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Expertise in Trial Advocacy: Some Considerations for Inquiry into Its Nature and Development

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EXPERTISE IN TRIAL ADVOCACY: SOME CONSIDERATIONS FOR INQUIRY INTO ITS NATURE AND DEVELOPMENT

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“There is a single word to characterize the single dominant issue (for the legal profession) in the 1980s. That word is competence.”

David Brink, President
American Bar Association

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I. INTRODUCTION

Of all the concerns and issues that are common across the professions the most complicated, the most important, and the most troublesome is that of competence. When some sphere of human activity is given the label "profession," its practitioners are under an obligation to possess one attribute above all others: competence in the knowledge and actions which define that profession. An indication of the importance of this attribute is the censure which consumers and the public place upon professionals (and even professions) who are discovered or suspected to be incompetent. It is vitally important for both the public and the professions to ensure that those who practice are properly trained, credentialed, and monitored.

Although competence appears in some form in the ethical codes of all professions, the ethical implications of professional competence go far beyond the rather limited treatment it is usually given in such codes. It plays a central role in perhaps the most important aspect of professional practice: the practitioner-client relationship. When a client chooses to place his or her affairs in the hands of a professional, there is an implicit promise that the practitioner possesses the requisite competence and will exercise it on behalf of the client. In accepting this promise the client implicitly acknowledges the competence of the practitioner, and this is the foundation for the trust which is the essential element in a successful practitioner-client relationship.

The role of competence in law is rather unique since it is not only an attribute important for its practitioners to possess, but is also part of the very cornerstone on which the adversary system of Anglo-American law is based. This is the principle¹ that if the parties to a dispute are equally represented in a legal forum, the truth will out. The problem is that equal representation is apparently not guaranteed by standards governing admission to the bar, and it is for this reason that the issue of competence represents one of the most important—and troublesome—concerns of the legal profession.² It appears that while professional competence remains a

1. This principle is perhaps honored more in its breach than in its realization.

2. A recent publication of the American Bar Association, *A Challenge to*

central focus of legal policy debates, it has been dealt with almost entirely rhetorically rather than empirically.³ As a result, there has been a great deal of heat generated, but very little light shed on the problem.

The one area of practice that seems to bear the brunt of most criticism is trial advocacy. The critical remarks by Chief Justice Burger concerning the quality of advocacy in American courts are familiar even to those outside the profession.⁴ In a recent survey⁵ of law students which attempted to compare the importance students attach to certain skills and the degree of competence in those skills provided by their training, the largest gaps showed up in the following areas: a) ability to interview and counsel clients, b) ability to investigate the facts of a case, c) ability to negotiate, and d) proficiency at trial advocacy.⁶ Other areas—such as proficiency at appellate advocacy, substantive knowledge of legal doctrine and theory, and ability to think like a lawyer⁷—showed much less discrepancy between what the students felt they needed and what their training programs were providing.

These presumed deficiencies in advocacy and related skills have spawned a variety of programs aimed at remediation. These include reform in law school instruction (especially the introduc-

Rise Beyond Ourselves: Clinical Legal Education's Rendezvous with Reality, 3(summer) LEARNING AND THE LAW 1-84 (1976) [hereinafter cited as LEARNING AND THE LAW], is entirely devoted to the deficiencies in the lawyering skills of many of those now practicing, and reviews several suggestions for improving those skills. Similar criticisms have come from the Chief Justice of the Supreme Court, see, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973), from other members of the judiciary, *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159 (1975) [hereinafter cited as *Clare Committee Report*], from practicing attorneys, Dunn, *Legal Education and the Attitudes of Practicing Attorneys*, 22 J. LEGAL EDUC. 220 (1969), and from students enrolled in various law school training programs, Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 4 B.Y.U.L. REV. 695, 939-51 (1977). See also *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO BAR REP. 2 [also known as the Crampton Report].

3. Burger, *supra* note 2.

4. *Id.*

5. Gee & Jackson, *supra* note 2.

6. *Id.*

7. The authors equate these areas with the skills acquired in a typical "Langdellian" program.

tion of clinical legal education programs),⁸ postgraduate and continuing education programs,⁹ and attempts to introduce minimum competence requirements for practicing in the courts in certain jurisdictions.¹⁰ Although there is a certain persistence in the feeling of need for such reforms,¹¹ their implementation has been delayed or made more difficult by several factors:

1. *Controversy over the existence or severity of the problem.* While there are criticisms of the current state of legal training and practice coming from all segments of the profession (and, of course, from outside the profession as well) there are many in leadership roles within the profession who do not see anything like a crisis in present day American law. This includes both representatives of academic lawyers and practicing attorneys.¹²

2. *Difficulties related to the diffuse character of legal competence.* Even where there is agreement concerning the inadequacy of many attorneys to competently represent clients in court or in other roles, it is difficult to arrive at a consensus concerning either the source of the deficiency or what to do about it. It can be argued that much of successful lawyering is an art, and, as such, can neither be defined nor taught. It is something that is either developed or not, and depends more upon native qualities and "experience" than anything that can be provided through formal training. Another possible position is that advocacy skills are potentially trainable, but that it is necessary to have a representation or definition of what these skills are before they can be successfully taught.¹³

3. *Political and economic factors.* There are, in the legal profession as in all professions, a number of institutional factors which prevent the ready acceptance of reforms. These include familiarity

8. Council on Legal Education for Professional Responsibility, Inc. (CLEPR), *Survey and Directory of Clinical Legal Education: 1976-1977* (1977).

9. Several such programs exist, such as those administered by the National Institute for Trial Advocacy (NITA), and several administered by individual law schools. Some states require mandatory continuing legal education (CLE), and some of these programs include clinical legal education.

10. *Clare Committee Report*, *supra* note 2.

11. *Gee & Jackson*, *supra* note 2.

12. A recent edition of the PBS produced McNeill/Lehrer report was devoted to this topic. Advocates for both sides of the controversy were presented, including a federal judge, a state bar association president, and two law school representatives.

13. R. Glaser, *Components of a Psychology of Instruction: Toward a Science of Design*, 46 *REV. OF EDUC. RESEARCH* 1 (Winter 1976).

(and therefore comfort) with current practices, idealized images of the profession, the high cost of instituting reforms (especially clinical education), and uncertainties as to the cost-benefit ratio of many reforms.¹⁴

It is the central thesis of this paper that what is needed to assess the validity of many of the criticisms directed toward legal practice and training, and to resolve many of the controversies surrounding attempts to correct these criticisms, is a representation or documentation of the structure of expertise in legal practice—especially in trial advocacy since this represents the focus of most complaints. Without such a representation it is difficult to support allegations of incompetence or to defend the efficiency of specific reform on other than subjective or intuitive grounds. At this time no systematic representation exists.

There are presently two kinds of efforts designed to correct this lack. One of these has been the attempt by certain legal experts to make explicit what they know.¹⁵ While the resulting products have often been both stimulating and useful, they suffer from two flaws.¹⁶ First of all, they barely scratch the surface (even in the most ambitious publications) of what the experts really know. These are usually limited to examples of legal reasoning and planning in certain circumscribed contexts. Secondly, there is no way to directly compare knowledge from one expert to another, since most accounts are neither written in comparable form nor for the same purpose.

The second approach has been largely empirical in nature, and has involved the administration of questionnaires and tests, and performance ratings on a variety of dimensions by expert observers.¹⁷ There are three problems with this approach. First, it lacks efficiency and generality. The results of such investigations are limited to the materials presented to subjects or respondents, and without a theory to guide the selection of items or instruments, it is not always clear how adequately the data represent the domain of interest in a given study.¹⁸ Secondly, such studies are often lim-

14. Gee & Jackson, *supra* note 2.

15. See, e.g., R. KEETON, TRIAL TACTICS AND METHODS (2nd ed. 1973).

16. A third problem, whether or not an expert can really represent his own knowledge, is discussed in the next section.

17. See, e.g., LEARNING AND THE LAW, *supra* note 2, at 13.

18. This, in turn, presents problems in the validation and interpretation of differential tests and surveys. See Cronbach & Meehl, *Construct Validity in Psychological Tests*, 52 PSYCHOLOGICAL BULL. (1955).

ited in scope and not well coordinated with each other.¹⁹ This means that only small, unrelated segments of legal expertise have been studied in the research to date. Finally, most of these studies are concerned either with reported attitudes or with behavior of lawyers from an outside observer's point of view. This means that there are few, if any, research efforts aimed at an expert's knowledge *per se* (or a representation of that knowledge); those that exist are aimed largely at a differentiation between competent and incompetent lawyers based on an analysis of the products of that knowledge.²⁰

It would seem, given the problems inherent in more traditional approaches, that a new approach is needed, if we are going to understand expertise in law generally, and in trial advocacy in particular. In this paper we propose an approach to the understanding of human behavior which seeks to analyze and represent the nature and development of expertise. This analysis is based upon the assumption that expertise is a function of adaptation to a complex and highly specialized environment in which both the nature of the individual and the environment constrain and shape the form such adaptation will take.

II. THE CONCEPT OF EXPERTISE

Before proceeding further we need to clarify the term "expertise." We can begin by distinguishing between experts and expertness, and then examine the related concept of competence, which occurs frequently in discussions of the goals of American Legal Education. We will then be in a position to take up the problem of understanding expertise in trial advocacy and to propose a framework within which this might be done.

19. Also at issue is the appropriateness of the level and form of analysis and representation. The generalizations arrived at in many of these studies may be true, while failing to be sufficiently detailed (or in a form appropriate) to allow an adequate determination of practical consequences (*i.e.*, for training, selection, and assessment).

20. The differential approach to testing in psychology is useful if one is interested only in *differentiating*. It is not the most efficient or useful way to arrive at a representation of the underlying basis for differences between people. Conversely, however, having such a representation does help enormously in differential test construction. See Cronbach & Meehl, *supra* note 18.

A. *What is an Expert?*

An expert is a person who, by virtue of training and experience, is able to do things the rest of us cannot. Experts are not only proficient in what they do, but are also smooth and efficient in the actions they take. Experts know a great many things, and have tricks for applying these things to problems or tasks. Experts are good at plowing through irrelevant information in order to get at basic issues or actual problems. Experts are also good at recognizing problems as instances of ones with which they are familiar, generalizing alternative solutions, and making good choices among the alternatives.²¹

Despite our ability to characterize experts in this fashion it is not always easy to decide who the experts are. A recent project undertaken jointly by the Carnegie Commission and the Educational Testing Service developed a list of criteria for choosing experts in a given area, which helps focus the problem. According to the report by this group, an expert can be identified by one or more of the following:

1. Recommendation from others who are expert in the same or closely related fields.
2. Published works (e.g., journal or magazine articles, books, etc.) in a given area.
3. Technical products or artistic works in a related area.
4. A directly related formal academic degree.
5. Other formal credentials such as a license.
6. Awards or honors for achievement in the field.
7. Instruction or teaching experience in the area.

21. Although there is some discussion of experts in the scientific literature, e.g. A. DEGROTT, *HET DENKEN VAN DEN SCHANKER* (trans. as *THOUGHT AND CHOICE IN CHESS*) (1965); Simon & Chase, *Skill in Chess*, 61 *AM. SCIENTIST* 394-403 (1973), the level of activity has increased in recent years, and can now be found in much greater quantity in psychology, e.g., Bransford, Nitsch, & Franks, *Schooling and the Facilitation of Knowing*, in *SCHOOLING AND THE ACQUISITION OF KNOWLEDGE* 31, 32-3 (R. Anderson, R. Spiro, & W. Montague, eds., 1977); Johnson, *What Kind of Expert Should a System Be*, 8 *J. MED. & PHIL.* 77-97 (1983); Johnson, *Expertise and Error in Diagnostic Reasoning*, 5 *COGNITIVE SCIENCE* 235-83 (1981); Larkin, McDermott, D. Simon & H. Simon, *Expert Novice Performance in Solving Physics Problems*, 208 *SCIENCE* 1335 (1980), and computer science, e.g., W. Mark, *The Reformulation Model of Expertise 1* (1976) (Technical Report from the Laboratory for Computer Science, MIT, Cambridge, MIT/LCS/TR-172), as well as in personal accounts by individuals in a field (K. BOULDING, *SKILLS OF THE ECONOMIST* (1958)).

8. Supervisory experience of individuals working in the same field.
9. Membership in organizations with a focus closely related to the subject area.²²

Notable by its absence from this list is any mention of explicit criteria for performance. The best we are able to do, it seems, is rely upon institutional factors documenting training, experience, or certification.

The lack of explicit performance criteria for defining who is expert and who is not is reflected in the recent concern in many fields over the inadequacy of certifying exams, and the use of the term competence has begun to figure prominently in discussion of practice and training as a means of referencing standards against which performance might be tested.²³ Though laudable in its intent, efforts by professional groups to create definitions or standards of competence for performance are often frustrated by an inability to identify a basis for this performance.²⁴ It seems only partly adequate to say that competence means what individuals can do, because this ignores the question of what they know.

The issue of defining competence solely in terms of performance on tasks is especially troubling when we ask about the basis for performance on tasks not yet encountered. It is not performance *per se* that is at issue in making inferences or competence, but rather whatever one knows that permits performance to be appropriate in a wide range of circumstances. The terms competence and expertness seem distinguishable on the basis of degree of proficiency or efficiency with which tasks are done (to be expert implies more than to be competent) and perhaps also on the domain of tasks over which performance can be generalized. They share the fact, however, that what is important to understand is not what individuals can do, but rather what they know that permits them to do certain things.

22. Cooperative Assessment of Experimental Learning (CAEL), The Use of Expert Judgment in the Assessment of Experimental Learning 1 (CAEL Working Paper No. 10, Educational Testing Service, April 1975).

23. It is probably true that practitioners have always been concerned with standards of performance as a means of deciding who should be licensed and who should not. It is only recently, however, that the issue has been seriously raised regarding what kinds of performance actually represent the goals of certification. See, e.g., Learning and the Law, *supra* note 2.

24. Koocher, *Credentialing in Psychology: Close Encounters with Competence?*, 34 AM. PSYCHOLOGIST 696 (1979).

B. What Do Experts Know?

What do experts know? In order to answer this question we might consider an insightful definition of expertise proposed by William Buckley:

Expertise being a word that is precisely used by a total of about twenty people, I pause to define it as meaning a *body of operative knowledge*. It isn't synonymous with *expertness*. One cannot be an expert except in a field in which there is something to be expert in: *i.e.*, in which there is *expertise*. A radar technician can be expert *only insofar as there is room for expertness*. Expertise presumes (a) that the knowledge is there, and (b) that the knowledge that it is there is *widespread*, readily available. Just because, during the Second World War, it happened that there was a wild British don who succeeded in cracking the German code, we are not entitled to deduce that cryptographical science was sufficiently developed to crack the German code. The distinction, as well as being interesting, is important. When buying a piece of equipment one should know just how widespread is the knowledge of how to keep it operative; and certainly, whether such knowledge exists in the first place.²⁵

According to Buckley, what experts have that the rest of us do not is a body of operative knowledge. A simple example of such knowledge is offered by Herbert A. Simon. He distinguished between a circle defined as a locus of points equidistant from a given point, which is something we learn in order to prove theorems in geometry (and can be used in apprehending a circle), and a circle defined by placing a compass on paper so that the sharp end is fixed and the end with a pencil is rotated through 360 degrees.²⁶ The latter definition is operative knowledge; it is the knowledge one needs in order to make a circle. Operative knowledge is knowledge that is organized to do tasks and (according to Buckley) knowledge that is shared among a group of practitioners. The latter feature is important since a single individual may develop the capacity to perform tasks and be virtually alone in his ability to do this. Such capability does not reflect expertise but simply a high and perhaps unique level of proficiency (or creativity).

The distinction between expertness and expertise offered by Buckley may become clearer if we consider an example proposed

25. W. BUCKLEY, JR., AIRBORNE (1976).

26. H. SIMON, SCIENCES OF THE ARTIFICIAL (1969).

by the philosopher-scientist Michael Polanyi in his book, *The Tacit Dimension*:

Return to our knowledge of a game of chess and the game itself. The playing of a game of chess is an entity controlled by principles which rely on the observance of the rules of chess; but the principles controlling the game cannot be derived from the rules of chess.

. . . .

Take the art of making bricks. It relies on its raw material placed on a level below it. But above the brickmaker there operates the architect, relying on the brickmaker's work, and the architect in his turn has to serve the town planner. To these four successive levels there corresponds four successive levels of rules. The laws of physics and chemistry govern the raw material of bricks; technology prescribes the art of brickmaking; architecture teaches the builders; and the rules of town planning control the town planners. . . .²⁷

Expertness (or proficiency and efficiency of performance) is a level of knowing in Polanyi's sense. It consists of knowing how to do one specific thing very well, without presuming other things can be done also. Expertness is achieved through training on specific and limited sequences of action and is a characteristic of technicians and paraprofessionals in many fields. The nurse practitioner performs a valuable service requiring both training and skill in the role of a screening agent listening to heart sounds in the school clinic. Similarly in law, the legal aid and indeed even the legal secretary reflect expertness in their behavior, which is related to, but different from, the expertise of the attorney for whom they work.²⁸

C. Acquiring Expertise

If expertness is achieved through the practice of specific sequences of action, how then does one acquire expertise? The an-

27. M. POLANYI, *THE TACIT DIMENSION* 34, 35 (1967).

28. Interestingly, the fact that limited sequences of action can be mastered in isolation from the body of knowledge from which they are derived is also the basis for theater and role playing in our society. The success of acting depends in part upon the fact that expert attorneys, to say nothing of the lay public, would have difficulty distinguishing (say on a video tape) between a skilled actor carrying out an episode of a courtroom drama and a competent attorney doing the same thing.

swer to this question can partly be found in the Guild system of training artisans and craftsmen in the Middle Ages. Society has devised master-apprentice systems of training in which the skills of the expert (master) are displayed (modeled) for the novice who in turn, must attempt them under directed feedback from the teacher. Such systems survive in most forms of professional education today as internships, clerkships, etc. However, the communication between master and apprentice is usually in descriptive rather than explanatory language so that much master-apprentice training ends up producing expertness rather than expertise. In order to understand better the basis for acquiring expertise, we shall examine a specific theory of skill acquisition.²⁹

The process of acquiring skill proceeds through three more-or-less distinct phases. In Phase I, often termed the stage of cognition or thought, the individual must learn from instruction or observations of his own performance what actions are appropriate in which circumstances. Phase II of skill learning, often termed the associative phase, then consists of practice in which the relationships discovered or taught in Phase I are repeated (with feedback) until they become smooth (fluent and efficient) and accurate (proficient). In Phase III of skill learning, termed the stage of automaticity, relationships are over-practiced to the point where they can be done without thinking. The result of Phase III learning is that the relationships which form the basis for actions are placed beyond the reach of conscious awareness.³⁰ Now since it is usually the expert whom we entrust with the teaching and training of expertise, we end up with a situation in which those who teach have lost

29. The theory presented here is probably best associated with the work of Paul Fitts, *see generally* Fitts, *Perceptual-Motor Skill Learning*, in *CATEGORIES OF HUMAN LEARNING* 224 (A. Melton ed. 1964), although aspects of it have been taken over and appear in specific work on perceptual learning *see, e.g.*, LaBerge, *Attention and the Measurement of Perceptual Learning*, 1 *MEMORY & COGNITION* 268 (1973); Norman & Bobrow, *On Data-Limited and Resource-Limited Processes*, 7 *COGNITIVE PSYCHOLOGY* 44 (1975), as well as general discussions of skill learning *see, e.g.*, J. R. ANDERSON, *LANGUAGE, MEMORY, AND THOUGHT* (1976); G. UNDERWOOD, *ATTENTION AND MEMORY* (1976).

30. For many years the term consciousness (and the distinction between conscious and unconscious experience) was unpopular in American psychology. Recently, however, it has become important in giving adequate accounts of language behavior as well as skilled performance in specific tasks. *See, e.g.*, Mandler, *Consciousness: Respectable, Useful, and Probably Necessary*, in 8 *LOY. SYMP. ON COGNITIVE PSYCHOLOGY* 229 (R. Solso ed. 1975); POSNER, *COGNITION* (1976); BLUMENTHAL, *THE PROCESS OF COGNITION* (1977).

access to the basis for what they wish to teach. David Sudnow provides a compelling example from his book on acquiring expertise in music.

I would spot him [Sudnow's teacher] going over what I saw was a course. He would go many places where the courseness in this sense could not be detected, involving intricacies that seemed puzzling, but I figured they were constituted as all the rest, and within his play many little spates of orderly passage could be nonetheless be spotted. I would ask 'what was that?' He would say 'what was what?' I said 'that little thing you just did over the G minor chord there.' Now a characteristic 'trouble' occurred, whose significance I did not appreciate at the time and for several years. I would say, 'that little thing you just did on the G minor chord', and he would have a hard time finding what he had 'just done.' He would at times frankly say, 'I'm not following rules, so I don't really know what I just did (and on other occasions admit, 'I just improvise, I really cannot tell you how, you have to have a feel for it'). I would ask him to play some more, or would try to produce some portion of the happening I had been able to spot in the midst of his playing. Given a piece of some possible orderly array of notes, he would accommodatingly do a jazz-sounding figure employing that array, but it was not the one he had originally done. Those, he found it almost impossible to reproduce after their accomplishment. It appeared that only when an express intention to do some playing for its reproduction was entertained in the course of a first production, only then would it be possible for him to reproduce it later.³¹

This state of affairs is not the result of any lack of interest in understanding what they know on the part of experts, but rather the end product of a process of cognitive adaptation. The result of our evolutionary history is a relatively large long-term (unconscious) memory for storing facts, principles, events, and knowledge of various sorts, and a severely limited conscious awareness which forces us to automate or place into unconscious memory most of the things that are done with any regularity, and especially those things in which we become highly practiced.

Given an expert's lack of awareness of what he knows, how then are teaching and training to proceed? The answer to this question lies partly in the capacity of some individuals for introspecting into the basis for their own expertise and an ability to articulate this introspection for others. The result of such activity

31. SUDNOW, *WAYS OF THE HAND* 25-6 (1978).

is found in textbooks and training programs which are designed to foster the development of expertise.³² The answer to the question also lies in a collaboration between those who have the "tacit" knowledge of expertise and those with tools for discovering and documenting this knowledge in others.

D. The Role of the Psychologist in Understanding Expertise

Ulric Neisser makes a point in his description of the factors important in the prediction and control of behavior which is at the heart of our orientation toward understanding expertise:

The prediction and control of behavior is not primarily a psychological matter. What would we have to know to predict how a chess master will move his pieces or his eyes? His moves are based on information he has picked up from the board, so they can only be predicted by someone who has access to the same information. In other words, an aspiring predictor would have to understand the position at least as well as the master does; he would have to be a chess master himself! If I play chess against a master, he will always, win, precisely because he can predict and control my behavior while I cannot do the reverse. To change this situation, I must improve my knowledge of chess, not of psychology.³³

If we must know chess to understand chess players, then we must also know law to understand lawyers. The factors which influence the behavior of the practicing attorney are not psychological in the usual sense; they are to be found in a body of operative knowledge and the cognitive representation of it. For it is this knowledge which permits the generality (transferability) of performance across specific task situations, and which forms the basis for commenting upon what we have done; it is also the potential source of insight into what must be learned (and therefore taught) by those who wish to become expert.

Although practitioners have an understanding of their own expertise, they are seldom aware of its dimensions; and while the foundation skills and knowledge of an expert practitioner are precisely what he needs in order to perform in his chosen field, an

32. Books such as KEETON, *supra* note 15, J. MCELHANEY, *EFFECTIVE LITIGATION* (1974), and G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978), as well as the training programs sponsored by The National Institute of Trial Advocacy (NITA) fit into this category.

33. NEISSER, *COGNITION AND REALITY* 182-83 (1976).

appropriate psychological analysis can also be useful in understanding and communicating this knowledge.

Even if a practitioner were aware of the totality of his expertise (which, in particular cases, is unlikely to be true), this knowledge is likely to be contextually stimulated — to be called up, as appropriate, according to the demands of a specific task (almost all human knowledge is in this form).³⁴ The practitioner can give a phenomenally adequate account of the source of his actions in a specific situation, but cannot give a general or abstract account of his expertise *per se*.

Given that a general introspective account might be constructed through the cooperation of a practitioner and an appropriate outside observer, there are three additional problems:

1. It is difficult to arrive at an objective test of the adequacy of an introspective account—*i.e.*, is it really the basis for what the practitioner does, or only a verbal rationalization?³⁵

2. Introspective accounts are difficult to communicate in a form that can be understood and utilized by a novice or interested outsider.

3. Introspective accounts are non-generative: they make it difficult to account for the practitioner's ability to perform in new situations. The lawyer's actions in a specific trial must be an outward manifestation of some more or less abstract underlying principles, *i.e.*, operative knowledge.

The common solution to each of these problems can be found in developing a comprehensive and sufficient representation of expertise in a relevant task domain—in this case trial advocacy. For reasons alluded to already, such a representation would necessarily be specific to a given area of expertise. This means, for example,

34. NEISSER, *supra* note 33.

35. The introspective method as a tool for exploring the mind has a controversial history in psychology. Bakan, *A Reconsideration of the Problems of Introspection*, 51 PSYCHOLOGICAL BULL. 105-18 (1954). The difference between verbal reports that communicate useful information about behavior and those that do not is an important issue, as yet not completely resolved. See, e.g., Nisbett & Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOLOGICAL REV. 231-59 (1977). One solution has been to argue for the use of so-called verbal protocol data, in which the emphasis is upon description rather than explanation for information sought and actions taken in episodes of problem solving or decision making effort. See, e.g., NEWELL & SIMON, HUMAN PROBLEM SOLVING (1972). In the next section we shall argue that verbal reports of all types are potentially useful. See generally HARRE & SECORD, THE EXPLANATION OF SOCIAL BEHAVIOR (1972).

that a theory of expertise derived from an analysis of medical diagnosis would have little to tell us about the grading of livestock; and, similarly, neither of these would help us understand expertise in trial advocacy.

In order to begin the investigation of expertise in any area, it is necessary to make explicit the set of assumptions about human behavior on which the study is based. The following section explores a set of assumptions which seem compatible with the investigation of expertise in trial advocacy.

E. Assumptions for the Study of Expertise

To a very large extent, the assumptions one makes about behavior determine research methodology to be employed, and the nature of the theoretical representations which flow from that methodology. We need, therefore, to make explicit a set of assumptions (a model) which is compatible with our preliminary conceptualization of expertise. Since this mode has only recently (re)gained some acceptance among psychologists, and is not universally followed, we shall outline it here.

The dominant world view in contemporary American psychology has been one in which the individual is presented in machine-like terms. Proponents of this view see people as deterministic "transducers" which lawfully transform environmental causes into behavioral effects. Although psychologists differ greatly over the nature of the transforming mechanism and whether the mechanism has achieved its nature primarily through biological or experimental processes, the central notion of human beings as passive receivers and processors of incoming information is paramount. The reasons for the dominance of this view in American psychology are too complex to neatly summarize, but seem to stem from two once-current philosophical traditions—British Empiricism and Logical Positivism—and the presumed need to model psychology after the natural sciences. David Hume is often seen as the dominant philosophical precursor to this psychological tradition.

In the past decade especially, several difficulties with this mechanistic model have surfaced. One problem has been the lack of intuitive validity in the representations that have come out of psychology, *i.e.*, people often fail to find confirmation of psychologists' theories in their own intuitions about their own behavior and the behavior of others. This criticism has been repeatedly dismissed on a variety of grounds, but a second problem is the observation that experimentation in psychology has failed to produce a

cumulative body of knowledge, in the way that a natural science is expected to.³⁶ This is often explained by appealing to demonstrations that people are quite sensitive to changes in contexts or situations and that perhaps what psychologists are studying in their experiments are creative adaptation to the *particular* situations or contexts represented in the experiments themselves, rather than the general characteristics of the man-machine.

These and other arguments have led to an increasing number of social scientists to adopt an alternative model for human behavior which is more in line with a tradition (largely European, recently) which traces itself back to Immanuel Kant, and which is, in some respects, reminiscent of American Pragmatism.³⁷

The core concept of the perspective we propose is that actions are produced by people, in accordance with the meanings they attribute to the situations in which they find themselves.³⁸ People as

36. See A. Newell, *You Can't Play Twenty Questions with Nature and Win: Prospective Comments on the Papers of This Symposium*, in VISUAL INFORMATION PROCESSING (W.G. Chase ed. 1973); see also P.E. Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Progress of Soft Psychology*, 46 J. CONSULTING & CLINICAL PSYCHOLOGY (1978).

37. This model, which has been labeled "contextualism" by some, sees man as an active agent or actor (the terms are used interchangeably), and aims toward capturing a representation which the actor would recognize of the events in which he plays an active role. See, e.g., PEPPER, *WORLD HYPOTHESES* (1942). Its adherents, see, e.g., Sarbin, *Contextualism: A World View for Modern Psychology* 24 NEBRASKA SYMPOSIUM ON MOTIVATION 1-41 (1976), see men as actors in dramatic sequences, and suggest a "dramaturgical perspective" as a means of capturing the essential characteristics of these enactments. See generally E. GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* (1963); E. GOFFMAN, *INTERACTION RITUAL* (1976); E. GOFFMAN, *STRATEGIC INTERACTION* (1969); E. GOFFMAN, *FRAME ANALYSIS* (1974); HARRE & SECORD, *supra* note 35; *HUMAN ACTION* (T. Mischel ed. 1969); Sarbin, *Contextualism: A World View for Modern Psychology*, 24 NEBRASKA SYMPOSIUM ON MOTIVATION 1-41 (1976). We intend to make use of much of this perspective in our discussion.

38. In order to utilize this perspective in research, an investigator is led to look for regularities in each of these key areas: (a) regularities in situations (which may take the form of "frames", E. GOFFMAN, *supra* note 37, or "affordances," Gibson, *The Theory of Affordances*, in PERCEIVING, ACTING AND KNOWING 67 (R. Shaw & J. Bransford eds. 1977)); regularities in the meanings of interpretations applied to situations (which may be represented as "social cognitions or implicit psychologies," WEGNER & VALLACHER, *IMPLICIT PSYCHOLOGY* (1977), as "structures", GARDNER, *THE QUEST FOR MIND* (1972), or as "schemata," Neisser, *supra* note 33); and (b) regularities in actions produced by agents (which might take the form of "rules," HARRE & SECORD, *supra* note 35, "plots," Sarbin, *supra* note 37; "scripts," ABELSON & SCHANK, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING* (1977);

agents do not respond to situations as much as they act in them, and in doing so, their actions become part of the situation itself. Relationships between the individual and his environment do not form a casual chain (situations causing meanings, meanings causing actions), but instead form a set of relationships which map onto each other.³⁹

Although psychologists have been analyzing situations and actions for much of their history, these analyses have been almost exclusively from the point of view of the psychologist as "objective" outside observer. The problems with this orientation are (1) that it fails to appreciate the fact that the psychologically relevant aspects of situations and actions can only be determined with reference to a behaving organism, that is, from the point of view of the actor (experts); and (2) that it fails to provide an obvious way of probing the actor's own meanings—which are perhaps the most important elements in an event.

It is in utilizing the expert's own accounts of events that the two most important advantages of the perspective proposed here emerge. First of all, these accounts provide the most direct source of information about the meanings that play such an important role in an expert's actions. The meanings derived from such accounts must not be accepted uncritically,⁴⁰ but it is foolish to ignore such an important source of information. Secondly, representations based on experts' accounts can be in a form that may be quickly recognized and utilized by experts themselves, and by other non-psychologists. This is a non-trivial advantage, because it facilitates communication with, and evaluation by, the professional community.

Two assumptions for understanding legal expertise are implicit in the above discussion. First, any adequate representation of legal expertise must utilize the expert's own accounts of his actions in relevant courtroom situations, including: prospective accounts (or plans), retrospective accounts (justifications, reasons), and ongoing accounts of current actions.⁴¹ Second, the expert's account

"games," BERNE, *GAMES PEOPLE PLAY* (1970), or "strategies," E. GOFFMAN, *supra* note 37).

39. This is also found in the structural thinking of Piaget and Levi-Strauss. See PIAGET, *STRUCTURALISM* (1968); GARDNER, *supra* note 38.

40. These accounts must not be accepted without criticism because they may be self-serving, misleading, incomplete, etc.

41. HARRE & SECORD, *supra* note 35, contains an excellent discussion of the use of accounts of these kinds.

of his own behavior must be supplemented by an outside observer's (psychologist's) account of what he has done. This has the advantage of allowing each type of representation serve as a check on (or validation of) the other.

Given this assumption, our earlier analysis of expertise, and the preceding argument for "contextualism" in psychology, we can now suggest a framework for interpreting behavior in which people (attorneys included) are seen as adaptive, rule-following agents. What people are at any given point are products of the adaptations that they have made, which are in turn functions of the situations they have encountered, and their fundamental human attributes—their genetic heritage. An individual adapts to the situations he encounters, and in the process of doing so, changes himself.⁴² The outcome of adaptation is some form (which will be left undefined) of internal representation from which an individual can derive a set of rules or procedures to guide action in a given situation.

In general, adaptations occur in specific situations, and the rules related to these adaptations are those which are applicable to the specific situation. At some point, adaptations to several related situations come together into more general meta-adaptations or inductive principles, here termed expertise, which can then be applied to facilitate adaptations to new situations. The term expertise is used in referring to these inductions, without presupposing the form of this expertise—*i.e.*, how it will eventually be represented. Expertise serves as a shorthand which allows a determination of the actions which apply in a given situation, without having to adapt to that situation in the same way that an individual without the appropriate expertise would. It is in the nature of the professionally relevant adaptations made and the organization of ex-

42. Despite its relatively infrequent use in much of the psychological literature, the mechanism of adaptation can be a powerful source of explanation for behavior, as ethologists among others have shown. See, e.g., DAWKINS, *THE SELFISH GENE* (1977). The same argument we make here has also appeared in the writings of Piaget. See, e.g., PIAGET, *BIOLOGY AND KNOWLEDGE* (1971); see also FLAVELL, *THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET* (1963); NEISSER, *supra* note 33. Our general argument is for the contextual nature of behavior, *i.e.*, that it is stimulated differently in different situations, so that there will be no "general laws of behavior," as we once thought. Cronbach, *Beyond the Two Disciplines of Scientific Psychology*, 30 *AM. PSYCHOLOGIST* 116 (1975) suggests that if there are cross-situational principles of behavior they will, in fact, be principles of adaptation.

expertise thereby induced, that the separation between expert and novice is to be found. We now turn to a preliminary characterization of expertise in trial advocacy, using the theoretical framework outlined above.

III. PRELIMINARY CHARACTERIZATION OF EXPERTISE IN TRIAL ADVOCACY

In discussing the rationale for clinical legal education, Chief Justice Burger has set forth what he perceives as the primary failing of contemporary law schools:

The shortcomings of today's law graduate lies not in a deficient knowledge of law, but that he has little, if any training in dealing with facts or people—the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom.⁴³

The assumptions for a theory of expertise outlined above allow us to make some sense out of this shortcoming in the following terms:

Training legal reasoning (a form of adaptation) generally proceeds through exposure to, and adaptation to, the results of previous applications of expertise in legal reasoning—*i.e.*, appellate decisions. Examples of cases illustrating legal principles are presented to law students in truncated, decontextualized form. People and facts involved in a case are usually presented in somewhat generic terms. Because the specific situations that a law student adapts to are already abstracted from and, therefore, abstractions of real situations, the rules induced from the adaptation to these problems cannot call up the actions required to adapt to specific, real (non-decontextualized) situations.⁴⁴

The adaptations that an expert trial attorney has been required to make, on the other hand, have (by definition) resulted in inductive rules sufficient to ensure adequate action in specific courtroom situations. These indicative principles allow the expert to generate actions which allow him to deal with both facts and

43. Burger, *The Future of Legal Education*, in 3 *SELECTED READINGS IN CLINICAL LEGAL EDUCATION* 50, 53 (CLEPR and the International Legal Center 1973).

44. John T. Noonan makes much the same point in *NOONAN, MASKS OF THE LAW* (1976).

people.⁴⁵

Effective legal action, of the sort implied by Chief Justice Burger, seems to involve the joint application of two sets of knowledge: (1) knowledge derived from a law graduate's adaptations to his legal training (*i.e.*, his knowledge of the law), and (2) knowledge derived from his adaptation to social situations of all kinds (*i.e.*, his knowledge of people).⁴⁶ If it is true that deficiencies in knowledge of the law are not the real problem in training for expertise in trial advocacy, then the problem may in fact represent deficiencies in knowledge of people, or more likely, in utilizing this knowledge.

Another way of stating this would be to say that non-expert lawyers either have inadequate rules for producing effective action in social situations in general, or that they have difficulty in coordinating their legal and social inductions for behavior, and are not able to simultaneously utilize both spheres of knowledge at the same time. Keeping this hypothesis in mind, let us turn to a more concrete analysis of the qualities which might differentiate between expert and non-expert trial attorneys.

IV. EXPERT-NOVICE DIFFERENCES IN TRIAL ATTORNEYS

The expertise of a trial lawyer must translate into action, and the degree or level of expertise which he embodies, is responsible for the potential adequacy of this action.⁴⁷ "Adequacy" must nec-

45. In a paper published in 1971 entitled *Law and the Fireside Inductions*, 27 J. SOC. ISSUES 65 (1971), Paul Meehl argued persuasively that the "person" aspect of legal reasoning is a significant factor in both performance and outcomes of trial law. Since then, others have examined person variables in legal thought and found it a neglected aspect of legal analysis. See, *e.g.*, NOONAN, *supra* note 44.

46. Knowledge of people, as the term is used here, implies operative knowledge in the sense stated earlier. The interesting difference is that operative knowledge of people is often largely implicit, though shared within a culture, see WEGNER & VALLACHER, *supra* note 38, or a professional group, see P.E. Meehl, *supra* note 36, rather than largely explicit as it is for things such as sailing and electronics repair. This is not to say that such implicit operative knowledge cannot be made explicit, however, as courses in "salesmanship," "advertising," and "How to Win Friends and Influence People" attest. We shall adopt the policy of regarding knowledge as operative when it embodies rules leading to actions, whether this knowledge is explicit or not.

47. It is necessary to be entirely clear about our use of the term expertise. While it seems sensible to argue that expertise requires operative knowledge, as we did earlier, it is also true that having a body of operative knowledge does not, by itself, ensure expertise. There are two conditions that must be met. First, in order for expertise to exist, someone (or something) must master all or some por-

essarily be judged by either the effect produced on the principals in a trial situation (judge, jury, witnesses, etc.), or by the expert critical evaluation of a legal commentator. There seem to be no well-defined criteria which enable an observer to easily and objectively isolate the characteristics of good and poor actions.⁴⁸ There are appeals to "touchstones,"⁴⁹ and certain rules of thumb, but neither of these is very satisfactory. These difficulties are not surprising, since adequacy must always be defined with reference to specific situations, and the purposes to be served by action in those situations. At this point we will simply assume that the results of expertise can be judged with respect to their adequacy, without attempting to define the dimensions along which these judgments take place.

Assuming that we can differentiate between expert and non-expert behavior, we must ask what it is that allows an expert to act more "adequately" in courtroom situations. As indicated earlier, this seems to boil down to (1) the sufficiency of the relevant knowledge which generates rules for action, and (2) the ability to bring knowledge (assuming its sufficiency) to bear in appropriate situations. In the discussion and characterization which follows, we shall assume an expert's knowledge of law,⁵⁰ since in most accounts of the deficiencies in current legal training and courtroom performance, knowledge of the law does not seem to be the central problem. In addition, deficiencies in this area are relatively easy to assess and correct. This leaves us with an emphasis on relating knowledge of the law to specific situations in which this knowledge is utilized, and the knowledge which generates rules for action in these situations.⁵¹

tion of this knowledge. How much is mastered, and indeed what portion is mastered, sets upper limits on the level of expertise. Second, expertise requires that the knowledge mastered in the first place be applied to performance over a domain of tasks. Practice in such applications sets an upper limit on the expertness of performance in these tasks. Saying that someone has expertise (the phrase often used is "know how") makes a claim about what he can do based upon what he has done. Expertise, then, is a psychological term; it refers to a particular basis (internal representation) for actions taken; it reflects an inference based upon convergent evidence for mastery of a body of operative knowledge and expertness in the application of this knowledge to performance on particular tasks.

48. These criteria would, of course, be definable if a representation of expertise in trial law existed.

49. "Touchstones" refer to examples drawn from famous trials.

50. For example, the rules of evidence.

51. A preliminary study of the literature generated by those who have at-

Although a complete characterization of expertise in trial law is obviously an eventual goal of the kind of inquiry we describe here, it is possible to postulate, in a very general way, what some aspects of this characterization might look like—based upon a preliminary analysis of some of the trial advocacy literature, and in the context of the perspective outlined earlier. This preliminary characterization will be in the form of tentative propositions concerning qualities which might serve to differentiate expert and non-expert actions, and preparation for action.

Assuming equal knowledge of the law, equal availability of the facts of the case, and equal willingness to devote time and effort to preparation, we then propose the following propositions regarding expert and non-expert trial attorneys:

1. Expert attorneys are better at analyzing legal situations. Another way of stating this might be, expert attorneys have more complete knowledge for generating action in legal situations (in general or in a speciality area), and they are able to recognize those elements in situations which are meaningfully related to this knowledge. In any given legal situation there are a number of things to be taken into account in arriving at a plan of action. It is quite likely that experts have (or have developed) the ability to recognize all of the appropriate variables in a given situation, to weigh them appropriately, and to consider them simultaneously in arriving at a plan of action. A non-expert may fail to recognize important aspects of the situation, may attach disproportionate weight to relatively unimportant aspects, and may tend to focus too much, losing the forest for a situational tree. We might include here the ability of the expert to recognize both legal and people variables, and to invoke the knowledge in both domains.

2. Experts are better at anticipating possible future situations, or long-term consequences of their (or their opponents') actions. A

tempted to explain or teach the basis of expertise in trial advocacy also indicates that, aside from knowledge of the law, this expertise is largely psychological—although not in a formal sense. Some accounts (the NITA training manuals, for example) make specific reference to the “show business” or “salesmanship” aspects of trial advocacy. While it is true that courtroom action has much in common with dramatic performance, it is important to remember that a legal performance is a special kind of performance involving the art of persuasion within its own set of rules. The actor/agent in this case is (or should be) always playing himself. Histrionics are definitely secondary to a *convincing* performance. Cf. Blunk & Sales, *Persuasion During the Voir Dire*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 39 (B. D. Sales ed. 1977).

good deal of a lawyer's efforts must necessarily be directed toward future events which cannot be completely predicted. By anticipating appropriately, the attorney can limit the amount of unpredictability, and have better control over events as they occur. The successful attorney must not only anticipate his own moves or actions, but must prepare for the counter-action which his opponent is likely to make. A legal situation, like most real situations, is dynamic, and constantly changing. This means that the expert must be able to imagine the detail in situations that may or may not occur in the future, much as a playwright must imagine the action unfolding on stage as he creates his script. Failure to correctly anticipate the actions, or set of possible actions, that might take place can force a non-expert into situations which require very complex judgments under both time and emotional pressure, which greatly increases the probability of errors.

3. Experts have more adequate (in the sense of more complete and/or correct) implicit psychological theories. In the last analysis, whatever an attorney does must be assessed against its potential impact on people, (client, judge, jury, etc.). If the non-expert has inadequate knowledge, or fails to utilize appropriate knowledge in the case at hand, he runs the risk of an inadequate action, reducing the probability of success, and failing in his obligations to his client.

4. Expert attorneys are more sensitive to the nuances of particular legal contexts. This has to do with both the completeness and coordination of knowledge in legal and social domains. In legal education, one can find a large number of pronouncements, or rules of thumb.⁵² Such pronouncements can be made absolute, and often are, or with various degrees of qualification.⁵³ The intricacies of what an expert actually decides to do in a given situation are such that they can probably never be captured in any finite list of pronouncements, no matter how long or how qualified. At best, some well-worked examples can be provided, which give some idea of how to approach situations rather than a set of rules for behaving in them. These rules must come out of the expert's own experience. At worst, a non-expert is likely to pick up a set of rules which get applied in a Procrustean fashion. A key distinguishing characteristic for differentiating expert and non-expert lawyers may be

52. This is true in almost any endeavor, including acting and selling.

53. For instance, if A, then do B, but if C, then D is more appropriate. But, of course, if E, then either B or D, depending upon X.

the willingness and ability of the expert to modulate his actions according to the specific situation, and to take a large number of factors into account in deciding on a course of action.

It is not possible to specify exactly how each of these propositions relate to an ultimate characterization of expertise, but each is, in principle, testable. The purpose of posing such propositions is not to provide answers to questions regarding the nature of expertise in trial advocacy, but to suggest some starting points in seeking them. From the point of view of the perspective we have outlined, it would be neither disastrous nor surprising for the ultimate outcome of such an inquiry if our preliminary analysis is wrong. The important thing is to begin.

V. CONCLUSION

This article began with the idea that there are a number of practical concerns in law (with respect to training, selection, and certification) that could be facilitated if an appropriate theory of expertise existed. We have tried to present an approach to the study of the problem which, we believe, is a promising way to develop such a theory, if it were to be implemented in an investigation of sufficient scope. Although this aim is an optimistic one, we feel that it is possible to attain with a collaborative effort involving representatives of both the psychological and legal professions.

Most psychological research is conducted by individual researchers (including their assistants); it is only rarely that research will involve two or more primary investigators, and even in these cases the investigators are likely to be from the same area of professional specialization. Such an approach necessarily limits the sphere of investigatory expertise that can be applied to a problem. If we follow Neisser's argument⁵⁴ that we need more situational knowledge and not more psychological knowledge to understand (or predict) behavior in specific content areas, then this is a serious limitation in any research outside the primary investigator's area of expertise.⁵⁵

The central problem in the analysis and representation of expertise is in knowing what to look for. Once this problem is solved, the methodological problem becomes routine, even though it may remain difficult in terms of the time and energy required to successfully complete the task. If one is interested in accounting for

54. HARRE & SECORD, *supra* note 35.

55. Including, of course, almost all "applied" research.

complex human action in complex situations, it is obvious that not all aspects of situations or actions are equally important in arriving at such an understanding. Situations can be thought of as providing a set of information possibilities, out of which the expert selects (or attends to) the information which is relevant to the task. It is just as important to an investigator of expertise to focus on the relevant aspects of situations as it is for the expert whose domain is being studied, since both are limited in their capacity to utilize information.

The basic method we have proposed for the study of expertise in trial advocacy is the analysis of episodes of the performance of experts and novices in task situations which are relevant to advocacy. The psychologist's task in such research is essentially similar to that faced by an ethologist interested in determining the nature of and reasons for sequences of action in the field, with one important exception: in the case of human beings we may utilize the fact that our subjects can speak. The data that we can collect from performance episodes can therefore be of two complementary sorts: records of expert and novice performance in task situations, and records of the accounts of their performance by the participants. Both sources of data will contribute to the eventual representation of expertise.