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# Human Sciences and Legal Institutional Development: Role and Reference Group Concepts Related to the Development of the National Railroad Adjustment Board

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THE HUMAN SCIENCES AND LEGAL  
INSTITUTIONAL DEVELOPMENT: ROLE AND  
REFERENCE GROUP CONCEPTS RELATED TO  
THE DEVELOPMENT OF THE NATIONAL  
RAILROAD ADJUSTMENT BOARD

The Keepers of the Law are aware of their sacred heritage and tradition. They know that their responsibilities today are of a kind with that of the many generations who went before. Indeed, they may feel the need to call for wisdom and knowledge in sources outside the law itself.

As modern man gazes in wonderment at the twentieth century's technology and tries to adjust to nuclear energy, weapons of mass destruction, jet-propelled aircraft, television, electronic computers, automation, etc., he becomes threatened with the loss of his self-identity as a man. For when he pictures himself on the mass-production assembly line, regulated in his activities by the machine-process, he may feel so overwhelmed, so helpless, so deprived of a sense of self-determination, that he may feel that he has become an "automaton-man" — a machine-like creature without a soul. Perhaps even the Keepers of the Law, many of them specialized toilers in the obscure cells of mammoth law firms, giant corporations, or governmental bureaucracies, may have difficulty preserving their sense of identity as self-determining persons entrusted with the sacred care of the law.

In spite of increasing production and comfort, man loses more and more the sense of self, feels that his life is meaningless, even though such feeling is largely unconscious. In the nineteenth century the problem was that *God is dead*; in the twentieth century the problem is that *man is dead*. In the nineteenth century inhumanity meant cruelty; in the twentieth century it means

schizoid self-alienation. The danger of the past was that men became slaves. The danger of the future is that men may become robots. True enough, robots do not rebel. But given man's nature, robots cannot live and remain sane. They become "golems"; they will destroy their world and themselves because they cannot stand any longer the boredom of a meaningless life.<sup>1</sup>

It would appear imperative, if the Keepers of the Law are to transmit their heritage to future generations, that life must be meaningful to them in the deepest and fullest historical and spiritual sense. Additionally, this same significance must be maintained in persons throughout society. This is a function of law and of the Keepers of the Law.

In this great enterprise, it may appear that the human sciences are destructive per se. Thus, from economics has sprung forth the monster of dialectical materialism which threatens literally and physically the destruction of Western Civilization and the values which have given meaningfulness to man's existence. In the words of Marx:

In the social production of their means of existence men enter into definite, necessary relations which are independent of their will, productive relationships which correspond to a definite stage of development of their material productive forces. The aggregate of these productive relationships constitutes the economic structure of society, *the real basis on which a juridical and political superstructure arises*, and to which definite forms of social consciousness correspond. The mode of production of the material means of existence conditions the whole process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but, on the contrary, it is their social existence that determines their consciousness. (Emphasis added.)<sup>2</sup>

Where skepticism and genuine distrust may be directed

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<sup>1</sup> Fromm, *The Present Human Condition*, THE AMERICAN SCHOLAR 29, 33-34 (Winter 1955-56).

<sup>2</sup> MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (1859); translated by Emile Burns in HANDBOOK OF MARXISM (1935); quoted in MAN AND THE STATE 372 (Ebenstein ed. 1947).

at the human sciences which brought forth economic determinism, utter abhorrence must be felt for the mate to Marxian dialectics, *i.e.*, psychological determinism. The teaching of some "learning theorists" that human behavior like Pavlovian salivating dogs, or like maze-running rats, is basically conditioned-reflex or stimulus-response behavior, however, has come into respectability in the legal literature. Thus, Underhill Moore and Charles C. Callahan have declared that a proposition of law is an artifact and its administration is behavior the effect of which may be described by the same laws as describe the effect of any artifact or behavior, such as "the effect of the ringing of a telephone bell on the behavior of the listener."<sup>3</sup> Along the lines of learning theory, in their view, "a proposition of law is nothing more than a sensible object which may arouse a drive and cue a response."<sup>4</sup>

The outstanding learning theorist in the field, Clark L. Hull, stated that the philosophy of law implicit in the Yale Institute of Human Relations investigation by Moore and Callahan was that:

[T]his is the basic hypothesis that there are ultimate laws to which all mammalian behavior conforms, that these laws may be discovered and formulated quantitatively as equations, and that the *forms* of these equations are the same for all individuals and species, the differences lying only in certain quantitative constants (coefficients, exponents, etc.) which appear in the equations. Such assumptions have long been commonplace in the

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<sup>3</sup> Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 3 (1943):

"The quantity and degree of conformity to the ordinances which the investigation discloses are in accord with the theorems of a psychological behavioristic theory of learning, in particular, the propositions of that theory referring (1) to stimulus situations in which mutually conflicting responses have been learned to the cues which are present and (2) to the gradient of reward. The investigation suggests that the quantity and degree of conformity to any proposition of law will be in accord with the propositions of such a learning theory."

<sup>4</sup> *Ibid.*

natural sciences, but they are not yet fully recognized in the social sciences in general and in the law in particular. Thus law is conceived as a special form of human engineering in which the science of behavior plays the role which physics plays in ordinary engineering, and in which statutes are regarded as verbal or symbolic inventions designed to mediate certain behavioral ends, much as mechanical, chemical, or electrical inventions are designed to attain certain physical ends.<sup>5</sup>

The Hullian learning theorist notion that "there are ultimate laws to which all mammalian behavior conforms" including human behavior undifferentiated from other life in his broad classification of mammalian behavior, is especially objectionable to acceptable systems of human values. To point out some of the objectionable aspects or propositions concerning psychological learning theory, of course, does not mean that human behavior may not be subjected to scientific methodology and thereby be discovered to follow patterns of orderliness and rationality which students of human nature long have observed.<sup>6</sup>

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<sup>5</sup> Hull, Moore and Callahan's "Law and Learning Theory": A Psychologist's Impressions, 53 *YALE L.J.* 330, 336-7 (1944). Hessel E. Yntema, speaking of the Moore and Callahan study, observed that ". . . the study may be taken as a demonstration that, in a limited sample of experience, the incidence of particular instances of legal regulation upon human conduct is susceptible of measurement and statement in quantitative form, the units of which represent a general theory of human behavior." Yntema, "Law and Learning Theory" *Through the Looking Glass of Legal Theory*, 53 *YALE L.J.* 338, 340 (1944).

<sup>6</sup> As to the Hullian notion, his followers might well consider the following observation by a more recent theorist:

"The degree of unity and coherence we find in learning theory probably depends in part on the objective situation and in part on our hopes and expectations. The latter, like the theories themselves, change with the times. A decade ago most influential theorists seemed to have as their goal the construction of comprehensive theories capable of embracing all varieties of learning phenomena. However, critical analyses of the major attempts at global theorizing, together with the negative results of sustained attempts to decide experimentally between the competing claims of these systems, indicate that the goal is an unrealistic one." Estes, *Learning*, 7 *ANNUAL REV. PSYCH.* 33 (1956).

Undoubtedly, in time the "rat" psychologist may discover that human behavior does not fit the patterned behavior of rats. The tendency, however, to study human behavior on the animal level, without discriminating man's humanity to man, may carry some untoward consequences, i.e., Kinsey's studies on sexual behavior.

As modern science seemingly casts dark shadows over the human spirit, and as the behavioristic disciplines of the social sciences, such as economics, sociology, anthropology, political science, and psychology, increasingly concern themselves with concrete factual elements and orderings of behavior, scrupulously avoiding value judgments, it is understandable why the Keepers of the Law must struggle to purify their efforts to maintain the norms, the goals, the ideals of law.<sup>7</sup>

Deep concern for the normative values of law, however, includes a determined willingness to discover in the actuality of human affairs and in the experiences of men, from birth to burial, those processes and dynamics which are available or accessible to knowledge and which strengthen and maintain in growing effectiveness the law-ideals. The earthly problem of seeking additional under-

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<sup>7</sup> Cf. Kelsen, *Law, State, and Justice in the Pure Theory of Law*, 57 *YALE L.J.* 377 (1948):

"[T]he Pure Theory of Law insists upon a clear separation of the concept of law from that of justice, be it called natural, true or objective law, and why the Pure Theory of law renounces any justification of positive Law by a kind of super-law, leaving that problematical task to religion or social metaphysics." *Id.* at 390.

"[T]he law is a social order, that is to say an order regulating the mutual behavior of human beings. An order is a set of rules prescribing a certain human behavior, and that means a system of norms. The saying that the purpose of the law is to establish order is one of the many tautologies used in jurisprudence or, what amounts to the same thing, a misleading pleonasm. It produces the illusion as if there were two things, the law on the one hand, and order on the other hand. But the law is itself the order which those who speak of 'law and order' have in mind." *Id.* at 377.

"In defining the concept of law as a coercive order, that is to say as an order prescribing coercive acts as sanctions, the Pure Theory of Law simply accepts the meaning that the term 'law' has assumed in the history of mankind. In defining the law as a coercive order the Pure Theory of Law conceives of the law as a specific social technique. This technique is characterized by the fact that the social order, termed law, tries to bring about a certain behavior of men, considered by the law-maker as desirable, by providing coercive acts as sanctions in case of opposite behavior." *Id.* at 378.

"The pure theory of law is a theory of positive law. . . . It answers the question of what the law is, not what it ought to be." Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *HARV. L. REV.* 44 (1941).

standing of ways and means of fulfilling the law-ideals has always been the problem of the Keepers of the Law.<sup>8</sup> In dealing with this problem, the human sciences may be looked to for possible useful theories and concepts. The duty to discriminate with wisdom when searching the sciences, and to exercise due restraint in reaching conclusions remains with the law profession.<sup>9</sup>

With the foregoing caveats in mind and with a view towards enhancing the normative values in the law, there will follow in this paper a brief discussion of role and reference group concepts as they have been formulated in the literature of the human sciences, particularly in sociology and in psychology. In addition, a possible application of these concepts to the functioning of the grievance machinery under the Railway Labor Act, including the National Railroad Adjustment Board, will be presented.

## I

### ROLE THEORY

Role concepts are as yet in an early stage of formulation, and there is not as yet a uniform definition of the concept "role" by the various writers.<sup>10</sup> Thus, in a recent survey of the role concept in the literature, the investigators con-

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<sup>8</sup> Cf. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 477 (1954): "I suggest the term 'eunomics,' which may be defined as the science, theory or study of good order and workable arrangements."

<sup>9</sup> The law profession may be inwardly pleased to have the unnecessary reassurance of psychiatrist Ranyard West that, "only the law and lawyers can give us machinery that will maintain our lives in order and peace." He asserts,

"There is no doubt that a healthy society needs to trust its legal machinery. Such psychiatric disclosures as that the judge represents 'Father' emphasizes rather than otherwise the human need. It is a wise society that does everything possible to maintain and enhance the confidence of a progressively educated community in the integrity of its legal system." West, *The Importance of Modern Psychiatry to the Lawyer*, 14 OHIO ST. L.J. 138, 141 (1953).

<sup>10</sup> ASCH, *SOCIAL PSYCHOLOGY* (1952); E. L. HARTLEY & R. E. HARTLEY, *FUNDAMENTALS OF SOCIAL PSYCHOLOGY* (1952); JAQUES, *THE CHANGING CULTURE OF A FACTORY* (1952); LECKY, *SELF-CONSISTENCY: A THEORY OF PERSONALITY*

cluded: "the concept *role* is at present still rather vague, nebulous, and nondefinitive. Frequently in the literature, the concept is used without any attempt on the part of the writer to define or delimit the concept, the assumption being that both writer and reader will achieve an immediate compatible consensus."<sup>11</sup>

In one meaning of the term *role*, it is a unit of organizational structure, and the organizational structure may be conceived broadly as "culture" or narrowly as a single small group enterprise, formal or informal. The organization, if complex, like a culture, or more simple, say, like a corporation, is composed of numerous interlocking and specialized functions, coordinated and directed towards achieving purposes of the organization. The organizational structure may be pictured as consisting of interrelated positions or statuses and may be described in terms of col-

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<sup>10</sup> *continued*

(1945); LINTON, *THE STUDY OF MAN* (1936); MEAD, *MIND, SELF, AND SOCIETY* (1934); MORENO, *PSYCHODRAMA* (1946); NEWCOMB, *SOCIAL PSYCHOLOGY* (1950); PARK & BURGESS, *INTRODUCTION TO THE SCIENCE OF SOCIETY* (1924); PARSONS & SHILS, *TOWARD A THEORY OF ACTION* (1951); Sarbin, *Role Theory*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY* (Lindzey ed. 1954); K. YOUNG, *PERSONALITY AND PROBLEMS OF ADJUSTMENT* (1952); Benne & Sheats, *Functional Roles of Group Members*, 4 *J. SOCIAL ISSUES* 41 (1948); J. C. BROWN, *An Experiment in Role-taking*, 17 *AM. SOCIOLOGICAL REV.* 587 (1952); Cameron, *Role Concepts in Behavior Pathology*, 55 *AM. J. SOCIOLOGICAL* 464 (1950); Cottrell & Dymond, *The Empathic Responses: A Neglected Field for Research*, 12 *PSYCHIATRY* 355 (1949); Cottrell, *The Adjustment of the Individual to His Age and Sex Roles*, 7 *AM. SOCIOLOGICAL REV.* 618 (1942); Coutu, *Role-playing vs. Role-taking: An Appeal for Clarification*, 16 *AM. SOCIOLOGICAL REV.* 180 (1951); Komarovsky, *Culture Contradictions and Sex Roles*, 52 *AM. J. SOCIOLOGICAL* 184 (1946); Motz, *The Role Conception Inventory*, 17 *AM. SOCIOLOGICAL REV.* 465 (1952); Neiman & Hughes, *The Problem of the Concept of Role—A Re-survey of the Literature*, 30 *SOCIAL FORCES* 141 (1951); Newcomb, *Role Behaviors in the Study of Individual Personality and of Groups*, 18 *J. OF PERSONALITY* 273 (1950); Sarbin, *The Concept of Role-taking*, 6 *SOCIOMETRY* 273 (1943); Turner, *Role-taking, Role Standpoint, and Reference-Group Behavior*, 41 *AM. J. SOCIOLOGICAL* 316 (1956); Turner, *Self and Other in Moral Judgment*, 19 *AM. SOCIOLOGICAL REV.* 254 (1954); Warner, *Social Disorganization and the Interrelationship of Cultural Roles*, 14 *AM. SOCIOLOGICAL REV.* 83 (1949).

<sup>11</sup> Neiman & Hughes, *The Problem of the Concept of Role—A Re-survey of the Literature*, 30 *SOCIAL FORCES* 141 (1951). Theodore R. Sarbin contributes a scholarly integration, if not a new formulation, of much of the literature of the role theory. See Sarbin, *Role Theory*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY* (Lindzey ed. 1954). The reader is especially referred to Sarbin for a more comprehensive view of the subject.



lections of reciprocal right-duty relationships which obtain amongst the positions or statuses. The right-duty relationships involve groupings of learned behaviors appropriate to the positions or statuses, and these groupings of behaviors or actions constitute roles. Roles such as president, senator, judge, lawyer, client, father, son, employer, employee, husband, wife, etc., when analyzed in terms of their behaviors or actions, provide a description of the culture or organization being studied.<sup>12</sup>

More specifically and concretely, the concept role relates to the behavior or actions of particular individuals coordinate with their positions. In this observed-behavior sense, the actions of different persons occupying the same position or status may be dissimilar. Thus, the actions of the persons may constitute different roles although the persons involved occupy the same position or status.<sup>13</sup>

The search for understanding as to why individuals oc-

<sup>12</sup> Cf. JAQUES, *THE CHANGING CULTURE OF A FACTORY* 249 (1952); Sarbin, *supra* note 11, at 224; LINTON, *THE CULTURAL BACKGROUND OF PERSONALITY* (1947); Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 *YALE L. J.* 951, 953 (1942): "Hohfeld, modified, provides at hand a set of accepted instruments which deserve rigorous use in primitive jurisprudence." In this Hohfeldian context, Hoebel illustrates:

Person A	Person B
Demand-right .....	Duty
Privilege-right .....	No-demand-right
Power .....	Liability
Immunity .....	No-power" <i>Id.</i> at 954;

LLEWELLYN & HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); LLEWELLYN, *THE BRAMBLE BUSH* (1930); Malinowski, *A New Instrument for the Interpretation of Law — Especially Primitive*, 51 *YALE L. J.* 1237, 1248 (1942): "The clearer our recognition that law is a system of principles which are deeply founded in the working of human culture and human society, the sounder will be our general jurisprudence and the better will it be able to assist the creation and the administration of a working social order."

<sup>13</sup> Cf. Cottrell, *The Adjustment of the Individual to His Age and Sex Roles*, 7 *AM. SOCIOLOGICAL REV.* 618 (1942):

"A role [is] . . . an internally consistent series of conditioned responses by one member of a social situation which represents the stimulus pattern for a similarly internally consistent series of conditioned responses of the other[s] in that situation. Dealing with human behavior in terms of roles, therefore, requires that any item of behavior must always be placed in some self-other context."

Also see Sarbin, *supra* note 11, at 225. BAKKE, in *THE FUSION PROCESS* 21

cupying the same position or status may nevertheless have actions which constitute different roles is as yet in a primitive stage. Nevertheless, certain general notions are regarded as bearing upon this question. The personalities of the actors, the interactions between the persons involved, and the situation are some of the elements being studied. The behavior of an individual is said to turn, in part, on his perception of reality.<sup>14</sup> The underlying needs and drives of the individual affect his perceptions—*i.e.*, of food, drink, love, etc. The individual's perceptions affect the personality structure and vice-versa in a dynamic perception-personality process.<sup>15</sup> The perceptions of the individual take place in a cultural setting and are influenced by the values and attitudes and expected behavioral patterns shared and transmitted in his culture so that the individual is motivated to govern his behavior in accordance with the cultural expectancies.<sup>16</sup> In particular settings or groups, the behavioral patterns expected of the individual take on a more or less defined cluster of characteristics as he learns the values or norms of the group. Thus, he takes on the role which is his.<sup>17</sup>

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<sup>13</sup> *continued*  
(1953) states:

"One very important fact should be noted about roles (as well as their component functions and conducts). They are always reciprocals. For one man to play successfully the role of 'bossing director,' another has to play the role of 'deferrent directed.' For one man to play the role of 'benevolent supervisor,' another has to play the role of 'grateful subordinate.' For one man to play the role of 'presidential leader,' another has to play the role of 'citizen follower.' No role can be adequately performed without the adequate performance of its reciprocal."

<sup>14</sup> Bruner & Goodman, *Value and Need as Organizing Factors in Perception*, 42 J. ABNORMAL AND SOC. PSYCH. 33 (1947); Bruner & Postman, *Symbolic Value as an Organizing Factor in Perception*. 27 J. SOC. PSYCH. 203 (1948).

<sup>15</sup> BLAKE & RAMSEY, *PERCEPTION—AN APPROACH TO PERSONALITY* (1951); KRECH & CRUTCHFIELD, *THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY* (1948).

<sup>16</sup> LINTON, *THE CULTURAL BACKGROUND OF PERSONALITY* (1945); BENEDICT, *PATTERNS OF CULTURE* (1934); LEWIN, *A DYNAMIC THEORY OF PERSONALITY* (1935); MURPHY, *PERSONALITY: A BIOSOCIAL APPROACH TO ORIGINS AND STRUCTURE* (1947).

<sup>17</sup> "When we study human behavior in terms of roles, we are looking at its public, or shared aspects. Whether we like it or not, we are all

The process of role definition may be viewed in part as a function of interaction amongst the individuals in the situation. Thus, where two persons are in a role-role relationship, the individual in role X may make a statement to the individual in role Y. The stimulus statement, *i.e.*, "close the door," may bring the other's response, "do it yourself," and this response may in turn stimulate the individual in role X to say to the person in role Y, "I'll spank you, if you don't shut the door," whereupon the individual in role Y responds by closing the door (or gets spanked). The parent-child role (or roles) in the interaction process become defined, and the expectations of the individuals involved in the particular situation are communicated to each other.

The perceptions of the individuals involved, of course, are an essential part of the interaction process. The perceptions may be of the self (as child, as adult, as pupil, as teacher, etc.), or the perceptions may be of the other, or the perceptions may be of the objective situation or statuses or positions and norms or values which are common in the culture or group (*i.e.*, to show respect to an older person, it is wrong of an employee to absent himself from work without justification, a judge should be impartial, etc.).<sup>18</sup> Role-taking, accordingly, has been called "a process of looking at or anticipating another's behavior by viewing it in the context of a role imputed to that other."<sup>19</sup> In

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<sup>17</sup> *continued*

assigned to various positions, and we are perceived by others as occupants of those positions. And whether we ourselves know it or not, we think and feel and act as *occupants* of positions—whether lifelong ones, as in taking sex roles, or momentary ones, as in taking the role of a bride. Thus both our behavior and others' perceptions of our behavior—which, together, constitute the two-way process of communication—are determined by our role assignments." NEWCOMB, *SOCIAL PSYCHOLOGY* 328-9 (1950).

<sup>18</sup> "It should be noted that implied in the reciprocal behavior encompassed in the reciprocal role is a recognition and acceptance by one person of the status conception the other holds of himself if the latter is to play his role effectively." BARKE, *THE FUSION PROCESS* 21 (1953).

<sup>19</sup> Turner, *Role-taking, Role Standpoint, and Reference-Group Behavior*, 61 *AM. J. SOCIOL.* 316 (1956).

keeping with this definition, role is defined as "a collection of patterns of behavior which are thought to constitute a meaningful unit and deemed appropriate to a person occupying a particular status in society (e.g., doctor or father), occupying an informally defined position in interpersonal relations (e.g., leader or compromiser), or identified with a particular value in society (e.g., honest man or patriot)." <sup>20</sup> From this point of view, there is a linkage or bunching of performances within roles, and such clustering of behaviors is a basis of expectation that certain behaviors come in orderly arrangement. <sup>21</sup>

Several aspects of role theory should be touched upon before moving into reference group theory. First, role theory contemplates the existence of norms or values which constitute the essence of the role.

[R]ole is a normative concept. It refers to expected or appropriate behavior and is distinguished from the manner in which the role is actually enacted in a specific situation, which is *role behavior* or *role performance*. While a norm is a directive to action, a role is a *set of norms*, with the additional normative element that the individual is expected to be consistent. The role is made up of all those norms which are thought to apply to a

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<sup>20</sup> *Id.* at 316-317.

<sup>21</sup> Cf. Lon L. Fuller's viewpoint in the *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457 (1954), at 481:

"If man's 'nature' is shaped entirely by the 'cultural matrix' then when that matrix is disturbed or broken it would seem that man would disintegrate and there would be no telling which way the pieces would fall. If there are constancies and regularities that persist through a change in social forms, these must reflect some constancy in the nature of man himself. It is at this point that the subject I have called economics reached common ground with the natural law theory of the source of ethical judgments."

The regularity and orderliness of the "cultural matrix," to use Fuller's phrase here, consistent with role theory, become "internalized" in the individuals through the "socialization process" and therefore there would be no occasion for man to "disintegrate." Thus, life in the American colonies, in France, in Russia, and elsewhere where revolution has occurred goes on very much along traditional channels. The role of "Premier" has attached to it the behavioral characteristics of the "Czar" and the peasants continue to perform their reciprocal roles to the substituted communist "bourgeois" or aristocracy. Liquidation of one set of role incumbents does not necessarily eliminate the role if the reciprocals to the role are functioning.

person occupying a given position.<sup>22</sup>

Second, role theory contemplates the existence of a "self" which is separate and distinct from role. The role performer is assumed to have a self-identity, a "self-image," which is self-directive, seeking actualization or development or growth of the self, and this "self" is uniquely capable, within the nature of the organism, to discriminate amongst norms and to take a directing function of its own free from any rigidity of social roles.<sup>23</sup>

Role theory, accordingly, is inextricably intermixed with concepts of the self and is substantially concerned with such problems as self-role and role-role conflicts.<sup>24</sup> Thus Elliott Jaques observes:

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<sup>22</sup> Turner, *supra* note 19, at 317.

<sup>23</sup> For a discussion of the "self" concept in the role theory, consult Sarbin, *Role Theory*, in HANDBOOK OF SOCIAL PSYCHOLOGY 224, 238-45 (Lindzey ed. 1954). Although the "self" concept is generally defined for purposes of the role theory as "the self is the individual as known to the individual," (G. MURPHY, PERSONALITY: A BIOSOCIAL APPROACH TO ORIGINS AND STRUCTURE (1947)), the notion of self is often used by writers on this subject together with the terms "self-image," "self-picture," "ideal self-image," and "total personality."

"At the same time the formal organization and the informal groups are trying to make an *agent* out of the individual for the accomplishment of their *organizational* and *group* purposes, the individual is trying to make an *agency* out of the organization, its people and other resources for the accomplishment of his *personal* purposes, the maintenance, development, expression, and realization of his personality, his conception of himself. We may label this process by which the individual does this, and may even try to impose his image on the formal organization and on one or more informal groups, the *Personalizing Process*."

BAKKE, *op. cit. supra* note 18, at 18. Although the role theory may use restricted definitions of the self in keeping with the aims of the investigators, the special usages employed do not run counter to religious and philosophical concepts, but, to the contrary, are consistent with them. Thus, when the self is regarded as identifying with the norms of society, there appears full consistency with natural law and religious concepts.

<sup>24</sup> There appears to be a close affinity between role theorists and certain neo-Freudians in psychoanalytic theory. Thus, Jung employs the concept "persona" which involves the role played by the individual in society. In the course of the individual's life, "he learns to behave in accord with what is expected of him. Each profession, for example, has a characteristic mask which the member tends to wear. The persona is not a part of the true character but is firmly attached to it and acts as a sort of protection of the inner man." BLUM, PSYCHOANALYTIC THEORIES OF PERSONALITY 167 (1953). Otto Rank employs the concept of "will" which is described as "a

The personalities of individuals affect social structure in the sense that a person is never perfectly suited to a role; gross discrepancies between personality and role being handled not only by redeployment or personality readjustment, but also by the individual gradually adapting the role to suit his own needs or by those in charge making an explicit alteration of the role to suit the available people—a procedure which usually entails modification of other roles as well.<sup>25</sup>

## II

### REFERENCE GROUP THEORY

The concept of reference group came into the literature just fourteen years ago and has not yet reached the stage of common definition.<sup>26</sup> In its initial use, the reference group was conceived as constituting the point of comparison in evaluating one's own status. Thus, overseas soldiers indicated relative satisfaction or deprivation with their status

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<sup>24</sup> continued .

positive guiding organization and integration of self which utilizes creatively as well as inhibits and controls the instinctual drives." According to BLUM, *op. cit. supra*, at 168-169:

"Originally the process of willing is said to arise as 'an inner primarily negative opposing force against compulsion.' The compulsion may be due to external factors such as parental commands or the internal demands of sexuality. These inevitable obstacles and restraints met by the child cause him to resist and thereby exercise his 'counterwill.' A second step in the development of the will is directed toward the attainment of particular things, desiring what others have, not in the sense of envy but rather merging one's own will with the will of the group. Comparisons with others are continually being made. The third step occurs when a person no longer measures himself by other's standards and, in a truly positive fashion, can take responsibility for his own willing. Prohibitions in childhood lead the individual to mistrust his will as evil, so that the adult possesses a will whose contents are in part good, or approved by parents and society, and in part bad, or disapproved. The resistance to authority, the bad aspect, is the counterwill."

For Kardiner, according to BLUM, *op. cit. supra*, at 177: "Character represents the special variation of each individual to the series of cultural norms encompassed in the 'basic personality structure' of his particular society. This basic personality structure, described as the personality configuration shared by the bulk of the society's members as a result of common early experiences, is said to provide the matrix in which character traits develop."

<sup>25</sup> JAQUES, *THE CHANGING CULTURE OF A FACTORY* 252 (1952).

<sup>26</sup> The term was first introduced by Hyman, *The Psychology of Status*, 38 *ARCHIVES OF PSYCH.* 15 (1942).

when they compared themselves with men in various groups at home and in combat.<sup>27</sup> The point of comparison, it may be noted, might be with a group with which the individual was not or was emotionally identified, in which he was or was not an actual member, in which he wished to belong or did not have aspirations of belonging. Moreover, the group which constituted the reference point for making comparisons might be one that did or did not actually exist in reality.<sup>28</sup> In a closely related sense, reference group is "that group whose perspective constitutes the frame of reference of the actor."<sup>29</sup> In this sense, an individual is assumed to structure his world of experience, to perceive the world, through his direct or vicarious participation in a group. It is the norms of the reference group which constitute the anchoring points in structuring the perceptual field.<sup>30</sup> The perspective which is derived from the reference group norms is defined as,

. . . an ordered view of one's world—what is taken for granted about the attributes of various objects, events, and human nature. It is an order of things remembered and expected as well as things actually perceived, an organized conception of what is plausible and what is possible; it constitutes the matrix through which one

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<sup>27</sup> Merton & Kitt, *Contributions to the Theory of Reference Group Behavior*, which is part of a collection of *STUDIES IN THE SCOPE AND METHOD OF THE AMERICAN SOLDIER* 42-53 (Merton & Lazarsfeld ed. 1950).

<sup>28</sup> Chapman & Volkman, *A Social Determinant of the Level of Aspiration*, 34 *J. ABNORMAL AND SOC. PSYCH.* 225 (1939); GRINKER & SPIEGEL, *MEN UNDER STRESS* (1945); Hartley, *Psychological Problems of Multiple Group Membership*, in *SOCIAL PSYCHOLOGY AT THE CROSSROADS* (Rohrer & Sherif ed. 1951); Kelley, *Two Functions of Reference Groups*, in *READINGS IN SOCIAL PSYCHOLOGY* (Swanson, Newcomb & Hartley ed. 1952); Newcomb, *Attitude Development as a Function of Reference Groups: The Bennington Study*, in *SHERIF, AN OUTLINE OF SOCIAL PSYCHOLOGY* (1948); Keller & Stern, *Spontaneous Group References in France*, 17 *PUBLIC OPINION Q.* No. 2, 208 (1953); Shils & Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 *PUBLIC OPINION Q.* 280 (1948).

<sup>29</sup> Shibutani, *Reference Groups as Perspectives*, 60 *AM. J. SOCIOL.* 562 (1955).

<sup>30</sup> Sherif, *The Concept of Reference Groups in Human Relations*, in *GROUP RELATIONS AT THE CROSSROADS* (Sherif & Wilson ed. 1953).

perceives his environment. The fact that men have such ordered perspectives enables them to conceive of their ever changing world as relatively stable, orderly, and predictable.<sup>31</sup>

The notion that it is the reference group which provides the norms which constitute the anchoring points in structuring the perceptual field is a notion which has been refined or abstracted to what appears to be the logical and realistic conclusion:

. . . when talking of reference groups, as our basic analytical concept, we might be guilty of reifications. This has already been alluded to in the literature, when it was emphasized that a "reference group" is a group with whose norms we identify ourselves. In all our interviews it became apparent that it is this norm (or, perhaps, in a broader sense, "value") that serves most as the frame of reference towards which an individual seeks to orient himself, and that only in some specific situations is such a norm tied to a concrete group. Thus it seems that the process of orienting oneself towards a frame of reference which transcends one's own concrete roles, is a part of the normative process in society, through which some value-orientations are maintained in concrete behavior.<sup>32</sup>

The reference group concept has thus been distilled to mean reference norms. The reference norms represent the basic values of a society and "both transcend various con-

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<sup>31</sup> Shibutani, *supra* note 29, at 564.

<sup>32</sup> Eisenstadt, *Studies in Reference Group Behavior: 1. Reference Norms and the Social Structure*, 7 HUMAN RELATIONS 191, 194 (1954). With a backdrop of empirical data growing out of the absorption of immigrants in Israel, a theoretical analysis is presented which attempts to specify the social situations in which reference group orientations are evoked and the social roles through which they are maintained. Eisenstadt states, at 192, that: "The maintenance of such orientations to reference groups and group norms is one of the important mechanisms of social control, and that it is closely connected with the exercise of leadership and authority, and with the processes of communication in a society." Also see Bott, *The Concept of Class as a Reference Group*, 7 HUMAN RELATIONS 259, 265 (1954): ". . . the individual himself is an active agent. He does not simply internalize the norms of classes which have an independent external existence. He takes in the norms of certain actual groups, works them over, and constructs class reference groups out of them."



crete roles and are implicit in them."<sup>33</sup> Through communication processes, the basic norms provide anchoring points for structuring the perceptual field of the individual, so that in certain kinds of situations order is created where otherwise disorder or chaos would be threatened. Thus, according to Eisenstadt, the main values and norms of a society are referred to in:

(a) situations of transition from one institutional sphere to another or of contemporaneous activity in several institutional spheres, and/or in several sub-systems of a society; (b) situations in which such various sub-systems have to be directly connected with the central values and activities of a society; (c) situations in which choice between various roles, possibilities, is necessary; and (d) situations in which the routine of a given role or group is endangered because of apathy of members, etc.<sup>34</sup>

In such situations, where established order seems to disintegrate, individuals occupying key communication roles in the society, such as leaders, "elites and communicators of various kinds," maintain the orientation to the basic norms and thereby reestablish order. Common cultures with order and stability are dependent upon communication channels which effectively transmit the basic norms reflecting the objectives or purposes of the individuals in the society. Segmentation into sub-systems and social disorganization result through failure of communication channels effectively to transmit upwards the goals and aspirations of the individuals involved or to transmit downwards the established basic norms or values of the society.<sup>35</sup>

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<sup>33</sup> Eisenstadt, *supra* note 32, at 213.

<sup>34</sup> *Id.* at 214.

<sup>35</sup> See in this connection Tamotsu Shibutani's discussion of the role of communication in maintaining our modern mass societies and variety of social worlds. 60 *AM. J. SOCIOLOGY*, 562, 565-569 (1955). Also see MILLER & FORM, *INDUSTRIAL SOCIOLOGY* 162-179 (1951), for discussion of effect of communication channels on industrial organization.

## III

ROLE AND REFERENCE GROUP CONCEPTS  
RELATED TO THE NATIONAL RAILROAD  
ADJUSTMENT BOARD PROCESS

Diverse points of view exist regarding the peculiarly unique institution called the National Railroad Adjustment Board.<sup>36</sup> On the whole, it may be concluded that the different viewpoints reflect the perspectives or reference groups of the individual commentators and writers dealing with the subject. Thus, a distinguished labor arbitra-

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<sup>36</sup> The National Railroad Adjustment Board consists of thirty-six members, one-half selected and compensated by the carriers and one-half by national labor organizations, and was established pursuant to the 1934 amendments to the Railway Labor Act, 48 STAT. 1185 (1934), 45 U.S.C. § 151 (1952). Each member holds office as long as he is acceptable to the side he represents. The Board is composed of four divisions whose proceedings are independent of one another. The First Division consists of ten members, five representing the carriers and five representing national labor organizations of the employees, and has jurisdiction over disputes involving train and yard-service employees of carriers, *i.e.*, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, as well as yard-service employees. The Second Division of the Board consists of ten members, five carrier and five labor, and has jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. The Third Division also has ten members and has jurisdiction over disputes involving station, tower, and telegraph employees; train dispatcher; maintenance of way men; clerical employees; freight handlers; express, station, and store employees; signalmen; and sleeping-car porters, maids, and dining-car employees. The Fourth Division has six members, three representing the carriers and three labor, and has jurisdiction over disputes involving employees of carriers directly or indirectly engaged in the transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, or Third Divisions. Under the Railway Labor Act, § 2(5), 48 STAT. 1185 (1934), 45 U.S.C. § 152 (1952), the general purpose of the Board is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Literature on the Board includes: JONES, *INQUIRY OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE AND HISTORICAL BACKGROUND AND GROWTH OF MACHINERY SET-UP FOR THE HANDLING OF RAILROAD DISPUTES 1888-1940* (1941); KALTENBORN, *GOVERNMENTAL ADJUSTMENT OF LABOR DISPUTES* c. 3 (1943); KAUFMAN, *COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY* c. 11 (1954); LAZAR, *DUE PROCESS ON THE RAILROADS* (1953); MCNAUGHTON & LAZAR, *INDUSTRIAL RELATIONS AND*

tor calls the National Railroad Adjustment Board the "busiest quasi-arbitration board in the country."<sup>37</sup> An authority on administrative law entitles an article, *The National Railroad Adjustment Board: A Unique Administrative Agency*, and calls the Board "... the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts."<sup>38</sup> A professor in business administration calls the Board a "piece of administrative machinery" and says "the Board functions more as a voluntary board of arbitration than as an administrative agency of the government. Neither the Board as a whole nor an individual division has any power to compel the attendance of witnesses or parties; neither has power to compel the production of relevant documents. It follows that the decisions of the Board resemble the awards of a voluntary board of arbitration."<sup>39</sup> A critical law review commentator speaks of the Board as a "forum" to be elected, as consisting of "four separate tribunals," as a "sort of 'supreme court' for the interpretation and application of labor agreements throughout the industry."<sup>40</sup> The United States Supreme Court has spoken of the Board as a "forum" and "tribunal" and in effect also consented to the labels of "administrative body" and "public agency."<sup>41</sup> A body of ad-

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<sup>36</sup> continued

THE GOVERNMENT cc. 6, 7 (1954); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937); Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis*, 5 IND'L & LABOR REL. REV. 365, 540 (1952); Spencer, *The National Railroad Adjustment Board*, 8 UNIV. OF CHICAGO STUDIES IN BUSINESS ADMINISTRATION No. 3 (1938); *Administrative Procedure in Government Agencies*, S. Doc. No. 10, 77th Cong., 1st Sess. pt. 4 (1941); Comment, 18 U. CHI. L. REV. 303 (1951); Note, 51 YALE L.J. 666 (1942).

<sup>37</sup> Miller, *The Railroad Adjustment Board*, 3 ARBITRATION J. 181 (1948).

<sup>38</sup> Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L. J. 567 (1937).

<sup>39</sup> Spencer, *supra* note 36, at 1 and 62.

<sup>40</sup> See Comment, 18 U. CHI. L. REV. 303 (1951).

<sup>41</sup> See *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 727 (1945); *Washington Terminal Co. v. Boswell*, 124 F.2d 235, 243-44 (D.C. Cir. 1941)

ministrative law specialists speak of the Board as an "agency" and as a "workable adjudicatory mechanism" and "administrative tribunal."<sup>42</sup>

The perspective of the labor organizations, as may be anticipated, is quite different from that of the lawyer or professor. In their view, the Board is the product of the collective bargaining system. As they put it:

Both employers and employees who desire harmonious labor relations have long been aware of the advantages offered by the conference room. A conference between the employee who has a grievance, and his immediate supervisor may bring a ready adjustment of the matter. Too often, however, the attitudes of the direct participants are warped by prejudices and predilections of a personal or local nature. The conference is more likely to succeed if held between representatives of the parties, just as attorneys can often arrange settlements of legal actions when their clients cannot.

If an adjustment is not reached in conference on the property between local representatives of the persons who are involved in the dispute, the next logical step is to submit the controversy to a conference off the property, between representatives selected by the carriers generally—or in other words, to an adjustment board.<sup>43</sup>

This collective bargaining perspective, of viewing the Board as a device to achieve peacefully what is felt to be a just claim, is forcibly presented by the statement of board member William Bishop, the Brotherhood of Railroad Trainmen's representative on the First Division, in testimony before the Attorney General's Committee on Administrative Procedure, June 26, 1940:

The National Railroad Adjustment Board was created for a good purpose, and it has been functioning, only it has not been functioning rapidly enough, and it has been

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<sup>42</sup> Administrative Procedure Committee Final Report, *Procedural Reform and Improvements*, S. Doc. No. 8, 77th Cong., 1st Sess. 185-87 (1941).

<sup>43</sup> H. E. JONES, *op. cit. supra* note 36, at 358, quoting *Memorandum Filed in Behalf of Railway Labor Executives' Association Before the Attorney General's Committee on Administrative Procedure*.

functioning notwithstanding a lot of people did not want it to function. And so far as some of the organizations are concerned, the organization that I have the honor to represent, we can get along without a board. We can settle our cases on these railroads, and do it more quickly than if we have to go to this board. But we are a peaceable organization, and we don't want to have to use our economic strength to get justice. But there are a lot of organizations on certain railroads that probably are not so well off economically as the Brotherhood as a whole. I think the public generally appreciates that we are trying to settle these things without disruption of traffic. And that is what we want to continue to do. But we don't think the railroads are playing fair.<sup>44</sup>

Different in perspective, however, from the labor organizations is the view of the carriers:

In hearing and deciding the cases which come before the Board, (the Board members) do not act as negotiators or adjusters. Whatever may have been the intent of the law in setting up an Adjustment Board there has been no trace in the history of the Board of any view on its part that its function is to iron out differences by taking into account the situation and needs of the parties and the practical effect of their respective demands, and on the basis of such consideration making concessions to one party in return for concessions by it for the good of the industry as a whole. The Board has never taken this view of its functions. Instead it has assumed with the strictest legalistic viewpoint that the loosely drawn and often vague terms of the schedules and agreements which come before it have a rigid technical meaning, and that this meaning is to be discovered by a process of purely technical reasoning. The most cursory examination of the nature of the arguments put up to the Board and the grounds of its decisions where these are given, conclusively demonstrates that it regards its function as one of strict legal interpretation rather than compromise and adjustment.<sup>45</sup>

The foregoing discussion of differing perspectives, de-

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<sup>44</sup> *Id.* at 343.

<sup>45</sup> *Id.* at 231, quoting statement in *Monograph No. 17 of The Attorney General's Committee on Administrative Procedure.*

pending on the reference group orientation, indicates instability of the Adjustment Board mechanism. The lawyer reference group orientation would view the machinery as full of defects, an anomaly that is shocking to norms which define the judicial roles and the judicial process.<sup>46</sup> Accordingly, if the lawyer were given full rein to remake the Adjustment Board into his own image, it is doubtful if much of the existing Board would remain.<sup>47</sup>

The perspective of the lawyer with his orientation towards the basic values of our civilization cannot and must not be demeaned. A realistic self-criticism and appraisal, a steadfast inner searching, however, is one of the role attributes of the law profession. Karl N. Llewellyn, in his penetrating, pathfinding realism points out that:

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<sup>46</sup> Thus, the writer of the Comment in 18 U. CHI. L. REV. 303 (1951) declares with vehemence at 321:

"Uniformity and fairness could both be achieved under the *Slocum* rule were the NRAB reconstituted as an impartial tribunal. It could combine the procedural and adjudicative advantages of a court with the specialized knowledge of an administrative agency. It could provide a hearing for third parties and accept inter-employee disputes without upsetting the balance of interests among its members. It could follow precedents and render consistent interpretations, and it could decide all the cases on their merits. It could dispense with the present time-consuming practice of rearguing deadlocked cases before referees. The carrier members have always favored such a tribunal, but the labor members are opposed. One reason for their opposition is clear—under the present set-up, the unions they represent enjoy important advantages over competing unions. But the interest of railway labor as a whole must lie with an impartial administration of collective bargaining agreements rather than with a system which operates to the advantage of vested union interests."

<sup>47</sup> The labor man's view of the lawyer is not very complimentary, in this area:

"Of course, I have no disrespect for lawyers. I like them. I have got some good friends who are lawyers. But their place is not in this game, I will tell you that. I will tell you, furthermore, of all the people that come before our Board representing the railroads on matters of contract between men and the employees the lawyer makes the poorest showing of anybody. And this is an absolute fact. And some of them are big enough to admit it. And about all they can do is talk court procedure to you. I had one of the biggest lawyers in this eastern country come over there to tell us how to run the board. He was a good fellow, too. I had met him before. When he got through he said, 'I find a lawyer can learn something from a layman.' He hasn't come back any more."

. . . a realistic approach to any new problem would begin by scepticism as to the adequacy of the *received* categories for ordering the phenomena effectively toward a solution of the new problem. It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely. The suggestion then comes to this: that with the new purpose in mind one approach the data afresh, taking them in as raw a condition as possible, and discovering how far and how well the available traditional categories really cover the most relevant of the raw data. . . .

The other suggestion of a realistic approach rests on the observation that categories and concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with terms of the categories.<sup>48</sup>

A sure mark of the lawyer craftsman is his ability to discriminate without error between fact and fiction. He resists with all of his capabilities the tendency to distort reality or to extend traditional legal categories or models to actual situations which do not fit the generalizations. Despite all this, there is the impulse of the individual immersed in his own world of perspectives, who thinks and

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<sup>47</sup> continued

H. E. JONES, *op. cit.* *supra* note 36, statement of William Bishop at 340.

Dean Erwin N. Griswold has observed: "Another field in which a lawyer's understanding of human relations could be of great importance is that of labor relations. . . . They had a tendency to lay down the law, to be inflexible, to be superior, to be domineering." *Law Schools and Human Relations*, WASH. U.L.Q. 217, 227. This self-appraisal of the lawyer is additionally consistent with the finding: "But there was one point on which virtually all companies and unions agreed in regard to the make-up of the negotiating teams: the exclusion of lawyers." NATIONAL PLANNING ASSOCIATION, CAUSES OF INDUSTRIAL PEACE, UNDER COLLECTIVE BARGAINING, FUNDAMENTALS OF LABOR PEACE—A FINAL REPORT 90 (1953).

<sup>48</sup> Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930).

feels and acts from the standpoint of his reference group, to bring what he finds deviant into the conformity with his own system of order.<sup>49</sup> Fortunately, it is recognized in the law profession that its own system of order includes the fundamental value of avoiding prejudging and of deciding on the whole of the evidence. Accordingly, it becomes necessary for the law profession to consider the roles and perspectives of the parties participating in the adjustment board process, in the light of the evolution of such roles.

It will assist in the understanding of the roles of the parties to the Adjustment Board process to sketch briefly some of the characteristics of the railroad situation within which the individuals involved function. The railroad industry functions much like an absolute authoritarian system. Semi-militaristic in its organization, it operates through a hierarchy of command with concentrated power in its general line officers. Perhaps this organizational structure is necessary to the efficient performance of controlled transportation. Numerous complex operations must be highly coordinated and reduced to the clock-like regularity of the time schedule. Numerous and detailed rules and regulations are applied and routinized, almost in mechanical precedent fashion, so as to achieve what resembles automatic regularity of operation. As of June 30, 1954, there were 5,157 working agreements in effect on the carriers governing rates of pay, rules, and working

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<sup>49</sup> Cf. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L. J.* 238 (1950), at 243 where it was said that:

"What is needed in law, if law is to become more scientific in the future than it has been in the past, is a body of learning from which we can predict that what looks like a straight story or a straight sale from one standpoint will look like a crooked story or a crooked sale from another, and from which we can predict the successive 'distortions' that any observed social fact will undergo as it passes through different value-charged fields in the 'world-line' of its history."

Our effort is not to be scientific, *per se*, but to be aware of the reality or irrealty, of the fit or misfit, obtaining between the actuality of fact and of category.



conditions.<sup>50</sup> These working agreements, commonly called "schedules" in the industry, are highly technical instruments containing numerous rules covering such matters as seniority, discipline, basic pay, vacations, and overtime wage rates. The rules are technically worded in the jargon of railroading. Each rule must usually be construed in connection with other rules, as they frequently are organically integrated to form a veritable complex, so that any change in one rule might substantially affect the meaning and application of interrelated rules.

In the language of Garrison, "the railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making."<sup>51</sup>

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<sup>50</sup> 20 NAT'L MEDIATION Bd. ANN. REP. 47 (1955).

<sup>51</sup> Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L. J. 567, 568-569 (1937). This language may be compared with that of Shibutani, *Reference Groups as Perspectives*, 60 AM. J. SOCIOLOGY. 562, 566 (1955):

"Modern mass societies, indeed, are made up of a bewildering variety of social worlds. Each is an organized outlook, built up by people in their interaction with one another; hence, each communication channel gives rise to a separate world. Probably the greatest sense of identification and solidity is to be found in the various communal structures—the underworld, ethnic minorities, the social elite. Such communities are frequently spatially segregated, which isolates them further from the outer world, while the 'grapevine' and foreign-language presses provide internal contacts. Another common type of social world consists of the associational structures—the world of medicine, of organized labor, of the theater, of cafe society. These are held together not only by various voluntary associations within each locality but also by periodicals like *Variety*, specialized journals, and feature sections in newspapers. . . . Each of these worlds is a unity of order, a universe of regularized mutual response. Each is an area in which there is some structure which permits reasonable anticipation of the behavior of others, hence, an area in which one may act with a sense of security and confidence. Each social world, then, is a culture area, the boundaries of which are set neither by territory nor by formal group membership but by the limits of effective communication."

Also see COTTRELL, *THE RAILROADER* (1940); Cottrell, *Of Time and the Railroader*, 4 AM. SOCIOLOGY. REV. 190-198 (1939).

The working schedules, or rules, were originally brief, unilateral, management-issued regulations pertaining to wages, hours of service, seniority, and working conditions, on the whole. The workers on the railroads, however, employed in an authoritarian system which disregarded human values, organized into labor unions. The Brotherhood of Locomotive Engineers, the Order of Railroad Conductors, and the Brotherhood of Locomotive Firemen and Enginemen were founded prior to 1880, and the Brotherhood of Railroad Trainmen was established in 1883. Prior to 1900, these operating brotherhoods held contracts with the principal railroads in the United States.<sup>52</sup>

In this early period, the traditional religious and social norms reflected in the master-servant body of common law, it may be suggested, constituted the basic values which combined to structure the labor leader and union roles. The needs and aspirations of the human spirit would not be content under conditions of the new technology. A setting which prompted the Congress of the United States to legislate a sixteen hour law<sup>53</sup> and safety appliance provisions in addition to an Interstate Commerce Act would indicate that railroad management was oriented perhaps less towards human values than towards special economic values.

Although headway had been made by the employees prior to World War I in their collective bargaining roles of concretizing those basic norms of human values through negotiating "schedule" provisions, railroad management, in the view of the union leadership, persisted in imposing improper interpretation and application to these bargaining provisions.<sup>54</sup> During this time, however, procedures

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<sup>52</sup> CLARK & MORRISSEY, *RATES OF PAY AND REGULATIONS GOVERNING EMPLOYERS IN TRAIN AND YARD SERVICE ON THE PRINCIPAL RAILROADS OF THE UNITED STATES, CANADA AND MEXICO* (1900).

<sup>53</sup> 34 STAT. 1415, 1416 (1907), 45 U.S.C. § 62 (1952); 36 STAT. 298 (1910), 45 U.S.C. §§ 11-16 (1952).

<sup>54</sup> For a documented history of collective bargaining relationships in

had developed on the individual railroads for "handling" or processing grievances through successive levels of the union and management hierarchy, culminating in some railroads with a joint management-labor committee called an "adjustment board." Deadlock of this bipartisan committee left the employees without recourse other than to strike, a drastic step which generally in those days could not be sufficiently justified by the minor nature of the grievance disputes.

In 1917, a radical innovation occurred in the collective bargaining machinery on the railroads. In settlement of the eight hour day controversy following enactment of the Adamson Act, it was jointly agreed between representatives of the carriers and the four railroad brotherhoods to award an eight hour day in various classes of railroad service, on most all of the nation's railroads, and that "if any differences arise over the application of the foregoing award, they shall be referred to a standing Commission of Eight, four to be chosen by the National Conference Committee of the Railways and four by the Railroad Brotherhoods. A majority decision to be binding."<sup>55</sup>

As a result of this agreement, the norms concretely set forth in the eight-hour day settlement remained to be applied to some 900 schedules on approximately 225 railroads. Clearly, this bipartisan board had the role of adapting the 900 schedules to the new eight-hour day norms. This the commission did in approximately 30,000 decisions, reaching unanimous agreement in all but three cases. Here the norms were clearly expressed and the

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<sup>54</sup> *continued*

the railroad industry under the Arbitration Act of 1888, the Erdman Act of 1898, the Newlands Act of 1913, the Adamson Act of 1916, and the period of federal control, 1917 to 1920, see especially FISHER, *USE OF FEDERAL POWER IN SETTLEMENT OF LABOR DISPUTES*, U. S. BUREAU OF LABOR STATISTICS BULL. No. 303 (1922). Also see McNAUGHTON & LAZAR, *INDUSTRIAL RELATIONS AND THE GOVERNMENT* c. 6 (1954).

<sup>55</sup> JONES, *op. cit. supra* note 36, in "Part 2" at 17, quoting the joint settlement.

roles of the commissioners plainly structured: they had the function of adapting, modifying, or, shall we say, "adjusting" the 900 schedules to the new norms.

Subsequently, during the period of federal control of the railroads, on March 22, 1918, the Director General of Railroads issued General Order 13, which approved and made effective a memorandum of understanding between the regional directors of the railroads and the executive officers of the train-service labor organizations. This order established for train-service employees Railway Board of Adjustment No. 1, superseding the Commission of Eight, but in operation retained the same eight individuals who functioned as the Commission.<sup>56</sup>

Significantly, the agreement establishing Railway Board of Adjustment No. 1 provided: "9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should any differences arise between the management and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 1, when properly presented, subject always to review by the Director General." Not long thereafter, the Director General issued General Order No. 27, with its supplements, addenda, amendments, and interpretations providing improved wages and working conditions. Again, as with the eight-hour day settlement, the individuals making up the membership of Railway Board of Adjustment No. 1 had the role of "adjusting" controversies arising on the nation's railroads as to "differences" which "arise between the management and the employees of any of the railroads as to such incorporation", *i.e.*, construing and applying, or adapting and modifying, existing schedules to conform with the new wages

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<sup>56</sup> DIRECTOR GENERAL OF RAILROADS, U. S. RAILROAD ADMINISTRATION BULL. No. 4 (Rev. 1918).

and working conditions norms fixed by the Director General.<sup>57</sup>

The role of the Adjustment Board members, it should be emphasized, was not one of applying basic social norms or statutory or judicial norms to concrete cases, as judges do in performing their roles. Instead, it was their role to make congruent the collective bargaining agreements with the directives of the Director General. Since the standards set forth by the Director General were previously the product of agreement between the carrier and brotherhood representatives pursuant to other machinery established by the Director General, there was little room for difference over the meaning of the new norms, and the adjustment process was relatively trouble-free. Up until April 7, 1920, this Adjustment Board disposed of 1,944 cases. It seemed to this writer that if the adjustment function were correctly stated as constituting the adaptation of one set of norms (the collective bargaining schedules) to another set of norms (the Director General's orders), then such an adaptation function, performed in a particular case, would be deemed controlling in similar particular cases. That is to say, if a "precedent" existed, it would be decisive, and that the Adjustment Board would use every proper opportunity to cite its "precedents" as would the disputing parties themselves.

Accordingly, the decisions of the Adjustment Board were scrutinized to determine whether there was any substantial number of previously decided cases referred to by the Board in the making of its decision in a particular case. As shown in Table I,<sup>58</sup> the Board made reference to prior decisions in a total of 111 cases. Out of these 111

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<sup>57</sup> Mr. Doak, of the Brotherhood of Railroad Trainmen and a member of the Railway Board of Adjustment No. 1, testified before a Senate committee that "there had never been a deadlock in a decision of Adjustment Board No. 1 and that there had never been a minority report." See FISHER, *op. cit. supra* note 54, at 74.

<sup>58</sup> See page 442

cases, there were 71 instances wherein neither party cited any prior decision to the Board, 8 instances wherein the labor organizations cited to the Board such prior decision, 8 instances wherein the carriers cited to the Board such prior decision, and 24 instances wherein the two parties cited to the Board such prior decision. In addition, there were 160 instances in which one or both of the parties cited to the Board prior decisions without the Board making any reference to such citation in the making of its decision in these instances. In these 160 instances, 78 were by the carriers, 34 were by the labor organizations, and 48 were by both the carriers and the labor organizations. It would seem to be correct to draw the conclusion from the extent to which precedent was cited that Adjustment Board decisions were regarded by individuals in the railroad collective bargaining reference group as carrying normative force. It is the belief of this writer that the normative force of the Adjustment Board's decisions was equivalent to the felt binding effect of the decisions of the Commission of Eight and that such felt binding effect was tantamount to the very provisions in the collective bargaining schedules themselves.

It should be observed that the basic norms or standards were not established by the Adjustment Board. These were established by other authority. Furthermore, the norms or standards being modified by the Adjustment Board had been established by authority outside of the Adjustment Board. The limits between the two sets of standards had been fixed outside of the Adjustment Board. Their role was to adjust, harmonize, bring into logical and practicable and

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TABLE I

## Reference by Board to Decided Cases

By Board alone	71
By Board and Labor Organizations	8
By Board and Carriers	8
By Board, Labor Organizations and Carriers	24
Total	<u>111</u>

just order the two sets of standards. In the process of doing this, their own prior decisions became anchoring points for them and for the parties as well.

Subsequently, with the termination of federal control of the railroads, Railway Board of Adjustment No. 1 ceased functioning. The Transportation Act of 1920, Title III, provided that "Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof." Regional train service boards of adjustment were established in the Southeastern Region (1921), Western Region (1921), Eastern Region (1921), and in the Southwestern Region, in 1928, this last adjustment board being established pursuant to the mandatory provisions of the Railway Labor Act of 1926. These adjustment boards functioned until the National Railroad Adjustment Board was established in 1934.

During the existence of the regional adjustment boards, the roles of the eight bi-partisan members were different from that of the Commission of Eight and of the Railway Board of Adjustment No. 1. The board members no longer had the earlier roles of accommodating two agreed-upon sets of norms. The reality of the situation was this: the carrier representatives, selected and compensated by the carriers and looking to the carriers for their economic security, perceived the norms of the management as the governing norms. Their reference group was management. The collective bargaining schedules, of necessity, were oftentimes generally worded so as to encompass the usual and ordinary railroad operation. Customarily, as in legislation, the schedules were designed to cover certain purposes, *i.e.*, overtime, basic day, deadheading, seniority, discipline, etc., and the negotiators accepted the fact that it was impossible to foresee every possible situation. The agreement, accordingly, was designedly kept general and

flexible so as to be workable. Necessarily, in the administration of the schedule, management would construe and apply the provisions so as to effectuate the highest economy. The managerial value of efficiency and maximal economy in the use of resources was the norm or reference point against which the unclear contractual schedule provision was compared. The managerial function, accordingly, provided a norm, a basic anchoring point, which constituted the perspective of the managerial representatives on the regional adjustment boards.

The role of the labor members on the regional adjustment boards, as can be expected, was directed toward the primary norms which brought about the union organization of the employees, *i.e.*, the religious and social norms which reflected the needs and aspirations of the human spirit. These norms, however, often ran into conflict with the managerial norms of economic utilization of the factors of production, and thus, when there was ambiguity or gap in the collective bargaining schedule, the management and labor adjustment board members would deadlock. Deadlock, in practical effect, was the equivalent of denial to the claim. Under the circumstances, deadlocked cases accumulated in volume, the grievance machinery became stalled, and pressure built up for the establishment of the National Railroad Adjustment Board under the New Deal Railway Labor Act Amendments of 1934. It may be noted that the economic strength of the labor organizations was comparatively inadequate to deal with the situation during the time of economic depression.

Along with the creation of the National Railroad Adjustment Board in 1934, there was introduced a significant innovation: provision was made for appointment of neutral referees to break deadlocks. The neutral referee began to assume a novel role: it was necessary for him to adopt a perspective, a point of reference, norms against which to compare the unclear contractual schedule provision. How



would he define his role? The problem did not remain unsolved: the referees who were appointed were predominantly of the law profession and they adopted the perspective of the lawyer steeped in the common law tradition. Supreme Court judges serving as referees applied the norms of the law of contract, of procedural due process,<sup>59</sup> of master and servant, corporations, criminal law, tort law, and other fields of law.

The innovation of the decisive eleventh man on the Board in the role of the judge, carrying the law perspective, oriented toward the judicial system and the judicial process, was almost incalculable in effect. Following the leads of role theory, there was a modification of the interacting roles of the management and labor representatives on the Board. Thus, the regular members were placed (1) in the role of teachers: "we have put ourselves in the category of school teacher. When a referee comes to our board we spend quite a few days in teaching him";<sup>60</sup> (2) in the role of advocates; and (3) in the role of "brother-on-the-bench," the fellow-judge.

The role of teacher was required if the norms of practical railroad operation and utility of working agreements were to be maintained. Obviously management and labor were both directly concerned with maintaining an orderly system of expectations to govern their complex operations. Especially so, since the working schedules were designedly left general in order to allow for flexibility of operation, in order to facilitate agreement in negotiations, and in order to produce an effective, working understanding and comprehension of the rules by rank and file. The jargon of the railroad world, with its established meanings, provided the system of symbols around which expectations of an

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<sup>59</sup> See in this connection, LAZAR, *DUE PROCESS ON THE RAILROADS* (1953) offering a vivid example of the application of constitutional law norms to the collective bargaining provisions dealing with the right to a fair hearing in discipline matters.

<sup>60</sup> Statement of William Bishop in JONES, *op. cit. supra* note 36, at 340.

orderly universe were built. This system of symbols required translation to the uninitiated law-man of another world. It was necessary to maintain the systematic order and logic of the symbols, for otherwise the entire system would be threatened. The role of teacher was a vital one, for unless the universe of the railroad world could be communicated effectively to the outside stranger who dwelt in the mansions of the law, the railroad world might disintegrate. In the language of the renowned anthropologist Bronislaw Malinowski,

The primary source, therefore, of social constraint, which as a sanction distinguishes law from other rules, lies in the organization of the groups for the achievement of definite ends. In other words, the sanction of primitive law resides in the constitution of purposeful, organized, and effectively working systems of human activities. The rules which are fundamental to the working of such institutions as the family and the clan, the military society, the age-grade, the tribe, and the occupational team have to be maintained. As Llewellyn and Hoebel repeatedly state, any failure to maintain the rules makes an end to the institution.<sup>61</sup>

The role of advocate was a product of the interaction with the judge-role assumed by the referee and was a necessary consequence of the reference-group orientations and obligations of the individual board members. Although both management and labor representatives endeavoured to maintain their total system, their own universe of the railroad world, there often was considerable room for differences of opinion in the fitting of the concrete case to the yet undefined or unclarified norm set forth in the working schedules. Management values of economy ran into conflict with the employee values of human dignity. The bipartisan representatives could maintain their positions only so long as they seemed to their principals to be effec-

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<sup>61</sup> Malinowski, *A New Instrument for the Interpretation of Law—Especially Primitive*, 51 *YALE L.J.* 1237, 1245 (1942).

tively performing their roles: furthering their respective value systems. It should also be noted that the referee, in the judge-role, had by habit acquired certain mannerisms, ways of questioning and searching for authority and fact, and in the course of performing his role would view the bi-partisan members as being in the standpoint of advocates. Additionally, the interactions of the bi-partisan members themselves, basically one of contention and dispute, would quickly be perceived by the referee as a taking of the advocate-role. The advocate-role, however, carries the value of "winning the case" regardless of intrinsic merit. Accordingly, the reciprocal judge-advocate roles assumed by the referee-partisan Board members lends itself to mischief.

The role of "brother-on-the-bench," the fellow-judge, is another role product of the interactions between the judge-referee and the Board members. The judge, accustomed as he is to dispassionate and objective understanding of the case, and imbued with the law-ideals of Western Civilization, strives to reach a decision that conforms with his inner sense of spiritual values, and to express his decision, in common law style, so as to provide a guide to conduct, an effective bridge that will carry contentious parties across to the peaceful harmony desired by the human spirit. These values he attempts to transfer to his colleagues on the Board. The nobility of the attempt often produces the response desired. The role of judge has a high value in our society and it is not too difficult for the referee-judge to induce or seduce the partisan members to fall into the role. Additionally, it should be observed that several management representatives have had legal backgrounds. For them, the law-reference group norms to a degree have already been internalized. This writer recalls one of such representatives who took pride in being addressed as "Your Honor," who sought to modify the physical setting of the Board room so as to assume characteris-

tics of a courtroom, who functioned as if he were in reality a judge. The judge-role for him matched the image he held of himself, and his inner strivings reached their fulfillment in that role. Another function of the judge-role by the regular Board members is that it serves to protect them, as a protective shield, against their own principals when the decision is against them. If the principals can be induced to perceive the Board members as judges, then such roles include the values of impartiality, of objectivity, of application of the rule law. Accordingly, the Board member functions as an instrument of the legal process. The responsibility for the decision is not his — it is solely the product of the impersonal law. He does not make the law; he is subservient to the law. This judge-role is further fortified by the interactions between the disputing parties appearing before the Board in the hearing of the case. The disputing parties take the role of advocates and cast the Board members into the reciprocal role of judges. The Board members thus apply the normative values which the disputing parties urge upon the Board, then the decision is the consequence of applying these values in judge-role fashion. Another form of interaction between the disputing parties and the Board members is significant. The disputing parties, at their own levels in the hierarchies of management and union, occupy decision-making roles which resemble, although a level removed, the judge-role of the Board member. In the informal interactions, such as luncheons, conferences, correspondence, etc., between these individuals on the two levels, the judge-role — judge-role relationship is established, comparable to the "brother-on-the-bench" "fellow-judge" role relationship between the referee and the Board member.

In this writer's estimation, there is a pronounced tendency for the judge-role to be assumed by the Board members. If this analysis is substantially correct, it may be

stated with reasonable conviction that in the course of time the Adjustment Board process will fit the model of the judicial process. If this analysis is correct in this case, the methodology of the analysis may provide a useful prediction tool for determining the development of other incipient judicial institutions.<sup>62</sup>

The role-taking process, it is believed, carries with it tendencies to be swept up into a conceptual scheme which distorts reality. Accordingly, it is imperative for the law profession to be consciously aware of this process so that it can more effectively cope with the increasingly complex and difficult problems of the atomic and electronic age. Along this line of thinking, if the analysis of the Adjustment Board is substantially correct, it would appear that the judicial process is realistically appropriate for some functions of the Board, but not for others. Thus, in matters involving the discipline function, on the whole, the judicial process is admirably suited to achieve just results, consistent with natural law and religious concepts. In the determination of certain seniority questions which require stability and predictability in the adjustment of the rights of employees amongst themselves, the judicial process would appear to be a realistic mechanism. But in certain areas of the operating rules, affecting the very vitals of the transportation function, it does not appear to this writer that the judicial process, or even the administrative process as molded by the courts, is realistically appropriate. If the Keepers of the Law are to make human life meaningful, then they must not themselves be cast into roles which are destructive of the very purposes intended to be served. By devising appropriate institutional mecha-

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<sup>62</sup> It is interesting to note that the outgoing Federal Trade Commissioner, James M. Mead, in his *Account of My Stewardship* stated that he "noted lately a tendency for the commissioners to gather themselves judicial robes and to assume the rarified atmosphere of appellate judges." If Congress had wanted the commissioners to be judges, he said, they would have made the commission a court.

nisms which can adequately cope with the earthy, actual problems confronting man in the twentieth century, the Keepers of the Law can contribute toward the fulfillment of their mission.

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