TAKING CUSTOMARY LAW SERIOUSLY

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1) This paper explores the realm of customary law. Two conceptions of the law exist —one is textual, the other behavioral.[1] Textual law refers to printed rules, codes, court and administrative decisions, and positive texts.[2] The behavioral sense refers to the phenomena of the law, to the ongoing enterprise that we identify as "the law" and to the regularized practices and activities occuring in that enterprise.[3] Customary law falls generally into the behavioral realm of "the law".[4]

2) Beyond these two general types of conceptions of law, three levels or realms of the law may be distinguished. The *technical* level of law refers to the statutes, constitutions, and explicit texts of the law. The *formal* level of law is "the law" as it exists within the engoing official law-applying institutions of the state. Formal level *rules* are those prescriptive rules observed or established and applied officially by those institutions. Formal level *practices* are the behavioral conventions and customs transpiring within the formal institutions of law. "The law" is constituted of these practices as well. Finally, the *informal* level of law refers to the law as it exists on the streets, outside of the formal institutions of law.[5] This paper concentrates upon customary law within this *informal* realm.

3) Jurisprudents have given far less attention to the formation and impact of customary law than positive law. This paper urges a closer scrutiny of the customary interactions which produce rules identified as "the law" *Formal* law is customary in that it is composed of rules as customarily interpreted and applied by courts and other institutions.

1 R.A.L. Gambitta, "Differing Realms of 'The Law' ", paper presented at Weltkongress Fuer Rechts-Und Soziophilosophic, Zeitgenossesche Rechtskonzeptionen, 9/30/79.

2 This conception is associated with the positivists in jurisprudence.

3 This conception is associated mostly with the realist and sociological schools of jurisprudence.

4 Gambitta, *supra* note 1.

5 Gambitta, *supra* note 1, at p. 2-3.

Customary law develops at the informal level and is never recognized formally by the official institutions of law. Yet according to everyday language, "the law" incorporates regularized practices and rules into its operating corpus. We seek to emphasize the importance of this type of customary law and argue along lines identified with later Wittgensteinian thought that linguistic interaction, not textual reinforcement, establishes certain practices as either "the law" or "against the law."

4) Much of jurisprudence is influenced by positivistic thought. The positivists are not sensitive to the *various uses* of the term "law" within societal contexts. They tend to view "law (or rather phrases such as "against the law") as uni-functional, as true or false or correct or incorrect as it relates information about something (usually a statute, jural decision, or a combination thereof). The usage of the term law (*e.g.*, in the sentence "That's the law") is thought to be a correct one if it properly relates the substance of a valid *a law* (or in the phrase "against the law", as it properly relates the contravention of a valid *a law*). They tend to see the sentences and phrases containing "law" as "statements" and hence their meanings simply as true of false, but this is to fail to see the *other* functions that "law" has, the uses to which it is put in society, and the impact of the term upon human behavior. The functions of various phrases containing "law" are not simply to relate truths about statutes, nor only to refer to those primary rules identified by the rule of recognition. This sees the term law as uniquely descriptive in nature. Nothing could be further from its meaning and role in many of the ordinary uses it receives.

5) The nominalists in jurisprudence (*e.g.*, Granville Williams),[6] realized that the positivists, even the legal realists, mistook terms as referential symbols[7] that actually performed quite different operations within the language. But this was never pursued, for nominalistic jurisprudence was dismissed as linguistic anarchism, in that *all* uses, being only myths, were legitimate uses.[8] Yet the seeds of discovery were within some of the nominalists' claims. Sentences involving the term law often are not simply referential, but rather are used to

6 See, G.L. Williams, "International Law and the Controversy Concerning the Word 'Law' ", 22 Brit, Y.B. Int'l L. 146 (1945) and "Language and the Law", *Law Quarterly Rev.*, 61 (1946): 71 and 62 (1946): 387.

7 That is, as referring to something, either a judicial decision, a statute, or the prophesies of future decisions.

8 And our position is *clearly* not one of linguistic anarchism. Nor is it susceptible to the "private language" arguments. For community *standards* are the criteria of correct usage.

structure, endorse, or reinforce certain behavior, or to persuade, order, or coerce someone to do something, or to accomplish any number of things that are non-referential in function. Yet the nominalists as well failed to see these usages. The question is more than a "verbal one," which is all they claimed it was, for the term's use *in* the world has profound effect *upon* the world. (Just as C.L. Stevenson saw that ethical language played a *role* in society, a fact early emotivists missed, we seek the role played by the language of law.)[9] The contribution of the nomanilists resided with their denial of the logical-atomistic doctrine of the early legal positivists, that elements in language refer only to specific data in reality. The usage of "law" is much wider than that of giving descriptions or of referring to an object (statute, entity, phenomenon, etc.), with its usage or meaning being correct on incorrect as it properly relates or represents the specific stature or the like. Utterance of "law" does not always belong to descriptive language, i.e., it does not always say what is or is not the case about *laws,* jural decisions, and so on, but rather to a language which *does* something.

6) Additionally, most of the positivists fail to see that speech is an activity. And that one acts when one speaks. And that the acts are not always those of describing or referring to something.[10] Nor is it necessary for a statute (an "a law" of any actual variety), to "stand fast" behind every meaningful usage of the term law (or phrase "against the law"). We might explore these points through the example to follow.

7) Pertaining to "law", the legal positivists (and most other schools of jurisprudence) operate on a strict referential theory of language, or as Gilbert Ryle has labeled it, the " 'Fido-Fido' " theory of meaning or usage. This theory seeks to find the meaning of a word in something that "stands fast" to that word, rather as the dog Fido "stands fast" to the name "Fido."[11] It is just this disposition that vitiates jurisprudence, militates against a proper understanding of the uses and meanings of the term "law" within complex modern societies, and consequently contributes to the misunderstanding of the operations existent in the law games in society (since usages of the term, as we shall see, play an integral part within the phenomenon itself).

9 C.L. Stevenson, *Ethics and Language,* New Haven: Yale University Press, 1946.

10 H.L.A. Hart varies on this account, from "ascriptivism" on the one hand to "correspondence" at other times. Overall, however, compared to other positivists, he more readily recognizes multiple uses of language and is not as at odds with the following contentions.

11 G. Ryle, "Use, and Meaning", *Proceedings of the Aristotelian Society,* supp. vol. 35, 1961.

8) We might examine this referential tendency in jurisprudence through what we have called the " 'law'-a law" theory of usage. This theory holds that *a law* stands fast to the (proper) usage of the term "Law"; that when "law" is used (in the sense we are now concerned with), it is used to refer to or to represent an existing (and valid) *a law* (that is, statute, decision, etc.); and that a sentence using the term law is to be viewed as either true or false as it correctly represents a corresponding statute (or the like). Yet, as we shall see, this tends to see only one function of legal language, while in fact there are many. *When looking at the use the term law has in the language of the example we are about to give, it would totally miss the importance of the sentence (and of the phrase "against the law") if we were to look at it as true or false.* For it has a *use* in the language quite apart from the correspondence to an actual or existing statute. To understand the role of "law" phrases such as "against the law" we must view them not exclusively as statements of assertions, and hence meaningful only as they are true or false.

9) Let us suppose that there is a community. In this community the term "law" or the phrase "against the law" is used in a certain way. We have all seen how the phrase "against the law" is generally used, and we derive its meaning from those general usages. And we all live in this community. We all use the phrase "against the law" in the way we grammatically have seen it used, that is, according to the *convention* that has developed for its use. And it is especially important we see that a convention of usage is created and established from these normal uses; that is, the regular continual uses of the phrase form a *convention*. And the important realization for us, at this point, is that subsequent uses of the phrase have *meaning* for us as they accord with the conventions formed from such usages —*not* with whether or not there is a reinforcing statute "standing fast" behind that usage. If the invoked phrase conforms to the convention, then it has meaning for us. And as far as meaning is concerned, it does not matter in the slightest whether or not there exists a reinforcing or corresponding statute (or *a law*, judicial decision, or summary of laws) tucked away somehwere in the statute books of law.[12]

10) Let us bring this to life by viewing an example of "street law" in a college community. On a street corner there is a group of students drinking beer and wine from open cans and bottles, and we might presume "horsing around" in a manner not uncommon to college

[12] Wittgenstein uses a number of examples to demonstrate this, pain, toothache, and his now famous "beetle box" example.

students. Two police officers arrive in a patrol car and one gets out and says, "All right, that's against the law!", followed by, "Let's put the cans away and get moving." And let us suppose that the young students comply, either with some good natured chuckling, or even some ill natured grumblings.[13]

We might now note a number of things. First, the use of the phrase does not rest simply in *description* of the statute. Indeed, for present purposes, let us suppose that there does *not* exist such a statute within the books of law. Instead, the use of the phrase acts as an essential element in the communication of the *prescription.* The invocation of the phrase plays a crucial role in the prescription of a course of conduct. The police officer has related a message to the students, and the message he has communicated is not simply that of relating a statute. It is that the students are to cease their conduct. The function of the phrase is to structure behavior, not simply to relate information about a statute. The use of the words "the law" performs a function inducing compliance with the statutorily unauthorized directive of the officer. Yet over time, regularized use of the phrase "against the law" in this way creates customary law. The regularized interaction creates a customary rule, enforced by sanctions, to which the word law attaches through customary usage.

Secondly, pursuing a different line of argument, let us note that the use of the phrase as referring to a statute is also perfectly consistent with the convention of usage for that phrase. In this sense, it is a proper use of the phrase. Because it is consistent with the convention, it has meaning for us, and we act according to this meaning. *But notice that it does not actually matter in the slightest whether or not there is a corresponding statute "standing fast" behind what has been said. The phrase's meaning is actually independent of the existence of a corresponding statute.* As long as the usage is consistent with the convention, the phrase takes on the character we personally relate to that convention. We simply *assume* the existence of a statute, but

[13] And let us note at this point that a ghetto community could just as easily have provided the scenario in many cities bottle case." In fact, the "brown bag" syndrome in many cities shows, in part, that though there may not be a law against drinking on the streets, it is "against the law" in the community.

whether one exists or not is simply irrelevant to both the meaning and the exchange that has taken place.[14]

11) Now clearly the position just espoused will be attacked as much by neo-naturalists as by positivists. Both critics would contend that we are claiming that there is *no* difference between an officer's usage of "against the law" when adjoined by a corresponding statute and his usage of the phrase when there is no pertinent existing statute or corresponding *a law* standing fast to the usage; and that this is to deny the very nature of what it is we conceive law to be.

12) But this is to miss the point entirely. Indeed, there is a great difference in the two scenarios presented in section 11 above. In fact, what greater difference could there be? In the one case, there *is* a corresponding statute somewhere in the "books of law" which "stands fast" to the term law. But in the second case there is *not*. However, the difference is irrelevant to what has been *said*. A message has been communicated that something is against the law; whether or not a corresponding statute *actually* exists is another question. the receivers have understood what the officer said, and have acted according to it. As long as what has been said follows the "convention of usage," the law game continues, and it matters not whether the reinforcing statute actually exists.

13) Now the actual existence of such a corresponding statute could be contested by one of the participants. He could state to the police officer that there is no such law. But note that his action in no way challenges the meaning of what has been said. What has been said and what has been understood is that this action is against the law. This meaning is *statute independent*.

Unless there were some anomaly to the convention, a challente to the existence of a statute would be unlikely.[15] Statutes are generally presupposed. Few of us carry a statute book in our pockets or in our heads. Rarely have statute books been read at all. Moreover,

[14] We are not denying that the policeman has the discretionary authority to take action in this situation. However, we are addressing his invocation of the term law and relating this to the positivist holdings about "law." It is important to remember that positivists hold something to be law *or* discretion. In philosophical terms they contend this is an example of the "excluded middle." For a discussion of the positivistic contentions on discretion see R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard Univ. Press, 1977. We agree with Dworkin that one does not move immediately from the realm of law to the realm of discretion in decision making in the law. As we shall shortly see, in our discussion of customary law, their total separation does not always hold. "Law" is a much more inclusive concept than the positivists assume.

[15] For instance, on a substantive matter, if the officer said, "Breathing! That's 'against the law'! ", that would be inconsistent with the conventional usages. For the usages we are accustomed to do not find such a statement congruent.

statutes are virtually impossible to check in most situations (oftentimes impossible to personally verify at all for most of the citizenry of a ghetto community). And if their *existence* is impossible to check, then the statutes become totally irrelevant.

14) Yet the positivists and the neo-naturalists would clearly not accept this. Presumably, they would contend that the "second scenario" or usage (viz., the usage *without* the accompanying statute) actually renders the corresponding statute in the "first scenario" irrelevant to an action's being "against the law." Simply put, it renders the statute itself "a nothing."[16]

15) But again there is misunderstanding. Statutes are not "a nothing" in our example. Neither are they "a something." It is just that what is being said is not negated by the non-existence of a corresponding statute tucked away in the "books of law." Hence, "a nothing" serves quite the same as "a something" in the action that has taken place. "A something" is no better than "a nothing" if the use of the phrase is consistent with the convention. And "a something" facilitates the exchange no better than "a nothing" if it cannot be checked. The statute's existence never enters into the exchange at all. At best, it is simply presupposed.[17] Finally, we might say, "a something" is no better than "a nothing" when the statute is irrelevant to the communication and to the meaning of the utterance.

16) In the above case, the importance of the "against the law" usage does not rest with the truth or falsity of a descriptive claim. It lies with the linguistic function of conveying a message, and consequently in the structuring of human activity. What the sentence "means" is clear to the officer and to the citizens involved. It is a mistake to seek some existential referent to correspond to the term, for the meaning of the phrase does not depend upon the actual existence of any statute.

The policeman's intent was to structure activity. It does not matter for the operation of the exchange whether or not there is a corresponding statute. When and if it does matter, then there is a new game, that of "verifying" law —and thus a more formal type of legal game begins. That only occurs if some question arises— i.e., when an anomaly

[16] Cf., Von Puerson's discussion of the "Beetle Box" and "pain" in *Ludwig Wittgenstein, supra.* Sections 9-20 are indebted to Wittgenstein's thoughts relating to the Beetle Box.

[17] But presupposing a statute's existence has nothing to do with the statute's actual existence. Strawson might have it that the "a law" has merely been *presupposed,* and hence no assertion about it is being made, thus it is neither true nor false in the example. Thus what the police officer has said is not true or false, for the laws have been presupposed by both parties and are therefore a given for the conversation. But such is a different position than the one taken herein.

occurs between the officer's usage and the normal conventions governing such usage —or when there is an outright rejection of the command the officer has given despite the acceptance of the convention. but one might say. "What of that rare case, which was not the case in our example, where one had direct personal 'knowledge' that it was not 'against the law'?" First we must ask ourselves how the law could ever really be *known.* All we could really know is that there was no "a law" printed in the "books of law" which stood fast behind the officer's statement, or that there was no court decision in the past upholding such an order. But then what? The prescription of the officer, you might say, could then be challenged. And what would be the behavioral consequences of this "street challenge"? The student's challenge would, in all probability, *increase* the chances of an arrest. And when the officer places the student in custody, a new *law game* begins, a verification game where the existence of specific statutes plays a more important role. When writing the report, the officer will find from his manuals of law an appropriate section or an applicable ordinance with which to charge the student, such as disorderly conduct or loitering. After an arrest, the actual existence of statutes becomes more important. A street challenge to the existence of a reinforcing "a law" will probably bring negative results to the challenger. It should also be abundantly clear that there is no relevant difference between a challenge *with* our hypothesized "perfect knowledge" and one without it. It is the *challenge* and not the knowledge that matters at the informal level; for it is the challenge to and the non-compliance with the officer's prescription which causes the arrest. After the arrest, the "non-existence" of a statute usually will have consequences; for, in the normal course of events, the student will be charged with an *existing* "a law." Then the game becomes more *formal,* the actual existence of statutes more germane, and the verification of those statutes more possible. Even at the formal level, however, conventions of usage may again invoke identical linguistic functions as described above. The lower level judiciary, such as encountered in justice of the peace or municipal courts, often will continue the convention that the prescribed behavior was indeed "against the law" whether or not a corresponding statute exists.

17) At the street level, unless there is deviation from the conventions of usage for the phrase, there is unlikely to be any challenge. And if this one prescription consistently goes unchallenged, or even

if some challenges are met with arrests,[18] the custom that it is "against the law" to drink from open containers on the streets becomes established within that community. A customary law develops which structures community behavior even though no "a law" has ever existed or no court has ever approved or recognized formally the rule or sanction. Regularized prescriptions develop into customary law.

18) The language of law is not simply descriptive, it is often prescriptive, it is often prescriptive. When we *speak,* we are *acting.* There are many other examples of legal utterances which are not descriptions of things. This is, of course, not new to the philosophic community. The general example is that of "performative utterances," as J.L. Austin, among others, has labeled them. For example, when a judge utters, "I find you guilty!", or a police officer, "I place you under arrest!", they are performing acts rather than describing something. It should be added that in these examples, the circumstances or environment must be those proper for the efficacy of the operation. (Clearly the courtroom is usually the wrong context or environment for the "beer bottle" example, for there is a different game going on -- the context and conventions are different. The rules governing the game occuring in the courtroom are quite different from those governing that occuring on the street. In the terms of the radical realists, however, it is not as different a game even there as we often are told. For the rules become relevant *post hoc,* after the decisions on disposition are made.) The judge's utterance of "I find you guilty!" does not have the same significance when uttered by a spectator at the trial. In philosophical terms, that would be a "misfire"; that is, the same utterance, but not in accord with the conventions of the institution of jural type law. And behaviorally, it might constitute *contempt.* Likewise, when a police officer says something "is illegal", it may or may not be the case at a different legal level or in the context of a different law-game. Language in the street, at the informal levels of law, does not, nor is it intended to, serve the same function as that in a courtroom. What a sentence or utterance means before or from an appellate bench is highly different from its function and meaning at the street level.

19) On the streets, statutes are rarely seen. Everyone "knows" *the*

[18] This becomes true even if the arrests are *formally* for something else. It is important to note that the two cases —1) the prescription consistently going unchallenged, and 2) challenges occuring and being met with arrests, *are* separate examples. We will concentrate upon the first, for it is the more interesting to our thesis. *And* it clearly is more demaging to the positivists. John Austin, for instance, could incorporate the second case into his cheme but not the first. For a custom to be law, according to John Austin, it must be recognized and enforced by the courts.

law, yet few have actually read the *laws.*[19] The statutes are simply assumed. Think how we learn law as children. Certainly we don't learn from reading the actual statutes. We usually see their application in the language. We are educated in "the law" through exchange relationships. By learning the uses and conventions of application for the term, and by successfully applying these within the language, we come to know the meaning and substance of "the law." In this sense, all technical laws are assumed from the beginning. Unless there is a deviation from the linguistic (and action) conventions of the term or phrase within the language, there is no reason to question the validity of the inferences we have made from the conventions themselves.[20] None of this says anything about the actual correspondence of reinforcing statutes. It merely says something about human interactions and the necessity of linguistic conventions of the "law's" application. Thus, experiences within our language determine our knowledge of the law.

20) In summation, we can see that reference is not always the important function of the "phrases of law" within our language. And the role in language of even the term "law" is not simply that of giving or relaying information about a statute (supposedly) existing somewhere in the books and journals of law. Terms and phrases have *uses* in language, and it is from the conventions of usage that we grasp what is meant in individual cases. Often when participating in these conventions, the supposed *object* of reference (e.g., a statute) drops out of sight as irrelevant.

21) Customary law represents an important part of the reality of the legal system as perceived by the general populace. This "law" may be enunciated by the police, in conjunction with everyday community interactions, or by judges or penal administrators, at the formal level of the legal system. Whatever the level of its integration into the legal system, customary law is a fusion of societal assumptions and acquired conventional understandings regarding prescribed behavior. The fact that these assumptions are based on valid or invalid descriptive claims is overshadowed by the linguistic function and accompanying message which structures societal activity. As long as a proper convention of usage is invoked, the existence or non-existence of a reinforcing penal statute is of no importance.

[19] Indubitably, one must therefore know "the law" of a community in order to understand the role of *laws.*

[20] This has relevance to the situation of prison or cell block lawyers (those prisoners educating themselves in the law, jural law, within the prison) often being astonished about the existence of certain *laws.*