

Reality and the Language of the Law

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The core of Professor Stone's paper, it seems to me, is that we can define and develop useful insights about that amorphous something that we call law by focusing on the language of the law.¹ Through the insights thus derived, we will succeed in advancing the law's attempt to encompass a variety of emerging claims to legal recognition, such as the special claims of fetuses and trees, and the universal claims of dignity and personhood. And in any case we can, through language-based perspectives, gain a clearer illumination of law itself and of law's own logical style.

I would like to address my comments principally to the first of these propositions. I recognize that, in so doing, I may be distorting the major theme that Professor Stone is trying to develop. As Dean Harry Wellington has recently pointed out,² there is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner. As a judge on an appellate court, I expect that I fall somewhere between these divergent approaches. I look to the writings of scholars to provide me with broad perspectives, with a sense of past and of future, that busy brief-writers and harried law clerks cannot often encompass.

From where I sit, legal scholarship is, and must be, in a continuing dialogue with reality. The mission that ultimately unites us all is the fundamental struggle of the law to cope with unruly reality. We have

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1. As an aside, I would like to comment on one of Professor Stone's minor themes, that legal treatises are no longer being written as effectively, perhaps even as grandly, as once they were. I doubt it. In my own field, Gilmore's two-volume work on security interests, G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965), and White and Summers's hornbook, J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (2d ed. 1980), have been enormously, and deservedly, influential. Boris Bittker would be surprised to hear that his multi-volume treatise on taxation, B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* (1981), does not reflect his total mastery of his infinitely complex field. Treatises are not what young scholars aspire to do, because first-rate treatises are beyond the competence of young scholars. The overview of a field of law as a whole is the peculiar prerogative of the mature scholar, reflecting the work of a lifetime. A good example is A. CORBIN, *CORBIN ON CONTRACTS* (1963), written when Professor Corbin had retired from the ranks of active teachers.

2. See *YALE L. REP.*, Winter 1980-81, at 4-7 (remarks of Harry Wellington).

no monopoly on that struggle. The physical scientist, the social scientist, the physician, the poet, even the author of modern short stories deals with reality, each in his or her own way. But our concern with reality, as lawyers, is fundamentally different, is different in kind, because our primary objective so often is to alter reality, to affect behavior, in short, to regulate reality.

The difficulties with this mission of ours are legion. The formalists thought they could deal with unruly reality by imposing rules, while the realists thought they could manage reality by finding facts. We have learned, to our sorrow, that neither approach fills the bill. It is easy enough to demonstrate that unitary rulemaking must accommodate itself to the existence of competing principles, that there is no readily discoverable a priori basis for choice among such competing principles, and that formalism is therefore a failure.³ But factfinding, as it is practiced in the law, is also remote from reality. Nothing is more apparent to an appellate judge than the extent to which the case before her is shaped by what, for better or for worse, has transpired in the trial court. And yet even the initial judicial factfinder, the trier of the facts, only hears and perceives a small fraction of the reality of the case.⁴ The result is that appellate decisions, where the common law is usually said to be made, depend on a factual record that is at least two long removes from the underlying reality that is being adjudicated.

There is no way for Courts, forever on Trial, to escape their progressive distancing from reality.⁵ We can hope at most to find ways to illuminate reality, to search for recognizable patterns. What Karl Llewellyn called a situation sense⁶ is an example. Yet the search for patterns, too, has built-in dangers. Patterns make reality accessible to legal analysis by teaching us what is relevant, and therefore instruct

3. In the law of contracts, the search for unitary principles has long been discredited, although the teaching of contracts to first-term students still struggles to make sense out of over-arching concepts such as offer, acceptance, and consideration. Perhaps the discrepancy between what we say and what we teach is justified as a matter of history, or as an illustration of how inadequate the classical constructs are. Possibly, formalism has some residual appeal that we are, after all, not altogether ready to abandon.

4. The judicial process necessarily imposes barriers to the fact-finding process. Inevitably, time has elapsed, usually a considerable period, between the actual happenings and their recital in court. Few witnesses come to court without some stake in the proceedings. Rules of evidence limit what can be reported. Finally, judges (like renaissance men, or utility infielders, depending on one's point of view) are expected to move fluently and perceptively, on consecutive days, from torts to contracts to administrative law to family matters to corporate dissolutions to unfair trade practices to environmental controversies and so forth.

5. I expect Jerome N. Frank would have agreed.

6. Danzig, *Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621, 623-27 (1975).

us in what to overlook. The great contribution of the *law and* schools is to educate us to different patterns of exclusion and inclusion. Each prism refracts, as Professor Stone suggests, a different ray of light. Each, however, captures only a small fraction of reality. The effort to fuse the various refractions into a workable beacon is a challenge that is as yet unmet.

To what extent can this challenge be addressed by examining the language of the law to determine what is peculiarly lawyer-like? Is linguistic analysis likely to offer a vehicle that will enable us to escape the pitfalls of formalism on the one hand and realism on the other?

It is of course true that we cannot, as lawyers, deal comfortably with anything until we have attached a label to it. Of course, identification through labels is a process that lends itself to linguistic analysis, an analysis to which I cannot speak because I am insufficiently familiar with the relevant literature. But even apart from linguistic analysis, the choice of labels is far from trivial. How we describe something is an important part of how we perceive it. Depression is inherently more worrisome than sadness; due and deliberate speed is inherently more deliberate than due. Language as label is an important aspect of law as language.

Let me relate briefly two examples that illustrate the powerful force that language can bring to bear. One deals with what is now a matter of history, the trust receipt. There was a time when commercial lawyers were having great difficulty in articulating to courts a concept that we now take for granted, that any number of parties may share interests in the bundle of rights represented by ownership of personal property. Apart from the common law pledge, which was of limited utility because of its insistence that rights be possessory, the most widely recognized security device in the nineteenth century was the chattel mortgage. A great deal of energy was expended by attorneys and by courts during the nineteenth century, not in deciding how rights could be shared, but in determining whether "X" was a chattel mortgage. Once that threshold question had been resolved, once it had been found whether a transaction was, or was not, within the chattel mortgage mold, all other questions were deemed settled—sometimes wrongly, but still settled. Endemic to the concept of the chattel mortgage was the understanding that mortgagee and mortgagor were natural enemies with goals so fundamentally inconsistent that they could be reconciled only within the rigid control mechanism of the chattel mortgage.

Toward the turn of the century, some unidentified genius came upon the notion of the trust receipt as a device to create a floating lien on goods and their proceeds. Grant Gilmore has admirably traced this development in his treatise.⁷ The point I want to make here is that the language of trust receipt evokes an entirely different *gestalt* and feeling than that of a mortgage, and thus facilitated an entirely different attitude towards commercial financing. Trust relationships, fiduciary relationships, suggest a joint enterprise in which shared goals minimize the need for insistence on inflexible restrictive controls. Yet I believe the trust receipt—in many ways the antecedent of the general security interest validated by article nine of the Uniform Commercial Code—succeeded not only because its label was felicitous, but because the ground was then ripe for a broadened view of commercial financing. The use of a new label accelerated a development, because it afforded a different perspective on commercial relationships. But I doubt that this difference in nomenclature and perspective would have been effective unless it was responsive to a commercial need that antedated or coincided with the birth of this “new” security device under its new label.

Another example of the impact of language is one with which I am currently struggling—always a harder challenge than one safely encapsulated in history. That is the concept of “the best interests of the child.” Who can resist this language as an organizing principle? Yet the best interests of the child, according to Goldstein, Freud, and Solnit, may counsel against reuniting a family torn apart by war, may turn temporary involuntary absence into permanent disqualification for parenthood.⁸ Here, it seems to me, evocative language may lead to role confusion. The responsibility of a court in custody disputes differs from that of a psychiatrist engaged in therapy.⁹ It is not clear whether it is ultimately more helpful for a court to fold competing interests into a larger conception of the true best interests of the child, or whether it is better to identify the child’s own narrowly drawn interests, the psychoanalysts’ view of “best interests,” as one of a number of concerns legitimately to be presented to and weighed by a court.

Here again, I am skeptical whether linguistic analysis alone will fill the bill. What has made *Beyond the Best Interests of the Child*

7. I G. GILMORE, *supra* note 1, §§ 4.1-12, at 86-127.

8. See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 107-11 (new ed. 1979).

9. See *Seymour v. Seymour*, Conn. L.J., May 20, 1980, at 14A, 16A (Conn. S. Ct.).

such a powerful and controversial force in the continuing dialogue about legal dispositions of children is its intensive analysis of a standard previously accepted without question, when, unanalyzed, it could shelter competing and inconsistent goals and values. What was once a unifying principle appears, on closer inspection, to contain the seeds of discord. Yet it is precisely this kind of analysis of language that is most essential to enable judges and scholars to enlighten each other about the issues that confront them both.

I would like to close with one more general observation. I think felicitous language, the seminal concept, is more likely to capture the past than to illuminate the future. Just as legislation is likely to enshrine the practices of recent history,¹⁰ so the drawing together of disparate facts into a new linguistic construct is more likely to tell us where we have been than where we are going. Judge Cardozo said, in the *Berkey v. Third Ave. Ry.* case, that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”¹¹ That caution seems as useful today as it was in 1926.

10. See Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 473-74 (1967) (discussing Uniform Commercial Code); cf. G. GILMORE, *THE AGES OF AMERICAN LAW* 85-86 (1977) (Llewellyn sought to free U.C.C. from past, but practicing lawyers who participated in drafting forced Code to retain many elements of past).

11. 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).