

**TRENDS IN THEORIES ABOUT LAW:  
MAINTAINING OBSERVATIONAL STAND-  
POINT AND DELIMITING THE  
FOCUS OF INQUIRY\***

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In a previous study,<sup>1</sup> suggesting criteria for a viable theory about law, we recommended that a distinction be taken between the standpoints of the scholarly observer (whose primary concern is for enlightenment) and authoritative decisionmakers and others (whose ultimate interest is in power, in the making of effective choices). This distinction we found important for assuring dependable, realistic and effective inquiry about law and for clarification of aggregate common inter-

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Karl Krastin was our student and has long been our friend and valued associate. By his writings, teaching, and critical advice he has made important contribution to policy-oriented theory about law. It is a pleasure and honor to be permitted to participate in an issue designed to honor him.

1. Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971) [hereinafter cited as *Criteria*].

est. We recommended also the delimiting of a focus of inquiry adequately comprehensive and selective, spotlighting *authoritative decision* in its larger context, with a balanced emphasis upon perspectives (the subjectivities attending decision) and operations (the choices actually made and enforced), and with clarity in conceptions of both authority and control. By authority we referred to participation in decision in accordance with community expectation; by control we referred to effective participation in decision, whatever the community expectation and whatever the variables affecting choice. The purpose of the present inquiry is to note the convergence toward these recommended criteria of many different trends in thinking and practice in jurisprudence and allied disciplines.

#### I. THE ESTABLISHMENT OF OBSERVATIONAL STANDPOINT

It could scarcely be expected that theories which define authority in terms of theological or metaphysical references would clearly articulate a distinction between the standpoint and theory of the observer and the data being observed. "Monks, by the conditions of their lives," as Zilsel pithily puts it, "are not much disposed to look at the world with open eyes."<sup>2</sup> When what is being observed is the divine will of a local god, the dictates of the agent of such a god, priestly interpretations of divine will, oracular revelations, the idiosyncratic spirit of a particular people, or autonomous entities, the relevance of secular community expectations and what established decisionmakers do in fact recedes to a minimum. The ceremonies appropriate for communion with the transempirical, in all its variegated faiths, are quite different from the standpoint and procedures required for the deliberate and systematic empirical investigation of social process.

In all ages there have of course been perceptive observers capable both of detaching themselves from the transempirical and of making realistic examination of the empirical patterns of authority and control enmeshing them. Certainly there is abundant evidence that many of the pre-Socratic Greeks achieved this capability.<sup>3</sup> The Romans developed a systematic and comprehensive jurisprudence, sometimes de-

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2. Zilsel, *Problems of Empiricism*, II INT'L ENCYCLOPEDIA OF UNIFIED SCIENCE 53 (1941) [hereinafter cited as Zilsel]. Zilsel's work is an excellent brief history of the development of empirical thinking.

3. See E. HAVELOCK, *THE LIBERAL TEMPER IN GREEK POLITICS passim* (1957) [hereinafter cited as HAVELOCK].

fined as knowledge of things "human" as well as divine,<sup>4</sup> and many of the great Roman juriconsults could, as a careful scholar has demonstrated, be most earthy.<sup>5</sup> Similarly, during the long centuries of Europe's emergence many of the best minds in various religious traditions were preoccupied with the great intellectual task of reconciling the early Greek notions of scientific scepticism and detachment with the demands of doctrine and revelation. The eventual vast expansion, beginning in the sixteenth century, of systematic observation and data collection in the natural sciences was not, however, immediately paralleled in jurisprudence or legal philosophy.<sup>6</sup>

The development of an explicit, self-conscious observational standpoint for inquiry about law and social process came with the early "sociological" jurists who, impressed by the considerable successes of the natural sciences in increasing man's control over his environment, sought to escape from the bondage of traditional derivational exercises in parochial myths and to establish the beginnings of an empirical science of law and society.<sup>7</sup> These jurists were able to perceive that observation was a first and indispensable step or procedure in any empirical science and that the requirements of validation by others necessitated both operational definitions of the events under observation and the careful specification of the position of the observer in relation to such events.<sup>8</sup> One of their strongest emphases was upon the necessity for making a clear distinction between the description of facts and the statement of preferences or making of value judg-

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4. The definition is that of ULPAN, DIGEST I.1.10, *quoted in* G. SABINE, A HISTORY OF POLITICAL THEORY 170 (3d ed. 1961) [hereinafter cited as SABINE].

5. See D. DAUBE, ROMAN LAW: LINGUISTIC, SOCIAL AND PHILOSOPHICAL ASPECTS (1969).

6. E. MEEHAN, THE THEORY AND METHOD OF POLITICAL ANALYSIS (1965) [hereinafter cited as MEEHAN]; Zilsel, *supra* note 2.

7. A. BRECHT, POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT 165 *et seq.* (1959) [hereinafter cited as BRECHT]. On the lateness of the application of scientific method to inquiry about social phenomena see MEEHAN, *supra* note 6, at 9; E. NAGEL, THE STRUCTURE OF SCIENCE 447 (1961).

8. BRECHT, *supra* note 7, at 28; F. KAUFMAN, METHODOLOGY OF THE SOCIAL SCIENCES 34 (1944); H. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 251 (1930); Lenzen, *Procedures of Empirical Science*, I INT'L ENCYCLOPEDIA OF UNIFIED SCIENCE 281 (1938).

In READINGS IN THE PHILOSOPHY OF SCIENCE 3 (H. Feigl & M. Brodbeck eds. 1953), "philosophy of science" is described as a "way of talking about science" as contrasted with being "a part of science itself." For an interesting contemporary attempt to construct a theory about the activities of scientists see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

ments.<sup>9</sup> Though there were many predecessors in general approach, perhaps the most concise and explicit statement of this emphasis was the relatively late formulation by Max Weber:

What is really at issue is the intrinsically simple demand that the investigator and teacher should keep unconditionally separate the establishment of empirical facts (including the "value-oriented" conduct of the empirical individual whom he is investigating) and *his* own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory (including among these facts evaluations made by the empirical persons who are the objects of investigation). These two things are logically different and to deal with them as though they were the same represents a confusion of entirely heterogeneous problems.<sup>10</sup>

In its insistence upon the importance of a clear distinction between two very different intellectual tasks, and in its specific inclusion of the "evaluations" of the persons being observed as among the relevant data, this formulation gave promise of a more comprehensive perspective which might distinguish other intellectual tasks and facilitate their economic performance. Unhappily, it must be recorded that Weber regarded his important formulation, in a distinction we would regard as irrelevant, as more significant for the "sociology" than the "rational science" of law.<sup>11</sup>

It remained for the American legal realists, with their insistence that all legal activities are inextricably a part of social process, to achieve a more complete specification of the recommended observational standpoint. The distinction between theories *about* law and theories *of* law has of course been a basic, defining characteristic of most of the work under the auspices of this frame of reference. Thus, there has been consistent emphasis upon detachment from legal technicality, sometimes invidiously described as "myth" or "folklore" or "transcendental nonsense," and upon the assumption of "functional" or "operational" or "instrumental" perspectives which aspire toward the description, prediction, and control of empirically observable phenomena in the interrelations of law and social process.<sup>12</sup> The study

9. BRECHT, *supra* note 7, at 221.

10. M. WEBER: THE METHODOLOGY OF THE SOCIAL SCIENCES 11 (E. Shils & H. Finch eds. 1949).

11. M. WEBER, ON LAW IN ECONOMY AND SOCIETY 11 *et seq.* (M. Rheinstein ed. 1954) [hereinafter cited as WEBER]. See notes 55, 56 *infra* and accompanying text.

12. An excellent summation of the attitude of the realists is offered in F. COHEN, THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 47 (L. Cohen ed. 1960) [hereinafter cited as COHEN]:

of the syntactical, logical structures of legal technicality has been sought to be subsumed within a larger framework of inquiry which would disclose the consequences of the invocation and application of different particular technical rules for the shaping and sharing of community values. A particularly happy, early formulation of the general point of view is that of J. W. Bingham, a pioneer in the realist movement:

[L]et us pause here a moment to determine the attitude from which we are to view the field of law. The judge, presiding over and deciding litigation, is engaged in the art of government. He is making law. The lawyer, who argues a case before judge, jury, or other law determining agency, is assisting in the law-making process. The legislator also indirectly influences similar future processes by the part which he plays in determining the existence and form of legislative expression, which authoritatively indicates what shall or shall not be done in concrete instances. These processes lie in the field of legal study. They are some of its objective phenomena. Therefore to view the field from the attitude of the judge at his official work, or of the lawyer in court, or of the legislator performing his function is, metaphorically, to attempt to see the field from a small spot inside it instead of from above and outside of it. If we are to view the law as a field of study analogous to that of any science, we must look at it from the position of the law teacher, the law student, the legal investigator, or the lawyer who is engaged in searching the authorities to determine "what the law is." These men are not directly acting as part of the machinery of government. Their study is not part of the external phenomena which compose the

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[T]he term "functional approach" is sometimes used to designate a modern form of animism, according to which every social institution or biological organ has a "purpose" in life, and is to be judged good or bad as it achieves or fails to achieve this "purpose." I shall not attempt to be faithful to these vague usages in using the term "functional." I shall use the term rather to designate certain principles or tendencies which appear most clearly in modern physical and mathematical science and in modern philosophy. For it is well to note that the problem of eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities is not a problem peculiar to law. It is a problem which has been faced in the last two or three centuries, and more especially in the last four or five decades, by philosophy, mathematics, and physics, as well as by psychology, economics, anthropology, and doubtless other sciences as well. Functionalism, operationalism, pragmatism, logical positivism, all these and many other terms have been used in diverse fields, with differing overtones of meaning and emphasis, to designate a certain common approach to this general task of redefining traditional concepts and traditional problems.

The basic themes upon which the realists built were well stated in P. BRIDGMAN, *THE LOGIC OF MODERN PHYSICS* (1927); P. BRIDGMAN, *THE NATURE OF PHYSICAL THEORY* (1936).

field of law. They are studying that field from without and therefore from the position which will give a wholly objective and the least confusing view.<sup>13</sup>

He continues:

The field of law is far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles. It is a field for scientific study analogous to the field of any other science. Concrete sequences of facts and their legal consequences are the external phenomena for investigation and prediction. Knowledge of the causative interrelations of such sequences and of the causes, organization, and operation of the governmental machinery entering into them constitutes knowledge of law in one of the legal senses of the word. Rules and principles have been developed for use in this field and technical terms with definitions more or less stereotyped have been adopted. They are only mental tools which are used to classify, carry, and communicate economically the accumulated knowledge of the law similarly to the use of generalizations and definitions in other sciences.<sup>14</sup>

The most explicit application among the American legal realists of the distinction between theories *about* and theories *of* law is found in the work—sometimes satiric and biting—of the two Yale collaborators, Thurman Arnold and E. S. Robinson.<sup>15</sup> In their various books and articles, espousing an “anthropological approach to human ideals,”<sup>16</sup> the “little man from Mars” is commonly invoked, technical legal doctrines are described as inevitably embodying men’s contradictory ideals and beliefs, humorous analogies from the histories of medicine and superstition are introduced, and the differences in results obtained by employing theories *about* and theories *of* in inquiry about various specific problems are indicated.<sup>17</sup> One of Arnold’s sharpest formulations reads:

This spiritual trouble [about conflicting ideals] would be avoided if the scholar realized that there is need for both a science of law and a science about law—the one for ceremonial use inside the insti-

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13. Bingham, *What is the Law*, 11 MICH. L. REV. 1, 10 (1912).

14. *Id.* at 11.

15. Their most influential books are: T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937); T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); E. ROBINSON, *LAW AND THE LAWYERS* (1935).

16. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1935).

17. See works cited in note 15 *supra*. A clear and amusing presentation of the differences obtained by employing theory *about* rather than theory *of* is made in Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

tution and the other for observation from above. An objective or naturalistic attitude toward human institutions is one that can be taken only by one writing about them from the outside. It is not pragmatically successful as a public attitude for one working as a minister of the institution. An objective history of a church can scarcely be written by its bishop, if he wishes to maintain the church as it is. He may use the understanding which he derives from such an attitude in order to make the operation of the church more effective, but while he is on the public stage he must play his part in accordance with the assumptions underlying the lines which he speaks.<sup>18</sup>

Emphasizing the importance of "scientific method" in inquiry about law, Robinson adds:

Jurists have in the main found great difficulty in picturing the legal institution as it would look from the outside. They have tended to succumb to the spell of the institution which they have sought to understand. That is one of the important reasons why the view of natural science has always seemed beyond the reach of legal thinkers. But with the growth of a psychological perspective, it should be possible for the lawmen to escape the customs, traditions, and taboos that have held them fast! And more than this, it should give the lawmen an opportunity to reeducate the public regarding the technique of social control.<sup>19</sup>

Unfortunately, neither Arnold nor Robinson carried through to the development of a framework of theory and procedures for facilitating performance of the intellectual tasks relevant to their aspiration.

It may be conceded that, despite the aggregate trend in their studies, not all the more important sociological and realist jurists have succeeded in consistently maintaining the external, community-wide perspective recommended by Bingham and others. Dean Pound, for example, was a vigorous and eloquent proponent of sociological inquiry who often defined law in terms of social control. Yet in much of his work Pound assumed somewhat exclusively the standpoint of a rather conventional judge, over-emphasized the importance of the application function to the neglect of other decision processes, and described past flows of decision in the categories of traditional legal technicality.<sup>20</sup> Similarly, Professor Llewellyn, though sometimes an innovative creator of "sociological constructs" of broad reference,

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18. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 813 (1936).

19. E. ROBINSON, *LAW AND THE LAWYERS* 62 (1935).

20. The generalizations we make here about Dean Pound and Professor Llewellyn build upon extensive studies by Professor W. L. Morison.

quite often appears to identify, not with the general community, but rather with the professional practitioner and to seek to create theory more designed to assist in the management or winning of specific cases than in describing aggregate flows of cases and their value consequences.<sup>21</sup> More comprehensive formulations would of course consistently manifest a broader community concern and seek, among other techniques of inquiry, systematically to exploit empathetic identifications with *all* types of participants in community process—not merely with authoritative officials and professional advocates, but with effective elites and community members more generally.

In a relatively new departure, some proponents of the analytical frame of reference appear to have become more sensitive to the need for an explicit observational standpoint external to legal process. Most surprisingly, Professor Kelsen, in his magisterial treatise on *General Theory of Law and State*, quotes from Bingham, in a selection from the same passage we have reproduced above.<sup>22</sup> He suggests that this is “exactly the standpoint” of his “normative jurisprudence,” and insists that the “ought-statements” of his pure theory are just as “empirical” or “descriptive” as the statements of sociological jurisprudence.<sup>23</sup> The “ought-statements” of the theorist, he explains, “descriptively reproduce the ‘ought’ of the norms.”<sup>24</sup> Earlier in his treatise he makes clear, however, that pure theory “must not be influenced by the motives or intentions of lawmaking authorities or by the wishes or interests of individuals with respect to the formation of the law to which they are subject, except insofar as these motives and intentions, these wishes and interests, are manifested in the material produced by the lawmaking process” and is not directed at “the reality of nature which constitutes the object of natural science.”<sup>25</sup> Hence, even if the “ought-statements” of pure theory can be meaningfully said to be empirically descriptive of some mysterious reality,

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21. Professor Llewellyn's concern with the practitioner is especially evident in K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). It is interesting that Professor W. L. Twining's brilliant address, *Pericles and the Plumber*, 83 *LAW Q. REV.* 396 (1967) does not extend its vision beyond great lawyers and plumbers to the observational standpoint of the scholar primarily concerned for enlightenment about law and social process.

22. See note 13 *supra* and accompanying text.

23. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 163-64 (A. Medberg transl. 1946) [hereinafter cited as KELSEN].

24. *Id.* at 163.

25. *Id.* at xiii, xiv.



they certainly leave much undescribed that both scholars and lawyers need to know. More recently, Professor Hart, in *The Concept of Law*, makes a distinction between the "external" and "internal" aspects of rules, which he generalizes into corresponding "points of view."<sup>26</sup> The external point of view is that of an observer who does not accept certain rules under inquiry; the internal point of view is that of a member of a group who "accepts and uses" the rules "as a guide to conduct."<sup>27</sup> This distinction is made, however, solely in aid of a better understanding of a putative general nature of rules and not for facilitating comprehensive empirical inquiry about the interrelations of law and social process in a particular community. Professor Hart is no more concerned than Kelsen with "the moral or political evaluation of law" or "the sociological description or explanation of law or legal phenomena."<sup>28</sup> What might be involved in, or achieved by, a more comprehensive external point of view is not explored.

In the vast literature of jurisprudence there appear few influential efforts, in implementation of an external standpoint, to create a meta-language for inquiry about law. The magnificent, incomplete attempt by Hohfeld, in distinguishing between "operative facts" and "fundamental legal conceptions" and offering a more comprehensive and precise table of fundamental legal conceptions, itself fell afoul the requirements of consistency in observational standpoint: it could in any particular instance be determined what facts were "operative" only after the response of the authoritative decisionmakers was known, and the fundamental conceptions of right, duty, power, immunity, and so on, could be given empirical reference only by relation to the same authoritative responses, which were among the data to be observed and accounted for.<sup>29</sup> Similarly, the ambitious classification of "legal interests" put forward by Dean Pound,<sup>30</sup> though it had potentialities, was never developed into a comprehensive and homogeneous specification in terms of the concrete demands and expectations of

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26. H.L.A. HART, *THE CONCEPT OF LAW* 55, 86, 99 (1961) [hereinafter cited as *THE CONCEPT OF LAW*].

27. *Id.* at 86.

28. Hart, *Kelsen Visited*, 70 U.C.L.A.L. REV. 709, 710 (1963). In a review of *THE CONCEPT OF LAW*, *supra* note 26, Professor Alf Ross offers some interesting strictures upon the narrowness of Professor Hart's "external" point of view. Ross, *Book Review*, 71 YALE L.J. 1184, 1190 (1962).

29. W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Cook ed. 1923).

30. R. POUND, III *JURISPRUDENCE* 5 *et seq.* (1959); R. POUND, V *JURISPRUDENCE* 5 *et seq.* (1959); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

community members.<sup>31</sup> The better hope for future achievement might appear to reside in the adaptation to the purposes of inquiry about law of some of the broad conceptual maps beginning to become current among social scientists.

The floating, indefinite quality of the great bulk of jurisprudential theory that fails to distinguish carefully and consistently between the standpoints of the observer and the decisionmaker can be partially explained as a consequence of minimal concern for systematic exposure to the further distinctions that must be made if conceptual categories are to be expressly related to concrete circumstances. The chief distinctions to be drawn run the gamut from relatively "extensive" to relatively "intensive" observational positions. Consider, for example, what is involved in describing the decisions that are made in a conventional process of government and law. Decisions may be partially "indexed" by "statutes" passed and "treaties" ratified. These decisions can be more "intensively" studied by reading and analyzing the documents involved, and by conducting brief or prolonged surveys of strategically situated persons designed to disclose the degree of commitment to the execution of decisions. Obviously the distinction between extensive and intensive standpoints takes into account the time required for an observer to make an observation, the complexity of the data called for, and the length of time required for training observers. These varying depths in observational standpoint require to be made explicit if jurisprudential maps are effectively to be adapted to the problem solving tasks for which they purport to offer guidance.

## II. DELIMITING THE FOCUS OF INQUIRY

### A. *The Balance of Emphasis upon Perspectives and Operations*

It is only in relatively recent decades, under the influence of the sociological and realist frames, that theory for inquiry about law has been able to achieve a clear and explicit focus upon decision, in balanced emphasis upon both perspectives and operations. The great historic conceptions of law as a field of inquiry, the conceptions which have dominated civilized thinking for some millenia, have been largely in terms of systems or bodies of "rules," and most of these conceptions have been extraordinarily vague about the references of these rules, whether to perspectives or operations, and if to perspectives,

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31. For an early indication of the inadequacies in Dean Pound's theory see Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838 (1922).

whether to the perspectives of community members or of established decision-makers or of other prior or subsequent evaluators.<sup>32</sup> Even the most insistent emphasis upon "rules" as the appropriate field of inquiry must of course make some indirect or implicit reference, however darkening, to operations or actual choices made and enforced, that is, patterns in decisions. The important question is whether or not the reference to decision is sufficiently explicit, comprehensive, and realistic to facilitate performance of all the relevant intellectual tasks. The procedure which the historic emphasis upon "rules" appears to invite is, unfortunately, that the scholarly observer should first seek some general method or criteria for identifying the rules of the system he is to study, then should concentrate his attention upon the logical inter-connections of the different rules in the system, and finally should leave the interrelations of the rules and other factors in decision and social context for separate and subsidiary examination, preferably by others than legal specialists. The consequence is a high degree of isolation and abstraction of the identified rules from the community and social processes which must at least condition their prescription, invocation, and application, and upon which their application must have its effects. The implications of this isolation and abstraction continue to be observable both in the kinds of inquiry undertaken about law and in the overall organization of curricula, as well as in the internal patterning of particular courses of instruction.

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32. For exposition and defense of this conception see H. KANTOROWICZ, *THE DEFINITION OF LAW* (1958). See also the eloquent introduction by Sir Arthur Goodhard. Cf. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926); W. ROBSON, *CIVILIZATION AND THE GROWTH OF LAW* (1935); P. VINOGRADOFF, *COMMON SENSE IN LAW* 22-44 (Hanburg ed. 1959) [hereinafter cited as VINOGRADOFF].

The ease with which this conception transcends cultural and ideological boundaries may be observed by comparing the definitions proffered by Professor Patterson and Mr. Vyshinsky. The former writes:

A law, then, is a norm having the authority of the state acting in the way and within the limits prescribed by the ultimate political sovereign.

E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 159 (1953) [hereinafter cited as PATTERSON]. The latter defines "law" as:

The totality (a) of the rules of conduct, expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state authority.

He defines "Soviet law" as:

[T]he aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will.

A. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 50 (1948). Our concern of course is not so much for how the word "law" is used as for whether the focus of inquiry is adequate to facilitate performance of the relevant intellectual tasks.

in the law schools and research institutes of much of the world.<sup>33</sup> The basic organizing principle for inquiry about law and of legal education is still predominantly that of legal technicality, with particular subject matters purportedly demarcated and arranged in terms of the concepts of authoritative myth.

The origin of this high emphasis upon rules, with its attendant overemphasis upon perspectives and relative isolation from social process, is commonly said to be in the transempirical frame of reference, at the very beginnings of history. "The legal thought that regards abstract rules, embodied within the coded law of civilized peoples or in the memory of pre-literate peoples, as the proper and exclusive manifestation of law," a distinguished contemporary anthropologist has summarized, not only "represents the major legal tradition in Western Europe," but also has a "long cultural history," dating "back to the Babylonia of Hammurabi and to the origin of the notion of natural law (c. 2,000 B.C.)."<sup>34</sup> The history of the development in Western civilization of the transempirical frame—from its early Middle-Eastern roots, through classical Greek philosophy, Roman law, and the Christian tradition to contemporary secular versions—is so well known that detailed illustration of its all pervasive emphasis on evaluative perspectives, incorporated in rules, is superfluous.<sup>35</sup> Comparable developments appear to have occurred also in other cultures, such as the Chinese.<sup>36</sup> In any event, when law is regarded as the embodiment of theological or metaphysical notions derived from a deity, the cosmos, or autonomous reason, divergences from recommended or deduced perspectives in the actual decisions men make are not likely to influence reexamination and change in the content of perspectives; in such a context, the decisions which control in prac-

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33. The restatements of the law prepared by the American Law Institute offer typical, if superior, illustration.

34. Pospisil, *Law and Order*, printed in INTRODUCTION TO CULTURAL ANTHROPOLOGY: ESSAYS IN THE SCOPE AND METHODS OF THE SCIENCE OF MAN ch. 8 (J. Clifton ed. 1968) [hereinafter cited as Pospisil].

35. See *Criteria*, *supra* note 1, at 365-66. See also C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHIES (1932); A. CHROUST, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHERS 70-84 (P. Sayre ed. 1947) [hereinafter cited as CHROUST]; L. FULLER, THE MORALITY OF LAW (2d ed. 1969); A. PASSERIN D'ENTREVES, NATURAL LAW (1951); H. ROMMEN, THE NATURAL LAW (T. Hanley transl. 1947) [hereinafter cited as ROMMEN]; Northrup, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430 (1950).

36. Pospisil, *supra* note 34, citing 2 J. NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA (1956).

tice are more likely to be regarded as untoward obstacles to implementation of the divine will or immutable norm than as an appropriate field of inquiry. Even the most devout proponents of transempirical perspectives, however, must address themselves to men in a spatio-temporal context and make some indication of how the revelations of faith or derivations of essences are to be recognized and related to empirical interpersonal relations. The more recent representatives of the transempirical tradition, such as the existentialists, appear to show an increasing concern for the complexity of the problems of human choice in the here and now.<sup>37</sup>

The frame of reference characterized as "historical," though it sought to bring law down from the transempirical to a specific location in social process, did not wholly escape the traditional predominant emphasis upon perspectives.<sup>38</sup> For the German representatives of this school, who defined law as a spontaneous manifestation of the unique, generative spirit in the common or collective consciousness of a particular people, there was no escape at all: their reference was as much to perspectives as that of the "natural law" approach, and often as mystical and transempirical. Viewing the community as a whole as the source of law and making no distinction between official and nonofficial decisionmakers, they had no chance to achieve a clear focus upon a process of authoritative decision. Some of the confusion inherent in this approach is well illustrated by J. C. Carter, an American proponent of the Germanic tradition:

Law *begins* as the product of the automatic action of society and becomes in time a cause of the continued growth and perfection of society. Society cannot exist without it, or exist without producing it. Law, therefore, is self-created and self-existent. It is the *form* in which human conduct—that is, human life, presents itself under the necessary operations of the causes which govern conduct. It is the fruit of the myriads of concurring judgments of all the members of society pronounced after a study of the consequences of conduct touching what conduct would be followed and what should be avoided.<sup>39</sup>

The English representatives of the historical frame, such as Maine, Maitland, and Vinogradoff, were less mystical and transcendental in approach, making systematic and empirical study of the interrelations

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37. G. COHN, *EXISTENTIALISM AND LEGAL SCIENCE* (1967).

38. See *Criteria*, *supra* note 1, at 366-67.

39. J. CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 129-30 (1907).

of law and social process, but the conception of law which inspired even their work remained explicitly that of a body of rules.<sup>40</sup> In its insistence upon the location of law in the social process of particular communities, the historical frame made, however, an enduring contribution toward the development of a more viable conception of law as decision process, indispensably embodying both perspectives and operations.

The emphasis upon law as a field of inquiry composed of a particular kind of rules—namely, the rules established and applied by community officials—is a distinguishing characteristic of the positivist or analytical frame of reference.<sup>41</sup> By this emphasis the representatives of this frame seek contrast with both the theological and metaphysical derivations of the transempirical frame and the spontaneous community emanations preferred by the historical jurists. The prime expositor in the English-speaking world of the analytical point of view, as a formal theory about law, is still John Austin, the nineteenth century jurist who built upon many predecessors, including Bodin, Hobbes, and Bentham. Austin began his presentation in the traditional way of looking for certain rules which could appropriately be regarded as legal. “A law, in the most general and comprehensive acceptation,” he defined as “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.”<sup>42</sup> In higher degree than some of his predecessors, however, Austin attempted explicitly to locate “positive law,” the special kind of law it was his object to study, in social process:

Every positive law, or every law simply and strictly so called, is set by a *sovereign* person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.<sup>43</sup>

Yet Austin's very method of location of “legal” rules involved not merely a diversion of attention from other factors than rules in social situations but also an isolation of such rules from social process

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40. See 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* XXV (1895); VINOGRADOFF, *supra* note 32.

41. See *Criteria*, *supra* note 1, at 367-69. See generally J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (Hart ed. 1954) [hereinafter cited as *THE PROVINCE OF JURISPRUDENCE*]; J. GRAY, *THE NATURE AND SOURCES OF LAW* (2d ed. 1921) [hereinafter cited as *GRAY*]; PATTERSON, *supra* note 32; *THE CONCEPT OF LAW*, *supra* note 26.

42. J. AUSTIN, *LECTURES ON JURISPRUDENCE* 86 (5th rev. ed. R. Campbell 1885).

43. *Id.* at 220.

through the recognition of only one point of contact as determinative of their legal character. In this conception, law, thus becomes the systematic exposition of the content of the sovereign's desires as signified directly or indirectly; and, in contrast with modern notions of decision as a choice enforced by high expectations of deprivation or indulgence, Austin was clearly prepared to classify significations of desire by the sovereign as law even if the potentialities of sanction were slight. This recognition of only one point of contact with social process as determinative of the legal character of rules is characteristic also of much later positivistic thinking, including Sir John Salmond,<sup>44</sup> John Chipman Gray,<sup>45</sup> and their numerous followers, for whom law consists of the rules enforced, or acted upon, by courts.

In some of its more transcendent versions, the positivist conception of law as a body of rules purports to escape all manifest reference to either perspectives or operations in social process. The most renowned propounder of this austere perspective is Professor Hans Kelsen. In his conception the rules which comprise law do not refer to anybody's actual perspectives but rather to certain transcendental forms or "hypothetical judgments" from which the actual perspectives of people have been dehydrated. For him a "norm" is a rule stipulating that somebody ought to act in a certain way without implying that anybody really demands or expects the person to act in this way. In sharply distinguishing his "pure theory" from the "ideological" emphasis of natural law, Kelsen offers a most explicit summary:

To free the theory of law from this [ideological] element is the endeavour of the Pure Theory of Law. The Pure Theory of Law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law. It does this not, as is generally the case with the traditional theory, by defining the legal norm, like the moral norm, as an imperative, but as an hypothetical judgment expressing a specific relationship between a conditioning circumstance and a conditioned consequence. The legal norm becomes the legal maxim—the fundamental form of the statute law. Just as natural law links a certain circumstance to another as cause to effect, so the legal rule links the legal condition to the legal consequence. In the one case the connecting principle is causality; in the other it is imputation. The Pure Theory of Law regards this principle as the special and peculiar principle of law. Its expression is the Ought. The expression of the causality principle is Necessity. The law of nature runs:

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44. See J. SALMOND, JURISPRUDENCE (11th ed. G. Williams 1957).

45. See GRAY, *supra* note 41.

If A is, then B must be. The legal rule says: If A is, then B ought to be. And thereby it says nothing as to the value, the moral or political value of the relationship. The Ought remains a pure *a priori* category for the comprehension of the empirical legal material.<sup>46</sup>

Similarly, by making certain assumptions about the effectiveness of entire systems of law and about the nature of sanctions, Kelsen is able to relegate the overt and comprehensive consideration of the operations of a system to the sociology of law.

It does not appear that contemporary positivists have moved much beyond this traditional, characteristic focus upon technical legal rules and the examination of the logical interrelations of the content of such rules. Thus, Professor Hart in one of his earliest formulations writes:

A legal system is a system of rules within rules; and to say that a legal system exists entails not that there is a general habit of obedience to determinate persons but that there is a general acceptance of a constitutional rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. We should think not of sovereign and independent *persons* habitually obeyed but of a rule providing a sovereign or ultimate test in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constitutional rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the laws.<sup>47</sup>

Later in his *The Concept of Law*, in an effort to provide "an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena,"<sup>48</sup> he suggests in interesting metaphor that law is most appropriately conceived as a "union" or "combination" of "primary" and "secondary" rules.<sup>49</sup> Under "primary" rules "human beings are required to do or abstain from certain actions, whether they wish to or not"; the "secondary" rules, "in a sense parasitic upon" the primary, "provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."<sup>50</sup> It is not entirely clear what Hart means by rules or what empirical reference he

46. Kelsen, *The Pure Theory of Law*, 50 LAW Q. REV. 474, 484-85 (1934).

47. *Introduction to THE PROVINCE OF JURISPRUDENCE*, *supra* note 41, at xii.

48. *THE CONCEPT OF LAW*, *supra* note 26, at 17.

49. *Id.* at 77.

50. *Id.* at 78, 79.



ascribes to them: he sometimes invokes the special mystical logic of "linguistic analysis" and on occasion he appears to suggest that legal rules make an autonomous reference to something other than community policy. In some instances, however, he makes relatively clear reference to perspectives. Thus, in despatching the command theory of law, he writes:

These fundamental accepted rules specifying what the legislator must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the Utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules. This notion, not that of a command, as Austin claimed, is the "key to the science of jurisprudence" or at least one of the keys.<sup>51</sup>

Unfortunately, this insight as to the relevance of the perspectives of community members and their officials is not carried through to a direct, explicit focus upon decision process, as including operations as well as perspectives. His concern for operations is as oblique as that of his positivist predecessors and is directed only toward whatever assistance operations may afford in increasing understanding of rules. The theory he constructs is not designed, in the author's conception or in fact, to facilitate comprehensive examination of the interrelations of law and social process in terms of empirical causes and consequences.

It is with the sociological frame, and its characteristic concern for the interrelations of law and social process, that a broader focus of inquiry, with a more explicit emphasis upon decision, begins to emerge.<sup>52</sup> The drive for a broader focus was pervasive in Ehrlich's insistence upon the importance of "the living law" of a community, though his "inner order of associations" would appear to make more reference to perspectives than to operations.<sup>53</sup> It has already been noted<sup>54</sup> that Weber made a distinction (which we regard as unneces-

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51. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958).

52. See *Criteria*, *supra* note 1, at 369-71. See also E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (W. Moll transl. 1936) [hereinafter cited as EHRLICH]; R. POUND, *I JURISPRUDENCE* ch. 6 (1959); N. TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* (1939) [hereinafter cited as TIMASHEFF].

53. See EHRLICH, *supra* note 52.

54. See note 11 *supra* and accompanying text.

sary and confusing) between the standpoints of jurisprudence and of the sociology of law:

When we speak of "law," "legal order," or "legal proposition" [Rechtssatz] close attention must be paid to the distinction between the legal and the sociological points of view. Taking the former, we ask: What is intrinsically valid as law? That is to say: What significance or, in other words, what *normative meaning* ought to be attributed in correct logic to a verbal pattern having the form of a legal proposition. But if we take the latter point of view, we ask: What *actually* happens in a community. . . .<sup>55</sup>

From the latter, the sociological, point of view Weber offers and employs a conception of law which clearly includes references to both perspectives (order) and operations (enforcement):

An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves especially ready for that purpose.<sup>56</sup>

A most comprehensive and explicit formulation, emphasizing both perspectives and operations as indispensable components of law, is that of Timasheff.<sup>57</sup> For him law is best conceived as an "ethico-imperative coordination of behavior" which includes both group convictions and patterns of conduct enforced by community officials. Early in his book he offers the hypothesis that what "most people think when speaking of law," apart from "the highest rules of constitutional law and the rules of international law," is of a "legal order" which is "constituted by patterns of conduct enforced by agents of centralized power (tribunals and administration) and simultaneously supported by a group conviction that the corresponding conduct 'ought to be'."<sup>58</sup> After elaborate examination of much evidence, he concludes: "Ethics and power . . . may be thought of as two circles which cross one another. Their overlapping section is law."<sup>59</sup> The encyclopedic Dean Pound, though he offered many varying conceptions of law and sometimes seemed to concentrate unduly upon the perspectives of authoritative myth, may also be regarded, because of his frequent and eloquent insistence upon law as a form of social control or social engi-

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55. WEBER, *supra* note 11, at 11.

56. *Id.* at 5.

57. TIMASHEFF, *supra* note 52.

58. *Id.* at 17.

59. *Id.* at 248.

neering, as having made important contribution to the development of a more balanced focus for inquiry about law.<sup>60</sup>

It is a principal achievement of the American legal realists to have formulated an explicit, central focus upon *decision*, as the most fruitful base for comprehensive inquiry about law. This emphasis is implicit in their characteristic insistence that the manifest, conventional reference of technical legal rules must be systematically examined for ascertaining their non-manifest, functional reference in terms of the consequences of their prescription and application. The basic notion was directly anticipated in Holmes' statement that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>61</sup> The same anticipation is contained in Hohfeld's "fundamental conceptions,"<sup>62</sup> which had for their empirical reference the outcomes in specific decisions, and in Mr. Justice Cardozo's insider's description of *The Nature of the Judicial Process*.<sup>63</sup> In urging the importance of bringing scientific method to bear upon the study of law, Walter Wheeler Cook, one of the early proponents of the realist movement, stressed that "the past behavior of the judges can be described in terms of certain generalizations which we call rules and principles of law."<sup>64</sup> Elsewhere, in restating the realist approach, he explained that "in making our observations . . . we shall focus our attention primarily on what courts have done rather than the descriptions they have given of the reasons for their action."<sup>65</sup> It remained for Jerome Frank, in his once controversial *Law and the Modern Mind* to take a bead squarely upon decision itself as the best focus for organizing inquiry:

Law, then, as to any given situation is either (a) actual law, i.e. a

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60. See, e.g., R. POUND, I JURISPRUDENCE 15 (1959); R. POUND, II JURISPRUDENCE 7 (1959).

61. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897), reprinted in COLLECTED LEGAL PAPERS 167, 168 (1920).

62. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (W. Cook ed. 1923).

63. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). Some of the relevant history is indicated in Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), reprinted in M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND PHILOSOPHY 571, 576 (1951). Cf. PATTERSON, *supra* note 32, at 537 *et seq.* Dean Pound finds an anticipation of the conception of "decision" in various European jurists. R. POUND, I JURISPRUDENCE 146, 181 (1959).

64. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 308 (1927).

65. W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 8 (1942).

specific past decision, as to that situation, or (b) probable law, i.e. a guess as to a specific future decision.<sup>66</sup>

Insisting that the "process of judging (which is law) is not to be confined within the compass of mere rules," he added:

From the point of view of the practical work of the lawyer, law may fairly be said to be past decisions (as to past events which have been judged) and predictions as to future decisions. From the point of view of the judge, the law may fairly be said to be in the judging process or the power to pass judgment.<sup>67</sup>

Upon reflection he acknowledged that decisions other than judicial had to be brought within relevant focus:

The emphasis in this book on the conduct of judges is admittedly artificial. Lawyers and their clients are vitally concerned with the ways of all governmental officials and with the reactions of non-official persons to the ways of judges and other officials.<sup>68</sup>

In similar vein and at about the same time, Karl Llewellyn wrote, in words that he later sought inartfully to qualify:

This doing of something about disputes, this doing of it reasonably is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.<sup>69</sup>

The thrust of Llewellyn's effort was to distinguish "real rules" from "paper rules" and to observe the actual "practices" of courts and other officials.

It may be conceded that proponents of the realist frame, in their vigorous rejection of the traditional conception of law as a body of rules, have on occasion thrown the baby out with the bath and greatly over-emphasized bare operations, at the expense of relevant perspectives. Even technical rules of law, despite their syntactic circularity and imprecision in semantic reference, are among the variables which affect the choices of decisionmakers, and any comprehensive and realistic inquiry about the variables which in fact affect decision must ex-

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66. J. FRANK, *LAW AND THE MODERN MIND* 46 (1930).

67. *Id.* at 274.

68. *Id.* at 47. Cf. J. FRANK, *IF MEN WERE ANGELS* 279-80 (1942); Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORNELL L.Q.* 568, 578 (1932).

69. K. LLEWELLYN, *THE BRAMBLE BUSH* 12 (1930). A somewhat unhappy qualification is offered in the 1951 edition of the book. See K. LLEWELLYN, *THE BRAMBLE BUSH* 9 (2d ed. 1951).

tend to many predispositional, as well as environmental, factors. The importance of a central focus in inquiry upon decision is not that such a focus is in itself either effectively explanatory or appropriately evaluative but rather that it affords a most economic base for a genuine and effective performance of the descriptive, explanatory, predictive, and evaluative tasks. This importance of an appropriate balance upon perspectives and operations in the conception of decision, and of decision rather than rule as a base for inquiry, has seldom been better stated than by Felix Cohen in his famous article, *Transcendental Nonsense and the Functional Approach*:

“Realistic jurisprudence,” as that term is currently used, is a theory of the nature of law, and therefore a theory of the nature of legal rules, legal concepts, and legal questions. Its essence is the definition of law as a function of judicial decisions. This definition is of tremendous value in the development of legal science, since it enables us to dispel the supernatural mists that envelop the legal order and to deal with the elements of the legal order in objective, scientific terms. But this process of definition and clarification is only a preliminary stage in the life of legal science. When we have analyzed legal rules and concepts as patterns of decisions, it becomes relevant to ask, “What are judicial decisions made of?”<sup>70</sup>

...  
A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences.<sup>71</sup>

...  
The functional approach permits ethics to come out of hiding. When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.<sup>72</sup>

...  
Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is

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70. Cohen, *Transcendental Nonsense and the Functional Approach*, reprinted in M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND PHILOSOPHY 33 (1951).

71. *Id.* at 70.

72. *Id.* at 75.

blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched.<sup>73</sup>

Felix Cohen's emphasis on the importance of adopting a double standpoint for the study and guidance of *decision* has been paralleled by developments in the theories and methodological procedures of the social sciences.<sup>74</sup> The policy sciences approach, for instance, is as much concerned with *choices* in the private sphere of civic order as with decisions inseparable from public order. As is widely recognized, the movement among specialists in every field was initially from the preferential to the descriptive. More recently the trend has been to interrelate the two standpoints. The result is to create an intellectual climate in which the double reference approach in jurisprudence continues to gain support.

The sequence is exemplified in the history of economics by noting that Adam Smith was a moral philosopher who undertook to become acquainted with the working of economic institutions as a means of cultivating an environment in which the responsible pursuit of private gain would be compatible with collective advantage. The factual complexity of a rapidly evolving Western European economy tended to divert attention from the formulation of comprehensive preferential criteria as guides to choices or decisions that affect wealth. In the non-Marxist as well as the Marxist world it is increasingly common for preferential *and* descriptive standpoints to be taken up by policy analysts and advisors. Among sociologists the taboo is being lifted against giving serious thought to the prescriptive *and* the descriptive dimensions of choice in every sector of society. Political scientists, too, are explicitly concerned with "normative" *and* "descriptive" theory in research and innovation. Similar currents are running among other social scientists, biologists and physical scientists.<sup>75</sup>

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73. *Id.* at 76.

74. For suggestive indication see NOMOS VII: RATIONAL DECISION (C. Friedrich ed. 1964) reviewed Caldwell, 10 NAT'L L.F. 275 (1965); POLITICS AND THE SOCIAL SCIENCES (S. Lipset ed. 1969); Danelski, *Values as Variables in Judicial Decision-Making: Notes Toward a Theory*, 19 VAND. L. REV. 721 (1966); Lasswell, *Current Studies of the Decision Process: Automation Versus Creativity*, 8 WEST POL. Q. 381 (1955); Mays & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Process*, 33 GEO. WASH. L. REV. 318 (1964); Schubert, *Behavioral Jurisprudence*, 2 LAW & SOC'Y REV. 407 (1968); *Symposium—Social Science Approaches to the Judicial Process*, 79 HARV. L. REV. 1551 (1966).

75. See H. LASSWELL, A PREVIEW OF POLICY SCIENCES (1971).

### B. *Clarity in Conceptions of Authority and Control*

The facts of effective participation in decision (which we refer to as "control") and of the expectations of community members about such decision (which we refer to as "authority")<sup>76</sup> are of course empirically observable features of social process in all of man's communities.<sup>77</sup> Yet traditional theories about law have commonly focused obscurely upon these facts of decision and expectation about decision and have seldom clearly specified the intellectual procedures indispensable to realistic and economic inquiry about such facts. In the vast literature of jurisprudence and political theory many different and competing theories of "authority" and "control," making both empirical and transempirical references, have flourished; and the interrelations of authority and control, in the empirical references we specify, have often been confused.<sup>78</sup> In some theories the importance of authority in decision is over-estimated: control is either assumed automatically to follow authority or its role is observed only through normative-ambiguous conceptions of authority. In other theories the potentially creative role of authority is underestimated: clubs are assumed to be trumps and authority to have little impact upon control. In still deeper confusion, many of the historically more influential

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76. As we have elsewhere explained our use of these terms:

By authority we mean participation in decision in accordance with community perspectives about who is to make what decisions and by what criteria; the reference is empirical, to a certain frequency in the perspectives of the people who constitute a given community. By control we mean effective participation in decision-making and execution—that choice in outcome is realized in significant degree in practice. When decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power.

*Criteria*, *supra* note 1, at 384.

77. See C. MERRIAM, *POLITICAL POWER* (1934).

78. Many standard histories of political theory offer excellent survey. See, e.g., BRECHT, *supra* note 7; C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963); R. MACIVER, *THE WEB OF GOVERNMENT* (1947); R. MACIVER, *THE MODERN STATE* (1926); C. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (rev. ed. 1947); C. MCILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932); C. PARKINSON, *THE EVOLUTION OF POLITICAL THOUGHT* (1958); SABINE, *supra* note 4; F. WATKINS, *THE AGE OF IDEOLOGY: POLITICAL THOUGHT, 1750 TO THE PRESENT* (1964); F. WATKINS, *THE POLITICAL TRADITION OF THE WEST* (1948).

For comparable surveys in the literature of jurisprudence see E. BODENHEIMER, *JURISPRUDENCE* (1963); H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949); K. CARLSTON, *LAW AND STRUCTURES OF SOCIAL ACTION* (1956); J. JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* (1940); PATTERSON, *supra* note 32; W. ROBSON, *CIVILIZATION AND THE GROWTH OF LAW* (1935).

conceptions of authority have been not merely descriptive in their reference, but also preferential and scientific or manipulative—designed to answer not the single question of what perspectives are actually held in a given community about the processes of effective decision, but rather the multiple question of what perspectives *ought* (by many different criteria) to be held and what perspectives are necessary conditions for certain demanded features of public order.<sup>79</sup> Sometimes, in a triumph of normative-ambiguity, conceptions of authority are explicitly framed in the quixotic purpose of serving descriptive, preferential, and scientific tasks simultaneously; this particular obscurity is especially notable in inquiry making use of such ancillary concepts as those of “obligation” and “binding,” which appear always to conceal somebody’s preferences or assumptions about conditions.<sup>80</sup> Similarly, many of the historical conceptions of control, inquiry about which has gone forward more in the Machiavellian tradition of practical advice to would-be rulers than of critical scholarship, have not adequately distinguished between the control achieved by naked force or coercion and that affected by perspectives of authority; and even when the bases of control are more discriminatingly delineated, inquiry about control sometimes seems to shift aimlessly back and forth between concern for the factors affecting decision and the efficacy of decision, in the sense of the degree to which decision is put into controlling community practice.<sup>81</sup> Fortunately, in more recent times it is becoming increasingly recognized that the many esoteric meanings ascribed to “authority” and “control” by different writers and schools in the historic quest for “essences” are of secondary importance and

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79. The essays in *NOMOS I: AUTHORITY* (C. Friedrich ed. 1958) illustrate both the bewildering variety of references with which the word “authority” is used and the failure to discriminate between the different intellectual tasks of inquiry.

80. For examples see *NOMOS XII: POLITICAL AND LEGAL OBLIGATION* (J. Pennock & J. Chapman, eds. 1970). The intellectual difficulties inherent in such ambiguous conceptions are well illustrated in the traditional infinitely regressive search for the “bindingness” or “validity” of international law. See McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188, 194 (1968). Possible early origins of the mystical concern for “obligation” are indicated in F. CORNFORD, *FROM RELIGION TO PHILOSOPHY* 88 (1957).

81. C. MERRIAM, *POLITICAL POWER* (1934) briefly outlines the history of inquiry about control. The relative neglect of appropriate inquiry and varying conceptualization are indicated in H. JONES, *THE EFFICACY OF LAW* (1970). For more macroscopic perspectives see A. BERLE, *POWER* (1967); K. MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* (1948). D. EASTON, *THE POLITICAL SYSTEM 159-70* (1960) sketches the origins of interest by contemporary political scientists in the facts of control.



that the urgent task for responsible scholarship is that of getting ahead with empirical inquiry about the interrelations of peoples' perspectives about their community processes of decision and the other factors that affect control, in the sense of effective participation in such processes.<sup>82</sup>

The conceptions of authority and control that we recommend, in terms of the empirical expectations and behavior of community members, are ancient in origin and have found expression, in varying degrees of clarity, at many different times and in many different contexts. Such conceptions or their equivalents are apparent in notions of customary law prevalent in primitive societies,<sup>83</sup> ancient China,<sup>84</sup> India,<sup>85</sup> Greece, Rome, Western Europe and the Americas. They form the descriptive component in the great, historic insistent demands made by many peoples down through the centuries, with respect to deliberately created as well as customary law and enduring into the constitutions of contemporary democratic communities, that authority rightfully comes from the whole people.<sup>86</sup> Certainly, from the time of the Soph-

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82. Some of the newer perspectives and studies are noted in W. GOULD & M. BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1970); W. MACKENZIE, *POLITICS AND SOCIAL SCIENCE* (1967); S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969); Peabody, *Authority*, 1 *IND. ENG. SOC. SCI.* 473 (1968); Pospisil, *supra* note 34, at 200.

83. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 67 (1926); B. MALINOWSKI, *FREEDOM AND CIVILIZATION* 187 (1944); Pospisil, *supra* note 34.

84. 2 J. NEEDHAM, *SCIENCE AND CIVILIZATION IN CHINA* 526 (1969).

85. A. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* 118 (1960); D. MACKENZIE BROWN, *THE WHITE UMBRELLA: INDIAN POLITICAL THOUGHT FROM NANU TO SANDHI* (1952); P. SEN, *THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE* 24 *et seq.* (1918).

86. See W. ROBSON, *CIVILIZATION AND THE GROWTH OF THE LAW* (1935). In one eloquent passage Robson writes:

The liberation of the human mind from the cramping influence of religious assumptions respecting the nature of the universe; the destruction of authoritarian dogmas concerning the sanctity of law and the behaviour of physical matter; the banishment of sprites [*sic*], demons, angels, gods, witches, and wonder-workers of all kinds to the realm of myth and legend; the substitution of rational analysis for a belief in supernatural intervention and miraculous interference in the affairs of daily life; the awakening of a spirit of patient and impartial enquiry into the processes of Nature; the belief that the behaviour of all phenomena is subject to the operation of known or knowable causes and effects; the recognition that the laws of man are what men make them and the laws of Nature what men discover them to be: all this constitutes a supremely important movement in the evolution of the human race. It forms, one may say, the most essential step towards freedom and knowledge and power that the human mind has yet taken.

*Id.* at 272.

ists the Greeks had available to them, as reconstructed by recent scholarship, a conception of law, including both authority and control, sufficiently earthy, secular, and community-centered to serve the purposes of fruitful, empirical enquiry.<sup>87</sup> This conception—in contrast with earlier and later transempirical and elitist notions—viewed “human codes of behavior less as principles than as conventional patterns, embodying not eternal laws written in the heavens or printed on man’s spiritual nature, but rather common agreements elaborated by man himself as a response to collective need.”<sup>88</sup> For illustrating “the character, origin, and application of all law,” the proponents of this model, Professor Havelock summarizes, regarded law as:

[N]ot a set of religious sanctions, nor ancient and unquestioned traditions, nor *a priori* imperatives; but a set of working compacts, instruments of social flexibility and prosperity; almost automatic in operation and certainly indispensable in effect; but still man-made, the servant of human demands which begin with the biological needs of human beings all fundamentally alike.<sup>89</sup>

Similarly, the Romans, despite their many different constitutional practices for the making and applying of law and many different conceptions of authority and control, honored a conception of customary law, in both their *ius civile* and *ius gentium*, which was built upon the “theoretical justification” of the “consent of the people,” and they sought, however vainly on occasion, to extend this same requirement of consent to other forms of legislation.<sup>90</sup> An often quoted and influential formulation is that of Julian:

Immemorial custom is observed as *lex*, and not without reason; and this is the law which is said to be established by usage. For since *leges* themselves are binding on us for no other reason than that they have been received by the judgment of the people, it is proper that those things of which the people have approved without any writing shall also be binding on everyone. After all, what is the difference whether the people makes known its will by a vote, or by the things themselves and by acts?<sup>91</sup>

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87. This is the principle theme of HAVELOCK, *supra* note 3. Cf. E. BODENHEIMER, JURISPRUDENCE 5 (1963); T. WELDON, THE VOCABULARY OF POLITICS 12 (1953).

88. HAVELOCK, *supra* note 3, at 29.

89. *Id.* at 338.

90. H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 363 (1939). Cf. W. BACKLAND, A TEXTBOOK OF ROMAN LAW 52 (1921); Schiller, *Custom in Classical Roman Law*, 24 VA. L. REV. 268 (1937).

91. ULPIAN, DIGEST, I. 3.32, *quoted in* C. MCLWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 64 (rev. ed. 1947). Cf. SABINE, *supra* note 4, at 171.

The most cogent summary is that of the Carlyles in their monumental history:

[T]he one and only theory of the source of political authority, which the Roman Jurists handed on to the Middle Ages and the modern world, was the theory that all political authority is derived from the community itself, is founded upon the consent of the community. The Roman emperor was absolute, but this absolutism was a legal absolutism—that is, it was derived from law, for if he was absolute, it was because the Roman people had conferred upon him their own authority. This is the theory, and the only theory of the Roman Jurists, from Gaius in the second century to Justinian himself in the sixth century.<sup>92</sup>

The pervasiveness throughout the Middle Ages in Western Europe of this conception that authority comes from the people, with both its descriptive reference to community expectation and its added components of preference or demand and causal assumption, is, again, perhaps best stated in one masterly peroration by the Carlyles:

We venture therefore to say, and we do it without hesitation, that the proper character of the political civilisation of the Middle Ages is to be found in the principle that all political authority, whether that of the law or of the ruler, is derived from the whole community, that there is no other source of political authority, and that the ruler, whether emperor or king, not only held an authority which was derived from the community, but held this subject to his obedience to that law which was the embodiment of the life and will of the community, and that the development of the representation of the community in Cortes or Parliaments or States-General was the natural and intelligible form which that principle assumed.<sup>93</sup>

The long course of development through the English, American, and French revolutions by which this conception that authority derives from the people has come to be imbedded in the constitutional and

92. 5 R. CARLYLE & A. CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST* 448 (1928).

93. *Id.* at 473. Cf. H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 261 (1949); H. YNTEMA, *THE CROSSROADS OF JUSTICE* 114 (1957). Sabine writes:

These general principles of government—that authority proceeds from the people, should be exercised only by warrant of Law, and is justified only on moral grounds—achieved practically universal acceptance within comparatively a short time after Cicero wrote and remained commonplaces of political philosophy for many centuries. There was substantially no difference of opinion about them on the part of anyone in the whole course of the Middle Ages; they became a part of the common heritage of political ideas.

SABINE, *supra* note 4, at 167.

other governmental processes of contemporary democratic communities has been too often, and comprehensively and eloquently, explored and recounted to require our elaboration.<sup>94</sup>

Among our major, inherited theories about law, that which has contributed least to clarity in focus upon the facts of authority and control, in the sense of the actual expectations and behavior of community members, and to specification of intellectual procedures for inquiry about such facts, is the transempirical or "natural law" frame. In the dim beginnings of perspectives about law it would appear that primitive man made little distinction between authority and control, and located all law, human and physical or cosmic, in supernatural sources. Indeed, the suggestion is sometimes made that primitive man had a completely different "structure of mind" from modern man and enjoyed mystic fantasies in which no clear-cut lines separated the "subjective" from the "material," the "living" from the "dead," or the "organic" from the "inorganic."<sup>95</sup> Even when urban civilization began to develop, there would appear to have been but a slow disentangling of the definitions of the phenomena to be observed from the factors mentioned in explanation.<sup>96</sup> In Egypt the God-King was thought to manifest his will in every official act and in the acts of those who executed his divine will. In Mesopotamia, in modest contrast, the King himself was not regarded as a God, though he was chosen by the Gods, and was expected to legislate as an act of piety, and to write down the will of God and to bring it to the notice of all. Among the Indo-European warrior aristocracies, the King was still believed to be a protege of the Gods, but the Gods did not, according to prevailing doctrine, speak through the mouth of the King, or inspire him directly on particular matters. The Gods had to be consulted by priests and interpreters of what were considered to be signs from heaven.<sup>97</sup>

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94. See generally note 75 *supra*. The expositions of Sabine and Watkins are particularly concise and eloquent. K. WHEARE, *MODERN CONSTITUTIONS 75 et seq.* (1951) outlines the development of constitutional theories.

95. H. FRANKFORT & H. A. FRANKFORT, *BEFORE PHILOSOPHY* (1949); F. CORNFORD, *FROM RELIGION TO PHILOSOPHY* (1954). The theme is developed in Lasswell, *Power in Political Theory*, Italian Encyclopedia (1977).

96. See Lasswell, *Power in Political Theory*, Italian Encyclopedia (1977).

97. M. HAMBURGER, *THE AWAKENING OF WESTERN LEGAL THOUGHT* (B. Miall transl. 1942); M. LEVI, *POLITICAL POWER IN THE ANCIENT WORLD* (1965); G. SEIDLER, *THE EMERGENCE OF THE EASTERN WORLD* (1968); Speiser, *Cuneiform Law and the History of Civilization*, 107 *PROC. AM. PHILOS. SOC'Y* 536 (1963); Speiser, *Early Law and Civilization*, 31 *CAN. B. REV.* 863 (1953). A useful collection of articles ap-

The later "natural law" theories which have dominated Western European thinking about law for some twenty-five centuries bear many affinities to these earlier pre-scientific perspectives. The great bulk of these theories have been concerned primarily with "authority," in the sense of a search for higher, "objective," standards by which mere human, positive laws can be appraised, but some have sought to identify the controls or forces from which human decision-makers cannot hope to escape.<sup>98</sup> Through the centuries the proponents of natural law theories have written many different policy contents into their recommended prescriptions, derived these prescriptions by many varying procedures from many different transempirical (both theological and metaphysical) sources, and related such prescriptions with varying realism to the effective power processes of the secular, empirical world. Both the great range and the unifying thrust of these efforts is economically summarized by Havelock:

For in the West, at least since the Hellenistic age, it has been the prevailing temper to think of morality and law in *a priori* terms as resting on principles which are independent of time, place, and circumstance, whether these principles are viewed as inherent in the structure of the universe, or as expressions of the divine will and purpose. Plato and Aristotle had taught that man's personal virtue and civic organization should express certain ideal forms of justice and goodness, or be viewed as reaching toward certain ideal ends of human and cosmic development. In the teaching of the church, these forms or ends became expressions of the will of God as revealed in Scripture, which spelled out rules of human behaviour for man in some detail. The united influence of classic Greek philosophy and religious revelation built up the conviction that man has an unchanging spiritual nature which is either itself the source, or is created by the source, of a moral law both timeless and complete.<sup>99</sup>

Similarly, Professor Anton-Hermann Chroust has demonstrated that the same notion underlies the perennial quest for "law" as it really "is":

From its very inception Natural Law has been primarily the quest for the ultimate and absolute meaning of law and justice. Thus it has become a problem of everlasting significance throughout the his-

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appears in Milson, *Authority and Law in the Ancient Orient*, J. AM. ORIENTAL SOC'Y No. 17 (Supp. 1954).

98. Concise summaries may be found in the jurisprudence surveys cited in note 75 *supra*. See also ROMMEN, *supra* note 35; SABINE, *supra* note 4.

99. HAVELOCK, *supra* note 3, at 28.

tory of legal and moral philosophies, the importance of which no philosophical criticism of its epistemological foundations—even a most valid one—could ever hope to diminish. For in its own right it contains one essential element common to every *philosophy* of law rightly claiming to be philosophy, as distinguished from “science,” realism, psychologism, semanticism, or plain statistics, viz. that it seeks certain comprehensive ideas or values transcending the multifariousness of merely “given” empirical data and facts; that it never ceases to search for a unifying higher point of view which would endow the notion of law with something above its naive “givenness”; and that it is intended to discover on a higher plane the “law” among “laws.”<sup>100</sup>

The details of the many different syntheses, interpretations, and reinterpretations of divine law, natural law, and human law—and of the many different conceptions of “authority” and “control”—achieved in this quest are spread broadcast in an immense literature from Plato, Aristotle, and the Stoics, through Cicero, St. Augustine, Isadore of Seville, Grotius and company, the modern scholastics, to Hobbes, Locke, Rousseau, Kant, Hegel, and the host of contemporary proponents.<sup>101</sup> It would be folly to minimize the contributions this frame of reference has made over the years to the formulation of community goals and to the establishment and reform of governmental structures and processes. Its enormous contributions to the development of constitutional law and international law, and to the clarification and implementation of individual freedoms and human rights more generally, are matters of common knowledge.<sup>102</sup> The point of our present emphasis is merely that a frame of reference which asserts an unchangeable “faith” as contrasted with a tentative postulation of goals subject to revision by experience, which defines authority and control in terms of transempirical entities rather than in terms of features of social process, and which employs intellectual procedures which include revelation by divine will, consultation of oracles, transcendental cognition of absolutes, participation in natural reason, and syntactic derivation, as contrasted with modern methods of scientific inquiry,

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100. CHROUST, *supra* note 35, at 72. For further useful description on and appraisal of natural law perspectives see Chroust, *Hugo Grotius and the Scholastic Natural Law Tradition*, 17 *NEW SCHOLASTICISM* 101 (1943); Chroust, *Some Reflections on the Natural Law*, 27 *NOTRE DAME LAW* 552 (1952); Chroust, *St. Augustine's Philosophical Theory of Law*, 25 *NOTRE DAME LAW* 285 (1950).

101. A sense of the great range of theories can be obtained from most of the general summaries cited in note 75 *supra*.

102. See E. BODENHEIMER, *JURISPRUDENCE* 57 (1963).

could scarcely be expected to make the most significant contribution to comprehensive, empirical inquiry about the power and social processes of man's many different communities. To the extent that proponents of "natural law" frames in fact employ modern scientific procedures they obviously cease to be dependent upon their trans-empirical baggage.<sup>103</sup>

It has already been observed that the historical frame of reference, though it aspired to locate law exclusively in empirical social processes, did not entirely escape elements of mysticism in its recommended conceptions of authority and control.<sup>104</sup> The distinguishing characteristic of this frame has been the demand, commonly made in terms of a vague and diffuse merger of conceptions of authority and control, that all alleged law, both that most deliberately and formally articulated and that most informally inferred, be tested for its conformity to a community "spirit" or "consciousness," specified with varying degrees of precision and comprehensiveness.<sup>105</sup> The principal enduring contribution of the frame would, however, appear to be found in its emphasis upon custom, in the sense of the uniform behavior and informal communications of community members, as an important modality in all communities for creating expectations, not merely about the content of prescriptions, but also about their authority and control.<sup>106</sup> The task of distinguishing between that behavior or usage which creates the expectations about authority and control requisite to law and that which does not has required that decisionmakers and scholars develop intellectual criteria and procedures for the systematic and disciplined review and appraisal of all the features of the context of behavior or usage that may be significant indices of the genuine shared expectations of community members.<sup>107</sup>

The transempirical elements inherent in notions about the unique

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103. Granfield, *Towards a Goal-Oriented Consensus*, 19 J. LEGAL ED. 370 (1967) emphasizes the degree to which proponents of natural law have employed theories of empirical reference and scientific procedures.

104. *Criteria*, *supra* note 1, at 366.

105. See generally E. BODENHEIMER, JURISPRUDENCE 70 (1936); W. FRIEDMAN, LEGAL THEORY 209 (5th ed. 1967); C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 131 (2d ed. 1963); PATTERSON, *supra* note 32, at 410; SABINE, *supra* note 4, at 622.

106. Vinogradoff, *Customary Law*, in THE LEGACY OF THE MIDDLE AGES (C. Crump & E. Jacob eds. 1920).

107. C. ALLEN, LAW IN THE MAKING 80 (6th ed. 1958); V. Raman, *The Making of International Law by Custom* (1967) (unpublished thesis in Yale Law Library).

“spirit,” “consciousness,” and “convictions” of different peoples, as tests for authority and control, are manifest even in Savigny’s famous, early formulation. In his broadside against efforts to achieve the deliberate articulation of legislative codes, he wrote:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.<sup>108</sup>

He added:

This organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.<sup>109</sup>

In implementation of this conception Savigny himself appeared more concerned with the mysterious *Volksgeist* and with the inherited lessons of Roman law than with the genuine perspectives of contemporary community members.<sup>110</sup> Other proponents of the same frame were able to assimilate into his formulation most of the transempirical elements of previous theories, as well as some of the newly emerging “scientific” theories.<sup>111</sup>

Some of the proponents of the historical frame, especially among the English, have of course recommended more earth-bound, empirical conceptions. Thus, Sir Henry Maine, without being very explicit about his conceptual structure, finds the effective control behind formal rules in peoples’ “habits of minds.” He writes:

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108. F. VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (A. Haywood transl. 1831).

109. *Id.* at 27.

110. See W. FRIEDMANN, LEGAL THEORY 212 (5th ed. 1967).

111. R. POUND, INTERPRETATIONS OF LEGAL HISTORY 19 (1923).



[T]he largest number of rules which men obey are obeyed unconsciously from a mere habit of mind. Men do sometimes obey rules for fear of the punishment which will be inflicted if they are violated, but compared with the mass of men in each community, this class is but small. . . . A vast variety of causes may have produced this habit of mind. Early teaching certainly has, a great deal to do with it; religious opinion has a great deal to do with it; and it is very possible, and indeed probable, that in a vast number of cases it is an inherited sentiment springing from the enforcement of law by states, and the organs of state, during long ages.<sup>112</sup>

In criticizing the Austinian view for ignoring “all influences controlling human action except force directly applied or directly apprehended,” he states:

[I]t is its history, the entire mass of its historical antecedents, which in each community determines how the Sovereign shall exercise or forbear from exercising his irresistible coercive power. All that constitute this—the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions and some by the constitutions of human nature—is rejected by the Analytical Jurists.<sup>113</sup>

Unfortunately Maine did not develop workable formulae for applying his insights in systematic inquiry, and many proponents of the historical frame have continued to regard control as a secondary feature of social process, appearing only when formal prescriptions in fact represent the spirit of the community. In this latter perspective, effective control is not a distinguishable component of law, requiring separate study: it rather serves to evidence the authority of existing rules and is itself a consequence of certain perspectives of authority.

The fatalistic determinism expressed in some versions of the historical frame's conception of control has been invoked both to minimize the potentialities of the conscious creation of law and to support Marxian single-factor theories about the interrelations of law and society. The animus against legislation, which affected some thought in the United States, has been summarized by Kantorowicz:

The unhistorical school of natural law, which had till now held the field believes that the law could arbitrarily be produced by the legislator at any given moment. The historical school teaches that the contents of the law are necessarily determined by the whole past of

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112. H. MAINE, *INTERNATIONAL LAW* 50-51 (1888).

113. H. MAINE, *EARLY HISTORY OF INSTITUTIONS* 359-60 (1888).

the nation, and therefore cannot be changed arbitrarily. . . . Legislation transcends the ability of young as well as of declining nations, and nations in their prime neither need nor care for legislation; only the writing down of the existing customary law or decisions of controversial questions, perhaps in the form of provisional decrees, or purely political legislation should be permissible.<sup>114</sup>

Marx and his followers, as is well known, stood on their heads not only Hegel but also Savigny, and found a deterministic control of law, not in peoples' perspectives but in the "material conditions" of production.<sup>115</sup>

The modern Western version of the analytical or positivistic frame of reference, in contrast with the emphases of the transempiricists upon "higher law" standards and of some historicists and many ordinary men upon the genuine perspectives of community members, has endeavored, as we have indicated, to confine its conceptions of authority and control to a very limited segment of social process.<sup>116</sup> Consistently with its origins in early justifications of the nation-state, this frame characteristically finds "authority" in the effective power processes of the organized community, as expressed in technical rules emanating from established officials. Beyond an assumption of the effectiveness of an entire system, it exhibits little concern for the patterns of control actually prevailing in a particular community.<sup>117</sup> The key conception of authority is aptly and pithily described by Brecht as

the theory that only those norms are juridically valid which have been established or recognized by the government of a sovereign state in the forms prescribed by its written or unwritten constitution.<sup>118</sup>

A characteristic conception of control is less easily identified. In their more detailed studies proponents of this frame have long concentrated

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114. Kantorowicz, *Savigny and the Historical School of Law*, 53 LAW Q. REV. 326, 332-33 (1937). Cf. J. CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION 205 (1907); I R. CUMMING, HUMAN NATURE AND HISTORY 62 (1969).

115. See E. BODENHEIMER, JURISPRUDENCE 79 (1963).

116. *Criteria*, *supra* note 1, at 367-69. Comparable conceptions have been observed in other cultures. See 2 J. NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA 544 (1969).

117. See generally E. BODENHEIMER, JURISPRUDENCE 93 (1963); H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 260 (1949); W. FRIEDMANN, LEGAL THEORY 253 (5th ed. 1967); PATTERSON, *supra* note 32, at 83, 147; SABINE, *supra* note 4, at 160, 382; S. SCHUMAN, LEGAL POSITIVISM (1963).

118. BRECHT, *supra* note 7, at 183.

upon the description of systems of rules, of the concatenations of authoritative myth, without the explicit relation of these rules to the factors affecting their prescription and application or their efficaciousness in fact.<sup>119</sup> Sometimes it is even insisted, perhaps in reflection of the ancient wisdom that it is not wise for commoners to look too closely at kings, that comprehensive and systematic inquiry about control is not an appropriate juristic or jurisprudential task, but rather a matter for sociologists or social science more generally.

The indiscriminate fusion of authority and control is most apparent in John Austin's classical formulations. For Austin, it may be recalled, the "positive law" of a developed modern community consisted of the commands set by a "sovereign" in the sense of a determinate person or body of persons to whom habitual obedience is paid by the other members of the community. The sovereign was the ultimate identifiable superior (later described as "top dog"<sup>120</sup>) in the power structure of a given community, and "superiority" signified "*might*: the power of affecting others with evil or pain, and of forcing them through fear of that evil, to fashion their conduct to one's wishes."<sup>121</sup> For a rule to be "positive law" it had to derive, directly or indirectly, from the commands of such sovereign; otherwise, it was mere "positive morality" or something else, such as divine law or natural law. Austin did of course make some provision for the complexity of modern government through notions of the delegation of power to subordinates and of acquiescence by the sovereign in actions of subordinates. The details of Austin's presentation make clear, however, that, while he purported to ground authority in effective power, his notions of such power were largely formulaic. Austin made little systematic investigation of the effective power actually available to different participants in social process; for a rule to qualify, under his criteria, as a rule of law, it was necessary only that there be the smallest chance of an official sanction being applied, and there was little consideration of the highly relevant question of whether a sanction, once invoked, would in fact be effective.<sup>122</sup> The many followers of Austin have sought to patch up his patent inadequacies with many minor modifications, but it would not appear that their variegated

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119. This may be confirmed by a sampling of the treatises or textbooks produced in Europe and the United States for many decades.

120. PATTERSON, *supra* note 32, at 87.

121. THE PROVINCE OF JURISPRUDENCE, *supra* note 41, at 24.

122. *Id.* at 16.

patchwork has added greatly to the utility and economy of the model as an instrument for inquiry about the facts of legal process.

The distinction Professor Kelsen makes between "validity" and "efficacy," in his closest approximation to empirical authority and control, is of strange and wondrous design, purportedly transcending the empirical but not itself making transempirical reference. In summary clarification of his distinction Professor Kelsen writes:

Validity of law means that the legal norms are binding, that men ought to behave as the legal norms prescribe, that men ought to obey and apply the legal norms. Efficacy of law means that men actually behave as, according to legal norms, they ought to behave, that the norms are actually applied and obeyed. The validity is a quality of law; the so-called efficacy is a quality of the actual behavior of men and not, as linguistic usage seems to suggest, of law itself. The statement that law is effective means only that the actual behavior of men conforms with the legal norms. Thus, validity and efficacy refer to quite different phenomena.<sup>123</sup>

The reference of "norms," it is often emphasized, is not to the genuine perspectives of community members but rather to ought-form statements "expressing the fact that somebody ought to act in a certain way, without implying that anybody really 'wants' the person to act that way."<sup>124</sup> For Austin's sovereign and paraphernalia of delegation, Kelsen substitutes a basic "grundnorm"—such as a "first constitution"—at the apex of a whole hierarchy of subordinate norms.<sup>125</sup> In this system, as described by Professor William L. Morison,

the 'highest' positive norm is an application of the basic norm—the 'presupposed' norm—by an act of will which creates a norm by the process of application, which norm in turn is applied by further acts of will which in turn create inferior norms until at the lowest level norms are merely applied without creating further norms in the process of application.<sup>126</sup>

Professor Kelsen insists that the process of imputation by which the validity of particular norms is tested is different from mere logical derivation, but he never makes clear what this difference is or how the "ought" in the presupposed basic norm is appropriately related to the oughts in subordinate norms.<sup>127</sup> The "efficacy" to which Professor

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123. KELSEN, *supra* note 23, at 39.

124. *Id.* at 35.

125. *Id.* at 115.

126. In unpublished manuscript in possession of authors.

127. KELSEN, *supra* note 23, at 111.

Kelsen refers, though he does locate it in "the actual behavior of men,"<sup>128</sup> would, again, appear more formulaic than genuine. The validity of a particular rule is, apart from *desuetudo*, made independent of its efficacy. It is only the whole system which must be efficacious. Thus:

A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, on the whole, efficacious.<sup>129</sup>

Similarly, efficacy is to be tested primarily by the response of community organs, only secondarily by the response of community members. "As far as by law we understand the genuine, primary legal norm," Professor Kelsen writes, "law is efficacious if it is applied by the organ—if the organ executes the sanction."<sup>130</sup> Factual disobedience may, however, cause the organ to cease to apply the norm. In such a system, more consequential inquiry about control is perhaps appropriately relegated to the sociologists.

The theoretical formulations of Professor Hart, while more sophisticated and complicated than those of Austin and Kelsen, do not appear importantly to advance the cause of comprehensive, empirical inquiry. The "root cause of failure" in the earlier theories, Hart finds, is in the absence of "the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law."<sup>131</sup> Hence, for Austin's undiscoverable determinate sovereign and principles of delegation and Kelsen's mysterious "grundnorm" and techniques of derivation, he proposes to substitute, as tests for determining the authority of his "primary rules," a special form of "secondary rules" described as "rules of recognition." In his most general statement Hart appears to stipulate both authority and control as indispensable components of law. Thus, he writes:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other

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128. *Id.* at 193.

129. *Id.* at 42.

130. *Id.* at 62.

131. THE CONCEPT OF LAW, *supra* note 26, at 78.

hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>132</sup>

His development of both these concepts is, however, somewhat obscure and wavering. On occasion, as in piercing the presuppositions of the common man, he presents authority in relatively clear social process terms. The common presuppositions about "validity," he says, "consist of two things":

First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.<sup>133</sup>

Yet, despite all the importance he attaches to rules of recognition, Hart never gives a very precise account, or illustration, of these rules, specifying how they are to be employed in determining the authority of primary rules or indicating in detail how they themselves acquire authority; a rule of recognition, it is said, "can neither be valid nor invalid but is simply accepted as appropriate for use."<sup>134</sup> Sometimes also, as in the first quotation above, Hart appears to relate "secondary rules" to the perspectives of officials only, and not to those of the entire community. The detailed specification of a comprehensive set of "rules of recognition" would, it may be suggested, require the description of a community's entire constitutive process of authoritative decision, including perspectives of authority and patterns of control scarcely alluded to in Hart's constructs.<sup>135</sup> Like Kelsen, Hart's primary concern with control is, further, only for its bearing upon "validity." He finds that "there is no necessary connexion between the

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132. *Id.* at 113.

133. *Id.* at 105.

134. *Id.*

135. Rogoff, *International Law in Legal Theory: The New Positivism*, 2 U. Tol. L. Rev. 1 (1970).

validity of a particular rule and its efficacy" and postulates only the efficaciousness of a whole system as requisite to validity.<sup>136</sup> Comprehensive inquiry about actual patterns of control is not a concern of the linguistic analysis of conventional rules, even when supplemented by "the idea of a rule."

The relatively modern sociological frame of reference, though exhibiting in its diverse forms a wide range of conceptions of authority and control largely borrowed from prior frames, has in some of its manifestations made substantial contribution to the development of conceptions that might facilitate comprehensive, empirical inquiry.<sup>137</sup> Thus, Ehrlich would appear to find both authority and control, albeit in somewhat undifferentiated form, in a "living law" of community members. In summing up his most influential book in a single sentence, he insists that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."<sup>138</sup> The conformity to "living law," which he consistently stipulates as necessary to effectiveness, would appear also to constitute, in the form of a broadly generalized *opinio necessitatis*, a somewhat covert conception of authority. In addressing himself to potential conflict between norms of living law and state law, he writes:

Whether we can consider a norm which is socially valid but which violates a prohibition issued by the state a legal norm in the sociological sense, is a question of social power. The decisive question in this connection is whether or not it releases the overtones of feeling which are peculiar to the legal norm, the *opinio necessitatis* of the common law jurists. It is precisely in this matter that the juristic science of the Continental common law, in a manner deserving our deepest gratitude, has prepared the ground for the work of the sociology of law through its doctrine of the so-called abrogative power of customary law; it has assumed and demonstrated that legal propositions that are in conflict with the legal consciousness may languish and die.<sup>139</sup>

Later he explains that even in the situation where "there is no legal proposition for the case that is to be decided," a judge must draw upon an unformulated living law norm, "for if this were not true the

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136. THE CONCEPT OF LAW, *supra* note 26, at 100.

137. E. BODENHEIMER, JURISPRUDENCE 103 (1963); W. FRIEDMAN, LEGAL THEORY 253 (5th ed. 1967); PATTERSON, *supra* note 32, at 509; SABINE, *supra* note 4, at 551; J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE, ch. 1 (1966).

138. Foreword to EHRlich, *supra* note 52.

139. *Id.* at 170.

judge would have no authority to decide the litigation according to it."<sup>140</sup> Ehrlich does not, however, relate the expectations which constitute his living law norms to established community processes and structures of decision; these expectations are left with a highly diffuse reference to the manifold interrelations of community members. Similarly, he offers little account of the constitutive process by which the community allocates different functions to different established decisionmakers, or of the contribution of these decisionmakers to the creation of new community expectations: the legislature is unimportant and the function of jurists and judges are largely that of the discovery of pre-existing living law norms. In his closest approach to specification of the procedures by which these norms are to be ascertained, he writes:

This then is the *living* law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.<sup>141</sup>

The "control" that Ehrlich ascribes to the living law is as diffuse and omnipresent as his conception of authority. In one comprehensive formulation, he writes:

One may contend that each and every, even the smallest, social association, every family, every house, every village, every commune, every country, every nation, has its own law, its own religion, its morality, its ethical custom, its code of decorum, of tact, of fashion. Accordingly a person who has an accurate knowledge of the circumstances often is able to tell at the first glance where a certain individual belongs. Side by side with these, however, there is a law, a religion, a code of morality, of ethical custom, of tact, of decorum, of fashion, which have their origin in the larger association, and which the latter imposes upon the smaller ones that it is composed of; and in the end norms of this kind proceed from society as a whole. Accordingly each society has legal norms of general validity through which it acts upon the inner order of the associations of which it is composed.<sup>142</sup>

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140. *Id.* at 172.

141. *Id.* at 493.

142. *Id.* at 151-52.



From this perspective, it should be no occasion for surprise that Ehrlich, while he makes reflection of the living law a precondition of effectiveness, does not relate effectiveness to the organized exercise of coercion in the community or to a theory of sanctions. For him authoritative prescriptions must perforce be effective when they converge with the superior living law standards.

A principal thrust of Max Weber's concern with law was to achieve conceptions of authority and control grounded in social process terms. His definition of "law," already noted,<sup>143</sup> in terms of an "order" or "norms" externally guaranteed by the probability of coercion by a special staff makes obvious reference to both these components. His formulations of authority, as well as of "validity" and "legitimacy," are, however, somewhat variously phrased, and he makes a number of distinctions between "legal" and other authority. In describing four different ways in which "actors can ascribe legitimate validity to an order," he writes:

Fourth, legitimacy can be ascribed to an order by virtue of positive enactment of recognized *legality*.

Such legality can be regarded as legitimate either (a) because the enactment has been agreed upon by all those who are concerned; or (b) by virtue of imposition by a domination of human beings over human beings which is treated as legitimate and meets with acquiescence.<sup>144</sup>

The other ways indicated for legitimating an order include "tradition" ("that which has always been"), "affectual, especially emotional, faith," and "value-rational faith" ("that which has been deduced as absolutely demanded").<sup>145</sup> Elsewhere he distinguishes legal authority from "personal authority," which can be based either upon tradition or upon "surrender to the extraordinary, the belief in *charisma*."<sup>146</sup> On occasion, he makes explicit, if modestly narrow, reference to community expectation about authoritative decision:

Thus, the existence of a "legal norm" in the sense of "state law" means that the following situation obtains: In the case of certain events occurring there is general agreement that certain organs of the community can be expected to go into official action, and the very expectation of such action is apt to induce conformity with the

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143. See note 11 *supra* and accompanying text.

144. WEBER, *supra* note 11, at 8.

145. *Id.* at 18.

146. *Id.* at 336.

commands derived from the generally accepted interpretation of that legal norm; or, where such conformity has become unattainable, at least to effect reparation or "indemnification."<sup>147</sup>

The "control" Weber seeks is largely that necessary to ensure that "validity" is not an illusion. Thus, he specifies:

Neither is it necessary—according to what was said above—that all those who share a belief in certain norms of behavior, actually live in accordance with that belief at all times. Such a situation, life-wise, has never obtained, nor need it obtain, since, according to our general definition, it is the "orientation" of an action toward a norm, rather than the "success" of that norm that is decisive for its validity. "Law," as understood by us, is simply an "order system" endowed with certain specific guarantees of the probability of its empirical validity.<sup>148</sup>

Yet his conception of control is appropriately capacious. In insisting that the "assumption that a state 'exists' only if and when the coercive means of the political community are superior to *all* others, is anti-sociological,"<sup>149</sup> he amplifies his argument:

[W]e categorically deny that "law" exists only where legal coercion is guaranteed by the political authority. There is no practical reason for such a terminology. A "legal order" shall rather be said to exist wherever coercive means, or a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of "legal coercion." The possession of such an apparatus for the exercise of physical coercion has not always been the monopoly of the political community.<sup>150</sup>

The contribution of Dean Pound to the clarification of authority and control is beclouded by his failure to assume the observational standpoint of the scholar who takes responsibility for his own recommendations. His various presentations are too much confined to reporting the conceptions of others and potential different points of view.<sup>151</sup> In his most extensive discussion of authority, in a chapter

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147. *Id.* at 14.

148. *Id.* at 13.

149. *Id.* at 16.

150. *Id.* at 17.

151. Pound's description of the origins of the sociological frame is classic. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591; Pound,

on *Law and the State—Jurisprudence and Politics*,<sup>152</sup> he considers four different “theories of the state”: “the juristic or legal theory (primarily analytical), the political theory, the philosophical theory, and the sociological theory.”<sup>153</sup> The “legal theory of the state,” Pound writes, “has reference to the immediate practical source of the authority of legal precepts and sanctions” and “considers whence as a matter of fact the precepts applied by the courts get their immediate force and authority.”<sup>154</sup> This source he describes, in what appears to be his preferred working conception of authority, as follows:

In a developed politically organized society courts are organs of the state, and law (in the sense of the body of authoritative grounds of or guides to decision) is something which has received the guinea stamp of the state through enactment by its legislative organs or through recognition by its tribunals. Hence to the courts the state is a fundamental fact. The analytical jurist looks upon the state as the source or fountain of law in the second sense of that term and as the source of the authority of tribunals.<sup>155</sup>

The “political theory” Pound explains as having “reference to the ultimate practical source of sanctions and of the authority of legal precepts.”<sup>156</sup> He adds:

It considers whence, as a matter of fact, governmental powers ultimately proceed. It asks what is their ultimate basis in actual fact. For example, in the legal theory of the British government we look only at King, Lords, and Commons. But the political theory perceives back of them, as the ultimate practical basis of authority, the body of electors.<sup>157</sup>

This would appear to raise the question of effective control, but Pound nowhere indicates how the “legal” and “political” are to be related to each other and even insists that they must be kept quite distinct. The “philosophical theory” has reference to the “ultimate moral force” of precepts and sanctions and sees “the wider claims of a people behind a limited body of electors”;<sup>158</sup> its problem is “the nature and

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*The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 489 (1912) as updated in R. POUND, I JURISPRUDENCE 283 *et seq.* (1959).

152. R. POUND, II JURISPRUDENCE 283 *et seq.* (1959).

153. *Id.* at 287.

154. *Id.* at 289.

155. *Id.* at 287-88.

156. *Id.* at 289-90.

157. *Id.* at 290.

158. *Id.*

basis of political obligation and so of the binding force of law."<sup>159</sup> The closest approach Pound makes to comprehensive community perspectives as a component of authority is in a combined philosophical and sociological theory:

Recent sociological philosophical theory, holding to the idea of common values as the social reality, has found many manifestations of that reality and no longer sees it in the state alone. Thus the state is not looked on as a contractually or consensually constituted agency of securing and prompting individual interests, but as an organ of the community as a whole for promoting certain of its common purposes. Accordingly, the coercion exercised by a sovereign political authority is seen as only one means of social control; as one means of enforcing upon the individual the supremacy of common ideals. After all, it is a moral authority because of the inherent limitations on effective legal action. Without the guarantee in a general habit of obedience or the backing of the stronger element of the community, coercion by those who exercise the authority of the state cannot continue to be effective.<sup>160</sup>

Unhappily, he never indicates, save in occasional invocations of a better social engineering, how all these different conceptions are to be integrated in comprehensive inquiry or decision. Pound realistically insists that law is one of several forms of "social control" and consistently emphasizes the importance of investigating the causes and consequences of legal decision.<sup>161</sup> His conception of "social control" is, however, somewhat diffuse for a serviceable focus of attention, and he does not develop theories and procedures for inquiry about the reciprocal impacts of different forms of social control.

The important contribution of Timasheff is in his clear distinction of authority and control and his location of "law" in the overlap or intersection of these distinguishable components. For Timasheff "ethics" and "power," group convictions about "ought to be" and patterns of conduct enforced by specific power centers, are "independent" facts in social process but capable of being combined into a unique form of social control.<sup>162</sup> Building upon Weber's four ways of "ascribing 'legitimate validity' to an order" ("tradition," "affective

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159. *Id.* at 294.

160. *Id.* at 295.

161. R. POUND, *SOCIAL CONTROL THROUGH LAW* 16, 51-54 (1942). This book offers a briefer statement of Pound's conceptions of authority and control.

162. TIMASHEFF, *supra* note 52, at 245.

faith," "evaluating faith," and "positive institution") he makes explicit reference to community expectation:

In any case the rule must be accepted by the individual as a guide in the situations it covers. In an earlier juridical literature this external relationship of men to rules was expressed by the term *opinio necessitatis*, which was stressed especially when speaking of customary law. This *opinio necessitatis* is nothing more than the acceptance by an individual of the fact that the rule has been imposed by a social group to which the individual belongs. Of course, *opinio necessitatis* exists not only in the domain of law, but also in those of morals and custom; in other words, in the total domain of ethics.<sup>163</sup>

In later exposition he specifies that for rules to qualify as law they must be recognized and obeyed by group-members and recognized and supported by "the members of effective power centers."<sup>164</sup> It is the "recognition of legal rules as obligatory patterns of behavior by the large majority of citizens" that "dominates the situation termed 'legal order.'"<sup>165</sup> This recognition may be direct, as when individuals know "rules either in abstract form or in the form of concrete examples, and combine with this knowledge the will to act in accordance with them," or indirect, as when individuals do "not know every rule" but are prepared to recognize the rules recognized by members of power centers when they do enter consciousness.<sup>166</sup> Timasheff appropriately conceives "power" as a complex "species of social interaction" in which "individuals influence others and are influenced by others, and the combination of various influences produces the phenomenon,"<sup>167</sup> and he outlines many predispositional and environmental variables that affect decision and the rise and fall of particular power structures. His emphasis upon the importance of organized power structures, in which social groups are molded by "face to face situations uniting dominators and subjects"<sup>168</sup> and his insistence that power, in contrast with the efficacy of "ethical rules," runs in only one direction, from rulers to subjects, would, however, appear unduly limiting. A more functional conception of power in terms of choices attended by the fact or threat of severe deprivations and high indul-

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163. *Id.* at 87.

164. *Id.* at 248.

165. *Id.* at 249.

166. *Id.*

167. *Id.* at 171.

168. *Id.* at 172.

gences might have enabled him to offer a more realistic account both of the internal constitutive processes of particular communities and of the patterns of authority and control transcending national boundaries.

The American legal realists, in execution of their distinctive mission of documenting the discrepancies between the manifest requirements of technical legal rules and the effective decisions actually made by courts, have not always bothered to make explicit their own working conceptions of authority and control. For the most part proponents of this frame have assumed the authority of established officials, while proceeding to demonstrate that the technical rules emanating from such officials, regarded in the analytical frame as the prime expressions of authority and control, do not in fact control either particular decisions or the aggregate flow of decisions.<sup>169</sup> The criteria that they have proposed and employed for evaluating particular decisions, or appraising alternative choices in decision, have, in a largely implicit fusion of conceptions of authority and recommendations about the clarification of policies, characteristically been formulated, as already noted,<sup>170</sup> in terms of the empirical perspectives of community members about the social consequences of decision.<sup>171</sup> It has been common ground for the realists, as several of the founding fathers of the movement insisted, that law is but an instrument for the community regulation of human conduct and, hence, is to be examined for and judged

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169. See generally E. BODENHEIMER, JURISPRUDENCE 116 (1963); W. FRIEDMANN, LEGAL THEORY 292 (5th ed. 1967); PATTERSON, *supra* note 32, at 537 (1953). See also Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968). The two most important books: T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) and THE FOLKLORE OF CAPITALISM (1937), are witty expositions of this major theme of discrepancy between the manifest demands of authoritative myth and the decisions in fact taken. See notes 15-18 *supra* and accompanying text.

170. *Criteria*, *supra* note 1, at 372.

171. Thus in F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933) and Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931), Felix Cohen makes "ethics" include all relevant evaluation and finds the evaluation of decisions inescapable.

Parsons, *Authority, Legitimation, and Political Action*, printed in NAMOS I: AUTHORITY 201 ch. 12 (Friedrich ed. 1958), describes the "legitimation of social action" in terms that could be adopted to the exposition of "realist" perspectives: "Legitimation in this sense is the appraisal of action in terms of shared or common values in the context of the involvement of the action in the social system."

by its contribution to desired community goals.<sup>172</sup> In this emphasis the realists have of course built heavily upon the earlier insight of Mr. Justice Holmes that all judicial decision is in measure legislative:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.<sup>173</sup>

In occasional formulations the American realists have, however, been quite explicit about both authority and control. Thus, in some of his later work Llewellyn, though he appears to merge both authority and control in the senses we have specified into a single conception of authority, offers a comprehensive and well-articulated theory. In general statement, Llewellyn writes:

Normative generalization is part of what goes to generate and to make up the "legal"; it is not the whole. The generalization must also be somehow accepted, it must be somehow effective on men's behavior or consonant with men's behavior. It must be more; it reaches beyond the *normation* of oughtness into the *imperative* of mustness. The "legal" has to do with ways and standards which will prevail in the pinch of challenge, with rights and the acquisition of rights which have teeth, with liberties and powers whose exercise can be made to stand up under attack. Let there be no doubt about this: you can have law-stuff, undeniable law-stuff, which is neither right nor just; when you are put to the choice, you will know the "legal" from the right or just because the "legal," when insisted on, is what prevails, and the right or just will have to suffer accordingly.<sup>174</sup>

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172. K. LLEWELLYN, *JURISPRUDENCE* 55 (1962); Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 308 (1927).

John Dewey's popularization of a logic of inquiry assisted in the establishment of this perspective. See J. DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938); Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924). Another important influence upon the realists was T. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908) which emphasized a conception of authority in terms of community expectations.

173. O. HOLMES, *THE COMMON LAW* 35-36 (1882).

174. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problems of Juristic Method*, 49 YALE L.J. 1355, 1364 (1940) [hereinafter cited as Llewellyn].

Yet he makes clear that by "legal" he does not mean "brute power exercised at odds with, or without reference to the going order."<sup>175</sup> For an exercise of power to be legal it must be "part of an *order*," that is, "part of a *system* which is recognized by or in the Entirety concerned."<sup>176</sup> "The minimal *normative* generalization which suffices," he adds,

is that as the order or system stands, exercise of power as part of or flowing from the system ought to be recognized as authoritative or conclusive; which is a different thing from right, or even from right-ful under the Law.<sup>177</sup>

In subsequent summary, he itemizes four attributes "which can be lumped as an element of *authority*":

(a) There is a necessary element of *effectiveness* or existence in and as part of the Entirety concerned: some quantum of de facto obedience to or acquiescence in a mandate or ukase, or in a disposition of a trouble-case . . .

(b) There is an element of *supremacy*: in the pinch the "legal" must prevail as against any competing standard or authority . . .

(c) There is an element of *enforcement* of sanction, of perceptible teeth to call into play against the challenger . . .

(d) There is an element of recognition that what is done or commanded or set as imperative or as norm is part of the going order of the Entirety concerned; not merely acceptance, but an attitude about the why of this acceptance: an element of *officialdom*. The attitude toward "why" need not go to approval; but it must go to recognition of the existence of a going system. . . .<sup>178</sup>

Llewellyn demonstrated in his study with Professor Hoebel, of *The Cheyenne Way* that he could give this broad, fused conception of authority and control appropriate empirical hands and feet.<sup>179</sup> Similarly, Judge Jerome Frank, despite his famed emphasis upon the influence of the father figure, in fact subscribed to a very comprehensive conception of authority. He wrote:

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*Cf.* K. LLEWELLYN, JURISPRUDENCE 31 (1962); Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

175. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problems of Juristic Method*, 49 YALE L.J. 1355, 1364 (1940).

176. *Id.*

177. *Id.*

178. *Id.* at 1367.

179. K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* chs. X, XI (1941).



More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social preconceptions, the 'value judgments' which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed 'the valuation system of the law.' The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.<sup>180</sup>

Felix Cohen, in final illustration, consistently emphasized the importance of a broad conception of control. Thus, he described "judicial decision" as an "intersection of forces":

Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself.<sup>181</sup>

Elsewhere he, like other realists, sought to specify in some detail what these forces are and how they are to be studied.

The importance of the many contemporary studies of authoritative decision by social scientists would appear to derive more from their specification of new operational indices for authority and control and their improvement of the technical procedures of inquiry than from the development of a more viable comprehensive theory about the interrelations of authority and control. The larger number of these studies have been focused upon control, in the senses both of the factors affecting decision and of the impact of decision upon social and community processes, but increasing attention is being given to how expectations of authority are created and to the role of authority in application of community policy in particular instances.<sup>182</sup> The

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180. J. FRANK, *COURTS ON TRIAL* 413 (1949).

181. COHEN, *supra* note 12, at 70-71.

182. W. GOULD & M. BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1969), review some of the more important studies of decision in both large and small

great promise of all these isolated studies is that, with increasing knowledge and skills, the relevant techniques and findings of all the sciences may eventually be brought to bear in more comprehensive and continuous inquiry about the detailed interactions and interdependences of the expectations and operations called authority and the expectations and operations called control.

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communities. For an indication of the great range of inquiries being undertaken see R. DAHL, *MODERN POLITICAL ANALYSIS* (1963); W. MACKENZIE, *POLICIES AND SOCIAL SCIENCE* (1967); S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969); *POLITICAL SCIENCE AND PUBLIC POLICY* (A. Ranney ed. 1968); Dahl, *Power*, 12 *INT. ENCYC. SOC. SCI.* 405 (1968); *Law and Social Change*, 13 *AM. BEHAVIORAL SCIENTIST* 485 (S. Nagel ed. 1970); Selznick, *Sociology of Law*, 12 *INT. ENCYC. SOC. SCI.* 50 (1968); Skolnick, *The Sociology of Law in America: Overview and Trends*, *LAW & SOC'Y REV.* (Summer, 1965); *Symposium—Compliance*, 4 *LAW & SOC'Y REV.* 479 (1970).