University of Miami Law School
University of Miami School of Law Institutional Repository

Articles | Faculty and Deans

1986

Law-The Last of the Universal Disciplines

Soia Mentschikoff
University of Miami School of Law

Irwin P. Stotzky
University of Miami School of Law, istotzky@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

 Part of the Legal Education Commons, and the Legal Profession Commons

Recommended Citation
Soia Mentschikoff and Irwin P. Stotzky, *Law-The Last of the Universal Disciplines*, 54 *U. Cin. L. Rev.* 695 (1986).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF

CINCINNATI LAW REVIEW

PUBLISHED QUARTERLY BY THE BOARD OF EDITORS

VOLUME 54 1986 No. 3

Law—The Last of the Universal Disciplines*

*By Soia Mentschikoff** &*
*Irwin P. Stotzky****

PREFACE: A NOTE OF EXPLANATION

Soia Mentschikoff delivered the Robert S. Marx Lectures at the University of Cincinnati College of Law on April 13 and 14, 1981. Due to a very

* Copyright 1985 by Soia Mentschikoff and Irwin P. Stotzky

** Former Dean and Distinguished Professor of Law, University of Miami.

Soia Mentschikoff lived a remarkable life. By any standard, her life in the law set the guidelines for excellence in the legal profession. She was universally regarded by those in the legal profession as an innovator, an individual who set exceptionally high standards for legal scholars, practicing lawyers, and students.

Her record is the stuff of which legends are made. In the thirties, she became one of the very few women to join a Wall Street law firm and be made a partner. She later became the first woman to teach at the Harvard Law School—at the school's invitation and at a time when no women students were admitted. She went on to help Karl Llewellyn draft and push through the legislatures in almost every state in the country the most significant statutory enactment in the history of American law—the Uniform Commercial Code. During this period, Soia Mentschikoff and Karl Llewellyn married and moved to Chicago, where she became the first woman to teach at the University of Chicago Law School. There, they created what can only be called an intellectual enclave within a larger institutional structure. Later, Ms. Mentschikoff reinvigorated the University of Miami Law School, turning it into a respected and important center for law training and intellectual ferment. At approximately the same time that she became Dean at Miami, Ms. Mentschikoff became the first woman to be elected president of the Association of American Law Schools. She was also the first woman mentioned as a possible nominee for the Supreme Court of the United States. For further discussion about Ms. Mentschikoff, see Stotzky, *Soia's Way: Toiling in the Common Law Tradition,* 38 U. MIAMI L. REV. 373 (1984); Stotzky, *Soia Mentschikoff: A Tribute for the Association of American Law Schools* (forthcoming).

*** Professor of Law, University of Miami. My work on this essay was supported by a research grant from the University of Miami School of Law. I am grateful to Amy Ronner, Diane Seaberg, and Susan Tarbe for comments they made on earlier drafts. I am particularly grateful to my research assistant, Anne Hayes, for the benefit of her criticism and counsel during the completion of this essay. Errors are mine.

heavy work schedule and her untimely illness and subsequent death, however, she never had a chance to work her preliminary thoughts, as expressed in her lectures, into an article. In September, 1984, Gordon Christenson, former Dean of the University of Cincinnati College of Law, contacted me and asked me if I would attempt to recreate Soia's views, fill in the interstices of her lectures, and put them into article form.[1] *I assume he asked me to do this because of my relationship with Soia. I had worked with Soia Mentschikoff for ten years (from 1974-1984) and had co-authored a casebook and teachers' manual with her. I had also spent a considerable amount of time talking with her about the nature of law and related issues. I am, therefore, somewhat familiar with her thoughts and work.*

In this article I have attempted to incorporate into a coherent theme what I understand to be Soia's thoughts about the issues she discussed in the lectures. I used the transcript of Soia's lectures as an outline for the article. Wherever possible, I used her language, examples, and ideas from the lectures to write the article. I also confined the discussion in the article to the themes she presented in her lectures. Much of the detail of the paper is based on conversations I had with Soia over the years; much of it follows her written works and spoken words. Some of it is mere speculation on my part. Although I agree with many of the themes raised in the article, I also disagree with some parts of it. At certain points in the article, therefore, I note my disagreement in footnotes.

One last caveat needs to be made. I have tried to be true to Soia's beliefs as expressed in her lectures and writings throughout the piece.[2] *But one can*

---

1. Soia Mentschikoff had great vision and knew instinctively what it took to be a great lawyer and educator. In the field of legal education, she believed especially in the importance of skills competence, diversity in faculty, and links to other disciplines of knowledge. Dean Christenson wished to have a wider audience share in Soia's views on law, and asked me to work on this article for that very reason.

2. For those interested in the scholarship of Soia Mentschikoff which is relevant to the ideas expressed in this article, one should consult the following articles: Haggard and Mentschikoff, *Responsible Decision Making in Dispute Settlement and Decision Making* and *Decision Consensus in Commercial Arbitration,* in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 277, 295 (1977); Mentschikoff, *Codification,* in AMERICAN LAW: THE THIRD CENTURY 195 (1976); Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846 (1961), *reprinted in* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT (1968); Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry,* 17 LAW & CONTEMP. PROBS. 698 (1952).

Other writings of Soia Mentschikoff which should be consulted but which are not as directly relevant to this article include: Mentschikoff, *Disagreement on Substantive Standards and What to Do About It,* 58 AMERICAN SOCIETY OF INTERNATIONAL LAW, *Proceedings* 129 (1964); Mentschikoff, *Highlights of the Uniform Commercial Code,* 27 MOD. 167 (1964); Mentschikoff, *How to Handle Letters of Credit,* 19 BUS. LAW 107 (1963); Mentschikoff, *Letters of Credit: The Need For Uniform Legislation,* 23 U. CHI. L. REV. 571 (1956); Mentshikoff, *Peaceful Repossession Under The Uniform Commercial Code: A Constitutional and Economic Analysis,* 14 WM. & MARY L. REV. 767 (1973); Mentschikoff,

never be sure exactly what Soia meant, because her lectures were merely an initial attempt to put together her years of thought about and experiences with law. Further, the themes she explored in her lectures are incredibly diverse and cover vast amounts of territory, some of which appears unconnected. Indeed, her lectures read like a partially completed mosaic. My task was to piece together the missing tiles in the mosaic. The article, therefore, is only a preliminary exposition of some of her views. It does not purport to be a fully developed theory of law. Moreover, Soia was a very complex human being and I can only hope to have accurately sketched some of her thoughts.[3] *I might add that the task was very difficult.*

I. MYOPIC VISION

> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it may be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.
>
> O. Holmes, *The Common Law* 5 (1881).

Oliver Wendell Holmes had a point. But his point is not limited to rules of law. It extends also to the practice of law and the training of lawyers. Furthermore, Holmes' point as applied to the

---

Reflections of a Drafter: Soia Mentschikoff, 43 OHIO ST. L.J. 537 (1982); Mentschikoff, *The Uniform Commercial Code, An Experiment in Democracy in Drafting,* 36 A.B.A. J. 419 (1950); Morse, Mentschikoff, Dillon, Julin & Hyde, *The Demand For Legal Education—Five Views,* 50 FLA. B.J. 70 (1976).

Finally, there are many unpublished notes, rough drafts, letters, and studies by Soia Mentschikoff and various collaborators which cover a wide variety of topics and are being organized and classified at the University of Miami School of Law. Professor William Twining of University College, London, and I have recently looked through these papers. They will be catalogued at a later date by an archivist and made into a permanent Soia Mentschikoff collection.

3. Soia's complexity and humanity is perhaps best expressed by the relationships she developed with the people she met in the many years she toiled in the law. Anyone who ever met her has a "Soia story," and this is the stuff from which legends grow. *See* Stotzky, *Soia's Way: Toiling in the Common Law Tradition,* 38 U. MIAMI L. REV. 373 (1984); Stotzky, *Soia Mentschikoff: A Tribute for the Association of American Law Schools,* (forthcoming)(1985).

legal profession is both partially right and partially wrong. Law practice and legal education simultaneously thrive and suffer through the uses of tradition.

In a twist on Holmes' theme, images of the past are being used by many legal actors to justify a myopic vision of the legal world. There is a contemporary movement in our legal culture to use "tradition" as the scapegoat for a rather narrow view of what law is about and how one should be trained and should perform within that culture. The push for "specialization" at the Bar,[4] the drive toward teaching students as many rules of law as three years of legal education permit,[5] or merely teaching students clinical, "practical" skills with very little, if any, emphasis on substantive knowledge about the processes of the law,[6] are all

---

4. For many years, the legal profession has debated the merits of recognizing legal specialization. Indeed, the controversy has generated a great deal of commentary. A bibliography of such materials through 1979 appears at 34 THE RECORD 441 (1979). By 1980, in a majority of the states, the Bar had either implemented a specialization plan or had considered seriously adopting such a plan. ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULLETIN No. 7, 36-42 (1980). Moreover, despite the intensity of the controversy over these plans, *de facto* recognition of specialization has certainly been accepted by the Bar. The debate over whether to approve specialization plans has rarely, if ever, focused upon the effect of such plans on society as a whole. Further, the adoption of specialization programs has been largely but incorrectly viewed as enhancing, rather than diminishing, lawyer competence.

5. In almost every law school in the nation, more professors than we like to admit continue to require students to learn only rules of law. In some sense, the "curse of Langdell" has never been laid to rest. It has periodically resurfaced with a vengeance in legal education in the twentieth century. Indeed, it is arguable that, in the more than approximately one hundred and fifteen years since Langdell was appointed Dean of the Harvard Law School, there have been few, if any, radical changes in American legal education.

Christopher C. Langdell believed that the purpose and method of legal education was to teach students to uncover the principles of law by analyzing their source, the cases. He placed great emphasis on law as a science, analogous to the physical sciences. As a science, law involved the search for general, consistent principles, to be discovered by the study of particular instances. Further, reported cases were the source of the study. Because Langdell believed that in a law school students should study only the law, every source material except for cases lay outside the boundaries of a law school education. A broad liberal arts education, therefore, was not the function of a law school. For a discussion of Langdell's views, *see, e.g.*, W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 10-12 (1973); THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL (1918); A. SUTHERLAND, THE LAW AT HARVARD (1917); K. LLEWELLYN, JURISPRUDENCE 376-79 (1962); Fessenden, *The Rebirth of the Harvard Law School,* 33 HARV. L. REV. 493 (1920). On some level, realism as a movement was a reaction to "formalism," and Langdell was seen as the leading representative of that approach.

6. Clinical exercises are often performed by students who do not possess the necessary substantive knowledge about the area in which the problem arises. For example, certain trial skills, such as cross-examination, are often taught in the context of a problem with which a student is entirely unfamiliar. This leads to a false assumption

manifestations of the argument that lawyers traditionally need to know only information per se. Indeed, it is no exaggeration to say that the legal world increasingly is becoming a one-dimensional world, a world where people are judged as though they were one-dimensional characters, "paper people under cardboard stars," to paraphrase an old song.[7] Not only people, but also legal institutions are viewed in exceptionally narrow and one-dimensional ways. Contrary to this view, the law does not consist only of adjudication and formal legal structures. It consists also of non-binding, informal customs between individuals and groups.

The drive toward this limited view of the world permeates the practice of law. It is fashionable to tell people that they do not know anything unless they have a great deal of knowledge about a very tiny aspect of a particular field of law. Hence, it is argued that a solid legal education, as well as competent law practice, should consist of the teaching and practice of infinitesimal detail that may or may not make a difference in the overall theory and practice of law. This emphasis on detail, on seeing more of the little and less of the whole, turns out lawyers who lack an overall understanding of the system as a whole. This misdirected educational and practice emphasis thus turns out lawyers who see less and less of what the world is really like. To put it another way, their legal lenses have severe blinders on them. This, in

---

by students that knowledge of "how to do it"—how to perform a cross-examination of a witness, for example,—is sufficient *without* knowledge of the field of law at issue. In out-house clinical programs, where students are placed in public agencies such as a State Attorney's office or a Public Defender's office, the problem of lack of knowledge is compounded. Often, supervision of the student is non-existent. Students are thrown into a process where representation of clients is left almost totally to them. At other times, the supervising attorney is himself minimally competent or worse, and therefore fosters the false view that lack of substantive knowledge is acceptable. Students have a role model that supports their false image of reality. If a lawyer does not know the law in detail, students perceive that such knowledge is an unnecessary ingredient of a successful lawyer. In-house clinical programs are more likely to teach the significance of knowledge. But even these programs often lack proper supervision and often fail to teach students the importance of knowledge. There are, of course, a number of law schools that do a very good job of pushing knowledge as a key aspect of trial advocacy. We note, for example, the Clinical and Trial Advocacy Programs at the University of Miami School of Law, and the in-house clinic at the University of Chicago Law School.

None of this is to say that clinical education cannot make or has not made a significant contribution to legal education. The debate over the methods and significance of clinical education continues unabated. For a discussion of this debate and a general bibliography of the literature in this area, see Anderson & Catz, *Towards a Comprehensive Approach to Clinical Education: A Response to the New Reality,* 59 WASH. U.L.Q. 727 (1981).

7. *It's Only A Paper Moon,* music by H. Arlen, lyrics by B. Rose & E. Harburg (1933).

turn, limits their perceptions of the social world. We intend, like the little boy and the emperor,[8] to expose the fact that this view of law has no clothes on; it is intellectually barren. It is also a disaster to our legal culture and to the larger civilization in which our law thrives. Such a narrow view fails totally to deal with a very complex world.

All of what we have said does not mean or even suggest that knowledge is *unimportant* . On the contrary, the acquisition and use of knowledge is the single most significant factor in the teaching and practice of law. But it is not knowledge of infinitesimal detail that is needed. Rather, one needs to acquire knowledge not only of rules of law, but also of the processes of the formal and informal legal system, and of how things interact within those processes. Moreover, that knowledge must constantly be subjected to analysis and criticism.

A holistic approach to analyzing problems as they arise in the world is a prerequisite to the training of an artist in the law. Lawyers must acquire knowledge of how people interact, think, and operate. But this is not all. Lawyers must understand how institutions, forces, desires, and dreams interact in any legal and social context. This is so precisely because law deals with the interactions of people and institutions in particular social settings. There is a relation, always, between what is going on in the world and what is happening in the statutory or case law. On the formal legal side, this is seen in the court's approach to cases and in the court's decisions about the issues that they perceive as arising in the cases.

Law schools should, therefore, be in the business of training people in the theory and craft of law. Again, on the formal legal side, lawyers must understand how the courts behave, and what the role of counsel is in the behavior of the courts. They must also understand the impact the court's action has on counsel's behavior, on the client's situation, and even on the life situation itself. They must be taught to determine whether what counsel does is good, bad, or indifferent. Further, lawyers must be trained to learn how to judge what the effects of the court's and counsel's actions are on the society as a whole.

All of this follows from the fact that law is an art, requiring vision and good sense. Theory and craft are intertwined and are essential concepts of the process of learning how to become an artist

8. H.C. ANDERSEN, *The Emperor's New Clothes,* in THE COMPLETE ANDERSEN (1947).

in law. The best practical training a law school can give to any lawyer is the study of law as a liberal art. In this vision of legal education, there are three necessary components to a first rate education—the technical, the intellectual, and the spiritual.[9] With-

9. The results of a true liberal arts education, which combines the "threefold cord" of the technical, intellectual, and spiritual aspects of law, are clearly visible in the artist in law. The problems of how to create a liberal arts curriculum in law schools, which provides this "cord" of knowledge and how to engage as a student in this educational process, however, has been the subject of debate in law schools and in the legal profession for many years. *See* Bunn, Cavers, Falknor, Feczer, Moreau & Llewellyn, *The Place of Skills in Legal Education,* 45 COLUM. L. REV. 345 (1945); Abramson, *Law, Humanities and the Hinterlands,* 30 J. LEGAL EDUC. 27 (1979); Elkins, *The Paradox of a Life in Law,* 40 U. PITT. L. REV. 129 (1979); Freedman, *The Law as Educator,* 70 IOWA L. REV. 487 (1985); Freilich, *The Divisional Program at Yale: An Experiment For Legal Education in Depth,* 21 J. LEGAL EDUC. 443 (1969); Fuller, *On Teaching Law,* 3 STAN. L. REV. 35 (1950); Gellhorn, *"Humanistic Perspectives": A Critique,* 32 J. LEGAL EDUC. 99 (1982); Hazard, Jr., *Competing Aims of Legal Education,* 59 N.D.L. REV. 533 (1979); Hall, *Toward a Liberal Legal Education,* 30 IOWA L. REV. 394 (1945); Kalven, *Liberal Education, The Case System, and Jurisprudence,* 14 U. CHI. L. REV. 215 (1947); Kronstein, *Experience of Other Countries For Our Use in Building Legal Education After The War,* 30 IOWA L. REV. 373 (1945); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203 (1943); Llewellyn, *McDougal and Lasswell Plan For Legal Education,* 43 COLUM. L. REV. 476 (1943)(a critique of the plan for legal education proposed in the Lasswell and McDougal article cited above); Murphy, *The Role of "Non-Practical" or "Cultural" Courses,* 15 J. LEGAL EDUC. 139 (1962); Pound, *Legal Education in a Unifying World,* 27 N.Y.U. L. REV. 5 (1952); Reich, *Toward The Humanistic Study of Law,* 74 YALE L.J. 1402 (1965); Rheinstein, *Education For Legal Craftsmanship,* 30 IOWA L. REV. 408 (1945); Van Doren, *Implications of Jurisprudence to Law Teaching and Student Learning,* 12 STETSON L. REV. 613 (1983); White, *The Study of Law as an Intellectual Activity,* 32 J. LEGAL EDUC. 1 (1982); *A Symposium in Honor of Hardy C. Dillard: Legal Education,* 54 VA. L. REV. 583 (1968); Comment, *Legal Theory and Legal Education,* 79 YALE L.J. 1153 (1970); *Report and Recommendations of The Task Force on Lawyer Competency: The Role of The Law Schools* (1979) ABA SEC. OF LEG. ED. AND ADM. TO BAR.

Soia Mentschikoff believed so strongly in the law as a liberal art view of legal education that when she assumed the Deanship at Miami in 1974, she constructed a curriculum to meet the goal of training the artist in law. The linchpin of her program was reflected in the first year curriculum. In an attempt to teach basic craft skills combined with theory, she introduced a course called "Elements of the Law." The implementation of the skills competency component in the first year was directly strengthened through the creation of an ambitious research and writing program. The course in Elements deals with the theoretical foundations of case and statutory analysis, doctrinal synthesis, factual perceptions, and the role of law in our society. The theoretical components are combined with a stringent tutorial course in legal research and writing, taught by selected tutors. This course teaches basic research, the use of case, statutory, and regulatory materials, all taught in a series of research and writing assignments, and ends with elementary moot court. The materials in Elements were developed over a thirty year period. Those materials were published as a casebook in 1981: S. MENTSCHIKOFF AND I. STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW—ELEMENTS (1981). An extensive teacher's manual to this Casebook which discusses, *inter alia,* the jurisprudential underpinnings of a liberal arts approach to law training, was published in 1983. The approximately twelve years of legal research and writing assignments are on file at the University of Miami School of Law.

out a rigorous training in effective technical proficiency, the mechanical aspects of law, one lacks the base for theory. The intellectual side of the art of law emanates from and is dependent upon the level of technical proficiency enjoyed by the lawyer. Just as in other arts, technical mastery liberates instead of binds. It allows one to explore the means to justice or to political, social, or commercial wisdom, or whatever other goals may be thought desirable by the larger society. It builds on tradition, on what came before, to allow brilliant new creations in the resolutions of disputes or in the pursuit of justice. At the same time, the judge, lawyer, or scholar is forced to be continually responsive to reasoned justification within that tradition. Stated otherwise, the search for the ideal result is limited by the means and methods one can employ to reach that result—tradition.[10] Yet this very limitation of means in the art of law, as in any other art, liberates as well as binds the artist.[11] It frees up the creative energies of the artist. It also allows

---

10. By use of the word "tradition," in this context, we mean the ways of arguing, writing, and thinking about legal problems that have been used by the actors in our legal culture throughout the past centuries. We also mean to include the study and use of the dispute resolution mechanisms employed within that culture, and the impact those mechanisms have on the behavior of individuals, groups, and the institutions within that larger society. Moreover, ways of thinking, writing, and arguing affect the behavior of individuals and groups, and more generally affect society and its institutions. These factors are therefore included within our definition of tradition.

11. The tension between ideal result and limitation of means and methods exists in all of our arts. It is, we believe, a prerequisite for the definition of an endeavor as an art form. It is also far more than a simple conflict between polar extremes. For example, almost all painting that is considered by our society as having artistic value is restricted to a single flat surface. "Three dimensional painting" does not exist. This is, clearly, a significant constriction of reality. Further, the range of variations in such things as color, tone, and dimension found in the natural world are strikingly and geometrically greater than the values of luminosity or clarity in painting. But we believe that these very limitations both bind and free up the art of painting. To put it another way, it may be that painting, as we understand it, would not exist without the severe restrictions that define its reality. Certainly, the case is the same for architecture, music, and any other art one can imagine. Moreover, we are convinced that brilliant new innovations in architecture, in music, in painting, as well as in law, come from building upon the almost infinitely rich, powerful, and contrasting resources of what came before in that art. That is, we believe that such creations, to be true creations, must employ the experience of all the traditions suggested by the history of that particular art in all its stages for their working materials and methods. We note as examples of brilliant new artistic creations that built upon tradition in the arts of architecture, music, and painting, the Frank Lloyd Wright School of Architecture, Jazz music, and Impressionist painting. While all of these art forms were new and different, they owed their creation to the traditions that came before and upon which all of these arts, of necessity, built. The same, of course, can be said about brilliant new theories in the social and physical sciences. Marx's work about man and society, and Einstein's theory of relativity, for example, were the results of building on tradition. For a somewhat similar view of law as an art see Christenson, *In Pursuit of The Art of Law*, 21 AM. U.L. REV. 629 (1972); J. WHITE, THE LEGAL IMAGINATION xxiv-xxv (1973).

the legal actor to strive for beauty or service in the art of law, both within and without formal legal institutions. This is the fulfillment of the spiritual aspect of the law.

Law is also an activity; it is something that people do. It is a set of social and intellectual practices that define a culture in which each lawyer must learn to function both as a lawyer and as an individual human being.[12] For example, on both an elementary and sophisticated level, one object of a solid legal education is to teach students to master the language fashioned by courts as the means by which cases arising on particular issues are to be addressed, and to subject that discourse to analysis and criticism. To think in one-dimensional terms, to think that merely learning detailed information about a very small area is the task of the lawyer, therefore, is a very dangerous position to espouse. It bears no relationship to reality.

But the problem runs even deeper. Law is not simply a separate culture; it is also a part of a broader culture. As part of the greater civilization, law bears a strong relationship to the ways people act, the ways people are organized, and the ways people use their intellectual and material resources. Indeed, one of the needs of the lawyer is to understand the roles law plays in society. In a very general sense, law provides the maintenance aspect of order which is a precondition to any complex civilization. Law makes order express. Furthermore, law uses tools from the rest of the culture—language, logic, writing—to achieve that order. It also borrows from the other disciplines to create the subject matter of its thinking. It borrows the whole stock of standards, ethics, and practices from the economic and social spheres of our civilization to use as its materials for the working of its ways. Law also adds enormously to the intellectual development of our society. It forces people to generalize about likenesses and differences. Not least of all, law forces us to think about justice.[13]

---

12. Law demands that the individual be able to think one thing and yet, within certain ethical and practical boundaries, say something quite different. It takes a special kind of mind and character to handle this contradictory requirement without damage to one's own intellectual and moral integrity, and with positive results for the general welfare. The effort can be a significant strain on some personalities. Indeed, one of the major tensions in the lives of first year law students comes from these strange demands of the legal culture.

13. Soia Mentschikoff believed that Western civilization owed its conception of justice to law. To Soia, it was questionable whether the idea and the ideal of justice would ever have come about without the idea of law and its constraints having first been created. I am not so sure. I believe that the matter may run the other way; that

Obviously, simply learning details and nothing else, simply seeing the world in a one-dimensional way, makes for a limited lawyer and poses significant problems for the operation of our social world and our culture.

Given all of this, it is clear that the nature of the legal discipline is such that one cannot practice any piece of law, one cannot think about and write about or teach any piece of it, without understanding the relationship between all of its pieces. Lawyers must be "jacks-of-all-trades"; they must be able to deal with such complicated ideas as competing theories of psychology, economics, politics, sociology, and commercial wisdom. Lawyers must understand these disciplines and utilize them in the problems they deal with in their practices. Hence our theme is that law must be maintained as the last of the universal disciplines. The rest of the article elaborates on this theme. It gives an overview of the functions and processes of law and thus illustrates the necessity for broad substantive knowledge about a variety of skills and topics in the successful teaching, learning, and practice of law.

---

is, Western civilization may owe law to the concept of justice. Law as a social institution that claims justice as its goal, however, is a unique institution. To put it another way, it may be that the law's greatest contribution to our culture is its attempt to create the machinery for achieving justice and to test its accomplishments. Indeed, it is at least arguable that United States Supreme Court opinions on public issues, along with achieving other goals, attempt to do this very thing—provide justice. For example, the effort by the Supreme Court to transform Brown v. Board of Education, 347 U.S. 483 (1954), into practice was an attempt to provide justice by creating the machinery for doing so. It required the courts to radically transform the status quo by reconstructing social reality. The courts had to restructure the public school system and overcome a most intense resistance by certain groups to change. Courts became the guardians and watchdogs—the machinery—to create and monitor these changes. On the other hand, it may be that we do not know what justice is, but can better address injustice. If so, binding court decisions on important public issues may merely be viewed as stopping injustices which have occurred within the context of those issues.

Another distinct possibility is that law may merely create images of justice that do not reflect reality. This, of course, can cause great social harm. Some of the critical legal studies movement literature argues these points. *See, e.g.*, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685 (1985); Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life,* 52 GEO. WASH. L. REV. 263 (1984); Horwitz, *Law and Economics: Science or Politics?,* 8 HOFSTRA L. REV. 905 (1980); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940,* in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (S. Spitzer ed. 1980); Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 209 (1979); Klare, *Critical Theory and Labor Relations Law* in THE POLITICS OF LAW 65 (D. Kairys ed. 1982); Mensch, *The History of Mainstream Legal Thought* in THE POLITICS OF LAW 18 (D. Kairys ed. 1982).

II. FUNCTIONS OF THE LAW

To show that the nature of the legal discipline is such that a lawyer must have a broad understanding of the interrelationship of law's multifaceted dimensions to work properly within the legal culture, we begin our exploration of the topic with a preliminary question: How can one define law?[14] One way to approach that question is to discuss the functions that the law serves in any society,[15] including our own.

There are at least three major functions of law: dispute settlement, channeling and rechanneling behavior, and allocating the final say.[16] Lawyers play integral roles in each of these functions.

---

14. We do not intend to explore the questions of whether law exists in our culture or whether it serves a legitimate function. Soia Mentschikoff believed that these were somewhat preposterous questions. To Soia, law was the matrix of all group life. Further, because people generally followed the dictates of the law, law was legitimate. Soia was very optimistic about law. She believed that law has an autonomous content and that it restrains and channels the exercise of power. She also believed that the existing collection of rules, procedures, and legal practices, though flawed at points, adds up to a reasonably tolerable structure for social order. Hence, in Soia's view, a competent lawyer who works within the structure will, in the long run, contribute to the overall good of society.

I am not as optimistic as Soia was about the role of law in our society. I believe that questions about the law's legitimacy in our civilization must be pursued vigorously. Nor am I convinced that our social structure, as protected through our legal practices, is just. Further, law is, in some sense, a mythical construct. It exists only because we invent it. Inventions sometimes legitimate intolerable social practices. The institution of slavery in the United States before the Civil War, and the institution of Apartheid in South Africa, are but two obvious examples.

15. When we say "any society," we mean the family and other small groups as well as the larger society. The family, which can be as small as two people, is the smallest society we know. Further, the functions that law serves in that society are the same as the functions that law serves in the larger society.

16. Law serves instrumental as well as intrinsic functions. The three major functions of the law discussed in this article serve both as an instrument to an end and as an end within our broader culture.

The ground breaking work on combining social science research and legal theory as applied to a real society, in this case the "legal" institutions of American Indians, was done by Karl Llewellyn in combination with E. Adamson Hoebel. *See* K. LLEWELLYN & E.A. HOEBEL, THE CHEYENNE WAY (1941). In their work, they discuss the functions law plays in American Plain's Indian society, which somewhat parallel those expressed in this essay. Professor Llewellyn thought of jurisprudence as a social science. He viewed the law itself as a sociocultural phenomena. To Llewellyn, law in any society was inextricably bound up with, influenced by, and influencing that society's culture. He studied other cultures to gain insight into things legal and he used that insight to argue for improvement in our legal culture, particularly in the adjudicatory mechanisms employed in dispute settlement. Others have built upon his cultural studies. *See, e.g.*, the essays collected in L. NADER, LAW IN CULTURE AND SOCIETY (1969), and the bibliographies in L. FALLERS, LAW WITHOUT PRECEDENT (1969), and M. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE (1965).

Indeed, to understand the significance of lawyers and law in our broader civilization, one must understand the varying roles lawyers play in serving these functions.

The most basic function of law, and a fundamental aspect of any legal system, is dispute settlement. One of the prime requisites of a peaceful society or group is that the settlement of trouble cases be by processes which do not splinter the group in such a way as to destroy its groupness. In most groups, therefore, dispute resolution machinery requires processes that are non-violent in character.[17]

Every legal system, if it is to survive, must create machinery for resolving disputes to a sufficient degree, with a sufficient regularity, and with a sufficient willingness by the group to abide by the result. Stated otherwise, the most basic function of law is to settle disputes well enough so that the society does not disintegrate, and so that the people whose law it is will follow its commands.

The bare bones requirement of any legal system is to provide dispute settlement machinery of some kind that will perform that minimal function. Each individual, small group, and larger society also has aspirations, but they come later. The dispute settlement function, which is the bare bones function of any legal system, becomes the law of the group. Moreover, it is the way through which the law of the group can best be seen.[18]

The second basic function of law—the channeling and rechanneling of behavior—is concerned with what we call the aspirational aspects of law. The aspirational aspects of law reflect the values

---

17. Some groups resolve disputes in a violent manner but still retain their groupness. For example, trial by battle and trial by ordeal employed violent processes for dispute settlement. The reason those processes worked, and the reason that people believed that the results of the contests were legitimate, was, of course, because of the particular society's belief in pre-ordained destiny. To put it another way, if the relevant society believes that the winner of the battle or the survivor of the ordeal is predetermined by an outside force, then the results of the contest can be accepted. As long as that belief is present, this is a marvelous way of settling disputes. Justice prevails because a higher power determines the result. Thus, an individual's belief that he was correct could be seen as a mistake by that individual which was corrected by a higher power. If this belief prevails in a society, even tossing a coin will be a marvelous way of resolving disputes. It will also be a very efficient and cheap way of resolving disputes. The side of the coin that comes up is determined by a higher force. The outcome of a coin toss, the battle, or the ordeal, therefore, can be accepted as beyond the control of any individual human being.

18. The dispute settlement function and the mechanisms employed to resolve disputes reflect the values of the groups involved and the importance they place on particular behavior. *See infra* text and accompanying notes 26-40.

we hold dear in our society, such as truth, freedom, and justice. These values are, in some sense, culturally derived. There are other aspirational aspects of law, however, that are biologically derived. They are also reflected in our legal culture. For example, almost from the time babies are born they are reaching out for something. It may be something as simple as love. Further, when human beings develop, they aspire for something beyond the minimal physical needs. One need not aspire to greatness but, at some point in life, everybody aspires to do something for oneself and for others. At some point, individuals within a group may have conflicting aspirations. Moreover, all of the conflicting aspirations may be acceptable. But, in terms of claims which have an arguable morality, an arguable need, and an arguable desirability, they cannot all be satisfied. There is not enough justice, for example, to satisfy everybody's felt need for some kind of satisfaction. The behavior conditioning function of law deals with attempting to work out a system that creates an image of "fairness" and recognizes that reasonable people differ in terms of their perceptions of the allocation. The fact that they differ is an aspirational aspect of law. Thus, to keep disputes at a minimum, to stop conflicting aspirations between individuals from bursting into a conflagration, law is created to get people to behave in certain ways. In sum, because of this aspirational quality, and because peace between individuals and groups is necessary to a society's own survival, one of the things law does is to channel and rechannel behavior.

Although this function of the law sounds like a very simplistic one, it is the most complex function that the law performs. It is also the most difficult function that the law performs and it is the least satisfactorily completed function that the law performs in anything other than bare bones character.

The third function that the law has in any kind of a complex society, and even in the small group, is to allocate the final say. That is, law determines who has the final power of decision. Somebody has to have that power. That somebody may be one person or a group of persons, but some identifiable somebody has to make the final say. The law is responsible for allocating that say and determining who the final decision maker will be.

The process of allocating the final say varies greatly among legal systems. In the United States, discussion of this function of law usually centers on whether the Federal government—the President or some administrative agency, the Congress, the Su-

preme Court[19]—or the State government, in all its ramifications, shall have the final say. This focus on government results from our concern with Constitutional commands. In areas not covered by the structural restraints of the Constitution, however, there is a viable alternative to government: the particular private parties involved in the transaction.

On another level, it is important to understand that the power to decide finally, is also the power to decide incorrectly. Hence, to whom the legal system gives the power to decide issues both correctly and incorrectly is an issue with which one must be concerned. This has consequences as to, for example, whether members of the society even follow the dictates of the law.

A. Dispute Settlement

1. The Nature of Disputes

Dispute settlement is a fundamental aspect of any legal system.[20] It is a safety valve mechanism for the continuance of the group and the society. Without some mechanisms for the settlement of trouble cases by non-violent processes, and in a way acceptable to the members of a group, the continued existence of a group is in doubt. In this section, we discuss the elements and contours of dispute settlement.

---

19. In the United States, the group that comes closest to determining who has the final say is the Supreme Court of the United States. That is unique in the history of mankind. Further, it is a very strange group to have this power when you consider how it is selected, its size, and its multiplicity. There is something in our system, however, that makes it work. Increasing the Supreme Court's power is the fact that, as a cultural characteristic, the commitment by our citizens to the rule of law is almost universal. If it is perceived by our society that the Supreme Court has the power and authority to allocate the final say, then citizens will follow the commands of the Court. Moreover, the authority of the law in our society, although having some boundaries, is almost without limits. Indeed, this was recognized well over a century ago by de Tocqueville. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123-32 (London 1838). Thus, the Supreme Court enjoys a rather significant and almost unimpeachable position in determining the final say.

20. Dispute settlement is one of the major functions of law, but not necessarily the major purpose of adjudication. This is particularly so in constitutional cases involving the restructuring of federal or state bureaucracies. In these types of cases, adjudication serves as a mechanism by which judges give meaning to our public values through the enforcement of public norms reflected in the Constitution. *See* Fiss, *Forward: The Forms of Justice,* 93 HARV. L. REV. 1 (1979). Dispute resolution becomes secondary to this function. The roots of this type of adjudication are Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny.

When we refer to disputes, it is important to consider the parties to a dispute, the subjects of a dispute, and the mechanisms involved in settling them. In general, when we refer to the parties involved in disputes, we are speaking of all types of parties. A dispute may arise between individuals in their private lives or between an individual and a private group. A dispute may arise between private groups. It may arise between government in any of its manifestations and an individual. It may arise between government and private groups in any of their manifestations. It may arise between government or pieces or branches of government, whether it is local, state, or federal, and whether it is executive branch, legislative branch, independent agency, or judicial branch. When we speak about the nature of disputes, therefore, we are speaking about a broad spectrum of parties.

We are also speaking in a very interesting way about all kinds of subjects. The disputes may range from the very informal, private, everyday problem,[21] to immensely complicated and significant public issues. For example, a "simple dispute" may arise between a wife and husband about a dinner arrangement. The wife has agreed to come home earlier than usual for dinner, and the husband has spent several hours cooking a spectacular dinner. Then comes the phone call. The wife tells her husband that she must stay late at the office. She has to work on a complicated securities case or on a criminal case and the pleadings are due in court early the next morning. Her husband is offended; he wishes her to come home at once. One can spell out that dispute as far as one likes. Is it a legal dispute? Is it a complicated dispute?

Obviously, depending on the possible consequences of a failure to resolve it, the simple dispute can be very complicated. The techniques used to resolve it may sometimes be very similar to those used in resolving great public disputes. The mechanisms for settlement of a "simple dispute" are, however, usually, but not always, different than those employed in a complicated

21. The simplest kind of dispute, of course, would be one between two private persons, affecting no other member of the society and requiring no specialized knowledge of any kind for its just resolution. Such a dispute would be exemplified by a controversy between two automobile drivers as to who should go first at an intersection, and settled by a traffic policeman who waved one of them on while holding up the other. Of course, if the controversy involved a busy intersection with a consequent piling back of traffic, the policeman, in making his decision as to who should go first, would be calling upon his expert knowledge of which avenues of traffic would be more seriously affected by the continued delay of several seconds.

dispute.[22] Further, the basis of making a settlement operate in both types of disputes is legal.

On the other extreme, a dispute may deal with enormously important issues involving the whole economy of the nation, and it may involve multiple parties. For example, a dispute may arise about energy conservation regarding oil reserves. Unlike the personal dispute between spouses, which will most likely be resolved by negotiation, this type of dispute is more likely to be settled by legislative or administrative action.[23] This public, complex dispute is usually multidimensional and it is usually unresolvable. Stated otherwise, nobody knows how to answer the issues raised by the dispute. Ultimate truth is not discoverable.[24] In the United States, the typical response to such a complex dispute has been to pass it off to so-called expert, administrative agencies that are merely told to do what is in the "public good."[25]

---

22. In the traffic example discussed in note 21, *supra,* few would feel that there was any necessity for an adversary procedure. Most everyone would agree that the major value involved lay in moving the traffic forward, regardless of where abstract justice lay as between the two drivers. So too in the stock exchange, if there be a controversy between two bidders as to who bid in at a certain price, the toss of a coin can settle the dispute.

As the dispute proceeds up the chain of complexity, however, whether it be along the continuum of who the parties are or the effect of the decision on other people or the knowledge necessary to make a just decision, these simplified procedures become less and less satisfactory. In the range of what we might call the middle areas of complexity stand the courts. If, however, the parties are too important, or the effect on the total polity is too enormous, or the degree of expert knowledge required is more than can be reasonably expected from our method of training judges, the formal legal system turns to other mechanisms of dispute settlement.

23. This is true for many public, complex disputes. If, for example, the dispute is between another nation and our nation, our courts will not usually decide the dispute. It is then left to the area of negotiation and mediation by the executive. If the dispute is between the whole of organized labor on the one hand and employers on the other, the matter is left to the legislature. If the matter is one requiring detailed knowledge of the mechanics of operating railroads or public utilities or radio or television, the matter is left to administrative agencies. As soon as we move out of the middle range of what the courts are handling, however, into the ranges of handling by other deciders, we are faced with the question of whether an adversary system is best suited to the production of a just result. For a discussion of the adversary system, see *infra* text accompanying notes 57-60.

24. Incomplete knowledge, scientific or social, or false data, skewed communication of what information is available, and failure to put all the pieces of the puzzle together, often lead to incorrect solutions. *See infra* note 76 and accompanying text.

25. Expert training, either in a profession or in a discipline, is rarely accompanied by training in the functions and needs of the larger civilization. This also holds true for business training or experience. As it approaches expert status, the business training tends to be narrowed to the needs of the particular business group at issue. Judges, too, tend to bring with them the attitudes and values of their prior practice experience. The redeeming factor on the appellate courts is that judges usually sit in panels of

2. Forms of Dispute Settlement, From Least Formal to Most Formal: How Disputes Get Resolved

Although most people simply assume that courts are the official organs for dispute settlement in the United States, it is clear that most trouble cases are decided by institutional arrangements other than the formal legal process. These methods can be methods either of compromise or of decision.[26] Every lawyer is, of course, conscious of the frequency with which negotiated settlements are made directly through the parties to disputes. Every lawyer is also cognizant of the great number of negotiated settlements achieved through the intervention of an agreed or volunteer third party, such as the machinery employed in mediation or conciliation. The significance of mediation and conciliation, our most informal methods of dispute resolution, lies in the fact that the "solution achieved is acceptable to the immediate parties to the dispute and that it typically gives each party less than he originally desired or felt was his due."[27] When the method of dispute settlement shifts from one of compromise to one of decision,[28] our most important mechanism is arbitration, not the formal law courts. This fact is largely overlooked by legal actors and writers.

The most common form of dispute resolution in our culture is negotiated settlement. This might be accomplished in the wife-husband dispute, for example, if the wife were to say to her angry

---

three or more. They are, therefore, subject to the differing perspectives of a group of people who often view the world differently than their colleagues. This gives the individual judge a greater breadth of vision, and forces that judge to meet the arguments of others while, at the same time, refining his own views.

26 The importance of determining whether a particular method is one of compromise or of decision lies in the psychological attitude that accompanies the use of it. These attitudes are significant on many levels. They determine the emotive connotations of the process. Moreover, the emotive connotations of the process determine the context and ways in which issues, facts, and results are accepted and interpreted.

Further, dispute settlement machinery is usefully classified according to the extent to which it embodies the utilization of third persons and the extent to which it gives a binding effect to decisions that are rendered by such third persons. Along these two lines, the kind of machinery utilized by a particular group tells us something about the commonality of value structure within the group and the extent to which the group, as a group, actually perceives a need to settle disputes in any given area. *See* discussion *infra* at 69-70.

27. Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry,* 17 LAW & CONTEMP. PROBS. 698 (1952).

28. We usually think of negotiation, mediation, or conciliation as examples of methods of compromise. When the method of settling a dispute shifts from one of compromise to one of decision, we tend to think of the courts and perhaps arbitration. Decision refers to a formal, binding legal result determined by a third party. *See* discussion *infra* at 70-72.

husband, "I love you." Whether her statement has nothing or everything to do with the underlying dispute,[29] it is accepted, and the dispute is resolved.[30]

A second form of dispute settlement is what we characterize as third-party nonbinding intervention. This is, like negotiation, a method of compromise. Here, an outsider steps in, either at the request of the parties or on his own initiative, and the parties can choose whether or not to do as he says. They do not agree beforehand to abide by his decision. Third party nonbinding intervention may take the forms of *fact-finding, mediation,* or *conciliation*. For example, in our wife-husband dinner dispute, if both parties agree to allow a third party, Joe, to counsel them about the dispute, Joe may find facts and talk to each party separately (mediate). This may or may not resolve a dispute.

The appearance of a third party, of course, changes the issues and changes the flavor and emotional climate of the dispute. People act differently and say different things when another person enters the scene. Further, the notion of a negotiated "bargain" and the emotive connotations of that word are evoked in the process. People may be more willing to compromise their extreme positions when a bargain situation is perceived as the relevant one. This may also hold true for other forms of third party settlement.

A third form of dispute settlement is binding third party intervention. This is the point at which we normally think of law—the legal matrix[31]—entering the scene. The existence of third party binding adjudication reflects a combination of the group's perceived need to require settlements in a given area and a commonality of values among the members of the group. Such a mixture of factors often results in the formulation of standards or norms by which the dispute can be settled or, even absent such

---

29. It may have been, in fact, the unexposed issue in that dispute. Indeed, almost every dispute has both a cognitive and emotive factor underlying the particular issue in controversy. For a recognition of this by the Supreme Court in the first amendment context, see Cohen v. California, 403 U.S. 15, 26 (1971).

30. This type of resolution of a dispute—negotiated settlement—sometimes may be replicated with multidimensional issues. In a strange way, when the legislature delegates complex public problems to the agencies, the public, through the legislature, has agreed to allow the agency to resolve disputes. Sometimes the resolution of such a dispute is non-binding.

31. We tend to forget that the basis of negotiated settlement is also legal. Stated otherwise, although the method of agreement or what is agreed on in negotiated settlement may not have a legal matrix, the basis of making such a method operate is legal.

formulation, leads to decisions which will not be disruptively violative of basic values of important sub-groups. To put it another way, if one looks at the kind of dispute that is available to third party binding adjudication, one can say that the group has either a commonality of values or else a perceived need for maintenance of group activity in the area covered by such disputes, or, more likely, a combination of the two. Moreover, the greater the perceived need for group activity in the area concerned, the more likely it is that divergence of held values will not impede the creation of institutionalized dispute-settlement machinery of a third party binding character.

There are three general classes of binding third party resolutions: arbitration, administrative or executive agency resolution, and the residual, least used category, the courts.[32] When we refer to arbitration, we mean private, consensual activity. This always takes place within a legal frame of enforceability, both as to compulsion to arbitrate, if the parties have agreed to do so, and as to award. The essential aspects of arbitration are (1) it is resorted to only by agreement of the parties; (2) it is a method not of compromising disputes but of deciding them; (3) the person making the decision has no formal connection with our system of courts; but (4) before the award is known it is agreed to be final and binding.[33] Inherent in the consensual character of the arbitration process is the fact that its procedure can be adjusted to fit the particular needs of the parties or the case. Moreover, contrary to popular misconceptions, there are rules of evidence, of procedure, and of presentation.[34] The rules simply differ from those of our court processes. The decisional nature of arbitration is what distinguishes it from the more informal types of settlement processes and makes it similar to our court processes.

---

32. Curiously enough, court resolution of disputes is in some ways the most important, and in other ways, the least important class of binding third party dispute settlement mechanisms. In law school we spend most of our time looking at courts as though they were the center of the universe, as if they took care of all legal disputes in our nation. They are not, and they do not.

33. We do not include arbitration that is said to be "compulsory." That term usually refers to a process of compelling parties by law to resort to a peaceful method of settlement in which the decider is a person having no formal connection with our system of courts. In pure arbitration contexts, the only semi-compulsive element is that the award is final and binding, but this results only from the agreement of the parties.

34. Soia's studies on commercial arbitration reveal the procedures used in arbitration settings. *See, e.g.*, Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961), *reprinted in* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT (1968).

Arbitration is the major decisional process for dispute settlement in the United States. In a study undertaken in the early 1950's,[35] it was discovered that, if we lay aside accident cases and cases in which government is a party, the matters going to arbitration rather than to the courts represent at least seventy percent of our total civil litigation. This trend has continued through the 1980's.[36]

Utilization of arbitration is perhaps best known in the labor field. What most lawyers do not realize, however, is that arbitration has been the single most important third-party machinery for adjusting commercial disputes between merchants.[37] Commercial arbitration appears as a mechanism for dispute resolution in three major institutional settings. These can be referred to as the "ad hoc" arbitration, arbitration within the context of a particular trade association or exchange, and arbitration within administrative groups.

The simplest method of arbitration within the commercial context has been the "ad hoc" or individuated method. This occurs when two parties to a contract delineating a business relationship agree to settle any disputes that may arise under the

---

35. Between 1955 and 1960, a series of research studies on the institutional and decision making aspects of arbitration were undertaken under Soia Mentschikoff's supervision. The studies focused on the basic question of how disputes are settled or avoided in commercial groups.

The studies had three disparate and yet related aspects. The first aspect dealt with why commercial groups on such a wide scale preferred their own institutions of law-government to those theoretically available to them in the formal legal structure. The second aspect dealt with what the kinds of law-government machinery in commercial groups were, and whether they differed significantly from those in the formal legal system. The third aspect dealt with how decisions settling disputes were made in the commercial groups, and to what extent these processes were similar or different from the processes normally used in the formal legal system. Most of the research data was never published. During the spring of 1985, William Twining, Quain Professor of Jurisprudence, University College, London, and I did a preliminary catalogue of Soia's books and papers. Much of the important papers consisted of notes and very rough drafts of materials related to this project. At present, we are attempting to locate the remainder of the data collected during this period so that we can create a Soia Mentschikoff collection. It should be noted that many of Soia's legal views are directly related to the insights she gained from the research on this project.

36. Indeed, the courts are never utilized in most disputes, and of those civil cases that enter the court system, about ninety percent are settled before trial. Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process,* 34 J. LEGAL ED. 268, 269 (1984). In criminal cases, which are handled exclusively by the courts, between eighty and ninety percent of all cases are settled without trial. *See, e.g.,* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 27 (1984).

37. The dominance of arbitration in settling disputes between merchants explains why there are so few cases that do not involve consumers under Article II of the Uniform Commercial Code. Also, arbitration has very limited review in the courts.

contract by resort to arbitration, before either named arbitrators or persons to be named at the time of the dispute. The making of arrangements, including the procedures for arbitration, rests entirely with the parties concerned.

In the second type of arbitration setting, within the context of a particular trade association or exchange, the group establishes its own arbitration machinery for the settlement of disputes among its members, either on a voluntary or non-voluntary basis. The group sometimes makes the arbitrating machinery available to nonmembers doing business in the particular trade. A particular association may also have specialist committees that are investigatory in character, leaving the arbitration machinery to handle only the private disputes involving nonspecialist categories of cases.

The third setting for commercial arbitration is found in administrative groups, such as the American Arbitration Association, the International Chamber of Commerce, and various local chambers of commerce. These groups provide rules, facilities, and arbitrators for any persons who wish to settle disputes by arbitration. Further, trade associations with insufficient business to warrant creation of their own dispute settlement machinery often make arrangements with these groups to deal with disputes that arise among their members.

A second form of binding third-party resolution occurs in decisions made by administrative agencies. Many of the federal administrative agencies make binding decisions on important public issues which may never be decided by a court. These agencies can also decide private disputes. For example, the National Labor Relations Board can act at the request of a union and can settle a dispute between the union and the employer, both private groups. Administrative agencies can also settle actions brought by the government against a private group or a private person and those brought by a private person against the government. The decisions of administrative agencies can be reviewed by courts, but only in limited circumstances.[38]

Courts, in effect, get what is left over. On the public side, much of the court caseload is concerned with criminal cases. Much of this is constitutionally mandated. Many appellate courts

38. For the standard and scope of judicial review of administrative agency actions, *see generally* K. DAVIS, ADMINISTRATIVE LAW TEXT, chs. 28-30 (3d ed. 1972). The review in the courts of administrative agency decisions is much broader than it is of arbitration.

also deal with reviewing administrative agency decisions. Courts do not, however, settle most of the disputes that arise in our society.[39]

This discussion of dispute settlement mechanisms obviously suggests certain consequences for the lawyer. Much of law and much of lawyering involves more than courtroom work and more than knowledge about very narrow issues. Lawyers play pivotal roles in all the mechanisms employed in dispute settlement. Lawyers generally spend more time as counselors than as advocates. As a counselor, a lawyer must do more than construct an argument or cite a case. He must be knowledgeable about the current state of the law and the changes in law over a particular period of time. He must also have a "situational sense" for the area in which he gives advice. A lawyer in a shipping case, for example, is less than helpful if he does not understand the industry, its practices, and the various resolutions of disputes made in the past. He must be able to predict the results, both legal and otherwise, of certain actions taken by his client. Further, a lawyer must understand the makeup of the group with which he deals, its goals, operations, and beliefs. In addition, if a dispute arises, the makeup of the dispute settlement machinery must be well known to the lawyer. Knowledge of the decisional model as well as of the decision makers, are prerequisites to sound lawyering. A competent lawyer must, therefore, be a universalist.[40]

---

39. *See supra* note 36.

40. Professor Llewellyn made this point in a somewhat different context as early as 1930:

> I stop at this place only to call your attention to one fact. It should be clear, it should be clear even to the blind, that the work of business counsel is impossible unless the lawyer who attempts it knows not only the rules of the law, knows not only what these rules mean in terms of predicting what the courts will do, but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the *working situation* which he is called upon to shape *as well as* the law with reference to which he is called upon to shape it. It has seemed to some students in the past that they had come to law school to "learn the law," and that the law was made up of legal rules and nothing more, and that all other matter was irrelevant, was an arbitrary interference with their proper training for their profession. I have been told by some that social science was for social scientists, in the graduate school; that what law students wanted was the law. I have met with resentment, sometimes bitter, at the so-called cluttering up of our law curriculum with so-called non-legal material. If I have made my point just now it should be clear to you that this is the language of men who do not see far enough beyond their noses to measure even their own job in life. If I have made my point it should be clear that for most lawyers the job of advocate is half, nay, less than half the job they have to do. Even as advocate, I am prepared to argue, they need,

B. *Channeling and Rechanneling Behavior*

A second major function of law in any legal system is the channeling and rechanneling of the behavior of persons in our society so as to achieve goals thought to be desirable by the society. The structure for channeling and rechanneling behavior has both substantive and procedural aspects. The questions raised are what behaviors are appropriate, how we determine what the behavior should be, and who decides what the appropriate behavior is for any given situation. These decisions are made in both binding and nonbinding modes.

1. Nonbinding Mode

The nonbinding mode, which is informal, is used in many groups, including the family. For example, lawmaking occurs in the family when the head of a family controls a child's behavior by saying, "In our family, we do it this way, and I don't care what anybody else says, that's how we do it in our family. If you wish to be a member of our family, do what I say." This is a prime example of controlling and channeling behavior. The message is clear. If someone is to be a member of the group, that individual will do things as the group does them. Members of the family always have the option of revolting and leaving the family by going out into the world.[41]

It is the ability to ostracize that gives the informal, small group its cohesiveness and power, and allows it to function. There is, however, a safety valve for those ostracized: they may reassimilate with the group. Reassimilation is always possible in the nonbinding mode because of the notion of regroup. To understand this notion, consider Professor Llewellyn's definition of home: "The place where no matter what you did, when you got there they took

---

> desperately, full knowledge of the facts of the life of the community, against which law must play. But when it comes to their task as business counsel there is no need for argument. The case is clear. The stones speak. What the courts will do means nothing save in relation with how people are to act in the light of the court's doing. For the meaning of the law in life and in the practice of lawyers is its meaning not to courts, but to laymen.

K. LLEWELLYN, THE BRAMBLE BUSH 16-17 (1981).

41. This can, of course, make things easier for everyone concerned. It may, for example, encourage independence by youth. This can lead a child to go out into the world and to live and mature through such an experience. The parents may then be able to keep whole the family structure. A child can also be reassimilated back into the family at a later point. *See* discussion *infra* at 41-47. Perhaps everyone will then have a healthier perspective on the family itself.

care of you." Even if you were an outlaw in the larger group or society, you reassimilated into the smaller family group when you came home. The family, in effect, regrouped. The regroup is a very important aspect of human life. Everybody has to have a place or person like that. It is the absence of that kind of place or person in people's lives that creates real alienation with all the disastrous impacts that factor has on society.

Some larger groups, such as churches, channel and rechannel behavior in the same nonbinding mode. Groups operating in this mode rarely expel their members from the group. An exception is excommunication, which was once popular with the Catholic Church, but which has lost its popularity. This analysis leads us, nicely enough, to a true story that exemplifies the larger group in conflict and its attempt to channel and rechannel behavior.

A group of Pueblo Indians was once excommunicated from the Catholic Church by a new Archbishop.[42] They were the Pueblo Santo Domingo on the road between Sandoval and Albuquerque, New Mexico.[43] When a new Archbishop came to Sandoval, he was told by another Priest that the Pueblos, especially the Santo Domingo Pueblos, would not go to confession and communion to receive the sacraments, but they did go in for the other sacraments. The new Archbishop said that would change; the other Priest said the Pueblos would not change. The Archbishop decided to visit the Pueblos and force them to change their behavior. When he entered the Pueblo village on his burro, he was treated with great respect. The Indians knelt and lit candles.

Not knowing the Pueblos very well, at a later point in his visit the Archbishop stood and said: "My children, you must now go to confession and communion, and, if you do not go, you leave me with no choice but to excommunicate you." The Pueblos saw the Archbishop out of the village in the same way as they had greeted him, with reverence and love. They did not, of course, go to confession or communion. Thinking he had no other choice, the Archbishop excommunicated them.

This act did not adversely affect the Pueblos' views of the world and their place within it. When the Indians were told they were

---

42. This story is based on Soia's experience with the Pueblo Indians. She spent a great deal of time with Karl Llewellyn studying and living with these Indians. She had the distinct honor of becoming a member of the tribe. More significantly, she became the keeper of their cultural ways through preservation of some of their most significant stories.

43. Sandoval is north of Albuquerque. The Santo Domingo Pueblo's territory runs between Albuquerque and Santa Fe.

excommunicated they simply said: "We buried and we married before the Priest came, and now we know how to baptize. We will survive." In the end, the Archbishop lifted the excommunication.

The Pueblos were a small group with their own notions of weakness. In this example, each side had taken a hard line position. There were two regroups in conflict, and the resolution, as usual, was done by settlement. The Pueblos reassimilated the Archbishop, and through him the Church, while the Archbishop, and through him the Church, reassimilated the Pueblos. There was nothing legal in this in the sense of it being involved in what we think of as a formal legal system. It was all very legal, however, in terms of the actions of the internal groups and the resolution of the dispute.[44] Behavior was channeled and rechanneled.

Such a change of behavior and the regroup operates in other large groups. Another example is the New York Stock Exchange group.[45] In the 1950's, when the Exchange was still being run by its members, and professional staff had not yet appeared on the scene, the members characterized themselves as gentlemen. If one were not a gentleman, one could not be a member of the Exchange. They put it that bluntly.

A gentleman was said to have certain inherent characteristics, one of which being that he told the truth to other gentlemen. In hearing after hearing, the Member Committee on Grievances would ask the member being accused of some unacceptable conduct whether he had done the dreaded act, and, inevitably, the accused would answer that he had done the act. At that point, he would be denounced for having performed "wicked" acts and told that he had to do whatever it was they wanted him to do to retain his membership in the Exchange. If he did what was asked, he was reassimilated into the group.

Obviously, there are significant differences between the Exchange and Pueblo examples. In the Exchange example, we are viewing an internal, coherent group dealing with itself. In the Pueblo example, we see outside cultural forces intruding upon the traditions of Indian life. Despite the differences, these examples

---

44. This example can perhaps be classified as one in between the binding and nonbinding modes. It is a complex example because it involves a group within a group and two separate regroups.

45. As part of the Arbitration Project she headed in the 1950's, Soia Mentschikoff was permitted to witness the actions of internal committees of the New York Stock Exchange. *See supra* note 35.

show striking similarities. Both show the internal nonbinding settlement mode and the regroup. Both employ the method of negotiated settlement. Both channel and rechannel behavior.[46]

2. Binding Mode[47]

The binding mode of channeling and rechanneling behavior operates under the formal law of the nation and of the States. Operating over all in the channeling and rechanneling of behavior is the Constitution, which sits like a brooding omnipresence over the other formal laws. Beneath the Constitution in the channeling of behavior in the binding mode are statutes (passed by state legislatures and Congress), rules and regulations of the executive departments, agency and administrative regulations, and, of course, printed decisions of the courts and other bodies.

Arbitrators and agencies also make rules about how people ought to behave by way of separate decision.[48] For example, in the labor field, the National Labor Relations Board publishes decisions. A labor jurisprudence has developed from these precedents. Any agency, to the extent it prints its own decisions, or to the extent newspapers print them, establishes a jurisprudence that may affect behavior. In commercial arbitration, on the other

---

46. The Pueblos dealt with dishonorable behavior in a manner somewhat similar to the people involved with the Exchange. When confronted with an accusation, a member of the Pueblos would confess and face his punishment in order to be reassimilated into the group. One punishment utilized was to force the wrongdoer to stand on his knees continuously for several hours. The Exchange and the Pueblos differed in one significant respect: the offending Pueblos were always reassimilated into the group, while the Exchange kicked out a member on at least one occasion. This certainly says something about the different values of each group, and perhaps it says something about which group is more "civilized."

47. Perhaps nowhere in our law is the attempt to channel and rechannel behavior in a binding mode more overt than in the criminal law. In both the definition of what behavior is or ought to be criminal, and in the purposes of punishment, the criminal law is engaged in affecting behavior. Further, there are gross differences in cultures on their answers to these questions and, over time, cultural views change. By and large, there is general agreement that "thou shalt not kill." There are, however, sharp differences in punishments even for murder between cultures. When you look at other types of behavior defined as criminal, there are extremely large differences between cultures. In the United States, for example, perhaps more behavior is termed criminal by statute than in any other country. Moreover, the theories for punishment range from deterrence (both general and specific) to rehabilitation and retribution. Each of the theories of punishment has different channeling and rechanneling purposes, and each affects individuals somewhat differently.

48. Arbitrators and courts always move by decision making, and legislators always move by formulating rules, while agencies can choose to move either by rule or decision.

hand, nothing is printed. Except for the inside group that does arbitration, there is not a jurisprudence equivalent to that in the labor field. The affect on behavior from commercial arbitration comes from the insiders, including lawyers, communicating the precedents to the merchants.

Courts, of course, by their decisions, attempt to channel and rechannel behavior. Court decisions, sometimes in the first instance, but always in review, not only give us a precise ruling, but also give us the becauses—the reasons the court reached its result. Each court opinion always has two major characteristics or becauses, the second one of which is not always expressed. The first because is the doctrinal or technical reason for the decision. The second because tells how the court perceived the situation and why it thought whatever result it hoped to achieve was a good result. The second because determines the prophecy of what the court will do the next time. That is, the second because reveals the court's perception of the situation. The second because affects the behavior of lawyers, parties in the case, other persons who are involved in the life situation, and other courts. It may even affect certain aspects of the larger civilization. The second because tells us what type of behavior ought to take place and how.

For any of these decisions, for any of these rules or regulations, for any of these statutes, and even for any part of the Constitution to have any effect whatever on anybody's behavior, the law has to be communicated to the relevant party. If one function of the law is to channel and rechannel behavior, then surely the law should be concerned with how to bring that information to the person whose behavior is involved. It is important, therefore, to know how law gets communicated to the persons whose behavior it is supposed to affect.[49] If that law is never communicated, it is never going to have an effect. On the other hand, if it is communicated inaccurately, it may have very peculiar effects.

Very little is known about this process of communication. Yet its importance to the proper functioning of our society cannot be

---

49. Not all law affects everybody, though some law does. Some laws affect only particular groups. Thus, for example, Articles III and IV of the Uniform Commercial Code were written stylistically for bank clerks, so that they would know what to do with the various pieces of paper that came across their desks. The effort was to communicate through teaching in bank clerks' language. The Code in its entirety was written for merchants, so that they could read it, understand it, and know when they had to consult a lawyer.

overestimated. Indeed, the significance of it was strikingly illustrated when both Mr. Chief Justice Burger and Mr. Justice Powell lamented the press coverage of *Gannett Co. v. De Pasquale*.[50] In *Gannett,* the Supreme Court held that an order of the trial court that excluded the press and public from a pretrial suppression hearing in a criminal case did not run afoul of the first, sixth, and fourteenth amendments. The trial court order excluding the press was based upon an unopposed defense motion. The trial judge, in reaching his conclusion to exclude the press from the hearing, found "that an open suppression hearing would pose a 'reasonable probability of prejudice to [the] defendants.' "[51] The Supreme Court majority held that neither the press nor the public have any right of access to pretrial proceedings stemming from the sixth amendment, and assuming that there was some right to attend the proceedings stemming from the first amendment, the right of the defendants to a fair trail under the facts of this case outweighed that first amendment right.

A great deal of controversy arose in the press and in the lower federal courts concerning the applications of *Gannett* to trials. The decision caused so much uncertainty that, in a rare public statement, Chief Justice Burger stated that judges who were barring the press and the public from trials might be misreading the decision because they read press accounts of the case instead of the Supreme Court opinion.[52] Mr. Justice Powell also claimed

---

50. 443 U.S. 368 (1979).

51. *Id.* at 376.

52. N.Y. Times, Aug. 9, 1979, at A17, col. 1. Chief Justice Burger claimed that the opinion referred to pretrial proceedings only. *Id.* He specifically stated that judges were reading newspaper reports of what the Court said, rather than the Court's majority opinion that the press and public may be barred from pretrial hearings at the request of the accused. Further, he claimed that, "[U]nder the decision, the defendant may waive his right to a public trial only if the prosecution agrees." *Id.*

Justices Powell and Rehnquist, in concurring with the majority ruling, suggested that the press and public might be barred from a criminal trial. 443 U.S. at 397, 403 (Powell, J., and Rehnquist, J., concurring). But Chief Justice Burger wrote a concurrence to the majority opinion making clear it applied only to pretrial proceedings. *Id.* at 394.

The New York Times, reporting on the controversy, cited a survey by the Reporters Committee for Freedom of the Press showing that principals in thirty-nine cases around the country had urged judges to close trials to the press or public, or both. "A judge in Westminster, Md. closed an entire trial to the public and the press last month, citing potential embarrassment to witnesses, and a Federal judge in New York City even barred the public from a sentencing at the conclusion of a trial," N.Y. Times, Aug. 9, 1979, at A17, col. 1.

"Judges in West Virginia, South Carolina and New York have made another distinction—they have barred the press from court proceedings but allowed the public in." *Id.* Poor communication resulted in a violation of constitutional rights and a major social disruption of our courts.

that the press's misstatement of the holding of *Gannett* resulted in district court judges excluding the press from trials. The interesting point about the *Gannett* decision and its application to trials, for our purposes, was the perception of these two Justices that district court judges learned their law from newspaper accounts and not from Supreme Court opinions.[53]

Thus, one of the things it would be desirable to know is where district court judges obtain their information about the law. Their behavior, like that of the other actors in the legal culture, is supposed to be channeled and rechanneled by *decisions* of higher courts. The proliferation of the possible questions and results from an inquiry of this sort, in a wide variety of areas, may well raise a number of challenges for the legal profession.

Where does the general public—the largest group whose behavior is sought to be modified by law—receive their knowledge of law? There are several sources from which they may obtain legal knowledge. They may obtain it from the broadcast media, which limits the time spent on many topics to sixty seconds. They may turn to the newspapers, which print stories only if they are dramatic and can be made exciting, sometimes at the cost of accuracy or depth. Finally, they may obtain their legal knowledge from their lawyers, who may not have accurate knowledge themselves or simply lack the ability to communicate intelligibly what they do know. All of these communication devices may be deficient. Indeed, the lawyer is often a large part of the communications gap.

Not only do many lawyers lack substantive knowledge about the law, but they also fail to understand the very processes of the law that are necessary to the just resolution of their client's problems. Knowledge matters enormously here; it is the most important commodity one can acquire in law school and in practice. But legal education is part of the problem. Law students are not taught the art of learning how to acquire knowledge. This problem is then compounded in law practice. Most lawyers know a little about a very small area. The universalist, however, knows a little about everything, and, more importantly, the universalist knows how to find out about what he or she does not know. Further, the universalist knows how to put all the information

53. The phenomenon of judges not reading carefully the higher court's opinions, but relying on a newspaper account or another lawyer's discussion of those opinions, is more common than we generally assume. Even if this only happens once, however, it is once too often.

together. The universalist has been the trademark of our profession. The universalist should continue to be our trademark.

C. *Allocation of the Final Say*

1. Overview

The third major function of law, allocating the final say, arises necessarily from the functions of settling disputes and channeling and rechanneling behavior. Decisions about what behaviors should be encouraged, and how particular matters or those that affect more general situations should be decided, must ultimately be entrusted to somebody. We must decide which bodies are best suited to the performance of these tasks.[54]

First, in analyzing this question, we must determine which disputes a legal system should be concerned with at all. Should it be concerned, for example, with the wife and husband dinner dispute, or should that problem be allocated to the private sector? We could make a rule that any broken dates between spouses are not of concern to the legal system. On the other hand, what should the legal system do with disagreements arising from major economic behavior? Are we going to say that this, too, should be resolved in the private sector?

Second, once we decide that a legal institution should be involved, we must decide which institution is appropriate. As stated below, our legal culture employs a wide variety of mechanisms for settling disputes, ranging from the very informal and private to the very formal and public processes. Our legal culture also has many different theories concerning the advantages and disadvantages of government regulation of private and public issues.[55] These theories, in turn, have translated into the systems

---

54. This is a very complex and difficult question which the legal profession in this country has not faced in any direct and systematic way. We have not faced the question of its centrality—the nature of the thing being allocated.

55. Lawyers must be aware of these theories and understand them thoroughly to represent adequately their clients on particular issues. In the twentieth century two public philosophies have struggled for dominance in our culture. We usually call one "conservative" and the other "liberal." Both "theories" give coherence to the world; they give explanations about our history and form the core for creating solutions to pressing public issues. For example, on public economic issues, the conservative public philosophy argues that for years America has been profligate. It continues by claiming that we must restore discipline to the economy by making control of inflation a first priority and by relegating unemployment to a much lower priority. Further, the conservative philosophy argues that we must control government spending either by

of adjudication and decision. Proponents of freedom from regulation argue that the best way to achieve wise dispute settlement in these systems of adjudication and decision is through the adversary system; proponents of protective legislation or regulation focus on a parental investigatory system of adjudication in lawmaking.

2. Decision-Making and Rule-Making Models

Third party dispute-settling machinery that is binding upon the disputants is not all of the same type. There are two primary models[56] that represent the variety of structures found in our legal

---

requiring a balanced budget or by allowing the free market to reward successful entrepreneurialism and to punish failure. It continues by claiming that we must stop stagnation by freeing up financial power so that it can be used by creative individuals. The market, rather than taxes or government regulation, is seen as the source of social discipline.

The "liberal" public philosophy takes a somewhat different approach to public economic problems. It argues that economic policy should favor full employment, even at the cost of some inflation. In this perspective, joblessness is seen as a terrible burden to impose on anyone. Inflation can be controlled by income policy that will cause no increase in unemployment.

Both philosophies, of course, have somewhat different views on the nature of man and the role of government. These views translate into the legal system's use of models to resolve disputes—the adversarial and the investigatory models. Just as in the legal models used for dispute resolutions, neither public philosophy is pure. Yet each view must be understood by the lawyer. He must integrate both perspectives into the lenses he wears to view public issues. Only in this way can he create the correct resolutions for disputes.

Without understanding the realities underlying legal issues, lawyers may mislead their clients. For example, the myth that has been created in our law relating to the notion of freedom from regulations in the marketplace is the view that the history of the common law has been one from total freedom to government regulation. That is complete and utter bilge. We have moved from high regulations to relative freedom, back to greater regulations, and we are now in the process of returning to more freedom in some areas but even greater regulation in other areas. Most legal obligations in the common law rested on status, not contract. Further, contract did not wholly free individuals to bargain out of their status. Even today, all contracts have some kind of status left over. Look at the typical lease. It has boiler plate provisions recognizing the landlord's higher status, and very few tenants are able to change the lease provisions. Lawyers must understand this or clients will be harmed.

56. There is also a third model: the umpire system. This is a system under which typically a single person is entrusted to render a decision without the participation of the parties. It is typified by four characteristics. First, the dispute itself has to be of relatively small dimension with a relatively limited impact upon either the parties or the rest of the group. Second, the standards or norms that are brought to bear by the umpire in making his decision have to be articulated with relative clarity and have to be congruent with the group's feelings about the appropriate standards. Third, a desire for speedy settlement must be present. Fourth, and finally, the relevant facts must be capable of personal ascertainment by the umpire. In the formal legal system, for

system. These extreme models of the processes used in making rules and decisions are the adversary and parental investigatory systems. No system, however, is purely adversarial or purely parental investigatory. In determining where a system lies on the continuum, the proper question will always be: To what extent is the system functioning more in the direction of one than in the other?

a. Adversary System[57]

If we are to accept the adversary system as a good system for settlement of disputes, we must presume that the parties to the dispute have relative equality of ability, knowledge, training, and economic resources. The adversary model is typified by party control over (1) whether the procedure should be utilized at all, (2) what the issues presented for decision are, (3) what data should be presented, and (4) what arguments should be presented. The model presupposes that the parties know best what is relevant to their positions, what happened in the past, and what impact any decision would have in the future. It also presupposes that the nature of the issues, data, and arguments to be presented can be understood by the deciders, and that the system of selecting deciders produces men and women who either have or can obtain from the parties the knowledge requisite to wise decision.

The adversary system proceeds on the assumption that the whole is not greater than the sum of its parts, and when each disputant argues for himself or herself, it will create a whole view of the problem. Thus, the parties to the dispute, those involved in the life situation, and the greater society (the whole) do not need representation by the judge. Further, it is assumed that the judge is not clothed with rule-making power, but with decision-making power only. In theory, if the parties are all equal, both truth and justice will emerge.

"To the extent that any of these presuppositions fails in a material aspect, the adversary system becomes inadequate as a tool of dispensing justice."[58] Clearly, there are problems with a

---

example, such decisions are made every day by traffic cops. Characteristically, this type of dispute settlement disclaims all rule-making power in the umpire and, especially in the commercial groups, this disclaimer typically is accurate. The chief value embodied in this system is speed and economy of decision.

57. The courts, in the formal legal structure, and arbitration, in the commerical group setting, provide the prototypes of this kind of system.

58. *See supra* note 34, at 847.

system of dispute settlement which is dependent on assumptions of party equality. Any thinking person knows that the suppositions of equality of the parties is utter nonsense. There is not equal ability and there never has been; people are not born alike. Diversity is a great thing, and one of the things in which people are diverse is ability. Moreover, we know that not everybody is trained in the same way, nor do people have the same prior experiences. Further, we know that we cannot depend on economic resources being equal. This variety is good, because if we were trained in the same way and had the same prior experiences and economic resources, we would merely be clones of one another. We would then see the world only through one set of lenses. All of us would wear the same blinders.

The queer thing is the extent to which the formal legal system has recognized, over the years, additional areas in which one or more of these presuppositions about the adversary system is materially non-existent. The other queer and interesting thing is the extent to which, when the formal legal system has recognized this, it has departed rather regularly from the adversary system toward an investigatory system of justice. Of equal interest are the areas in which either recognition or departure has not occurred.

Before moving to the prevailing models of investigatory systems, it is useful to point out some of the ways in which our court system, for example, itself departs from the adversary system model. It must be remembered that the adversary system model emphasizes party control and disclaims rule-making power in the decider. Yet we all know that courts in fact have and do exercise a great deal of rule-making power. We also know that courts can and do decide cases on the basis of issues other than those presented by the parties. Moreover, we know that courts can and do supplement the data presented by the parties, not only by resorting to the concept of "judicial notice," but also by resorting to economic, sociological, legal, or psychological texts. Further, the courts can and do supplement or disregard the arguments which have been made by the parties. In fact, some courts have even been known to supplement data presented by the parties by directing personal inquiries regarding the subject matter to persons wholly outside the formal proceedings before the court. The fact is that when the value of wise decision, a term which we will refer to again later in more detail,[59] is set against the value of

59. *See infra* text accompanying notes 67-69.

party control of the data bearing on decision, our courts have frequently preferred the value of wise decision. But the one aspect of an adversary system from which our courts have seldom, if ever, departed is party control over the bringing of the dispute to the court for decision.[60]

b. Parental Investigatory System

Under the investigatory model, it is presupposed that the parties will have unequal ability, knowledge, training, and economic resources. Thus, there is a perceived need for the decider to redress the inequality of the parties to assure that neither the parties nor society incurs a loss. The decider is assumed to have better knowledge, skill, and ability than the parties, and to know best what is good for the parties.[61] Further, under this system, the parties do not need to be intimately involved in presenting data, because the decider undertakes the investigation. In sum, under the parental investigatory system, it is assumed that the state or private decider knows best. Moreover, the decider's function is both to protect the weaker party and to make wise decisions. Under the adversary system, of course, the parties are assumed to know best.[62]

Basically speaking, the investigatory type of adjudicatory machinery is characterized by decider control rather than party control over whether a dispute should be decided, over what issues should be presented for decision, and over what data and arguments should be advanced or utilized in decision. Typically, also, in the investigatory type of machinery, the deciders have explicit rule-making power. It can thus be said that the investigatory type of machinery is a response to one or more of the following situations: (a) the non-bringing of the dispute for third party adjudication has resulted in some undesirable consequence to the total group, or (b) the inequalities of the parties and their counsel are of such regular and large dimensions as to produce either

---

60. This refers to civil, but not necessarily to criminal cases.

61. The corollary to this position is that the parties do not always know their own best interests. For example, law school decisions about curriculum are often based on the view that students do not know what is good for them. If some law students were to demand a twelve credit course in trial advocacy, it is certain that most law school faculties would likely deny that request. Most faculty members view themselves as standing *in loco parentis* to students, and they usually believe that they know what is best for students. Whether this is correct, of course, is another question.

62. This view is often rejected in the actual workings of our adversary system. *See supra* text accompanying notes 57-60.

condition (a) or to result in highly undesirable decisions, or (c) the range of knowledge appropriate to wise decision is not readily available in the normal course of procedure to the persons who, in the normal course of events, will be selected as the deciders. These three conditions are conditions whose existence, in our opinion, goes a long way to explain the proliferation of administrative agencies in the United States.

It will be noted, however, that these conditions are all specifically geared to what might be called the civil type of case. When, in contrast, we take a look at what might be called the "criminal" side of law, we see a different picture. The pure investigatory type of structure employed in civil cases moves primarily on a view of the necessity for wiser, in the sense of more expert, decision. The criminal cases, on the other hand, move on either an explicit or implicit idea of the importance of the value of reassimilating an offender to the group. This type of system, which Professor Llewellyn has called the "parental,"[63] has interesting by-products, because it typically presupposes that the group is more important than the individual and that the individual, as a consequence, is the holder of an inferior status. Typically also, because the decider makes the decision, after *ex parte* investigation, as to when to haul the offender before him for reassimilation into the group, it is reasonably clear that the guilt of the offender has been assumed. The normal presumption of our criminal law that a man is innocent until proven guilty, therefore, is reversed.

These investigatory parental procedures, which are found with a relatively high degree of frequency among the ethics and business practices committees of our commercial groups,[64] are by no means without parallel in the formal legal structure. It will be remembered that their basic characteristics stem from the importance of bringing the offender back within the fold of the group and that this characteristic depends upon a belief that the group is more important than the individual. The glaring example of this juxtaposition of purpose and belief is, of course, our juvenile court. We find other echoes of this same set of values in some of the Soviet trials and rather regularly in the courts of justice of

63. Karl Llewellyn coined this term in the 1930's, and he used to discuss this type of system regularly with Soia Mentschikoff, particularly when discussing the law in different cultures.

64. *See supra* text accompanying note 45 for an example of a business practice committee in the New York Stock Exchange, and its use of the parental-investigatory procedures.

the Pueblo Indians.[65] One of the interesting sidelights of the use of this system, and one whose presence in the Soviet trials has occasioned much adverse comment, is that because the deciders generally believe that the offender is guilty, and because the deciders generally wish to reassimilate the offender to the group, the deciders rather regularly press for and obtain confessions. This holds true for all the illustrations discussed above. The act of confessing is viewed as a first step on the road to reassimilation.[66]

In our formal legal structure, many of our administrative agencies exemplify the expert investigatory type of system. This

---

65. *See generally* K. LLEWELLYN & E.A. HOEBEL, THE CHEYENNE WAY (1941). *See also supra* note 46 for a discussion of the Pueblo Indians' system of justice.

66. The confession is employed as a useful tool for reassimilation in almost all group life in which we engage. It is employed in the reassimilation of a family member back into the family as well as in the reassimilation of a citizen back into the political state. Further, the notion that confession is a positive act, and a first step on the road to reassimilation into the group, is a central tenet of psychology and psychiatry, some religions, and some systems of criminal law. For elaboration of these ideas, see J. WHITE, THE LEGAL IMAGINATION 608-10 (1973).

The psychiatrist, psychologist, and counselor, for example, all view confession as essential to the process of growth into maturity and acceptance of the human condition. The repression of knowledge and desires is very harmful to growth and maturity. If the goal of therapy is to allow people to accept themselves and others, and to understand and view their true situations, then confession is essential to this process. It allows people to accept knowledge and desires and, therefore, to understand their role in groups, and in the larger society. Such understanding allows them to rejoin their groups within the larger society, while viewing themselves as important parts of those groups.

Confessions are also very highly valued in the Western Christian religions. In some churches, for example, confession is a necessary part of penance. Further, the confession of desires is considered as important as the confession of behavior. Indeed, the person who does not confess is said to be subject to the world of the damned. He cannot be reassimilated into the group of those who are to be saved. If he confesses, however, he is assured of reassimilation into the "correct" group.

Most criminal law systems also recognize the importance of confession for purposes of growth and reassimilation into the group. In the People's Republic of China, for example, the criminal process involves informal sanctions ranging in seriousness from so called "criticism-education" by members of the local power elite, to so called "struggle or speak-reason-struggle," which exposes the individual to intense and vituperative criticism from those in attendance. The result of this severe, exhausting, and humilating criticism is confession and repentance. *See* Cohn, *The Criminal Process in the People's Republic of China,* 79 HARV. L. REV. 469, 490 (1966). This is an effort to educate members of the society. It also allows reassimilation into the larger group—the society. The purpose of criminal law is not upon crime control, but upon an educational process in which confession plays a central role in the reassimilation of the offender into the society.

The confession is sometimes viewed in our criminal justice system as a step towards rehabilitation and is often rewarded as such. For example, the guilty plea is often seen as a step in the rehabilitation of the defendant and is often rewarded by a lesser charge and sentence than would be the case if the defendant demanded a trial for allegedly committing the same acts. Further, our juvenile courts attempt to use confession as an aid to reassimilation of the youth back into the greater society.

system also exists in commercial groups. It predominates in exchange groups. An example is the specialist committees the exchange groups create, such as the Odd Lots Committee of the New York Stock Exchange. In fact, if we view the term "dispute" as including any controversy between substantial portions of the membership of the relevant group, we can see that our legislative bodies also use an investigatory method, though unfortunately not always of an expert investigatory type. Even including legislative groups in the investigatory system, however, we have yet to encounter a machinery which has only the characteristics envisaged by our model. The same is true, of course, of the adversary system model.

Almost all existing machineries to some extent embody aspects of both the adversary and investigatory models. These models are important because they give us the wherewithal to question the extent to which a particular machinery embodies either adversary or investigatory system characteristics. This, in turn, allows us to state to what extent the values embodied in such systems prevail in the particular machinery under study. To put it another way, we find that, as in the formal society, so, too, in the commercial groups, the selection of particular kinds of machinery for the settlement of particular kinds of disputes reflects the relevant group's reconciliation of the conflict between the values represented by the two systems. For example, in the formal legal system, although we believe firmly in the value of "freedom of contract" and the freedom of a person whose contract has been breached to take remedial action by bringing a case in the courts or to refrain from doing so, we also recognize that certain kinds of contracts cannot be left within the scope of the adversary system. An example of such contracts may be service contracts between public utilities and the consumers of power. The adversary system may be perceived as an inappropriate one for resolving disputes that may arise between these parties for at least two reasons. First, because there is an obvious disparity between a householder and a large public utility such as Consolidated Edison. Second, because the type of knowledge necessary to a determination of the fairness of the contract can scarcely be supposed to reside in judges who are selected by the processes currently in use.

In the commercial groups, however, restoration of equality between parties does not seem to have been a major operative cause for the creation of investigatory tribunals. This may be because the parties are more likely to be equal in their relations

to the tribunal. The major reason for the creation of investigatory tribunals in the commercial groups seems to lie in the felt need to utilize specialized knowledge in the decisional process. This matter of specialization or expert knowledge is, of course, an extremely relative one. Arbitrators in trade associations or exchanges, by comparison to judges, would certainly be viewed as experts on the issues brought to them for decision. Arbitrators are not specialists, however, with respect to some areas of controversy inside their own trade group. In that context they are generalists as our judges are generalists. The issue in the utilization of experts is the extent to which specialized knowledge not normally available to the deciders is necessary to a wise resolution of the kind of controversies likely to require decision. This question cannot be answered without some knowledge of what the decisional process is and what is meant by "wise" decision.

3. The Decisional Process: Wise Decision[67]

Controversies or disputes are of two basic kinds. The first type, and the one we think of as peculiarly suited to the "judicial" process, involves a demand by some person against another for compensation or change of behavior. The second type is a demand by some person or sub-group for change in the standards regulating the future behavior in some particular area of some or all of the members of the group. Normally we think of this latter controversy as best suited to the "legislative" process. In the first type of dispute the conduct complained of typically has occurred in the past or is threatened specifically for the future. Although this factor is also present in the second type of controversy, typically, its presence is obscured by emphasis on the necessity for creating more just standards against which to measure or channel future behavior. So, too, controversies of the first type obviously involve the use of standards against which to measure behavior, and they also involve the channeling of future behavior to the extent they have precedential value. This fact tends to be obscured, however, by the emphasis on the need to decide the particular controversy on the particular facts.

---

67. For examples of in-depth analyses and empirical studies of decision making and decision consensus in the commercial arbitration area, *see, e.g.*, Haggard & Mentschikoff, *supra* note 2, at 277 (setting out results of research regarding "how individuals make decisions and how groups achieve decision consensus"); *id.* at 295 (examining "decision-making and decision consensus phases" of dispute settlement).

If we recognize that the resolution of all controversy involves both fact-finding and standard ascertainment, we can see that the resolution of the issues in any particular controversy turns on either what factually has occurred or is likely to occur, or on what norm or standard should be applied to judge or channel or rechannel the conduct involved. On the other hand, the issue can and frequently does involve both aspects—that is to say, the factual and the normative. The particular issue or issues depend on the areas of disagreement between the parties and the acceptance of those areas by the decider in framing the controversy. Decision, therefore, if it is to be wise, necessarily involves the selection of the most appropriate substantive norm possible and its application to a correctly perceived set of facts.

Contrary to general belief, the selection of a norm does not depend upon "the facts" but upon the issue,[68] and "the facts" instead depend upon the norm. To the extent that the norm is improvidently selected or the facts are inaccurately perceived, the decision which ensues is not the "wisest decision" that could have been reached. Both the selection of a norm and the perception of facts, however, are extremely complex processes. Neither the selection of a norm nor the factual perception rests on ultimate truth. In both cases, an assessment of certain probabilities is involved: (a) that the norm selected is the one that will best serve the relevant group's values and achieve the end desired, and (b) that the facts as perceived are the facts which exist in reality.

The decider's prior experience and training have material influence both on his selection of data from which a picture of the facts can be developed and his selection of the appropriate norm to be used in deciding a particular case. It is easy to understand why selection of evidence rests on prior experience and training. Obviously, for example, to a mechanic, a discourse on carburators has a very different meaning than the same discourse would have to the typical law professor. The factual framework or Gestalt which each brings to bear to the study of the evidence is necessarily different. The effect of prior experience and training on the selection of a norm is more difficult to see because it embodies two aspects, of which only one is generally recognized. The generally recognized aspect is that as a result of growing up and being educated in a particular cultural context, we grow to assume the importance of certain values usually

68. *Id.*

without further inquiry. This is easy to see. The other aspect is that the determination of the wisdom of a particular norm is always made, on an implicit or explicit basis, after an assessment of the probable consequences that utilization of that norm will have on the behavior of the members of the group to which it applies. This latter phenomenon is obviously a factual inquiry, and yet we tend to view it as a value judgment and consequently beyond empirically based criticism.

It is thus apparent that the process of estimating factual probabilities, whether as to past or future conduct, is an extremely important part of any decisional process. It is also clear that the more we know about the kind of conduct underlying the dispute, the more likely we are to make an accurate estimate both as to what probably has happened, and as to the impact the selection of one norm or rule rather than another will have on future conduct. The ability of a decider to utilize knowledge and experience directly related to the kind of controversy involved is, therefore, one important factor in moving toward the achievement of wise decision.

The other thing to be noted about the decisional process is that the norms of rightness and wrongness themselves operate as screens or filters for the perception of fact. This is necessarily so because the human mind cannot carry all of the data before it as to anything, but necessarily selects that which it believes to be significant for the purpose at hand. Moreover, significance for the purpose at hand rests on the standard by which the conduct in the controversy is to be judged or channeled.

The question of how to achieve wise decision, therefore, becomes in the first instance one of how to set up a system that will produce deciders who will have the requisite knowledge—by virtue either of prior experience or of on-the-job training—to select and use the most relevant substantive norms and fact-finding norms. This does not mean, however, that specialist or expert deciders are the best means for the production of "wise" decision. A person who is a mere specialist may not have adequate background or training for the selection of appropriate substantive norms which are good for all of us. Nonetheless, a mere specialist may be excellent in the application of fact-finding norms and even in the selection of substantive norms for the resolution of controversy in the particular area involved. What is good for General Motors need not be good for the entire country. The allocation of the forum for ultimate norm selection is the age-old problem of the allocation of function or area between generalist and specialist

and is exemplified by current discussions of the relation that should prevail between courts and administrative agencies.[69]

This issue is clearly related to the procedures being used by particular types of tribunals. If the procedures can be altered so as to permit ready access of specialized knowledge to generalist deciders, perhaps that is a better solution than changing the forum of decision. Certainly it is an alternative that needs further exploration than it has yet received.

What this suggests, is that we must re-examine all of our procedures—court, administrative, legislative, and executive—to see the extent to which they facilitate wise decision in the particular areas concerned, and the extent to which they embody values other than those inherent in producing the wisest decisions possible. The study of this conflict of values and its variety of resolution is one that seems to us to be as perennial as the conflict itself, and as incapable of final resolution in any general form.

III. Grist for the Mill

The need for knowledge in all its forms, including the study of disputes, the channeling and rechanneling of behavior, and the allocation of the final say, is a prerequisite for an artist in law. Without this knowledge the lawyer, his client, and the greater society will always be less than they could be. Indeed, our failure to train lawyers in the correct way is an abdication of our responsibilities as citizens of our society.

All of what we have said, therefore, has enormous meaning for lawyers and law students. It means that they must acquire knowledge not only about the rules of law, the ways and processes of the formal legal system, and the way people think, but that they must also acquire knowledge about how things interact with each other—how institutions interact, how forces interact, and how people's dreams and desires interact. They also have to face the possibility that, although everybody in our culture may have a similar set of values, and we believe that they do on the whole, the differences lie in the hierarchy set up of the values at any given moment for any given situation. Stated otherwise, many of

69. So, too, the allocation of forum is a major problem in the relations between the generalist bodies of commercial groups and their specialist committees.

the differences lie not in differences in value at all, but are differences in the perception of the life situation.[70]

Let us take, as an example of the need for broad knowledge, the decisional process.[71] As stated below, in a court or arbitration process, the search for justice always proceeds through the investigatory-parental mode, even if it is also adversarial in nature. There is always the possibility that the decider will do independent research on the issues presented for decision. The court is never limited to the law presented by the parties or to the situational facts as presented. Deciders, if they are conscientious about their tasks, also usually wish to know as much of the situation as possible. They are limited, however, by time and energy constraints.

Moreover, in any case which is worth fighting about to begin with, good judges can find a technically impeccable way of deciding for either party. If the judges are decent human beings, and we think ninety-nine percent of them are, they are trying to find the best solution for all of us. To achieve that end, they must understand the life situation and know whether it is aberrant or typical. If the judges are to have this information from each advocate's perspective, the attorneys for the parties must understand the situations and all their possible ramifications, and present them to the judges in the light most favorable to their clients. But if this task is not performed adequately by each party to the dispute, the judges will most likely have their vision of the problem severely constricted. In the typical case, judges simply lack the

---

70. One can see this dramatically by reading opinions of the Supreme Court of the United States or the supreme court of any particular state. If cases are read horizontally, in a chronological order, on whatever topics arise in that order, and not vertically by doctrine, we suggest that what one will find is that the biggest difference among the Justices is in their perception of the life situation. Further, we think that one needs to read just one term of cases to see this difference very, very clearly. While reading the cases, one should ask: How does the writer of this opinion perceive the life situation, and is that perception different from the writer of another opinion? If so, there is obviously something operating on the value side, because it is certainly not operating in terms of the prior law which, of course, remains constant. The other thing to look for in the Supreme Court opinions is where the Justices are obtaining their information about the life situation. Perception is never complete, and no one ever sees anything entirely in the round. The lenses through which one sees the life situation can come only in three ways: prior experience, training, or knowledge acquired on the job. Indeed, we have taught classes using this very approach, and we believe that the results of the classes strongly support our position. The groundbreaking work on appellate advocacy which is suggestive of such an approach is K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

71. *See* Haggard & Mentschikoff, *supra* note 2.

time to put the case together from all perspectives without counsel's help.

Our system of selecting judges assures that they do not know a great deal about everything, or about anything in particular. For example, it is highly unlikely that federal district court judges will know anything about commercial finance, mergers and take-overs, secured lending, or sales. Judges are not expected to know these things. They are selected because they have good sense, are quick studies, and are competent to be jacks-of-all-trades. The theory is that they can find out quickly; they can be filled in by lawyers. That is the skill for which they are selected, if they are selected properly.[72] In a sense, they are universalists, having a little bit of knowledge about everything, but not a great deal of knowledge about anything that is substantive in nature, except possibly the specific areas in which they practiced before assuming the bench.

It is terribly important when one has a good, conscientious judge, therefore, to present to that particular judge the situational patterns. The ability to provide this information is essential. Lawyers must know what to give the judge, but they cannot do so without broad knowledge. Lawyers not only must possess broad knowledge of the situation, but they must also know how judges determine facts so that they can convince judges to make good decisions and select the correct rules.

For example, lawyers must understand something about the decision making process. The decision making process proceeds through stages. The first question that is pursued in either arbitration or in the courts is a determination of what actually happened in the particular case—who was doing what to whom, when, how, why, and where? The second question is whether what happened in the particular case is what usually happens in that kind of case. This is what we call situational credibility. The third question is the degree of credibility possessed by the purveyor of the information. We call this personal credibility.

The way to judge situational credibility, or whether what happened in the particular case is what happens ordinarily, is to look to the inherent probability of the story which is being told. Unless you know what is typical, you cannot know the inherent

72. Judges are not, of course, always selected properly. Many judges, as well as many lawyers, are simply insufficiently prepared to do their jobs. This stems both from inadequate training and disinterest in the job.

probabilities of it. Many people know what the inherent probabilities are as far as car accidents are concerned, and that is why juries are good fact finders in automobile accident cases. If a lawyer shows the jury the physical damage and skid marks, the jury usually will make a fairly accurate guess about what happened on the basis of sheer probability.

On the other hand, imagine that a buyer is suing a seller because goods he bought were damaged when they fell out of the delivery truck outside of Albuquerque, New Mexico, and the contract was CIF[73] London-Albuquerque. That should sound strange to a lawyer. Indeed, it is strange. A CIF contract is an overseas contract, and Albuquerque is a long way from the coast. The goods came from the coast by truck. Also, with a CIF contract, the buyer pays against the shipping documents. In this case, the buyer had already paid for the goods long before they fell off the truck. He unloaded the vessel, put the goods on the truck, and now he is complaining against the seller. It does not make any sense, does it? The inherent probability is that the buyer is lying, because the situation is just so nonsensical that it could not be true.

The problem is that not many people in our society stop and think about this or other problems that arise in life. Moreover, not many lawyers or judges know much about CIF, anyway. A lawyer, to be competent, must stop and think deeply about problems such as this. The first and most important test that can be given to any testimony or any delineation of any situation is that if it does not make sense, it probably is not so. The world is not eccentric; it moves with regularity. People usually behave the same way today, tomorrow, and the next day. With the exception of random acts of violence, such as terrorism, things are fairly well-patterned. Absent patterns of behavior, the world could not operate. This is also true about the law. Eighty percent of the law is regular, well-patterned, and clear.[74] Only approximately twenty percent of the law is subject to quick change.

The second factor in gauging credibility is the kind of person making the statement. With experts, we look to qualifications.

---

73. A CIF term indicates that the price includes "the cost of the goods and the insurance and freight to the named destination." U.C.C. § 2-320(i) (1978).

74. A simple example is the everyday check cashing procedure. When someone signs on the back of a check, that person is said to endorse it. If that check is not paid, it "bounces" back to that person. That is the law. Further, the possible exemptions to that law are infinitesimal when one considers the billions of checks that are cashed each day.

Without discussing in detail what considerations are important in the process of qualification, we will say that anyone with a Ph.D. has a union card. If the case requires information about economics and the witness has a Ph.D. in microeconomics, he is viewed as an expert. Otherwise, he is not an expert, but just an ordinary Joe and jack-of-all-trades like the rest of us. In that case, what he has to say is worthless, even if he is right and the "expert" is wrong.

Factors beyond possession of a Ph.D. also affect the credibility of experts. For example, if an economist specializes in a narrow area such as market theory and has testified in a number of cases in the past, it may add to his credibility. On the contrary, if a doctor does the same thing—works on the same kinds of cases all of the time and is a famous "expert witness"—we may think that particular doctor is a phony. That may be grossly unfair to the medical profession, or it may be that we hold this view because we know more about medicine than we do about economics.

Calling in an expert does not dispense with the need to understand the situation independently of the expert's testimony. A lawyer has to know enough to know whether what the expert is saying makes any sense at all. A lawyer cannot accept testimony as fact just because the expert says it is so.

The law is universal and covers all parts of life, every last bit of it. Lawyers must acquire the habit of being jacks-of-all-trades, just as good judges are. They must be able to shift lenses when different problems arise, so that they have a holistic view of the problem. They should be able to get into any issues that arise in our civilization. Further, lawyers should never believe anything until it has been proven sufficiently to feel right. We use the word feel, because there is a rightness about some kinds of feel. One never reaches that point, however, until one has first gone through the rational process. Feelings are useful in lawyering only after there is a broad basis of knowledge behind the feelings.[75] Thus,

---

75. Soia Mentschikoff always cautioned first year students about allowing their feelings to override their intellect. She used to tell them to put aside their feelings until they learned to work problems through the rational process. The first year of law school, in her view, required a withholding of one's beliefs. Indeed, I vividly remember Soia's constant denouncement of "feelings" when I was a first year student in her Elements class at the University of Chicago. She often refused to discuss a student's "feelings" until the student had first shown the class a rational thought process. This could, of course, cause great tension among the students. It did make the point, however, and students usually learned to combine the rational and the emotional aspects of their thought processes.

for example, unless an "expert's" testimony feels right, we should question it critically despite the aura of personal credibility that exists because of the expert's personal qualifications.

Another problem inherent in depending upon credibility of the person, rather than of the situation, is that we all possess the dreadful stereotypes that have been imposed upon us by the media and by our culture. For example, take the stereotype of the "perfect judge." If we say to a group of people that the door opened and a small, fat man with greasy hair and perspiration pouring down his face entered dressed in a black robe and scuttled over to the bench and sat down with his eyes moving in all directions, what would people say? Most likely, they would say: "Hey, that is a queer judge, isn't he?" But, if we say to this same group of people that a tall, distinguished, silver-haired man entered the room with his black robe flowing in back of him and smiled, what would most people say? Most likely, they would say: "Justice is going to prevail because he looks like a judge." These are two possible stereotypes. Everyone has stereotypes. Lawyers must be aware of the perceptions people have of one another and understand them. Lawyers must also be cognizant of the stereotypes they possess.

The only two ways to determine credibility of information is by the person or by the situation. If we determine credibility of information solely by the personal characteristics of the purveyor, we are not necessarily being rational. The more knowledge we have about various topics, the more likely we are to be correct about any given situation, and the more likely we are to be able to make a better judgment as to what happened or is about to happen.

The discussion above is addressed not only to the need for knowledge in resolving disputes. Knowledge is also vital in the area of channeling and rechanneling behavior. When we try to control behavior, we start with the end or the value involved and then state what type of behavior we want to elicit. We say that we want people to behave in a particular way, because it will achieve some end or value which we hold dear. This necessarily involves some presupposition that we know what behavior will result from our actions.

As previously noted, the first thing that must be done to channel and rechannel behavior is to convey knowledge to the immediate parties and, on a wider basis, to the general audience involved in the life situation. We must rethink our method of conveying knowledge about what ought to be, and about how people should

behave, because it is being conveyed now in a very fragmentary fashion. No one in the media, for example, explains the interrelationship of the various factors involved in any situation. People are left unable to put together fragmentary information into a whole view of important public problems.[76]

As a society, we also suffer from lack of knowledge due to lack of data. This has significant consequences. For example, there are many areas in which our society has inadequate knowledge, such as on environmental issues. The state of the art and of knowledge are simply incomplete. If society through the law acts incorrectly because of the inadequate knowledge, the consequences on behavior may be devastating. If our society does not act, similar consequences may occur. Lawyers, the managers of our society, must study and understand physical as well as social science research. They then must study the communications problem and work out solutions to it. Without broad knowledge

---

76. The lack of adequate information about public issues causes severe problems in the search for solutions. In the immigration field, for example, several attempts have recently been made to introduce bills in Congress for new immigration controls based on the view that our borders are being overrun by hordes of illegal aliens. Estimates of the number of illegal aliens in the United States are, therefore, politically sensitive. If the number could be shown conclusively to have increased substantially in recent years, this could be used to support arguments for new immigration controls. On the other hand, if the number of illegal aliens could be shown not to have increased substantially in recent years, opponents of restrictive legislation could argue that the problem had been exaggerated.

On June 26, 1985, a panel of the National Academy of Sciences estimated that there are two to four million illegal aliens in the United States. This is a figure substantially below the previous government estimate, which ran from four to six million in number. The panel also noted, after an exhaustive study of immigration statistics, that the number of illegal aliens has not increased sharply in recent years. Government officials have argued vehemently that there has been such an increase. Further, the panel stated that immigration statistics are totally inadequate for making decisions about immigration policy, which has caused immigration policy to be made in a data vacuum. N.Y. Times, June 26, 1985, at A10, col. 1.

False images of reality must not replace the facts. If they do, societal responses to important social issues will greatly harm those affected by the solutions. Indeed, the false image that aliens are increasingly entering the United States has been used by the government since 1981 as an excuse to incarcerate approximately 2,000 Haitian refugees for up to one year in "camps" and to segregate them by sex and age, thus splitting up husbands, wives, and children, with cruel results. This incarceration and the government's refusal to parole Haitians into the country pending a determination of their asylum claims, while paroling other similarly situated refugees, led to a major lawsuit challenging this discriminatory action. The Supreme Court, after more than four years of litigation, finally barred INS from using national origin or race as a factor in determining whether to parole each individual excludable refugee. Jean v. Nelson, 105 S. Ct. 2992 (1985). But the suffering these people endured can never be erased from our memories.

about the vast number of individual factors that exist in any problem area, and about the way they interact, lawyers, law, and our civilization are likely to act incorrectly.

All of what we have said also has enormous consequences for legal education. It is clear that the most effective work of the lawyer in practice depends on vision, depth, balance, range, and humanity. These are, of course, the very things that a first rate liberal arts education can and should induce in students. Thus, the best "practical" education that law schools can offer to any lawyer is the study of law as a liberal art. There are three necessary ingredients to the study of law as a liberal art: technical competency; intellectual integrity, or the making clear the meaning of the art for the culture and all those involved in it; and the spiritual aspect, or the quest of the art for service and beauty.

Technical proficiency, the mechanical underpinning of the art of law, is indispensible to any lawyer. Any member of the practicing bar must be able to do what is needed for any consumer of the law's service, at any time, and with at least a certain level of technical proficiency. It is sheer folly to require specialization in law schools or at the bar. Technical proficiency cannot be entrusted to a subordinate. Each lawyer must be minimally competent in a variety of skills.

The intellectual ingredient of the art of law comes itself from the achievement of technical proficiency. A lawyer cannot, for example, learn the craft of legal writing, or learn how to read legal and other materials with excruciating exactitude, without some notion of the meaning of the institution of law and the roles played by the various actors in the legal culture. What the law-government institution does for and to the parties to a dispute, the group or nation, and the entire civilization affected by it, calls for explicit study on its own terms.

This is not all. Each major one of the individual crafts of the law-government institution deserves its own study as a whole. For example, there are varying theories of advocacy or rhetoric which have been the basis for liberal arts since classical times. Moreover, these theories, and ones that must be developed by the present day scholars, are empty unless they build upon the ethical and psychological nature of an issue and client, within the tribunal, society, and law institution. There are also varying philosophies of advocacy which are analogous to and at least as intriguing as those in different branches of philosophy or political theory. There are, further, varying theories of the aesthetics of advocacy.

What we have said of advocacy, of course, can be said for counseling, for the study of the craft of judging on both a trial and appellate level, for legislation, and for all the various crafts of law. Perhaps even more significantly, we have found in our combined years of teaching law that the combination of the theory, philosophy, and techniques of the crafts, stir otherwise uninterested students to seek the beauty or service or both in the art of law. This teaching style also has created the opportunities for intellectual and moral growth among the same group. It has given them the wherewithal to seek truth and knowledge throughout their lifetime as lawyers and human beings. We must never underestimate human potential. The results of a true liberal arts education in the law cannot be overestimated.[77]

The law schools, therefore, must teach a broad range of the crafts of law. If a law school is to give adequate training for the bar, it has to teach the skills involved in at least the five major crafts of law:[78] (1) appellate argument; (2) trial advocacy; (3) counseling; (4) negotiation; and (5) drafting. This is certainly not a new proposal. Indeed, since the thirties, experimental work has been going on in all these areas. Yet, legal education has progressed very little from the days in which rules were said to determine results and skills training was unknown. The hope that there would be a rapid increase in the development of materials and teaching techniques in the crafts of law in the post World War II era never materialized. As late as 1979, the American Bar Association talked about the importance of teaching skills for the crafts of law.[79] We must reverse this trend. Academic lawyers must do the research necessary to teach these skills.[80]

---

77. Indeed, those results are clearly visible in the good lawyer. For example, it is true that a first rate lawyer has skills superior to that of a lawyer trained in an inferior manner. Day after day those differences appear in our legal culture. Anyone who knows the difference between a good and poor lawyer can testify to this fact. For a discussion of a liberal arts education in the law, see the articles cited in note 9, *supra*.

78. Additions to this list can easily be made. We limit ourselves to these five major crafts because in our definition of these crafts we mean to include the teaching of most skills needed by lawyers.

One of the things that terrifies us as we look at the law school world and see that skills are often taught without substance or that information is stressed to the exclusion of an understanding of the process, is that those who are being trained in that limited way are simply never going to know what they do not know. They will simply be unable to judge adequately the necessary ingredients of a competent lawyer.

79. *See Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 ABA SEC. LEG. ED. AND ADM. TO BAR.

80. Very little has been achieved in this area since Langdell's day. *See supra* note 5.

More is needed, however. Law schools must give students the wherewithal to pick up information. Scholars should devote time and energy to create reading lists and syllabi in various areas. Students must be encouraged to obtain a broad liberal arts education and to pursue rigorously their interests with great vigor. They should be encouraged to do more research and to write essays on independent research topics.

Further, empirical and theoretical research must be combined on substantive issues. Law students must have a working knowledge of economics, social science methodologies, and social theory. Joint projects by social scientists and lawyers must be encouraged.[81] We need empirical knowledge about how various systems function, how transactions occur,[82] and how better to communicate law to those it affects. At the same time, we must continue the basic training in the effective use of legal materials, case analysis, doctrinal synthesis, and the acquisition of substantive knowledge.

This is certainly a large task for law schools to perform. It is necessary for our legal culture and greater civilization, however, that we do so. If disillusionment has set in amongst law school professors and lawyers, if they do not believe law schools can meet these goals,[83] there is a simple answer for them: neither

---

81. The commercial arbitration studies undertaken under Soia Mentschikoff's direction in the 1950's, are prime examples of the joining of lawyers and social scientists. For publications from this effort, *see, e.g.*, Haggard & Mentschikoff, *supra* note 2.

82. Broad knowledge about how transactions occur is vital to the commercial lawyer. Soia used to tell a wonderful anecdote to illustrate the nature of a transaction:

One day, the residents of a small Spanish village discovered that the village donkey was missing. The donkey provided the only means of transporting supplies to the village, which was on a hill several miles from the nearest road. A scientific search strategy was developed, and everyone but the village idiot put the plan into action by fanning out in concentric circles designed to encompass every bit of land in the area. A day-long search proved fruitless, and a more extensive search was planned for the following day, when the villagers would fan out even further.

On the second day, the village idiot conducted his own search. At nightfall, the villagers returned to their village discouraged because their search had failed once again. To their surprise, they found the village idiot sitting in the middle of the square with the donkey. When asked how he found the animal, the idiot answered, "I said to myself, 'If I were a donkey, where would I go?' and I went, and there I was."

In law, also, scientific methodology and decision making based on what parties themselves would do in a situation are no substitute for understanding the usual manner in which things work.

83. It is customary for many faculties to argue that law schools are not equipped to teach the legal crafts, that faculty members are not qualified to do so, and that the teaching of the legal crafts should, therefore, be done by the practicing bar. We believe that this is merely an attempt by law faculty to justify its own abdication of its responsibility to prepare students for entry into the legal culture. The assumption lurking beneath these arguments is that once a law student passes the bar, some magical

rainbows nor the pot of gold can be obtained, nor would be worth the having if it were. But the search is good.

---

transformation occurs which endows him with the capacity both to perform at a high level of competence and to teach others how to do so. Such an assumption is, obviously, nonsense, particularly when applied to all members of the practicing bar.

A second proposition often advanced to justify the failure by law faculty to teach legal crafts and skills is that it would be too expensive because it would require a one-on-one type of instruction. This is simply not correct. To adequately teach a craft skill, a teacher must have the ability to deal both with the theoretical foundation and understanding of the skill involved, and with the critical appraisal of the student's attempted performance. Yet it is said that the technical skills involved in the use of legal materials, case analysis, and problem issue spotting, is taught in every law school in the country. Further, these law schools certainly do not teach these skills by one-on-one type of instruction. Moreover, materials already exist, and others are in the process of creation, to teach the skills and craft of law. *See supra* note 9; *see, e.g.*, I. STOTZKY & S. MENTSCHIKOFF, THE THEORY AND CRAFT OF AMERICAN LAW—ELEMENTS (1981).