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LAW IN THE CONSUMER PERSPECTIVE

EDMOND CAHN †

I. THE TASK FOR LEGAL PHILOSOPHY

Almost two centuries ago the German scientific philosopher Georg Christoph Lichtenberg said, "For a long time now I have thought that philosophy will one day devour itself." [1] If Lichtenberg had a chance to observe the low morale of our contemporary faculties of philosophy, he would probably claim that his prediction had come true. In ancient Greece, when philosophy began its career, it proudly called itself "the love of wisdom," but today it seems that if there ever was a love affair between wisdom and the professors of philosophy, each of them has gradually lost interest in the other. A typical statement by a prominent Oxford moral philosopher reads: "To get people to think morally it is not sufficient to tell them how to do it; it is necessary also to induce in them the wish to do it. And this is not the province of the philosopher. It is more likely that enlightened politicians, journalists, radio commentators, preachers, novelists, and all those who have an influence on public opinion will gradually effect a change for the better—given that events do not overtake them." [2] A highly regarded American scientific philosopher says: "Whoever wants

† Professor of Law, New York University. B.A. 1925, J.D. 1927, Tulane University. Member, Louisiana Bar, New York Bar, Supreme Court Bar. This Article, based on lectures delivered during the summer of 1963 in the Teachers Training Program and Appellate Judges Seminar at New York University School of Law, summarizes one of the recurrent themes of Professor Cahn's books: THE SENSE OF INJUSTICE (1949), THE MORAL DECISION (1955), and THE PREDICAMENT OF DEMOCRATIC MAN (1961).

1 STERN, LICHTENBERG—A DOCTRINE OF SCATTERED OCCASIONS 322 (1959).

2 HARE, FREEDOM AND REASON 224 (1963).

to study ethics, therefore, should not go to the philosopher; he should go where moral issues are fought out."[3] With few exceptions, the professors of philosophy have despaired of trying to influence the political and moral decisions of their fellow citizens.[4]

It would be a gloomy day for mankind if this failure of nerve were to infect legal philosophy and jurisprudence. Our world offers innumerable invitations, challenges and opportunities to juristic theorists. Never in previous history have so many social and individual problems been put under the sway of law. Law has absorbed substantial slices of relations and transactions that used to belong to homes, churches, voluntary associations, and other disciplinary organs of social environment. Law has assumed burdens that our ancestors left to corporate religion, private benevolence, group ethics, the play of market and economic forces, and the unpredictable shifts of weather and climate. It has recently begun to bear certain responsibilities that the men of the past called "political" and consigned to the tender mercies of state legislatures.[5] Never has law had so much to do; never has it stood in greater need of philosophic guidance and enlightenment. Jeremy Bentham spoke to our time when he declared, "If it be of importance and of use to us to know the principles of the element we breathe, surely it is not of much less importance nor of much less use to comprehend the principles, and endeavour at the improvement of those *laws*, by which alone we breathe it in security."[6]

No one can charge that the theorists of law have defaulted in their strictly critical function. There has been no deficiency of what we may call the "prudence" in jurisprudence. Our modern realists and skeptics have excelled in analyzing legal standards, exposing latent fallacies, testing the relevant insights of the social sciences, and generally disclosing the role of personal psychological factors that affect the processes of judgment and decision. The only significant deficit on the skeptical side of modern jurisprudence has been a deficit of fact-skepticism.

It is not the critical or aporetic function that has lagged. In point of fact, legal philosophers have been working so devotedly at systematic doubt that most of them have come to think of it as their whole task. The consequences are not altogether wholesome. As reflective thought that remains too long barred from release in action

[3] REICHENBACH, THE RISE OF SCIENTIFIC PHILOSOPHY 297 (1951).

[4] My estimate is quite similar to Karl Jaspers', expressed in an interview published in Die Zeit, March 8, 1963, p. 8 (U.S. ed.). To those who may need the reminder, Jaspers comments dryly, "Philosophie und Philosophieprofessor sind ja nicht identisch." *Id.* col. 1.

[5] *Cf.* Baker v. Carr, 369 U.S. 186 (1962).

[6] BENTHAM, A FRAGMENT ON GOVERNMENT 94 (Montague ed. 1891).

may lead to mere carping and abulia, a jurisprudence that is exclusively critical may conclude, as Lichtenberg warned, by "devouring itself." He had another remark that is pertinent to our era: "To be frequently alone, and meditate about oneself, and create a world from within oneself, may well afford us great pleasure; but in this way we come imperceptibly to evolve a philosophy according to which suicide is right and permissible. It is a good thing, then, to grapple oneself to the world again by means of a girl or friend, so as not to fall off altogether." [7] What legal philosophy needs is constantly to grapple itself to the world.

As I see it, the single most important fallacy of twentieth century thought is that we have homogenized our relativism. Spurred by semantics and anthropology, philosophy has taught that all propositions and judgments are relative, and legal philosophy has echoed the teaching. Depending on the point of view, every statement and its contrary are fungibly true, fungibly false. Yet, oddly enough, the philosophers who so assure us have failed to apply their dialectical and critical talents to their own relativism. Relativism alone stands undifferentiated, untested, unassorted, and unclassified. Since values are merely relative without discrimination or distinction among them, Adolf Hitler may be regarded as relatively bad or good in the same sense that Albert Schweitzer is relatively good or bad and Charles Darwin is relatively superior or inferior to an anthropoid ape. In the spirit of homogenized relativism, a professor of philosophy may insist that all standards and judgments are equally flexible and equally unreliable, that a female ape, for example, may likely prefer her mate to Mr. Darwin. Yes, well she may; but is her case really ours? Granting her the privilege of choosing according to simian standards, may we not reply that in the present state of human affairs we have not only a right but also a most urgent duty to rank Mr. Darwin higher?

It is time for relativism, too, to acquire a measure of self-consciousness and functional sophistication.[8] If, as we are assured, everything depends on and varies with the point of view, then the point of view, the angle of vision, the chosen perspective necessarily becomes the most decisive factor in the formation of responsible judgment. If everything depends on the point of view, we are under a pressing need to select the best, wisest, and most enlightened among available points of view. If everything depends on the point of view, one of the prime tasks of legal philosophy is to examine diverse points

[7] STERN, *op. cit. supra* note 1, at 323.

[8] The practice of grading beliefs according to conceived human costs is an indispensable step toward this sophistication. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 154-58 (1961).

of view, contrast their respective implications for a free society, and indicate the point of view that intelligent judges may esteem and just judges may adopt.

II. The Imperial or Official Perspective and Some of Its Rhetoric

All the modern legal systems have inherited a single, characteristic way of viewing the problems of society. We may call it "the imperial or official perspective" because it has been largely determined by the dominant interests of rulers, governors, and other officials.[9] A similar perspective can be found throughout the history of legal philosophy and jurisprudence. At least from the death of Aristotle down to recent times the classic philosophers of government and law developed their theories while observing the ways of empires, kingdoms, aristocracies, and republican oligarchies. This circumstance left distinct marks on their thinking.

Whenever a concrete question arises for decision in a given society, most of the inhabitants will be seen to accept more or less the same list of factors as relevant to resolving it, and if some disagree with others in their answer, it is mainly because they appraise the respective factors in different proportions of size and materiality. Almost everything in the process of deliberation depends on where they take their stand while they appraise them, on what we correctly call their "point of view." Of course, extreme passion and prejudice may blind some people to the very existence of relevant factors; by like token, a magistrate who is a small man may not be able to see over the mace of authority that lies on the bench before him. But, by and large, the principal differences among valuations will be attributable not so much to myopia as to differences of habitual perspective. In the law, the habitual perspective has been imperial or official.

During the third century B.C., the Emperor Asoka of India, a monarch of extraordinary enlightenment, expressed the imperial or official perspective in the following attractive terms:

> Just as a man feels confident when he has intrusted his child to a skilled nurse, thinking, "This skilled nurse will take good care of my child," so I have appointed the provincial governors for the welfare and happiness of my provincial people.

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[9] The perspective is described in Cahn, *op. cit. supra* note 8, at 17-42. In an article to be published in the December 1963 issue of the *New York University Law Review*, entitled *Fact Skepticism: An Unexpected Chapter*, I endeavor to show its relation to fact finding.

> In order that they may perform their duties fearlessly, confidently, and cheerfully, they have been given discretion in the distribution of honors and the infliction of punishments.
>
> Impartiality is desirable in legal procedures and in punishments. I have therefore decreed that henceforth prisoners who have been convicted and sentenced to death shall be granted a respite of three days. [During this period their] relatives may appeal to the officials for the prisoners' lives; or, if no one makes an appeal, the prisoners may prepare for the other world by distributing gifts or by fasting.[10]

As Asoka illustrates, the imperial or official perspective does not necessarily convey a cruel or oppressive purpose. What it constitutes is a sort of "internal colonialism" whose motive may be kindly and benevolent. To take a modern example, when our representatives in Congress directed the Postmaster General of the United States to censor mail from abroad and make sure that Communist propaganda sent to American citizens was labeled as such, they employed the old imperial or official perspective. In this perspective, one assesses the factors of freedom and security from the point of view of the official processors of government.[11]

It would be misleading to assume that the official or imperial perspective operates within the sphere of public law only. While easier to notice in constitutional law and criminal procedure, it leaves unmistakable traces throughout the legal system and controls the value judgments of the majority of lawyers in every country. The official perspective is not confined to despotic and tyrannical regimes. Implementing as it does the inveterate "we/they" attitude of the professional processors toward the lay consumers, it remains characteristic of bench and bar even in the western democracies.

The official perspective has a typical rhetoric which, when expertly manipulated, can seem very persuasive. Like effective rhetoric

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10 THE EDICTS OF ASOKA 60 (Nikam & McKeon eds. 1959).

11 For a neat instance of the perspective, see the following remarks of Mr. Justice Harlan in Wood v. Georgia, 370 U.S. 375, 400 (1962). The Supreme Court held that Wood, a Georgia sheriff who, in a series of out-of-court statements, had harshly attacked a grand jury investigation into block-voting by Negroes, could not be punished for contempt since the record failed to disclose a clear and present danger to the administration of justice. Dissenting, Justice Harlan objected:

> Indeed, the test suggested by the Court is even more stringent than that which it applies in determining whether a conviction should be set aside because of prejudicial "outside" statements reaching a trial jury. In such cases, although the question is whether the rights of the accused have been infringed rather than whether there has been a clear and present danger of their infringement, it is necessary only to show a substantial likelihood that the verdict was affected, and it is no answer that each juror expresses his belief that he remains able to be fair and impartial. . . . The test for punishing attempts to influence a grand or petit jury should be less rather than more stringent.

in other domains of social activity, it employs phrases and maxims that would sound quite reasonable if they were restricted to their proper uses. As the proper uses keep depositing money in the bank of our experience, we may easily become confused and extend credit when we meet the same phrases in improper or dishonest references.

Some of the familiar phrases are: the public interest in getting things finally settled; the duty to abide by established principles and precedents; the necessity of showing respect for expert judgment and administrative convenience; the dominant need for certainty in the law; the obligation to preserve the law's predictability so that men will know how to order their affairs; the danger of opening the floodgates of litigation; the danger of opening the gates of penitentiaries; the danger of inviting collusion, fraud, and perjury; the deference due to other organs of government; the absurdity of heeding mere speculations; the necessity of leaving certain wrongs, however grievous they may be, to the province of morals; the paramount need to maintain strict procedural regularity; and (by way of solace to a man on his way to the electric chair) the undeniable right to petition for executive clemency.[12]

Whoever wishes further examples may turn to Bentham's *Handbook of Political Fallacies*[13] and convert the respective political locutions that he finds there into legal counterparts. Surveying obstructionism in all its guises, Bentham affixed a label to almost every conceivable species of rhetorical hypocrisy. Our day has produced only a single item to add to his list; it would be called the "Fallacy of Self-Assumed Superiority" and would declare, in effect, "I, the judge, am personally ready for a better, more humane rule of law in this case, but my duty requires me to decide according to the people's standard, and of course the people are not."[14]

It would be redundant to multiply examples of the imperial or official perspective.[15] Not long ago, when I asked some of my colleagues what they considered its most heinous use in the reports of the United States Supreme Court, they offered a variety of nominations and finally chose the decision in *Daniels v. Allen*.[16] The case involved

[12] There are occasions when even this last cannot be uttered with a straight face. Suppose, for example, that the governor of a state considers himself bound by a campaign pledge never to exercise clemency. Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938). (I am obliged to Professor Ralph C. Thomas of the University of Tulsa for calling this interesting case to my attention.)

[13] BENTHAM, HANDBOOK OF POLITICAL FALLACIES (Larrabee ed. 1952).

[14] See Mr. Justice Frankfurter's concurring opinion in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947).

[15] See CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 30-42 (1961).

[16] Reported *sub nom.* Brown v. Allen, 344 U.S. 443 (1953). The circumstances of the *Daniels* case are recapitulated in dissenting opinions by Justices Black (Douglas concurring) and Frankfurter. *Id.* at 548-553 and 557.

two North Carolina Negro youths, seventeen years old, who were under sentence of death. The Supreme Court of North Carolina and the United States Supreme Court refused to consider their very substantial constitutional claim (based on systematic exclusion of Negroes from the jury lists) because their lawyer had served a notice of appeal one day late, and the North Carolina court, although possessed of full discretionary power under state law to accept a tardy notice, had curtly refused.

During the 1920's and 1930's the United States Supreme Court was occasionally unfaithful to the official perspective and began to move away from it. In those days there was no sign that the Court consciously intended to disavow the old point of view; it intended only to employ it with stricter system and decency. The game of litigation was expected to remain the same old game, the sporting theory of justice was still to prevail, but the officials were to be held more closely to established rules. Mr. Justice Holmes epitomized the official perspective at its most ambitious when, dissenting in the *Olmstead* case, he protested against the Government's engaging in "dirty business." [17]

We can see the start of the movement (which no one suspected of launching a transition) if we look at the ordeal of Tom Mooney. Mooney was convicted of murder for participating in the San Francisco bombing of 1916. After his time to apply for a new trial had expired under California law, it was discovered that the district attorney had received information before the trial, which he did not disclose, showing that the two principal eyewitnesses for the prosecution were offering wholly false testimony.[18] In 1918, despite this specific evidence of fraud and perjury directly involving the prosecutor, the Supreme Court of California decided unanimously that Mooney had no remedy.[19] It adopted in its opinion the following statements of the lower court:

> The defendant in such case is without remedy. In this state it is the settled law that a judgment cannot be set aside because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed. The fraud which is practiced in such cases upon both the court and him against whom the judgment is pronounced is not such fraud as is extrinsic to the record; and it is only in cases of extrinsic fraud that such relief may be had. . . .
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> Nor can it be said that the duty of a district attorney differs in the trial of criminal actions from that of counsel

17 Olmstead v. United States, 277 U.S. 438, 470 (1928).

18 See Mooney v. Holohan, 294 U.S. 103, 110 (1935).

19 People v. Mooney, 178 Cal. 525, 174 Pac. 325, *cert. denied*, 248 U.S. 579 (1918).

> in civil actions. Each has an equal duty imposed upon him by the oath he has taken and by the law of the land to present to the court and to the jury only competent and legitimate evidence from which may be determined the truth of the issues involved. If that obligation be violated, and perjured testimony produced, or material evidence suppressed by either, as we have seen, in so far as the judgment is concerned, the injured party is without remedy.[20]

It is embarrassing to add that the Supreme Court of the United States denied Mooney's petition for certiorari.[21]

By 1934 the law was ready for a transitional step. Mooney, after more than sixteen years of imprisonment, turned to the Supreme Court's original jurisdiction and moved for leave to file a petition for habeas corpus. At last the Court put its foot down on the issue of official honesty. Though it denied the petition without prejudice, ingeniously distinguishing the 1918 determination and remitting Mooney to the use of state habeas corpus, it declared categorically that if he could prove the fraud he asserted, his conviction must be nullified.[22] Due process, it said,

> is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[23]

Thereupon, weary of fraud, delay, and injustice, the Governor of California declared his belief in Mooney's innocence and gave him an unconditional pardon. No one returned sixteen years of life to Tom Mooney. Few even considered the question whether the official prosecutor and the legal system that had denied a remedy ought to admit their guilt and petition for a pardon. The whole episode demonstrated that although on some occasions "hard cases make bad law" on others bad law makes hard cases. Significantly enough, the former is a familiar saying among lawyers, and the latter is not.

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[20] *Id.* at 530, 174 Pac. at 327. With respect (or at least an outward show thereof), I doubt that the court's statement about "the duty of the district attorney" was California law in other cases. See, *e.g.*, People v. Wells, 100 Cal. 459, 34 Pac. 1078 (1893).

[21] 248 U.S. 579 (1918).

[22] Mooney v. Holohan, 294 U.S. 103 (1935). See also Berger v. United States, 295 U.S. 78 (1935).

[23] *Id.* at 112.

Following the *Mooney* decision, the United States Supreme Court and various high state courts developed and elaborated its doctrine with commendable firmness.[24] During the quarter century after Mooney's release, though it cannot be said that prosecutors' behavior improved, the courts at least endeavored to elevate their standards of due process and fair trial. The more revolting instances of official misbehavior came to be generally regarded as indecent, undutiful, and "dirty business." We shall see that this phase, impressive as it seemed, was only a transition.

III. Emergence of the Consumer Perspective

The democratic revolution that began in the seventeenth century and is still under way in the twentieth is gradually providing the law with a new and different perspective. The old point of view—the imperial or official—was that of the processors; the new point of view, which we may call the consumer perspective, is that of the consumers of law and government. A free and open society calls on its official processors to perform their functions according to the perspective of consumers.

How does a person become a consumer of government and law? The obvious and traditional way consists in living amid conditions of reasonable public order and being safeguarded and regulated from day to day as one goes about the chores of his life and fills his place in society; in this sense, one consumes law whenever one talks or writes, walks or sits, buys or sells, rents or rides, pays or receives. In addition, there is a more dramatic way to consume the law. One may engage in a lawsuit, or be charged with a crime.

Under democratic government, a citizen also consumes law in a more extensive fashion.[25] He influences the shape of policy and legislation, casts his vote, supports his political party, urges reforms, asserts the interests of a special group or of the whole community.

Finally, there is a third way to consume government and law. It consists in examining, judging, and assuming responsibility for what our officials do in our name and by our authority, the unjust and evil acts as well as the beneficent and good.

Suppose we consider a case like Tom Mooney's in the consumer perspective and ask whether the doctrine reached in the 1930's was adequate. Is it enough to hold that a conviction is unconstitutional and subject to collateral attack when the prosecutor with guilty motive

[24] See, *e.g.*, Alcorta v. Texas, 355 U.S. 28 (1957).

[25] On occasion, the bringing and conducting of a lawsuit may belong in this more creative category. As Mr. Justice Brennan has recently reminded us, litigation may be one of the most effective ways—sometimes the only effective way—to achieve redress of group grievances. N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963).

introduces evidence that he knows to be false, suppresses evidence that would exonerate the accused or, if you will, stands silent in the courtroom when he hears prosecution witnesses testifying falsely?

Granted that from the imperial or official point of view, the prosecutor's guilty purpose may make a decisive difference, how much difference can it make in the consumer perspective? As far as the public is concerned its interest is in having trials conducted fairly and in minimizing, though it cannot eliminate, the risk of convicting innocent persons. As far as the accused is concerned, he suffers from the giving of false testimony or the suppressing of favorable evidence just as much, whether the prosecutor's motive be good or bad, well-intentioned or vicious. The harm to him is the same either way. True, a prosecutor with good intentions may cast a lesser onus of disgrace on the community and its law-enforcement apparatus; yet what consolation can that be to an innocent defendant who is left to remain in the penitentiary? The best of official motives cannot make prison walls acceptable to an innocent man. Thus in the consumer perspective the *Mooney* doctrine fell short.

The next evolutionary phase began in 1956 when the New York Court of Appeals upheld an attack on a conviction when the prosecutor had remained silent in court though he knew that the state's principal witness was giving false answers to questions that bore directly on his credibility.[26] Judge Stanley H. Fuld's opinion for the unanimous court adopted a consumer view of the prosecutor's motive: "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for *its impact was the same,* preventing, as it did, a trial that could in any real sense be termed fair." [27]

Five years later in *Brady v. State,*[28] the Court of Appeals of Maryland unanimously embraced the new doctrine and when the case reached the United States Supreme Court, the Court's opinion by Justice William O. Douglas consolidated the advance.[29] Under the fourteenth amendment it is now unconstitutional for a prosecutor in any state to withhold "evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty" [30] annexed to the offense. Affirmng the Maryland court, Mr. Justice Douglas stated:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

[26] People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).
[27] *Id.* at 557, 136 N.E.2d at 855, 154 N.Y.S.2d at 887 (emphasis added).
[28] 226 Md. 422, 174 A.2d 167 (1961).
[29] Brady v. Maryland, 373 U.S. 83 (1963).
[30] *Id.* at 87-88.

punishment, *irrespective of the good faith or bad faith of the prosecution.*[31]

It will be noticed that the Supreme Court's statement still requires (a) a demand or request for the pertinent item and (b) some knowledge or information on the prosecutor's part by which the item can be connected with him. In all likelihood, the Court will soon begin to erode the former requirement and dispense with demand, particularly where the defense has no cause to suspect that the item of evidence exists. Surely Judge Edgerton was right when he remarked a number of years ago:

> [T]he case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.[32]

To complete the evolution and provide a doctrine that comports fully with the consumer perspective, it will also be necessary to eliminate the requirement that the prosecutor or police know about the item at the time of trial. If the prosecutor's motive is deemed irrelevant as it now is, the same ought to be true of his knowledge or information. If a conviction rests on perjury, what difference does it make to the public or the defendant that the prosecutor and police have no cause to suspect the testimony when they offer it at the trial? It may even be that a prosecutor who credits the veracity of his false witnesses can work more harm than one who distrusts them. At any rate, the right to collateral attack on a conviction obtained by perjury should not be made to depend on the prosecutor's subjective state of information. The conviction is equally unjust however much or little the prosecutor may have known when he obtained it. Once its injustice comes to light there is no warrant in the consumer perspective for permitting it to stand.

Of course, this does not imply that a convict who has had a completely fair trial is entitled to submit the same conflicting evidence to another jury. It does mean that if at any time he offers concrete, newly discovered evidence to establish that he was convicted through perjury, his right to a new trial should not be denied simply because he cannot implicate the prosecutor.[33] In the consumer perspective, con-

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[31] *Id.* at 87 (dictum) (emphasis added).

[32] Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950).

[33] Obviously, if as in the *Savvides* case the prosecutor knew of the perjury and did not disclose it, the court will not listen to an argument that, since the proof of defendant's guilt was overwhelming, the episode was immaterial. As Judge Fuld put it, "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." 1 N.Y.2d at 556, 136 N.E.2d at 854, 154 N.Y.S.2d at 887.

victions and penitentiary terms should not rest on clearly demonstrable perjury under any circumstance.

Nor for that matter should they rest, as experience demonstrates they sometimes do, on the mistaken identification of sincere and respectable eyewitnesses whose powers of observation have been confused by anger, excitement, or panic fear.[34] Suppose a convict at any time offers newly discovered evidence that is not merely cumulative and not substantially contradicted by contrary evidence; suppose the newly discovered evidence is sufficient in quality and probative effect to convince a judge that the man was wrongly convicted: surely on these conditions the court ought to set aside the conviction without finding it necessary to label either the prosecutor or his witnesses as scapegoats. It should be enough to find that the trial process, which we all acknowledge to be imperfect, has manifestly miscarried and condemned an innocent man. Our courts, which have come a long way during the past generation, ought to be ready to take the remaining steps.

IV. What the Consumer Perspective Is Not

So much for a particular illustration of the consumer perspective. What is it in general? Perhaps, to minimize misunderstanding, we should begin by saying rather flatly what it is not.

For one thing, it is not an attempt to repudiate the values that the traditional perspective has emphasized (or overemphasized)—governmental efficiency, public order, respect for authority, and national security. Far from banishing the traditional values, the consumer perspective puts them in their proper rank and proportion as instruments of the people's welfare.

For another thing, when we regard the general citizenry as consumers of law and government, we are not assigning them a merely passive role. We do not mean they are like a flock of Strasbourg geese that have grain pushed down their throats in order to hasten their conversion into pâté de foie gras. On the contrary, the people are consumers in much the same sense that a farmer is one, who grows his wheat and sends it to the miller to be ground into flour, which he takes away and consumes, the lesser part of it directly in the form of home-baked bread and the greater part indirectly by sale or exchange for other merchandise which in turn he uses or consumes. It would be a strange miller who believed that farmers, because they were con-

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[34] That innocent persons accused of crime are more likely to suffer from mistaken eyewitnesses than from deliberate perjurers would appear from the instances collected in Borchard, Convicting the Innocent (1932) and Frank & Frank, Not Guilty (1957).

sumers, were merely passive. Such millers, of course, there may be; there may also be tailors who fancy that men have arms in order that they may make sleeves, and legs in order that they may fit trousers. But no one who has ever had a baby in the house can long believe that the role of a consumer—even of a sleeping consumer—is truly passive. In a free society, no influence is more cogent and active than the citizen-consumers' needs, demands, and complaints.

This does not mean that we are furnishing officials with excuses for abdicating their lawful authority. The judge who uses the consumer perspective still has to decide individual cases as they come before him; he still has a solemn duty to sift the evidence, deliberate over the issues, and reach his own conscientious determination.[35] So too, the president, senator, congressman, or commissioner who uses it is still obliged to think for himself; he cannot delegate his thinking to public opinion polls. The perspective is not an escape from official responsibilities, nor a signal for installing so-called "people's courts" in the free nations.

Nor is it an attempt to take sides between the individual and the social group, or between material and economic interests, on the one hand, and intellectual, cultural, and ideal interests, on the other. It does involve shifting the focus of law and government from processors to consumers; but among the various consumers and their diverse interests, it offers no simplistic formula, no a priori preference, no lazy hierarchy of values. Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience.

Finally, to avoid one more conceivable misunderstanding, let us add that in a criminal case the accused is obviously not the only pertinent consumer of law. The community is likewise a consumer, and so, too, are the persons whom the crime has injured directly. It would travesty our theme to take it as suggesting that we look at criminal trials exclusively from the point of view of the accused. We have proposed nothing so fatuous.

V. What the Consumer Perspective Is

So much for what the consumer perspective is not. Turning now to its positive attributes, one sees what is new about them in the following operations.

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[35] See Cahn, The Moral Decision 300-12 (1955); Bridgman, The Way Things Are 243-46 (1959).

A. Quoad the Targets and Occasions of Law's Impacts

In the consumer perspective, the significance of any principle, rule, or concept, however exalted, is investigated by observing the specific human targets of its impacts and the occasions when it becomes material to concrete experiences of the members of the community. It was this method that disclosed that the sense of injustice—rather than a purported sense of justice—exerted vital influence within the operations of law.[36]

Current trends in the court reports provide a variety of encouraging positive illustrations.[37] For example, anyone who has been watching the field of products liability must see how the concern with consumer impacts has steadily eroded conventional concepts of warranty and the requirement of privity. Justice Roger J. Traynor, writing for the Supreme Court of California, recently broke through the barrier of warranty and declared, "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." [38] Not only a purchaser, mind you, not only a privy or relative or connection of a purchaser, but a "human being" pure and simple. Recognizing that "the injured persons . . . are powerless to protect themselves," [39] the California court brushed past warranties with all their technical refinements, and boldly imposed liability on the manufacturer. If legal philosophers would examine concepts like freedom, truth, security, welfare, and sovereignty with a comparable sensibility to human impacts, they might bring a bright new light to the law.

B. Quoad the Concretization of Men

In law as elsewhere, conceptual statement tends to make even a gray notion seem black along its edges. This happens because whenever our concept says "A is this," it seems silently to imply that "A is

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[36] CAHN, THE SENSE OF INJUSTICE 1-27 (1949). In this reference, it is fitting to reiterate Horace Kallen's inspiring pronouncement:

> The ultimate consumer is the basic social reality. He is the *natural* terminus of any chain of change in human life. He is the end for whose sake things are not merely used but used up. He is the topmost turn of any economy, the seat of value, the individual in whom the processes of life, whatever their course, begin and end and find their meaning.

KALLEN, INDIVIDUALISM—AN AMERICAN WAY OF LIFE 215 (1933).

[37] *E.g.*, the renascence of the eighth amendment's clause forbidding "cruel and unusual punishments." One vector is instanced in Robinson v. California, 370 U.S. 660 (1962), another in Trop v. Dulles, 356 U.S. 86 (1958) (opinion of Warren, C.J.). Resort to the clause has remained prudently cautious. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[38] Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (Sup. Ct. 1962).

[39] *Id.* at 901, 27 Cal. Rptr. at 701.

not that," and it may make the implication all the more dangerously because it does it mutely. By avoiding an explicit statement that "A is not that," it escapes open qualifications and disagreements. To say, for example, "This juvenile delinquent is a lawbreaker" seems to imply (by means of the truth itself) that this is the aspect of his total personality we ought to attend to; it seems silently to ask us not to notice what else he may be.

Since we certainly cannot dispense with abstractions and concepts in the ordering of human affairs, our only working approach to the whole personality of a human being is to employ a consumer perspective. Though the law classifies its consumers as facets or fragments of men, it touches them as whole men. It puts the whole man in jail, hangs the whole man, takes away money, status, and property that affect the life of the whole man. When it imposes guilts, they pervade the whole man. It protects the physical and psychic safety of the whole man, and the property on which he may depend. The law guarantees social values, ideals, and freedoms that make life meaningful for the whole man.

There is no denying that the whole man, whoever he may be, is fearfully and wonderfully complex. In the consumer perspective we put aside the convenient marks and statistical dots that stand for human beings and see our congeners in their diverse mixtures of rationality and irrationality, altruism and selfishness, decency and viciousness, magnanimity, cupidity, and repulsive pettiness. Peacocks for vanity, goats for lubricity, and monkeys for conformity they may be—yet strangely endowed with nobility, valor, devotion, and passionate intelligence.

Permeating these singular beings is the unpredictable and highly various chemistry of sex. According to the consumer perspective, sex may make a difference not only in the person judged but also in the person judging; the Supreme Court has taken the proposition seriously enough to overturn a criminal conviction because women had been intentionally eliminated from the jury panel.[40] Thus the perspective not only directs our attention to concrete data of human behavior which the old official perspective ignored, it employs the data more functionally, flexibly, and equitably.

C. Quoad the Relative Proportions and Weights of Items

Judgment in the consumer perspective tends to reverse the respective proportions and weights attributed to the traditional concerns of law. Though responsive to the interests of internal efficiency and

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[40] Ballard v. United States, 329 U.S. 187 (1946).

convenience, it accords larger significance to the felt needs of the general citizenry.

D. Quoad the Concern With Particular Cases

It is traditional for jurists of the official perspective to justify the legal system in terms of averages, wholesale statistics, and overall performances. In point of fact, they are prone to disparage an interest in the outcomes of particular cases as unscientific, unphilosophic, and unlawyerlike.[41] The system, they submit, would not be a system if it were not impersonal and indifferent; it works well enough for them if it meets its purpose in the long run.

Seen in the consumer perspective, these defenses seem dubious. If an innocent man is sent to prison or the electric chair, there is something not quite adequate about assuring him (or his widow) that miscarriages do not happen very often; the man may have a stubborn feeling that he is entitled to justice in his particular case. So too, for that matter, may the litigant in a civil action with a good claim or a good defense. In the consumer perspective, there is something repulsive about the complacent grin with which we are assured that not many judges have been caught taking bribes, that the third degree is not so common as it used to be, and that not many prosecutors suppress evidence favorable to the defense or, if they do, it is seldom proved.

If a layman goes to a surgeon who bungles his operation and he loses an arm or a leg, it is not likely that he will recommend the surgeon to his friends just because other patients have had more satisfactory results. Why should laymen use a different standard when they judge the legal system? How can one expect to solace them by promising

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[41] Here we meet the ambiguity at the very core of Holmes' predictive view of law. Did he mean prediction of the outcome in a specific assumed or pending case, which is what a practicing lawyer is mainly, and a "bad man" exclusively, concerned with? Or did he mean merely prediction of the development of doctrines and general principles, which is what the traditional jurist would consider sufficient? He surely *seems* to mean the former. See Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 445 (1954). Observe one of Holmes' early statements:

> The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered.

Holmes, Book Review, 6 AM. L. REV. 723, 724 (1872).

Which is Holmes taking as the criterion here: his notion of a competent lawyer or his notion of what conduces to a treatise on jurisprudence? All we can say with certainty is that a lawyer who did *not* consider "singular motives, like the blandishments of the emperor's wife" and their many modern counterparts, would soon find plenty of time on his hands, whether or not he used it to compose a treatise on jurisprudence. "Singular motives" indeed; what a singular lawyer he would be!

that some day the law will awake to needs like theirs?[42] Unless a litigant happens to be an Olympian philosopher or a legal historian, he probably desires justice here and now. He can understand that the law is imperfect like any other human contrivance, that juries may err, and that judges—even the best of them—are restricted by the law and are neither omnipotent nor omniscient. What he cannot understand is inertia and smug indifference.

VI. Are Judges Consumers of the Law?

Legal philosophy in its long career has found a score of ways to ask whether judges are themselves consumers of the law. Does a judge assume any personal responsibility of an ethical nature when he enforces an immoral private law (*i.e.*, a contract) or an inhumane public law (*i.e.*, a statute)? If he does, has he a *legal* right to refuse enforcement?

Without attempting to examine these perennially vexing issues in all their ramifications, we can surely say that the long histories of Civil Law and Common Law alike confirm the status of the judge as a consumer of law. Both systems have recognized his legal right to deny enforcement under certain circumstances. At times his authority for refusing may be explicit, at others implied or assumed; at times it may be expansible, at others fixed and rigid. But that judges may be authentic consumers of law seems beyond doubt in our tradition. They have not been mere menials of the political branches.

The systems provide various techniques to enable a judge to defend his integrity. In the first place, he is authorized and expected to construe the provisions of contracts and statutes so as to avoid socially obnoxious, oppressive, immoral, or inhumane results.[43] In the second place, he is expected, under the aegis of public policy, to refuse enforcement of contracts that serve illegal, immoral, or anti-social purposes. In the third place, by disavowing the notion of parliamentary supremacy, the American system rescues him even from acts of legislation if they transgress the specified limits and prohibitions of the written constitution. In our time, the judicial review of constitutionality has come to prevail in more than thirty nations, perhaps because the humiliating spectacle afforded recently by Nazi Germany and Fascist Italy, and presently by the Republic of South Africa, showed what degradation might befall judges without it. The tragic experiences of

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[42] See Judge Frank's important warning against appellate judges' becoming so preoccupied with possible future cases that they overlook the interests of the actual parties before them and "never quite catch up with themselves." Aero Spark Plug Co. v. B. G. Corp., 130 F.2d 290, 295 (1942) (concurring opinion).

[43] For a worthy example of the art, see Rosenberg v. Fleuti, 374 U.S. 449 (1963).

these countries imply that a free society owes a written bill of rights not only to its general citizenry but also to its decent and honorable judges. When law affects basic human values, judges cannot dispense it to others without partaking of it themselves.

The proposition that judges too may be consumers of the law has immediate practical applications. Suppose, for example, we consider the subject of "entrapment" and its consequences in criminal jurisprudence. For almost forty years the United States Supreme Court has fumbled with entrapment doctrine,[44] and for about thirty years—ever since *Sorrells v. United States*[45]—the respective justices have attached themselves to two different theories of its import.[46]

In general, entrapment takes place "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[47] According to the Supreme Court majority, a trial judge must assume that Congress in enacting a criminal statute did not intend it to apply to instances of entrapment, must construe the statute accordingly, and on receiving evidence that government officials may have instigated the crime, must submit the defense of entrapment to the jury. Though this approach to the problem has irrefutable merit, it suffers from two defects: (a) it concedes the power of Congress to eliminate the defense of entrapment by express enactment, and (b) it leaves the judge unprotected if he feels convinced that entrapment took place, but the jury, for whatever reason, feels otherwise.[48]

According to the minority, the doctrine should not rest on imputed legislative intent or statutory construction. It should rest on public policy and the preservation of the court's integrity. Consequently, the minority contend:

> It is the province of the court and of the court alone to protect itself and the government from such prostitution of the

[44] See, *e.g.*, Casey v. United States, 276 U.S. 413 (1928); Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958).

[45] 287 U.S. 435 (1932).

[46] See Sherman v. United States, 356 U.S. 369 (1958); Masciale v. United States, 356 U.S. 386 (1958); cases collected in 1962 ANN. SURVEY AM. L. 75-76; *cf.* Lopez v. United States, 373 U.S. 427, 434 (1963).

[47] 287 U.S. at 442.

[48] Though in the *Sherman* case the majority held that there had been entrapment, it reached the conclusion as a matter of law.

> We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. . . . We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

356 U.S. at 373. The ruling does not meet the trial judge's needs in the more usual case when a finding on entrapment involves a choice between conflicting witnesses. *E.g.*, Masciale v. United States, 356 U.S. 386 (1958).

> criminal law . . . . Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury.[49]

Although this approach likewise has merit, it too shows defects: (a) relying as it does on a general notion of judge-made policy, it leaves the court vulnerable to a statute that might expressly eliminate the issue of entrapment, and (b) though it safeguards the judge's position, it leaves the issue of entrapment entirely to his judgment and allows no other protection for the defendant, the jurymen, or the general community.

I suggest that each of these views is inadequate. The majority have neglected the interest of the judge as a consumer of law while the minority have concentrated on his interest to the exclusion of everyone else's. The majority have evinced respect for the motives of the legislature and the minority for the honor of the judiciary as though these were irreconcilable alternatives and the law must make a choice between them. But would it be unreasonable to assume that neither judges nor legislators approved the vicious practice called entrapment? If so, what has so long been treated as a problem of either/or is not one at all, it is a problem of both/and.

In order to satisfy all the pertinent consumer interests, we need a procedure that would combine the minority with the majority solution. In short, whenever the evidence of entrapment is sufficient to convince the trial judge, he should stop the prosecution and quash the indictment, and whenever it is substantial but insufficient to convince him, he should submit the defense of entrapment to the jury. In either situation, there should be no need for proof of entrapment beyond a reasonable doubt; a preponderance of credible evidence should suffice.

Finally, in the improbable event that a legislature should expressly forbid the judge or jury to consider entrapment, the statute should be held unconstitutional. If an act of Congress, its invalidity would stem from violating the separation of powers (article III) as well as denying due process of law (fifth amendment) and inflicting cruel and unusual punishment (eighth amendment).[50] If a state statute, its invalidity would rest on corresponding provisions of the state constitution together with the due process clause of the fourteenth amendment. By

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[49] 287 U.S. at 457 (footnote omitted).

[50] See Robinson v. California, 370 U.S. 660 (1962).

means such as these, judges could preserve their own high status as consumers of law.

VII. Strife

It would be pleasant to infer that the positive advances we have been noting betoken a dependable trend in the law, that democratic and humane standards must sooner or later supersede the old imperial ways of viewing and deciding, and that once the judges become conversant with the consumer perspective their attachment to it will be not only complete but irrevocable. It would be pleasant to engage in reveries like these, pleasant but altogether groundless. For us who are witnessing the course of the twentieth century (the century that rediscovered genocide), there is no excuse for a bland and shallow optimism.

There are, of course, a number of gains and reforms underway on the legal scene which, though they cannot guarantee future developments, do furnish occasions for hope. The libertarian judges of our era are displaying an admirable and increasing capacity for psychological projection, social insight, and creative intelligence. Empathy is at work as never before in the judicial process.

On the other hand, we have grimly to admit that the counterforces—the impulsions that resist the consumer perspective—can never suffer a final defeat in human society as we know it. Even if subdued locally and temporarily, which seems unlikely, they would be sure to rise again and renew the contest. The first great counterforce is man's insatiable lust for power, inviting temptations and corruptions that an honorable official may dismiss from his psyche today only to succumb to their poison tomorrow. No one can retain official authority and immunize himself totally from them.

The second counterforce—equally irrepressible—is man's inveterate propensity to distinguish "we" from "they," to wall off "we" from "they," and eventually to promote "we" and subordinate "they." Who has ever met a human being exempt from the predisposition? In all probability none exists. It is part of the way our species is wont to behave and misbehave, part of what we mean by the loyalty we admire and the bigotry we detest. It is the incorrigible jack that will not stay down but keeps popping up in our human box.

Though all we can be sure of is contention and strife, we have abundant incentives to continue striving. Our legal order already displays extensive shifts away from the old, harsh official perspective. Every move toward a consumer perspective demonstrates how much intelligence and resolution are able to achieve for the law. And even if the trend should change one day for the worse and all our hopes

prove to be dupes, no one could cancel what we should have gained in some individual case on behalf of some individual human being, no one could strip us of some concrete good that we should have redeemed then and there, some particular act of equality that we should have performed, some specific exercise of freedom that we should have made whole. Only in the consumer perspective can a passing skirmish count as much as a long campaign and the rescue of a single life as much as either.