



1932

# THE LAWYER'S LAW

UNDERHILL MOORE

GILBERT SUSSMANN

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

## Recommended Citation

UNDERHILL MOORE & GILBERT SUSSMANN, *THE LAWYER'S LAW*, 41 *YALE L.J.* (1932).  
Available at: <https://digitalcommons.law.yale.edu/ylj/vol41/iss4/4>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

## THE LAWYER'S LAW

UNDERHILL MOORE \* AND GILBERT SUSSMANN †

AN attempt to define the limits of the field of law and the problems within it, what are and should be the approaches to those problems, and the data and methods for investigation must begin with the activities and ways of thinking of the practitioner. These have established the boundaries of the field and the mode of its cultivation not only for the practitioner but also for those with scientific curiosity.

There are many callings the professional activities of whose practitioners are the advising of clients what, in a developing situation, are the forms which the future behavior of others are likely to take, and to what extent and how the course of the situation's development may be affected so that the future behavior in question may take the form preferred or least objectionable to the client. The profession of marketing or sales adviser is one of them. It directs its attention to the forms of behavior called buying. The profession of public relations counsel is another. The behavior of press and platform and their remote consequences in voting, buying and giving are its specialty. There are many others. Among them is the profession of the lawyer. The lawyer advises as to the probable forms of the judicial behavior of courts. His clients are those against whom governmental intervention is sought, those who are seeking intervention in their own behalf, and those with enough foresight to wish to mold the present and the future in anticipation of the necessity of seeking or avoiding intervention in the future.

The behavior of many different groups is the subject matter of the advice of the public relations counsel to his client. Today, when the problem is the limitation of the production of petroleum the group is the producers of crude oil; tomorrow, when the recognition of the Union of Socialist Soviet Republics is the focus of the situation the group is the government; when a president is being nominated and elected, his advice relates to the intermediate behavior of almost every group in the community. So in the practice of the marketing expert one group after another passes before him as he regards the likelihoods of

---

\* A. B. 1900, A. M. 1901, LL. B. 1902, Columbia; Sterling Professor of Law, Yale University.

† A. B. 1926, Oregon, LL. B. 1929, Columbia; Research Assistant in Law, Yale University.

the behavior of each. In one case he advises upon the sale of yachts, in another second-hand cars, in a third lollypops. But only one among the many groups in the community engages the lawyer's professional attention. The likely behavior of judicial officers of the government is the burden of his advice. Seldom does he advise or assist in his client's contacts with the discipline committee of a church or club or with the arbitrations of a trade association. If he advises during his client's business negotiations, only rarely does his advice include more than a statement of what judicial behavior would be probable were the negotiations to take this course or that.

The professional work of the marketing expert compels him to take into account many factors besides the wares of his client and their distribution, the argument in advertisements, and skill in face to face contacts. For this reason he does not devise for his clients plans for selling ice cream on Hudson River ferryboats during the winter nor for selling golf clubs to the blind. Neither does he advise that slate roofing will be bought by nomadic groups or that attempts to sell uniforms for army or police in communities in which there is no organized government will succeed. So the public relations counsel would at present hesitate to advise his client to adopt a plan for the election of a negro to the office of Mayor of the City of New York. But the lawyer's work is commonly done in but one region, the outstanding elements of whose material and non-material culture appear to him to be relatively stable. He does not face the problem of securing favorable decisions from Abyssinian tribunals, from informal gatherings of Polynesian savages, as well as from the courts of his own country. In formulating his advice, therefore, he passes over unnoticed most of the cultural factors in his situations; and those which he does take into account are given no systematic consideration.

Like the practitioners of other professions, the lawyer has invented saws, adages, proverbs, and maxims to guide him in judging and advising how contacts with the courts will eventuate. These saws and maxims have been elaborated into a bulky professional literature which attempts to describe the way courts behave in the great variety of situations in which the individual is in contact with them. Thus on one side of its equations appears the behavior of judicial officers.

On the other side appears the behavior of parties, their witnesses, and counsel. Among all the variables present in his situations, the lawyer has chosen the behavior of the parties with which to equate the behavior of the courts. The obviousness of the variability of the behavior of the parties and the great significance which in his cultural inheritance is attributed to the behavior of a human personality doubtless accounts for the

choice. Consequently the primary statements of the lawyer's literature are written in the form of sequences of behavior. After the parties behave in this manner the court behaves in that manner.

These sequences are descriptions of the behavior of parties and the behavior of courts in cases which have arisen in the past. A few sequences are descriptions of the behavior in a large group of very similar cases. But most of the situations in which individuals come in contact with judicial officers present eccentric behavior not only deviating from the usual and regular course but also deviating in its own peculiar manner and degree. In order to avoid the unwieldy bundle of particularities which would result from according a separate description to each of these situations, they are thrown into large groups and the common factors of the behavior in each group abstracted and a mere fragment of the behavior of the parties described. But this course is by no means always followed. Often a sequence is derived from one or a very few of these cases.

The sequences which are derived from a large group of very similar cases the lawyer has incorporated in propositions in which he ascribes a causal relation between the behavior of the parties and the decision of the court. But he has not clearly distinguished between causal relation attributed as a result of observation, causal relation hypothetically attributed because of belief that observation would justify it, and causal relation attributed because of faith in its existence. Consequently the sequences derived from one or a very few cases and those derived from the large groups of situations in which the eccentric behavior of the parties is only more or less similar are also regarded as disclosing a causal relation between behavior of parties and decision. Thus propositions which are verified hypotheses and propositions which are unverified hypotheses are, without distinction, regarded as rules of law which indicate not only how a court has, does and will behave, but also how a court must behave. Taken together these rules of law give a complete account of how a court decides in any and every situation.

It will be noted that no mention is made of statutes, ordinances, and regulations in describing how the lawyer derives the sequences in his rules of law because they are not derived from the models of behavior for parties, for court or for both set forth in statutes, ordinances, and regulations. The traditional attitude of the lawyer is that until these models have been refined by courts the weight to be accorded them in accounting for judicial behavior is too uncertain for them to be incorporated in his rules of law. In consequence he has no systematic procedure for dealing with them.

In formulating his professional advice, however, the lawyer's

rules of law are not his exclusive or even principal reliance. In addition he takes into account every factor in the situation which he can differentiate from its context and on the basis of them and of his rules of law he makes an intuitional judgment of the form which judicial behavior will take.

The activities of the lawyer have for the most part been limited to advising how a court will act, *viz.*, whether it will intervene at all and if it does the model of behavior which will be prescribed. This limitation has resulted in the lawyer only casually observing whether or not the parties conform to the model. He has not attempted a systematic study of the degree by which the subsequent behavior of the parties conforms to the model. Neither has his professional work required him to study the effect, if any, of the form which the behavior of the parties takes after the decision, upon the behavior of persons who are not parties. Nor has it required him to observe and study the effect of his rules of law and of decisions and statutes upon the behavior of the community. In short, the study of judicial behavior and of statutes as devices for social control or for any purpose other than to aid in forecasting future judicial behavior does not come within his province.

Such are the activities of the lawyer. They define and limit the field of his profession. For them he is trained and in them he acquires his special competence.

Some report should now be given of the lawyer's traditional ways of thinking. He takes no account of the fact that intuitional judgments are the bases for his advice. On the contrary his opinions are taken to be forecasts dictated by his rules of law. His rules of law do not appear to be unverified hypotheses. There is a failure to observe that the attribution in them of causal relation between decisions and the behavior of the parties is the product of either methodless empiricism or dogmatism. Since rules of law are taken to state an established causal relation and are not seen as hypotheses, the problems for research have appeared to be not the verification of rules of law but rather their historicity, their logical consistency with one another and their logical elaboration in postulate systems. For the same reason in the teaching of law the objective is seen as the imparting of knowledge of decisions and of the rules which the lawyer derives from them; the material, documents; and the method, exegesis.

In this way of thinking a judicial officer of the government appears to be a person without biological and cultural inheritance whose behavior is not the product of the factors regarded as significant in accounting for the behavior of human beings. This person's behavior seems to be fully accounted for by the law of the lawyer. Hence, the art or science of judicial be-

havior is a field of knowledge complete and self-sufficient, wholly independent of all others and coordinate with them. It is inadmissible to view hypothetically the behavior of a judicial officer as a response given in an inclusive situation. It is unnecessary in a study of such behavior to set up as a control a study of the like behavior of other persons.

In this way of thinking no account has been taken of the fact that in any situation which includes human behavior, past decisions are only one among many factors; that in any situation, whether or not decisions are one of the factors, it is a matter of tentative choice what factors are attempted to be correlated; that in choosing factors to be correlated there is no necessity for selecting the two factors of judicial behavior and behavior of parties; that any study which attempts to correlate but two factors is unlikely to supply even an index; and that the correlation of decisions and any other factor in the situation may profitably be studied by statistical method.

Another aspect of the lawyer's way of thought must be stated. He has come to share the layman's view that the lawyer's rules of law and the decisions from which they are derived, as well as statutes, are dominant factors in accounting for the behavior of the community. He often refers to them as "law," thereby implicitly attributing a causal relation between them and the behavior of the community of the same sort that he attributes in his rules of law between the behavior of parties and the decision of a court. This manner of speaking has led him and others to confuse lawyer's rules of law for the behavior of the court with rules of "law" for the behavior of the community applicable to every situation of daily life and regularly observed by everyone.

Such is the lawyer's traditional way of thinking of his problems, his data and his methods. To be sure it is grossly inadequate and filled with misleading notions. But for him it is a by-product of his professional work, seriously regarded on ceremonial occasions only, and never permitted to limit his field of vision to less than the whole situation upon which he gives an intuitional judgment. However, to the lawyer's rational account can be attributed his failure to recognize that his judgments are intuitional and given in inclusive situations of many biological and cultural factors, his failure to attempt an analysis of the process of his judgments and his failure even to begin systematically to take into account the factors in the situation.

## II

When a lawyer advises his client of the probable form which, under the circumstances, the decision of a trial or appellate court will take, his forecast, it has already been observed, is an

intuition of experience. This is equally true of forecasts as to rulings upon motions, objections to evidence, instructions, *etc.*, which the lawyer makes for his own guidance. In making his forecast, he takes into account every factor in the situation which he is able to differentiate, compares them with similar factors in other situations which he has experienced, estimates their similarities and dissimilarities, weights the results as best he may, and integrates them in his judgment. Since the lawyer's advice is a forecast of the probable form of judicial decision in a developing, inclusive situation he should frankly recognize that he is stating probabilities and adopt a method which provides for the systematic consideration of the factors in his situations and thus makes for the greatest available precision in stating probabilities.

A judicial ruling or decision is an event. The event which is the ruling should be distinguished from the opinion and also from the other concurring and following events, such as the behavior of the litigants and of others subsequent to the decision, which are thought of as its "consequences." Though the events regarded as consequences are, more often than not, more important than the ruling they are not events within the field of law. Nor is the form of the opinion a matter of professional forecasting.

The forecast of a particular event is a statement of the probability of its occurrence. A statement of the probability of its future occurrence is based upon the frequency of its past concurrence with other particular events. All the events in experience are conceived of as an inclusive situation organized with reference to a critical particular event, the concurrence of which with other events is the subject of inquiry. The number of such inclusive situations is as great as the number of critical events. Whatever the choice of critical events the problem of forecasting the concurrence of events in any one inclusive situation is no different from the problem of forecasting the concurrence of events in any other. Thus the forecasting of a particular ruling is no different from the forecasting of any particular event of behavior, as for example, the behavior of the discipline committee of a club or the decision upon an application for admission to the Yale Law School. This is true despite the fact that the ruling has official prestige and important consequences and despite the common belief that particular rulings must and do conform to statutes and prior decisions.

The statement of the probability of concurrence is the product of observation and statistical method. It would be impossible to observe the concurrence of the critical event with all the events in an inclusive situation. Inevitably a limited number of events is selected for observation. The selection is tentative

and based upon the hypothesis that observation of the concurrence of the critical event with the selected events will indicate, sufficiently for the purpose in hand, the probability of the concurrence of the critical event under inquiry with all the events in the inclusive situation.

If there are a sufficiently large number of situations in which a critical event of the type selected for inquiry concurred with events identical with or, according to some relevant standard, similar to the selected events in the situation in hand, it may be possible by observing the frequency of each of the critical events to state the probabilities as to the form of the critical event in the situation at hand. For example, by observing the frequency of each of the several forms of the critical events of type E, *i. e.*, E,<sup>1</sup> E,<sup>2</sup> E,<sup>3</sup> E,<sup>4</sup> E,<sup>5</sup> which have in other similar situations concurred with A,<sup>1</sup> B,<sup>2</sup> C,<sup>3</sup> D,<sup>4</sup> it may be possible to state the probability that in the situation at hand, in which the selected events are also A,<sup>1</sup> B,<sup>2</sup> C,<sup>3</sup> D,<sup>4</sup> the precise form of the critical event will be E.<sup>5</sup> If in an idle moment it were imagined that there were a sufficiently large number of situations organized with reference to each event of behavior which is supposed to be regulated by the government and if it were further imagined that there were estimates of the frequency of the concurrence of each of the diverse forms of these events with each combination of forms of the selected events, then one would be conceiving the abstraction, a law regulating every event of behavior, and be imagining the actualization of the possibility of its statement.

But the critical events in the form of which the lawyer is interested comprise, it has been observed, a much more limited group than those in which the government is supposed to be interested. His group of critical events is confined to the behavior of courts. Lawyer's law, therefore, is much more limited than a law imagined to impinge upon everyone all the while. Among the lawyer's situations or cases there may be some in which the selected events are so similar in form to the events present in a large group of similar situations, in all of which the critical event is judicial behavior, to permit him to state the probabilities of the form of the critical event in the situation in hand from observation of the frequency of the concurrence of each form of the critical event in those situations. Thus *under certain circumstances* the lawyer is able to forecast the admission to probate of a will, duly attested and executed by a decedent who was of sound and disposing mind, or the entry of a default judgment after the failure to answer a summons and complaint within the prescribed time.

But in many instances, among the lawyer's cases, the situations in which the selected events are identical with or, accord-

ing to some relevant standard, similar to the selected events in the situation in hand and in which the critical event is judicial behavior are so few in number that observation of the frequency of the concurrence of each form of the critical event in those situations will not indicate a useful probability of the form which the critical event will take in the situation in hand. These are the usual instances in which the case before the lawyer is not foreclosed by a number of recent cases from his own jurisdiction. In dealing with such situations, therefore, he cannot proceed by the method which has been abstracted for stating probabilities of the form of the critical event but his procedure must be a variation of that method. Since there will not be a large enough number of situations like the situation in hand to permit the making of a sufficiently useful statement of probabilities, it will be necessary to include within the group situations in which the forms of the selected events differ from those in the situation in hand. It will no longer be possible to define the group and thereby earmark the situations to be included in terms of the form of the selected events. The situations within the group are chosen as follows. From the possible alternative forms of the prospective critical event in the situation in hand are chosen, on the basis of experiential judgment, the several forms which the critical event is likely to take. Any situation in which there is actualized any one of these likely possibilities is included. Since at least two likely possibilities will always be present, the group will include situations in which there are actualized at least two and perhaps more possibilities. It will be noted, also, that such a grouping permits the inclusion of situations having selected events differing in form from those in other situations within the group as well as from those in the situation in hand. On the basis of the similarity of the selected events the situations thus included will be classified in subgroups. Observation of the frequency of the actualization of each likely possibility will thus require observation of its concurrence with the selected events in each of the subgroups. Such observation will disclose that there is, at most but one, if there be any, subgroup of situations in which the selected events are identical with or, with reference to a relevant standard, similar to the selected events in the situation in hand. To enable the utilization of the data as to the frequency of the concurrence of each likely possibility with each combination of selected events, the selected events in the situation in hand must, with reference to some relevant standard, be compared with the selected events in the situations in each of the subgroups to determine the degree by which they deviate from each other.

The determination of the probabilities as to the form of the critical event is thus the result of the integration of two steps:

(1) observation of the frequency of concurrence of each likely possibility with the various subgroupings of selected events and (2) measurement of the degree of deviation between the selected events in the situation in hand and those in the situations in the various subgroupings. The probabilities are the function of two variables, frequency of concurrence, and degree of deviation. For example, assuming that  $E$  is the critical event, that  $E^1$  and  $E^2$  indicate the likely forms of the critical event (but two forms are supposed for the purpose of simplicity and not because it is thought unlikely that there will be more than two), and that  $A^1B^1C^1D^2$  describe the selected events in the situation in hand. One of the events in each situation in the group will be an event actualizing either  $E^1$  or  $E^2$ . The selected events in these situations may be  $A^1B^1C^1D^1$ ,  $A^2B^2C^2D^2$ ,  $A^3B^3C^3D^3$  or any combination of them. Also as has been observed,  $E^1$  or  $E^2$  may concur with any combination of selected events. The frequency of such concurrence will have been noted. As a result there will be subgroups of situations in which the events will be  $A^1B^1C^1D^1$  and either  $E^1$  or  $E^2$ ,  $A^2B^2C^2D^2$  and either  $E^1$  or  $E^2$ ,  $A^3B^3C^3D^3$  and either  $E^1$  or  $E^2$ , etc. The selected events,  $A^1B^1C^1D^2$ , in the situation at hand will successively be compared with the selected events in each of the subgroups  $A^1B^1C^1D^1$ ,  $A^2B^2C^2D^2$ ,  $A^3B^3C^3D^3$ . The probable form of the critical event in the situation at hand will thus appear as a function of the degree by which  $A^1B^1C^1D^2$  deviate from  $A^1B^1C^1D^1$  and the frequency by which  $E^1$  and  $E^2$  concur with  $A^1B^1C^1D^1$  etc. Thus if  $A^1B^1C^1D^2$  deviate but slightly from  $A^1B^1C^1D^1$  and if  $E^1$  concurs with those events in almost 100% of the cases, there is a very high probability that the form of the critical event in the situation at hand will be the model for behavior which is actualized by  $E^1$ . Similarly if  $A^1B^1C^1D^2$  deviate very greatly from  $A^1B^1C^1D^1$  there is a very high probability that the form of the critical event in the situation at hand will be a model which is not actualized by  $E^1$ .

This abstraction of a procedure enables one to conceive the abstraction, lawyer's law, and to imagine the actualization of the possibility of its statement.<sup>1</sup>

### III

The lawyer's process of intuitional judgment is obviously a very rough and haphazard approximation of a precise method de-

<sup>1</sup> An attempt to apply a method derived from this abstraction has been reported in Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 381, 555, 752, 928, 1055 and 1219. It will be noted that in that attempt only two factors in the situation were taken into account.

rived from the procedure which has been abstracted and his forecast a rough approximation of the result which would be obtained by a special application of that method. Obviously until special applications are accomplished, the roughest approximations are all that can be had. Were this all, it would not be a matter of regret. But unfortunately the lawyer's failure to see his problem as one of attempting to systematize and to make methodical the processes implicit in his intuitional judgments and his clinging to the traditional notion that his problem is one of systematizing statutes and decisions have completely blinded those with scientific curiosity to the direction which the inquiries into judicial behavior should take. They have also completely obscured the contribution which the lawyer can make towards the solution of the problems posed by the other arts, sciences and disciplines and the contribution which they can make towards the solution of his problems.

In an attack made by a worker in one of the arts, sciences or disciplines upon the problems which an inclusive situation suggest to him the lawyer's contribution will of necessity be within narrow limits. His contribution cannot extend beyond the making of statements as to the form of judicial behavior. He can forecast the model for behavior which the judgment of the court will prescribe. He does not forecast whether the judgment will be conformed to or, if it is, what the "consequences" of conformity, partial conformity or nonconformity will be. Within these limits he can contribute experience in making intuitional judgments in situations more or less similar to the situation under observation. In respect of methods for correlating the form of judicial behavior with other events or factors in the situation, he can contribute substantially nothing. This seems to be as true of statutes and decisions as of the many other factors.

The contribution of the lawyer in such an attack does not include the making of statements of the likely forms of the behavior of individuals in the community which will concur with other selected events in situations, especially in those which include statutes and prior decisions. It is true, that in the process of forecasting the probable forms of judicial behavior, he has frequently had occasion to observe the concurrence of forms of the behavior of individuals with various selected events which include among them statutes and decisions. This experience may give him a certain facility though his professional activities have not practiced him in judging such likelihoods.

One who attempts to approach precise method in forecasting the form of judicial behavior must seek the aid of workers in many other fields of knowledge. Were he to attempt to forecast the behavior of an individual in a situation which includes

statutes and decisions this would be equally true. The events in the situation which he selects and takes into account include events which are the focus of study in anthropology, anthropogeography, sociology, and psychology, psychiatry and perhaps other biological sciences. In dealing with each of the selected events, he must call upon those trained in the discipline which focuses upon that particular event for the special knowledge and techniques which they command. In the application of his method he must rely upon the statistician.

It is implicit in what has been said that the problem presented by an inclusive situation is a problem suggested by one of the existing arts, sciences or disciplines. Until a problem has been posed the situation is but amorphous and unorganized experience. Consequently a cooperative attack upon a situation made by workers from many fields cannot be an attack upon the situation, but must of necessity be an attack upon a problem set by one of them and the cooperation of the others must be aimed at the verification of his hypotheses.