Reductionism in the Law Schools, or, Why the Blather About the Motivation of Legislators?

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The ghost of Christopher Columbus Langdell—the dean of the Harvard Law School whom Judge Jerome Frank once called a "brilliant neurotic"—still stalks the law schools. Often it comes to rest in the offices of the law reviews that most law schools think it necessary to publish. Here, Langdell's influence may be seen in almost everything the editors print: the choice of topics, the selection of articles, and particularly the affliction that Karl Llewellyn once called "cititis,"[1] the disease of too many footnotes. (The disease is contagious; it infects the Supreme Court itself, as any issue of the *Supreme Court Reporter* will reveal. Possibly this is because some of the Justices and most of their clerks have been editors of law journals.)

That, of course, is quite familiar, but is it relevant to the theme of legislative motivation in judicial decisionmaking? I think that the answer is obvious. Intense concentration upon such minutiae of the judicial process does not lead to the type of understanding so badly needed, understanding not only about the judiciary but about law itself. It is the very antithesis of what should be done.

What passes for scholarship in the law journals is a legal form of reductionism. It has long been known, to be sure, but it continues at precisely the time that it is not sufficient to the need. Since

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1. K. LLEWELLYN, THE BRAMBLE BUSH 8 (1960).

Ely wrote his (far too long) disquisition on motivation in the *Yale Law Journal*, a few others have waded in to stir the mud of that detail of adjudication. The symposium published in 1978 by this *Review*[2] should cause everyone to call out: "Hold on! Enough, already; let's get on with other, better things."

Reductionism in legal scholarship, prevalent in every law review (there are a few honorable exceptions in single articles), serves a very limited purpose at best. One purpose, never stated, is for recruits to a law school faculty to publish articles that will, because of the demonstrated capacity of the recruits to split hairs with judges and because the articles are garnished with mountains of footnotes, enable the recruits to achieve the status of "tenure." Once gained, tenure should free the minds of the professoriate so that important problems can be tackled. But that is seldom done. It is important to understand why.

"Tenure" articles are written in a reductionist style for two reasons. First, that mode of expression fits into familiar and thus accepted thought patterns of peer groups. Put bluntly, if one wants tenure he or she chops logic with judges, preferably with footnotes numbering into the hundreds. Second, the supplicants are themselves familiar with that style, many having been law review editors themselves.

Well and good, I readily admit: if one joins a team, then play the game by the rules (stated or unstated). But the reason for tenure is to give a person freedom of expression, and that is precisely what does not happen. The problem is that the tenure article sets the pattern for whatever writing a professor might do. (Many do little more; "publish or perish" is one of the great myths of higher education.) So it is in legal periodicals; and so, too, in the other principal scholarly activities—compiling casebooks and writing texts. The low-level empiricism or scientism of most, perhaps all, casebooks and most articles in law journals needs no present restatement. Academic freedom for legal educators tends to mean the freedom to follow the familiar. There may be a sociological law describing this phenomenon, analogous to the law of faculty meetings: the more trivial or insignificant the topic, the longer it will be discussed.

Is there any other purpose for what law journals print? Certainly none is discernible for the usual student contributions, which tend to be tedious discussions of the minute—reductionism, again—and which probably are read only by the writers and top editors. As for "lead" articles, the only additional purpose is

2. 15 SAN DIEGO L. REV. 925 (1978).

the extent to which, if at all, the disquisitions help to illumine not only the judicial process but the law itself. On that score, their failures are obvious and widespread.

The need is for a thoroughgoing and comprehensive understanding of adjudication and the role that both it and the law play in the social process. Additional commentary on the motivations of politicians in legislatures can help fulfill that need only if some attention is accorded to how legislatures operate. Do they exemplify Michels' "iron law of oligarchy"? Do legislatures exist, as Jacques Ellul once said, merely to put the decisions of experts and pressure groups into statutory form?

To take only one example, it is manifestly impossible for any one member of Congress to be informed about the details of the 400 public laws enacted each session. How, then, can one speak of the motivation of Congress? (One is reminded, in this regard, of Max Radin's remarks almost fifty years ago about how a search for legislative intent was a bootless quest.)[3] We do not have a sociology of law and, what is more, there is no discernible demand for one. I fail to see how legislators' motives can be analyzed without beginning with the sociological truism that the State and the legal system are inextricably intertwined and proceeding from there. If that is done, then exegeses on the written words of judges will have to be buttressed by considerably more data and more analysis.

Some years ago, in reviewing Alexander Bickel's best book, *The Least Dangerous Branch*,[4] I ventured to suggest that scholarship about courts generally and the Supreme Court particularly could be improved if attention were paid the following:

> (1) the data relevant to the decisional process; (2) impact analysis of Court decisions: what difference does a decision make in the practices of the American people? (3) what are the factors which have influenced the Court? (4) what are the preferred means of getting information to the Court? (5) are there aids that could be established through which the Court could receive assistance in making decisions? (6) what are the "social realities" which the Court should consider? (7) what are the goals which the Court does, and should, seek? (8) what is the relationship—and what should it be—of the Court to the other units of government? (9) what insights can students of the sociology of knowledge and of human cognition bring to an understanding of the thought processes of the Justices? and (10) what are the criteria (principles) which should operate as

3. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

4. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

standards of judgment by the Justices (and of evaluation of the Court's work by commentators)?[5]

That list is by no means complete; additional questions would be added were I to list the needs of Supreme Court scholarship today. My point is much simpler: With all due deference to the several authors, the long dissertations on motivation which readers have been offered thus far fall woefully short of the need.

A few years ago, Lon Fuller observed that there are two philosophies of science: One "sees the aim of science as *understanding*; the other as *prediction*."[6] Langdell proposed to make a science of the law by referring to the reported cases. To the extent that legal scholarship is scientific in the Langdellian sense, it, generally speaking, contributes little to either of Fuller's goals. Readers gain little or nothing toward understanding the Supreme Court, and we bloody well cannot predict what those nine middle-aged or elderly men might do in future decisions. (Some political scientists quantify Court decisions and attempt thereby to predict given decisions. That type of scholarly astrology, however, is as futile in its way as is the resort to mathematics by some economists. The worst offender among the political scientists is probably Glendon Schubert[7] of the University of Hawaii, but there are others, such as Harold Spaeth[8] and Sidney Ulmer.[9] Through their scientism, these worthies, led by Schubert, have intellectually crippled a generation of political scientists.)

The reductionism of the articles, in this *Review* and elsewhere, has added little to our knowledge and understanding of the Supreme Court. My suggestion is that scholarship of that sort be replaced, instanter, by intellectual activities more relevant to the needs of the American people. I do not expect that to happen. I do not foresee any sustained inquiry into the "macro," rather than the "micro," of law and the legal process. As elsewhere in academia, the trend seems to be toward learning more and more about less and less. The logical end of that, as the cliché goes, is

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5. Miller, Book Review, 9 HOWARD L.J. 188, 190 (1963).

6. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1623-24 (1966).

7. G. SCHUBERT, HUMAN JURISPRUDENCE (1975); G. SCHUBERT, THE JUDICIAL MIND (1965); G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959).

8. Spaeth, *An Analysis of Judicial Attitudes in the Labor Relations Decisions of the Warren Court*, 25 J. POL. 290 (1963); Spaeth, *An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior*, 5 MIDWEST J. POL. SCI. 165 (1961).

9. Ulmer, *The Discriminant Function and a Theoretical Context for Its Use in Estimating the Votes of Judges*, in THE FRONTIERS OF JUDICIAL RESEARCH (J. Grossman & J. Tannenhaus eds. 1969); Ulmer, *Toward a Theory of Subgroup Formation in the United States Supreme Court*, 27 J. POL. 133 (1965); Ulmer, *Subset Behaviors in the Supreme Court*, in THE STUDY OF COALITION BEHAVIOR 396 (S. Groennings, M. Leiserson, & E. Kelley eds. 1970).

to know everything about nothing. Law students will not get quite *that* far, but they are fast approaching it. At the time when the need for generalists has never been more pronounced, law schools—the profession itself—have become narrow specialists. Even worse, the schools are turning out new lawyers who have keen "legal" minds, but who in the main are legal mechanics—hired guns for those with the means to employ them.

Legal education requires a thorough re-examination and revamping. As matters now stand, what the approximately 120,000 law students get can best be called a form of brain damage. In the early twentieth century, Roscoe Pound argued that law was the last of the sciences in the march away from preconceived notions.[10] So it was—and so it is. Legal scholarship has progressed little since Pound's comment. Just as "conventional economics can best be understood as a form of brain damage," as Hazel Henderson has said,[11] so it is with law. The study of law is tottering into senility—ironically, at the exact time that there are more lawyers and more law students than ever before.

Langdell lived in the mid-19th century, but his shade lingers on. Trivia still is piled on trivia. The shelves of law libraries groan with books containing the reported cases of courts. Casebooks expand, bulging with new decisions from appellate courts. Legal educators continue to proceed on the demonstrable fiction that what judges say in their opinions accurately reflects their mental processes and that the reasoning of judges is the most important desideratum of law students. That just isn't so. To be sure, that is about all that law professors and students have at present—which itself evidences an obvious failure of scholarship. The American people are not getting value from the millions of dollars spent to support the law schools. Vocationalism reigns supreme in those schools, which are ever more reverting to the status quo ante (circa the 1920s).

Almost everything I have said above has been said before and fairly often. But it has not been said recently; and because no one listens, it must all be said again. To answer the question in the title to this commentary: The blather about motivation of legisla-

10. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

11. H. HENDERSON, CREATING ALTERNATIVE FUTURES: THE END OF ECONOMICS (1978), *quoted in* Robertson, *Perils of Dictatorship by High Technology*, The Manchester Guardian Weekly, Apr. 2, 1978, at 22, col. 1.

tors is a means of avoiding discussion of the real problems facing humankind. It is a form of latter-day scholasticism. Did anyone ever definitively determine exactly how many angels can dance on the head of a pin?