CURRENT PROBLEMS IN LEGAL THEORY

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THE STATE OF LAW AS A DISCIPLINE

Lawyers who expect to use an approach of searching for commonality in legal experience must face the problem of the failure of legal theory to understand the specific experience of our own legal system. We have not produced a general legal theory. We have put countless man-hours into composing a universal definition of law and legal system, occasionally hesitating to complain about conspicuous lack of success.¹ The naivete of jurists who imagine that any definition of law is value-free, or that its inherent values might be generally accepted, is astounding. Law is not an objective phenomenon. Like personality, it is culturally bound. Yet law schools do not attempt to teach law as a cultural phenomenon; even very basic sociological and political perceptions are not systematically exposed to the view and criticism of law students. Obviously we need more information about the relationship between culture and law before we can make substantial disciplinary advances. This has been suggested before.² Now, thirty-six years later, we can still draw attention to an obvious gap in research and theory, and hope that it will not be ignored.

That lawyers have not made greater fools of themselves has been due to three lucky accidents: (1) almost universal acceptance of law as an autonomous discipline; (2) continuance of stable political geographies in the west which settle the internal boundaries of its legal systems and foster a single culture outlook in traditional legal theory; and (3) the withdrawal of legal theory from a sustained examination of the relationship between socio-economic reality and changes in central theoretical ideas and norms. Lawyers have not been forced out of law or even out of their own system of law. Legal theory has an acute case of abstraction.³

Though law is traditionally viewed as an autonomous discipline, it has utilized the familiar patterns of western thought, including a dichotomy of cause and effect. This may be the inevitable product of the inability of the human mind to focus on more than one thing at a time; if mental

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¹ Richard L. Abel, “A Comparative Theory of Dispute Institutions in Society” (1973) 8 Law and Society Review 217. In fn. 9, p. 221, he extends the complaint to “family, religion, language and justice”.


³ This is not to suggest it is necessarily irrelevant, thought it may in fact be.
perception is bound to see phenomena as separate and distinct, the construction of relationships is a forerunner of understanding, communication and planning. Inevitable or not, this has significant impact on epistemology of a discipline. It requires particularism. In law, particularism has become a pervasive attempt at differentiation of one thing from another. It is overused. Moreover, the theoretical relationships and connections which are invented to create apparently integrated wholes are remarkably artificial. In other disciplines, the network of relationships is regarded as ephemeral and tentative, dependent on the perceiving mind for its legitimacy. However, the theory of knowledge in traditional legal thought remains permeated by a desire to discover "truth" in the form of settled meanings of concepts and unalterable relationships between them.

The narrowness and conservatism of lawyers is an acknowledged professional characteristic. These behaviour patterns are related to the psychological impact of cognitive structures of traditional legal thinking, which inculcate a professional habit of looking backward with blinkered vision. Obviously, stability is important. "Deprived of a stable sense of reality, of truth, of the past, of themselves, man becomes incapable of political action, incapable of the kind of public speech it presupposes." True, but too much stability is equally debilitating, especially if it is wrought of an unthinking response to narrow intellectual constructs employed in traditional legal education and theory. Indeed, a sense of stable reality in a world vibrant with ideas and conflicts is dangerous.

The function of traditional legal education is to create a perceived unity in the collective disciplinary memory. It is highly successful because it assumes values are shared, and does not examine epistemological foundations of legal knowledge in the light of current philosophical conceptions of knowledge or socio-economic reality. It fails to encapsulate the variety of professional experiences and contains no intellectualization of the social experience of law. This endows law with a facade of certainty and apparently clear boundaries, broken effectively only if the theoretical foundations of legal knowledge are articulated, and what law does is systematically considered according to a variety of ideological, economic,

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6 For example, Lawrence Tribe, "Policy Science: Analysis or Ideology" (1972) 2 Philosophy and Public Affairs 66.

philosophical,⁸ and political⁹ criteria. To an increasing degree, this is what recent innovators in legal theory are doing.¹⁰ For convenience, and with considerable over-simplification, we can describe their efforts as stages. First, many have felt that there should be direct acknowledgment of how and when law invokes espoused social values of justice, fairness, peace and freedom, and exposure of those situations when it does not.¹¹ Second, others have gone further and considered alternative methods of achieving these social values.¹² Third, other have gone further still: they have abandoned traditional values as the source of wisdom, and entered a completely different mind-set, sometimes borrowing an established philosophy or ideology,¹³ such as structuralism, psychology or Marxism.¹⁴ These are essentially attempts at cross-disciplinary analysis, and include important new perceptions of legal phenomena that await integration into main-stream disciplinary thinking.

There are many varieties of, and variations on, these three stages, and none is necessarily better than the others. In brief outline, they represent the political spectrum for the legal theorist from the “right” to the “left”, and involve progressive levels of difficulty for individuals concerned to integrate personal thinking and behaviour with the role perceptions of their professional colleagues, students and clients. More importantly, the “stuff”¹⁵ of the legal system becomes more unrewarding and even alarming as individuals move through the stages. Though law as a discipline can accommodate all these approaches, most lawyers stop intellectually at stage two, and never leave stage one for teaching and other professional purposes. If there are good reasons for this, they are buried deep in the private nexus of personal psychology and its behavioural manifestations. While satisfaction of the individual may be won by sublimation of deep questions of legal theory, the collective disciplinary experience of law can grow only if lawyers develop an intellectual map of the rich variety

¹² For instance, the reliance on economic efficiency as a test of legal effectiveness in Posner, *The Economic Analysis of Law* supra fn. 7.
¹³ Ideology is used non-pejoratively. All law includes ideology.
¹⁴ A sustained discussion of alternative legal theory is in Chambliss and Seidman, *Law, Order and Power* supra fn. 9.
of alternative legal perspectives and their psychological, professional and philosophical implications.

Recent contributions to legal theory contain significant attacks on the cognitive structures of traditional legal thought—the paradigm of the appellate court judge, legal logic, legal tradition and the version of law as a system of rules. These attacks can be quickly summarized.

(a) **The Paradigm of the Appellate Court Judge**

The professional paradigm of lawyering, the appellate court judge, exemplifies maximum capacity for personal judgment.\(^6\) Paradoxically, the predominance of the paradigm has severely constrained analysis of decision-making in traditional theory. It has encouraged legal theory

"derived from the commitments and reasoning of practical lawyers, which involves a particular ‘world view’, an orientation to practical and pragmatic problem-solving and set methods for tackling these problems. For disciples the paradigm involves acceptance of the legal system as given, and, by operating within the framework of the legal system, an adoption of its particular standpoints in interpreting or construction reality. . . . Legal theory adopts a social control standpoint. Its ‘exemplars’ and puzzle solutions flow from the judicial process as does its methodology in seeking to answer such questions. Commitments and stances of this sort go to make up the paradigm—the constellation of beliefs, values, techniques that is shared by members of the jurisprudential community.\(^7\)

Professionalism is highly oversimplified by continuous reference to a judicial paradigm which ignores the increasing importance of bureaucracy. Organization requires structure, functional delegation, tasks differentiation and a variety of techniques which establish internal traditions, standards of rationality and social significance. Decision appears simplified when examined from the viewpoint of the bureaucratic decision-maker because he has resort to an intellectually satisfying apparatus of detailed rules, internal discretion controls, traditions and standards which tend to obviate judgment based on extraneous criteria, and which seem, by practice, persuasion or participation, to cover most of the decisions involved. However, any particular decision will be a single event in a large mass of events, including accidents; it will gain its meaning and significance from the social identity of the organizational structure. All organizations must deal with the internal problems created by the inability of rules to provide answers all the time, and with external problems of relating the organizational process with other social processes to ensure its continu-


While lawyers realize bureaucracies can never obviate judgment, they view the kinds of judgments involved through a theory of legal decision designed to anticipate, explain and analyse judicial behaviour. Lawyers enjoy a special professional expertise in the overview of important social organizations, though the impact of their continued theoretical concentration on judicial functionaries in the hierarchical court systems deprives them of useful professional dimensions. They limit overview of bureaucracies to procedural issues and stay clear of the substantive questions of matching bureaucratic function and methodology with its supposed or stated aims, and, on the larger scale, of evaluation of the aims according to current social perceptions.

Overuse of the paradigm contributes to a continuing failure of traditional theory to encompass different kinds of lawyering. Adjudication, negotiation, legislation and enforcement require significantly different legal behaviour. Adjudication typically involves an institution. Capacity to adjudicate is socially derived authority, whether it develops from loose family roles or highly structured hierarchical orders. Depending on the seriousness of adjudication and the number of people affected, the trappings of the decision will be ad hoc or ritualized. The ritualization has its rationale in resolving tension. At socially significant tension points in conflict resolution, adjudication proceeds with an armoury of tension dissipating techniques, such as rules of evidence, intervening professionals, depersonalizing methods of argument, and implementation of the decision by functionaries, all of which are independent of the parties to the dispute. Because of the centrality of the judicial paradigm to legal theory, all aspects of adjudication have been subjected to rigorous analysis. Contrast negotiation. Where are the theoretical models of behaviour? Where is the detailed analysis of processes? In negotiation, people with seemingly incompatible specific aims and shared understandings work through a dispute to the nearest point of mutual satisfaction in a process that is usually fairly unstructured. This in part accounts for the comparative lack of interest of theorists—analysis of inherently flexible human arrangements is difficult.

Legislation is a specific method of creating rules with an acknowledged purpose. Because of its inherent importance and social significance, it is highly ritualized and connotes a detailed process, political in nature, overtly involving conflict, power and interest. Yet classic legal theory applies an artificial closure rule to exclude "the political" from "the legal",

19 Abel, "Dispute Institutions" supra fn. 1, passim. especially Part V, "A Theory of the Dispute Process".
even in analysis of legislative processes. The effect is that the processes of legislation are ignored in favour of emphasis on procedures, in much the same way as judging is cleansed of political and ideological content.\textsuperscript{21}

Enforcement typically involves a chain of delegation. There are good reasons for this. Spreading the responsibility for the ultimate terror of enforcement reduces its psychological impact on the people involved. Detection, incarceration and execution are time consuming tasks beyond the capacity of single individuals. When rules become complicated, breach is harder to detect, prove and punish. Different kinds of rules require different responses to breach: immigration fraud attracts deportation, murder attracts gaol and execution, tax evasion attracts fines, and so on. The typical feature of enforcement involves decision-making based on rules which control discretion and obviate the need for judgment much more than in the case of higher level adjudication. Enforcement frequently involves unrecorded and unpublished decision-making, and a bureaucratic organization which makes difficult the identification of specific individuals responsible for specific decisions. This is not to say that judgment has no role in enforcement, or to deny the existence of discretion of police, prosecutor or warden. It is to assert that the nature of the decisions and the function of rules is so significantly different from those in other legal contexts that the enforcement process is often assumed to be non-legal in character and fails to attract theoretical treatment at all. Analysis is by and large left to empirical social science.

At this point, it is apparent that an anomaly exists. We would expect lawyers to view lawyering as involving a fantastically wide range of multifaceted tasks. Instead, they have deliberately and systematically opted to view lawyering in its narrowest possible conception. The appellate court judge has become the lawyer's "ego ideal". Even if he cannot aspire to the position, he models his behaviour in all lawyer roles on the appeal judge. When he talks law, he thinks of rules and gives reasons for his interpretations that would be satisfactory in that microcosmic appellate arena. At times, this seems more a result of our habit of zealous court reporting than a considered disciplinary decision. A cursory look at legal literature and legal education curricula shows legal theory principally concerns itself with appellate courts. A cursory look at reality suggests de-emphasis of courts is long overdue.

Other intellectual and professional implications of this narrow paradigm are just as deplorable. It stalls disciplinary consideration of other social sciences. It envisages law as a system of rules, and directs responses to them in terms of what a judge might do.

\textsuperscript{21} The relationship between politics and judges in the United States is well documented: Henry J. Abraham, \textit{Justices and Presidents: A Political History of Appointments to the Supreme Court} (New York, Oxford University Press, 1974). However, by and large in other common law systems, judging is traditionally viewed as an apolitical function, especially by the judges themselves.
Kuhn’s analysis of the function of a “paradigm of scientific knowledge” suggests a method of understanding the development of a discipline—paradigms have behavioural implications. This is certainly true of the appeal judge paradigm in law, despite far reaching criticism of this disciplinary focus. At this stage, legal theory could usefully develop a series of paradigms related to other kinds of professionalism. If these are not forthcoming, the judicial paradigm will continue in unabated influence. The single image focus might seem to provide disciplinary cohesion, but the high cost of irrelevance, narrowness and loss of professional competence hardly makes it worth it.

(b) Legal Logic

The educational experience of lawyers always involves an introduction to the concept of legal logic, or “thinking like a lawyer”, by analysis of judicial reasoning. The approach assumes rules of law are general premises which can logically yield answers to legal disputes. As a result of deliberately pursued educational directions, lawyers have always tended to see legal decisions as the product of logic and argument, and not of ideology, psychology or vested interest. Logic is an inadequate framework for analysis of human endeavour. Complete commitment of experience to language and signs is impossible; perfect communication is a dream because signs are always interpreted by the listener according to his personal experience. If language cannot contain human existence, it follows that logic, which is one kind of language, cannot. While lawyers focus on logic as an analytical tool and

23 Kuhn’s theory of paradigm does not develop behaviour models. His paradigm is an accepted model or pattern of thought such as Aristotle’s analysis of motion, Ptolemy’s implications of planetary position, Lavoisier’s application of balance or Maxwell’s mathematization of electromagnetic field. Ibid. 23. These are “models from which spring particular coherent traditions of scientific research”. Ibid. 10. “The study of paradigms prepares the student for membership of the particular scientific community with which he will later practice.” Ibid. 10-1.
25 In various common law jurisdictions, lawyers have lost tax and company law to accountants, conveyancing to land brokers, family and juvenile law to sociologists and psychologists. While the discipline of law remains myopic, transfer of function may well be inevitable.
26 Karl N. Llewellyn, The Common Law Tradition (Boston, Little Brown, 1960) 20 makes the point that no one is educated to be a judge. The point would better be that all lawyers are. The force of traditional concentration on the paradigm of the appellate court judge remains despite the repeated experience of the law graduate that his training in law school is irrelevant to what he eventually does as a professional.
27 Chambliss and Seidman, Law Order and Power supra fn. 9 is an exception.
29 “There are human forces stronger than logic. There always have been...”: Robert M. Pirsig, Zen and the Art of Motor-Cycle Maintenance: An Enquiry into Values (New York, Bantam Books paperback ed., 1974) 17.
ignore other human forces, they fabricate and depersonalize the experience of the law. Overemphasis on logic in the creation, application and interpretation of rules in language form discounts the influence of personality, the attraction of style, the assumption of validity, the nuance of obligation, the compulsion of fear, the impact of traditional thought patterns, and the immense variety of human experience, its meaning to the actor and its variable interpretation by others. Logic is a tool for the analysis of ideas. Law is a tool for the control of behaviour. Unfortunately, action is constrained little by logic, and its overemphasis creates problems for lawyers who hope to affect behaviour by according it symbolic legal meaning.

The place of formal logic in legal reasoning has been challenged. Perelman\textsuperscript{30} criticized Ulrich Klug who suggested that “legal logic is... practical logic consisting of the application to law of rules of pure or theoretical logic”.\textsuperscript{31} While conceding that the structure of syllogism and the principle of transposition apply to legal judgment, Perelman differentiated “theoretical reasoning” according to formal logic and “decisions justified on stated grounds”, which is judicial logic. The peculiar contribution of this judicial logic is to free judges from the constraints of formal logic at all stages of the decision process. Fact finding,\textsuperscript{32} subsumption of facts under particular legal norms,\textsuperscript{33} drawing legal conclusions, evaluating legal results,\textsuperscript{34} and constructing legal reasons, all offer the judge freedom from the strictures of formal logic, even without recourse to the problem of lacunae in the law. The rules of logic are analytic truths, internally verifiable and never falsifiable. Judges do not (and never can) give “analytical proofs" which are compelling. They can, according to Perelman, give “dialectical proofs which aim at convincing or at least persuading”.\textsuperscript{35} Law cannot involve a “theory of formal demonstration” yielding correct conclusions. It requires a “theory of argumentation”, in which “the force and relevancy of the grounds will be evaluated by the judge (or other legal audience) trained in a fixed tradition to whose elaboration he

\textsuperscript{30} Chaim Perelman, “What is Legal Logic?” (1968) 3 Israel Law Review 1, 1.
\textsuperscript{32} Chaim Perelman, “Judicial Reasoning” (1966) 1 Israel Law Review 373 analyses judges’ discretion in fact finding.
\textsuperscript{34} Such as assessment of damages, measure of punishment, award of costs of suit and terms of final orders.
\textsuperscript{35} Perelman, “Legal Logic” supra fn. 30, 3.

The concept of judicial logic has fundamental significance. It is not formal logic, since it does not demand verifiability. Its use of logical forms is selective and needs its own special description. It uses logical forms of induction, deduction, syllogism, analogy and distinction of cases. The question of selection of a logical form in a particular instance appears to hold the key to our understanding of the judicial process; selection is a product of unrevealed judgment, the attraction of the result yielded and the state of the precedents, all of which demand analysis.
contributes by his judgments and the reasons therefor". Perelman calls on logicians to develop a special logic for the social sciences. Lawyers could do well to heed this call. The disciplinary habits of seeking validity in circular arguments, and of searching for meanings of words in the context of other words rather than in the context of their application, are becoming embarrassing.

(c) Legal Tradition

Tradition is not always explicit or systematic. It is merely the way things have been done before. It is highly value-loaded. At one extreme, it is built up of past social responses to felt needs, according to perceived social designs, and, at the other, of unthinking responses blending over time into observable patterns which, once consciously recognized, became sufficient reason for continuance. Whether the product of thought or habit, tradition and the values it invokes need constant identification and evaluation. As these values are necessarily past values, techniques of isolating them, of testing them against current needs, and of moving the practice if necessary toward different values are essential legal functions for which deliberate and sensitive training is necessary.

Legal decision is never analytically verifiable; it is more or less acceptable, according to a well-defined, thoroughly expounded legal tradition. The forms of argument that are acceptable to this tradition are far from rigorous. Thus we are comforted if judicial reasoning conforms to formal logic, but this does not give substantial comfort that ensues from a concerted effort to justify traditional legal arguments according to a variety of criteria selected from a wide horizon, which includes alternate ideologies and consciousness of the social reality that influences them. Legal tradition is particularly important, since the articulated reasons for judicial decision potentially become part of the acceptable reasons which can be adduced by later courts according to their theory of argumentation or rationality of decision.

While we maintain the intellectual expectation that legal rules will be followed all the time, and that they are the only "stuff" of the law, we oversimplify the business of law and inhibit appreciation of the subtlety of decision-making techniques invoked daily by lawyers. There is a much smaller place for logic in law that we are prepared to accept. There is a

36 Perelman ibid. 6.
37 Distinguish falsifiability of legal decisions from verifiability. Conformity with rules of formal logic has a major role to play in the case of the former.
38 Tradition allows recourse to such "good" reasons as "it's the law" in situations where the judicial power to innovate clearly exists. It tests consistency of a rule by matching its formulae to the existing rules rather than to its impact on human action, and it allows for justification without requiring recourse to value arguments.
much larger place for tradition than we have admitted. Perelman’s "logic of argumentation" is another name for a legal tradition which assumes hierarchical premises and grants significance to a statement according to its source and not its sense.

If we use Oakshott’s two forms of moral life, the problem with lawyering is that its standard moral form is the "habit of affectation and behaviour, not a habit of reflective thought but a habit of affectation and conduct. . . . The unreflective following of a tradition of conduct in which we have been brought up". It is not the practice of professional lawyers to state what they are doing and why, since tradition requires the lawyer to give reasons for action in terms of existing rules. Without a presupposition of legal tradition which makes them acceptable, rules are insufficient reasons for action. Together, rules and tradition yield answers satisfactory to an audience sharing the tradition. Fine, but who tests the tradition and by what measures? We accept that "[t]o justify or criticize rules in purely legal terms is always to argue in a vicious circle". It is time we applied the same lesson to legal tradition.

(d) The System of Rules

Another predominant feature of legal theory is the conceptualization of law as a system of rules or, as Dworkin argues, as rules and principles. This might be a legacy of Blackstone, but it is an idea that appears with significant permutations. Weber, Perelman, Hart, Dworkin, and Raz all to some extent postulate law as a system of rules, though they probably have little else in common.

The idea of law as a consistent, gapless and complete rule structure is attractive to legal theory, but misleading when used to theorize about lawyer roles. At first sight, the paradigm of the appellate court judge seems to be incompatible with law viewed as a system of rules, though the ideas can be related in terms of the psychological experience of judging:


45 Hart, Concept of Law supra fn. 33.


48 The conceptualization of a system of rules is fundamental to the positivists, though Dworkin is, of course, critical of positivism.
the obligations to give reasons and to make decisions encourage the idea in a judge's mind that law is gapless and complete. In reality, however, all this constrains is the way a judge defends his decision, or the kind of rational argument he makes. Even then, sometimes little constraint is involved, especially at higher levels of judicial functioning. Despite professional pressure and the demand for defence of personal choice by systematic reference to traditional legal sources, the judge at the appellate level chooses and knows he chooses. His vision of himself includes law-making functions. This ensures the capacity of the legal system to find solutions to new problems in the mechanisms of judicial discretion. If the rules are complex, if his argument is "strong" enough, if his professionalism is sustained by personal charisma, his decision is unconstrained by the rules because the system allows him to innovate.

The idea of law as a system of rules controlling human behaviour has been exposed by the realists as pure fiction. The variety of decisional factors inherent in appellate judging has been analysed by Llewellyn,\(^49\) Stone\(^50\) and others so effectively that it is hard to see how the idea survives, unless we define "system" so widely that it encompasses not just principles, policies, ends, aims and varieties of reasoning, but the "rest of the world" as well. It is another case of a cognitive structure remaining significant in the discipline, though it has been demonstrated to be theoretically unsound because the critique has offered no easily graspable replacement. What has resulted is a series of subtle changes in emphasis. Modern traditional theory does not accept the Blackstonian idea that rules are found and not made. Rather, it suggests that the legal system does comprehend all possible cases, not by virtue of its rules, but by virtue of the established mechanisms which allow judgment by choice.

Law does involve rules, but a cognitive structure of law as mainly rules, and systematic rules at that, is dangerously narrow. Rules are not self-executing. They are only one facet of a complex social process. Despite appearances, the content of law is not ordered. Law is as much a product of historical accident as rational design, pursuing values in a pluralist society that are relativistic and not absolute.\(^51\) The system of rules approach

\(^49\) Karl Llewellyn, *The Common Law Tradition* supra fn. 26, 19-59, "Major Stabilising Factors in Appellate Courts". The American realists, including Llewellyn, are primarily responsible for broadening the perception of judicial thought. The traditionally accepted distinction between rule making and rule applying has been tested by them and by behavioural jurisprudence. See Wilfred E. Rumble Jr., *American Legal Realism: Scepticism, Reform and the Judicial Process* (New York, Cornell University Press, 1968) passim, William Twining, *Karl Llewellyn and the Realist Movement* supra fn. 4, passim.

\(^50\) Stone, *Legal System* supra fn. 16.

\(^51\) These ideas are explored by G. Edward White in a book review of *A History of American Law* by Lawrence M. Friedman, (1973) 59 *Virginia Law Review* 1130. White remarks: "Our legal institutions, over time, have been to an important extent repositories of the helplessness and prejudices of mankind and the disorderliness and absurdities of our experience": 1139.
overemphasises internal consistency of law as a value, camouflages personal choice, and attempts to validate law by reference to itself, as though it is a self-regulating system. It conceals important and relevant questions that lawyers should be trained to ask and to answer.

VALUES FOR LAWYERS

The general thread of these criticisms of the traditional cognitive structures in law is that they understate human judgment by reducing the task of judging (in any lawyer role) in one way or another to mechanistic routine. This routinization of task runs counter to the experience of pluralism in western societies, and to the questioning of epistemological foundations and methodologies in sister disciplines. What follows is a discussion of the relationship of law and values with a re-evaluation of moral relativism as a counter to the narrowness of traditional legal theory, and as a framework within which to sensitise lawyers to the impact of pluralism on analysis of legal phenomena. The ideological assumptions of liberalism and individual autonomy are recognized as tentative, but they are necessary to the argument, along with the assumption that pluralism should be fostered.

The lack of sophistication in legal theory is most clearly felt when lawyers are called on to handle values. Value judgment is implicit in all lawyer roles, just as it is implicit in all human decision-making, though traditional theory only acknowledges its presence in legislation and adjudication, the processes which include acknowledged capacity to change the rules. No rule structure or bureaucratic organization can obviate value judgment by anticipating all possible circumstances, or official and personal reaction. The standard of rationality required in lawyer roles differs in character according to whether the decision is clearly subsumed under the rule invoked or not. Where it is subsumed, tradition accepts the rule and the values it invokes as the reasons for the decision. Where it is not, other rationalizations, including expressed value judgments, must be used. To function with professional competence, lawyers need an appreciation of the wide range of value languages and their distinct, though overlapping, functions.

(a) The Legal System and Values

Social actions presuppose having values and pursuing them. Lawyering is obviously social action. Understanding its meaning has long been

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53 John Stuart Mill's distinction between other regarding and self regarding actions expounded in On Liberty is a useful starting point for analysing social action, though I would include a larger range of human activity in the other regarding category than he does.
attempted in terms of a search for a definition of law. Time and space
do not permit a survey of two and a half thousand years of accumulated
attempts to define law, though we can note that a definition is not true or
false, only useful or useless. In western experience, law is concerned
with conflict, and legal rules are the important mechanism for control.
These rules attempt to settle human disputes that become evident at the
meeting points of inconsistent values such as freedom and security,
political participation and disorganization, stability and change, environ-
ment and industrialization, capital and labour, individual needs for food,
sex and shelter and scarce resources. Llewellyn's vision of "law jobs" gives a full sense of the universality of these problems, and of the variety
of apparatus available to a society to settle them. By its very nature, in
balancing individual interests and social interests as then perceived, law
must implement values.

Whether admitted by legal theory or not, lawyer roles in our legal
system include adjudication, negotiation, arbitration, advice giving,
administration, legislation, enforcement, prosecution, defence, power
allocation and control, distribution of resources and authority, dispute
obviation, rule analysis, rule change, rule implementation, maintenance
of social cohesion, arbitration of moral tensions, "provision of an official
version of knowledge", protection of persons, property and promises, conferring validity on decisions and on arguments supporting them,
discretion control and creation, legal theorizing, legal education, public
education, employing values and setting standards. No doubt there are
more varieties of present legal experience. All these activities affect the
distribution of power and wealth. Any satisfactory analysis needs to
appreciate human and ideological factors; highlighting values in law is a
direct way of raising these questions for analysis. However, an immediate
problem of methodology is apparent. Lawyers exhaust much disciplinary
energy in defining words, though even the skilled artisan of the ultra-
subtle legal distinction will not assume this approach is useful in all
professional situations. That it is impossible to offer a definition of values
in general, or of any value in particular, is a perception that is difficult
to build into an explicit consideration of values by lawyers. It runs

54 Cohen, "Transcendental Nonsense" supra fn. 41, 835.
56 This definition is culturally biased and narrow. Compare that offered by Roberto
Unger, Law in Modern Society supra fn. 10, 49: "Any recurring mode of inter-
action among individuals and groups together with the more or less explicit
acknowledgement by these groups and individuals that such patterns of interaction
produce reciprocal expectations of conduct that ought to be satisfied".
57 Law in Modern Society supra fn. 10, 49.
58 I think this is a perception of H.L.A. Hart.
59 Kenneth Culp Davis, Discretionary Justice (Baton Rouge, Louianna State
counter to well nurtured disciplinary expectations, myths, theories and methodologies.

It is possible to have a working theory of values, and for this to be communicable to others. The central value in western legal thought is justice. We can probably understand the core content of justice in a society at any particular time, or, in the case of pluralist societies, what it means for identified groups. We can therefore use justice language amongst ourselves with the expectation that it will communicate something to the hearer, though we cannot use it to alter his moral conclusions if he does not share our aspirations. Justice as a working ideal (in the sense that proponents on both sides of any argument need to have systematic recourse to it), is related to a rule-based legal system. In contrast to civil and primitive legal systems, ours has a special commitment to rules as devices to create expectations and to solve disputes. Rules are generalizations of particular instances, and hence need to be applied systematically, not arbitrarily. Thus legal rules imply co-existent, specialized structures to invent, apply, evaluate and alter their specific content.

Recourse to legal rules also implies having values. First, there are the values in the rules. Given the functions of law in a society, legal rules can never be value free.

"A legal right (and, with it, a law) is the restatement, for the purpose of maintaining peaceful and just operation of institutions of society, of some but never all the recognized claims of persons within these institutions; the restatement must be in such a way that these claims can be more or less assured by the total community or its representatives. Also so can the moral, religious, political and economic implications of law be fully explored."60

Thus, law contains the values inherent in the recognized claim; it makes those values legal in a peculiar way. The process of recognizing the values as legal values has another ramification. Hart distinguishes habits from rules on the basis that the former are observable general behaviour of a group, while the latter involve "some (of the group) looking upon the behaviour in question as a general standard to be followed by the group as a whole".61 He calls this the internal aspect of rules. This suggests that in so far as the rules of a legal system import, apply and conform to values, internalization of these values, either consciously or unconsciously, occurs.

60 Paul Bohannan, "The Differing Realms of Law", in Laura Nader ed., "The Ethnography of Law" (1965) 67 American Anthropologist 37. When analysing the relationship between rules and values it is useful to distinguish traditional microjustice which concentrates on the values of individuals and macrojustice which examines the values in the system at large: Alfred F. Conard, "Macrojustice: A Systematic Approach to Conflict Resolution" (1971) 5 Georgia Law Review 415.

61 Hart, Concept of Law supra fn. 33, 55.
Second, a legal system that uses rules as a primary device necessarily has to evolve a principle of distributive justice, or the habit of treating like cases alike, a paraphernalia of sub-rules for making these distinctions raw or micro-refined, depending on its sophistication. This is the primary task of the specialized legal apparatus of the rule-based legal system.

Third, ideal justice is the view of what the system is or could be doing right. All systems can be characterized by their officials and participants as ‘‘just’’, and as capable of reform in so far as they are not, though perception of an ability to change law is not culturally shared by any means. There is an obvious connection between development of higher ideals for law, a society’s awareness of its capacity for self-determination, and its vision of law as an instrumental tool in social processes. This helps explain why a concept of justice is not a world-wide phenomenon. Societies only need it if they have an appreciation of their capacity to be self-determining and an instrumental view of law. They then need to develop “ideals” toward which law should move and which constitute a social vision. At the same time, a rule-based legal system develops a tradition which defines justice in terms of itself; the values in the rules are related to the idealized values. Perelman says:

‘‘[T]he rule of justice results from a tendency, natural to the human mind, to regard as normal and rational and so as requiring no supplementary justification, a course of behaviour in conformity with precedent. In any social order, then, everything that is traditional will appear as a matter of course. Per contra every deviation, every change, will have to be justified. This situation, which results from application of the principle of inertia in the life of the mind, explains the role played by tradition. It is tradition that is taken as a starting point, it is tradition that is criticised and it is tradition that is maintained in so far as no reason is seen for departing from it. And this holds good in many diverse fields—ethics or law, science or philosophy.’’

The Ideal Vision of Man in Society, or justice, is an argument for departing from tradition (or rules) and a defence of the status quo. Hanna Pitkin says:

‘‘[T]hough we learn the meaning of terms like “justice” and acquire some standards of what is just in connection with existing institutions and practices, we can and do use them to criticise and change those institutions and practices.’’

62 In the Aristotelian sense: Book V, Nicomachean Ethics.

63 The same ideal can have varying political significance depending on the balance of power and the sources of authority in a particular society. A theory of natural law can bolster a regime or become a tool of successful revolution. Likewise with positivism. These theories have political significance that must be understood if lawyers are to develop a capacity for diagnosis of sources of social tension, and their command of the range of devices available for its non-violent dissipation.

64 Perelman, The Idea of Justice supra fn. 44, 86.

65 Hanna Pitkin, Wittgenstein and Justice supra fn. 5, 189.
From this vantage point, we can see that justice cannot be defined in terms of content—it is a relative social value. It can have meaningful application in a loose language structure by which people with shared perceptions confer praise, make arguments, support cases and suggest law reforms. Though it can be learned and used, it has limited effectiveness as a tool of political or social advancement since its content is relative to each man’s experience. If Hanna Pitkin is right when she says “We value a just judgment or a just society because we know what justice is”, she must concede what we call justice is not what the Greeks thought it was. If each of us “defined” justice to our personal satisfaction, we would quickly find little agreement with our neighbour even in the fairly simple cases of distributive justice.

At least since Hobbes classified a natural existence as solitary, poor, nasty, brutish and short, social theory has conceded man needs a society. The particular construction of that society can be infinitely variable, as can the content and methodologies of its “law”. Weber suggested we can categorize, quantify and differentiate the types of devices available to a group to perform its essential law jobs. Though much work needs to be done to establish this, it is probable that a society that does not resort to rules will have little need for allied concepts of a legal system, distributive justice and ideal justice. It will look to other devices, equally legitimate and socially effective. (The only rider concerns the survival potential of a system that uses physical power to sustain itself. An opinion common to all theorists is that such a technique could only be partially and temporarily successful.)

Once we look at ideas in their particular social context, the relativity of the idea of justice is obvious, though it continues to be systematically neglected by legal theory.

(b) Values and Individual Lawyers

Lawyers as a group do not debate values, maybe because they think their professional function requires them to remain in the system. Much

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66 Hanna Pitkin, ibid. 225 (emphasis in original).
67 Weber, Law in Economy and Society supra fn. 43.
69 The point that every society must definitionally provide a legal system of some kind is conceded; the social vision of particular rules constituting a conceptually separate legal system is not essential to societies.
70 If the society is self-determining and has an instrumental view of law, it will tend to develop familiar patterns of value arguments and reliance on rules for governance of behaviour.
72 Unger, Law in Modern Society supra fn. 10, 34: “But if no basis for cognitive and moral consensus existed, the making and applying of rules would be impossible, except under a dictatorial regime. Even then, the commands of the dictator would likely be ineffective.”
criticism of legal education voices legitimate dissatisfaction with the comfortableness of law teachers in their "moral neutrality". No human social function, certainly not teaching, and never law teaching, can be performed from a neutral moral position. It can be done by people who say they do not care about morals (as some law teachers have been heard to say), but that is simply because they do not admit what they are doing.

Defining values involves us as individuals. Our "definition" of values serves to self-define in a way that our definitions of numbers or of paper do not. It makes a personal statement about ourselves, and the people we accept, which is visible even if we try to present it as abstract. Value statements involve definitions of ego boundaries.

"Boundaries and values change. Ego boundary applies to every situation in life. Assume you are in favour of the freedom movement, of acceptance of the Negro. . . . So you identify with him. . . . The boundary disappears between you and the Negro. But immediately a new boundary is created—now the enemy is not the Negro, but the non-freedom fighter. . . . So you create a new boundary. . . . There is no chance of living without a boundary."75

A parallel process occurs in societies at large.76

Personal value statements are complex. Our self-selection of values involves inclusion and exclusion. It creates (at least) two kinds of tension: invisible internal tension between the values personally selected and rejected, and visible external tension of relating the self to others who share similar values and rejecting people who do not. This is important to a lawyer. The resolution of the invisible tension defines much of the ego boundary of the self and influences behaviour. Being a lawyer involves professional norms, relationships and roles that are enormously value-loaded. The legal functionary is required to internalize the legal rules and their inherent values as an individual. His professional functioning involves him internalizing the traditions as well. A lawyer confronted with a significant issue of personal values can find his professional identity in question. If he rejects the system's value choices, he faces acute problems of professional identification. Thus a tendency to ignore value questions is reinforced by their psychological impact.

Selection of personal values is a long process. Though only in part conscious, the process cannot be depersonalized or abstracted from experience, even when the apparatus of a sophisticated legal system camouflages individual decision. Take justice as an example

73 An historical analysis of positivism in legal theory and moral neutrality in legal education is overdue.
76 Perls, ibid., "Any society will quickly form its own boundaries".
The meaning of 'justice is learned from observing the kinds of situation in which the various members of the family of words occur, the kinds of changes in actions or affect or relationship they produce, in short their signalling functions. . . . The meaning of 'justice can be learned as much from what we do about 'it' as from how 'it' looks. Like the meaning of 'God', it can be learned even if the phenomenon is never experienced or is experienced only partially or imperfectly."

Lawyers do, see, act and experience justice (and injustice) first hand. To the extent they believe in it, they have internalized a set of signalling functions. Recognition of the existence of its signalling function is consistent with a personal belief that the experience of justice, like the experience of morality generally, is a social experience, that the value does not objectively exist, and that its reference is continually changing for the individual and society.

Psychology and professionalism are not the only reasons for lawyers eschewing value analysis. The history of legal ideas had an important impact on criteria of relevance. Positivists post John Austin, or correctly, post Bentham, since he was the originator of the idea for modern purposes, worked to establish an intellectual environment in which any rule or system could be understood as a working legal reality, even though the values it pursued and implemented were regarded by the observer as immoral. Since World War II they have been strongly attacked on the grounds that the divorce of law from morality implied moral neutrality.

However, it would be more correct to regard a positivist as a person who is not restrained from moral decisions—he is required to make them like everyone else, once he recognizes the law and the legal system as valid. Positivists brought much wisdom and clarity of thought to the study of law not readily apparent in the massive debates. They, more than others, deserve credit for providing lawyers with analytical tools which clear the air of much mist. A science of law can begin only if we have a perception of what we are looking for. In Kelsenian theory, analytical criteria of a legal system cannot be used to judge a system; they can be used to identify a system. Though a subjectivist, he never suggested that moral

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77 Hanna Pitkin, *Wittgenstein and Justice* supra fn. 5, 176.
78 Hans Kelsen is especially criticized for this, though his normative system is unequivocally admitted to be grounded in social beliefs and is far from neutral. Raz, *The Concept of A Legal System* supra fn. 47, 101 examines the relationship between Kelsen's grundnorm and the “first” constitution. His criticisms are directed against treating a first constitution as the grundnorm. In Kelsen's theory, however, the grundnorm authorizes the first constitution but is different from it. The grundnorm invokes the political, social, cognitive and legal realities underlying a legal system. Since this norm can never be value free, even if we concede it is difficult to classify philosophically, we are analytically required to see values in the system in terms of actualities and not myths. See Ronald Moore, “Kelsen's Puzzling 'Descriptive Ought'” (1973) 20 *UCLA Law Review* 1269.
79 Llewellyn, “Science” supra fn. 2.
judgments should not be made, and suggested his personal basis for judgment in the "What is Justice?" essay.\(^80\)

As far as I understand them, no subjectivist is suggesting that human values are merely what they seem to be, or that responsibility for them belongs to upbringing, enculturation, the system, neuro-psychology or any other handy excuse. The subjectivist is suggesting that arguments relying on absolutes hold little or no intellectual power to persuade unless moral judgments are shared, and agreement on the facts and their value implications is forthcoming, a position now common in moral philosophy.\(^81\) Moral argument cannot establish absolute values. Doing something about values therefore involves subjectivists in doing something very different from preaching, and akin to what determinists do when justifying punishment.\(^82\) Moral persuasion is not outside the subjectivist's scope; he should do it better because he appreciates what he is up against.\(^83\)

**CONCLUSION**

Given the common heritage of law and philosophy, we would expect lawyers to have developed a detailed, intellectually satisfying disciplinary capacity to handle value arguments. Instead, traditional theory has developed its four cognitive structures and has popularized the idea that they are utilized by detached and autonomous lawyers. Disciplinary narrowness has other facets: one hundred years of misapplied positivism, incestuous legal history,\(^84\) unexamined constitutional ideologies presented as everyman's Utopia,\(^85\) university law schools that seek their justification in training professionals rather than in social criticism, and perception of law as a separate, internally viable science that is detached from related fields of modern thought. Under the guise of being free of politics, law is defined as an autonomous and neutral discipline, and justification of legal reasoning is sought in law itself as if this was theoretically possible or socially desirable.

Like logic, rationality cannot be the only intellectual tool at the disposal of legal theory. Some healthy cynicism would not be misplaced. Nor

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\(^84\) T. S. Midgley, "The Role of Legal History" (1975) 2 *British Journal of Law and Society* 153.

\(^85\) The assumption of the transferability of British constitutional democracy to the Third World has been soundly attacked.
would wonderment, or unrestrained imagination—if only to create a pleasant contrast to otherwise dull legal literature. But there is more than this to recommend alternative intellectual skills: myths, metaphors, fictions, and images are as much the “stuff” of the law as reasoned argument. The discipline should provide appropriate tools of analysis for these neglected legal experiences, including some attempt to explain why we have them.

While autonomy in other disciplines has been countered more or less successfully by internal debates, emphasis on the four cognitive structures has enabled law to establish a surprisingly calm image. Internal dispute has been quietly dissipated by professional disinterest, coupled with a thick blanket of publishing protocols which stop the debates (and there are some!) from reaching the lively crescendo of personality against personality, school against school, idea against idea, presented in a vivid and vibrant literature. Detachment has become the lawyer's professional characteristic, adjectives his lost vocabulary. He has been taught to relate to the system so effectively he scarcely questions its values. If he does, he seeks answers outside his legal experience and is encouraged by the legal curricula's narrow definition of lawyering as a value neutral skill. No wonder lawyers have traditionally found areas of law where moral conflict surfaces very difficult to handle.

Recent reaction to the positivism and natural law debate has been to give it a small corner in the non-compulsory law school curricula. Rightly so, till redirection of its material sensitizes lawyers to the complexities of values in a pluralist society. Meanwhile, jurisprudence must continue its ad hoc eclecticism. The hoarding of gems from other disciplines will continue because legal thought is an inadequate and narrow frame for analysis of law, especially of the relationship between law, tradition and values. Only when disciplinary theory is widened to comprehend the social

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86 Consider the intellectual paths that reveal themselves when we analyse the acceptable rationalizations of law as myths satisfying ideological, psychological and social needs. Rationality in the law may be the biggest myth of all.

87 Felix Cohen, “Transcendental Nonsense” supra fn. 41 remains an unsurpassed critique of legal fiction.

88 For instance, mathematical versus political economics, analytical versus moral philosophies, Freudian versus experimental psychologies, structural versus historical anthropologies, etc.


90 The victimless crimes problem appears to be resolving itself on considerations of police convenience while lawyers stand in the wings. In other areas, such as obscenity, they cannot escape and are clearly at sea. How can they separate pornography from fine art without a vocabulary of meaningful distinctions? Where else can they discover the vocabulary but from the literature of aesthetics? See Thomas Cowen, “The Law at Finnegan’s Wake” (1976) 29 Rutgers Law Review 259, 275-6.

91 Its “magpie nature” is described by Colin Campbell, “Legal Thought and Juristic Values” supra fn. 17, 24-5.
reality of law and objective analysis of its own myths, will it be able to borrow meaningfully and not haphazardly from other disciplines.

The discipline of law engenders deep intellectual conservatism, and much unnecessary and inappropriate conservativism \(^{92}\) will remain until lawyers cease accepting "legal phenomena" as their criterion of relevance. Any widening of view offers attractive gains in self-perception and, when intelligently controlled by a perceptive mind, it can produce a master-piece of critical analysis. \(^{93}\)

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\(^{92}\) If law is expected to control terrorism, scientific experimentation and use of the environment, a rethink of its established methods and institutions is essential.