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Theories and Practices in the Legal Profession

Walter Probert

Louis M. Brown

THEORIES AND PRACTICES IN THE LEGAL PROFESSION

WALTER PROBERT* and LOUIS M. BROWN**

I. PROLOGUE TO NEW INQUIRIES

Law and Lawyers in a Changing Society

The time is ripe for jurisprudential theory to take account of lawyers. Numerous signposts indicate that we are in the process of developing such theory. More than scientific and philosophic interest is involved. While sociological jurisprudence and legal realism point the way naturally to anthropological studies of lawyers and lawyering, other significant developments indicate that the resulting theory will not just be a continuation of old styles.

We stand on the threshhold of an accelerated evolution not only technologically and sociologically but also intellectually. Revolutions of blood can take place without drastic changes in law or legal system. Modern revolution—accelerated evolution—can take place without loss of blood but perhaps not without drastic changes in conceptions of law and ultimately in law itself. Both nationally and internationally minorities are finding ways of exerting power that threatens traditional conceptions of law and the social structures which are preserved by law. While poverty may be an issue of politics, its deeper socio-political significance looms larger. Civil rights strain at the restraint of politics. Traditional conceptions of law are bulging at the seams.

So clear do the clash of values loom before us that we may tend to let the vision pull us beyond our knowledge and our reason. Law and especially legal theory have in our culture placed a high value on reason. The values wax impatient at slow and often obstructing analysis. Analysis and reason and even data do not give quick enough promise of a better world or society.

Yet in the end, any social structure old, modified, or brand new will have to be held together by law and it in turn by reason which allows the deeper emotions and needs at least to transcend the chaos of details and otherwise merely conflicting demands. In all this there will continue to be lawyers, even if a changing breed to work with changing law stuff. Developing legal theory is necessary at all levels, for those who would understand what they are facing, working with, or trying to change.

*Professor of Law, University of Florida.
**Professor of Law, University of Southern California.

We believe that lawyers are much more a facet of legal process than jurisprudence or other legal theory has yet postulated. Our main purpose here is to show how that is so. We regard our inquiry as a tentative probing, or as a kind of scouting expedition. We hope also to suggest something of usable technique for those who would philosophize, observe, or otherwise study this aspect of law-society that has until recently been neglected in legal theory.[1]

Lawyering, as a phase of law in action, has been neglected because what lawyers do is felt to be anything but law or even law in action. What lawyers do has always literally been thought to be the practice of law. Law's image has been that it is external and above all individuals or groups, even governors. Legal realism's exposure of the man in law did not just prove that the older image of law was dying. It set some thinkers to increased effort to prove that law was or could be somehow transcendent of individual wish or volition.[2] Still others could see more clearly the social goals or values that had been obscured in the older dogma. So, if judges should not be seen as law, how could lawyers be seen within that concept, particularly since lawyers seem to work mostly for individual ends?

Legal realism may be said to be dead,[3] but a new intellectual, philosophical, and behavioral science interest has developed which no longer allows the luxury, if it was that, of the prevalent symbolism of law as merely transcendent. That interest concerns the way that language and symbolism enter into behavior and observation to qualify and often determine what we think, believe, and observe and how we evaluate.[4] We have moved far beyond the early phase of "seman-

1. Both authors participated in the Conference on Lawyers' Roles and Skills, Greystone Lodge (Denver Law Center), Sept. 16 to 19, 1966 (Report forthcoming). Also present were several prominent law teachers, sociologist-anthropologist experts, and Foundation representatives. In discussing goals of social improvement, especially with respect to indigents, pessimism was expressed as to the roles of legal education and attorneys. Currently, the legal profession is coming under fire from several directions. See, *e.g.*, CARLIN, LAWYERS' ETHICS (1966); CARLIN, LAWYERS ON THEIR OWN (1962); SHKLAR, LEGALISM (1964). For a more optimistic discussion of lawyering and its public responsibilities and attunement, see STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 56-62 (1966), which also contains in the footnotes a useful bibliography relevant to many of the points of this article.

2. R. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

3. Legal realism is not so much dead as assimilated. See STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 70 n.271 (1966). *Cf.* LLEWELLYN, THE COMMON LAW TRADITION 508 (1960), and Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317 (1960).

4. Julius Stone brings semantics to bear on what he calls lawyers' reasoning, meaning really in the perspective of the common law. See, for instance, his LEGAL SYSTEM AND LAWYERS' REASONINGS 9-10, 29-41 (1964).

tics" and the psychoanalytic trinity which in opening the door to new insights tended to make nonsense of reason and almost anything that we said or did. Not that we have yet developed the intellectual calculus which will cancel out the risks lurking in ignorance to leave the beautiful equations of full knowledge. We are just beginning to be able to deal, if only in academic moments of contemplation, with the ambiguities and other kinds of symbolic conflicts that at least obstruct communication and understanding.[5]

Ambiguities will remain, of course, as will misunderstandings of all sorts. But at gross levels we should be able to see that despite disputes about the meaning of "law," for instance, such inquiry is not a fruitless task if the meanings of law be searched for in smaller orbits. We have learned in scientific measurements to take account of the position and motion of the observer in relation to the position and motion of what is observed. Now we can see that in a sense the process of observing law involves movement through intellectual space via language vehicles which themselves must be observed for their locations and velocities.[6]

Thus, a major theme of our analysis will be that views of law will vary as we move from perspective to perspective and that there are various perspectives and observation posts within the legal profession as well as outside it.[7] We want to begin to expose the range of variations. We must then emphasize that the language vehicle used in one perspective is not necessarily moving at the same velocity or serving the same functions as the similar looking language vehicle in another perspective.

Before commencing this theoretical movement, we wish to challenge a dichotomy that has helped to block travel from perspective to perspective within the legal profession. We speak of the distinction between theory and practice. Every person has his practices, his

5. Language, beyond the semantic dimension, is now seen as a facet of human behavior which is, if not the key, at least the lock barring the way to significant empiricism and interpretation of what is observed, reported, and evaluated. See J. L. AUSTIN, PHILOSOPHICAL PAPERS (1961); KORZYBSKI, SCIENCE AND SANITY (4th ed. 1958); LANGER, PHILOSOPHY IN A NEW KEY (1947); MORRIS, SIGNS, LANGUAGE, AND BEHAVIOR (1964); NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES (1947); WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

6. F. S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950); F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Concerning general theoretical background, see NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES, especially ch. 4 (1947); WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953); F. S. Cohen, *The Relativity of Philosophical Systems and the Method of Systematic Relativism*, 36 J. OF PHILOSOPHY 57 (1939).

7. We have been looking for law out "there," SHKLAR, LEGALISM (1964), rather than in people, Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963), i.e., in the perspective of individuals as "consumers" of law.

approaches to problems and situations, as does every group. Intertwined with the practices at all levels are theories, even if partially inarticulate. A person could not act without theory. He could not walk, read, or drive an automobile without generalizations in living habits and assumptions that make it reasonable to pursue the value of each goal-directed act. Certainly, once you start using words, you generalize, you theorize.[8] As has been said, "The facts one dislikes are called theories."[9]

We do not deny that law teaching and legal theory often fail to take account of lawyer activities. Indeed we insist that they have been more than simply remiss. However, it is not simply that law teachers or some of them are merely theoretical and that lawyers are only practical. It is incorrect to say there is no theory operating at the level of lawyers' practices. To a person outside the lawyer perspective, their theory can be seen permeating their activities.[10] Furthermore, outside the law academic perspective, individuals inside can be seen engaging in practices of very definite kinds. So, even though the distinction between theory and practice touches a significant chord, pointing at two often widely varying perspectives, it fails to suggest the possibility of a bridge between two spheres of theory-practice.

We would encourage those who are most experienced at articulating their own theory to bridge the gap and attempt to articulate lawyers' theories, not just to develop a pragmatic jurisprudence, but the better to understand other legal institutions and the rest of legal theory. Lawyers themselves might come to know what theories they are using and be able to engage in useful conversation regarding their practices and values with those who may best see them sympathetically even if sometimes critically.

Levels of Theory and Practice

Now to elaborate the suggested direction of inquiry, we make several admitted hypotheses, not fiats. The legal profession is made up of several significant perspectives or frames of reference. Sociologically speaking they are interacting and at times conflicting groups, not just one commonly based group. Each group has "its" view of law and legal process which is somewhat distinctive from that of the other. The distinctiveness is camouflaged by a seemingly common vocabulary. However, the cultural nature of a particular subgroup in the professions, its traditions, goals, personalities, experiences,

8. NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES ch. 3 (1947).

9. F. S. Cohen, Book Review, *Lewis: An Analysis of Knowledge and Valuation*, 61 HARV. L. REV. 1469 (1948).

10. *Cf.* the discussion of lawyers' ideology in SHKLAR, LEGALISM 1-28 (1964).

roles, and so forth does much more to affect the legal concepts as they are used in *that* group than vice versa, except where the groups traditionally interact.

To be more specific, the legal profession has at least these groups: practicing attorneys, judges, and professors of law. Judges and attorneys talk alike and possibly mean alike in courts. Professors and potential attorneys talk alike in law school. But the professorial group has a different anthropological nature from the attorney group. Their images of law, for instance, are bound to be different because they have such different roles. Of course, the professors think of themselves as teaching law to future practitioners. The charge is made that much of what is taught is "theoretical." This does not so much refute the notion that law is in fact taught, as it does the notion that law is taught as seen from the practicing attorneys' perspective.

We are not saying that the professorial group is therefore wrong. It may be that their goals are socially desirable, but it may also be that the status structure of the profession, for instance, prevents the young law graduate from fulfilling those goals, as much as he might have wanted to in law school. Consider the status and control of the professor with respect to the student while he is in law school. Consider the drastic change that takes place upon graduation or shortly thereafter. The new lawyer comes under quite different influences and controls, which seem to include to some extent a degree of hostility to the now "outside" professors. What we have may be looked at as a power dynamics between these two groups, the professors' greatest influence being during a formative but comparatively short period. The conclusion does not have to be "change legal education"; it could just as well be "change the structural dynamics," if either is possible.

There are further distinctions to be made. It may be that the practicing attorney group should be divided further into smaller groups, for there seem to be widely varying perspectives of law and legal process therein. There is good reason to believe that the problems and roles of the interviewing counselor are sufficiently different from those of the interviewing trial lawyer to allow a wide variation in the use by each of key legal concepts, for instance. There is certainly evidence of a class stratification within the practicing attorney group. Many other distinctions could be pursued.[11]

Nor is the professorial group as one. The bulk of law teachers

11. Some distinctions are suggested, *infra*, regarding roles and kinds of practices. Further distinctions have been drawn elsewhere as to status lines within the practicing attorney group and as to the interrelationships of status, client involvement, practices, and values. CARLIN, LAWYERS' ETHICS (1966); CARLIN, LAWYERS ON THEIR OWN (1962); SMIGEL, THE WALL STREET LAWYER (1964).

pursue their fields and specialties according to the articulated leadership of those who prepare casebooks and write Hornbooks, leading treatises, and law review articles. A particular theory of law is implicit in these leading presentations, and they are leading only partly because they show expertise in determining "what the law is." There is data aplenty in faculty dynamics to support several worthwhile novels, let alone a scientific sociological study. The membership of the American Law Institute, for instance, reflects the sociological structure within the professorial group as well as within the practicing attorney group much more than it does scholarly status from a university community point of view.

In any event, the practices of this part of the professorial group are as expedient in their own way as are those of the attorney group: in that context, in that frame of reference, highly practical. While less so than in previous years, the law image is rule oriented and rules are explicated in appellate opinions, statutes, to some extent regulations—and also leading casebooks and commentaries. If one reads attorneys' briefs and especially if one looks at the theory obviously underlying bar examinations, which are often drafted by attorneys, it would seem that the view of the practicing attorney group is exactly the same as that of the dominant professorial group. Such is not necessarily the case, although we are not stating that the perspectives of these groups are entirely different. They still have enough common experience and views to justify definitional togetherness. But bar examinations are directly or indirectly controlled largely by judiciaries, after all, and that professional group has much in common with this portion of the professorial group. Insofar as bar examinations are controlled by members of the practicing attorney group, it would seem unfair for examinations to test law graduates in some other perspective than the one they have perhaps temporarily assimilated, and such an exam serves as well as any other as a selection device. Further, while the bar examination provides a pressure on this portion of the professorial group, keeping it from moving closer to the perspective of the attorney group, assuming any real desire to move in that direction, it provides a greater pressure keeping the other portion of the professorial group from moving perhaps farther away or engaging in uncontrolled experiment that might be subversive to the attorney group.

Many less in number are the members of this other part of the professorial group who work away in the fields of jurisprudence and other kinds of so-called legal theory. They often rebel at the notion of teaching "law" in the perspective of their colleagues, although they are to be found teaching traditional courses perhaps even in a fairly traditional fashion, a fact that bears some exploration in itself.

Still, all in all, they tend to identify less with the attorney group than do their colleagues. They take on more of the markings of the academic community generally, whatever the reasons. Now that does not make them any *more* theoretical than their teaching colleagues in the law school, although their colleagues will think so. We find possible status lines within the entire legal profession in terms of who is the "most theoretical," lines that are related to those found in society generally. All this might be translated in terms of threat to group solidarity. For perhaps that very reason, the theory of this portion of the professorial group is the least liked by the rest of the profession. Often this kind of theory is not made up of the sort of statements that "insiders" would make; they go to extremes in purveying other than professional values, perhaps as an intellectual gambit, perhaps for the sake of social crusade, maybe as a matter of intellectual fervor, for the sake of science, pure theory, what have you. As with any other theory-practice, for our present purposes, it is a mistake to ask merely whether these theories are wrong. Rather the attempt should be to articulate the particular theory beyond any author's or speaker's own version into his sociological and psychological frame of reference. By this process we could actually derive more faithful versions of the various theories.[12]

What has been said does not mean that the theories of this group could not be used by the other groups. Obviously they have been used to some extent; certainly that is true regarding legal realism, just as it continues to be true of other so-called theories. Anyone who has tread in all the theory-perspectives, or at least those named here, knows full well that these theories might be even more used. But there is a clear lack of communication. This does not mean that these individuals do not write well or that they write absolute nonsense, although certainly that may sometimes be true too. What it

12. The best evidence of these internal dynamics and rifts was the special meeting of teachers of "legal theory" held immediately following the meeting of the Association of American Law Schools in Chicago, Dec. 30, 1965. It arose out of an apparent feeling that law schools were becoming increasingly anti-intellectual and were being given over to the interests of "vocationalism." See minutes of meeting, Dec. 30, 1964, American Section of International Association for Philosophy of Law and Social Philosophy. The society adopted a resolution entitled "A Resolution Concerning Anti-intellectualism in Legal Education," which is reproduced in a somewhat weaker form in 18 J. LEGAL ED. 63-64 (1965).

Legal theorists are subject to bitter attack, often out of print, by another group of theorists, namely, the "empirically" oriented advocates. To some extent competition and power dynamics are involved, or in Shklar's terms, "variant ideologies," that according to her are not likely to be brought together by any amount of analysis. See generally SHKLAR, LEGALISM (1964). It would be difficult to find any criticism of general legal theory more critical than this work by a political scientist, a self avowed "liberal."

means is that there are semantic-psychological-anthropological variations that tend to block communication in *both directions.* It is not, on the other end of it, that these professors cannot understand the attorney group; they do not seem to attempt to do so.

How can any thoroughgoing theorist ignore such a large portion of the happenings in the law area? Reasons have been suggested already. Partly it is because of the strong underlying image which makes attorney practices appear irrelevant. But that is not enough of a blockage to account for the antagonisms between these groups, to the extent they exist. Of course there are personality types within this portion of the professorial group who shrink from lawyer pragmatism, perhaps on purely idealistic grounds, and make it their role to change those practices. But one of the very points of this section is that this cannot be accomplished merely by lecturing to a group that will not listen.

The data is there. Its collection and the implications to be drawn from it in the process may be highly useful to all portions of the profession. Much of this data is accessible to the most theoretical amongst us, simply because he is a member of the profession. Who in this group has paid close attention to the meetings of attorneys, the institutes, continuing legal education series, and the writings which come out of these places? Much might be drawn from these sources, but there are deeper levels which remain fairly inaccessible within the attorney group. What do attorneys do in interviewing, in making decisions, in all the variations that make up actual practice? To those attorneys it may be said that if they want law school to be more practical, they should take a leaf from the book of psychiatrists who share with each other, including those in academic psychiatry, case histories from which new theories and practices emanate. To those in the professorial group who have no desire to make legal education into the image of the attorney practices, let it be noted that their inquiry need not be in the name of that kind of practicality. Let it be in the name of throughgoing theory.[13]

13. For significant contributions to a theory of lawyering, see FREEMAN, LEGAL INTERVIEWING AND COUNSELING (1964); HART & SACKS, THE LEGAL PROCESS (tent. ed. 1958); WEYRAUCH, PERSONALITY OF LAWYERS (1964); Krastin, *The Lawyer in Society — A Value Analysis,* 8 W. RES. L. REV. 409 (1957); Llewellyn, *The Modern Approach to Counseling and Advocacy — Especially in Commercial Transactions,* 46 COLUM. L. REV. 167 (1946); Llewellyn, *The Normative, The Legal and the Law Jobs,* 49 YALE L.J. 1355 (1940); Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation,* 109 U. PA. L. REV. 972 (1961); Rutter, *A Jurisprudence of Lawyers' Operations,* 13 J. LEGAL ED. 301 (1961). One of the authors, Louis Brown, conducts courses at The University of Southern California Law School on the Jurisprudence of Lawyers' Operations and on Preventive Law, in both of which courses he has prepared mimeographed materials.

II. Explorations Under the Cover of Lawyering[14]

Moving Into Position

With small exception, legal theory continues to attempt to see how law works by looking at a still shot of a moving process. Should we try to paint such a two dimensional picture, we would discover not only that lawyers were helping us to paint the picture, but also that they were in the picture watching it being painted. We ourselves can move into the picture only by understanding something of the way in which such a painting can come to exist. Our jurisprudential picture is painted with words and that is the material which is ignored. To see how lawyering relates from the inside to law as it is seen from the outside, it is helpful to perceive relationships which can be seen only by adopting the lawyers' attitudes and vocabularies, that is, by obtaining a grasp of lawyering dynamics by a kind of observation-feeling process.

Thus the question is not what is law, not even what is the legal process, but how is law felt, used, transmitted, or affected within the community of lawyers who, in a way, have the closest contact with law dynamics and its many aspects and complications. To get that feeling involves a special vocabulary consciousness. By and large we are not conscious of verbalizing, we just do it. At first, becoming formally logical involves becoming conscious of word or symbol usage and of certain rules of usage. A class in grammar calls up a related consciousness. It is possible to be logical and to be grammatic without thinking how to be that way. But in order to truly observe a group or community—even if to generate theory about that group—it is first necessary to become intensely conscious of the vocabulary rules of that group. One may learn a new language without the aid of a text, but he will at first be highly conscious of the strangeness of the words used. Remember well how a beginning law student is acutely aware of the vocabulary which confronts him—and how confused he is.

Those who write jurisprudence and legal theory suffer from a related disability. They know *a* vocabulary of law only too well, that is, the vocabulary of those who are law-trained. The silent assumption seems to be that certain terms appearing in all vocabularies of law mark them all as the same, so they do not look under the camouflage. On the other hand, those who are not law-trained are conscious of the markedly different vocabulary of lawyers. Yet sometimes the sophisticated ones tend to mark the vocabulary off as a jargon which

14. For convenience, instead of the phrase "practicing attorneys," we will henceforth use the term "lawyer (s)."

has no implications for either lawyer behavior patterns or the phenomena of law.[15]

These are not just admonitions about semantics, but attempts to point out a varying behavior pattern. This is a call for observation which includes as much as possible a total sensitivity to what is at least a partially alien institution for most nonpracticing lawyers, wherever their observation posts, even if within the legal profession. The result will ultimately be a sensitivity to the way the observed persons are behaving. Behavior is a complex of words inseparable from other actions. In this approach, you do not ask for definitions, for then you get a different kind of behavior and at best abstract and distorted recall. Rather, it is preferable to obtain spontaneous definitions, that is, definitions in use in behavioral situations. People generally use words spontaneously. The spontaneities are at least as important as the planned and thus often artificial definitions. They form the base for a dynamic, involved analysis rather than a static, merely logical dissection.[16]

Commenting observers often do not see the drama or the game from the inside. The actor who is within may wrap himself in his role and yet glimpse and feel the outside world from time to time. A practicing lawyer is perhaps wrapped up in his law role, still able at times to catch glimpses of law on the outside, but unable to execute his role except as he sees it from within. How can we presently expect him to see his role or roles as those in other perspectives see them?

The metaphor does not say that we all must ultimately define and see law and facts as this or that lawyer defines and sees them in action. But the internal realities are somehow related to the external realities. The legal realists apparently tended to see mostly the external realities of the judicial process, having been somewhat influ-

15. *Cf.* SHKLAR, LEGALISM (1964). She seems to have been drawn to an opposite extreme. In an often admirable commentary on the limits of current legal theory, including that of lawyers, she fails to recognize the diversities that do exist, even if they are not predominant. In short, she overgeneralizes.

16. Thus there may well be a significant validity to the techniques of an observer, familiar with two legal cultures, who engages in only semi-directive participant observation in one of those cultures for specific conclusions that are hypothesized as to the other. See WEYRAUCH, THE PERSONALITY OF LAWYERS (1964), observations on the German legal profession extrapolated at times to the United States. Compare the possible static use of questionnaires which may come very close to a quest merely for definitions. The reporting participant observer takes the risk of being regarded as automatically biased if his skill as an interpreter is not otherwise shown, especially if his conclusions raise defensive hackles. Questionnaires, too, can be interpreted in a biased fashion. If science is to be seriously used in socio-legal research, research conclusions must be cross checked, no matter what the technique.

enced by seeing a few of its internal realities. Rules tended to disappear as they watched, yet inside the process they are still clearly visible.

A golfer can use a golf ball without knowing all about how it works. He might conceivably know more if he became a realist and took the ball apart. He would see how the inner layers and the inner core related to the cover and how the internal potential energies made up, in a sense, the ball which could be unleashed from without. The legal realists attempted some such analysis of courts and law, but they left off the cover. They continued to comment how silly the law and the courts looked without their cover. They were, of course, trying to change the manner in which the courts and the law functioned, but the change for awhile was attempted by driving away with a club at a ball that had no cover.[17]

Proximity to Litigation

There are practicing lawyers who handle personal injury claims from beginning to end. There are also firms which specialize in personal injury claims and allocate subspecialties to lawyers within the firm. The view of law and facts and lawyering function will vary as the involvement varies. The interviewing lawyer will screen individual damage claims and determine that many cases are clearly not sufficiently ripe for "the full treatment." Some of these unripe claims will be rejected but some will receive a short treatment, perhaps as a favor or out of sympathy, maybe with a sense in the lawyer of his influence, by telephone calls, or letters. He may say that these briefly handled claims contain no legal problem and do not need a knowledge of law for their handling. The observer not yet involved will *feel* that judgments on law were used in making these determinations.

The remaining situations are "probable claims." The interviewing lawyer will in these cases probe deeply into the nature of the injury, the extent of damages, how they occurred, the prospective defendants and witnesses, and so on. He may very likely say that he assesses these cases not in terms of rules of tort law but in terms of how "good" a case he *feels* there is. The less he has to do with trials, and especially the less he has to do with appeals, the more likely he is to say that law is rarely involved. On the other hand, the

17. On the observations of this section, see generally R. BROWN, WORDS AND THINGS (1958), especially at 260, where it is stated that the study of language cannot be distinguished from the general study of culture. *Cf.* the observations in ch. 9 regarding Freud's technique as being oriented toward "listening with the third ear" to human behavior as "expressive language." See further REIK, LISTENING WITH THE THIRD EAR (1948); SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

nonlawyer investigator, probably guided on his way by the interviewing lawyer, will be even less aware of the rules, confident in his feeling that he is better in his task for the lack of law bias which he observes in the interviewer.

If the interviewing lawyer also does trial work, he will interview the client with his eye on settlement factors and to some extent on witnesses, evidence, arguments to the jury, and so on. To the observer this is law-related material, but to the lawyer it is not law—or at least not law school law. Of course, once in a while a claim is sufficiently questionable on "liability" to justify research, but since the worth of the claim is determined by many other factors in addition to liability, the "law" plays a minor role.[18] The appellate court specialist in the firm will have a different involvement and so a different perspective. Each could be somewhat annoyed by the other's seeming naiveté and his respective interest and emphasis on "controlling law" or "the more important facts and other factors."

Whether he runs the whole of the case or is only a trial specialist, the lawyer will spend only a part of his time on a case in trial. Much of his assessment and conversation will turn on settlement factors. Even regarding trial work, very little of that seems to concern law, rules, or legal concepts. The observer may feel that the case is intertwined with and circumscribed by rules of substance, evidence, procedure, and the overall formalities and traditions of the judicial institution. The lawyer's concern with the trial judge will tend to be in terms of the judge's disposition and leanings and how tough he is. The "rules of law" are bound to be felt against such matters. Not that the lawyer is oblivious to rules of substance and procedure; they simply occupy a relatively small part of his attention and conversation, although more so, of course, when he is involved in trial. In any event, he will be likely to say that what he learned in law school had little to do with his practice.[19]

Many a general practitioner can be found, particularly in small communities, who talks in a similar fashion about his law schooling.

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18. COUNTRYMAN & FINMAN, THE LAWYER IN MODERN SOCIETY 279-98 (1966); Lorry, *Settlement of a Personal Injury Claim — 10 Years in Retrospect*, 11 PRAC. LAW. 15 (1965).

19. Claimants' attorneys will be more "law" conscious in areas where courts are making dramatic changes, as in products liability and governmental immunities. See Probert, *Creative Judicial Sanctioning: Application in the Law of Torts*, 49 IOWA L. REV. 277 (1964). Defense lawyers will operate quite differently from claimants' attorneys, perhaps often taking on some of the characteristics of business lawyers, discussed *infra*. Prosecutors and criminal defense lawyers, both private and public, would have more overlap with claimants' lawyers than with insurance lawyers. The considerable discretion available to prosecutors is likely to weigh heavily, for instance.

His *law* needs are felt by him often to be simple. Much of his work is routine, involving the use of form books or instruments pulled out of the files from records of past cases.[20] His law book references are largely on the order of dictionary checking and usually involve only the state reports, perhaps the state digests and perhaps "American Jurisprudence" or "Corpus Juris." He does not very often confront situations where legal rules present problems. His practice takes him to many forums other than those regarded as legal to the observer.

This is not to say that the general practitioner regards himself as any less a lawyer. Will the observer come to feel a different relation to law or sense a difference in the phenomena of law as he watches and himself becomes more deeply involved? He will see that the personal injury lawyer regards himself to some degree an expert lawyer. Many such lawyers, incidentally, see themselves as sort of ministers of justice rather than just of law, seeking to gain satisfaction of rights, fair compensation for injuries, and so on.[21] This lawyer doubtless has some sense of advocacy in settlement as well as in court, possibly during the interview also as it moves on toward probability. He is not advocate against the client but with him as he considers what "facts" he may *use* as advocate, how *his* claims would shape up and be influential in negotiation with the insurance company against a backdrop of considerations as to how a jury might be influenced in a trial. The rules and facts of the trial are contingencies playing into the better knowns of the moment.

A remote observer might see these individuals as lawyers who have lost their perspective of law. A personal injury claim, for instance, is not a "good case" except to a person who has been trained to look for the law aspects. Above all, the case must be able to stand up in court. Thus, the hypothesized lawyers are like individuals who say that the rules of subtraction and addition are of little value to them because when doing arithmetic they do not think or talk the way they did in grade school. It is, for further example, quite clear that we may use what we have learned about putting letters together into words and then into sentences and paragraphs without going back to the A B C's.

This is a reasonable point of response to the lawyer who is dubious about his law school training, but it diverts us from our task. It is not that these lawyers have "lost their perspective" of law. It is

20. CARLIN, LAWYERS ON THEIR OWN 41-122 (1962), regarding "The Work of the Individual Practitioner"; Llewellyn, *The Bar's Troubles, and Poultices—and Cures*, 5 LAW & CONTEMP. PROB. 104, 116 (1938); Stumpf, *Continuing Legal Education: Its Role in Tomorrow's Practice of the Law*, 49 A.B.A.J. 248 (1963).

21. See PIKE, BEYOND THE LAW 56-66 (1963), regarding "The Lawyer as Pastor"; CAVANAUGH, THE LAWYER IN SOCIETY (1963).

that their perspective on law has changed. Maybe it is even more apt to say, in the visual sense of perspective, that they do not have the former picture of law because they are, in a sense, *in* law, not outside of it. The rub-off principle indicates that what a person has most immediate and prolonged contact with will rub off onto his outer vocabularies and interests. Maybe we see here justification for the view that describes what lawyers do as "law-in-action."[22] To extend a figure of speech, maybe the observer in the "ivory tower" does not see the lawyer as being in law and the lawyer sees no reality in the view from the tower because the lawyer is in a "cave of gold."

The Lawyer Ordering Process

One way to examine the differences in perspective between law teachers and practicing lawyers would be to observe what changes may occur in a young graduate. Suppose such a person moves into a corporate practice involving small to medium sized corporations. At first he will not likely deal directly with corporate representatives. His proximity to law school perspectives will affect the rate of assimilation of new influences. Probably he will be given packaged problems to research and translate into memoranda. He will later see that he was a subspecialist.

In discussing his research findings with a more senior member he may feel that his law calculations are merely arithmetic compared to the calculus with which he is confronted, although later he may realize that he has learned to deal with different levels of fact and different symbols of calculation.

Suppose as a simple example that the firm has corporation *X*, in the business of manufacturing, as a client. The corporation has been incorporated in another state, although a few of its representatives are in the state, involving themselves with other corporations that are clients of the law firm. The new lawyer is told by his immediate superior that the time has come to determine whether corporation *X* should register with the state corporation officer to "do business" in the state. If it does register, it will file an appropriate form along with a nominal fee. As he listens to his superior, he recognizes "facts" that fit into rules he studied in his business organizations class. He and his superior discuss the problem at this level and he believes that he has learned all the facts relevant to a proper decision and for research purposes.

He engages in careful research and analysis. He ultimately reports

22. See WEYRAUCH, THE PERSONALITY OF LAWYERS 1-5, 75, 79-81 (1964), for the suggestion that his are observations on law-in-action, somewhat in the perspective as suggested here.

that according to the judicial tests, corporation X is doing business in the state and must register. There is a statute requiring the registration along with a penalty for noncompliance, namely, a disability to use the courts of the state for any suit.

He learns however that there are other considerations entering into the final decision. His sense of legal obligation suffers, for he feels that the client should be advised if it is to continue in violation and that it ought to register or cease doing business in the state. He learns that this is the kind of decision that the law firm will make, not being on the order of reorganization, merger, or contract negotiation. His sense of obligation suffers further when he is told that the statute as such is not controlling. Rather the decision involves a calculation of risk of penalty as weighed against benefits and losses coming from such registration. The superior decides not to register, for from the time of registration the corporation's profit and loss is to be reported to the state corporation office. Not only must a yearly fee be paid, but several yearly reports must be filed, opening up the details of the corporation business to the state's scrutiny. Further, there is then the possibility of state taxes being levied, and even though the tax probably could ultimately be avoided, the risks and burdens are not worth the possible benefit of being able to use the state court system. He is told that the same decision would follow even if there were a fine for noncompliance.

He begins to wonder why he was called upon for research at all, a wonder that is not lessened when he sees the memorandum that is to be filed. The memorandum does not seem to adopt his judgment on the law but indicates instead that it is not clear whether the firm is doing business in the state. His superior's overall judgment is proven by the test of time, for no further negative happening occurs to call for a reconsideration.[23]

This example, in microcosm perhaps, raises questions befitting any course in jurisprudence. An observer could argue that the superior has sat in judgment, his function encompassing that of trial judge and jury and appellate court. It does not seem that way to the young lawyer, however. It could be argued that in many cases which cross the lawyers' desks in this firm the lawyers are "making law" at least as much as any court. They do not see it that way, except that in rare cases they can envision the possibility of a future court fight which may necessitate the effort to make some "new law." Behind

23. While the textual example is not hypothetical, it is not meant as a paradigm case. It is meant to raise some typical questions, however. In this kind of situation action can be taken to avoid, not evade, the statute, and often the interpretation is not clear. The example raises lego-moral questions and suggests the decisional powers of lawyers, as elaborated *infra*.

such effort will be a record in the firm's files which may not be evidence, but it will help in the argument. Furthermore, in other situations that are routine there will be a record which will be evidence in court, should that be necessary. Contracts are negotiated at least partly with an eye in that direction. Letters are written to preserve certain "facts" for the record and to keep others from being admissible under, for example, the parol evidence rule. Minutes of corporate meetings are written not just with a sense of corporate history but with a sense of legally relevant corporate history.[24] There is no feeling in the firm that such action is law-creating. They are merely exercising their expertise as lawyers, interpreting cases, statutes, regulations, letters, and other memorials while developing the facts of the client's business. In this way they may aid in charting the future course of the client's business along lines that involve minimal risk of negative sanction or impact, not only judicial, but of this or that official or administrative or taxing agency. The effort also is to minimize the likelihood of dispute involving the internal dynamics of the client or its relationship with its customers, suppliers, independent contractors, or what have you.

Whenever disputes do arise, they are unlikely to be traceable to some mistake in legal judgment or action within the firm. No wonder the firm feels it is dispensing skilful legal services. In the same way, the financial condition of the company is dependent upon business decisions, not legal ones.[25] Our young lawyer grown older forgets his state of earlier puzzlement while worrying over this or that legal consideration upon hearing the senior partner's conversations in his nearby offiice. There seemed little of law in those statements, although he recognized that often they seemed pieces of advice designed to chart a client around legal pitfalls he himself had noted.

Of course, advice will not always be followed and facts will arise that were not or could not be predicted. Disputes may arise. A firm lawyer may then be involved in negotiation, perhaps on the order of mediation, or it may be advice on the order of advocacy, worked out in confrontation with another lawyer or battery of lawyers. Even more than in the personal injury settlement, the factors that enter into this kind of bargaining seem quite remote from anything resembling familiar rules of law or legal concepts. Yet the end product is usually familiar law stuff. If it be a contract, it will be in a form

24. Tarleau, *The Role of Corporate Minutes in Taxation*, U. So. CAL. 1957 TAX INST. 1.

25. An omniscient observer might at times trace disputes or financial losses to lawyer judgments, but the nature of lawyers' involvement tends to immunize them from clear responsibility, a fact that contributes to the great difficulty in bringing successful suit against a lawyer in any area of practice.

whose traditions find their bindingness as much or more in the stare decisis of lawyer practices than in those of a court, although courts have probed their merit long years past.

It is increasingly popular to refer to contracts and other lawyer drafted or created instruments as nonofficial law making.[26] The lawyers in the firm probably do not see their work that way, even though a small scale "constitution" arguably is involved, with rights and duties recorded in the context of managed facts and expectations. Future happenings are likely to be tested against these provisions and not against common law rules. But the lawyer is working with familiar mechanisms. All the same, no matter how they are regarded within the firm, it is clear that contracts and other "codifications" of business, labor, government dealings with individuals, corporate charters, bylaws, and so on may have at least as large an impact and regulatory influence as some official pronouncements.[27] It would be interesting to know how lawyers at this level characterize these instruments and their involvement with or relation to law.[28]

Counseling and Other Roles

When an individual asks a lawyer to help him obtain a divorce, the lawyer may handle it routinely, seeking information simply to satisfy the grounds and the procedures. Where there is a contest, routine may be left behind and we have a situation closer to, even if not the same as, that of the personal injury lawyer.[29] There are matters of negotiation as to property allocation, support and alimony,

26. HART & SACKS, THE LEGAL PROCESS 207-09 (tent. ed. 1958); KELSEN, GENERAL THEORY OF LAW AND STATE 137 (1945); STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 57-59 (1966); Cavers, *Legal Education and Lawyer-made Law*, 54 W. VA. L. REV. 177 (1952); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). See also L. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956). The analysis of this section feeds into notions of preventive law, *infra*.

27. Whether advising or aiding business, labor, and other group factions and institutions, lawyers can be seen as "architects" of, or at least in, society, STONE, *op. cit. supra* note 26, at 59. *Cf.* at the other extreme, the lawyer as arch-conservative and perpetuator of social structure, SHKLAR, LEGALISM (1964).

28. Corporate house counsel serve many of the same roles as the firm business lawyer, but separate analysis is called for as well. They are subject to different pressures, work with different techniques of influence, and probably view themselves more as law-business managers. Certainly they operate closer to the "facts" of the business activities they evaluate. See STONE, *op. cit. supra* note 26, at 57 n.183 for citation to several relevant studies.

29. For reference to various relevant works, see FREEMAN, LEGAL INTERVIEWING AND COUNSELING 46-47, 56-68 (1964). See also Fain, *The Role and Relationship of Psychiatry to Divorce Law and the Lawyer*, 41 CALIF. S.B.J. 46 (1966), and generally O'GORMAN, LAWYERS AND MATRIMONIAL CASES (1963).

future relations to the children, and so on. Yet apparently quite a few lawyers involved in such divorce requests look for more than legal rights and remedies. They see the possibilities of legal characterization, but they hear statements and infer facts that may seem not "relevant" to the observer. Perhaps to the lawyer, the lawyer problem takes on a different appearance from the law problem seen by the observer. Both may agree that the problem, whether to be called legal or lawyer, cannot properly be considered except in relation to what the observer might call the total psychological-sociological problem of the client. Yet the lawyer may say that his role is to consider alternative actions to divorce, based on whatever facts he can discover as being relevant to the client's current family crisis rather than merely relevant to a divorce claim. In helping the client to see the problem in this way he may suggest other alternatives, such as separation or conference with a counselor known for expertise in family relations. Yet he may himself give counsel to the client with respect to the implications for the client of taking one route or another, maybe also regarding the implications for the children or even the spouse, among others.

As the lawyer moves along on this route, it may seem to the observer that the lawyer is departing from his law role. Perhaps he sees the lawyer as adopting a psychiatric role, using in-depth interviewing, interpretations of conduct, attitudes, and even fantasies. He may take advisory steps and actions aimed at helping the client adjust to the reality of the current situation rather than continuing, say, to act out infantile regressions. Yet to a particular lawyer such action may seem inseparable from lawyering. Who is to draw the line at what knowledge discovered by psychology a lawyer may in fact have assimilated. We all know much more of psychology than our parents. Arithmetic was once the province of mathematicians we may suppose, but does it follow that the lawyer is not lawyering when he adds up the figures to reach the proper sum to be claimed for alimony or support?

Field research might reveal that this is not lawyering in the collective opinion of the Bar or even the collective opinion of the lawyers who handle such cases. Yet it might suggest an available or potential lawyer role. The authority of the lawyer's office, his personality, the submissive readiness of a client, the mystique to the client of law, its institutions, and norms—all these and other factors may make lawyer counseling as good or better for certain situations than therapeutic or other kinds of counseling might provide in other situations.[30]

30. Apparently many lawyers see themselves as engaged in the counseling role, sometimes coming close to the role of psychiatrist or clinical psychologist.

The observer might discover that the lawyer is quite unaware that anyone would believe he had departed from some preconceived role. Even his conversations with colleagues might not disclose any sense of deviation. It might be otherwise should the lawyer take on all the appearances of a psychiatrist, talking and analyzing as a psychiatrist would. The observer might in some cases conclude that the best results were not being achieved. He might then seek to promote a better lawyering theory and approach for such and a host of other camouflaged situations to be implemented by law school training. However, he should not therefore assume that he has observed something other than lawyering simply because his expectations have been surprised or even shocked.

This is not to say that anything done by a person who has a law degree or who practices in an office would be or should be looked upon as lawyering from within by the lawyer who is engaged in a specific transaction. Examples of nonlawyering easily come to mind: the managing of a community charity drive, running for political office, or investing in real estate, for instance. Many activities must be outside the lawyer role in the lawyer's mind as well as in most other perspectives.[31] Yet in another sense, many such activities are part of the lawyer's total business, his role as citizen or as entrepreneur, and so on. Then, too, political scientists may be interested in the lawyer and his political activities and his community influence. The anthropologist or sociologist might be interested in the lawyer's general status in society and his profession, or his educational background, his ideological attitudes, and on and on—while at the same time missing sociological significances of the lawyer by maintaining an observation post at too remote a distance.

The psychologist would justifiably argue that a lawyer's manner of dress, his sleeping habits, anxieties, and all sorts of psychologically relevant data go to make the lawyer what he is no matter what some other observer believes he is supposed to be. Of course, expectations of those outside of lawyering, particularly those of clients, enter as strong influences in lawyers' role images and behavior, often in un-

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See situation reports in FREEMAN, *op. cit. supra* note 29, at 80, 88, 95 and the field survey at 231. As time goes on, lawyers will be better trained for this role because of the tendencies in legal education to give increased training in the psychology of the lawyer-client relationship.

31. The Conference at Greystone Lodge, *supra* note 1, included considerable discussion of persons in "quasi-legal" roles, such as those in accounting firms, title companies, trust companies, insurance companies, and so forth. Dean Yegge of Denver Law Center offered the inventive notion that law schools might consider special training for such individuals. Medical schools train personnel for "health-related" activities.

noticed, that is, unconscious, ways.[32] So it is that psychological and anthropological theory justifies looking outside lawyering itself to generate theories on how lawyers do and ought to behave.[33] But so long as the observer collects data which is seen through the windows of a differently structured viewpoint, he may miss vital data that ought to enter into his theories and conclusions, whether of fact or value.[34] The observer may turn propagandist and attempt to influence the insider directly or indirectly to view law and his role differently. That of course involves all the same a power play. Such efforts are democratically acceptable. They may still be said to be not scientifically based and not necessarily the only realistic view or, in a policy sense, the best view. An omniscient observer may have his reasons for smiling.[35]

III. Mapping Perspectives on Fact and Law

Kinds of Fact

In common parlance outside the legal processes, we talk and act as if what we can observe, our observed facts, were there for all to perceive, were public objects. Careful distinctions as to the actual content of observations from different posts are rarely made, except when some conflict of goals motivates greater care partly as a rhetorical device, forcing into the open the relativity of individual perception. Even then the assumption is often that two conflicting views cannot both be correct. So it is at the trial, although certainly in that forum there are clues that observations are relative to individuals.[36] The more removed in the legal process we are from the trial court, the less likely there is to be a dialectic of words and actions

32. See in this respect, Carlin, Lawyers' Ethics ch. 4 (1966). *Cf.* the 1963 Missouri Bar Survey on the effect that being a client has on the popular opinion toward lawyers.

33. Weyrauch, The Personality of Lawyers (1964); Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, 57 American J. Sociology 121 (1951).

34. The tendency will be to ask, "What is the lawyer's role?" Role is looked at as almost predetermined, "out there," but actually projected from the perspectives of the commentator. While the functional approach often brushes aside surface happenings as not being "real," within its multiple perspectives lawyers' roles should include serving the client, themselves and their associates, and so forth, as well as serving society in this or that preferred fashion.

35. As an example of biased research technique, it would be possible to say that indigents are not getting "adequate" legal service and that therefore lawyers are not serving their "roles." Not to deny the merit of the wishful confusion, it is still not purely empirical. Many such wishes took the form of facts at the Greystone Conference, *supra* notes 1, 27.

36. See notes 4-10 *supra* and accompanying text; see also Probert, *Courtroom Semantics*, 5 Am. Jur. *Trials* 695, 704-716 (1966).

to remind us of the variations existing behind the curtain of seemingly common words.

Philosophers and semanticists tell us to beware, and there are times when we are aware. But more important to our study are the high frequency comments on factual certainty, important to reveal the views that exist. These comments tend to disclose the prevailing perspective of a given individual or group. The interviewer in a personal injury case, for instance, probably sees himself as working with facts, that is, objectivity. However, since this is the most sensitive area in that regard, the more important it is for the lawyer not to take risks of fact dogma, the more likely he will be to seek corroboration. He is, then, potentially if not actually a fact skeptic.

Thus, where there is a live dispute, it is more important to have a fact skeptic on hand to raise doubts. Where the context is one of preparation for negotiation in a nondispute situation, it might be equally important to retain a fact skeptic, but the dialectic or negotiation may serve as well to give clues to fact disagreement. Contract negotiation is not usually influenced by the possibility of adjudication in the way that a personal injury settlement negotiation is. The unknowns in a contract negotiation are perhaps more apt to be influenced by "hidden agendas" that may be discovered by the sensitive participant and responded to even if not mentioned. Further, each side in a business setting negotiation may be beset by doubts concerning what is good for its side and what the future may hold for the business and economic risks involved.

Where the lawyering is unilateral, as so much of it is, there is probably less motivation for the client to hide his truths and less motivation or opportunity for the lawyer to discover disagreements on the "real facts." Furthermore, the unilateral situation allows the lawyer greater control over the "facts," past and future, so that he apparently may rely more on his own judgment of facts than may the litigational lawyer. He has more control over the factual process, or at least he can insure that the factual process contains the only significant facts which are legally relevant, such as those recorded in self-proving records and instruments.[37]

It is debatable whether he knows his client's facts in a way that would satisfy a philosopher or general semanticist, but the risks of ignorance can be minimized by a variety of lawyering techniques known as preventive law practice. In the preventive perspective, he is not resolving or curing disputes; he is preventing them by maintaining his client's legal health.[38] As compared with the cold facts of the

37. See notes 25-28 *supra* and accompanying text on the discussion of the corporation lawyer.

38. One of the authors has written extensively on a variety of facets of

curative lawyer, the preventive lawyer deals with hot, live, controllable facts. Cold facts are to a great extent signposted in history and less under the control of the curative, litigational lawyer.[39] Of course each litigating lawyer has some control over strategies and selections of factual evidence, but the past happenings he seeks to probe have created waves and ripples that reach to each bank of the litigating stream.

By comparison, the risk of fact ignorance is much less to the decision makers, not because of control over past (litigational) or future (preventive), but because judges and juries have immunity to great degree from probing doubts of outsiders. Little wonder that statements of fact, and law too, continue to appear in largely confident phrasings. The least risk of fact ignorance exists in legal education and possibly accounts for the over-reliance on the coldest facts of all—frozen statements that bear little similarity to the dynamics of fact-finding found at the litigational level.[40]

Dissolving the Acid of Legal Realism

Probably a given individual uses law in different ways in different contexts. At one time he may tend toward the absolute, at another the relative, and so on. We have been attempting to explore dominant tendencies, but still it makes sense to speak of an individual's law perspective profile.[41] Legal realism, for instance, must appear to some extent in every lawyer's law perspective profile. There probably is less of fact skepticism than rule skepticism, generally speaking, although more of fact skepticism among trial lawyers than others. Such lawyers probably have changing perspectives regarding rules as they move through the various stages into trial. Earlier stages see an emphasis of facts. The trial forces the lawyer to some extent into the dogmatic law rhetoric typical of judicial opinions and much of legal commentary. Research could fairly easily uncover this lawyer's degree

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preventive law practice and theory. See, *e.g.*, L. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956), and generally a symposium on preventive law in 38 So. CAL. L. REV. 377-497 (1965).

39. See L. BROWN, *The Case of the Re-Lived Facts*, 48 CALIF. L. REV. 448 (1960). Rutter states that language sensitivity is crucial to the skill of fact management in *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL ED. 301, 316-18 (1961). On the relationship of "fact-sensitivity" to language behavior sensitivity, see Probert, *Causation in the Negligence Jargon: A Plea for Balanced Realism*, 18 U. FLA. L. REV. 369 (1965).

40. Regarding fact-skepticism, see further *Confronting Injustice*, in THE EDMOND CAHN READER 265-324 (L. Cahn ed. 1966).

41. The notion of personality profile is related, but even closer is that of epistemological profile, Bois, *The Epistemological Profile and Semantic Psychoanalysis*, 18 GENERAL SEMANTICS BULL. 43 (1956).

of rule skepticism, whether he manipulates legal concepts consciously or unconsciously to accent evidential claims favoring his client. Outside of the generalities of a nuisance suit or the maxims of equity, the so-called rules of negligence law are about as malleable as any to be found. Some such awareness must rub off and affect the personal injury lawyer's view of rules generally. Do they view the rules of evidence on the same plane or as more a matter of trial discretion? Trial lawyers probably have a feeling for the locus of the real final judgments. It would be possible, then, to be part rule optimist and part rule skeptic or pessimist.[42]

A preventive lawyer could view rules in the manner of the legal realist, yet there may be pressures keeping that view low in his profile. He is called upon for legal opinions and advice, as an authority on law. While there are clients with whom he might speak in terms of probabilities or risks, it seems likely that most clients press for "yes" or "no" answers that are hard to resist. If so, this kind of lawyer is forced to a judicial kind of decision which a trial lawyer could more easily fend off by a "let's wait and see" attitude. Legal realism is low in the judicial profile, at least as we see it from outside, perhaps partly because that view places greater responsibility on an individual court or judge. If a judge sees himself largely as spokesman for the law, then there is similar reason for the preventive lawyer to take a related attitude. He, after all, would often feel *sole* responsibility for his law decision were he to take the view of legal realism.

Whatever the lawyer's profile of perspectives on law (and facts), it probably correlates to some degree with his role conceptions and attitudes toward clients and authorities. The product in turn probably correlates with behavior patterns of some kind. Whatever degree of legal realism exists on the inside, we may use the legal realistic perspective from the outside to some advantage in exploring further lego-social roles of lawyers.

Legal realism's greatest value has been its semi-anthropological approach to the judicial process, looking at it from several perspectives more or less simultaneously. The discovery was then that the doctrinal vocabulary attributed to courts could itself contain more than one perspective at a time. In a manner of speaking, at least it had that potential. Law doctrine was seen as normatively ambiguous, containing within itself an "ought-ness," an "is-ness," and a "must-ness." The idea is important to the view of this section, but it does not go far enough.

Legal realism stopped short because it was not fully anthropologi-

42. See the discussion of the way rules vary in use as between advocates and counselors in Rutter, *supra* note 39, at 327.

cal. It did not involve *participant* observation. Further, while legal realism relied heavily on semantic analysis, it made a false assumption about language, perhaps because it did rely on semantics. But the assumption seemed to make inside observation unnecessary. Semantics was tied to logic for the heaviest attacks on judicial and commentator reasoning. As the argument went, since legal terminology was ambiguous, if a judicial decision was justified with that terminology, it necessarily begged the question. A deduction cannot validly be made from an ambiguous major premise.[43]

Yet doctrine may look ambiguous from the outside and not be so from the inside. When the doctrine is used, it is no longer ambiguous. Furthermore, normative ambiguity is not a peculiarity of legal language at all, for a related kind of ambiguity pervades most of the ordinary language we use most of the time. It might as well be said that every time we use any word to answer a question we are begging the question. Suppose someone points to an object and asks, "What is that?" The question, according to the legal realistic analysis, cannot be answered without begging the question. The observer is having a unique experience, a novel experience in the sense that it is not *identical* with his or anyone else's previous experience. If he were to stick to logic, he would have trouble answering such a question. Very often the responses are spontaneous and are to be understood as being *psycho*logical. It is only a particular view of law that has said the judges must be logical. Perhaps legal realism denied only the logical rather than the psychological validity of a judicial opinion. There is a spontaneity to language usage which logic simply cannot capture.[44]

The Vocabularies of Law and Language

So, if we go a step beyond legal realism, we come to this: Looking at lawyers from outside, we see that the apparently single vocabulary which constitutes what we call legal language is actually several vocabularies, all of which may be represented in an individual's total legal vocabulary. This feature allows an individual to move through several perspectives without being aware of the shift and without being observed, except perhaps by the skeptic's eye. Likewise, the lawyer is free to use ordinary language, and here too lies the opportunity for unnoticed movement through several additional vocabularies. The lawyer uses both language of law and ordinary language in permutation. Judges and all of us do also. Legal language is not

43. Oliphant & Hewitt, *Foreword* to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1929).

44. This point has been developed with respect to judicial discourse in Probert, *The Psycho-Semantics of the Judicial Process*, 34 TEMP. L.Q. 235 (1961).

pure "legalisms." But lawyers are less restrained in the permutations than are judges; they have considerable mobility as to what thinking and talking perspectives they may adopt without being accused of leaving their area of expertise.

We have said that the language has several vocabularies representing several perspectives. Wittgenstein used the figure of speech, "language games," to get at this idea.[45] His point was that the same word is used in many different language games. We have tried to show how this is true of the words "law" and "fact," for instance. And these particular words control the games playable with all law words and all fact words. To continue the metaphor, each person plays many word games (albeit deadly seriously at times) and moves with facility from game to game, the more so as his total vocabularies increase, not just in the sense of how many words, but how many ways he may be able to use given words. And of course, a person may and does play more than one word game at a time. What we call "by-pass ambiguity" in the sense of this metaphor is that one person is playing one game with a word and the other is playing another. The implications of the analysis go deeper than ambiguity, however.[46]

Interpretational Power and Decisional Analysis

Whether we speak of vocabularies, perspectives, or games, the maximum potential of a lawyer to parlay social into legal judgments, as seen from the outside, would be greater than that of a judge seen from the outside. This is not an easy point to accept. This maximum potential exists because every happening is, from at least one perspective, unique. Also, every rule, even a statute, is ambiguous even with respect to a given happening. The happening can be seen as unique and the rule can be seen as ambiguous *prior* to the point of decision and resolution. This point is not easy to see largely because of the habit of thinking that the last accepted interpretation, for example of a statute, whether one's own or that of a judge or other official, is *the* interpretation.[47] This is not to say that there is no

45. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

46. The word "vocabulary" is being used in a special way in the text to suggest that an individual's verbal use capacity is not tested merely by seeing how many words he can use in one way or another. Rather, a given word appears on several or many vocabulary lists. The given word has varying rules of usage as one moves from one perspective to another, from group to group, from relationship to relationship, or, in Wittgenstein's figure, from game to game. *Cf.* R. W. BROWN, WORDS AND THINGS (1958) and his discussion of categorization in THE ORIGINAL WORD GAME ch. 6 (1958).

47. The premises of this paragraph are demonstrated in Probert, *Causation in*

rhyme nor reason to statutory interpretation, but it is to say that there is neither rhyme nor reason to the statute until it is placed in some perspective, whether that be the perspective from which it came or not. From a law perspective, the right interpretation is ultimately that of the final official decision maker. Short of such final decision making, a lawyer is often for many purposes the ultimate interpreter of statutes, regulations, common law rules, facts, and so on.

Prior to some decision, then, the maximum potential is absolute discretion in the lawyer. No lawyer has such maximum freedom, although he may have it on some occasions when nothing is likely to happen to place his interpretation of law and fact into doubt. To convert Holmes' aphorism, the "bad lawyer" would predict not what a court would do but what likelihood he has of being contested in some place that counts.

What of the hypothetical lawyer at the other extreme, not only good but internally obligated, literally bound to the letter of the law? Since, from outside, the letter of the law is ambiguous, unconscious influences would have maximum influence. Literal interpretation without effort to place "the rule" in the perspective of sources tends to be subjective, particularly in light of the tentativeness, from the outsider's point of view, of fact judgments. But considering how this lawyer looks at it, he has no choice, and that will be the truth of it from outside also.

These extremes bound what must be the range of actual lawyering or even of a particular lawyer's range of law-fact operation. Of course there are many situations where the law and the facts can be stated with confidence, but there are doubtless many situations where the confidence is only subjectively based. Some lawyers surely give moral advice openly, others via an interpretation of law.[48] Even business and other kinds of advice can be given in similar fashion, projected through the authority of law and the expertise of the lawyer as a license of authority. The combination provides a strong rhetoric whether in counseling or mere opinion. In short, in the total range of lawyering lies a possibly great power to use all the norms of society.[49] What lawyers can do is to translate problems out of various social perspectives into the legal medium of exchange. In so doing, they stand as communicants between officials and individuals. One way go the values of individuals and of individual groups, the other way go collective community values and norms. The lawyer acts as

the Negligence Jargon: A Plea for Balanced Realism, 18 U. FLA. L. REV. 369 (1965).

48. For an interesting example see the situation report and accompanying comments in FREEMAN, LEGAL INTERVIEWING AND COUNSELING (1964).

49. It is not enough to say that the potentials of lawyers' characterizations are conclusions; they are functions of the total decision making situation.

mediator in a way unknown to a court of equity or even a sympathetic jury. Of course they do not communicate this way with respect to all individuals or even with respect to all groups or classes. Maybe, though, we have more reason than we know in a democracy to encourage lawyering in all segments and corners of society.

The potential power of authoritative decision making of the litigating lawyer is probably less in one respect than the power of the preventive lawyer or the lawyer in the unilateral situations. But with respect to courts he has another power.[50] It may be inaccurate to assess his role as merely the humble minister, the carrier of a prayer for relief. It should not be forgotten that it is he, or at least lawyers in tandem, who determines whether to unleash the otherwise inert power of courts. When the case has been initiated, the court is theoretically free to exercise complete power within the limits of the law, but actually the attorneys choose the claims, the issues, and the characterizations. The lawyer in all this may be more quarterback than water boy.

Thus it looms as a possibility that lawyers serve a greater variety of roles than has yet been assessed, partly for the failure to observe the process of law in the dynamics of its use. Lawyers may be a power unto themselves. The power is difficult to assess. The debate in jurisprudence with respect to courts has some relevance here. One worry has been to help law be law and not the mere tool of men, at least in the sense of government action, a government of laws and not of men. Legal realism suggested that courts were mostly men and not law in the traditional sense. Ever since, nervous commentators have been attempting to find controls somewhere, if not in rules, then in policy or cultural restraints. The old notion of stare decisis is gone, and now it is a question of "creative continuity."[51]

But how is it with lawyers? What would be disclosed if we brought to bear a theory of decision on the processes of lawyering? There may be generalizations that can be derived once we leave the simple notion that "law," unanalyzed, determines decisions in light of "facts," also unanalyzed. There may be not only patterns of influences in the positive sense but also discernible restraints, such as conventional morality, public opinion, professional traditions, client demands, and so on.[52] It may still be an interesting question to

50. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940).

51. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

52. Cowan, *Decision Theory in Law, Science, and Technology*, 17 RUTGERS L. REV. 499 (1963); McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 NATURAL L.F. 53 (1956); Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964).

inquire how "free" a "marketplace" lawyering may be.

If there is anything to the thought of this section, that skill in legal rhetoric extends in power beyond the courtroom, the law schools play an unsung role in that extension. It has been the case system combined with socratic dialectic that has given lawyers maximum potential with the permutations of legal and nonlegal vocabularies. Much more is taught than "the law" of this or that area. A socratic technique that bombards with variations in law interpretations, factual statements, rationale characterization, and so on is bound to teach a dialectic process and probably a skill that could not be explained by the student, a skill that need never go to court to be power. A casebook of today without such teaching may be transmitting a different skill, a less creative role. Perhaps a problem approach is necessary to preserve skills that will otherwise subside with the apparent decline of the case system of yore.[53] What the law schools have not yet learned is that legal rhetoric as here described could be taught head-on rather than unnoticed. Yet some might argue that then we would be teaching manipulation and not law: That is a dilemma that must sooner or later be faced. An essential element of law and lawyering no doubt involves a faith of some kind. If not in law, then what? There was too little of faith in legal realism.

IV. H. L. A. HART AND LAWYERING

The Evolution of Analytical Positivism

Jurisprudence is notable for its strikingly various perspectives on law. In the beginning of its rise, sociological theory attempted common law analysis in terms of sociological interests, using mainly the information provided in judicial opinions. Legal realism was somewhat more operational in nature although not scientific in any laboratory sense. Yet in both views some of the aims of science were present, such as clarity and predictability.

As is well known, analytical positivism made an even earlier move to be scientific and to deal with observables or "actualities." Officials and rules and sanctions seemed observable and real. There was an effort to carve out a manageable body of information and derive meaningful propositions. That is also a worthy scientific kind of goal.

But the march of technology, knowledge generally, and culture showed this view to be lacking both in anthropological and psychological sophistication. A more modern empiricism left this early version of positivism behind. Process became the way to think: structure

53. Cavers, *"Skills" and "Understanding,"* 1 J. LEGAL ED. 295 (1949).

and change. Frozen structure or hierarchies and a static logic simply did not capture what could be observed and felt. Somewhat different or less authoritarian attitudes probably played beneath the surface of the growing views in the United States, especially in the case of legal realism. Thus, judicial authority was questioned and it was doubted that mere rules could have any authority at all. Meanwhile, democratic aspirations pushed the wheels of the sociological school further toward society and its parts, to a closer observation of what was going on there and to increased effort to carve out an area for study.

Once officials and their procedures and their pronouncements are left behind, a science of law potential seems to fade. There seems to be, in the "what is law" sense, no way to identify "it." One gets involved with social structure, a great variety of norms and attitudes and actions. Analytical positivism had grown out of a reaction to felt chaos in the intuitive and theological and even illusory theories of natural law. In some ways those early natural law views served to reflect to a degree the social dimension. We seem to have come a bit of a circle.

The next move was up to analytical positivism. The move came: Influenced by the new look of English analytical philosophy and reacting to the excesses of legal realism, H. L. A. Hart brought his heirloom into the twentieth century and gave it, too, a new look.[54] Legal realism had in one way carried on in the tradition of good positivism. It was an approach that did not concern itself directly with values because they were not observable or manageable in any scientific approach. Yet legal rules were outlawed, too, and what became more important was the behavior of judges.

But judges without rules were not law. Enter Hart![55] Rules do exist. Not just in law but outside of it, rules are used to control behavior, to justify it, to punish it—in a variety of ways in society. Law involved special kinds of rules. Nor were they self-operating rules or pronouncements only of officials. Again, the very idea and life of law has been rules that somehow control all men, including the officials.

Influenced by English philosophy generally, Hart has seen that jurisprudence as a whole has been plagued, in the same way as philosophy, with misleading questions. It has until recently continued to ask "what is law" and even yet, "what are rules." Even legal realism

54. For a commentary on Hart's general approach and a bibliography of his writings, see Pannam, *Professor Hart and Analytical Jurisprudence,* 16 J. LEGAL ED. 379 (1964).

55. See especially HART, THE CONCEPT OF LAW (1961). References hereafter are largely to this work, unless otherwise noted.

asked and answered such questions. In keeping with the new mode in English philosophy, Hart would instead ask, how are the words "law" and "rules" used. Such questions are improvements not because the man in the street has been right all along, but because such questions, geared to a special sensitivity to language forms, have a better potential for answers that disclose "what" people are *really* talking about.[56]

Hart has used this approach, in a manner befitting his tradition of jurisprudence, somewhat cautiously. He speaks not as critical observer but as alert insider, guided by flashes of light from the outside. In the first innovative flash, he sees that the "outsider" (legal realistic observation, for instance) sees and feels and talks about what is going on differently from the inside participant. He labels the view of legal realism that rules are predictions of judicial behavior as the external viewpoint. From an internal viewpoint, rules of law exist and we are generally bound by them, obligated by them.

The second innovative flash is that the word "rules" is used variously to refer to differing human phenomena. It is only because of the form of the language and because of the common name that we tend to think of rules as being one kind of thing. The different usages of "rule" can be detected by close observation and careful analysis.

He concludes that, generally speaking, there are in a legal system two kinds of rules: primary and secondary. There are primary rules which bind us all with primary obligations and secondary rules that do not oblige but confer powers. Within the latter group are several kinds of rules, including those that confer powers on individuals and those that confer powers on officials. More important than the names and the distinctions is the fact that Hart is actually taking account of the relativity of perspectives in these distinctions.

Hart also deals with another special problem raised by legal realism. That theory seemed to say that law was what judges said it was. According to Hart that is at best only partly true. The word he used to prove the existence of a legal rule is a word currently important in jurisprudence, "validity."[57] Judges play a special role in determining the validity, that is, existence or "lawness," of a legal rule. If judges operate within the powers conferred upon them, then usually their pronouncements are of valid rules which are binding. Judges must operate according to accepted traditions, practices, and procedures. Similar analyses apply to legislatures and administrative bodies, apparently.

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56. The main philosophical influence on Hart seems to have been from his Oxford colleagues via Wittgenstein and J. L. Austin (not John Austin). The viewpoint has been dubbed the "ordinary language" approach, an unfortunate misnomer. See generally WARNOCK, ENGLISH PHILOSOPHY SINCE 1900 (1958).

57. Christie, *The Notion of Validity in Modern Jurisprudence*, 48 MINN. L.

Another important set of rules are those called "rules of recognition." They are pervasive and are the means by which other rules are ultimately determined to be valid. While these rules are not actually known to all individuals, they are potentially knowable. In the meantime, of course, judges have special knowledge of these rules and special expertise in evaluating claimed rules by means of rules of recognition. Apparently included among the rules of recognition is one according validity to the pronouncements of judges when issued in accordance with appropriate process. Of course, other rules of recognition indicate when a statute outranks a court decision, or a constitutional provision outranks them both, and so forth.

Lawyers in the System

Hart does not regard his analysis as complete. Rather he sees it as a framework for further exploration. In that spirit it is our suggestion that our own analysis of the lawyering process places lawyers into Hart's analysis in a way that he has not yet seen and in a way quite consistent with his analysis.

His emphasis is still on the authority of law, the authority both of officials and of rules.[58] But inchoate in his analysis is a view that the authority of law is also invested in persons who are not officials. That comes from his view that certain rules of law confer powers on private individuals. In Hart's perspective, the *balance* of authority of course rests with rules which are complemented by officials.

Put most simply, our analysis has shown that a special authority rests with lawyers. It is an authority closer to that of officials than private individuals. Perhaps that is why in a sense lawyers are sworn into office with a tenure somewhat akin to that of federal judges.

While Hart could not concede that lawyers bind individuals, neither is the authority exercised by judges strictly of that kind. What judges do in this respect is to determine what rules are valid and it is the rules which bind individuals. Lawyers seem to have a similar power. It is true that judges have special insights into rules of recognition which provide the tests of rule validity. It may be that in the sense of breadth of involvement over the totality of law, lawyers have an even greater quantum of such insight and expertise. But in potentiality, Hart seems to say that rules of recognition are accessible to all citizens without the necessity of judicial determination as a

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REV. 1049 (1964).

58. It has been said that Hart is a "liberal" because his chief concern is to preserve private autonomy against government encroachment. SHKLAR, LEGALISM 41-42 (1964), relying on Hart's views expressed in HART, LAW, LIBERTY, AND MORALITY (1963). Many lawyers are involved in that kind of liberality.

prerequisite to rule validity. It is only when there is doubt that judges are needed. When doubt rises to insoluble dispute, then judges may have to resolve such doubt. But lawyers are there first, almost without exception. While lawyers' dispute settlements do not have a stare decisis impact like that of judges, probably their informal process solves more in number, and probably a greater variety of techniques of interpretation are used, as earlier suggested.

There are other kinds of doubt than disputes. Judges ordinarily have no power to resolve doubts short of dispute. Lawyers do. We may call it advising or counseling, but the lawyer's office is usually one of authority in this respect. An individual is not bound, in Hart's sense of obligation, by what the lawyer says. But if the lawyer is correct in his analysis, then the individual is bound whether he feels it or not. More important is the feeling of bindingness and it would seem most likely that many individuals feel bound by the rules which lawyers reveal to them. Even if the feeling is missing the belief is there.

Close followers of Hart may object that he makes it quite clear that it is not the feeling of obligation but the fact of obligation that counts in law. However, thoughtful followers will realize that Hart is referring to the supremacy of valid law over private contrary feelings. In the run of situations, it seems likely that individuals feel bound when they are bound and so notified by appropriate authority, for example by courts and by lawyers, at least by lawyers in nonlitigating unilateral situations. It might be further objected that lawyers are not really the ultimate decision makers because they may be declared wrong by a court or administrative official. But these bodies in turn may be reviewed and reversed. A person does not have to rank at the top of the hierarchy to be an official or to have special powers to determine when laws are valid. Can there be any doubt that in the total hierarchy of authority lawyers have special powers vested by law and acknowledged by individuals?

Citizens do not go to lawyers only in doubt or dispute to determine if they have breached legal obligations. They also go with respect to potential future obligations, as well as to obtain aid in the exercise of powers conferred upon them by law which require the special knowledge that usually only lawyers have. Again, special knowledge may be tantamount to special power. We have earlier analyzed this power in terms of its preventive practice aspects. There may be the acquisition of benefits as well as the avoidance of sanction. Further, there may be involved the working out of a legally sanctioned and lawyer arranged "private ordering," by such means as contracts, for instance.

Also note that our earlier exploration carries the analysis of rule

differentiations further along in the direction that Hart has started. He apparently has not yet seen that lawyers may operate otherwise with rules than do either judges or private individuals and that such usage would prove the existence of different rules and powers for lawyers by the very means of analysis which he has used to make his beginning differentiations. Our exploration hardly exhausts the total possibilities even within the lawyering process, let alone in society at large.

Our exploration also carries into an analysis of facts analogous to the analysis of rules. No more than with rules can the nature and significance of facts in the law and the lawyering process be discovered let alone appreciated under the assumption that there is only one level or kind of fact, even though the shift in usages is not readily seen. So we have suggested that this generally neglected dimension, *entirely neglected by Hart,* be pursued into the different areas to fulfill all the better the multidimensional analysis of law processes suitable to this age. Such an analysis can be carried beyond the discussion of law, and lawyers, and facts, into the total legal-fact terminology and beyond. We would avoid, however, the mistake of legal realism in running too fast to see what has been overrun.

The Lawyer and Morality

Analytical positivism does not today ignore the relationship of values to law, but it does minimize them. The current debate is not in terms of values, but still of morality as it was for Austin.[59] For both Austin and Hart, the exclusion of morality from the legal framework is not so much a separation from moral influence or even from general humanitarian pressures in the evolution of law or even in the application of rules of ambiguous purpose. Rather, in this perspective, once law is promulgated validly, it should be strictly applied in accordance with other rules of application. Morality influence should not sway the application of valid rules except to change them *before* application by appropriate procedures. Otherwise law becomes relativistic to the particular case or situation and is no longer law because it is not general in application, nor stable in expectancy; it is thus arbitrary in decision and promulgation. To Hart such pressures seem necessary to preserve law as generally just, that is, to preserve it as law.

Such a premise requires in a decision maker an aloofness from the pleas for mercy or for equity, for fair treatment if not in the name of law then in the name of God, and from emotional or psy-

59. HART, LAW, LIBERTY, AND MORALITY (1963); HART, THE CONCEPT OF LAW (1961).

chological involvement in the lives of individuals whose merits lie somehow outside the generalities of a given law or of law generally. If law is to be changed on the spot, it is not to be just for the sake of an individual if there is some reliable promise, by rule, that a general significant class of like cases will be treated in like fashion when occasion arises.[60] But even then, there are guidelines, rules, and procedures for the mechanism of change. For instance, it is in the nature of sanctions such as those of the criminal law that they should not be applied except by virtue of pre-exisiting rule.[61] Certain kinds of legal relationships such as those captured in property and contract rules are so important to the preservation of society that they should not be altered in the judging process, perhaps not even by legislative process, except very slowly to meet the change that society itself has produced outside the legal system. Certain kinds of freedom and expectations that have traditionally been protected within the law, for example by the Bill of Rights, should be preserved most of all against invasion by law. And so on.

True enough, law's structure is dependent upon social values; but then overall values are dependent on the integrity of that structure. The traditions of the rules and of the mechanisms within the structure are what guarantee the structure and the society against chaos, tyranny, arbitrariness, and impetuous or selfish changes that may cumulatively undermine or destroy the structure and at the same time precious individual freedom.[62]

So, in Hart's view, while there are moral obligations, even of a primary kind, very often they are apt to be embedded in law already. Generally speaking, where there is conflict between legal obligation and moral obligation the importance of the legal system to the preservation of society probably gives higher priority to the legal obligation for the sake of society than to the private or small group moral obligation despite the possible loss to the private individual or small group. If the moral obligation wins out against the legal obligation, the legal sanction is justified against the chooser. Of course it may

60. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

61. On the observations of this paragraph see generally FULLER, THE MORALITY OF LAW, especially ch. 2 (1964), in which there seems to be much agreement with related views of Hart.

62. Shklar de-emphasizes what appears to be an authoritative component in analytical positivism generally. See note 58 *supra*. Probably Hart does despair of legal realistic push for general reforms through law, or at least through common law. But even if the role of government through law is limited, in its sphere it is supreme against nongovernmental encroachment. There is a nice notion of balance involved. Lawyers play a highly significant part in the balancing process.

be true for the individual that obedience to law will bring moral sanction upon him. It seems to be in the society's best interest for law to function in this way and for citizens to expect it to function in this way.

How, then, do legal and moral obligations run with respect to lawyers? If they are merely citizens they should be obligated to law in the same way as any man. Officials are controlled in that way. Yet this assumption can readily be put into doubt as to lawyers. Interesting questions can be raised as to the role of lawyers in the law-morality relationships.

A lawyer is not free to commit murder under the law. That obligation is both legal and moral. Yet he is legally free to aid a murderer to avoid the sanctions of law so long as he acts within the procedures of law. It is possible to argue, of course, that no man is a murderer until adjudged guilty by a jury, but such argument is definitely cloaked in legal perspective. It is doubtful that many outside the profession believe the jury to be the only valid factfinding or value-finding process.[63] Of course, it might be argued further that until jury judgment a man can only be morally guilty and be therefore subject only to moral sanctions. Such argument will sway a few minds, but murder will out in private judgments, even if it does not in court.

It is not that the aiding lawyer himself breaches the obligation not to murder, of course. Yet, no matter how we may rationalize it the lawyer within the legal process, in his role as advocate and champion, is not only free but expected to defend a "guilty" man to the limits of the client's desires within the legal processes. At least, so may it be viewed from the outside.

This champion role seems likely to extend beyond the criminal or other litigational forum to avenues that are not so well lighted. How far should and does the role of lawyer go to aid a client in doing battle with the law itself? The traditions regarding defense of accused persons is easily justified in terms of protecting the innocent as well, putting a burden on the state, and so on. What of corporate crimes? Consider the minor example given earlier, the lawyer's decision not to register a foreign corporation as doing business in the state, to risk the legal sanction instead. Within Holmes' viewpoint on the matter, a citizen or a corporation has that choice. But that is not Hart's view of it. Doubtless there are numerous bits or patterns of "civil disobedience" of much greater magnitude in the business

63. Law school perspectives probably transmit the attitude into the lawyering process that the trial is the ultimate in fairness and accuracy in factfinding. *Cf.* Shklar's comments on the political trial, SHKLAR, LEGALISM 143-51 (1964) and lawyers' ideology at 1-28.

world—and not just in the business world—bolstered by lawyers' opinions or advice.

Perhaps a lawyer is not obligated to aid in the enforcement of law unless the particular law is also of moral magnitude. He would himself be an accessory to advise a murder or a robbery or embezzlement on the ground that the risk of legal sanction might actually be slight.[64] How about aiding or abetting a monopoly or actions in restraint of trade?[65] What does it mean when a lawyer takes an oath to uphold the law? In this period, it seems likely that a lawyer who advised a trespass in aid of Negro moral rights, in the process of publicizing the Negroes' plight to aid ultimate legal change, would be performing a desirable role not only in that advice but then in bending every rule to protect his clients from legal sanction.[66]

There probably is a difference of some sort in advising a client to breach a contract and pay the penalty or even to utter a libel on the one hand and on the other advising a breach of criminal statute which is in breach of morality of the entire community at all class levels.[67] To aid in civil rights movements is to pit one morality against another. Criminal laws, generally, involve class coercions, one class against another; not always, but very often. Lawyers ought to be free within the law to promote changes. Would that extend to promoting a sex morality of one class against the law which promotes middle class sex morality?[68] Surely upper class persons find protection against such laws. And compare the laws regarding divorce. Here we may camouflage the law-moralities conflicts by reverting to legal realism and saying that the law on the books is not the law.[69] In a way

64. Note, *Advising a Client as to a Future or Continuing Crime*, 18 WYO. L.J. 65 (1963).

65. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 443-47 (1966), discussing the difficulty of proving violations of antitrust laws and the inadequacy of sanctions weighted against the profit motive. See also LEVY, CORPORATE LAWYER, SAINT OR SINNER (1961); Paul, *Restatement of the Law of Tax Avoidance*, in STUDIES IN FEDERAL TAXATION 9-157 (1937).

66. Here one morality meets another. Lawyers in the South, and very possibly elsewhere, who attempt to uphold "the law of the land" run the risk of the destructive sanctions of local power figures if not of the community generally. Pollitt, *Counsel for the Unpopular Cause: The Hazard of Being Undone*, 43 N.C.L. REV. 9 (1964). On lawyer duty to push civil rights, see Tinnelly, *The Lawyer and Civil Rights*, 10 CATHOLIC LAW. 24 (1964).

67. CARLIN, LAWYERS' ETHICS (1966) deals with the text kind of problem to some extent. While he makes a distinction between the internal norms of the profession and community norms generally, he fails to maintain the difficult distinction.

68. FREEMAN, LEGAL INTERVIEWING AND COUNSELING 126-32 (1964) presents the report of a lawyer on his handling of two statutory rape cases. See especially Professor Weyrauch's comments on the clash of moralities at 131-32.

69. See the general findings on the conflict of law and practices in this area,

that is a fiction which is not consistently applied. We do not say that it is legal to murder even though murders go unpunished at times.

Lawyers probably come under law-morality binds such as tempt no other class of individual.[70] What is a lawyer to do when pressured by client demands to promote ends or means that are questionable in light of the letter or spirit of discernible rules, whether judicial, legislative, or administrative?[71] He can find most convenient rationales in legal realism, but that is one reason so many do not like legal realism. It considerably weakens the authority even of clear law.[72]

What we may be coming to in this analysis is the suggestion that no matter what law or legal system is in the Hartian sense, and even if we did agree that the lawyer is part of that legal system in a significant way, when we come to the consideration of morality and values he is not just a lawyer, he is a valuer.[73] He is part of two systems, the legal system and the value system. That fits our earlier statement that lawyers are communicants between law and individuals. He represents them both at once. Such is his obligation and his role. He takes special risks and perhaps therefore should receive special immunities when acting as lawyer-valuer. When the Canons of Ethics say, "Do not become involved, lawyer, in a conflict of interests," they do not truly embrace such matters. Of course a lawyer's overall ethical profile is hardly limited to influence from the Canons.[74]

These are matters that might be probed much further. They raise serious questions for legal eduation. If lawyers become involved in law-morality conflict, they should be prepared fully to handle them

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O'GORMAN, LAWYERS AND MATRIMONIAL CASES (1963).

70. For comment in the tax practice area, see Cahn, *Ethical Problems of Tax Practitioners*, reprinted in CONFRONTING INJUSTICE 259 (L. Cahn ed. 1966); Paul, *The Responsibilities of the Tax Adviser*, U. So. CAL. 1950 TAX INST. 1.

71. Or "ethical." Carlin finds that the ethics of the lawyers he questioned in New York City are shaped, *inter alia*, by the pressures of clients, which is no surprise. CARLIN, LAWYERS' ETHICS ch. 4 (1966).

72. *Cf.* the comments in notes 58, 62 *supra*. A lawyer who is a legal realist, or perhaps an unconscious manipulator of legal rules, may be quite free to let prevalent or even private moral pressures come through his legal interpretations. See the analysis under "Dissolving the Acid of Legal Realism," text accompanying notes 42-46 *supra*.

73. *Cf.* an impact of a functional analysis of lawyers with respect to their policy and social value significance. See authorities cited notes 26, 27 *supra*; Krastin, *The Lawyer in Society—A Value Analysis*, 8 W. RES. L. REV. 409 (1957); McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 NATURAL L.F. 53 (1956), who sees lawyers as having significant policy influence, if nothing else, as advisers to top policy shapers; E. BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE (1948).

74. CARLIN, LAWYERS' ETHICS (1966). This work opens the door to the kind of inquiry we suggest, but we still need something closer to participant-observation.

and to know how such matters are worked out in the course of lawyering. They should become aware of the known and the debatable obligations. A law school cannot do its job well and be just a law school in the Hartian perspective or in the related positivistic perspective that ranks so high in the United States legal educational profile.[75] This is not to say that these perspectives do not contain a high level of moral attitude, at least to the exent that law itself reinforces morality.[76] Positivism's fear of legal realism may partly have been that it was carrying positivism too far, to the point that lawyers might be amoral in disobedience to the morality embedded in law itself. But to the extent that law is middle class morality, and not overall morality, the camouflage of values that lies in typical positivistic analysis in the United States is to some extent, then, amoral—not fully conscious of morals and values.

There will be resistance to all levels if the argument for teaching morality as well as law in law school is left at this level. For one thing, it will be said that such education is preaching and impractical. But the suggestion here is that the practicality can be proved in the very process of uncovering the conflicts, by dealing with the kind of problems that lawyers face. The attempt in such process should not be just to prove what law is in the traditional sense, not just to teach students how to deal with legal problems from the old perspective, but to gain a new perspective on the social problems faced and handled by lawyers—as well as those not faced. The inquiry cannot be made by persons who close their eyes or see with stereotyped impressions. The problems and the viewpoints must be seen as they exist. That, of course, was the legal realists' desire too: not to be amoral, but to find out how to be really moral. A resistance to the effort of such discovery might partly reflect a fear of discovery rather than merely moral concern. But open minds can grapple with such problems, having learned from past mistakes. All of learning comes to that, leaping over the mistakes made in the process of discovering and pursuing truth—and values.

75. *Cf.* Lasswell & McDougal, *Legal Education and Public Policy*, 52 YALE L.J. 203 (1943), going much further in analysis than the term morality, certainly further than Hart or Fuller want to go, probably further than most persons in the profession are willing to go even today. See also STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY (1959). The pressures for moving much beyond positivism in law school education are mounting, as was evident at the Conference at Greystone Lodge, note 1 *supra*. Yet one cannot simply reach into the profession and change its values. Realism seems to call first for speculation on those values — and we have a lot of that — then for an attempt to confirm speculative hypotheses. Short of revolution, such steps are necessary antecedents to reform efforts.

76. "[U]sually the separation doctrine [of law and morality] is held by thinkers who have a keen sense of responsibility and great moral earnestness." STONE, HUMAN LAW AND HUMAN JUSTICE 254 (1965).

V. Conclusion

Despite all we have said, it will not seem fitting to many to think of law in terms of lawyers' activities. Of course old commitments cannot be easily relocated. Yet we would regret losing our way for the lack of suitable definitions. Essentially our theme calls simply for a clear-eyed look at lawyering as a specially significant process of human interplay relating official decisions and private activities to each other. Sociological jurisprudence and legal realism lead readily in this direction as one of several relevant pathways. Analytical positivism and natural law approaches tend to ignore what are regarded as mere implementations of controlling norms, either official or transcendent. Of course all these approaches are grounded in varying ideologies. As we see it, any ideology remains footless without a communicative nexus to the society from which it stems. In the end, a legal theory must make sense to those who work with the stuff of law. Maybe there will be some who will believe with us that it is now politic to attempt at least some minor span across one of the valleys of misunderstanding.