

Turtles always seem to know the right thing to do. They have their affairs, lay their eggs, and bask contentedly in the sun. They don't overeat; they don't seem plagued by uncertainty. What is in a turtle that tells him, seemingly infallibly, how to get the most out of his life? Why is it that I, with a far more highly developed cerebrum, can make a mess of mine? Has evolution stripped me of a capacity common to simpler forms of life? What was that about the lilies and the sparrows? Perhaps I could reach through to where the turtle and sparrow cannot help but be.

C: *Contracts*

Businessmen, so long as they are friendly, don't take their formal agreements too seriously. They make adjustments as they go along, rescind and revise as the situation demands. It is only when there is a falling out that they refer back to the piece of paper—the contract—which they then suppose embodies a past act that binds them into this present.

The courts are almost as cavalier with contract terms. If they think the terms worked out badly, they will change them (often enough to disconcert contract teachers and ideologues). The freedom of the actors back when they drafted and signed is simply not enough to make a court find that they had bound themselves in accord with their words and into an irrevocably uncertain future. Words are too flimsy, too slippery, even when hardened by lawyers, and the future is too wonderfully unknowable to allow us to tie the one with the other.

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Have you noticed that the 79th Congress cannot bind the 80th?

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And yet we say, and are certainly right, that a man should fulfill his promises. But what do we mean by this? Certainly we will understand why some promises are not fulfilled, and forgive. But we do not readily tolerate those who unilaterally decide not to fulfill promises that are inconvenient to them. How is a man to know when in good conscience he need not go forward?

D: *Death*

Thomas Hobbes said that fear of death is the force that drives men together into political communities. We want to avoid destruction in the warring state that exists, he says, where there is no central government to overawe us. The idea that mankind was always at war, each with all, before there was government, is today not believable. We know that hunters and gatherers commonly are peaceful people. Where there is war it is among larger groups, within which people may live lives as safely and as peacefully as in any modern state.

Equally unsupportable is the belief that the fear of death was a universal motive among primitive men. Indeed, it seems the less civilized one is, the less frightening is death. It was the ferocity of barbarians indifferent to their own deaths that made them so threatening to settled peoples. "Lord, preserve us from the Vikings," who fatalistically accepted the possibility of death in battle. Those upon whom they preyed, warriors in earlier generations, may have come to accept death with less equanimity.

We prefer to turn that barbarian virtue into a sin. Americans value life. The Chinese at the Yalu River did not. And then there were the Japanese, the kamikaze pilots, and the P.L.O. terrorists. But is the preservation of life at any cost the mark of mature humanity? Or the revolt at seat belts and crash helmets atavism? I think not.

Obsessive fear of death is, roundabout, the result of so insoluble an unhappiness that death seems the only possible release. There may be no conscious desire to die, only phobic reactions

such as a fear of heights. Fear of heights is not fear that the tall building I am in will collapse so much as that I will throw myself out the window. Obsessive fear of death is fear of that part of us that is tempted to suicide. Such overwhelming unhappiness is the final result of pinning serenity upon changing or causing things we are impotent to control. (Can I make my wife love me the way I want her to? No matter which way I turn, the project is impossible.) I find it a great comfort to know that our life is not as Freud claimed—an evenly matched battle between the forces of life and the forces of destruction. The “death wish” is not one party to a universal drama, but an artifact of unhappiness. Fear of death is its progeny. That fear need not afflict us if we learn to find satisfaction in each of the days we are given.

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And why do we assume that men are moved to social invention only by pain? Hobbes is not alone in thinking so. Much of the theorizing about the state, for instance, assumes government would not have come to be but for troubles, such as overpopulation and food shortages. Is it not possible rather that men explore possibilities the way trees take shape, to reach all available light?

E: *Explaining*

Every time I explain my behavior it is special pleading, an effort to justify to myself or others, a lie. I know its inadequacy as I utter it. Why did I marry? Because she was pretty? Because I loved her? Because it was the thing to do? None of these. It was because I wanted to. I experience my wanting as irreducible.

Yet it is not so. My wanting must be composite, for sometimes I can, when a time has passed, see through it. When I do, all there is is confession, no explaining. Of a cutting remark, I can see that pride underlay it, or that fear prompted my dissembling. Those things I have no need to confess are underlain by virtue, which I have no need—or right—to claim.

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When I explain the actions of others and their settings, I refer to familiar wantings. I assume we are all much alike, that I can recognize in others wantings I have felt, and that I can report my

recognition to others who will reverberate to the same beat, who will understand.

The choice of exactly the particular act that I am reporting is made more and more understandable as I (selectively) enrich the description of the actor and the circumstance. For no simple, linear motivation is sufficient to explain an exact choice of action with all its nuance. And enriching the explanation so enhances knowledge that we may finally say "to understand all is to forgive all." Only single-cause explanations leave us really free to indulge our moral indignation.

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A much different way of explaining has been common to Marxists and positivists: what Hempel calls the covering law model. It assumes the priority in explanation of particular features in the field of action. For Marxists, of course, economic relations have been treated as independent variables. Many today who call themselves Marxists are disposed to jettison the positivist, they say later Marx, in favor of the humanist, they say earlier Marx. It is quite clear, for instance, that law cannot be completely explained in terms of the interests of the dominant class. Hence among legal historians there is a widespread falling away from Marxian materialism. But revolutionary Marxism without the dialectic of material conditions seems to reduce to mere resentment. I said to Duncan Kennedy: "Blaming capitalism for the contracts I enter is the same as blaming my wife for my alcoholism." He agreed. I would consider it absurd to say an alcoholic, to solve his problem, should overthrow his wife, but Kennedy does not consider it absurd to say capitalism should be overthrown.

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The most fatal condemnation of scientific history is that it is boring, even to those who believe the derivation of law is a nobler undertaking than the telling of stories. Even Popper conceded that the explanatory laws were, by and large, simple truisms as that, all things being equal, the bigger army wins.

I spent several weeks one summer in seminar with historians, who believed in studying history to elicit general laws. They asked their colleagues to help them draw out the important truths in the

narratives they were working on. No one would, but all freely helped by adding information and asking questions to enrich the stories. I learned a great deal.

F: *Freedom*

What we mean by freedom when we talk about it in ordinary course seems in fact to be impossible, because we believe in—or perhaps cannot help but think in terms of—cause and effect. We have, however, long acted in practical affairs as if we were free and responsible agents. (If you are not responsible for your dream, who is?) But our disposition to think in terms of cause and effect is ever more widely shaping our institutions at the cost of that seemingly indefensible disposition to treat ourselves as free. We come to direct our energy to responding to and especially resisting the efforts of others to manipulate us, and so have none left to explore the interior in which only the construction of a free life is possible. But how can it be said that I speak of anything but romantic wish?

Secular philosophers have paid no heed to the absurd religious claim that freedom is obedience. The Christian is also told both that he is beyond the law and that he should forswear concern with outcomes. How then is he to act? The calculating mind cannot know, for to act it needs rules to support it like crutches (which constrict our natural gait), or desired results to lead it on.

It is well to notice that Christ tells us that the kingdom whose commands we are to obey is within, for that is the key to the riddle. A recommended obedience to human superiors has the virtue of simplifying life, but, more importantly, it introduces us to the discipline of surrendering the conscious will or self to movement deeper within, which many call God.

In another cosmology, the psychic experience to be surrendered is called the personality, and the deeper feeling is called true self. The experience is the same across cultures. Some suppose the source to be immanent in man; others suppose it to be transcendent, though experienced within. Jung might call that source the universal subconscious (a beneficent one, not Freud's garbage heap) to which some individuals have more ready access than others.

That is all—different ways of explaining the same experience. Unfortunately, the ideologies stand to many as impossible barriers

to the truth being explicated.

To use this mode of decision making is to free oneself of the double constraint of rules and outcomes. It is to feel outside the chain of cause and effect—and to seem so to others, too. For people who so act seem self-possessed, not easily classified, and not predictable. To feel free and to seem free to others—what more could one ask?

Religion's most powerful claim to attention in our faithless epoch is its support for turning, in the name of God, to the long-run inclinations of what I find it comfortable to call the spirit.

I: *Is/Ought*

It is a terrible pain to believe one ought and to know one cannot, or to believe one ought yet really not want to. Neurosis, insanity, and addiction are different ways of evading that conflict. Suicides and addicts go to their death entangled in a seemingly objective web of oughts. But what spider wove that web?

J: *Judges*

In games we may restrict the possible moves and results to those provided by the rules. I cannot imagine a reason to allow a rook in a chess game, just this time, to move diagonally. But in real life every legal and moral rule is admittedly riddled with qualification and exception. There are circumstances in which running a stop sign will be forgiven.

Any case that comes before a judge may be one of those in which disobedience to an apparently applicable law is forgivable. How does the judge know when he has such a case? Is there a rule that tells him when the other rule does or doesn't apply? Remember, every case he sees may be one of those exceptional ones. Judges must be remarkable people.

K: *Knowledge*

Raymond Chandler in *Playback* has Philip Marlowe say: "There are things that are facts, in a statistical sense, on paper, on a tape recorder, in evidence. And there are things that are facts because they have to be facts, because nothing makes any sense otherwise."

L: *Legitimacy*

The search for legitimacy is political Archimedeism. "Give me a fulcrum and I can move the world." "Give me a legitimate government, and I will give you rules that can move consciences." In every sphere we search (desperately) for a certain base upon which to build a rational structure. For positive law—a law that precedes cases—a universally confessed (legitimate) legislator is a logical necessity. But in practice no one we respect makes that confession. Only the Eichmans of the world do so. Positivists, you see—whatever their political sentiments—are easily mistaken for totalitarians.

The project of building a decision-making structure on a firm base is impossible, not only because no virtuous man will finally surrender his moral judgment to a state, but because it is logically impossible for rules to dictate with certainty how cases should come out. In law and in morals, cases and general rules are intransitive, just as Wittgenstein said they are in language. And in the real world people will not long freely assent to governments that seriously claim otherwise. They become restive at the usurpation of personal moral authority. If there is a single excuse for the anger abroad in the world, it is that half-confessed surrender to legitimate authority that leaves us not quite sure we are on our own side.

O: *Organizations*

There is always some son-of-a-bitch who wants to read and follow the by-laws or, worse yet, to get a committee together to re-write them. (You're a lawyer, aren't you?) It sounds so utterly reasonable, when we are not following the by-laws (as inevitably we are not), to ask that little favor.

P: *Personality*

Doesn't it seem as if this were true: that it is the relative permanence of the personality (or the self—let us not for the moment try to distinguish them) that creates the possibility of freedom. Being a relatively stable structure (existing in an eternal present in a world experienced in the flux of time), it need not respond in a way patterned by the moment. The self faces the moment independent of it, able to judge how to make of the mo-

ment that which will further its own ends.

I may choose to tie myself to the moment by responding to it not in terms of myself but as it seems reasonable a self would be caused to act. I can choose, in a word, which way of choosing actions I shall pursue. At least I can once I understand the possibility of that choice. But it has been a mystery how that discovery is made. It seems a gift, grace. The Reformation revolved around this problem as its center.

P: *Primitives*

Karl Llewellyn told us that it is no use to ask a Cheyenne what his laws are. The code we wheedle from him will touch only occasionally what is really done when trouble comes. What the anthropologist must study is law in action. What is really done is what the law is. But how does it happen that Indians cannot tell us the rules that guide their behavior? They tell us lies instead, romances. Do you think it could be the primitive mind?

But this is not merely the modern observer's problem. If there were no express rules, no legislation, no customary formulae to guide the tribal moot or the elders underneath the banyan tree, how could the natives themselves resolve their conflicts? How could there be a law in action for the anthropologist to describe? Which came first, the rule or the case?

S: *Selfishness*

It is selfishness alone that purifies and makes acceptable the good we try to do one another. Only my pleasure in the immediate act makes it possible truly to be indifferent to appreciation or outcome. I should not do anything for another that I still feel is a burden to me, that I am disposed to congratulate myself for, for which the doing is not itself a sufficient reward. All else is a burden to the beneficiary—and often to innocent third parties—greater than any benefit bestowed.

It is well to discover how we truly feel on this matter. At a seminar for social workers last year, one had the honesty to say: "I'm tired of doing good."

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A widely held vision is that a good man is indifferent to his own satisfaction but gives of himself selflessly. We are to scratch not our own backs, but the next man's. Many people feel they are dutifully scratching the next man's back but that no one is scratching theirs. Is it really infantile narcissism in that circumstance to stop scratching the next guy's back and scratch your own? Is it so surprising that on first resuming responsibility for their own backs they should express an exaggerated indifference for others? After all, they had been being conned for a very long time.

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The discovery to be made by anyone who pursues the matter is that happiness is finally to be found in a doing for others and a forgetting of self. Aristotle was right that happiness is found in a life of virtue.

V: *Virtue*

There is enough of an acting, responsible self (independent of action) to say that the problem of virtue is not one of learning right action but of improving the self. (Gissela is Boking up the wrong tree.) I am not a good man because of my actions; if I am good, my actions will be good.

When Aristotle tries to tell us how to act virtuously, it is like his trying to correct the aim of a blind archer ("a little to the left," "up a bit, now"), or my trying to tell my wife where to scratch on my back. Aristotle knows this, for he says a right action is not made right by its external aspect; it must be done out of the right spirit. The right spirit (which knows not roughly, but precisely where to scratch—or perhaps it is that where the good man scratches is where the itch places itself), Aristotle says, is a gift of God. Yet he still tries to tell us the externals of good behavior. I don't know whether that is a mistake. Perhaps those who want to be good can learn the feel while practicing the form. But the failure of organized religions in the modern west is surely a consequence of the meaninglessness of forms not infused by the spirit. Hardly anyone today will play at that mockery of a spiritual life which consists of suffering resentfully in this life in the hope of a life to come.

