

Introduction

Toward Unification

Slogans and mottoes in praise of law are a central fixture of our legal culture. A number of stirring law-affirming expressions are encountered again and again in the contexts of law in our society – in its law schools and legal forums, courts and legislatures.

Words chiseled in the courthouse wall proclaim “equal justice under law.” Historic documents teach readers today that theirs is “a government of laws, not men,” meaning by “men” arbitrary officials. Judges remind lawyers, and lawyers remind judges, that “like cases should be judged alike.” Much-repeated Latin maxims epitomize law’s place in life. “No offense without a law,” declares a tutelary slogan – *nulla crimen sine lege*. A ringing denial meant to chasten the king long ago, carried forward to our law-formed world, promises: “not under man but under God and the laws” – *non sub homine sed sub Deo et lege*.

The familiar law-affirming expressions, taken together, set up a fundamental opposition between a regime of lawfulness and absence of law. They call for control of life by law, not by the will of the authorities: government of laws not men, *non sub homine*. They require treatment according to law, not law-less judgment: justice under law, like cases decided alike, *nulla crimen*. Together they picture impersonal law, accessible to reason, regularly operating in life.

Behind the various proclamations in praise of law is, I believe, a fundamental conception of what law ought to be. This is a conception of legality. Legality is a sought situation in which lawfulness is realized.

The several expressions noted above, and many kindred slogans, contain ideas about essential conditions of lawfulness. When these ideas are studied in relation to one another, with a view to defining sought properties for our law today, they may be seen to fit together. They constitute a unified conception of legality. According to the unified conception, law’s excellence lies in the confluence of law-like qualities of generality, impersonality, coherence, regularity, and rational application.

In the vocabulary of this book, the conception of legality that underlies and unifies the grand phrases of law-affirmation is the idea of law-like law. This terminology – law-like law, law-like legality – will turn out to be very helpful, but at first glance it seems puzzling. Isn’t law, by definition, law-like?

In this book, the idea of law-like law is not at all a definition. It is a prescriptive conception, and a demanding one. It focuses on certain qualities of well-developed laws: generality, impersonality, coherence, and the like. It prescribes that these qualities – law-like qualities – should be realized throughout the realm of law.

The idea of law-like legality says how law's precepts should be formed, and what law ought to bring about in the world. According to its preachment, law should take the form of general, impersonal, coherent prescription that operates to sustain rational resolution. Law should be law-like in form and operation, in order to uphold people's legal entitlements and confer even-handed legal justice. Law should be a body of rationally connected reasons that serve as grounds of rationally determinable dispositions.

Law-like law, according to the lexicon of this book, is liberal law. Another name for the idea of law-like law is the liberal conception of legality. The idea that laws should be law-like is a liberal conception because of the connection between law-like law – general, impersonal, coherent – and equal liberty. This kind of law serves liberty. Of course, the law-like form of law, by itself, doesn't confer liberties. But when people in society resolve to establish freedoms in life, and to secure equal freedom by law, the law-like form of law is the best way to secure it. More on this a little later.

Our law, in virtue of its aspiration, is liberal law. That is, our legal practice works to develop law-like laws – general, consistent, and so on. It does so in order to realize the sought ends of liberal legality – securing entitlements under law, conferring justice under law. The defining objectives of liberal legal striving – entitlement, justice, law-likeness, rationality – are, when described in down-to-earth terms, readily recognizable as aims of our law. These aims, entrenched as workaday aspiration in our legal practice, are familiar to its practitioners and observers. By studying liberal legality, we learn about the way we do law in our own society.

The thesis of the book is that the liberal conception of legality is the controlling commitment of our law. It states the high ambition that directs ongoing legal activity. It forms the practice of legal argument in our society.

In the terminology of the present study, a practice of legal argument is a discourse of law, instituted in society, in which participants put forward legal reasons as grounds of judgment. At the center of the practice are society's judges rendering decisions in the courts. Our practice of law, on account of its controlling commitment, is liberal legal practice – the practice of liberal legality.

To say that liberal commitment controls our legal practice is to make two claims. First is the claim that the liberal conception can control – it is the sort of thing that might, when embraced, control law. Second is the claim that the liberal aspiration does control – it is indeed in control of our law. It is the reason why we do law the way we do, not another way.

First, my claim is that the liberal conception of legality is a substantial intellectual construct. It has sufficient integrity and power that it may serve as the source of effective instruction in the doing of law.

The liberal conception is formed at the intersection of convergent lines of thought about law. It integrates multiple interrelated elements. The conception of liberal legality contains assumptions about what it means to depend on law, and only law, not the will of another; what it means for law to be impersonal; what happens when law is in abeyance. The complex conception brings together ideas about kinds of capacities exercised, and not exercised, in grasping law's meaning; the kind of rationality needed in judging of situations; the nature of arbitrariness.

The commitment formed by the coming together of these elements – the conception of law-like legality – is a highly general allegiance. It speaks to all the performances of legal practice. It supplies the prescriptive content that underlies and unifies the grand law-celebrating messages rife in the rhetoric of our legal practice. It is a demanding conception of what law and legal decision ought to be.

Second, I want to show that salient features of our practice of legal argument are generated by commitment to realize liberal legality. The liberal conception of law-like legality controls the practice.

The salient features of our legal practice are characteristic projects and assumptions. Characteristic projects are particular ways of arguing legally. Characteristic assumptions are cautionary guidelines about what can go wrong. My claim is that law's general commitment gives rise to the specific projects and assumptions of our law.

Liberal conception defines a general situation in which legality is realized. Legality is sustained when the laws exhibit law-like qualities in form and operation. It turns out that legal argument might bring about law-like legality two different ways. One way is to hammer out legal rules, and use the rules as grounds of law-like judgment. The other way is to formulate practical moral principles and policies which are law-like in nature, and use these ideal aims as legal grounds. Since legality might be realized by two kinds of argument, a dual impulse to undertake both kinds arises within legal practice.

The liberal conception also defines in general terms how legal argument might fail to achieve legality. Brought to bear on the specific projects of liberal law, this general understanding gives rise to specific assumptions about what can go wrong in law. And corresponding to the concrete ways in which the two kinds of legal argument might fail are specific admonitions about how to avoid failure. Liberal law goes forward on the assumption that law-like precepts of both kinds – rules on the one hand, principles and policies on the other hand – are the artefacts of intent construction.

In short, characteristic projects and characteristic assumptions arise within legal practice controlled by liberal commitment. That is the thesis advanced by the analysis which commences after this introduction ends. The projects and related assumptions constitute a framework of elements of legal endeavor. The framework defines the distinctive pattern of pursuit of our law. Thus, foundational commitment

to realize liberal legality underlies development of the fundamental features of our law.

By our law I mean American law in particular, and, by extension, law of kindred legal systems. Many other legal systems today share the same aims in virtue of which American law may be said to be liberal law. Our kind of law – that is, law of the kind done in the United States, defined in terms of its characteristic workaday aspiration – comprises doing of law in a number of other legal orders as well, but by no means all on earth today, much less all that have existed in the whole sweep of legal history.

0.1 FORMATIVE COMMITMENT

Liberal law's aspiration may be stated – briefly – two different ways. One is to focus on the sought properties of the laws themselves – how law's precepts ought to be formed. The other is to emphasize legality in life – what law ought to bring about in the world. Both ways formulate aspiration in line with the liberal conception of legality.

In its most general statement, the liberal conception of legality says that the laws should be law-like. The liberal conception is, in a word, the idea of law-likeness. Liberal law's aspiration is to develop laws that display, to a high degree, law-like qualities of generality, consistency, impersonality, regularity, accessibility to reason.

The idea of law-like law is an austere conception. It identifies proper legal grounds with a specially qualified set of practical reasons. Still it encompasses much more than just hard and fast rules, or rule-like generalizations. Principles, policies, and purposes underlying rules are admissible grounds of judgment, provided they are law-like in nature.

In more elaborate statement, the liberal conception of legality says that the law should be law-like for a purpose. The purpose is to uphold two law-formed conditions in the world: entitlement and justice. Liberal law aims to honor people's legal entitlements, which are valued positions of persons that depend just on the meaning of the standing laws, grasped by exercise of reason. It aims to achieve legal justice, which is conferred upon persons brought to judgment when like cases are judged alike, according to general laws. Law-like legality is a perfected condition of law in which legal entitlement and legal justice are sustained through rational legal resolution.

The idea of law-like legality is liberal in that the condition of law it prescribes is intimately related to human liberty. Law-like law is liberty-serving law, the kind of law needed in order to secure individual liberty in society – the kind required by political commitment that prizes equal freedom of individuals. Of course, the law-like form of the laws doesn't guarantee that the content of the laws affirms this or that liberty. But when laws recognizing particular liberties do exist, the laws of liberty ought to be law-like in form and operation – general, impersonal, consistent, rationally determinable. All the laws ought to be law-like, in order for liberty to be well instituted.

Equal freedom is disserved if judgments of the courts are the product not of law-like argument leading to rational resolution, but of arbitrary decision. Arbitrary resolution is judgment based on sheer power or moral predisposition. Liberty in the polity diminishes if legal judgments about people's options and facilities are the upshot of the manipulative power or the personal morals of disposing legal authorities, rather than a regime of law-like law.

We should note that judgment seen from the standpoint of the liberal conception of legality to be arbitrary may be thought to be quite proper when viewed from the standpoint of a contrary conception of law's excellence. Many contrary conceptions are known to legal history. The antithesis of a regime of law-like law is a legal order which rejects liberal commitment to law-likeness altogether.

Consider, for example, a non-liberal conception of law's aspiration which praises context-dependent judgment by specially wise judges. According to that conception, decision of a case in the courts is well justified when it is responsive to a rich narrative of a unique past state of affairs, or when it has in mind the unique set of future consequences the decision might bring about. In deciding, wise judges exercise special insight into the nature of humans and the needs of society, wisdom which they uniquely are understood to possess.

It is worth remembering that, in many legal orders of the past, and some of the present, judging of cases in their incomparable contexts is thought to be proper, and specially wise judges are thought to preside – the elders, a priesthood, agents of a political party specially in tune with the demands of social development.

By contrast, seen from the standpoint of the liberal commitment to law-like legality, contextual judgment springing from uncommon wisdom is arbitrary disposition. Decision that restricts its view to a unique state of affairs or unique consequences is denial of legal justice – the opposite of deciding like cases alike. Decision by judges exercising special insight is denial of legal entitlement – the opposite of judgment based on the meaning of the standing law, accessible to reason, not the will of the authorities. And absent a regime of legal entitlement and legal justice, the liberty-securing service of law-like law is absent.

The condition of legality in life here under discussion, identified as a compound of entitlement and justice, is also – frequently – called by another name. Another name for the governance of law in life is the rule of law. Liberal political commitment, eager to secure liberty by a regime of rational law, prescribes that the laws should rule. However, in this book, for the most part I use a different terminology. I speak of liberal legality, or law-like legality. For the most part, I don't speak of the rule of law.

The reason for my usage is this. The idea of the rule of law, much discussed, is sometimes taken to refer to rather specific institutional formations. Then the idea's meaning comes to be freighted with rather considerable detail about the operation of government in relation to society. By contrast, as I wish to present it, the idea of liberal – or law-like – legality is a highly general conception. It is fairly abstract, and

far-reaching, not concrete. It focuses on a few fundamentals having to do with the properties of laws and the relation of people to law. This highly general conception points to what I take to be the basic properties of a situation in which the governance of law – the rule of law – subsists, and leaves out what I take to be inessentials.

One advantage of working with the idea of liberal – law-like – legality is that it becomes pretty evident that this general prescriptive conception, well understood, might be realized in the conduct of legal practice different ways. And this is a main claim of the book: that there are alternative ways of realizing law-like legality in the doing of liberal law, each of which is actively pursued in our legal practice.

0.2 COMMITMENT UNFOLDS

The aim of the present study is to show that a powerful governing commitment, in charge of the activity of legal argument and decision, generates salient features of our practice of law.

The method of the inquiry to come is to draw lines of connection between basic commitment and consequent undertakings. I want to show how the general commitment of liberal law leads to particular facets of legal enterprise. Analysis connects general and particular.

My hope in this study is to illuminate central features of actually existing legal activity, our practice of legal argument, but the method of the book is not one of inference from the concrete. We will not start with phenomenology of law – law described in concrete terms – and proceed to infer general properties and aims. Rather, we will start with highly general commitment, to carry out a conception of legality, and go on to see how the general commitment gives rise to fundamental aspects of legal enterprise which are features of our law. In this way, we may see that foundational aspiration unifies what otherwise may seem to be disparate undertakings of observed legal endeavor.

The method of deriving features of practice from basic commitment to realize law-like legality, even if evidently successful, might be challenged as follows. Suppose the procedure of derivation does – as an exposition – succeed. We see that certain general ideas about legality, taken as premises, do fit the main features of our legal practice, presented as derived conclusions. However, maybe the premises were made to fit. Perhaps the general ideas used as premises, stated by themselves, don't start out sharp enough to generate specific conclusions about the features of legal practice. Maybe the premises have to be sharpened and toughened – reverse engineered – in order to yield the features.

Even so, if we end up with a set of storable general ideas that do fit a range of observed attributes of law, and are able to account for the attributes in an economical way, that would be interesting. Elegant premises that make sense of diverse particulars are worth discovering. But I believe that the idea of law-like legality is more than an elegant abstraction able to fit details of our legal practice. It is the

source of the lineaments of practice. It is the driving force that impels liberal legal argument. It shapes the practice to its design.

I hope that the analysis to come will show that the conception of law-like legality, when entrenched in legal practice, is very powerful. It says what, in particular, to do. It has a sharp edge. It rules things out. It says what not to do.

The main purpose of the book is theoretical. My aim is to show that important features of our legal practice can be traced to – because they are determined by – a basic conception of what law ought to be. By tying constituents of practice to controlling conception, we produce a unified theory of the elements of law. This is a framework for understanding the enterprise of liberal law. A fundamental framework defining the elements of law answers, in a way, the perennial question of legal theory: what is law? It tells us how law is defined by law itself.

Our method for showing that law's general commitment gives rise to particular features of law is to imagine law's unfolding. First we suppose that commitment to bring about law-like legality is entrenched in the controlling canons of legal practice. Then we go on to identify the kinds of argumentative pursuits and assumptions that emerge within a legal practice so controlled.

Practice of legal argument is constituted by canons of good argument. Such canons are criteria that say what counts as a proper legal presentation. Liberal practice of law is formed by incorporating a specific conception of legality – liberal legality – into the canons of good and sufficient legal assertion. In liberal practice, judges and other practitioners are instructed to conduct argument and judgment in such a way that legality is sustained.

The method of imagining law's unfolding starts by assuming the existence of a legal practice constituted by canons of good argument that incorporate the liberal conception of legality. Then the method is carried out by a narrative of legal development which tells us how a variety of undertakings and admonitions arise in the doing of law, as diverse consequences flowing from common starting conception, and shows that they arise smoothly, without a hitch.

0.3 UNIFIED UNDERSTANDING

In the main body of this book, which starts after the present prolegomenon ends, we will trace law's unfolding, in the conduct of legal practice, from its starting point in commitment to liberal legality, step by step. We will follow a flow of ideas from general conception to particular entailed projects and assumptions. By connecting particular features of legal striving to a basic idea of what law ought to be, we show how those features fit together as a whole. We arrive at a unified understanding of diverse elements of our legal practice.

According to ensuing analysis, two notable unifications arise in the unfolding of commitment to liberal legality. My claim is that general ideas about law's aspiration generate two groups of closely connected features of our law. One group comprises

positive projects of legal argument. The other group includes cautionary assumptions, warnings telling argument what to avoid. These are the projects and assumptions briefly noted earlier in this introduction as salient features of liberal law.

The two groups of features are manifest properties of liberal legal practice. Each of these aspects of law, taken by itself, is pretty familiar. But the several features, considered one by one, seem to be separate properties, quite distinct. My claim is that appearances of separateness are misleading. The seemingly independent attributes of law, when each is traced to its source, turn out to be various ways of realizing the same thing. They are consequences of common – unifying – commitment.

In other words, there is a way to axiomatize liberal law such that, when a few ideas in the nature of postulates are well understood, a rich array of particular entailments, in two groupings, positive and negative, may be seen to follow as derived consequences of fundamental commitment.

The first unification emphasized in this book has to do with various ways of arguing legally. The ways of arguing legally are positive projects. They are argumentative pursuits undertaken in legal practice in order to establish law's meaning and so answer legal questions.

Three positive projects are persistent undertakings of liberal legal argument. Two of the three projects are contrasting kinds of legal reasoning. We noted these two kinds briefly early on in this introduction. On the one hand, law-like legal argument makes use of rules as grounds of judgment. On the other hand, law-like argument invokes practical moral aims – principles and policies – as legal grounds.

The third project cuts across the other two. Law-like argument undertakes to make law's elements cohere. Coherence-seeking is a manner of working with law's rules, on the one hand, and with law's principles and policies, on the other. The third project is to make law's elements of whatever kind fit together.

The three ways of arguing – invoking rules, invoking principles and policies, making things cohere – are pretty evident features of our legal practice. The kinds of reasoning plus coherence-seeking are familiar ways of doing law. But the three seem to be pretty distinct, indeed disparate. The two kinds of reasoning are very different in nature. Reasoning based on principles and policies is practical moral argument; reasoning based on established legal rules is not. The third project, coherence-seeking, is not by nature particularly related to either one of the other two – or so it seems.

As we will see, the three positive projects all arise from the same root. They are the varied fruit of singular purpose. The two contrasting kinds of reasoning are kindred – while contrary in their relation to morality, they are complementary, not contradictory. Each process is generated by aspiration to achieve law-like legality. The project of coherence-seeking is as well. All three positive projects are direct entailments of the formative commitment that stands at the center of liberal legal practice.

The second unification established by the book's analysis has to do with cautionary assumptions put to use in the conduct of legal practice. The assumptions say what legal argument ought not to do, what it should steer clear of. They are directives of a negative nature.

Two lines of directive assumption address law's morality and law's language. In the terminology of the book, law's morality is the sum of practical moral principles and policies used as legal grounds. Law's language comprises classifications and distinctions established by law's rules. Cautionary assumptions identify two kinds of pitfalls – perils – standing in the way of successful use of principles and policies on the one hand, and successful use of rules on the other hand, in legal argument.

Along one line of admonition, legal arguers are instructed to be careful in use of moral grounds. It is bad for legal decision to depend on personal moral judgment; practical moral grounds used in law must not be the same thing as morality embraced outside law. Along the other line of exhortation, arguers are told to watch out for imprecision. It is bad for law's categories to be irreparably vague; classifications and distinctions used in law must be sharper than those of common language outside law.

The two sets of admonitions are pretty unexceptionable. Their advice is familiar. Legal arguers should develop terminology having greater clarity than ordinary language – yes, indeed. Arguers should avoid getting embroiled in moral debate going on outside law – again, sure enough. But what does the one thing have to do with the other? Advice about avoiding moral conflict, and advice about linguistic clarity, address altogether different aspects of legal endeavor. The two suggestions seem unrelated, separately warranted, quite independent.

As we will see, the two sets of cautionary assumptions, about language and morality, arise from the same source. The source is liberal law's understanding of the relation between law and other realms of discourse. From the standpoint of liberal law, disorder exists in intellectual realms beyond law. Law's language and morality must do better than nonlegal language and morality. The admonition to do better is a consequence of law's view of discourse outside law, and that understanding is a consequence of the conception of legality that stands at the center of liberal legal practice.

O.4 OUR LEGAL PRACTICE

The thesis of this book, it is by now abundantly clear, is that the liberal conception of law-like legality is the controlling aim of our law. This means that the liberal aspiration defines the fundamental features of legal practice, its main projects and basic assumptions. It doesn't mean that the liberal commitment, by itself, controls everything.

Our practice of law is a liberal practice. The aspiration to secure law-like legality, here called liberal, is our vital aim, deeply entrenched in the discursive canons of

existing legal practice. The idea of law-like legality and the canons of good argument that embody it are quite familiar, as we shall see in detail when the conception and its prescriptive entailments are elaborated later on. This well-known conception works powerfully to give shape to argument and decision, hence to form law's logic. I believe that it is the central commitment of our law, that it establishes the basic logic of the legal argument we do, and that in it may be found the distinctive character of the law we develop.

At the same time, actual practice is a motley proceeding. By no means are all its notable aspects readily assignable in full to the unfolding logic of any singular aspiration, however complex. Society's legal practice comprises an enormous number of performances enacted over time by a large cast of characters in a wide range of settings. Real practice by human beings is full of impurities. Governing canons of argument are sometimes executed rather strictly and skillfully, and sometimes not. More important than evident laxity or straying from the prescribed path is the apparent eclecticism of legal striving. Rhetoric of legal arguers about law's purposes is diverse. Legal practice seems to pursue a plurality of aims, to follow a variety of argumentative canons, hence to display many logics. In addition to the liberal conception, participants in practice invoke other ideas about legality – ideas of law's excellence, right resolution, good judging – not expressed in the standard vocabulary of liberal aspiration.

The other ideas of legality that appear to operate in argument may turn out upon careful examination to be equivalent to liberal dedication. Or maybe not. They may be elaborations or specifications of the idea of law-like legality, or largely compatible conceptions kept in tutelage. Or they may be truly divergent ambitions for law, straining to move law in directions different from the path indicated by liberal protocol, if often in practice suppressed. It is possible to point to numerous aspects of practice that seem discrepant in terms of the liberal commitment, better understood by light of some further or other commitment. Certainly, alternative construals of the point of the practice are possible, and any imputation is contestable.

But for purposes of the inquiry of this book, divergent aspiration – non-liberal motives in addition to liberal ones – ought not to be thought to be among the governing aims of the practice we study. We should assume that the formative commitment of legal practice is the liberal aspiration to achieve law-like legality, and none other. We ought not to assume that any significantly divergent conception of legality is operative in legal argument.

The thesis of the present study is that liberal commitment is the source of the major features of our legal practice. Major features are the main projects and assumptions which constitute the basic pattern of legal pursuit. Minor features of practice, matters of comparative detail, are not our interest. If we find that the major features of our law are indeed accountable to liberal aspiration, then any non-liberal motives pursued in practice are left with a relatively minor role, and so are outside the focus of the inquiry.

The method of the book is to trace the unfolding of specifically liberal commitment within legal practice. Its project is to see how liberal ambition itself works out. It is beside the point that actual practice may be governed in minor part by non-liberal aspiration. For the object of the inquiry is to investigate the development of the liberal commitment that lies within our law. Divergent commitment may safely be bracketed.

To see how commitment to seek law-like legality unfolds, we should imagine a liberal practice in unremitting pursuit of its own defining aspiration. We should posit a practice governed quite stringently by the conception of law-like legality, and then see how argument proceeds within that legal enterprise. This program of inquiry is the procedure of a thought experiment. We posit initial conditions under which an envisioned activity takes place. These conditions are the canons of argument that constitute law-like legal practice. Then we ask, taking such a practice as given, what follows. We figure out – work out – what argumentative pursuits within law, and what assumptions about discourse beyond law, take shape in the operation of the stipulated practice.

This procedure is a protocol of philosophical investigation, involving use of imagination. However, at the same time, the initial conditions we posit for law in this procedure are not imaginary, merely hypothetical, but rather are quite real. Practice of law under these conditions is not just a thought experiment we – author and reader – might dream up. Rather it is the way we – people in our society – have arranged to have law done.

Of course, the imagined practice will be different from actual practice to some extent. Actual legal argument is no doubt not so single-minded, not so fastidiously liberal. But we can also be sure that a specifically liberal legal practice is not an arbitrary invention. Liberal commitment surely operates – liberal canons are surely operative – within the legal practice we've got. So an inquiry into the development of liberal legality is more than the speculative investigation of an abstract logic.

So far as our own practice is concerned, to whatever extent it is in fact controlled by the liberal conception of law-like law, it is then subject to the specific discovered logic of liberal legality. This is a very great extent if, as I believe, the imagined practice differs from the one we've got only in the posited purity – not in the preeminence – of its liberal ambitions.