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Murphy's Law

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Law is a way of knowing as well as mastering what is known.¹ When law ceases to know, it ceases to be master. Exactly this has happened to the legal systems of modernity, says Tim Murphy in *The Oldest Social Science? Configurations of Law and Modernity*. Law has stopped knowing its subject, which is society, and thus no longer masters it. Murphy explores law as a way of knowing, the transformation in society making it largely impervious to law's way of knowing, and the ways of knowing that have elbowed law aside. It is a remarkable performance—rich in learning, teaming with *aperçu*, blessed with set-piece analyses (Max Weber's model of bureaucracy, the contribution of Christianity to Western legal culture, the common law's epistemology) of such surpassing beauty that it more than repays the effort to work through Murphy's sometimes taxing style. Yet his big-ticket thesis—that law no longer knows its subject and therefore cannot master it—is largely wrong.

Murphy follows the legal sociology of Niklas Luhmann, in which sufficiently differentiated societies dissolve into a congeries of self-reproducing, hence autopoietic networks of communication, each sustained by a distinctive code. In Luhmann's vision, the modern legal system is just one subsystem amongst many, each constantly irritating the others, each maintaining a boundary against the others as a consequence of the irritations. The social system has no centre, no hierarchy—or, more accurately, centre and hierarchy are themselves just images circulating in a series of communications. But law, unique amongst the sub-systems, assumes a centre and strives for hierarchy. Centre and hierarchy are the very logic of law's approach to society. That is why law can no longer know its subject, can no longer be master of society.

This, Murphy argues, was not always so. Once (the ancien régime, the good old days, the Gothic constitution), society was transparent to law. Before disintegration into autopoietic subsystems, up to the early modern era, society organized itself according to law's logic. All this changed, however, in the course of the eighteenth and nineteenth centuries, when government started to take responsibility for the performance of the disintegrated sub-systems, for the economy and social welfare. Then the new...

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¹ The premier text on this is Plato's *Laws*. See especially 957c, where the Athenian associates law (*nomos*) with intelligence (*nous*). For the moderns, Lord Bacon, *Novum Organum* (ed. J. Devey, 1902) 11: 'Knowledge and human power are synonymous, since the ignorance of the cause frustrates the effect; for nature is only subdued by submission, and that which in contemplative philosophy corresponds with the cause in practical science becomes the rule.'
science of political economy began to compete with law as the dominant language of statecraft (pp. 126–32). This defeasement of law progressed into the private sphere in the twentieth century, with the emergence of auditing and the science of management. Law was once master, and because it was master, also what was mastered. Now the mass media and identity politics compete with it in the public sphere, and auditing, enterprise, and a sharply defined zone of privacy compete with it in the private sphere.

These other ways of knowing and mastering the social system share a clear methodological disagreement with law, about what can be known and how one goes about mastering what one knows. Law knows qualities of soul and actions evidencing those qualities. Government by law is thus adjudication, the mastery of souls (p. 60). Law’s competitors know statistical aggregates (pp. 124–5, 133–9). Law masters souls directly through education, and indirectly, by assigning responsibility and punishment (Murphy nicely captures this regime with the phrase, ‘the penetrative scheme and juridical soul’, pp. 8–36). Law’s competitors master statistical aggregates through the creation or revision of systems. Law’s methods and aims are thus discordant with the reality created by the methods and aims of its competitors. Law is master in its own house, but many larger, more resplendent mansions, housing their occupants in greater luxury, have grown up in the neighbourhood.

What role does law play in a Luhmannian world? The legal system responds to ‘irritations’ on its boundaries with other sub-systems by ‘an intensified (because it is far from entirely new) fragmentation and dispersal of law – what is usually referred to innocently as specialization’ (p. 187). Law becomes just another management science. ‘Whereas in the past administration took the form of adjudication, today law increasingly tends to take the form of administration’ (p. 187). But law’s reaction, Murphy says, need not be only reactive. With its obsessive focus on the individual, law can perform the role of conscience to the other sub-systems. It can irritate them as well. Law thus has the salutary effect of ‘carving out an ethical space’ (p. 197). It provides the energy behind ‘the moralization of society’ (p. 201). None the less, law’s fundamental claim, that it knows society and masters it, remains unsatisfied. Murphy’s law is in mourning.

Murphy’s mistake is to ignore the contribution law makes to the creation of its competitors, hence to underestimate law’s capacity to respond to their needs. Changes in the way law knows preceded the changes Murphy fingers as the cause of law’s estrangement from society. We can trace the positivization of law to the seventeenth century, to the political and legal theory developing and sustaining the secular sphere that the Reformation began to establish in the sixteenth century. If an exemplary figure is needed, it is Hobbes. The positivization of society began only a century later, with the self-conscious, rational reflection on business methods introduced by the Scottish Enlightenment. The first theorist of law in modern society, the Baron de Montesquieu, was also the first theorist of statistical aggregates. Montesquieu recognized the fundamental relation between legal forms and
population density, and made this relation the theoretical bedrock of The Spirit of the Laws.²

The positivization of the law led to the positivization of society by strictly limiting and defining the reach of state power. Unlike ‘the penetrative scheme’ of the Christian commonwealth, Hobbes’s absolute sovereign cares only that the legal person stay within the hedgerows marked out by the law. Within that space, the person is unaccountable.³ Nor does the sovereign treat the person as a ‘juridical soul’, whose education and correction is the main goal of the Christian commonwealth. Rather, persons are like cattle, animals to be controlled. The sovereign is interested in the person’s interior life only to the degree that it presages action, not in itself. Hobbes’s model of mastery is thus far more modest than the mastery sought by the Christian commonwealth. It is limited in scope, to external behavior, and limited in space, to the fields of activity the sovereign chooses to control. From here, the positivization of society is but a short step, the institution of ‘Systems Subject, Political, and Private’,⁴ where the iron laws of political economy replace the civil law of the sovereign as the well from which all power is drawn.

Hobbes’s main point is that the person’s freedom would be impossible without this peculiar sovereign. His sovereign creates the conditions for activities in which the sovereign has no interest and scarcely knows. But that is the very aim of Hobbes’s commonwealth. His sovereign seeks estrangement from society. Society is law’s excess. Self-estrangement is the sign and seal of modern law. Indeed, in a different key, it is possible to show that self-estrangement is also the sign and seal of law in the Christian commonwealth, of any sort of law. Far from being an affront to law’s logic, the positivization of society is its very core.

Murphy is right that law’s estrangement has become more pronounced in our century. But legal theorists and practicing lawyers have been busy reworking doctrine and methods to track social developments. The class action, statistical proof, and virtual representation are some of the procedural devices lawyers have used to master the issues of mass industrial society. Yet law continues to be the source of the empowerment of persons, as it was for Hobbes. Legal feminism and anti-discrimination laws in the United States of America are but two examples. Rights-based jurisprudence is the often overlooked premise of Hobbes’s sovereign.

Murphy’s mistake, then, is to use an overly narrow definition of law, the one granted to him by his ‘penetrative scheme’. Classical theorists maintained

² Baron de Montesquieu, The Spirit of the Laws (tr. T. Nugent, 1949) especially ch. 23. Montesquieu also recognized the fundamentally statistical basis of knowledge, that knowledge is information. This is expressed in his invention of the footnote, for which we all owe him a great debt.


⁴ id., ch. 22.
that humanity is inconceivable without legality, that humans are creatures whose very identity and existence is a legal identity and a legal existence. Murphy denies that this is true any longer. He is wrong.

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