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A WORKING MODEL FOR JURISPRUDENTIAL INVESTIGATION: ON THE LAWYER AS AN EMERGING FORCE IN MODERN JURISPRUDENCE

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I am not sure what deep instinct prompted the editors of this Review to suggest for study the subject of the Lawyer, an Emerging Force in Modern Jurisprudence. My own instinctive reaction to the notion is to ask bluntly, Is it so? After that I would be forced to add: if it is so, then surely I am not the person to write on the subject. For I know distressingly little of the ways of the practitioner. Unlike the judge or even the legislator, the practitioner is not called upon to give a reasoned running account of his professional doings. I do not mean that an investigation of the life work of the practicing lawyer could not be undertaken. Still less do I mean to imply that this potent force in the making of the living law should not be investigated. It is hard to imagine a more absorbing problem for the legal scholar than a study of what is taking place at the front lines in the struggle between law and the human propensity for conflict. I mean rather that this basic cumulative account has not yet been given and therefore that jurisprudence, however sympathetic it may be to the idea that the social matrix out of which law arises is the main focus of twentieth century jurisprudence, has practically nothing to theorize about.

At this point common sense should dictate a stop to speculation until some data to speculate upon are in. But if the legal philosopher possessed that modicum of common sense he would soon find himself without much to do in most areas of the law, since all appears unsettled; basic legal conception is subject to no learned consensus and the very meaning and nature of law is still very much in dispute. Perhaps then there is some point in resorting to the philosopher's inevitable reaction to a situation that catches his interest: to start asking questions about it. For example, take the question of the lawyer as an emerging force in modern jurisprudence. How would one go about finding the answer to the question? Philosophic temperaments other than mine might find other questions more congenial. Such as, What is a lawyer? What is a jurisprudential force? What is modern jurisprudence? What is jurisprudence itself? But I prefer to assume that the answers to these questions can be held in abeyance (their turn will undoubtedly come) while I direct attention

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to the question I want raised, namely, Is the Lawyer really an Emerging Force in Modern Jurisprudence?

I am well aware that this question belongs to that large class of questions which if pursued long enough are likely to be answered in the affirmative. For of course the prime movers in shaping the day by day progress of the law, that is to say, the lawyers, are undoubtedly also in some sense the prime shapers of jurisprudence. Otherwise we could be sure that jurisprudence would have no real connection with its fundamental base, the living law. Hence, to raise the question is to indicate an affirmative answer just in the nature of the case. But this is not enough. It may turn out to be nothing more than the homely wisdom that would point out that on similar and even more philosophical grounds one could undertake to look at People as an Emerging Force in Modern Jurisprudence. That People are a force in modern jurisprudence goes without saying, so we shall say nothing about it. That Lawyers are more explicitly a force in modern jurisprudence is by virtue of their preoccupation with the law merely a more explicit truism. But to ask whether Lawyers are an *Emerging* Force is no tautology. In fact, it is a matter of investigating a possible change in the fundamental role of an ancient highly organized profession deeply set in its own ways. If Lawyers are "emerging" in any important way, we should know about it; and if they are emerging as a new and explicit force in the shaping of jurisprudence, this is surely a prime concern of the jurisprudentialists.

For I believe that the word "emerge," which turns out to be the critical term for us, is well worth pondering. It immediately raises an important question of methodology for all about to undertake study or speculation on the emergence in question. Namely, should one study the emerging lawyer in the way in which one studies a butterfly emerging from a cocoon, that is, without asking the butterfly what it is up to, but just observing what it does whether in its natural environment or in the altered environment of a laboratory or test field? To take it as a sample of behavior and to report its reactions to its environment? Such an enterprise yields a certain measure of information. And at present there is a growing interest in observing the lawyer as a member of a professional entity and in attempting to generalize on his reaction to his environment. This way could be called the scientific, or rather, considering the present state of the art, the protoscientific way. Eventually one might suppose that an "answer" could begin to gather shape, so that one could say "Yes, the lawyer *is* an emerging force in modern jurisprudence, or no he is *not*."

Another method of procedure would lead not to an answer, but

to a response. Let me explain. Suppose one were to stop a busy lawyer and say, "Are you an emerging force in modern jurisprudence?"; he might reply, "Of course." The proper thing to say to him then is, I suppose, "Prove it." This would immediately give him a client (himself), and a cause, namely, to prove that his client (now an entire profession) is an emerging force in modern jurisprudence. Without doing more, one has already advanced the affirmative response to our question by a small but definite step. It has an advocate and he has a cause. Multiply this process by an indefinitely large factor and soon one might begin to find a large affirmative response emerging. For unlike the method of observation which usually supposes that the object undergoing scrutiny is left unchanged, the other way aims to see whether the affirmative hypothesis can be substantiated by careful nurturing. The method of observation becomes a program of action, and it may expect to be called upon to justify itself sooner or later.

Is it possible that without becoming a program of action, which in the nature of things must appear confident that it knows what it is about, our program may be and remain a program of *inquiry* without becoming an alleged unbiased, unprejudiced investigation of the lawyer as a thing; in this case, a thing emerging as a force in jurisprudence? I think it is possible. So let us be clear about what we intend to do. We intend to try to investigate a method for answering the question whether and if so in what way the lawyer is emerging as a force in modern jurisprudence. We shall not follow the protocol of the scientist, the behavioral scientist. On the other hand, we shall not stay that we will be unscientific or even nonscientific. It may turn out that, stubborn as we are, we shall insist that our inquiry is to be properly and appropriately called scientific, since it is designed to yield us more knowledge than the other ways of investigation which purport to be scientific.

We could begin our inquiry in a rather unusual way. Instead of trying to imagine what our subjects, the lawyers, are like, suppose we ask ourselves what we, the investigators, are like. Our model, we might say, unlike that of the so-called scientist, gives first precedence to the kind of creature the investigator is, not the kind of creature he thinks he is investigating. The usual model of an experimental scientific sort sets down the investigator's presuppositions, his hypotheses, his method of gathering data and his scheme for drawing inferences from his results. We will not use this model for two reasons. First, we are philosophers and such models customarily leave out philosophy. And second, it is our conviction that these models aren't any good anyway for investigating the kind of matters we want to be informed about. Just to begin with, our "objects" change in extreme-

ly lively fashion during the inquiry (this is not so unusual in this day of nuclear physics whose particles cannot be investigated without being indeterminately perturbed). More than this, they directly affect us as we investigate them, we in turn affect them, they affect us again and so on in a dialogue that none of the scientific models one knows anything about would be able to tolerate for a moment. Our scientific "objects" are not "subjects" either, in any meaningful sense. They are co-investigators, and more important to our enterprise than we are; they are authoritative, for we depend upon what they do and say for what we want to know. They are opinionated, informed and decisive — they make the ultimate decisions. So I believe that the ordinary behavioral science models which recognize in their "subjects" none of these sovereign characters are of little use to us. We must make up our own models, with the humility that the nature of our enterprise forces us to cultivate.

We propose in short to construct a scientific model of a dialogue on the subject of jurisprudence. Our Dialogue Model would not only be expected to answer the question, Is the lawyer an emerging force in modern jurisprudence? *The very use of the model would itself be jurisprudence.*

The Elements of the Model

1. A list of the Jurisprudential Biases of the investigator
2. A detailed account of the Purposes of the investigation
3. A Schedule of Questions to be asked
4. A Recording of the Responses, replies, replications, and so forth
5. A Summing up of changes in the investigator: what he thinks he has learned and how this information has affected him
6. An estimate of changes in the subject matter of the investigator
7. The feasibility of the program as a model for general investigation into complex aspects of human conduct and specifically as a jurisprudential tool.

With this list before us it becomes apparent that we are attempting to sketch the outlines of a model to guide us in the investigation of questions such as, Are lawyers now emerging as a force in jurisprudence? Can we suppose that this model may be used in the way the behavioral scientist uses a polling model, for example? Hardly. One could not expect that an investigator trained only a short while in the use of the polling model could be turned loose to collect

what has been perhaps inadvertently though accurately called "data," that is, mere "givens," reactions. It demands too much self-knowledge on the part of the investigator, too much knowledge of what the purposes of the investigation are; and finally, altogether too uncomfortable a demand that he report what happened to *him* in the investigation.

It will not escape attention that these extraordinary burdens we are putting upon our investigator are at the same time a criticism of much of what passes for social science today. Still, that is not our purpose. Our aim is to frame our own model, designed for our own use and as such perhaps not transferable to other investigations without substantial change.

1. *Jurisprudential Biases*

Our jurisprudential investigator will almost certainly have bias in one of the three following directions:

A. He will believe that there is a substance common to all humanity whose nature it is the business of jurisprudence to discover and whose purpose it is the function of law to serve; or
B. He will believe that this assumption is impertinent and that it is incumbent upon one who would study the nature of law or any of its manifestations to stay within the confines of authoritative legal materials. The question of what are the bounds of this area is of course pertinent to this inquiry; or
C. He will try to synthesize these points of view.

The A's. The "common human substratum," taken by the *A*'s to be the ultimate legal substance has many forms. It is St. Paul's law written in the hearts of all men; it is that part of God's eternal law participated in by men and called natural law by the Christian theologians. It may be love, but it is more likely to be reason, or whatever else is taken to be the true mark of general human nature. Those are the leading ideas of all the systems which go by the name of natural law. They postulate a nature, usually a "higher" nature for man, and tend to infer what is right (and lawful) for man to do from that postulated ideal. These systems align themselves traditionally with religion and morality, looking for a religious base or perhaps a nonreligious moral base for law.

Differing radically from these but still looking for a common human substance as a base for law are the *A*'s who try to find it in actually observable human conduct. Perhaps the common substance is *custom,* the tendency of human beings to persist in ways of doing

things when equally efficient alternatives exist or can be imagined. Or the harsh human necessities are examined to see if they form a structure sufficient to support the superstructure of the law. The biological necessities, food, self- and species-preservation, shelter, war may be made into a system that is supposed to give rise to law so that one imagines that without law the life of man soon becomes "solitary, poor, nasty, brutish and short." Or man's fundamental mode of exploiting or being exploited in class conflict may be taken as the basis of all his ideologies including law, and the "suppression of exploitation" (cruel paradox) give rise to cooperativeness. Law and its harsh compulsion then wither away leaving only administration. The Marxian ethics finds the common human substance in the mode of production, the vast uniformities in the ways in which human needs get satisfied.

One might believe that law is embedded in man's biology, that is, in his rooted instinctive tendency to react as, for example, against certain patterns of injustice. The process may be identification with the fate of the injured one, identification giving rise to an emotional response which in turn triggers off somatic reactions that we recognize as "righteous" anger. Or, becoming "scientific" one might seek merely for empirical generalizations with which to describe observed uniformities in human action, reporting as dispassionately as possible those uniformities which give rise to law and order.

We know that during many millennia, for western culture, which has always been obsessed with the need to set mankind off sharply from the rest of God's creatures, the stuff common to all members of the genus *homo sapiens* has been taken to be Reason. Now surely this is a vast conceit. But it has served our greatest thinkers as a base upon which to found a system of law. I refer to the natural law. Of course, natural law has had and still has as many varieties as there are theories of the nature, the origin or the purpose of reason — and more, since natural law (law conforming to the nature of man, universe or god) is by no means confined to the choice of reason as its substantial base.

Preoccupation with a common stuff out of which law arises (as distinct from the idea that law arises out of itself) takes, then, two directions. Either one sees ethics or morality as the foundation of law or one sees science, behavioral science, as the mode by which the mysteries of law are to be unravelled.

The B's. We come now to the *B's*. For them, law arises out of itself and stays pretty much in its own community. Law is a self-sufficient, self-contained system at the lowest aspects of casual human interchange as well as at the highest reaches of jurisprudence. Every-

thing human beings do is potentially law, but the point is that the potentiality is *legal.* Else it is irrelevant to us. Law is an art: the legal craft. Law is a science: the autonomous science of all sovereign dispositions ordained to be executed through the institutions of government. And so on. In common law countries this study is apt to be called Analytical Jurisprudence and in civil law countries Positivism.

Since it certainly would make a difference to the investigator of the question whether or not lawyers are an emerging force in modern jurisprudence that his, the investigator's, jurisprudential bias is or is not in this direction, we must examine further what such a bias consists of.

To begin with, why do we call the bias in favor of an autonomous science of law Analytical Jurisprudence? What has the mood or sentiment in favor of "legal autonomy" got to do with Analysis? Are people who like to draw a circle around a group of objects and say, "Everything inside the circle is *L,* and everything outside the circle is not-*L,*" likely also to be people interested in Analysis? John Austin, the founder of modern Anglo-American Analytical Jurisprudence, began his celebrated lectures with the title, "The Province of Jurisprudence Determined." The significant words are Province and Determined.

The preoccupation of the *B*'s is with the law as a closed system. Their instinctive action is to draw boundary lines around the activity of law. They spend much time to determine the marks of law, what is as distinguished from what is not Legal. So for them the first problem of Jurisprudence is to look for necessary characters or definitions of law. This enterprise, which calls itself analysis, keeps right on going after it defines or separates out law from nonlaw. It continues to classify. The various kinds of law are thus studied. Subdivision follows subdivision until one can subdivide no more. Then the categories are closed and thereafter everything that purports to be law must fit into the scheme or be discarded. This mode of procedure is easily recognized as the oldest form of Jurisprudence. It is the way Roman law was analyzed and taught. All primitive lawmakers must attend closely to what they want to call law, a very solemn and even dangerous matter.

All *B*'s agree more or less that the most important aspect, mark, or quality of law is its sovereign or imperative character. They are very much impressed by the fact that all law purports to be enforcible and usually go so far as to say that any formulation of a rule for human behavior which does not carry with it a sanction by governmental authority is not law. They tend to regard as irrelevant other contradictory characters of law, such as that only a tiny part of it

is ever enforced in fact, or that a great deal of it is literally unenforcible, or that most of it doesn't need enforcement, since it is well understood that most law is simply ignored or disregarded or not even known. It is enough for the *B*'s that all law can theoretically be enforced, if anyone having certain rare characteristics can be found sufficiently motivated to invoke the appropriate governmental apparatus, provided the governmental agency in question thinks the matter is appropriate for enforcement. If one were to consider only two species of law that the Federal Government spends so much time on the lesson would become clear. Congress taxes and spends. Its spending laws are not enforcible in any conceivably useful sense of the term. Its tax laws are, and painfully so. A purist *B* might be led to say that tax is law, but spending is not. But as the activities of the service state grow, the clearer law is seen to be administration and not enforcement. And in the areas where enforcement is still prominent, notably in the criminal law, enforcement takes on the aura of a civil war between those who support the police functions of the modern state and those virtually in armed rebellion against it.

In a situation so fluid as that of modern law "enforcement," those whose temperament leads them to seek the sovereign marks of law, so that the process of rational analysis may proceed, are increasingly hard put to find any such distinguishing characteristics. Hence, the gap between *ad hoc* legal determinations of an increasingly complex nature on the one hand and overall analytical generalizations necessary to an adequate science of law on the other grows apace. The legal analyst is driven further and further down the chain or hierarchy of legal processes until he is forced to settle for work in the ancient bedrock of basic legal subsystems such as tort, contract, property, and procedure, which are brought up to date by a process of shallow analogy in such new rubrics as labor law and unfair competition, negotiation and arbitration, estate and urban planning, judicial administration and legal process. It is not unfair to say that the jurisprudentialist *B*'s in common law countries have not gotten much above the level of generalization represented by these newer analogues of very old processes of the law.

The vast wealth of analytical power tied up in modern analytical philosophy, modern logic, decision theory and system science is, despite a few very notable exceptions, simply not available for use in legal theorizing. This means that a *B*-minded investigator intent on engaging in a dialogue with "the modern lawyer" on the question of the lawyer's emergence as a force in modern jurisprudence would find himself severely constrained, so severely indeed that it is my impression that he would be very apt to conclude that the job was not attractive enough to be worth undertaking.

I should conclude that the *B*'s would have to upgrade the methods of legal analysis very drastically before they could profitably undertake the kind of investigation we have been talking about here with anything like the degree of sophistication that modern science, especially physical science, takes to the problems it investigates. Logic, mathematics, decision theory and system science are just not in usable shape at present for the jurisprudentialist, or indeed for that matter, for the behavioral scientist.

On the other hand, the homely virtues of old-fashioned case analysis, the process which ushered in western culture in the practices of the western religions and which was the mainstay of Roman law, are still being practiced by myriads of members of the legal profession all over the world. It is in this area of living law that the jurisprudential *B*'s would have to conduct their investigations, trying to find out how much of this activity they would call "law," how much "jurisprudence," and how much "practitioner jurisprudence." They could note, for example, that the body of law known as "conflicts" governs only a very tiny fraction of the vast amount of intercourse that goes on among the citizens of different political states, transactions which presumably give rise to the normal amount of real conflict to be expected of such human interaction. They might ask themselves how much of the alternative modes for resolving such conflict they would be willing to call law. And if these alternative modes are largely the result of efforts of practitioners and if they constitute genuine departures from traditional legal modes of conflict resolution, then it would be in order to ask whether, taken as a whole, the new modes of international conflict resolution do not represent the creation of new systems of lawmaking, which in turn give the jurisprudentialist a new problem to work on, in deciding upon ways and means for incorporating these new systems in the body of traditional lawmaking. And if this is true for international conflicts, it is also true for many other areas of activity which constitute the daily work of the practitioner of law. So there is much to be done by our legal analytical jurisprudentialist in a dialogue with a real or simulated practitioner. But little of it could get under way unless the investigator both knows that he is a *B* and wants to undertake *B*-like investigations, despite their obvious limitations.

The C's. I am not sure that the *C*'s even exist. Therefore it becomes necessary to create them. *C*'s are synthesizers, and may expect to be regarded with suspicion not only by *A*'s and *B*'s alike but also by all reasonable people. For although *C*'s try to avoid the defects of *A*'s and *B*'s and to consolidate only their virtues, they often end up in fact with having consolidated only defects. The strength of the *A*'s is in their instructive hold on what truly matters in every legal

disposition: the notion of justice, right reason, custom, the mode of production, and the like. Their weakness is their inability to order their intuitions into a system. Conversely, the *B*'s instinct is for order, but their weakness is that they are willing to sacrifice everything for order-ability, discarding what does not lend itself to neat analysis and reasonably rational ordering. The *A*'s danger is moral sentimentality. They tend to offend the *B*'s with their romantic unconcern for scientific rigor and clear thinking. The *B*'s, on the other hand, offend with their apparent disregard for human feeling and sensibility. Their logic cuts like a knife and kills what it dissects. The *C*'s, I am intimating, are designed to avoid these defects. They attempt the almost impossible task of reconciling thought and feeling. They would humanize science and scientize the humanist. Can this be done, even in contemplation?

So far I have suggested that it cannot be done if the jurisprudential investigator does not know his own jurisprudential bias, that is to say, does not know whether and to what extent he is an *A*, a *B*, or a *C*. I do make the egregiously unproved assumption that if he does know these things, he can incorporate them in his jurisprudential dialogue model with fortunate results. I should not like to have to defend this assumption against spirited opposition and so must be content to let it stand undefended.

I take it that the ideal *"C"* I am talking about would be no less humanist than scientist in his pursuit of knowledge. That is to say that he would reject, on grounds both moral and scientific, any piece of data that he came by in ways that would seem to him to be suspect from the point of view of decent respect for the intellectual and moral integrity of his so-called subjects. This means that he could gather data only from an Equal. I mean by this that data obtained in any other way is too contaminated for use in Jurisprudence, for I consider that the legal ideal of Equality or better still what Stammler called Respect is not merely a tenet of our "minimal ethics," known as the Law; it is a precept that we of all people can ignore only with the most disastrous consequences to ourselves. I am reminded at this point of the feeling which caused the Founding Fathers of our nation to say in their Declaration of Independence that a decent respect for the opinions of mankind impelled them to state the reasons for their revolutionary action. Well, a decent respect for the opinions of others must impel our jurisprudential investigator to engage in a personal dialogue with the one who is the source of his information (in this case the practicing attorney), to engage him in dialogue which knows of no superior or inferior, and whose outcome instead of being *data* is jurisprudence itself, lived through and saved up for the sake of theory — the most convenient form of knowledge known.

I repeat. I do not mean to make this aspect of our *C*'s investigatory efforts applicable to behavioral science generally; that it should be applicable *pari passu,* I have no doubt whatever. And of course I should think it proper, if behavioral scientists should collaborate with us in matters jurisprudential, that they should take as seriously as we do the ideal of Equality, summed up in the phrase, "A decent respect for the opinion of mankind." But whether this criterion is sufficient to remove from behavioral research the stigma now attaching to it that it treats men as "things only," or as Kant said, "means merely and not also as ends in themselves," is something the behavioral scientist himself must decide. All that I can be sure of is that his methods will not succeed in jurisprudence until he makes every honest effort (we just speak of motivation here, not *result*) to accord his human subjects the dignity which every human being is apt at any moment to insist upon as his Natural Right.

At this point, an argument from convenience intervenes, coming from the mouth of the Reasonable Man. How in the name of God or Science or anything else sacred can one go about collecting data (average common results subject to the powerful equalizing force of statistics) by means of this insane device of "dialogue." For religion, yes. For intimate personal relations, also yes. But any such restriction as this would resolve, would it not, the whole of behavioral science into a complex mess of confused human interactions and convert the budding behavioral scientist into a gossip at the worst or into a novelist-artist at best? In either event, would it not deprive him of his living and strip him of his human dignity as a humble though determined worker in the field of science?

O.K., I don't love statistics; but I don't hate it either. No more powerful tool is known to modern science. And when it comes to the leveling effect of generalization, we in law yield nothing to the statisticians, as when we proclaim, "*All* men are born equal before the law"; or, "*No person* shall . . . ."; or, "From and after the date of the enactment of this act, *all persons* . . . ."; or, "*No one* shall be permitted, under penalty of . . . ." I also know the difference between their generalizations and ours. Theirs are of *ideal* conceptual entities; ours of *real* human beings. More than that, and more important, their generalizations are Thought Constructs; ours are Feeling Relationships. Theirs are subject primarily to their Logic; ours are subject paramountly to our Morality. Their individuals are Things; ours are People, or since this is palpably not so for they too deal with People and we also deal with Things, their objects are Thought Of and our subjects are Felt About.

Well and good. But we have evaded the main point. If we say we deal feelingly with subjects, why is our lumping together of *all*

individuals into generalized categories for legal prescription any more in accordance with human feeling than their generalizing of things into Laws? (Note the very name for the scientists' generalizations. We supplied them with the word Law.) Now we are at the nub.

At this point I must confess ignorance. I have gone as far as my small store of wisdom will guide me. If I continue, it must be stumblingly, into what is for me unmarked territory. Metaphor aside, I know next to nothing about how feeling judgments get generalized. I do not know much about the process that takes me from saying that your children should not be discriminated against in matters of education and my children should not be discriminated against, to the grand generalization: No child should be discriminated against. I do know that both individual judgment and general judgment are feeling judgments. As Kant put it, they would remain "law," even though no single instance of them ever existed. And this surely distinguishes feeling judgments from thought judgments. What is good need not ever be true, just as what is true need not be either good or bad — as in abstract thought.

And so I should say that nothing less than a complete revolution in the nature of scientific inquiry is called for (a philosophical program if not a practical ideal) in order to make the scientist truly humane. But conversely, our humanist cannot claim exemption from the rigors of science. And in the law particularly, our methods of scientific proof are so shockingly outmoded that we ourselves violate a fundamental feeling prescription whenever we use our rickety system of factfinding in a hotly contested case where the truth of the competing claims matters materially.

In answer to the inescapable question, Is our Jurisprudential Dialogue Model capable of gathering generalized data on jurisprudential questions?, I can only say that I believe it is, though I cannot say how. We are just beginners at teaching one another the ways by which Wisdom grows. Perhaps we shall have to be content with a few negativities. Wisdom does not grow in the absence of feeling; it does not grow in the absence of perception; it does not grow in an aura of sentimentality, falsehood, indifference to what is factually so and what is not. That is about as far as I can push this line of inquiry. I conclude that our ideal *C* does not yet exist, but that we have taken some small steps on the way to bringing him about.

2. *The Purpose of the Investigation*

Our Jurisprudential Dialogue Model requires us next to formulate as explicitly as we can the Purpose of our Investigation. We must get agreement from our partners in the Dialogue on what we are

after. I am well aware that many behavioral scientists would take issue with me here. For them, the disclosure of their own motives, when it would not vitiate their data, would in any event be irrelevant and, they would say, as attested by general human experience could be expected to cause the inquiry to degenerate into a personalistic nonscientific exchange of views.

These are formidable objections. How shall we meet them? Only a very pressing need on our part could induce us to depart so radically from the ways which the behavioral scientists have labored so hard to perfect in order to convert gossip into science.

I shall use the lawyer's prerogative of contradictory defenses or attacks. I shall ask concerning the behavioral scientist on the question of converting gossip into science: (1) Has he succeeded at all?; (2) Has he succeeded only too well?

(1) I am not here concerned with the behavioral scientist's objective reports of observed human behaviors. These constitute an immense reservoir of ordered experience in the ways human beings act. Nothing that people do with a fair degree of regularity has escaped the attention of these dedicated investigators. It is surprising, however, to realize how little of this vast store of learning is available to the law. This has been a source of severe disappointment to interdisciplinarians many of whom, including most prominently Roscoe Pound, confidently predicted more than half a century ago that the day was close at hand when law would take its place among the social sciences as itself a species of social science. Still, law apart, the learning is indeed impressive. When however we come to our main concern, the area of human motivation and the cause and cure of conflict we find ourselves embroiled in the bitterest controversies in the behavioral sciences over every fundamental, indeed every elemental, question. The psychology of human motivation is rent by a massive schism. The depth psychologies battle the brain psychologies tooth and nail. It is not that an immense amount of side learning is not spun off. The issue for us is that no agreement emerges on the nature of human motivation, and specifically nothing sure, nothing agreed upon, on the nature of human conflict. Anthropology has much to say on the behavior (including legal behavior) of primitives. The behavior of advanced civilized peoples is too much for it. Sociology, in the opinion of some of its most thoughtful leaders, is still struggling to perfect a method. Meanwhile it is fortunate when it attains to the level of common sense.

Clinical practice in psychology tends to build up bureaucracies, instinctively attaching themselves to power nodes in large-scale organizations in a manner reminiscent of the great religious and political bureaucracies. Its chief method, "testing," is currently under severe

fire, as the bureaucracies relying on the instruments of clinical practice react to consolidate their power positions in all the large institutions in which they are represented.

Economics as a learned discipline has never achieved a method for checking its predictions. Its rationalistic learning, econometrics, has no working rapport with the vast army of empirical practitioners of the various economic arts and crafts. A self-perpetuating and self-validating bureaucracy has also blossomed forth from the curious mixture of folklore and tautology calling itself economics. Meanwhile, Marxist economics and capitalistic economics enjoy a certain precarious "coexistence" with erosions taking place on both sides as bits and pieces of lore and learning are exchanged. No grand synthesis has emerged, however, and the economic behavior of mankind, a most important sector of his life for law, is matter for polemic instead of science.

In sum, despite a century of the most desperate straining to attain to the level of science set by the natural sciences, the behavioral disciplines have achieved nothing in the field of human behavior comparable to the vast synthesis of the natural sciences respecting their subject matters. And so I ask of the behavioral scientists, Have you succeeded at all in being scientists, even in your own eyes?

(2) Turning now to the other horn of dilemma, there is a sense in which the behavioral scientist has succeeded all too well in being scientific. The major concern of any basic scientist is with method. This is virtually all that occupies a logician or mathematician. It has also been an overwhelming concern of the behavioral scientist. But whereas logic and mathematics have provided the formal framework, the ordering principles, and the grand manipulative rules by which the natural scientist works, these amazingly powerful servants of science are not available to the behavioral scientist in anything like the way they serve the natural sciences. There is a great hope that decision theory and system science may remedy this defect. But at present it is only a hope. The other important device in the natural scientist's repertory is experiment. Together with the formal ordering principles of logic and mathematics, experiment is the invaluable tool for securing to the natural scientist access to the world of experience. The behavioral scientist is denied this other major element. He is forbidden to experiment with human behavior in any way at all comparable to the natural scientist's freedom to experiment with inanimate and animate nature, including even some aspects of human life. Thus, deprived of the two parents of modern scientific method, the behavioral scientist has been forced to invent his own by spontaneous generation, so to speak. The result has been a distressing gap between method and result. The behavioral scien-

tist has succeeded only too well, it may be, with an inappropriate method, generated on the model of the natural sciences, but not apt for studying the kind of behavior he is interested in, namely, that of men in action as whole living beings and as groups in their native environment.

The question of disclosure of motivation and of frank and open confrontation between investigator and subjects in behavioral science research is not to be disposed of in a few short paragraphs. But the profession is coming to realize the seriousness of the deficiencies in its attitude toward the human beings it treats as subjects through the growing storm of outraged protests against its unfeeling procedures. The ultimate question to be faced is not whether and how these should be circumvented, but whether they are not a warning to be taken seriously as clear indications that the behavioral scientist is being a bad scientist; that his methods must be reorganized even in his own interests as a scientist.

At any rate, our Dialogue Model assumes that in our own interests as jurisprudentialists we intend to make frank and clear disclosure of our purposes first in our Model and then as modified by the inquiry in ourselves. It remains to illustrate how the question of Purposes can be formulated in advance of inquiry and, incidentally, to note how Purposes can be distinguished from Jurisprudential Biases, the subject of the preceding section.

We might decide to try to find out, for example, whether our subjects (practitioners) are *consciously* using what we would consider to be Natural Law arguments in Civil Rights cases. Our Jurisprudential Bias might be that such arguments should (should not) be consciously and explicitly formulated and urged upon the court. Such Bias if it exists should be disclosed. Our Purpose however is different. We now want to know what the practitioner in fact *does*. And we tell him that that is what we want to know. This procedure is based on the assumption that such knowledge on the part of the subject does not vitiate the results, but that on the contrary the deliberate suppression of disclosure of our Purpose would so contaminate our results as to make them untrustworthy.

3. *The Schedule of Questions*

Here the investigator is on his own. The Schedule of Questions must be drawn up in very general terms. The explicit questions would vary according to the responses of the subject. Yet the main outlines of the inquiry could be set down and Leading Questions could be devised in advance. The whole procedure should be informed with the spirit of a genuine dialogue, with the burden of

carrying forward the Purpose of the investigation resting upon the investigator. The interview is not open-ended. It is no fishing expedition, whose purpose is to beguile the subject into making disclosures unknown to himself. The investigator yields nothing of frankness and honestry to the supposed demands of a "scientific" inquiry in which the motives of the investigator remain concealed and his subjects are allowed to fall into traps of their own devising without the active but with the full passive connivance of the investigator. The following are a few fragments of imagined Questions, which, it must be borne in mind, are raised only after Biases and Purposes are disclosed:

Q. Do you believe that some offenses are basically so evil that no safeguard of the criminal law, such as the prohibition against *ex post facto* laws or reliance upon clear and explicit sovereign authority should prevail as a defense to such acts?

A. Yes.

Q. Would you kindly list the offenses you think meet this test? If you list Genocide, do you think that a war between races can never be legal? If you list war, are you prepared to abolish the so-called "laws of war"? Do you include murder, rape, looting, arson? What principle do you use to bring your list to a stop? If you tried, would this be an attempt to make jurisprudence?

A. No. It would be merely an individual opinion of a private person.

A. I answer the previous question, No.

Q. Then what do you think of the idea of a universal common law of crimes binding on all humanity without previous or indeed without any enactment so that a court is justified in the individual case before it in ruling that the offense charged falls within the prohibition of such universal common law? This in effect would be an extension of the method of the original English common law to all peoples.

A. I don't like it.

Q. Do you nevertheless believe that a lawyer* who persuaded a court to accept this view would be making jurisprudence?

. . . .

Q. Do you find that the idea expressed in the phrase "the merits of the case," is a considerable force moving courts toward decision especially in hotly contested cases or in cases in which the previous "law" is either doubtful or else clearly two-sided?

A. Yes.

*Associate Justice Jackson in the Nuremberg Trials.

Q. Do you think lawyers today argue "the merits" more frankly than they used to?

A. I don't know.

Q. If you found that in fact they do, do you believe that this would mean that they are becoming conscious makers of jurisprudence?

A. Makers of law perhaps, but not makers of jurisprudence.

Q. Do you believe that judges legislate?

A. Of course Holmes, Cardozo and nowadays all sophisticated judges accept their role as legislators.

Q. Do you also believe that lawyers legislate?

A. Hold on now. I didn't say that.

Q. I know you didn't, but do you believe it? And if so, give me examples from your own experience.

A. But I'm inclined to think I don't believe it.

Q. O.K. But you do believe that lawyers give judges the wherewithal to work. That they decide what points to urge and that generally speaking judges accept some at least of these telling points? And that if lawyer's don't raise these issues judges can't either? So, explain this apparent inconsistency of yours.

. . . .

Q. Do you believe in the natural law, that is, that some fundamental common substance of human nature is the basic foundation of law?

A. Yes.

Q. Do you believe that this basic human substance, feeling, instinct is paramount over enacted law?

A. No.

Q. Explain the apparent contradiction.

. . . .

Q. Would you venture an opinion of what the phrase, "the merits of a case," really means?

A. It means the sympathies of judge and jury, their so-called gut reactions. As in widows, orphans, mothers, the poor, the small, the unprotected, the individual, and so on. If any of these is on your side you have a plus.

Q. Do you think a lawyer is justified in explicitly asking a court to take any of these things into account in his decision, assuming of course that no previous rule of law has made such judicial recognition of the underprivileged status authoritative?

A. No.

Q. But if a lawyer did so argue, would he be attempting to make jurisprudence?

A. Law, not jurisprudence.

Q. But isn't the law's partiality to the underprivileged a fundamental tenet of the natural law? Of natural law jurisprudence?

A. I don't know.

. . . .

Q. Do you believe a court should take into consideration the so-called findings of social science about the social effects of rules of law?

A. No.

Q. Do you think it was improper for the Supreme Court to take into account the reports of sociologists on the effects of school racial segregation?

A. Not improper, perhaps. Just useless. Or perhaps better still, harmless.

Q. Do you think that counsel who urged these findings on the court were making jurisprudence?

A. If so, they didn't make much of it.

Q. But if others follow their example would these all be instances of lawyers making "sociological jurisprudence"?

A. A big name for a picayune matter.

Q. Do you ever use any such argument yourself in any of your cases?

A. No.

Q. Do you know any lawyers that do?

A. It seems to me that counsel representing big social welfare organizations are prone to do so.

Q. Is this proper conduct on their parts?

A. If the courts let them get away with it I suppose you have to admit their right. I don't like to hamper counsel too much in their choice of tactics. I would tend to let the courts rule on the relevancy of testimony. They are certainly broadening that notion considerably in recent times.

. . . .

Q. Have you recently argued a point in the conflict of laws in any of your cases?

A. I've never argued a point of conflict of laws.

Q. Have you ever had a case that could have involved a point of conflict of laws?

A. I must have had. But I can't remember any.

Q. Do you know any lawyers that have argued such points recently?

A. I can't think of any offhand.

Q. But you are prepared to argue such a point if it comes up squarely?

A. Of course.

Q. But it doesn't often come up?

A. Not to me.

Q. Isn't this strange for a country composed of fifty-two different jurisdictions, all differing from one another in many important respects?

A. It may be strange, but then again it may not be. Most law is local.

Q. Would you say that by ignoring many opportunities for raising conflicts questions lawyers as a group are making law, negative law, so to speak?*

A. You could say that.

Q. And if this should turn out to be a general feature of American law, that the lawyers are making a very general rule of law?

A. O.K.

Q. And that if there are other broad areas of such negative lawmaking, we have a jurisprudential principle working?

A. That's all right with me. I have no objection. Only you would have to extend it to the general practice of keeping all possible disputes out of court and say that lawyers are engaged mainly in the practice of nonlaw. Of course this means nonjudicial law. I guess it in itself is law, if you want to look at it that way.

Q. Is this practice growing, in your opinion?

A. I don't know.

. . . .

These fragments should acquaint the reader with two things. In the first place it should warn him that while I have much to say about how these jurisprudential inquiries ought to take place, I do not know how to undertake them myself, judging by my questions. Secondly, that the questions are not and should not be artfully

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*In discussing the *Babcock* situation in his country, a Swedish jurist remarks on the poverty of case law on the question of the rule of *lex loci delecti* in automobile cases. This law is virtually nonexistent. The learned commentator suggests that "practicing lawyers prefer a friendly settlement to a law suit in which the outcome is difficult to predict." H. Eek, *Babcock in Sweden*, 54 CALIF. L. REV. 1575 (1966). Actually, the outcome, as this writer himself intimates (if by outcome we mean the rule of law), is not at all difficult to predict: The Swedish courts he says have, whenever the opportunity presented, applied the *lex loci delecti*. But lawyers don't litigate the point. The outcome on a generalized basis is not only difficult but undesirable. So settlement practices grow up to circumvent the largely rationalistic rule of the conflict of laws and its undesirable consequences.

designed to be understood by the ordinary run of men, the "average" practitioner, or the "reasonable" man. Much of the dialogue, if not all of it in some cases, would consist in mutual attempts to make sense of the Questions. And it could be expected in many cases that the "subject" would be seen to take over the investigation in fact, and not in mere appearance as frequently happens in the so-called open-ended interview.

4. *Recording of the Responses*

Any mechanical Recording of Responses is so apt to introduce such an intolerable bias into the Dialogue that the use of such devices ought to be surrounded with unusual safeguards to prevent the emergence of only stilted, carefully edited and blandly platitudinous matter. This very important aspect of the Dialogue should be governed by whatever constraints suggest themselves to the good sense of the investigator and the subject of the moment.

5. *Summing Up What the Investigator Has Learned*

This depends entirely upon the wit and ingenuity, the past experience and present motivation, of the investigator, plus his ability to know himself before and after an information-laden experience. One encounter with a wise versatile experienced active practitioner might result in an information overload. When assimilated, the experience could be checked by repeated encounters, as many as one could stand. What should emerge are overall intuitive guesses as to what one has learned on the question whether or not the Lawyer is an Emerging Force in Modern Jurisprudence. One may find one's Jurisprudential Bias has been somewhat altered. One is more likely to find that the Purpose of the investigation has undergone considerable modification. One may have learned how and how not to ask questions, what questions are profitable, which ones are too distracting, and the like. One may have learned how to Record Responses and Sum Up. Contrariwise, one may have learned rather to give up, itself a valuable lesson in self-knowledge.

6. *Changes in the Subject Matter of the Investigation*

Assuming that one has wrung all the good for himself out of the Dialogue experience, he may then turn to a consideration of what the experience has meant so far as information on the Subject Matter of the investigation is concerned. Here again intuition must play the major role in helping to frame general overall propositions

concerning the subject matter. *At this point and not before the investigator is in a position to frame Hypotheses for testing by the formal methods of social science.*

7. *The Dialogue Model as a General Tool*

We are now back where we started. If the hypotheses that emerged from the preliminary Dialogue are to be turned over to the formal methods of social science, what gain? Why go through an elaborate process of dialogue in which the personality of the subject is carefully respected only to emerge with Hypotheses to be turned over to the impersonal and therefore unfeeling processes of the behavioral scientists. If this did happen, it would be the worst use to which our Hypotheses could be put. Still, they are better Hypotheses than behavioral science is apt to get in any other way, and that much would be a gain. More to be hoped for is that the Jurisprudential Investigator could enter into a Dialogue with the Behavioral Scientist for the purpose of showing him how superior our Dialogue Model is to his intuitive one. This might result in a genuine attempt on the part of the behavioral scientist to adapt his method to the fundamental requirements of our Dialogue Model, so that his formal testing, if it could survive such an experience, would surely be a superior tool for behavioral investigation in general. That it would be a superior tool for investigations in jurisprudence and specifically for throwing light on the special problem of the influence of the practitioner in modern jurisprudential matters I have no doubt.

Conclusion

The net result of this inquiry can be stated very briefly. I do not know whether the lawyer is an emerging force in modern jurisprudence but I believe that I have outlined a possible way to find out whether this is so and (paradoxically) make it come about to a small extent at the same time. Our inquiry has been twofold: how to assure decent respect for the subject of a socio-legal experiment and at the same time how to combine the generalized truth-seeking of scientific inquiry with individuated feeling relationships between investigator and subject. I strongly suspect that in all investigations of human nature these two worthy objectives are really inseparable.