From a Language Perspective

Christopher D. Stone†

My thesis is that law scholarship, lacking any unifying sense of place and purpose, is fragmented and drifting. Not, obviously, that there should be a single mold. But we might at least compass ourselves by a firmer and perhaps more modest sense of our own specialness in the intellectual and social order. Much of the work we have sidled into can be done as well, if not better, by sociologists, economists, political scientists, and many others—often lawyers, playwrights, or judges. When I ask myself what we have to contribute that is unique—unique even in joint effort with others—the tasks I return to all have, at their basis, our special familiarity with the legal language. The language point of view provides a conception through which we can integrate the three overlapping roles that law academics play, of teacher, of commentator, and of participant in the law-creation process. What the law is, is a language activity. A just appreciation of this fact offers a fresh perspective on some of the most fundamental issues legal scholarship has traditionally probed. Even among those who would not characterize their work as about language, the language framework helps locate our common bonds, our points of contact with each other, with those in allied fields, and with society.

† Roy P. Crocker Professor of Law, University of Southern California. Those beyond blame for the last words, but to be thanked for some early ones, include Steve Barkan, Scott Bice, John Borgo, Orrin Evans, Ron Garet, Barbara Herman, Charles Kennel, Martin Levine, Michael Moore, Jill Mubarak, Judi Resnik, Ken Russak, Edwin Smith, Joel Shor, Robert Thompson, Dallas Willard, and my commentators, Ellen Peters and Martin Shapiro.

1 As teachers of law, it is a set of language skills that we teach. See pp. 1157-59 infra (examining law as a language activity). As theoreticians on law, it is the characteristics of the law-language as a medium that we examine. See pp. 1159-73 infra (relating traditional problems of legal theory to characteristics of law as a language medium). And as participants in the lawmaking process, it is a linguistic activity to which we are contributing. See pp. 1173-92 infra (relating scholarship's role in law-creation to legal language).

The distinction is roughly that between teaching physics, commenting on physics as a metalevel activity in the philosophy of science, and participating in scientific investigations in physics. The roles, particularly the last two, may readily conflate. Would one consider Albert Einstein and Niels Bohr, for example, as commenting on physics from without or contributing to its development from within? Though conflation may sometimes be useful, separating the roles, with their slightly different emphases, serves to clarify the present paper.
In the fall of 1959, when I entered the Yale Law School, the most eminent scholars were predominantly treatise writers: Bogart, Casner, Corbin, J.W. Moore, Pound, Powell, Prosser, Scott, Williston, and many others. I should not have to add that all these men were larger than their treatises. But whatever they turned their hands to, it was on the credit of their treatises that their words were somehow backed, and they benefited by a sort of rubbed-off reverence for Cooley, Gray, Greenleaf, Kent, Maitland, Mechem, Pollock, Pomeroy, Steffen, Story, Thayer, and Wigmore, whose tradition was in their keep.

The ascendance of the treatise has to be understood against the background of legal education. Legal education did not simply grow out of universities; it was grafted onto them. The law schools retain a heritage, a mission, and a host of institutional conceits, such as “thinking like a lawyer,” that imply a lingering separation from the rest of the university, with consequent uncertainty as to the place of scholarship.

The treatise emerged as the law school’s compromise. At its most commonplace, treatise writing represented an earnest and industrious attempt to accommodate the expectations both of university and of profession. At its best, the scholarship was—in compass, subtlety, rigor, and imagination—nothing for other university departments to sniff at. The respect was displayed in the hush with which we tributed Corbin, then nearing ninety, when he materialized in the law library to cull the advance sheets, as best he could with his portable lamp and dying eyes. Men such as Corbin were, in the law at least, the embodiment of scholarship.

Not so today. Treatises, some of them splendid, are still being written, but the prestige of the undertaking has tarnished. In the fifteen years I have been interviewing prospective law teachers, prompting them in overheated hotel lobbies to describe their idealized careers, I cannot recall any who fancied doing a treatise. Indeed, it is my impression that few today aspire to the mastery of any body of

2. Ellen Peters has called to my attention the fact—generally unappreciated by my classmates—that Corbin did not undertake his well-known treatise until after “retirement.”
3. See Stevens, Two Cheers for 1870: The American Law School, in 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 538 (D. Fleming & B. Bailyn eds. 1971) (because law schools are primarily professional schools, teaching takes pride of place over scholarship).
law in particular. The brightest of the candidates, though typically “willing to ‘do’ torts,” have as their principal interest some body of scholarship outside the law. They have discovered in, say, economics or social-choice theory, some lance of insight with which they are prepared to take a tilt at the law—any body of legal rules should do—in some way it has not been tilted at before.

What accounts for the lost luster of treatise-writing as a principal, if not the principal, outlet for scholarly ambitions? There are only partial explanations. Each part, however, contributes to a fuller understanding of the concerns about purpose and direction that have led to this symposium.

Probably the most significant way to regard the treatise’s demise is to count it among Mark Tushnet’s “legacies of realism.” The aspiration that drove the traditional treatise—to locate the quintessential legal rules and principles—was, at the least, deflated by the realist attack.

Part of the explanation lies, too, in contemporary temperament. To do a treatise well and to keep it current involves fastening to a single, more or less foreseeable set of problems for a professional lifetime, a commitment not suited to the generalist self-image of those attracted to law teaching. Treatise-writing is discouraged, too, by the fact that much of the most challenging, creative, and rewarding work that the enterprise once entailed—the supplying of insight and system—has largely been done in the major common-law fields. The potential influence of treatises has also declined. In an era when the courts were guarded about their capacity to “make law,” the treatise was a vehicle for subtle and diplomatic advocacy, often under the


7. From discussions I have had with scholars from other fields, however, I suspect that the demise of the treatise is connected with something that is more endemic and revealing. It may be that, in all fields of endeavor, the real world, which has always been regarded by scholars with some detachment if not disfavor, has become so overwhelmingly beyond comprehension that scholars generally have abandoned trying to account for what is happening out there in favor, as the most they can hope for, of an account of what is happening among themselves.

There may be, as an independent disincentive to the continuation of the treatise in law, the fact that the sheer burden of “keeping up” has increased dramatically with the increased volume of reported cases. Yet improved data-systems such as LEXIS may offset the burden of the increased volume.

8. This is not to deny that new, broader conceptions of the treatise may continue the search for insight and system through alliance with other fields. See R. Posner, Economic Analysis of Law (2d ed. 1977).
guise of saying what the law was. Gray made perpetuities. But today's scholars can employ journal articles quite as effectively, particularly considering the more frank environment about judicial law-making power. Moreover, the new fields, such as environmental law, are increasingly legislated, and old fields are being codified. Those who itch to influence the course of law can testify before legislatures or serve on Restatement committees.

We have to account, too, for the many specialized reporter services, such as those provided by the Bureau of National Affairs and Commerce Clearing House, and the ever-improving library support services, often computer-aided, such as those of LEXIS and WESTLAW. Obviously, although the new generation of services and technologies cannot by themselves displace treatises, their existence may slightly demean the undertaking. Witness, in this regard, how many of the treatises that remain in print, once under the guiding hand of scholars associated with law schools, have been contracted out for “updating” to practicing members of the bar; in some cases, the effort to keep current has simply been assumed by publishing houses.

In summary, our distant predecessors found things within the law to take pride in, to wonder at, to carry on. Those of my generation were molded by teachers who found this view of the mission a bit unchallenging and worn and had a philosophy to justify shifting

9. A flavor of this from a master: “The following well-reasoned opinion shows a correct way to avoid the fallacy of rejecting an inference upon an inference, and yet to give effect to the underlying distrust of inferences which rest upon too many intervening inferences . . . .” 1 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 41, at 438 (3d ed. 1940).

10. Gray's influence was such that even after the publication of 4 Restatement of Property (1944), his views, and not those of the Restatement, continued to dominate in the courts. See 6 American Law of Property § 24.1, at 8 n.4 (A. Casner ed. 1952).

11. Of course, there never was any required “sonnet” form for the treatise. Perhaps one effect of the new technology is to alter the form of treatise-type undertakings, further substituting theoretical analysis for synopsis and completeness to account for the ready availability of reported opinions to a broader population of users.

12. For example, W. Fletcher, Cyclopedia of the Law of Private Corporations (rev. ed.), is now in the hands of members of the bar and of the publishers' editorial staff, as is W. Bowe & D. Packer, Page on the Law of Wills (1960). The attorney who is keeping up G. Bogert & G. Bogert, The Law of Trusts and Trustees (2d rev. ed. 1965), appears to be a son, George Taylor Bogert, of George G. Bogert, who wrote the first edition, G. Bogert, The Law of Trusts & Trustees (1935). Not all the academics have bowed out, of course. Professor Tribe has stepped in with L. Tribe, American Constitutional Law (1978), and James H. Chadbourn is revising J. Wigmore, supra note 9. Professor Scott was keeping up A. Scott, The Law of Trusts (3d ed. 1967) until shortly before his death this spring.

It is interesting that Corwin on the Constitution, one of the most eminent treatises that had been in the custody of a non-law-school faculty member, is being maintained in its 14th edition by Harold W. Chase and Craig R. Ducat, both, like Corwin, associated with political science faculties. See H. Chase & C. Ducat, Edward S. Corwin's The Constitution and What It Means Today (14th ed. 1978).
their attention to other, more glamorous chores. They launched us along the path of what might be called Late Realism. If the principles of the treatise writers, even the principles of the realist writers such as Corbin, fell short of providing an adequate accounting and justification of law, then “our” task was to press on to discover the principles on some yet “higher” level—in a theory of the state, or of social choice, or of morality. Yet, as Paul Brest’s paper evidences, there is a growing sense in our community that this path only winds up in its own contradictions and muddles. And so we are left to reconsider, once more, what we are all about.

II

In view of the emphasis law schools place on teaching, the writing of teaching materials is more esteemed in legal scholarship than it is in other disciplines. But neither the energies devoted to, nor the laurels won by, the casebooks have expanded to replace treatise-writing. The content of even the most ambitious casebooks is too much someone else’s. The dominant forms of scholarly expression have therefore become journal articles and books, in which those who feel they have something to say can say it less obliquely.

Current scholarship obviously has a breadth, richness, and volume that defy any summary judgment. If I had to offer one broad generalization, I would call it overwhelmingly risk averse: clarity and not-being-wrong dominate imagination. That misgiving aside, my principal concern here is not so much with the quality of the work as with the character and aim of the scholarly activity behind it.14


14. A variety of inquiries might add perspective on our activities, some of which would benefit from the assistance of experts, such as sociologists conscripted from “outside.” One model is Robert Merton’s study of the sociology of science. R. MERTON, THE SOCIOLOGY OF SCIENCE (1973). A sociologist of law scholarship might inquire, for a starter, whether any practicing lawyer attended this symposium, and whether anyone who did, cared. Which, and how many, lawyers, judges, and newspaper editors read which of the law journals or other scholarship that is coming out of the law schools, and for what purposes? Who is reading and writing the law scholarship that is more closely associated with practitioners—that in Trial Magazine, the state bar journals, The Business Lawyer, and Case and Comment? Conversely, where do the people who are writing the law scholarship on each of these various levels get their information?

These questions concern what has been called “the invisible college,” the informal and extra-institutional pathways that link disparate influences and shape the course of intellectual development in any discipline. See D. CRANE, INVISIBLE COLLEGES 49-56 (1972). Learning more about how these connections are organized, and perhaps most important, how the scholarly agendas are set in law, would be a worthy aim of a scholarship of law scholarship. Until we have a better feel for what other relationships exist in other fields, we are limited in any discussion of whether what we have is what we want.
We can divide this activity serviceably, if roughly, into three levels. The base level, commanding the bulk of the energy, aims at conventional intellectual housekeeping: summarizing, unveiling common underlying elements, smoothing over apparent inconsistencies and propounding advances and retreats, usually within modest bounds. Periodically the scene is livened by activity on a second level, a vogue, in which a flurry of attention is concentrated on a particular topic or technique. "Neutral principles," the insanity defense, condemnation, state action, the digesting of Rawls and the Coase Theorem—all have enjoyed their day and have, to their credit, commanded widespread, and unifying, interest and contributions. The third level takes place in what we might call "schools," which have a longer lifespan than the vogues, enlist a broader membership, and like schools in any discipline, define themselves by a shared theme or technique. The predominant organizing bond in legal scholarship has been the interdisciplinary, co-venturing "law and . . ." enterprise—law and anthropology, law and economics, law and psychiatry.15

I do not know enough about the functions of schools in the arts and sciences generally to be able to say how ours compare with theirs. Certainly, wherever it takes place, there are some all-too-obvious hazards to school-work, chiefly the lure of a comfortable insularity. Isolated by a common tongue, absorbed in their own puzzles, confident of what problems, methods, and people count, the members of a school may wind up speaking to no one but themselves.

On the other hand, the very prevalence of intensive, specialized activity in so many fields is strong evidence of countervailing advantages. The schools in law, with their predominantly interdisciplinary bias, provide legal scholarship's most significant link to extralegal intellectual sources. The schools also afford the benefits of community, both intellectual and psychological: a pooling and concentration of insight, effort, and prestige, and a supply of respected colleagues to provide reassurances of worth. Although this mutual reinforcement and shelter from broad-based criticism may have its vices, it also has its virtues: in the life of every idea, there is a critical period for nurture, in which it stands to benefit from a little space safe from puncturers and cannibals.16

15. The school may assume a multidisciplinary form, as with one of our most enduring and internationally influential schools, that of Lasswell and MacDougall. The newest "school" of significance is probably the Critical Legal Studies group whose members are "actively seeking to expose and explain the central social/personal crisis of our time: the collapse of official rationality" and its implications for legal studies. See D'Errico, A Critique of 'Critical Social Thought About Law' and Some Comments on Decoding Capitalist Culture, AM. LEGAL STUD. A., June 1979, at 39-40.

16. Although the division into schools increases the risks of retreating from the prob-
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If there is, then, a problem—and there being a symposium, one presumes that there is—it is not that many of our most creative and energetic minds have been drawn off into schools, nor even that we frequently seem to lose sight of society’s dilemmas in favor of our own. Some fragmentation is inevitable. The problem is one of degree: lacking a common sense of endeavor, we have detached into separate islands of activity, mutually isolated from many potentially unifying and beneficial dialogues. Some of us are occupied with particular themes and techniques because they are familiar; others work with other themes and techniques because they are novel. Our over-extension is another symptom of drift: lacking a clear sense of “our own” mission and abilities, we tend to take on problems for which we are unsuited, often to the neglect of what we can do best. When we work with nonlawyers, as we surely should, what should we be looking to contribute? In our internal and external dealings, is the benefit of one’s labors lost on others unnecessarily? Are we exchanging ideas in all instances where we could produce gains from trade?

I concede that all of these points sound impressionistic and vague. But it is easy to generate concrete illustrations. For example, one measure of organization of law scholarly activities is the extent to which those engaged in gathering data respond to what the theorists need for the testing of their theories; some coherence would be confirmed if the theorizers even read the empiricists’ work. Does anyone really believe, though, that those who do empirical research on the criminal justice system have a clear idea of what those who are doing Big Theory Justice are about, or vice versa? Doubtless, the direction of empirical research in law is most strongly influenced by the availability of grants, the techniques that are fashionable in social science research, the kind of research that is technologically feasible, and what sounds exciting. The data that the rest of law scholarship might need, or even find useful, do not orient empiricists’ thinking. If we were to ask the same sorts of questions about other intrascholarly relations, would the answers be any different?

To define and approach the same sorts of problems in different lems that trouble the world to those that seem to trouble only academia, who is to say that the interests of the larger community are disserved? Even if we assume that Watson and Crick, in their long hunt for the DNA molecule, subordinated the sight of mankind to that of prizes and professional triumph, see J. Watson, The Double Helix 48 (1968) (goal of Watson and Crick was to “imitate Linus Pauling and beat him at his own game”), and the satisfactions of puzzle-solving, cf. T. Kuhn, The Structure of Scientific Revolutions 35-38 (2d ed. 1970) (discussing such satisfaction among scientists generally), the rest of us came off none the worse for it. Perhaps the necessary research was achieved even more quickly and efficiently than had they been motivated by a desire to promote some abstract good of mankind.
ways is a source of vitality. But the fragmentation of effort that sees so many different techniques being applied to so many different themes, with so little effort devoted to identifying and developing what we uniquely have to offer, can produce a disconcerted, however impressive, babel.

III

In an academic setting, whatever degree of organization and order it is possible to achieve has to be self-imposed and governed by a more-or-less shared understanding of what the subject matter is. Indeed, in almost every discipline, a traditional function of scholarship was once to keep the "what is . . . ?" questions in view: "What is art?" "What is science?" "What is music?" Asking "what is law?" has fallen, I fear, out of fashion. Considering the hazards of abstraction, this should not be wondered at. Yet, for my present purpose—to establish some broadly coordinative consensus—a fairly general view is precisely what we need.

Let me put forward—if only to serve as a common baseline—the view of law as a language activity. That conception is neither as nebulous nor as unhelpful (nor as pretentious) as it may sound. For to say that the law is a language is to say more than that the law is in language. It is to point out that the law is one of several ways we present the world to ourselves. In common with the other modes of presentation, the presentation through law involves a process of composition and editing. Whatever else understanding the law involves, it involves an understanding of this process.

17. Of course, there are other ways to view the law—for example, as a means of distributing wealth and power. To view the law as a language activity, however, is certainly broad enough to account for a range of competing perspectives, even if it cannot quite swallow them all. For example, the law may have, as Arthur Leff has emphasized, large elements of play, Leff, Law and, 87 YALE L.J. 989, 1005 (1978) ("[The law] is not a game, [but] it is not not a game, either."). But to the extent that it is a game, it is a game through language, a playing with words, as Johan Huizinga so clearly saw. J. HUIZINGA, HOMO LUDENS 83-88 (1955). To expose the law's ludic basis, if it is that, is not to concede that there is nothing we can say about the law in the scholarly metalaw. In fact, our analysis of "significant" attributes of the law may be better informed by an appreciation of the law's language-ludic qualities: for example, the gaming element may render adjudication more predictable if it induces the players to strip from legal issues some of the more serious, and perhaps therefore destabilizing, implications.

18. Nelson Goodman has identified the following processes as going into world-making: (a) composition and decomposition, achieved largely by reference to the labels through which we sort reality into classes of relevant kinds; (b) weighting, which relies on differences in emphasis or accent, as illustrated in art and music; (c) ordering, such as the standard ordering of tones by pitch and octave; (d) deletion, which is a result, for example, of using a discontinuous scale for measurement (of temperature, say), and sup-
Let me illustrate with a simple, perhaps trivial, example. Consider the performance of a piece of music. There are several alternative frameworks that can be applied to describe or depict various aspects of the performance. A formalized system of conventional music symbols allows the composition to be transcribed quite literally in terms of its notes, pitch, rhythms, and so on. There is what we might call a musical metalanguage, with which we can apply concepts that transcend the aspects of the piece that the notation system aims to capture—concepts such as harmony, melody, and structure. The language of physics tells its own story in terms of sound waves, vibrations, and the density and elasticity of air. Other languages, girded on other concepts, can express what the composer (or composition) meant. One could also bring to bear languages of a looser sort, such as painting and choreography—“looser” because they seem to possess only by considerable extension of meaning such elements as syntax, grammar, or vocabulary.

I am suggesting that we look at the law in the same way, as a means of abstracting from—we could say with equal validity, “putting into”—the world as it exists (that is, insofar as it may be said to exist independent of the law’s terms, perhaps in the terms of some other language) what we would call the world’s law-relevant features. In the illustration of the musical performance, one of the law’s mundane concerns would be copyright infringement; the law-language therefore brings to bear—constructs its world view in the terms of—“registration,” “originality,” “access,” “infringement,” and so on.

Granted, to say that the law is a language is to call attention only to some of its most obvious features, namely, those that it shares with other languages. And it is not yet to say anything about the distinctions between the law-language and other languages—most important, about the special things we try to do with the law language. But those broad, shared features of language are vital to our understanding of what law is. Most important is the basic terminology with which

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19. I stress the law as a language activity in which the scholar is engaging in Parts VII-X, pp. 1173-92 infra; in Parts III-VI, I emphasize the world-describing functions of the legal language, pp. 1157-73 infra. Obviously, the two functions—acting and describing—cannot always be distinguished satisfactorily, since describing is one of the many related activities we use language to engage in. See L. Wittgenstein, PHILOSOPHICAL INVESTIGATIONS 11-12* (G. Anscome trans. 1953) (speaking a language is part of an activity in life in which, in accord with different ‘language games,’ we may be describing, giving orders, cursing, greeting, and so on).
the law's view of the world is constructed. It is a world in which people not only walk and punch, they "trespass" and "commit battery." They are not persons simpliciter, but "buyers" and "sellers." The legal language answers the fundamental questions of jural ontology. Who, for example, will populate the judicial world as its first-class citizens, the bearers of legal rights: men, women, corporations, minorities as groups, fetuses, states, rivers, trees? The language, too, determines what attributes of the world are to be noticed: monetary value and certain mental states have gained a place, as have pain and suffering, and consent. Sincerity's place is not so clear. Terms such as "res ipsa loquitur" and "proximate cause" are not just handy descriptions of what is; they ingrain our worldview with important presumptions about how the world works.

To know a language obviously involves more than knowing its terms. The point is underscored in a classic simile of Wittgenstein's, in which he likens the meaning of a term in a language to a piece in the game of chess: 'When someone shows someone the king . . . and says: "this is the 'king,' " this does not tell him the use of this piece . . . .' To know what the king is—to know the piece's meaning—one must know the moves that it can make, what it can do (and what can be done to it), and with what significance, in the nearly infinite variety of situations that can arise in the game of chess. So too, in a language, one does not know the meaning of a term until one knows the rules of the language that govern its "movement," that is, how it is correctly applied, what service it may and may not perform in various appearances.


22. For those who care, trees are not having much luck before the bar. See Ezer v. Fuchsloch, 99 Cal. App. 3d 849, 863-64, 160 Cal. Rptr. 486, 493 (1979) (refusing to recognize right of tree itself not to be trimmed, notwithstanding modest body of legal scholarship suggesting such right).


24. L. WITTGENSTEIN, supra note 19, at 15.
We can carry that image one step further. We know that when we move a checker piece from a checker board to a backgammon board we alter the piece’s “meaning,” though the piece retains the same physical shape. Likewise, in my musical-performance illustration, certain symbols that appear in the law-language also appear in other languages; the judge, like the musicologist, may speak in terms of “tonal resemblance,” “striking similarity,” “common trite note sequence,” and so on. But because the same symbol is used as a “piece” first in one “game” and then in another—with different prizes hanging in the balance in different games—there is no assurance that the symbol’s applications, the “moves” that can appropriately be made with it, are the same in both settings.

The same distortion of meaning is involved when we introduce into law terms from, say, psychiatry or economics. Courts get confused and expert witnesses frustrated. While the symbols retain their shape as they emigrate from one language game to another, they are being resettled into a different linguistic culture that seems somehow to imbue, and to alter, their rules of conduct, their mores.

IV

The law comprises, at least, a host of terms—the law’s pieces—and a body of complicated rules that govern their use, their movement about the law-board (or more correctly, about the law’s various boards). But the mastery of these terms, and the acquisition of the skills for their proper use, are precisely what the routine practice of law requires. Hence, they are part of what the law school academic emphasizes as a teacher. The role as scholar implies concern for something more.

I do not want to get mired in the entire relationship between theory and practice—how much of the one a student will need in

25. See Kern v. Universal Pictures, 154 F.2d 480, 487, 488 (2d Cir. 1946) (suit for copyright infringement of musical work dismissed, evidence showing some but not sufficiently striking similarity, considering triteness of note sequence in issue, to compel inference of access).

26. See Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (suit for copyright infringement of musical work improperly dismissed on summary judgment; at trial, “[t]he impression made on the refined ears of musical experts . . . [is] utterly immaterial on the issue of misappropriation”).

27. Even within the law, a given term such as “manufactured product” may have a different range of application depending on whether its use is in the Tariff Act, Patent Act, or Interstate Commerce Act. See, e.g., ICC v. Allen E. Kroblin, Inc., 115 F. Supp. 599, 606-07 (N.D. Iowa 1953) (finding history of application of “manufactured product” in Patent Act and Tariff Act inconclusive regarding application under Interstate Commerce Act).
order to succeed at the other—although it rightly constitutes an important issue for any branch of university studies that has its roots in the soil of a trade. Although my colleagues may disagree, I see no reason to deny that at some point the students’ professional needs and our scholarly curiosities part ways; at that point, wherever it may be, we begin to measure the marginal returns on our efforts in terms of advancing an understanding of law, not in terms of training lawyers. The role we then assume is akin to that of the philosopher of science, art critic, or musicologist. The interest carries beyond the current “body” of art, or “body” of law, to a perspective from which the principles that define the field, and give it coherence and distinction as a unique medium or worldview, can be understood and perhaps influenced.28

There is, in law, no agreement on what these field-defining principles are. I want to persist with the notion that we can most usefully seek them among features of language. This is not as odd as it may sound. Law is as much of a language activity as any field we can imagine. Executors of the various law roles are continuously operating with words and principles—classifying, applying, distinguishing, deducing. Granted, most practitioners can learn most of the required language acts by doing; little more need be understood of fundamentals than trained intuition can usually provide. The same is generally true of practitioners of other arts and crafts. The principles the painter needs—regarding perspective, light, planes, and so on—are by and large mastered through practice and experiment.

Scholarship of something—be it philosophy of science or theory of dance—aims to pass beyond what common sense and intuition can provide,29 and to develop insight into relationships the practitioners themselves may find superfluous or silly.30 This is ordinarily done by recourse to some metalanguage, either one specific to the scholarship

28. I do not pursue in this paper, but am frankly intrigued by, other related analogies. For example, someone might compare the impact law scholars have on the direction of law with that of art dealers and museum curators on the direction of art, and with dance impresarios and dance critics on ballet.

29. Examples of such scholarship include N. GOODMAN, LANGUAGES OF ART (1968), Campbell, The Structure of Theories, in READINGS IN THE PHILOSOPHY OF SCIENCE 288 (H. Feigl & M. Brodbeck eds. 1953), and Hempel & Oppenheim, The Logic of Explanation, in READINGS IN THE PHILOSOPHY OF SCIENCE 319 (H. Feigl & M. Brodbeck eds. 1953).

30. Arthur Koestler reports how, at a lecture he delivered on his theory of creativity in art, an artist was drawn to protest, “I do not ‘bisociate.’ I sit down, look at the model, and paint it.” A. KOESTLER, THE ACT OF CREATION 393 (1964). Our unhappy lot involves the equivalent of informing ungrateful painters that they “bisociate”: informing dubious jurists that what they really deal in are “debilities” and “no-rights.” See p. 1175 infra (discussing “distant dialects” of legal theorists).
in issue or, more commonly, one that includes concepts borrowed from other fields.  

I am suggesting that if we regard the law as a language activity, and infer the law scholar's role from the relationship of scholars to their fields generally, one would expect the principal efforts of the law scholars to involve analyzing the law as one would analyze a language.  

Such an endeavor involves recourse to semantics, language philosophy, linguistics, psycholinguistics, communications theory, structuralism, and (radiating outwards from the purest language concerns through everything else that bears on language activity) literary criticism, rhetoric, and so on.

To illustrate in what way a language-based perspective might lend law scholarship structure and direction, let me borrow from ordinary language philosophy Freidrich Waismann's suggestion that there are different language strata. The notion can be illustrated by reference to a recurring, if arcane, debate in philosophy: whether, as phenomenologists claim, all statements about material objects, such as "there is a cat on the mat," can, without any loss of meaning, be reduced to (that is, replaced by) a set of statements about sense data, such as

31. Thus, a music theorist may borrow from the language of art and architecture criticism to clarify his "own" field, see D. COOKE, THE LANGUAGE OF MUSIC 2-10 (1959), and a theorist of comparative creative undertakings may be drawn to a perspective from which he can discern the commonality of the "languages" of mathematics, art, and music, see D. HOFSTADTER, GÖDEL, ESHER, BACH: AN ETERNAL GOLDEN BRAID (1979).

32. See Ackerman, Four Questions for Legal Theory, in NOMOS XXII, Property 351 (J. Pennock & J. Chapman eds. 1920) (Yearbook of the American Society for Political and Legal Philosophy) ("[r]ather than begin [writing B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977)] a jurisprudential study of property . . . I wanted to ask how people used property talk. From the start . . . I was concerned with the linguistic practices of a special group of conversationalists--people who, like myself, were trained as lawyers.")


"over there there is a purring sound," "... a blotch of such and such shape," "... of such and such a color," and so on. 

Waismann proclaimed the unlikelihood of such a reduction: sense-data statements and material-object statements were like movements on parallel game boards, each with its own rules or, as he variously put it, different macrological properties, distinct "logical styles" or "logical textures." The same could be said of other broad classes of statements, such as those of physical laws or of one's own feelings: they constitute independent language domains, marked by independent logical styles.

The notion of "logical style" is, unfortunately, itself inexact. Waismann suggested several related ways in which one might get a grasp of a stratum's logical style, beginning with examination of the concepts it employs. In mathematics, what one wants to say seems adequately expressible in symbols whose operations are governed by a complete set of rules (like those for the movements of pieces in chess). In natural languages, by contrast, the concepts are subject to various infirmities of meaning—for example, ambiguity, vagueness, and open-texture—of which no set of symbols and rules of governance can fully rid them. The character of the concepts—their precision, for example—is integral to the logic of the entire stratum. In scientific languages, the law of excluded middle holds. But languages are conceivable, such as that with which we recount memories, of which we may not be able to make the same demands. Mathematics has clear


37. Waismann suggests that micrological properties are those that deal with "local relations between propositions"—for example, whether two propositions are inconsistent. Macrological questions, on the other hand, concern a system as a whole—for example, "whether the system under consideration is free from contradiction." Waismann, Language Strata, supra note 35, at 234-35.

38. Id. at 235.

39. Id. at 236.

40. Id.

41. A term is vague if it is "actually used in a fluctuating way," that is, if the rules for its application are indefinite over a broad range of applications. "Warm" and "mountain" are examples. By contrast, a term such as "gold" is not vague in current usage, because we have rules that enable us to distinguish what is gold from what is not, at least in reference to all things that we have seen so far. Open texture involves the possibility that some new substance may be discovered that satisfies all the chemical tests for gold, but emits a new sort of radiation unique to science, or perhaps is black. Because such a thing might be found, "it is not possible to define a concept like gold with absolute precision, i.e. in such a way that every nook and cranny is blocked against entry of doubt." Waismann, Verifiability, supra note 35, at 126; see Waismann, Language Strata, supra note 35, at 236.

42. Waismann, Language Strata, supra note 35, at 237.

43. Waismann argues as follows: to speak of some memory experience of color, we are forced either to countenance a highly blurry terminology or else to abandon the law of excluded middle. Id.

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rules to identify contradictions, which it banishes. In contrast, the languages of wit and aphorism suffer them gladly.

Waismann emphasizes, too, that as we pass from stratum to stratum, we encounter different standards for what makes a statement meaningful. The logical positivists caught part of the truth when they pronounced, after examining science, that to be meaningful a statement needs the credentials of sensible experience. But they were too quick to generalize from science about the requirements of meaningfulness elsewhere. In other strata, meaningfulness can turn on other, less demanding connections with experience. Similarly, as we pass from stratum to stratum, we encounter different standards of verification and criteria of truth (or “validity”), different pragmatics. In a system of geometry, for instance, the truth of a statement turns on its coherence with the other statements of the system, indifferent to the shape of the natural world.

V

I am not contending that law constitutes a “language stratum” that is as distinct from ordinary language as, say, the language of mental events is from the language of physical events, or as that of mathematics is from that of morals. Nonetheless, there are many important

44. See id. at 238.
45. Id. at 241-42.
46. Id.
47. See Carnap, The Elimination of Metaphysics Through Logical Analysis of Language, in LOGICAL POSITIVISM 60 (A. Ayer ed. 1959). Of course, the “positivism” in law that goes back to Austin is related to the positivism espoused by Ayer and Carnap. See S. Shuman, LEGAL POSITIVISM (1965). Ayer’s and Carnap’s argument in its most extreme form is that no statement, other than a tautology or contradiction, provides any information—augments knowledge, has any meaning—unless we can provide a set of necessary and sufficient empirical criteria by reference to which it can be either verified or disconfirmed. See Ayer, Editor’s Introduction, in LOGICAL POSITIVISM 10-14 (A. Ayer ed. 1959).
48. See Waismann, Language Strata, supra note 35, at 241-42. Pragmatics, as opposed to semantics, deals with the conditions under which an utterance is appropriate. Moore, The Semantics of Judging, 54 S. CAL. L. Rev. 151, 185-86 (1981). The emphasis is important for an understanding of law viewed as a species of activity; for example, one declares one’s testament, advocates (as a prosecutor) that a defendant be found guilty, finds (as a judge) the defendant guilty, and so on. See generally J. Austin, HOW TO DO THINGS WITH WORDS (2d ed. 1975) (discussing how acts of speech perform various social functions).
49. Waismann, Language Strata, supra note 35, at 229. Moreover, “... a law of nature is never true in the same sense in which, say, ‘[t]here is a fire burning in this room’ is, nor in the sense in which ‘[h]e is an amusing fellow’ may be; and the two latter statements are not true in the same sense in which ‘I’ve got a headache’ is.” Id.
50. Most strikingly, the language of physical events constitutes an ontological commitment to objects in space and time. The language of mental events constitutes a commitment to events in time, but is, at the least, ambiguous with respect to space: it would be odd to ask where one’s fear or intent is.
features of the law that make it peculiarly suited to scholarly analysis from this perspective. There are, to begin with, special constraints on the character of the concepts the law will allow—restrictions on vagueness, ambiguity, and open-texture. Then, too, the rules of evidence, pleading, and procedure constitute their own straining mechanisms, endowing the law with standards of verification that are in many ways peculiar to law, and that give law a special cast.\textsuperscript{51} Evidence that may be valid to an historian, such as a coerced confession or uncorroborated testimony, is not allowed in law. The law’s “truth,” too, is different: it is inextricably woven with the special thread of things we are doing in law that we are not doing in mathematics.\textsuperscript{52} And while the classic positivists’ criterion of meaningfulness is almost certainly out of place in law,\textsuperscript{53} it may be profitable to pursue the notion that the law stratum possesses its own standard of meaningfulness, that is, of some minimal information content that a statement must possess in order to be “legally meaningful.”\textsuperscript{54}

I am not suggesting an inquiry confined within the traditions of the ordinary-language school, which has now said much of what it has to say, and perhaps taken a turn toward being merely clever.\textsuperscript{55}

\textsuperscript{51} Throughout history, the idiosyncracies of law language have provided commentators with many grounds for comment. See J. Alkison \& P. Drew, Order in Court (1979); D. Mellinkoff, The Language of the Law 11-23 (1963).

\textsuperscript{52} The point is that the notion of “truth” cannot be understood apart from the other elements of the stratum. The statement, “truth, too, is different,” might as well be expressed, “truth, therefore, is different.” Perhaps, in law, neither “truth” nor even “validity” is the word one wants; as Tony Kronman reminds us, lawyers aim to produce conviction in people with authority. See Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 963 (1981).

\textsuperscript{53} “Value-statements,” such as moral statements, traditionally have been regarded as the most tenuously related to sensible experience. Hence, unless the law is prepared to, and can, purge itself of all value-laden terms, as some, including Holmes, have advocated, see Holmes, The Path of the Law, 10 Harv. L. Rev. 437, 464 (1897) (“I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”), the law has to be regarded as an area whose “meaningfulness” most inadequately comports with positivist criteria. Moreover, the capacity of positivism to give an adequate account of reasoning even in “value-free” sciences is in doubt, see W. Quine, Two Dogmas of Empiricism, in From a Logical Point of View 20 (1961) (criticizing view of logical positivists, note 47 supra).

\textsuperscript{54} See p. 1190 infra (discussing problem of nonlegal terms losing or changing meaning as they are brought into law-language).

\textsuperscript{55} I should remark, in view of my reliance on Waismann’s insights, that he himself had apparent misgivings as to how far he could carry his notion. Language Strata was originally read in 1946 to the Jowett Society at Oxford, but when Antony Flew asked him permission to publish it, Waismann, in Flew’s words, “found that there was so much that he wished to alter, and so much else that he wished to develop at considerably greater length.” Flew, Introduction, in Logic and Language 226 (A. Flew ed. 1965). Some effort was required to persuade him to permit its publication in the form
The idea is to carry the concept of a law-language stratum as far as it will go, and thereafter to flesh it out with insights from the many other language-focused fields I have referred to. I do not think, even with those amendments to the endeavour, that we are likely to emerge with anything like a clear, radically new notion of what law is, a notion that will change our conceptions at a stroke. Nonetheless, I am prepared to defend the examination of the law as a "language stratum" as fit for a baseline mission of legal scholarship, or of one principal "school," if only for the added understanding that the continuing effort would provide.

To begin with, the significance of the law's "logical style" overwhelms almost everything else we do. I have already remarked that whereas some crafts are handicrafts, the law is intellectual: its practitioners engage in such acts as the application of legal language to the world and the decomposition of principles of relative generality ("policies" and so on) into principles of narrower scope useful for the disposition of particular cases. It involves continual explanation and justification. Justice requires that like cases be treated alike; analogies have to be sorted into those that fit and those that do not; metaphors have to be kept within the bounds of judicious constraint.

It is not surprising, therefore, that much of what the law-world asks its scholars to provide involves commentary on "logical style," as distinct from legal substance. There are several problematic distinctions involved here, which a contrast may clarify. I am assuming that the reader of an archeology journal, for example, expects to find reports on new "digs," and that in applied physics journals, the papers report how some experiment worked out. By contrast, in our own journals—perhaps aside from reports of some of the social-science-related activity and the old-style "case developments" sections—most of the contributions turn inward on legal analysis itself. We pick apart the "logical" (whatever that means in law) bases of decision; we analyze "rationality analysis." Indeed, whether or not we do so in the language of logical style, one could maintain that, rightly understood, every major question of concern to legal scholarship is ingrained with a view (ordinarily unspecified) of the law's logical character. Consider, for example, the in which it is published. Flew indicates "that the eventual decision to publish was made rather against [Waismann's] better judgment." Id.; see F. WAISMANN, HOW I SEE PHILOSOPHY 91 n.1 (1968) (indicating Waismann was "conscious of exploring new territory" and dissatisfied with his articles).

56. See p. 1161 supra.

cluster of issues that surrounds separation of powers. We incline to think of them in what we could call their political-science dimensions—how do we square a theory of democracy with so powerful a non-elected judiciary? Yet the questions of political theory—how independent do we want our office-holders to be—are in a sense secondary to questions of semantics and epistemology: considering the character of the language that lawmakers must use to communicate their instructions to law-enforcers, and of the “facts” that the legal system is committed to address, how and within what range can we bind the office-holders to a limited function?58

No one in law scholarship would deny the importance of these “logical style” questions, once asked. “Thinking like a lawyer” is part of the vocation’s self-image. What is remarkable, in the circumstances, is how little we yet have to say about what the logic of the law, insofar as there is one, is. True, no one can be found today avowing what the formalists and realists (or rule skeptics) at their most extreme may have been contending.59 But while the old positions have lost their champions, what new, generally acceptable views of the character of legal reasoning and justification have been provided to take their places?60 Almost everyone seems satisfied to suppose that the truth lies “somewhere in between,” and to leave it at that. Small wonder, then, that the avowedly discarded views continue to regenerate with new fruit or disguised in new foliage.

One cannot deny that some search for the “in between” continues. But in several ways, it is an unenthused pursuit. First, few—a rather isolated few—are doing it today.61 When formalism and realism were in earnest contention, the debate—whatever, in retrospect, the exaggerations and shortcomings—seems to have enlisted a broader, more visible and mainstream contingent of law scholars.62 Second, almost all those who are examining the issues of legal logic are doing so in a way that is in the predominantly secular tradition of “doing juris-

59. See Moore, supra note 48, at 155-67 (attempting to sort out possible points of disagreement among various realists and formalists). It is an unflattering commentary on our literature that even those celebrated positions were left so ill-defined that they have become identified with their caricatures about slot machines and judges' breakfasts.
60. Arthur Leff has rightly suggested that part of the attraction economics holds for law professors is the same old yearning for formalism. Leff, supra note 6, at 453-59.
61. The most recent and outstanding exception is Moore, supra note 48.
62. We may attribute the wider interest in jurisprudence among our predecessors in part to the broadly appreciated political implications of how the judiciary was reacting to social welfare legislation. Have we simply allowed society—and ourselves—to lose sight of legal logic’s continuing implications for contemporary problems?
prudence." Legal reasoning is certainly—in some ways, and regarded narrowly enough—special; my suggestion that we pursue the notion of a distinct law stratum assumes that much. But to study legal reasoning outside the context of reasoning (language, meaning, and so on) generally is to examine the specific without sufficient grounding in the general—like discussing a species unmindful of the phylum—and thus to miss what is special about the law.

The skeptic may well ask why, if the case for connecting the law with language activities in general is so strong, we are not doing more of it. In part, the line of inquiry I recommend is probably retarded by a sort of institutional ethos that hangs over the law schools: never to say anything, if you can't say something solid. Whatever may lie in between formalism and realism is part of the morass that "playing safe" steers away from.

There may be the feeling, too, that all this is "old hat," that any number of traditional commentators on the law, including Hohfeld, Kelsen, Morris and Felix Cohen, Radin, and Lewellyn have already said what there is to be said about the law's logical style, if not in those exact terms. Moreover, those familiar with the literature of, say, psycholinguistics and the various communications theories, may rightly wonder how much of it may be useful to us, that we have not already said, as well, in our own ways.

I can appreciate such misgivings. In my view, however, they misconceive what is marginal because they misjudge the centrality of the inquiry. We support concerted efforts in law and psychiatry, and in law and economics, even though their contributors can claim to illuminate no more than scattered areas of the law (except perhaps in their very most expansionist moods). By contrast, the language-related disciplines contribute to an understanding of the law in its every manifestation; the amount of effort we should be putting into language analysis has to be measured in that light. Moreover, to claim

63. This gives our work some of its most commendable flavor, but it has its drawbacks, too. See Waismann, How I See Philosophy, in LOGICAL POSITIVISM 345, 359-60 (A. Aver ed. 1959) ("[T]here is nothing like clear thinking to protect one from making discoveries . . . . And some of the greatest discoveries have even emerged from a sort of primordial fog.")

64. Incidentally, this sort of caution, if endemic to scholarship generally, may be more prevalent in law. Much of legal scholarship draws on judicial opinion for its raw data and looks to recognition by the courts as confirmation of worth; the richness of the literature is destined to suffer from the fact that even modern courts are generally constrained against too frank a public examination of the logic that they stand on. Consider, for example, the classic "strict constructionist" disclaimer of Justice Roberts in United States v. Butler, 297 U.S. 1 (1936): "the judicial branch . . . has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." Id. at 62.
that many of the language-related fields do not have much in them for us is to mistake the nature of the ideal scholarly relationship. Even if the work of our colleagues in other fields is running as dry as our own, the implication is not to ignore one another but to be mutually irrigating—not to ask whether there exists, in "their" work, the answers to "our" questions, but to ask whether greater interchange might be beneficial to all.

In summary, I doubt that, on close inspection, the legal language will ultimately turn out to be distinct from most other ordinary languages with respect to each and every stratum element: syntax, concept texture, rules of transformation, pragmatics, verification, basic ontological commitments, truth (or validity), and so on. Indeed, if we look ahead, we can readily anticipate that different areas of law will turn out to vary, one from the other, with respect to certain stratum elements. Most obviously, a term employed in the definition of a crime is subject to severer ambiguity and vagueness constraints than are terms employed elsewhere. Nonetheless, the mere pursuit of the notion that there is a law stratum—made jointly with others and refining our aspirations as we proceed—would lend legal scholarship a direction and depth now lacking.

VI

One may object that the focus on the law's language is too narrow to accommodate many of the appropriate concerns of legal scholarship. The law is not merely a way of describing the world; it is a way of dealing with it according to certain principles that cannot be palmed off as mere principles of language. This objection is valid enough so that in the next section I will introduce a slightly modified perspective, one that connects legal scholarship with participation in general social activity. Meanwhile, I want to carry the case for turning inward on language one step further, for I believe the product of such efforts can account for, clarify, and advance much of what law scholarship sets out to do.

Consider the connection between law and morals, which all of us would agree is one of the fundamental issues for law scholarship. Certainly medicine, science, technology, and even literature and art generate and address moral questions. The moral constraints operative in biology and physics, however, are limited to those placed on any communal activity: in doing one's job, as in doing anything else, one has to consider one's effects on others. But no one would say that the biologist who is splitting genes, or the physicist who is splitting atoms, is not "doing science." By contrast, it is at least a respectable position
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in legal scholarship to maintain that for an edict to be “a law,” or for a judicial decision to be “lawful,” or for a social system to be a “legal system,” it has to possess certain moral qualities and avoid others. In law, that is, objections to the morality of some actions may take the form of objections to language usage: not (just) that something is “wrong,” but that it is “not law.”

At its worst, this turn toward English usage can deteriorate into the most sterile squabble, like an out-of-hand debate about whether “x is art” or “y is music.” Nonetheless, it is a claim worth examining, even if its ultimate intelligibility is unclear. The contention that music entails something more than the mathematically possible combination and permutation of notes may not settle a dispute about whether a John Cage composition is or is not “music.” But putting the question that way may force us to uncover and clarify principles of music. So too in law. The focus on language principles may lead us to uncover significant relationships between law and morals: we may learn not just about the content of norms, which is commonly commented on, but also about principles of logical style, which are ordinarily slighted.

On the level of logical style, at least three relationships between law and morals are possible and merit inquiry. The first inquiry would ask what we can predicate about the law’s logical style, in the terms of ethics. Suppose that the law has its own standards of “truth” (or validity), its own standards of verification, and its own ontological commitments deeply embedded in its rules of evidence and pleading, in the character of acceptable terms, in the practice of cross-examination and appeal, and in the complex matrix of legal defenses and justifications. Suppose further that the lens these elements make

65. This is roughly the “internal morality” position suggested in L. Fuller, The Morality of Law (rev. ed. 1969) and in Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 645-46, 660 (1958). Fuller was certainly never able to define the notion to general satisfaction. See S. Shuman, supra note 47, at 88-93; Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 615-21 (1958). Note, however, that the text below involves not substantive principles of legality of the sort conceived as fundamental by Fuller but elements of logical style, in the sense I explain just below.

66. By the content of the respective norms, I mean what the rules and principles say and signify, the subject-matter of traditional jurisprudence and legal sociology. It is common to observe, for example, that what the legal rules command or permit should not, and usually do not, wander far from roots in commonly held morals. I am contrasting these traditional matters with something more basic if more vague, that is, the relationship between the logical style of the rules and principles of the legal system, on one hand, and those of ethics, on the other.

67. See P. Schuckman, Problems of Knowledge in Legal Scholarship 17-23 (1979) (reviewing procedural rules from perspective conscious of epistemological and semantical implications).
of the law is not transparent, but that it has its own grind and polish, its own principles of refraction. Is it not then appropriate to ask of the law’s logical style the same sorts of questions we have customarily asked of bodies of substantive principle: what can we say of it morally? For example, insofar as the lens determines those aspects of reality that are expressible in law, is it doing so “justly” (according to whatever standards of justice one might employ)? Or we could examine the refractions for their implications for political processes, for example, along the lines suggested by Jurgen Habermas—that is, with a view to how the law’s logical style contributes to the suppression, mediation, or elimination of conflicts that are capable of destabilizing society.

The second inquiry would operate on the assumption that legal and ethical discourses take place in separate, parallel strata, like two chess games being played on two boards, one above the other. This inquiry would presume no systematic connection between the two strata but would test the hypothesis that, in each, the respective ways of making and then justifying verdicts involve intellectual activity of fundamentally the same sort, that they share a common logical style.

68. I have already adverted to the possibility that the law’s special filtering rules may constrain it to tell its stories in a manner more morally sensitive than do gossip or history. P. 1164 supra. It may be, too, that at this level—where institutional rules intersect with dictates of semantics and epistemology—we begin to build our understanding of why and how the law strains out certain “fragile values.” See Tribe, Ways Not to Think About Plastic Trees: New Foundations for Environmental Law, 83 Yale L.J. 1315, 1317-22 (1974) (development of environmental law along traditional doctrinal lines threatens “fragile” values at issue in environmental policy). We may also better comprehend why and through what processes the law traditionally seems to favor the intellectual values of expression, association, academic freedom, and so on, over those of jobs, food, and housing. See J. ELY, DEMOCRACY AND DISTRUST 59 (1980).

69. See J. HABERMAS, LEGITIMATION CRISIS 95-97, 100-01, 111-17 (T. McCarthy trans. 1975). Habermas contends that “systematically distorted communication” can so warp a society’s process of identifying norms and values through discussion that interests that would otherwise be asserted as important social goals are “suppressed” or excluded from a prevailing “world view.” An ideal “legitimation system” would be based on a “smoothly functioning language game” that “rests on a background consensus formed from the mutual recognition of at least four different types of validity claims . . . that are involved in the exchange of speech acts: claims that the utterance is understandable, that its propositional content is true, and that the speaker is sincere in uttering it, and that it is right or appropriate for the speaker to be performing the speech act.” Id. at xii-xiv (translator’s introduction). Habermas’s analysis suggests that the language of the law can either facilitate the effective formulation and implementation of “generalizable” values—values would be validated through rational consensus in an ideal “communicative community”—or impose a set of normative constraints through “systematically distorted communication” that represent the values of powerful, dominant groups.

70. Alexander Bickel suggested that the Supreme Court “is the place for principled judgment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place only for that, or else its insulation
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Now, obviously, to claim that law and ethics display a common logical style is something less than a claim that their reasoning is, in all respects, "the same." The intellectual process that gives rise to the law-verdict is hedged and permeated by a set of highly specialized law-rules, the accounting for which undoubtedly serves to distinguish, in some degree and at some level, the law's style from that of ethics (or of history or of any other stratum).\(^7\)

On the other hand, if we put the inevitable distinguishing marks aside, there are striking similarities between the law's style and that of ethics, similarities that we have largely disregarded in the effort to identify ourselves with the more solid model of the physical sciences. Consider, for illustration, two verdicts, the first of law, the second of ethics: "Jones's copying Davis's work was criminal 'infringement';" "Jones's copying Davis's work was 'wrongful.'" This is not the occasion to carry out the comparisons in full detail, but we should observe that in both cases, some of the most critical steps in the judgment process occur well before the introduction of formal rules. In both strata, the process begins with shaping the world "as it is" into a composition that shows, almost from the start, the stamp of the stratum's interests and needs—that Jones was "an adult," "of sound mind," and so on. In both strata, it is difficult to draw a line between where neutral observation statements—a "mere preparation" for judgment, if there is such—drop off, and where evaluation of the act begins. Moreover, in both cases the epistemological footing of the description is comparably uncertain and complex, and too critical for serious scholarship to dismiss as unanalyzably "intuitive."\(^7\)

It is because of these common elements that we have more to learn about from the political process is inexplicable." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 87 (1978 ed.). Notwithstanding the considerable significance he thereby attached to "the method" of moral philosophy, he did not proceed to elaborate. See id.

71. As Llewellyn observed, much of judging's logical style turns upon the assumption that there is a "single right answer." K. LLEWELLYN, THE COMMON LAW TRADITION 26 (1960). Of course, there is not a single right answer. But the commitment to come up with a single right answer reverberates throughout the stratum, just as, in science, there is not a single cause or explanation for an observed phenomenon, but nonetheless the commitment to find the cause pervades the character of scientific study.

72. Of course, the importance of intuition, particularly as it relates to judicial decision-making, is not one that our predecessors missed. See Hutcheson, The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision, 14 CORNELL L.Q. 274, 279 (1929) (in complicated cases, judge waits for "intuitive flash of understanding"); Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71, 75 (1928) (human intuition dominant motive in judicial decisionmaking). But the goal should be to press our understanding of intuition beyond the merely intuitive; we should be seeking to learn more about the underlying dynamics of our intuition in terms of neural dispositions, cultural determinism in communication, the uses of paradigms and metaphors in reasoning, and whatever other models can help us.
legal reasoning by looking to the literature of formal ethics than we do by clinging to that of science and syllogism, at least at the present margin of our knowledge.73

The third inquiry would test the hypothesis that not only are ethics and law two strata wrought of common internal style, but that there are connections between them that prevent one from giving an account of the one stratum without some accounting of the other.74 We know, for example, that the two strata share many terms in common: "malice," "person," "willful," "agent," "harm." The meanings of these terms—the things and actions they denote—seem to change, depending on the stratum in which they are used.75 When, for example, a term from one stratum is replicated in the other, are there principles of deformation that enable us to understand how the term’s meaning bends as it passes out of one stratum and into another, somewhat the way Snell’s law enables us to understand the bending of light as it passes from air into water?76

This task is not easy. The logical styles of ethics and aesthetics are themselves so imperfectly understood (perhaps so imperfectly understandable) that there is no ready-made model of ethical or aesthetic reasoning available to which the legal scholar can analogize and from which he can borrow, as the formalist hoped to do with mathematics.

73. For example, R.M. Hare analyzed logical discourse by reference to notions of "universalizability" and "prescriptiveness." See R. Hare, Freedom and Reason 4-5, 186-202 (1963). Hare, in fact, attempted to ground ethical argument in syllogistic, scientific methodology, id. at 87-88, 91-93, and it may well be that scientific, syllogistic reasoning carries further in ethics than is commonly acknowledged, see H. Aiken, Reason and Conduct 97 (1965) ("ordinary deductive methods . . . apply, not merely to the factual parts of an argument to a moral conclusion, but also to the distinctively normative aspects" even if some part of the reasoning process is noncognitive in a scientific way); N. MacCormick, Legal Reasoning 19-52 (1978) (exemplary analysis of role of deductive justification in law).

74. The more we identify common features of two strata, of course, the less meaningfully we can maintain that we are discussing two strata rather than one.

75. This is not an uncontroversial thesis. It is possible to maintain, as Richard Epstein strongly implies, that basic terms in tort theory, such as "invasion" and "cause," are in fact determined by their meaning in paradigms of ordinary language usage. See Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 8 J. Legal Stud. 49, 53 (1979) (legal "invasion" a description of natural state of affairs); cf. Borgo, Causal Paradigms in Tort Law, 8 J. Legal Stud. 419 (1979) (critical review of Epstein’s use of causal paradigm). As explained in the text, I am dubious that the rules governing any such terms—their meanings—would evolve in precisely the same way, indifferent to their placement in or out of law. This is not, however, to deny the plausibility of maintaining that the ordinary usage does or should, at least presumptively, constrain the legal usage of various terms.

76. It is not merely the bending of concepts with which we are concerned but that of whole moral principles as well. One wants to know, for example, how the character of law-language—the rules for verification, the obligations of clarity, the special pragmatics—distort a principle like "love thy neighbor" when it is transposed from morals into the resolution of a legal dispute.
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and the sciences. But the mutuality of our ignorance and the alliance of our interests should be incentive for a joint effort of scholars from law, ethics, and aesthetics, as well as from literary criticism, psychology, medicine, psycholinguistics, mathematics, and other fields, to search out what is common, and what distinct, in how we reach and justify our respective decisions.

VII

The emphasis I have placed thus far may depict a mission too confiningly “academic,” too detached from social growth and turmoil. Legal scholars are more than theorists of law; we are active agents in it as well. To clarify the place of legal scholarship in the context of law and society, it may serve to borrow a model from another discipline with obvious parallels in its linkages of abstract theory and practical application: the world of mathematics.

The world of mathematics has been visualized as consisting of a central sphere, a core, at the center of many concentric layers. In this model, the central core is conceived as the domain of “pure” mathematics, which includes number theory, mathematical logic, differential topology—whatever is most abstract and arcane. As one moves outward from the core through the regions of the surrounding layers, the focus of interest shifts away from the most purely theoretical—from subjects most disregardful of matter and human affairs—and toward regions where the interest, increasingly, is in applying the theories to the solution of practical problems.

Ideas from the core percolate through the outer layers . . . providing a constant supply of intellectual fuel for some of the incredibly complex problems of the more applied fields. And, in

77. There is, however, a relevant literature of ethical-aesthetic reasoning, including H. Aikens, supra note 73; P. Edwards, The Logic of Moral Discourse (1955); N. Goodman, supra note 37; R. Hare, supra note 73; and S. Toulmin, An Examination of the Place of Reason in Ethics (1961).

78. A close examination of law and ethics as strata would reveal not only the similarities the one bears to the other but also their common affinity with aesthetics, one much stronger than law scholars generally have been prepared to recognize. Compare the intellectual act that underlies the verdict that “Jones’s copying of Davis’s work was ‘criminal’” with those beneath the verdicts that it was “wrongful” or “well-executed” or “beautiful.” As in law and morals, the basis of the judgment involves a sanctioned description—“deft” brushwork or “subtle” shading—and appeal to some “rule” that enjoys currency or authority in art. See Isenberg, Critical Communication, 58 Philosophical Rev. 330, 330 (1949) (dividing critical process in aesthetics into three parts: a verdict: “[this] picture or poem is good—,” a reason: “—because it has such-and-such a quality—,” and a norm: “—and any work which has that quality is pro tanto good”). We should certainly pursue the suggested comparisons with judgments in law and ethics.

Core mathematics . . . is nourished both by internal energy, like a self-sustaining atomic reaction, and by new fuel supplied by the outer layers that are in closer contact with the surface of human problems. Layers near the core employ sophisticated techniques in the service of external objectives. . . . Layers remote from the core employ mathematics more as metaphor than as theory: applications blend with technique so thoroughly that a totally different discipline emerges.\textsuperscript{80}

Transferring this model as best we can to the world of law,\textsuperscript{81} the core is the domain of the most basic stuff of law, its principles of language, its fundamental particles and logic, its most abstract theories. An immediately contiguous layer (or a part of the core—it hardly matters) is the province of the most abstract fields with which the law is in some close way bound: ethics, economics, political science, social-choice theory, and so on. Moving outward, one passes through the layer in which the United States Supreme Court and other appellate courts operate. Their charge entangles them in real human controversy, but the controversies reach them as highly abstracted fragments of life; and the appellate courts seem, of all the law-related institutions, to keep the most sympathetic ear, and voice, for theory. Beyond them lie, in sequence, the trial courts and administrative agencies, the legislatures,\textsuperscript{82} the law offices, police patrol cars.

As we move outward, each layer of law-connected activity through which we pass is decreasingly occupied with the abstractions and puzzles that scholarship devises when left to its own, and more with the concrete problems that life throws up at us whether we have theories about them or not. As we move outward, each successive

\textsuperscript{80} Id.

\textsuperscript{81} Absolutely no one to whom I have offered this model for consideration is satisfied that it can be fitted, without considerable modification, to suit our own conceptual needs in relating legal scholarship to law. Someone claims that to account for one thing or another in the law-world, I need to introduce what sounds like a mobius strip. Someone else wants me to abandon the whole mathematics model and, if I am going to persist in employing some interdisciplinary filch, to reach into biology for a living cell (which works in its own way rather nicely). It is not as important for scholarship that we all agree on a single model—I doubt that we could or should—as that we recognize the value of devising some such images with the capacity to provide an overview of our functions.

\textsuperscript{82} In placing the legislatures further from the core than courts, my assumption is that, although the courts may not be unmindful of election returns, the legislatures are, by a degree at least, more influenced by the practical necessities along the edges, and less by the theories of the core.
level carries on much of its business, ordinarily, without bothering to derive and legitimate the basic premises with which it operates; that is the job of someone else, closer to the center. The computer designer takes what the number theorist gives him; the construction engineer accepts the computer on faith.

Some of the most important work in the core is "internally fueled"; that is, it turns inward on itself, indifferent to signals for help or the availability of new material that may be emanating from the outermost layers. Moreover, a considerable portion of the activity at the core is carried on with relative indifference to any use that activities in the outer layers may make of it. Some of the activity at the core may even be considered, broadly speaking, "play." Indeed, some of the language spoken in the core may sound to those living in the outlying regions, even to the judges and legislators, like a distant dialect: Hohfeld's table of jural opposites and correlatives, Radin's "no-demand rights," Koucerek's "debilities," the terminology of Laswell's and MacDougall's policy science analysis, the Coase Theorem, "externalities," and "Pareto-optimality." These are elements of another language, of a speech not in law, but of it.

The use to which those in the outer layers put the work of the core is often incidental to the core's laborers. As in the physical sciences, an idea may abide in the core for years before someone on the outside finds out about it and appreciates that it has some use, that it can help build a better mousetrap. And those in the core, preoccupied with their own language and function, may leave unspecified their connection with the layers.

83. See J. Huizinga, supra note 17, at 4 (expounding view that "the great archetypal activities of human society are all permeated with play from the start"). And, of course, the "schools," see p. 1154 supra, receive some of their animation from play-like qualities.

84. At least three, sometimes four, languages of interest to us are at play: first, the language of a symposium such as this, which takes as its object law scholarship, and applies to those activities whatever terms may be appropriate—for example, that its product is "fun to read," "irrelevant," or, as I maintain, "drifting"; second, the language of scholarship, which predicates of its object, the legal system, that it is "efficient," that it is "just," and so on; third, the language of the law-players themselves, which may take as its object the world, in its own special way, see pp. 1156-58 supra, or may even take as its object another language, as does the law of defamation, which passes a judgment on (the fourth possible language) a statement that A made to B about C. As I indicate below, p. 1186 infra, we do not consistently keep the layers segregated, so that a statement in the law's metalanguage (the second level) may be employed in some functions in the operating level (the third level), but may be disallowed in other operating level functions. Thus, a metalanguage statement may be used in reasoning to a decision—one operating level function—but not in justifying a decision, another operating level function. See Lipson, supra note 20 (examining the independence of various language levels in an opinion by Judge Cardozo).

85. Consider, for example, the literature of law and economics, which often appears ambivalent about what it purports to provide: a theory of legislation, an explanation of how individual judges decide, a prescription of how they ought to decide, an alternative
Even when some of the core custodians do undertake to become consciously involved with the rest of the system—and let me emphasize that almost all of us at some time or another do—the function is not (as the imagery may suggest) as simple or as flattering as to serve up new ideas for the surrounding layers to bat at. Many ideas that come to influence law come not from its center, but from beyond its outer reaches: they originate in folksongs, on the stage, in periodicals. Many other of the law's inventions take place in the courts, legislatures, and law offices, where they have the advantages not only of necessity's mothering, but of clients' and lobbyists' bankrolling as well. And the buffering and resistance is such that many ideas, and indeed many social problems, never penetrate the core in recognizable form.

Indeed, in many respects, the core may appear to outsiders as a sort of margin, and we, its custodians, as marginal people. We mop up. Consider, to illustrate, a happening in a layer that is of fabulous interest to the core: the Supreme Court decides. In the core, scholars swarm about the reports of it. They find gaps or dissonance. To some extent, the core hopes thereby to exercise influence outward. But the concern is as much inward, with how the Court's decision can be fitted into prevailing scholarly views of the law, with what it tells us about the adequacy of our own constructs and what we must do to revise them.

way of describing the legal system's implications (however those doing it would describe their own actions). The point is that for many of those who are absorbed in the problems of the core, spelling out the connections between their problems and those of the layers (the reaching out) is simply not a major concern.

86. In his unpublished farewell to the Yale Law faculty, Arthur Corbin observed that the most important part in the evolution of our legal system is played by the judges. . . . The work of professors is a necessary work, and may be increasing in its importance. We are the midwives who start the infant lawyer and jurist on his way. We are the gadflies that sting judges into better action. We are, of necessity, the generalizers, and the critics of the generalizations that judges make to justify their decisions. But the judges make decisions. The professors make none.

A. Corbin, Farewell to the Yale Law Faculty (n.d.) (unpublished address, Yale Law School) (on file with Yale Law Journal).

87. We might do well to contrast our current agenda—what law scholars are predominantly writing about today—with a list, independently established, of what we would rank as the most important items on a social agenda. My guess is that many high-ranking social items, including peace, inflation, poverty, and natural resources (energy and water) are considered only at the periphery of currently prestigious scholarship.

88. Yet, even in being concerned primarily with tidying up their own conceptions, scholars may contribute to helping the legal system's actors "understand" what they have said and done. For example, it is quite plausible that in a considerable number of decisions, judges intuit the correct answer without benefit of theory. The task of devising the "correct" theory ex post may be relegated to scholarship—where the courts, if interested, can thereafter turn to find it, along, perhaps, with implications that they could not originally have foreseen. One may well debate the appropriateness of courts
Yet the whole system interconnects. In each region (core and layers), new needs and new possibilities evolve, sometimes by a sort of intellectual or institutional parthenogenesis, but more often under the pressure, or on account, of something that is taking or took place somewhere else. Take, as an example, the issue of a job discrimination against women. We might locate the first complaints in feminist consciousness-raising groups—a “distant” layer. The complaints work their way “inward.” Periodicals pick up the theme. People appear on television. In these early stages, the claims are apt to be met with the sorts of jokes and smirky skepticism that are the inevitable symptoms of social growing pains. Gradually public debate spreads and acquires a more serious tone. Sometime during this period someone figures out a way to fit the grievances, as they are being expressed in ordinary language, into some accepted legal rubric—“equal protection is being violated”—so there can be a lawsuit, complete with judicial legitimation and pronouncements. Or before it all comes to a constitutional head, there may have been enough of a stir that new rules are implemented. As a consequence of the new decisions and rules, reinforced by the new, and more pervasive, levels of awareness, more women enter the workplace, and more advance to positions of higher status. The result is a new social environment, in which new levels of complaining lead to new conflicts—for example, sexual harassment of women on the job.89 New debate begins, accompanied by new smirks, new skepticisms, but eventually new social soul-searching and a new level of law or regulation.90

Much of the adjustment this process requires—the absorption, growth, and repair—can be handled by the various layers without scholarly intercession. The scholarly contribution would seem to be most important when, in the course of the evolution, the adjustments that seem called for put pressure on the law’s basic concepts, principles, theories, perhaps even mode of reasoning. The pressures may plunging ahead of their abilities to justify themselves, see Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973) (criticizing Roe v. Wade, 410 U.S. 113 (1973), as creating, wholly without justified basis, a “fundamental” right to abortion), but to assess the objection requires a firmer sense than we now have of the “logical status” of intuition, see pp. 1171-72 supra.


90. But if we sought to locate the real beginning, we could not maintain with confidence that the notion was born in the consciousness-raising group; it is equally likely that the group had taken its cue, perhaps unaware, from something that had occurred previously in an inner law layer, or even in the core—agitation on behalf of homosexuals, or trees, for examples.
turn up inadequacies that are fundamentally social: the existing law system is not plastic enough to satisfy prevalent feelings about what the social order should look like or do. Or the inadequacies may be largely intellectual, when the law’s arrangements, while working adequately to meet the world’s demands on it, cannot be fitted to meet the contemporary scholarly framework. Old familiar concepts are candidates for withdrawal: separate but equal goes; rehabilitation comes under assault. Some concepts are simply disemboweled: the malice in “malice,” once required in earnest, comes to be, we say, “presumed.”

To meet the demands for a more discriminating environment, concepts begin a process of splitting, as cells do. In the ninth century, the notion of wrongful acts, theretofore largely undifferentiated with respect to mental states, bifurcates into willfully wrongful and accidentally wrongful; 91 accidental proceeds to split into careless and faultless; careless into reckless and negligent; willful spawns intentional, which, in turn, subdivides into purposeful and knowing. Sometimes existing concepts need, not replacement, but the assistance of new, mediate concepts to extend their reach to new areas or to aim them more precisely: suspect classification is introduced under equal protection, privacy under due process of law.

It is when we move into this area, with its husbandry of fundamental concepts, that the contributions of law scholarship, although hardly the unique source of the law’s growth, are looked to most respectfully. This is particularly true when the courts themselves appear drifting or stumped and when the law has not yet matured to a point where the needed development can be achieved through the ordinary client-driven system.

Note that throughout these efforts of the scholar in law, the attention remains based in the law’s language, just as when the scholar’s contributions stress commentary on law. The difference is that there is more emphasis here on interaction with nonscholars and more conscious concern with the furtherance of social growth through law. The balance shifts from the law-language as a special description, a medium within our expertise, to that of the law-language as a special activity in which we are engaged. The office, even in these engaged-activity efforts, is not one of power to effect changes in the world. Nor, however, is it one of being a mere steward of the legal language, although there is some of that in it: keeping affairs under eye, review-

91. See Robinson, A Brief History of Distinctions in Criminal Culpability, 31 Hastings L.J. 815, 821-25 (1980). A particularly interesting aspect of Robinson’s paper is his attention to the lag between the recognition of a conceptual distinction and its authorized implementation. Id. at 822, 851-52.
ing when and where new concepts have to be invented, the “wrong sort” kept out, others borrowed, rearranged, abandoned, fostered, stocked, preserved from rude assault. We might conceive of the legal scholar’s job as a sort of editorial function. That is, if we can regard the law as an editing of the world, then the scholar’s attentions are to issues of editorial policy. There are the questions of what is and what is not fit for expression in the law as a medium, what stories to go after, what sources to rely on, what words one will print, what standards of logic and style to uphold. It is in these affairs that scholarship exercises its largest influence.

VIII

In a recent essay on the murder of John Lennon, Meg Greenfield observed that the luminaries of the 1960s (with whom, including Lennon, she could summon little sense of identity) “tended to obliterate the distinction between the personal and the public, to politicize their own most private experiences and feelings, to see their own emotional condition as a social issue in itself.” This reaction can, I think, be used to illustrate the place of law scholarship for which I am contending.

No one should think that his or her emotional condition is a social issue “in itself.” To be acted on as a social issue, one’s feelings need, at the very least, to be translated into the terms in which social and political agendas are framed. On the other hand, making the appropriate translations, like composing songs, is a special and complicated skill that not everyone has. Moreover, the accepted frameworks for social and political agendas are themselves not beyond some amending in a direction to meet the feelings half-way or somewhere in between. To suggest this is not to “obliterate” the line between the personal and the public. But it is to mark the obvious fact that that line can and probably ought to shift as feelings and various social relationships evolve and, indeed, as theoretical insights (emanating, if you will, from the core) enable us to conceive old feelings and relationships in new ways. The question is, by what processes is this

93. Id.
94. Some of the significant changes in social relationships are undoubtedly traceable to new levels of technological, economic, and military strengths and threats, which bring with them shifts in our capabilities to trust and to tolerate. Other changes may not be so strongly rooted in identifiable material conditions. See E. Dodds, The Greeks and the Irrational 232-55 (1951) (societies seem to alternate faith in the rational and desire for freedom with faith in the irrational and need for authority; phases may reflect workings of cultural-intellectual dialectic not satisfactorily traceable to changed conditions in material world).
The public-private boundary line to be shifted? Whose responsibilities extend to doing what?

C. Wright Mills was as severe on England's Angry Young Men of the 50s as is Greenfield on those of the 60s, on much the same grounds.

They have not made plain—and I don't think they know—the reasons for their anger. What they have done, and with great skill, is to specify the mood of personal uneasiness and the quality of public indifference. They have done so mainly in the direction of private troubles. But even in that direction they have not succeeded in converting uneasiness into explicit troubles; I don't think they can without translating the public malaise and indifference into political issues.95

And, Mills, too, was right. But it may simply be unrealistic to expect the same people to perform both services at once—to identify the uneasiness and also to prepare the definitions and translations required for social action. The first may be the job of the songwriters, social scientists, playwrights, psychoanalysts, and the people who do soap operas: theirs is to make clear what the private (and, for that matter, public) troubles are, each in their own medium. In many ways, they can probably do a better job indicating what the law should be than can be done in the law and its literature. One has only to consider the quality of insight and persuasion that can be achieved by an article on the death penalty in a law (or philosophy) journal, as compared with literary treatments such as In Cold Blood or The Executioner's Song,96 to understand why much of the shaping of the significant sentiments, the significant perceptions of power relationships, and so on, takes place outside the law world. Further, much of the adjustment that the law-world needs to make in response to these changing sentiments, it can achieve with only marginal contributions from us scholars.

I am contending that where the law scholar's skills and traditions serve most specially, and where scholarly collaboration is most required, is in establishing what attributes of the world—in particular what aspects of human character and conflict—should be fitted into law, and in what manner, and in accordance with what logical style they should be handled. Of course, the answers continuously change as civilization evolves. To carry out the refitting that is required, some editing needs to be done on the attributes in order to accord

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with the worldview's editorial policies, or else the editorial policy needs to be reformed, or both.

Let me illustrate this, the integrative side of our mission, with reference to the various "life-style" issues that are now wending their way toward and into legal recognition. The term, as we know, can be used to include a broad range of claims that touch the coming into life, the going out of life, and many of people's preferences for what goes on in between.

Let us agree that there have always been people who wanted to live their lives as they have wanted to, and others who have wanted to restrain them, and that there is a case to be made for each side. In the legal literature, most of the central themes have been discussed under the heading of "legislating morality," which has not wanted for distinguished contributors. It is thus tempting to dismiss some of the stir over these life-style issues as trendy, and in part, I do.

It may be wise, nonetheless, to listen for something new in it. To begin with, the claims have spread to new fields of law. Traditionally, the law's involvement with life-style claims (however termed) was considered almost entirely in the contexts of crimes and, to a lesser extent, perhaps, of family law and contracts. Today, as a reflection in some measure of the spread of law in our lives, we find life-style claims coming up in areas that include zoning, nuisance, welfare law, federal support programs, evidence, and child custody. Moreover, the types of claims seeking recognition have multiplied: we see not merely the traditional ones of consenting sexual acts and gambling contracts, but of hair length, where alternative families can live, and what one...

97. These claims include claims to abortion, e.g., Roe v. Wade, 410 U.S. 113 (1973), and claims to birth control services, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (availability of contraceptives to unmarried as well as to married couples); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (sale of contraceptives).

98. These claims include the "right to die" and euthanasia. Courts have almost uniformly ordered transfusions necessary to maintain the lives of critically ill hospital patients. See John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 582-85, 279 A.2d 670, 673-74 (1971) (ordering blood transfusion over patient's religious objection in order to prevent patient's death); Annot., 9 A.L.R.3d 1391, 1394-98 (1966) (collecting cases). In the legislatures, however, the trend may be otherwise. See Cal. Health & Safety Code § 7186 (West Supp. 1981) (Natural Death Act) (invoking patient "autonomy," "dignity," and "privacy" in support of statutory scheme recognizing right to have life-sustaining procedures withheld or withdrawn). Although the courts seem generally unwilling to recognize a right to die, they are more favorably disposed towards certain decisions for euthanasia. See In re Quinlan, 70 N.J. 10, 41-42, 355 A.2d 647, 664 (1976) (individual's interest in termination of life-support system overcomes state interest in continuation as degree of bodily invasion by medical equipment increases and as prognosis dims).

can wear to work. And even where the claims are, on their surface, the same old ones, the feelings that back them seem to have shifted to something more strident, more open, more broadly held. There is evidence that what people want and expect from the law is extending beyond the services the law was traditionally called on to provide. The new claims have less to do with the restraint of state power, the securing and allocation of wealth, or the guarantees of franchise. More frequently, people want law to protect their feelings from their neighbors, to give their ways a measure of legitimation, even to help the society as a whole work out new standards and levels of sensitivity. It is as though the legal system is finding itself pressed to devise a new set of "property" and "liability" rules for an economy of psychic well-being.

However we view these developments, I think it is clear that the region toward which the law is being driven is one sketchily mapped by existing legal language. It is not certain that our reasoning can reach it. Perhaps the law should not venture there. Who is to say, if not we?

IX

Let me pursue an illustration of this mission in some detail, and carry through some of the language-based connections. In the Karen Quinlan case, the father of a comatose child sought a court order


101. I am assuming that the reaction of individuals to stimuli is underdetermined by physiological conditions, and responds to cues provided by social institutions and ethical norms. For example, court decisions concerning the appropriateness of the death penalty inevitably touch and affect our feelings about the sanctity of human life, of "dignity," and of "personhood." See Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1145, 1173-85 (1980) (implications of respect for persons and human dignity underlying death penalty decisions require that death penalty in any form be declared unconstitutional).

102. Cases marking this path include Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (school board's concern about school children viewing pregnant teachers and other factors insufficient to justify compulsory maternity leave), and New Rider v. Board of Educ., 480 F.2d 693, 698 (10th Cir.), cert. denied, 414 U.S. 1097 (1973) (Pawnee Indian children's suit for right to wear hair in traditional braided style fails in face of school hair code regulation that "bears a rational relationship to state objective . . . of instilling pride . . . and high school spirit and morale"). It is possible, too, that the forced transfusion cases, supra note 98, involve trading off the feelings of the family of the patient against the feelings of the hospital staff. See also L. Tribe, supra note 12, § 15-12, at 940-41 (suggesting similar trade-off in feelings in legislature's decision to require motorists to wear helmets; legislature's concern is not as much to protect society from injury accident costs as to shield it from the lifestyle bareheaded motorists' suggest).
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authorizing the hospital to discontinue the child’s life-support system. In the press, the father’s request was reported in terms that his daughter be allowed to die “with grace and dignity.” 103 In court, the issue was bent into rubrics of cruel and unusual punishment, free exercise of religion, and ironically (to say the least) of the moribund child’s “privacy.” 104

In the law’s edit of the world, some such twisting and bending is, as I have observed, inevitable. The law has its attributes to emphasize; the other strata (or world-views) have theirs. Our questions involve the law’s editorial policy, and whether it may be refracting the world into themes that are, in some sense, less than the best ones.

We can see this process of refraction at work by identifying terms whose currency is on the increase in the society at large, and examining their paths as they converge toward law. 105 “Alienation,” 106 “au-

103. *See Karen’s Precedent*, TIME, Apr. 12, 1976, at 50.
104. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (N.J. 1976). The court turned aside the father’s claims as guardian on behalf of the daughter based on free exercise and cruel and unusual punishment. *Id.* at 35-38, 355 A.2d at 661-62. It issued the order, however, opening the way for termination of life-support, “as a valuable incident of her right of privacy.” *Id.* at 41, 355 A.2d at 664.
105. The path sometimes carries to the law’s back door. In his concurring opinion to *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts*, 383 U.S. 413 (1966), Justice Douglas used an appendix to quote the view that “Cleland is suggesting that one must be cautious about what is condemned and what is held in honor. . . . The world outside the brothel affirms its faith in the dignity of man, but people are often treated as worthless and unimportant creatures.” *Id.* at 437 (Douglas, J., concurring). In *Terry v. Ohio*, 392 U.S. 1 (1968), a case framed in terms of “probable cause” for a frisking, Chief Justice Warren employs a footnote to inject a different level of awareness of what the case was about.

[Frisking] cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.” *Id.* at 14 n.11 (quoting L. TIFFANY, D. McINTYRE, & D. ROTENBERG, *DETECTION OF CRIME* 47-48 (1967)).
106. A LEXIS search indicates that “alienation,” once associated with transfers of property, is entering the law in its existential sense across a broad frontier. It represents a protectable interest of an employee, see *Lagies v. Copley*, 110 Cal. App. 3d 988, 969-74, 168 Cal. Rptr. 368, 374-78 (1980) (upholding tort complaint alleging acts of employer causing “anxiety, emotional distress and alienation on the job”), and of the general public, see *People v. Putland*, 102 Misc. 2d 517, 527, 423 N.Y.S. 2d 999, 1006 (N.Y. Duchess County Ct. 1979) (refusing to remove criminal prosecution of juvenile to Family Court in part because closure of trial in Family Court would create sense of alienation and anomie in general public). See also *Kutska v. Cal. State College*, 564 F.2d 108, 111 (3d Cir. 1977) (fee award rules construed to avoid “‘exclusion of minorities from effective participation in the bureaucracy . . . [which] creates mistrust, alienation, and all too often hostility toward the entire process of government.’” (quoting S. REP. No. 415, 92d Cong., 1st Sess. 10 (1971)).
tonomy,"107 "dignity,"108 "personhood"109 will serve to illustrate. My interest is not in carrying the banner for the introduction of any of these terms into any particular legal context. Rather, I want to examine what a "case" for adopting such terms should look like and, in particular, to illustrate the role that legal scholarship

107. Claims couched in terms of "autonomy" have surfaced in a number of areas, including criminal procedure, see Bittaker v. Enomoto, 587 F.2d 400, 403 (9th Cir. 1978) (defendant's right to self-representation incident of his "personal autonomy"), mental health law, see Scott v. Plante, 532 F.2d 959, 946 & n.10 (3d Cir. 1976) (involuntary medicatation of patient committed to state psychiatric hospital raises constitutional claims including autonomy interest in right to refuse treatment), family law, see Zablocki v. Redhail, 434 U.S. 374, 397 (1978) (Powell, J., concurring) ("the guarantee of personal privacy or autonomy secured against unjustifiable governmental interference by the Due Process Clause has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)"") (quoting Roe v. Wade, 410 U.S. 113, 192 (1973)), substantive criminal law, see Coker v. Georgia, 433 U.S. 584, 597 (1976) (opinion of White, J.) (death penalty for rape impermissibly disproportionate to crime even though rape is "highly reprehensible . . . in its almost total contempt for the personal integrity and autonomy of the female victim"), sexual conduct, see Lovisi v. Slayton, 589 F.2d 349, 356 (4th Cir. Craven, J., dissenting), cert. denied, 429 U.S. 977 (1976) (married couple did not forfeit right of personal autonomy to engage in sexual acts simply because third person was involved), and life-style claims, see Kelley v. Johnson, 425 U.S. 253, 260 (1976) (Marshall, J., dissenting) (holding validating county regulation of police officers' hair length "fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect").

108. Dignity has long been accepted as an Eighth Amendment principle. See, e.g., Trop v. Dulles, 356 U.S. 86, 100 (1958) ("[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"). More recently, however, "dignity" values have been perceived in new constellations of constitutional conflicts such as conscientious objection, see Gillette v. United States, 401 U.S. 437, 471 & n.5 (1971) (Douglas, J., dissenting) (conscientious objection standard should recognize that decision on morality of particular war is wholly personal and that, as "Pope Paul VI in § 16 of the Pastoral Constitution on the Church in the Modern World states: 'Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey . . . . His dignity lies in observing this law, and by it he will be judged.").", libel, see Time, Inc. v. Hill, 385 U.S. 374, 414 n.5 (1967) (Fortas, J., dissenting) (state law limiting wrongful and unjustified press reports when individual's reputation at stake appropriate because protecting reputation reflects our basic concept of "essential dignity and worth of every human being" (quoting Rosenblatt v. Baer, 385 U.S. 75, 92 (1966) (Stewart, J., concurring)) and voting, see Cousins v. City Council, 466 F.2d 830, 855 n.39 (7th Cir.) (Stevens, J., dissenting), cert. denied, 409 U.S. 893 (1972) (assumption in redistricting cases that groups rather than individuals vote shows "disrespect for the dignity to which every man is entitled".")

109. The concept of personhood has arisen most notably in the abortion cases. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Parks v. Harden, 504 F.2d 861 (5th Cir. 1974). But it promises to be far more expansive. See Alma Soc'y, Inc. v. Mellon, 601 F.2d 1225, 1231-36 (3d Cir.), cert. denied, 444 U.S. 995 (1979) (adults adopted as children have right to have adoption records unsealed and natural parents identified in part because of "right to 'personhood,'" although privacy interests of natural parents in remaining anonymous and interest of adoptive family in maintaining "full recognition of a family unit already in existence," make "good cause" showing for release of information permissible). The notion of personhood may also exert considerable influence in search and seizure cases in which private papers, as opposed to business records, are deemed to be "so much a part of personhood that they ought to enjoy a superlative privacy." See, e.g., Shaffer v. Wilson, 523 F.2d 175, 179 (10th Cir. 1975); VonderAhe v. Howland, 508 F.2d 364, 370 (9th Cir. 1974).
ought to play in shepherding them into (as well as out of) the law.

It should go without saying that, in each context, the threshold decision is one on the merits: whether the attribute in question is one worth singling out for special legal attention. If I seem to pass over that part of the judgment too quickly, it is because I have deemed the law scholar's contribution to the merits, while important, no more informing (and perhaps less so) than that of political scientists, sociologists, economists, and many others. This may be viewed as unduly confining by a profession not notorious for modest aspirations. But my own impression is that an examination of the world from this more restricted base is conducive to work of higher quality and utility than the contributions that come of explorations on grander tether.

How often do we hear discussions of "what is death?" to rival those of "what is 'death'?" in some particular legal context? And whether one agrees or not about the realistic quality and utility of these debates, the fact remains that the law scholar's truly special qualifications are to connect broad social issues with narrower elements of the legal system, through his or her expertise in the character of the law language.

We can demonstrate this by supposing that an affirmative decision has been made, that personhood, say, has been deemed worthy of special legal recognition and foster. That decision would only set off a whole train of inquiries. First, what is the function, in the recognition and foster of a concept, of giving it a name? A poem can successfully evoke sadness without the express use of the word;

110. Of course, recognition and foster are not synonymous; some concepts, such as malice, are given names in law disapprovingly.

111. See N. Goodman, supra note 18, at 12.

112. The overburdening of a legal term, and many other concept-focused problems, have been best dealt with in what must be deemed one of our more worthwhile "vogues," see p. 1154 supra, the considerable recent literature on privacy, see, e.g., Freund, Privacy: One Concept Or Many, in NOMOS XIII, PRIVACY 182, 190-98 (J. Pennock & J. Chapman eds. 1971) (Yearbook of the American Society for Political and Legal Philosophy); Gavison, Privacy and the Limits of Law, 89 YALE L.J. 421 (1980); Posner, Privacy, Secrecy, and Reputation, 28 BUFFALO L. REV. 1, 41-55 (1979); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 SUP. CT. REV. 175, 197-216; ELY, supra note 96, at 928-33; Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong? 31 LAW & CONTEMP. PROB. 326 passim (1966); Gross, The Concept of Privacy, 42 N.Y.U. L. REV. 94, 40-46 (1967).
bodiment in law, even in rules intended for their foster, could have a perverse effect and redound to the eventual erosion of associated values.113

Much depends on where the term’s use is sought and in what role. A term can be received on limited visa, its travel restricted to the metalaw language only. There, in association with “efficiency” and “justice,” it may serve solely to shape the way in which scholars review and make recommendations respecting the path of the law. For those purposes, the constraints on entry would seem to be relatively undemanding: a term is free to immigrate if anyone cares to sponsor it.114 The standards become more complicated in several hybrid situations, such as in the instance of a term (“efficiency” may illustrate) that is (1) widely accepted as appropriate to the metalaw, (2) inappropriate, or at least not yet generally appropriate, for publicly justifying decisions, but (3) arguably appropriate, nonetheless, in judicial and administrative reasoning.

In all events, more stringent barriers certainly arise when the terms seek entry not in metalaw, but in one of the languages of the law itself.115 Presumably, the proponents of the term’s adoption in law will contend that to name “alienation” or whatever will advance some particular goal, depending on the rules in which it is to be set.116 At the least, adoption of the term in the operating level will constitute direct acknowledgment that some such quality is one of the attributes that the law will ascribe to the creatures with which it deals, and that the law is prepared openly to hear and talk and learn about.

Why should anyone object? I want to emphasize how many of the objections are rooted in implicit claims about language,117 claims that

113. For example, the more we take dignity under legal, hence state, guardianship, the more we risk enlarging the power of the state to a degree that may ultimately undignify the citizen. And to those supporting freedom of abortion, there is a threat in too fecund a definition of “personhood.” See Roe v. Wade, 410 U.S. 113, 156-57 (1973) (if fetus is person, its right to life guaranteed by Fourteenth Amendment).

114. Whether other scholars choose to engage the term is another question, but one likely to turn upon a fairly loose standard, such as “fittingness” with the law’s proper concerns, more than upon the standards that are significant at the operating levels, such as precision and intersubjective verifiability.

115. To place a term in the law itself ordinarily consists of embodying it expressly in statutes, authoritative rules, or constitutional amendments. Sometimes, though, a term enters by being accepted in the principles and policies that, if not quite “in law” the way legislation is, are openly resorted to both in reasoning and in justification. See Freund, supra note 112, at 198 (“if it would be misleading to incorporate a right of privacy into a legal rule, it would be impoverishing to exclude it as the term of a legal principle”).

116. Depending on the rule, the term may be made, for example, a protectable interest (or disfavored characteristic) or an element of an independent right (or wrong).

117. There are possible objections to the introduction of a term in addition to those based on its inability to advance legal values or on its semantical or epistemological
have not been consistently sorted out in the literature or ordinarily dealt with beyond the reach of common sense. One could, as an extreme, take the position that "alienation" and similar words are meaningless in the positivists' sense, that no statements we can make with them can be either true or false, because they are not reducible to a specifiable set of expressions verifiable by sensory experience.\footnote{118}

But I doubt many of us believe that this particularly narrow standard of meaningfulness, if it can still hold its ground in the sciences, is the gate-guarding criterion in law.\footnote{119}

One could make a related objection, not that a term is "meaningless" in the technical sense the positivists invoked against metaphysics, but in the sense of being hollow or transparent. That is, one could object that all sentences in which its embodiment is currently sought can be adequately reduced to a set of expressions that avoid it entirely.\footnote{120} Of course, there is rightful hostility to terms that are mere surplusage. But it is hard to argue—although some of the Scandinavian Realists seem to have tried\footnote{121}—that any term of significance in law can be replaced as adequately as, say, "4" can be replaced by "2 + 2". A term of the sort relevant to law would be introduced, presumably, with the accompaniment of some rough, intuitive ideas and theories about how its application might be different from the application of present terms even if we assume the term is perfectly substitutable with other terms at the time of its introduction. In such circumstances, the term is likely to gather about itself over a period of years new insights and applications that could not have been conceived origi-
nally and that may lead the law along a different path than the law would have travelled without it.122

Nor is it a final objection to the introduction of a term into ordinary languages generally (putting aside for a moment any special requirements of the legal language, to which I shall turn) that at the time of the introduction, we lack a complete set of rules that will distinguish its proper application in every instance. Indeed, a case can be made that not only the most obviously vague terms, such as “warm,” but even so-called “natural kind words,”123 such as gold, defy coralling with a completely adequate set of necessary and sufficient criteria because of open texture.124

Thus, although a debate over a term’s appropriateness may sound like an argument about the properties of language in general, it is likely on closer inspection to reduce to demands peculiar to the law-stratum. For example, even supposing the positivists’ criterion of meaningfulness to be out of place in law, the law stratum may possess its own standards of meaningfulness. In this light, one might explore as an objection to Justice Frankfurter’s invocation of “shocks the conscience” as a due process standard125 not that the term is vague (which would imply an indeterminate applicability over a conceivable range of meaning) but that it is substantially devoid of the minimal information content the legal system requires.126

122. I have advocated that legal metalanguage adopt the elocution, “trees have rights,” with some associated refinements in operating level rules, even if, at the time of the adoption, all the legal relationships we might wish to alter could be altered without changing the way we speak.

123. That is, words that purport to name the common nouns and qualities into which we divide the natural world, perhaps partly through intuition. For example, whatever word we choose, there exist dogs and gold and green in nature. Natural kind words are distinguished from theoretical words, and words whose meaning is understandable only by reference to complex human-invented relationships, such as technocracy, title, and tort. See W. QUINE, NATURAL KINDS, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 123 (1969); Moore, supra note 48, at 202-03.

124. See note 41 supra (describing “open texture”).


126. I am not prepared to conclude that the terms employed in that opinion, such as “sense of justice,” are in every sense “meaningless.” There may be virtue, however, in examining legal language against some standard that emphasizes minimal communication, if doing so thereby encourages scholarship to recognize and draw upon the relevant body of nonlaw literature. Consider, for example, the post-Rochin line of cases, including

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Other objections could be explored as problems of verification. Consider, for example, the law's reluctance to deal with sincerity in the context of the special procedures, standards, and limits of legal institutions.127 Other rightful misgivings connect with logical texture. I do not mean by this merely that the rules for a term's use have to be determinate enough to account for the legal system's demands for predictability, fairness, impartiality, and so on. We should account for the fact that the law relies preeminently on words—words in the taking of testimony, words in the production of records to take up with written briefs on appeal. The significance of this bent can be appreciated, and some future work for law scholars indicated, if we consider that new audiovisual techniques are making it increasingly possible to bring into court, and even to transmit on appeal, tapes that capture nuances not so finely capturable in words (including, let us suppose, nuances of dignity and its opposites): of how a kidnapped Patty Hearst looked when she attended a bank robbery, of the atmosphere in a room in which covert government agents arranged payments to a congressman, of what transpired in a law office during the closing of a contract.128 What new legal terms and concepts will these technologies make possible and require?

It may be that some concepts simply cannot be brought into the law intact. For example, perhaps we can "gather in" the word "alienation," but the character of the stratum, including the way pleadings are made, proof is taken, appeals perfected, and so on, will shear it

Irvine v. People, 347 U.S. 128 (1954) (upholding conviction based on microphone planted in bedroom closet for one month), and Breithaupt v. Abram, 352 U.S. 432 (1957) (upholding conviction based on blood sample taken from unconscious defendant). The confusion and irreconcilability of such cases may stem from failure of the Rochin opinion to have transmitted to police officers, courts, and others who have to act in reliance on Supreme Court opinions, information adequate for them to form concepts even of what features of the world are relevant.

Such a failure does not necessarily imply that the opinion was "bad," absent a fuller normative vision of Court role. In science, a paradigm may be inaugurated on the basis of inspiration and hunch based on notions of elegance, the details of which others are to fill in gradually. In art, someone may be persuaded that a new form of painting is "beautiful," trusting to others to provide reasons why. "Shocks the conscience" is somewhat like proposing a scientific theory before the confirming data is available, or judging a painting to be beautiful before one can explain why. What sort of limits are there on the Court, in comparable circumstances, to hold in abeyance an advance in the law until it can give adequate explanation? A criticism of the Court's opinion demands two related inquiries, one into language—how terms acquire meaning in law—and the other into the proper role of the Supreme Court.

128. See Balabanin, Medium v. Tedium: Video Depositions Come of Age, LITIGATION, Fall 1980, at 25, 25 ("[t]he new generation of jurors who receive their truth from the tube may prefer video to live testimony"). In one recent case, a court allowed a plaintiff to take his own deposition at the point of death over defendant's opposition. Id.
of its intended identity. Or, one might be concerned that if we introduce a term from some other stratum into law, the gravity of its nonlaw career may affect its legal orbit in erratic and unforeseeable ways. This concern is probably less acute when the term in question belongs to a discipline such as economics, if we assume it will therefore enter the law more or less disciplined. But the life that terms such as “alienation,” “dignity,” and “personhood” enjoy in ordinary nonlegal discourse is more casual and libertine. Would such terms, once adopted into legal usage, steadfastly resist the temptation to make stray and unpredictable borrowings from old comrades?

There is no way to dispose of these concerns abstracted from any particular decision. And I gladly grant that the language considerations shade off into, and soon merge with, traditional “institutional” considerations, such as the desirable allocation of adjudicative functions between judge and jury, trial and appellate court, and so on. One who felt that the courts have a leading role to play in the evolution of social concepts might advocate the adoption by the courts of terms in a relatively early stage of definition, the courts thereafter providing themselves as lead forums for fleshing terms out.129 There are reasons, too, to prefer a term whose meaning will change somewhat, even in somewhat unforeseeable ways, with developments that take place in the culture.130 And there are conflicting reasons for the law to grow from within, on its own terms, and, if a new term is required, even to draw down from a Latinate inventory some item relatively unfreighted with the connotations of familiar usage.

My point here is simply that continuous decisions of this sort determine the law’s character and growth, that they need to be informed by a close familiarity with language and the legal language in all their complexities, that our understanding of these features could be improved by more systematic and concentrated “inward” effort, and that if I were to identify the critical functions that the law scholar, by familiarity, training, and tradition, is best positioned to provide, they would center around these matters and their development.

129. See note 118 supra (discussing Rochin v. California, 342 U.S. 165 (1952)).

130. Paul Freund made a similar argument in favor of a unitary concept of privacy in the law:

[T]he fuzzy contours of a concept provide, despite the metaphor, a cutting and growing edge. Logical reductionism, or operationalism, which eschews concepts in favor of discrete statements of the form “if . . . then . . .” sacrifices assimilative powers. In reducing a concept it reduces too our chances of accommodating new relations . . . . The value of a rich and pliable concept of privacy needs no laboring when our technology is bringing new threats at least as menacing as . . . psychological testing . . . [and] electronic surveillance . . . .

Freund, supra note 112, at 193-94.
I would like to close on this note. The terms on which I have relied to illustrate the integrating side of the law scholarship mission—"dignity," "alienation," "personhood," and so on—are terms that acquired an inertial boost toward law as a consequence of the cultural movements of the sixties. We are witnessing now the law world's continuing and in some ways delayed reaction.

In principle, the process analyzed is no different when the concepts in play cluster not around feelings, but around shifting notions of blameworthiness, of social merit, or of power and authority. It is tempting to take a glimpse ahead, to consider what is happening on the law's horizons that will put sway not merely on the law's rules, viewed as its molecules, but on its very terms and concepts, which we have considered as its particles, and even on its logical style, conceived here as the law's "field." I have spoken of what we do from the perspective largely of reaction to change. What should we look forward to and prepare for?

It does not take much of an eye to discern some of it. The increasing bureaucratization of society is putting up between individual and state a cluttering layer of formal bureaucracies: there will be continuing proliferation of new claims of, for, against, and through organizations and groups.151 Second, as long as the per capita pie continues to shrink (perhaps until the fusion fairy arrives), and the metaphor of "spaceship earth" continues to wend its way toward the center of social consciousness, we can anticipate significant rethinking in ethics, as regards, for example, the status of cooperation and the equities of dividing up spoils.152 The implications for law are displaying themselves already in the language of "welfare rights." But they will undoubtedly show up in other ways. Can we anticipate

151. See Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1 (1979) (need in increasingly bureaucratized society to reevaluate fundamental judicial concepts, perhaps particularly remedies for securing constitutional values); Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 YALE L.J. 1 (1980) (same, with emphasis on reevaluation of strategies required to ensure corporate law-abidance).

152. See, e.g., P. French, The Scope of Morality 54-58, 115-60 (1979) ("nonobjectivist" account of how and why people should act morally); D. Regan, Utilitarianism and Cooperation (1980) (modification of traditional utilitarian theories with theory of "co-operative utilitarianism"). The growing literature on intergenerational obligations can also be viewed as reflecting the same concerns. See, e.g., Delattre, Rights, Responsibilities, and Future Persons, 82 ETHICS 254 (1972) (obligations regarding future generations distinguished from obligations to future persons); Golding, Obligations to Future Generations, 56 MONIST 85 (1972) (obligations owed to further generations based on claim that future persons are part of our "moral community"); Hubin, Justice and Future Generations, 6 PHILOSOPHY & PUB. AFF. 70 (1976) (nonutilitarian account, employing "ideal contract model," of duties to future generations).
the law's participation in the growth and refinement of *greed* and *sharing* attributes: avarice, cupidity, wastefulness, selflessness, and altruism? There are the many changes the new technologies, such as those in biology and communications, will require. And ironically, if the area of alternative-to-law settlements grows, it will look for guidance to us.

But I can imagine law scholars, in the period ahead, extending our concern beyond the legal concepts, rules, and principles, beyond all the things that go into what the law *says* it is saying, and paying increased attention to those features of its communication that more ordinarily go unspoken. That is to say, over and beyond the resolving of disputes, and the firming of expectations, the law and courts serve as paragons for social temperament. They exemplify how urgently felt needs can be confronted and mollified with the claims of principle; they legitimate temperance and reflection; they are involved in working out compromises with reality, and in confirming and questioning sources of authority.

I am supposing that at different stages of social development, there are, ideally, different balances that can be struck between trust and threat as instruments of social organization; and that, in the establishment of what is the right balance for the moment, the law serves an important function not often enough considered. That service is in the atmosphere to which the law contributes—of severity, leniency, frankness, consideration. In filling that role, the words of the law seem no less important than what we might call its style and tone. To adopt the right ones, we need to understand more about the capacity and limits of the courts to engage in education, if not in a sort of cultural psychotherapy.

All these efforts seem expansive, and are. Yet, to determine the special part that we have to play, as law scholars, they call for added concentration inward, on languages and logic. The reward is a firmer sense of what the law is, and what it and we do best.

133. A thoughtful exception is P. Nonet & P. Selznick, *Law and Society in Transition* 76 (1978) (distinguishing three types, possibly stages, in legal development—repressive, autonomous, and responsive law, which “can be understood as three responses to the dilemma of integrity and openness.”)

134. The footnote in Chief Justice Warren's opinion in *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1969), *see* note 105 *supra*, is an example. It takes an issue framed in an accepted law-stratum way—“probable cause”—and suggests an alternative interpretation for the police and body politic to consider: that the situation involves not the defendant's rights and a single arrest, but a pattern of behavior in which the police (themselves victims of an uncomfortable self-image?) seek to retain authority among minorities.