

PUBLIC ORDER UNDER LAW: THE ROLE OF THE ADVISOR-DRAFTSMAN IN THE FORMATION OF CODE OR CONSTITUTION*

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PROBLEMS of special gravity face the lawyer who serves as advisor or draftsman to a constitutional convention or a legislative body. The consequences of his advice, if it is taken, will reverberate large and long; and in the performance of his advisory functions he must take account not only of these consequences but of special obstacles as well. It is our purpose here to examine certain aspects of the advisor-draftsman's role in the making of a constitution or a legal code: his professional relation to his client, the community's representative; the special tools of knowledge and language employed by him; and his function in the decision-making process of the body politic. Finally, we shall draw in a background picture of the legal system as a whole, analyzing it into the various component codes with which the advisor-draftsman immediately deals.

THE ADVISOR-DRAFTSMAN AND HIS CLIENT

The advisor-draftsman not only is, as we assume, an attorney, but he performs the familiar role of legal counsel to a client. His client is a special one—

*When Professor Dession died he had approved of the text of the present article and was planning to add a few footnotes prior to publication. The article was to be the first of a projected series of joint publications with Professor Lasswell designed to provide a systematic examination of the theory of corrective ("criminal") codes and of the relationship of the advisor-draftsman to the preparation of such instruments. For several years the authors had worked together in a seminar at the Yale Law School. They deferred publication of their theoretical position until some result commanding general professional interest could be described. Such a result was promised by the invitation to Professor Dession to prepare a draft of a criminal code for Puerto Rico. Greatly stimulated and challenged by the task, he had finished the main structure before his untimely death, and it is probable that the proposed code can be completed according to his blueprint.

The original plan was to use the series of joint articles as an introduction to the final draft of the code. The present article deals with the position of the legal advisor-draftsman at work on codes, outlines a systematic analysis of the major components of a legal system, and places the corrective code within this framework. A second article was to consider the principal problems that arise in constructing a corrective code. The final article was to discuss the principal questions that arose in meeting the special requirements of Puerto Rico. It is uncertain whether Professor Dession's papers contain enough material for the contemplated series to be completed.

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a committee or an assembly representing the entire commonwealth—and in some respects his task as counselor is modulated to the extraordinary nature of his employment. But in other, and important, ways he differs little from the private attorney dealing with his customary clients.

The Interests of Client and Community

Under ordinary circumstances the lawyer engaged in private practice is continually reminded of the tension between the immediate claims of a client and the good of the commonwealth. Under the relatively exceptional circumstance in which the client officially speaks for the commonwealth itself it might be supposed that the tension between “part” and “whole” has disappeared, and the sole issue become what constitutive or legislative arrangements most effectively contribute to the good of the whole. The appearance is, however, deceptive. The legal counselor may be working with an assembly or a committee in which many diverging views must be dealt with—differing conceptions of the common good, and differing degrees of selfless devotion to that good. Such lapses of wisdom in the collective client add a dimension to the advisor-draftsman’s problems that is not, at least in the same degree, faced by the private practitioner: the element of client consent to the counselor’s suggestions.¹ The same disparities of viewpoint also suggest, however, a parallel between the attorney dealing with a private client and the counselor to a collective one.

It is true that in a formal sense the advisor-draftsman’s client is speaking for the whole community; and further, that the problem of both counselor and client is to state general policy requirements for the whole community. Hence it may be said that the client is not “part” of the whole, since he stands for the entire body politic; nor is he pursuing a part interest rather than the aggregate interest. But despite the formal identity of the client as the whole acting on behalf of the whole, on fundamental questions pertaining to the whole, the formal language that designates a gathering as a “constitutional convention” or a “committee on code revision” does not charm away the tough, hard facts of difference and confusion over the ends to be sought or the means to be employed. There is no drug capable of inducing a trance state in the seasoned politician (or the unseasoned citizen, for that matter), by which he becomes a dispassionate spokesman for the common good. Even when the individual does his conscious best to discover and define the common good he is hampered by limitations of experience and by inadequacies in his current sources of information, to say nothing of unconscious distortions of mind and character. Any formulation of the public interest—any statement of the goal values and preferred institutions of the body politic—suffers from the twin contaminations of ignorance and unconscious vice, even where there is purity of conscious purpose joined with vast learning and experience.² And so the advisor-draftsman

1. See pp. 177-79 *infra*.

2. Decades of research on the Philadelphia Convention of 1787 are filling in the picture of the relative weight of the “principled” and the “expedient” interests of the membership.

confronts, like his brethren in the legal profession, the problem of relating his client's aims to the common good.

It is assumed in modern society that the professional man differs from the nonprofessional in his awareness of, competence in, and service to the common good. In every professional relation the lawyer is supposed to function in some degree as an agent of the whole body politic, and modern society implements this special function by making the lawyer an officer of the court and imposing upon him standards of skill and integrity. When the legal counselor represents a private client it is understood that he is not stepping outside the bounds of community policy, since the public policy is to provide private parties with access to judicial tribunals and expert advice. But concern for the public welfare prohibits certain methods (jury tampering, for instance) by which overzealous advocates may be tempted to advance the claims of particular clients. And on the other hand there is public concern for protecting the client against his legal counselor, so that the lawyer is forbidden to exploit information obtained in his professional capacity for private gain. The whole system of judicial procedure is part of the institutional setup designed for the task of putting our fundamental concern for the dignity of the individual into the working relations of everyday life. Even when a professional man represents the government in litigation with a private party, the official connection does not entitle counsel to special privileges against the opposing advocate.

Every lawyer knows that, whether he likes it or not, he influences nearly every private client. This is also true of the legal advisors of those who make constitutional charters or legislative codes. Except in the largely hypothetical situation where a single dominant figure gives continuous personal attention to every successive issue and has preconceived ideas about all of them, the counselor influences the result. He affects nearly all definitions (and redefinitions) of the client's conception of his interest, whether the client is seeking to act on his own behalf or as a representative of the aggregate.³

We posit that the professional obligation of the lawyer is to inform his client to the maximum while manipulating him to a minimum. We agree with standard professional assertions that the counselor should in fact impose his will upon the client as little as possible; and that what the counsel does should be open and above board. A lawyer should not delude himself into thinking that

See, *e.g.*, CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); 1 DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* (1946).

3. We are, of course, conversant with the tactical advantages to be derived by members of the legal profession in many cases when they publicly disclaim any influence upon clients. Many clients look upon the attorney as an agent; and they are not averse to acknowledging or even magnifying the degree in which their minds are autonomous, hence insusceptible to guidance. If a lawyer intends to manipulate tyrants or democratic officials or private clients he will find it a sound strategem to pretend not to. It has sometimes been intimated that this is one of the reasons for the reluctance in many quarters to make explicit the policy significance of the legal and political process. See BURNHAM, *THE MACHIAVELLIANS* (1943).

he is acting within the proper boundary of professional responsibility if he tries to "wangle" his client rather than to contribute to his understanding; or if he tries to put something over by pretending to have no influence upon the client, or no concern for community consequences. Phrasing the point positively, in his capacity as advisor it is not the counselor's responsibility to tell the client what to do, but rather to aid him *in relating private policies to the policies of the aggregate*. If the client is authorized to speak for aggregate policy, the responsible advisor will assist in bringing the declarations of aggregate policy to be embedded in constitutional charters or legislative codes into harmony with the preferred form of public order of the majority.

Unless a society is riddled with discontent or in the throes of revolution there will not be much doubt about the system of dominant preferences. In societies where the dignity of the individual is highly valued—as with us—and where this is taken to imply direct participation in the making of important decisions—as with us—the ideal values of the society are beyond reasonable dispute.⁴ Even in the dynamic setting of American life the legal advisor can readily ascertain the dominant values and institutions that are deeply grounded in the preferences of the American people.⁵

The Problems of Consent and Compliance

The advisor-draftsman will labor to little avail if the code or constitution he produces fails of adoption or, once adopted, is not complied with. And so the attorney advising a constitutive assembly or a legislature must take into his reckonings two elements that do not similarly confront the ordinary lawyer in dealings with his client.

In assessing the dynamics of consent by committees, legislatures or assemblies, it is necessary to weigh the importance of individuals and of viewpoints

4. In our present analysis of public order under law we associate ourselves with the overriding goals of human dignity. We leave to one side any consideration of how to advise tyrants or autocrats. We omit these matters not because they fall outside the province of jurisprudence, but because we have our hands full with the problems of implementing the values of societies that aspire toward freedom. We are concentrating on the public order of a free society. What we say is addressed to the members of the profession who are willing to accept these values; and who are also willing to give them institutional implementation when occasion arises. These occasions are limited to situations in which the lawyer is able to act on behalf of responsible authorities who are agreed upon the ideology of freedom, or who comprise a majority in support of this perspective. We exclude the problem of "boring from within" an anti-democratic regime for the purpose of bringing about conditions favorable to a democratic revolution. In a word, we leave to one side situations calling for subterfuge on the part of a legal advisor who is genuinely identified with the goal values of a free society.

5. The ideology that prevails in a given society makes articulate or implies the goal values of the ruling elements, and of all who support them. See MANNHEIM, *ESSAYS ON SOCIOLOGY AND SOCIAL PSYCHOLOGY* pt. I, cc. 2, 3 (Kecskemeti ed. 1953); MANNHEIM, *IDEOLOGY AND UTOPIA* (1936); LASSWELL *et al.*, *THE COMPARATIVE STUDY OF SYMBOLS* (1952), and succeeding publications of the Hoover Institute.

in the context of the whole commonwealth. It may be that the word of one man is of such overwhelming importance that no one else need concern the advisor-draftsman. A situation of this kind does not necessarily imply the existence of autocracy or tyranny, for even democratic communities may, especially in moments of great crisis, defer to the judgment of one man on constitutional and legislative matters. If this outstanding figure has clear ideas in every field of policy, the advisor is in the end little more than a drafting clerk.

Typically the situation is more complicated, even when one leader is temporarily or permanently dominant. He may have ideas; but the rush of affairs may so overwhelm his energies that he has little time left for more than the broadest consideration of issues. Or it may be that the leader refrains as a matter of principle from taking advantage of his exceptional position in the hope of encouraging civic initiative throughout the body politic. The leader may also rely upon a chief advisor whose attitudes in turn may run the gamut from the inflexibility of assumed omniscience to the permissiveness of farseeing statesmanship.

Surrounding the principal figure may be a circle of advisors; and if there is no dominant figure then there will be a group or groups exercising the effective power of consent. Differences of opinion among the leader's advisors or the other wielders of power may signify little more than the play of personal ambition within a common framework of devotion to the leader and the cause. But there may also be well-argued controversies within the common ideological frame of reference, reflecting the urgency of those who would move ahead rapidly and the caution of those who would go slowly; or the demands of those who would push through a major revolution, conflicting with those who are content to stop short of utopia. Ideological differences may, indeed, transcend faction or party to mirror whole systems of thought, secular or sacred (as when communism and socialism, or Christianity and Islam are in conflict). Cleavages may arise between groups reared in a "modern" civilization or an "old" civilization or folk culture.

It may be that contrasting predispositions among the leaders can be explained in class terms: side by side in the ruling class of a new body politic may be elements of the old ruling class and elements originating outside it. Some divergences can be accounted for on the basis of differing skills and perspectives resulting from specialized experience within organizations that cut across the lines of culture or class. It may be that contrasting personality structures are at the bottom of some conflicts within a ruling circle. In assessing the likelihood that a given individual or group can influence immediate consent it is important to pay full attention to these cultural, class, organizational and personality factors.⁶

6. Information about the factors likely to affect elite outlook and influence can be obtained from systematic studies of the ruling groups of various societies. See BENDIX & LIPSET, *CLASS, STATUS, POWER: A READER IN SOCIAL STRATIFICATION* (1953); RENNER,

The advisor-draftsman who takes a professional attitude toward the job looks beyond the probabilities of immediate consent to the longer range probabilities of compliance after consent or imposition. There would, of course, be no problem of compliance if makers of constitutional and legislative codes always prescribed what the community would live up to, or if the community would unquestionably live up to whatever is prescribed. No one needs to be told that these expectations are wide of the mark, whether in reference to complex industrial societies or to simpler ones.⁷ To deal with this element of compliance the advisor-draftsman requires special equipment less directly relevant to the needs of the ordinary legal counselor.

THE TOOLS OF THE ADVISOR-DRAFTSMAN

Knowledge

Part of the specialized equipment of the advisor-draftsman should be knowledge allowing him to make accurate estimates of the likelihood of future compliance with particular prescriptions, and of the probable success of the prescriptions in achieving the policy goals of the community.⁸ Given a sufficiently comprehensive body of jurisprudential knowledge, he should be able to answer the following questions:

- (1) If a given prescription is authorized in the code, will publication be enough to bring about prompt, universal and continuing compliance?
- (2) To the degree that noncompliance is likely on publication, are there measures short of sanctions that may be employed (campaigns of information and persuasion, for example)? At what cost? With what prospects of success?
- (3) To the degree that noncompliance is likely to occur despite the measures referred to in (2), what positive sanctions may be employed, at what cost and with what prospect of success? (A positive sanction is an

THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (Kahn-Freund ed. 1949); SIMPSON & STONE, CASES AND READINGS ON LAW AND SOCIETY (1948); TIMASHEFF, A INTRODUCTION TO THE SOCIOLOGY OF LAW (1939); LASSWELL *et al.*, THE COMPARATIVE STUDY OF ELITES (1952), and subsequent volumes of the Hoover Institute (which to date include partial information about Germany, the Soviet Union, China and other countries).

7. If the body politic has had a long tradition, the code maker and his advisors can inform themselves about the degree of past compliance under various circumstances. But despite the obvious relevance of objective and comprehensive information the available sources are exceedingly fallible. See the judicious discussions in such standard texts and treatises as HENTIG, CRIME: CAUSES AND CONDITIONS 51-90 (1947); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY c. 5 (4th ed. 1947).

8. In the formulation of a corrective code there is an assumption that full compliance with the requirements of the legal system is unlikely; and that while some deviations may be ignored or else dealt with by regulatory measures, a considerable residue of non-compliance will remain.

In some of the other sorts of codes—such as the regulatory, see pp. 190-91 *infra*—even full consent to and compliance with published prescriptions would not necessarily guarantee the accomplishment of the ends sought to be achieved.

increment of value: it may take the form of tax remissions, bonuses, decorations, and the like.)

(4) To the degree that noncompliance is probable despite the measures indicated in (2) and (3) above, what negative sanctions may be employed, at what cost, and with what prospects of success? (A negative sanction is a value deprivation, rather than indulgence: it takes the form of fines, imprisonment, and such.)

(5) Having regard for the probable degree of compliance attainable at any assumed level of cost, in what degree are the fundamental goals of the public order likely to be realized by the total impact of the contemplated prescriptions?

The final question above suggests another sort of knowledge required of the advisor-draftsman—in his function of clarifying the goals to be achieved through the code or constitution. It is clear that a simple declaration of fealty to the ideal of dignifying the individual does not dispose of the task of identifying the institutions consonant with the ideal. No lawyer, certainly, could imagine that words like “law,” “justice” and “liberty” are used in the same way by all men. Yet in our view every responsible citizen (and a fortiori every lawyer) needs to be clear as to what he is talking about, at least when he is talking candidly to himself, even though he may have to abbreviate and simplify in dealings with others (but not for the purpose of shearing the client for the counselor’s private advantage). This is the responsible use of the mind: it begins at home. Part of the act of using the mind is the construction of working definitions of fundamental value categories;⁹ and this is a major part of the advisor-draftsman’s task.

The lawyer who is cognizant of his client’s goals can (1) translate some goals into working definitions which are not likely to be modified by further experience; and (2) translate many of them into provisional definitions subject to relatively easy modification in the light of further knowledge and experience. An example of a working definition that is unlikely to change might be a definition of free government as one in which power is shared—a definition that excludes the continuing concentration of power in a single executive. We never expect to change the definition of free government to include permanent popular acquiescence in a self-perpetuating, single executive. Less simple are the marginal definitions—determining, for instance, the precise degree of power to be entrusted to the executive—which are vulnerable to the limiting and bias-

9. Elsewhere the authors have begun to specify the forms of governmental and other institutions that they accept as in accord with the fundamental conception of a free society. A preliminary framework was used in *DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER* (1948). See also McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 *YALE L.J.* 915 (1952).

We shall draw upon these provisional specifications throughout the present analysis. At this point we are underlining a fundamental approach and method rather than giving it full exemplification.

ing experience of the draftsman's own culture and to the limitations of present jurisprudential knowledge. These definitions will be provisional because they are open to modification in the light of scientific and scholarly inquiry.

To some extent the advisor can assist the client by asking for specification. As a rule the decision-maker is somewhat vague about what he wants to accomplish, and a patient and competent counselor can assist in pinning down unarticulated objectives. And under modern conditions the advisor-draftsman has at his disposal a substantial body of scholarly knowledge useful for the purpose of translating broad value goals into more explicitly formulated objectives. Scholarly journals and books typically provide the essential orientation toward the historical trends and salient factors conditioning the present situation of the body politic. In addition to the traditional material, the developing behavioral sciences have developed a number of tools making it feasible to arrive at a fairly detailed picture of the perspectives characteristic of the culture, the social class, the organizational affiliation, and even the predominating forms of personality. These modern instruments range from the brief polling interview through more intensive interviews to comprehensive investigations of representative communities and organizations.

Language

All prescriptions in codes or constitutions are acts designed to influence the course of future events. Rational choice of the language in which the prescriptions are expressed will increase the probability that the events sought will occur (and diminish the likelihood that undesired events will take place).

The advisor-draftsman has at his command a technical vocabulary suitable for use under various circumstances in the statutes of a body politic.¹⁰ There are contradictory views current among both scholars and laymen who attempt to evaluate the importance of words in public affairs. Words are often dismissed with some contempt as idle winds playing over the surface of the fundamental factors in social and political evolution. Or at the opposite extreme they are hailed as the quintessential instrument of human life and social growth.

10. Of course, neither professional knowledge nor professional syntax will necessarily be a decisive element in the influence of many advisor-draftsmen upon politics. Circumstances may associate them with a victorious power, or with a dominant political faction in domestic politics. A wealthy advisor may find his position enhanced by the financial and related ramifications of his economic ties. As a member of a famous family he may enjoy a position of peculiar intimacy with the leading families of the body politic. By early association he may possess a circle of intimates strategically located in the community.

While the control of power, wealth, and other social values may improve the position of the advisor, these relationships are not always an unmingled blessing. The values of some arenas are not transferable to other arenas. Hence the possessor of wealth or kinship connections may find himself deprived of some of his usefulness as an advisor if wealth is unpopular and distinguished historical family connections are at a discount.

We leave to one side the questions that arise in connection with the exploitation of various personal assets and liabilities by the legal advisor and solely in the interest of brevity restrict our present discussion to professional matters.

In recent times the function of communication in society has been the subject of intensive investigation, and as a result we are better prepared than we were even a few years ago to assess the role of language as a factor in the life of man.

In the perspective of our present knowledge of communication it is possible to suggest some guiding lines for the advisor-draftsman in using the verbal instruments at his disposal in the preparation of codes. The hints will be related to (a) the balance of legal technicality and broader considerations, (b) the balance of the general and the detailed, and (c) the balance of old and new in form and fact.

In societies with a mass basis the constitution and statutes reach an audience far beyond the confines of the upper level of judges, civil servants, lawyers and professors. The constitutional charter in particular affords an opportunity to focus, crystallize, and remind the body politic of the overriding goals of society. Even in the Soviet Union, where power is tightly held, the Constitution of 1936 was hailed as a triumph of freedom, and expected to reverberate throughout the world.

To the extent that the audience is the community at large constitutional charters have tended to incorporate provisions that are more legislative than constitutional in character. The tendency to absorb institutional detail into the written charter was especially apparent in the documents drafted for the many new states and regimes that were created in Europe after the First World War. For instance, the elaborate economic provisions of the Constitution of Weimar Germany were concessions to the economic demands of trade unions and political parties connected with factory workers. The amplification was designed to contribute to the solidarity of the German polity by demonstrating a solicitude for the position of the workers that would reduce the appeal of the emerging world revolutionary center in Russia. Hence there was incorporation of many of the institutional details stressed in the Soviet world, rendered easier by the predispositions that had been developed in Germany by several generations of socialist activity.

In sum, a broad popular audience increases the incentives to multiply the use of emotive terms in the draft, and to substitute a popular and prolix style for a concise and technical style.

When innovations are to be introduced that are likely to be resisted by influential minorities, the phrasing of the document can afford to err in the direction of explicitness, for if judges recruited from an earlier regime handle the new laws they will in all likelihood narrow uncongenial requirements by strict construction. If the purpose of a document is to assist in maintaining free institutions, and to contribute to their growth, the purpose will be served by providing unequivocal verbal anchors for freedom. Uneasiness about the security of private rights was a major factor in bringing about the first ten amendments to the Federal Constitution, making explicit certain fundamental guarantees that might have been considered implicit in the Constitution as a whole. The uneasiness was justified; and so was the resulting Bill of Rights.

This is one of the ways in which "words engrossed on parchment" may be relied upon, in part at least, to "keep a government in order."¹¹

Some balance is essential between conventional and novel words, phrases and conceptions. In the midst of a period of revolutionary reconstruction the way is cleared for the scrapping of entrenched formulas, but even in less permissive times situations develop in which innovation is acceptable. Parts of the established formula may have been given a welter of contradictory interpretations, and a clear, new prescription may be welcome. It is, however, necessary to look beyond the fact of overelaboration to decide whether a fresh start is likely to succeed. Frequently there are sentimental and vested interests which would be seriously upset by any tampering with the status quo.

Resistance may be expected when substantive reform is proposed, but equally vigorous, though more subtle, resistance may be encountered even to the substitution of simplified standard procedures for clumsy and colloquial modes of operation. In many jurisdictions it has been impossible to obtain an efficient method of title registration because of the quiet influence of the lawyers and banking concerns who specialize in the lucrative intricacies of title clearance. Many small privileges—such as claims to a seat in the legislature or on administrative tribunals—remain as relics of previous forms of social organization which may be seized upon for exploitation purposes by special interests in the current scene. This applies to "rotten boroughs" of all kinds which may be taken over by private interests in order to increase their power in national government.

The thrust of social and political development is rarely uniform in any society or historical period. While some sectors are quiet, predispositions favoring innovation are gathering strength elsewhere. An advisor-draftsman who locates these pockets of motivation can enhance the viability of the whole code by releasing the enthusiastic support of rising components of the body politic. Usually he will go beyond a simple language problem to a question of social structure. The drafting task in such a case is to reduce those disharmonies among the various parts of the social order that arise from the perpetuation of out-of-date formalities, or from failures to cope with emerging developments.

THE FUNCTION OF THE ADVISOR-DRAFTSMAN IN THE DECISION-MAKING OF THE COMMONWEALTH

We have discussed several aspects of the advisor-draftsman's role from the viewpoints of his relationship to his collective client, and of the special equipment he requires for the performance of his function. Drawing these threads together, we can now analyze that function itself, and cast the advisor-draftsman against the background of the decision-making processes of the community as a whole. By the term decision we intend a special category of choices in a body politic—choices that are sustained, or expected to be sustained, by

11. Hamilton, *Constitutionalism*, 4 ENCYC. SOCIAL SCIENCES 255 (1937).

community coercion. Put another way, decisions are sanctioned choices.¹² A system of law is a residue of past decision processes, which is expected to mould and in turn be re-moulded by future decisions.

In order to explore and compare decision-making and execution in various countries and historical periods we need to employ a more refined set of categories than the trilogy so familiar in the American tradition—"legislative," "executive" and "judicial." We speak of seven functional phases: *prescription*, *recommendation*, *intelligence*, *invocation*, *application*, *appraisal* and *termination*. In modern bodies politic the *prescribing* function is typically performed by constitutional conventions and legislative organs, since they lay down formal requirements of a general character for guidance in specific application. Among us the function of *recommendation* is typically carried on by political parties and pressure groups. The *intelligence* function is the supplying of knowledge of the past and of information about the future. The *invoking* function is the provisional characterization of an act as constituting a violation of (or a conformance to) community prescription. The official who issues a warrant of arrest is engaged in an act of invocation. The *applying* function is the final assessment of an act according to conformity or nonconformity, and is typically performed by judicial agencies. The *appraisal* function is closely connected with intelligence, though specialized to assessing the effect of past policy; it is performed in some degree by every participant in the process who has discretion to perform or not, or to perform with varying degrees of attentiveness to crystallized policy aims of the past. The *terminating* function is the ending of prescriptions (as by repeal or denunciation). It is apparent that we are speaking of the decision process of the whole community, and that while some of that process is specialized to institutions conventionally called "government," unofficial participants and agencies are typically involved.

The advisor-draftsman performs an intelligence function (and occasionally a recommending function)¹³ for an official agency which in turn is empowered to recommend or prescribe fundamental rules for the commonwealth.¹⁴ The

12. All decisions, however, are not laws. Effective coercion may be controlled by upstarts lacking authorization by the community. Naked power is not law; nor is law the pretended power of a previously established authority that has lost effective control. By making these distinctions we attain the possibility of comparing bodies politic with one another according to the degree of lawful and unlawful power exerted through given periods, and so establish trends in some of the fundamental facts of public life. See LASSWELL & KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950).

13. The recommending function involves persuasion, which we feel falls outside the appropriate role of the counselor. See pp. 176-77 *supra*.

14. When we use the term "empowered" we have both dimensions of a decision in mind: authority and control. Besides having a formally correct authorization the constitutional convention (or other body) is expected to exercise effective power. This does not mean that the recommendations or the enactments of the body in question will be adopted or put into effect at once; on the contrary, they may be rejected in whole or in part. When we speak of "effective" as well as "formal" power, we are not referring to total success or failure to match conformity with prescription, but rather intend to indicate that the organ, if a recommending agency, is taken seriously; and that it achieves a considerable degree

activities that come within the scope of the advisor-draftsman's intelligence role may be analyzed into the following:

- (1) Clarifying the goal values and institutions preferred by the decision-makers. The advisor with an image of the entire social context in mind is able to aid the decision-maker in giving precision to his objectives under a variety of contingencies. In this way explicit criteria are obtained by which to determine what information about past events has a bearing on future preferences and expectations.
- (2) Obtaining and making available information about the past with a bearing on the problems at hand. Some of this information refers to trends and some to scientific knowledge of factors affecting trends.
- (3) Projecting the future course of events if no change of prescription occurs.
- (4) Inventing new alternatives of policy and estimating the probable outcome of all alternatives for the optimal attainment of preferred goals.

The four points in this analysis, it will be noted, restate the relationship between a professional counselor and his client, discussed above.

CODES COMPRISING THE SYSTEM OF PUBLIC ORDER

In examining the distinctive problems that arise in the making of a legal code, it is useful to have an explicit conception of how such a code is linked with the system of public order as a whole. We propose to define the system of public order; and then to analyze it into its several component codes, or systems of prescriptions,¹⁵ according to a variety of characteristics of the legal prescriptions they comprise.

Public Order

When we refer to public order we have in mind the entire system of institutions in which are incorporated the value goals and objectives of the community, and which are sought to be protected and fulfilled by the instrumentalities at the disposal of the authorized decision-makers of the body politic. The provisions of constitutive and legislative codes are among the instruments in the hands of successive generations of public officials and private parties for maintaining institutional balance in harmony with the system of public order. Under the impact of modern ecological, techno-scientific and ideological influences it is impossible for a system of public order to remain altogether

of compliance if it is a prescribing one. Since the future cannot be predicted with complete certainty, the advisor-draftsman may be laboring under a misapprehension while the work of code-making is going on. Factors of which the advisor is ignorant, or which arise *de novo*, may bar the path of final adoption, enforcement and conformity. But so far as the advisor's estimation of the future is concerned, the relevant expectation is that of the "insiders." If the "insiders" think the chances of adoption or application are good, the existence of this pattern of expectation is enough to warrant the classification of the agency as effective at the time, even though later events may warrant a revision of this judgment.

15. The term "code" as it is used here is not intended to coincide with conventional legislative labels; rather, it is used as a convenient category for comparative legal analysis, which may include common law rules as well as statutory prescriptions.

static. It is equally impossible for the system to survive if it becomes entirely fluid, unrepentive and hospitable to all forms of improvisation.

Human societies are living processes, and as such exhibit variations within frameworks that are at least temporarily stable. The variations themselves may proceed in recurring temporal order, as in the case of the familiar cyclical fluctuations of production, employment, consumption and pricing. In addition, the relatively stable features of the economic process, in common with the social process at large, undergo degrees of mutation. These are structural rather than cyclical transformations, taking place in the stream of interaction among human beings in every institutional situation—whether in the market constituted by those who chiefly pursue wealth, or in the arenas where power is the principal value sought, or in other situations relatively specialized to respect, well-being or another value outcome.¹⁶ In the perspective furnished by social analysis it will be found that when a community process is left relatively unstimulated by the impact of other communities the tendency is to crystallize the system of public order and to reduce the dynamic features of the system. But in modern communities a “steady state,” though roughly approximated, is never fully consummated. As a participant in attempts to make articulate the lawful prescriptions of the body politic, the advisor-draftsman learns that an inescapable requirement of rational thinking about the problem is to hunt for indications of the contours of an order of “preferred events,” an order that can be taken for granted as a working image of what *can* emerge because it is imbedded in current and prospective volitions concerning what *should* be.

A comprehensive body of assumptions about the future, then, is part of the appropriate equipment of the advisor-draftsman. Assumptions must go far enough to forecast the self-correcting tendencies within the institutional balance of the body politic in its current and impending world environment. If crises of national security are likely to continue, is it probable that any considerable erosion of civil liberties will be subject to counteraction by the revival of intensely felt demands to repair the balance between private rights and public needs? Will the extension of military control, after undermining the practice of civilian supremacy, provoke vigorous measures to reassert civil authority? Can it be anticipated that when a strong trend toward monopoly appears, potent demands will be made for the restoration of competitive features within the market system? On those occasions when the level of law enforcement in regard to offenses against property and persons deteriorates, is it likely that “reform” waves will succeed in arousing enough support to attract into the public service personnel of such competence and integrity, equipped with such ample facilities, that the situation is ameliorated? When shifting distributions of population undercut the facilities available in older cities and districts for

16. The equilibrium pattern of thinking about society is well established in economic studies and appears to be a significant mode of dealing with all living processes. See CANNON, *THE WISDOM OF THE BODY* (1932); PARETO, *THE MIND AND SOCIETY* (1935). For failure to utilize the pattern in political studies, see the critical appraisals of EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* (1953).

education, health and related services, will programs of reconstruction contribute to the prompt restoration of equality of opportunity to the inhabitants who remain in these areas? If the growth of industry brings about a decline in the prosperity and morale of rural areas, will countervailing initiatives result in sustaining, if not the influence, at least the affluence and self-respect of the less industrial sectors of the nation? Will periods of rapid depletion of national resources precipitate positive action capable of redressing the situation by measures of conservation and development?¹⁷

It may be that the advisor-draftsman's image of the potentialities of the total situation will come to include the expectation that structural rather than cyclical transformations are highly probable in many if not all institutional structures. Some of the expected lines of development may tend to bring the level of practice throughout the community into closer harmony with the ideal norms of the community. To take an instance close to all Americans, there may be residues of past systems of caste calling for liquidation, and the prospect of advance in that direction may be bright. In other institutional relationships, however, the outlook may be dark—as in the case of competitive markets and open channels of public enlightenment.

Manifestly, the advisor-draftsman finds it rational to operate with a conception of public order that refers to the *effective* preferences of society, not simply the ideal preferences as formulated in professions of faith or in statutes. Advisor-draftsmen need to look beyond the printed words of the constitutional charter and the collected statutes to the social process as a whole, and to assess it in terms of the degrees of correspondence attained and attainable (at various costs) between formal authority and effective control.¹⁸

The Classification of Legal Prescriptions

The formal prescriptions of a legal system are addressed by decision-makers at a given point in time to succeeding decision-makers. Where everyone in the body politic is to some extent involved in the decision process the audience is community-wide, though the immediate audience may be made up of officials. The formal prescriptions of the legal system are statements telling decision-makers who is supposed to do what, to whom, how, and under what circumstances. A preliminary classification, useful for purposes of comparison, may be made in terms of the degree of generality of the prescriptions. The most

17. A "correctional cycle" is outlined as an instrument of inquiry and control in L. J. CARR, *DELINQUENCY CONTROL* 151-63 (rev. ed. 1950).

18. We do not employ the terms "law" or "legal" in reference to a pattern of words divorced from deeds. Jurisprudence is not properly a branch of lexicography. Rather, the living fact is that law is a structure of institutional practices at once verbal and overt. When we estimate the future of a given form of authoritative language, we consider the likelihood of its being protected against challenge to a degree entitling it to be regarded as a presumptive practice of the commonwealth. A formal prescription must have been backed by effective control in the past, and have a high probability of being so sustained in the future, before we speak of it as part of law.

general—"first-order"—prescriptions are *constitutive*. "Second-order" prescriptions are *legislative*. All prescriptions of a lower order still (sub-legislative) may be tagged with any of several terms of art which are frequently employed with similar connotations ("ordinances," "regulations"). It is hardly necessary to warn a legal audience that a classification of this kind, which serves the needs of comparative law, does not necessarily conform to what in a given legal system is called "a provision of the constitution" or a "legislative statute." It is true that the United States Constitution is very concisely drafted and contains a great many first-order prescriptions. However, it also includes a number of requirements that are distinctly legislative, or even sub-legislative, in content.

The codes can usefully be classified according to the degree and kind of their focus upon *acts*, *objects* and *methods*. For instance, certain prescriptions are specialized to the methods by which decision-makers act. These prescriptions can be divided into three categories, and the codes in which they appear can be appropriately described as emphasizing methods that are: *jurisdictional*, when prescriptions deal with who decides what; *procedural*, when prescriptions relate to the detailed practices by which decisions are made; and *organizational*, when prescriptions cover the composition, qualifications and modes of selection of the organs of decision.

A major question pertinent to the classification of prescriptions is whether the acts they refer to affect the preferred patterns of community life, or whether the "structural" pattern is left intact, so that the acts have "operational" significance only. There is evidence from our own legal system, and from others, that when the social structure is assumed to be at stake the requirements of the code usually display distinctive features.¹⁹ Put another way, every prescription deals either with acts that directly involve the social *aggregate* or with acts more narrowly circumscribed—that is, with *particular* acts. If a statute places the administration of a widely ramified class of enterprises in the hands of government, the aggregate is more immediately implicated than when rules are made for private contractual arrangements. A contract between two persons may have consequences that immediately affect very few individuals and do not affect the social structure. However, it may be that the whole social setup is involved once the volume of private agreements of the particular kind has been increased by thousands and millions.

The actors who are "objects" of official prescription may be *private* or *official* persons. The distinction is worth making since officials are typically able to monopolize the use of community coercion. Hence they are given more scope than private individuals on many occasions, while being made the target of precautionary policies designed to protect the freedom of private parties.

Prescriptions laying down a standard of conduct for their objects are linked as a rule with prescriptions (sanctions) which define the measures to be taken

19. Thus, the imposition of liability without fault may be thought necessary in order to attain or preserve a particular structural distribution of power or wealth.

by community authorities in case of failure to comply, or even in the event of compliance. When there is failure to comply, deprivations (losses of values, such as fines or imprisonment; or denials of gain, such as the prohibition of profit taking) will be imposed upon those who have failed to conform, or who have precipitated nonconformity. The community often rewards compliance by granting indulgences, which are improvements of value position (such as rewards) or preventions of loss (such as tax exemption for various losses in speculation).

More fundamental than the distinction between negative and positive sanctions is the difference in the purpose to be served by sanctioning policy in various circumstances. The purpose is influenced to a marked degree by the intention (and capacity) of violators. The intention may be nondestructive in the sense that the offender is going about his business with motive, expectations and capabilities whose destructiveness does not exceed the ordinary range for members of the community. Or the intention may be destructive: that is, there may be relatively strong conscious rejection of the prescription, so that the usual explanations for and inducements to conformity are rejected; or the individual may not be amenable to ordinary appeals by reason of an organic defect of perception, understanding or motivation, or as an outcome of acquired compulsions. We may, then, consider the several codes in terms of emphasis upon the intention and capacity of their objects: *destructive* or *nondestructive*.

The Five Categories of Codes

Taking these several emphases into account we find that the codes of a legal system fall conveniently into five main divisions which we call *supervisory*, *regulative*, *enterprisory*, *corrective* and *executory*.²⁰ These might be referred to as legislative codes, since they incorporate most of the statutory products of such institutions as Congress and the state legislatures. Strictly, however, such a designation is open to the objection that the content of the five codes may be constitutive, or at the opposing extreme, sub-legislative, in reference to the decision process as a whole and in terms of the order of generality employed.

The *supervisory* code is designed to stabilize the expectations entertained by private individuals going about the ordinary affairs of everyday life. In Western European systems of public order, at least, there is a strong presumption in favor of deferring to individual freedom in the making of private arrangements. The role of the decision-makers who speak in the name of the entire body politic and who have the sanctioning instruments of the community at their command is to act as umpires when controversies arise over private agreements which the parties are unable to settle among themselves. The prescrip-

20. The analysis of the legal system into five codes was first outlined by the authors in the symposium held in New York City in June 1953, by the American Psychopathological Association. See Dession, *Deviation and Community Sanctions*, and Lasswell, *Legislative Policy, Conformity and Psychiatry*, in *PSYCHIATRY AND LAW* 1, 13 (Hoch & Zubin ed. 1955). [The present version is in the slightly revised form approved by Professor Dession. H.D.L.]

tions that we call supervisory define the standards to be applied by community decision-makers when they are asked to umpire such controversies. The supervisory code determines when and how private agreements are enforceable. The supervisory character of the community's intervention is underlined by the practice of leaving to the parties themselves, rather than to public officials, the initiative in alleging that a violation has occurred. Moreover, if the parties are able to put an end to their disagreement after submitting the matter to a court, the appeal to the community may be withdrawn at any time. The sanctions of the body politic are employable against a party only when a decision has finally been made by an umpire.

The supervisory code also comprises the rules that relate to private affairs when an allegation of wrong is made by a private party. A wrong differs from an agreement in that a general standard of conduct is held to be applicable irrespective of reaffirmation by the parties. The general standards are "rules of the game" which define "injurious acts" and the circumstances in which some compensating indulgence will be given to an injured party by the one who inflicts the injury. The supervisory role of the community is emphasized by the noninvolvement of public officials until a private party seizes the initiative, asserts as a fact that he has been the victim of deprivation in a manner inconsistent with a legal norm, and names a party from whom compensation is sought. As in the case of controversies over private agreements, the decision-makers of the body politic are ready to step out of the picture if the parties succeed in coming to a settlement. Sanctions are used only when a judgment has been given by the umpire.

The supervisory code is limited as far as possible to the "little things" of life, to the myriad of private transactions that remain outside the ken of the powers that be unless initiative is taken by a private party to bring them to the attention of the community. But the transactions of everyday life are drops in a stream whose dimensions and consequences vary from time to time according to the fundamental goals of the system of public order. In the United States, for example, we are in favor of a very considerable sharing of power and have long been apprehensive of the deleterious effect upon free government of any considerable degree of monopolization of basic industries. Many prescriptions found in our national statutes are aimed at the prevention or the elimination of private monopoly on behalf of what Galbraith has recently popularized as the principle of "countervailing power."²¹ The frame of reference of such prescriptions—which we refer to as *regulative*—is the aggregate and not the minutiae of individual acts. Regulative prescriptions often, if not indeed typically, seek to proscribe acts that remain within the purview of the supervisory code until the aggregate impact of such acts endangers the preferred structures of public order. As modern societies become more complex, the volume of the regulative codes swells in unison until every value-institu-

21. GALBRAITH, *AMERICAN CAPITALISM, THE CONCEPT OF COUNTERVAILING POWER* (1952).

tional process is subject to an elaborate set of requirements. This is true of family interrelations, of the conduct of scientific research and publication, of the affairs of private professional and occupational associations, of operations that involve the custody and care of the ill and the defective, and so on through the whole social context.

It is possible for many features of a regulative code to be invoked at the initiative of private parties. But the primacy of the aggregate is indicated by the practice of associating the community with the invoking individual. Furthermore, it is usual for the community to provide special administrative as well as judicial agencies which are made responsible for the performance of intelligence and appraisal functions, and for the invocation of sanctioning measures against those who deviate from the desired pattern.

The regulative components of a system of legal prescriptions are made with an eye to the construction of dikes and cutoffs capable of holding the stream of private activity to a permissible course. But the community itself figures as the responsible administrator of a certain range of activities. In all bodies politic the legal system embraces a set of requirements that are not aimed at the activities performed for the most part by private individuals, whether supervised or regulated, but are carried on directly through public agencies. The *enterprisory* code, as we designate it, deals with the traditional "monopolies" of government, notably organized military and police coercion, together with whatever operations come within the scope of civil and non-police administration.

We speak of the fourth component of the system of codes as *corrective*, which has reference to much but not all of what is commonly called "penal" or "criminal," and also covers some relationships that are not ordinarily bracketed with these. There is, however, a common denominator whose significance is only recently becoming fully understood. The corrective code does not concern itself with every deviation that occurs from the prescriptive norms of a legal system. On the contrary, it deals in concentrated fashion with one comparatively homogeneous though huge category: deviations with *destructive intent*—that is, with conscious or unconscious destructive motivations of extraordinary intensity.²² The primary prescriptions of every code are typically buttressed by provisions for the use of positive or negative sanctions against those who

22. We are reaffirming the ancient maxim "no crime without criminal intent." See *Morissette v. United States*, 342 U.S. 246 (1952); Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644; Note, 1952 U. ILL. L. FORUM 449. Adherence to this principle removes from the purview of the corrective code sections found in the ordinary code that exclude the consideration of intent as an element of the crime. Typically we find that such provisions are regulative, and impose deprivations as a convenient device for protecting the political and social structure irrespective of the intentions of the offender. See HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 10 (1947); Hall, *Revision of Criminal Law—Objectives and Methods*, 33 NEB. L. REV. 383 (1954); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). The category of "absolute liability," for example, may ignore either the fact or the degree of damage done, as well as

breach the norms. And it is appropriate to leave to each code the task of dealing with a great variety of deviations. For instance, each code may well cope with acts that inflict damage upon community values inadvertently—which is to say, without destructive intent. If an act with damaging consequences was unintended there is no legitimate ground for charging it against the “precipitators” of the damage. It should be treated rather as a common risk of living within the confines of a given culture and a particular historical epoch, and the burden of reparation and relief should be apportioned broadly throughout society.

The corrective code fastens exclusively upon situations of damage to community values whose precipitators, having “destructive intent,” demonstrate by the fact of their existence that the social process of the community has been in some measure ineffective. If the social process were completely successful all members of the community would possess both the will and the skill to abstain from acts that endanger common values. The distinctive task of the corrective code is to specify the measures appropriate to the destructive situations in which community failures have imposed deprivation upon “recipients.” Obviously, something must be done to repair the damage, if possible. But the principal challenge is to select the measures to be employed by the community in coping with the “precipitators” of the damage.

The *executory* code, finally, prescribes who acts how in formulating and putting prescriptions into effect.

We summarize in Table I the principal codes that we have distinguished according to major emphasis. The *supervisory* code quite clearly emphasizes particular acts rather than the whole social process. In free societies the objects dealt with are predominantly private rather than official; and when officials

the intent. Thus unlicensed possession of firearms may carry automatic penalties. See, *e.g.*, N.Y. PENAL LAW § 1897.

Similarly found in many penal codes but excluded from the corrective code are offenses involving “negligence.” Where the damage from acting unreasonably is great, such action may be called “culpable negligence” even though no conscious intent is involved. See MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE 37-40 (1944); Dession, Book Review, 58 HARV. L. REV. 621 (1945). The term may refer either to a high degree of carelessness in conduct, or else to a duty imposed upon some individuals to maintain greater vigilance than persons engaged in ordinary pursuits. Thus the courts have held that junk dealers have a duty of alertness in relation to stolen property. See HALL, THEFT, LAW AND SOCIETY 211-13 (2d ed. 1952). The policy objectives of the community are quite clear in this connection, since one of the ways to reduce offenses against property is to impose barriers upon the disposition of stolen goods. But the measures taken by the community are regulative, and not corrective, in nature.

However, since our definition of intent includes “unconscious” as well as “conscious” intent, some of the cases now commonly viewed as involving no destructive intent come within the scope of the corrective code. If it can be shown, for example, that a person is “accident prone,” he is a correctional problem, and community values are not properly served by leaving him to be dealt with by private initiative through the invocation of tort liability. For data see James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

Table I

PRINCIPAL EMPHASES IN THE CODES OF A LEGAL SYSTEM

<i>Code Name</i>	ACTS		STATUS OF OBJECTS		INTENTION OF OBJECTS		METHODS		
	<i>Particular</i>	<i>Aggregate</i>	<i>Private</i>	<i>Official</i>	<i>Nondestructive</i>	<i>Destructive</i>	<i>Jurisdictional</i>	<i>Procedural</i>	<i>Organizational</i>
Supervisory	✓		✓		✓		✓	✓	
Regulative		✓	✓		✓		✓	✓	
Enterprisory		✓		✓	✓		✓	✓	✓
Corrective	✓		✓	✓		✓	✓	✓	
Executory	✓			✓	✓		✓	✓	✓

are targets the stress is upon treating an official much like a private party. The intentions of parties dealt with in the supervisory code are assumed to be those of the ordinary community member. Even though the last code in the list—the executory—can be considered as comprising most of the jurisdictional and procedural directives for supervisory relations, it is worth noting that the vast amount of specialized detail in making private agreements probably justifies the inclusion of many jurisdictional and procedural specifics in the supervisory code.

The *regulative* code is concerned with the aggregate flow of activities in the political arena, the market, the family system, or elsewhere in the social process. The status of the persons dealt with is private, since the aim is simply to set limits upon the private channels by which social values are shaped and shared. As with the supervisory code, the objects dealt with are assumed to act with non-destructive intent, and a certain number of jurisdictional and procedural prescriptions are necessary.

The prescriptions called *enterprising* have to do with the social aggregate since they designate the levels upon which the government administers continuing activities directly. The prescriptions relate with particular force to officials, and require rather complex procedural, jurisdictional, and organizational standards.

Corrective prescriptions are more often aimed at small numbers of individuals than the aggregate, even though the aggregate is usually held to be sufficiently involved to monopolize or at least share the initiative in invoking action. The status of the objects dealt with may of course be either private or official. Wherever destructive intent occurs the problem is within the purview of a corrective code. Once more jurisdictional and procedural provisions are necessary to the functioning of the corrective code as a whole.

The executory code might be called the “decisional” code if all codes were not spoken of as parts of the decision process. The distinctive frame of reference here is the identification of the decision-maker (at every level: prescription, recommendation, intelligence, invocation, application, appraisal, termination), and the provision of guidance concerning the domain, range, scope and procedure of every decision maker. As has been suggested, the vast amount of detail connected with organization, jurisdiction and procedure renders it impracticable to segregate all the prescriptions pertaining to the entire process of decision. Hence each major code within a legal system necessarily contains a number of particularities, though the degree of interlapping need cause no difficulty when the overriding goals of policy are distinctly understood.

SUMMARY

The “substantive” problems of public order appear when we keep in mind the level of human relationships that we desire to achieve and sustain throughout society. If human beings are to act in harmony with the goal values of a free society they must possess the motivations, skills and opportunities to do

so. This implies that whenever social practices and institutions begin to depart from patterns consistent with human dignity, or to produce results out of harmony therewith, the body politic must be willing and able to act in self-correcting fashion to redress form and fact. For this purpose the decision process must draw upon the requisite reserves of talent and incentive, whether at the phase of intelligence, recommendation, prescription, invocation, application, appraisal or termination. The stream of communication distributed throughout the society must provide the cues appropriate to eliciting acts of collaboration that are able to protect and perfect the functioning of the preferred form of public order. It is implied that a structure of identification, demand and expectation will be achieved and sustained that in turn is strong enough to maintain a structure of operation consonant with the overriding values of the commonwealth. In this way the dynamic equilibrium of public order will continue, capable of meeting the frictions that develop within the system of living societies, and able to overcome the recurring challenges of the surrounding world. Man seeks to maximize his values and to bend institutions and resources to the service of those values. In a free society the ideal equilibrium is one that offers the optimum opportunity to realize a system consonant with the conception of human dignity. As part of this process the advisor-draftsmen of the several components of the legal system can play a not altogether insignificant role.