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SYMPOSIUM

SEMIOTICS, DIALECTIC, AND THE LAW†

Toward A Legal Dialectic*

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A QUICK LOOK AT THE LAW

In this century, we have seen many important developments in the law. Perhaps the most important has been a greater sensitivity to social issues and moral considerations. Having become increasingly interdisciplinary, especially respecting sociology and economics, law and legal education have made their peace even with some of the rigorous disciplines of science, including symbolic logic and (most recently) computer technology.

Some developments have been less wholesome. As is now generally recognized, the law has become too complex, too slow, and too expensive.

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** Professor Emeritus of Law, Indiana University School of Law (Bloomington); Chairman, Committee on Language Science and Formal Systems, Section of Science and Technology, American Bar Association. It is tentatively planned to publish at least some of these articles (together with other papers on semiotics and the law delivered at the 1984 annual meeting of the Semiotic Society of America) also in book form. In the preparation of this article, I have benefited much from discussions with Dean Maurice J. Holland and Professors Hector-Neri Castenada, Stephen Conrad, Harry Pratter, Michael B.W. Sinclair, and Henry B. Veatch.

Worse, it has failed to adjust adequately to the exploding world of nonjudicial lawmaking: the world of statutes, administrative rulemaking, and private ordering through consensual arrangements. This "world" refers particularly to the planning involved in preventive law, which tries to implement clients' programs and head off future controversy. Legal education's broad neglect of constructive legal planning[1] has helped prolong a legislative tradition that is inadequate in substance, lacking in coherence, and productive of unnecessary tensions.

The main culprit in this inadequate readjustment to the increasing importance of nonjudicial lawmaking has been legal education's self-perpetuating preoccupation with litigation and case law. Recent shifts in the law's social scenery to problems of new civil rights, conservation, the environment, poverty, and immigration, while covering wholesome objects of study, have done little to counterbalance the traditional common law orientation. Although statutes have become fashionable enough to be recognized, they are still viewed, for the most part, through judges' eyes.

Sociological studies would show, I believe, that the legal profession has undergone a profound shift in professional challenges from a preoccupation with litigation to a broader concern that includes an enormous involvement with public and private planning. Indeed, many more law-hours are probably being spent in planning than in going to court. But it is hard to divert case-law trained minds from the familiar problems of litigation.

Although lawyers are beginning to realize that most new law is legislative rather than judicial, few realize that statutes constitute only a small fraction of the total output of new law. How is most of it being made? Through the delegated legislation we call "administrative rulemaking."[2] Unfortunately much, if not most, of such legal planning is being done by lawyers with inadequate training in the conceptual and architectural disciplines of planning or is being done by laymen.[3]

Principles of social justice cry out for equality. Equality, in turn, requires a strong commitment to consistency. Consistency, conventional wisdom tells us, is assured by legal reasoning. The catch is that the "legal reasoning" of

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1. One modest exception is estate planning.

2. F. Emery, What Washington Is Doing (II), Remarks at the International Seminar and Workshop on the Teaching of Legal Drafting, Indiana University School of Law, Bloomington 45, 46-49 (October 3-4, 1975), *excerpted in* R. DICKERSON, MATERIALS ON LEGAL DRAFTING 6-8 (1981); J. Minor, Improving the Drafting of Federal Regulations, Remarks at the Conference of Experts in Clear Legal Drafting, National Center for Administrative Justice, Washington, D.C. (June 2, 1978), *excerpted in* R. DICKERSON, *supra*, at 9; J. Minor, What Washington Is Doing (I), Remarks at the International Seminar and Workshop on the Teaching of Legal Drafting, Indiana University School of Law, Bloomington (October 3-4, 1975), *excerpted in* R. DICKERSON, *supra*, at 5-6.

3. For example, several years ago I lectured on legal drafting to about 30 employees of the Environmental Protection Agency who were drafting Agency regulations. Not one was a lawyer.

the contesting lawyer rests on a necessarily biased selection of partial truths. Additionally, in instances where, because of widespread judicial fallibility, he must choose between being reasonable and being persuasive, loyalty to his client normally persuades him to opt for the latter. For the advocate, strategy is thus the ultimate arbiter of "reason."

Being preoccupied with the social pathology addressed by case law, legal minds continue to be jurisprudentially scarred by such discredited dogmas as John Chipman Gray's contention that a statute is not law until the courts breathe life into it[4] or Judge Holmes' assumption that law consists only of predictions of what courts will do.[5] In the real world, most legislative law gets promulgated and acted on without relevant intervention by the courts.[6]

In the nonlitigious area of legal planning, which normally culminates in definitive documents whose purpose is to inform rather than persuade, the lawyer is freest to present balanced legal truth. But this calls for an expertise of which legal education provides little and for which case law is largely irrelevant. Certainly, the law's mission is broader than the dispute resolution (with its incidental sociological tinkering) represented by litigation.

Law's preoccupation with litigation and its accompanying rhetoric has not only created a cluster of biased values but fostered an insensitivity to a number of obstacles to rationality. Many of these are fallacies about language. Some involve the mishandling of concepts. Accordingly, to match its impressive rhetorical achievements, the law needs a heavy dose of legal dialectic by which lawyers are trained to develop and communicate useful ideas couched in legal form free of concessions to persuasion and free of fallacies attributable to ignorance of the workings of language in its interaction with thought.

Also, a disproportionate reliance on sociologists, economists, and psychiatrists to the neglect of other relevent disciplines has produced an unfortunate substantive warp. Should not the interdisciplinary impulse reach out, for instance, also to the management people, the social psychologists, the psycholinguists, the philosophers of language and meaning, and even the philosophers of knowledge?

Not only is a wholesome legal dialectic a prerequisite to objective legal planning, but it is valuable even to the operation of the advocacy system. In addition to helping persuade judges who are sensitive to logical analysis, it facilitates the development of optimum positions against which the most satisfactory compromises can be negotiated.

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4. J. GRAY, THE NATURE AND SOURCES OF THE LAW 124-25 (2d ed. 1921).

5. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

6. C. ALLEN, LAW IN THE MAKING 502 (7th ed. 1964); J. HURST, DEALING WITH STATUTES 31-32 (1982); E. PATTERSON, JURISPRUDENCE—MEN AND IDEAS OF THE LAW 199 (1953).

INTRODUCING LEGAL DIALECTIC

Why the name "dialectic"? It seems apt for an important concept that needs identifying and exploring. "Dialectic" is used here in the classical sense of the art of objectively ascertaining "truth," which Plato (among others) differentiated from the art of "rhetoric" (the art of persuasion), but only as a separable tool of it.[7] For the lawyer-planner, "truth" means a clear-eyed understanding of what results are needed and what elements in the process of concept selection and formation and the use of language are best adapted to reaching those results. It may also serve to remind us that the significant problems involving language and meaning are not confined to manipulating words.

Dialectic, which requires clear thinking as conditioned by language uncluttered by the blandishments of persuasion, is hardly something that we can adequately deal with in the space alloted here. All we can do is give some inkling of the kinds of matters that lawyers need to be concerned with if they are to become as interested in socially sound answers as they have traditionally been in litigative jockeying for position. All the reader will get here is some bits and pieces of semantics, syntactics, and pragmatics (which coalesce into the now fashionable and burgeoning field of semiotics) and some relevant samplings of epistemology, psycholinguistics, lexicography, and other areas with which the law has been inadequately interdisciplinary. Should it matter what discipline the material comes from? If it can improve the rationality of law, why not use it?

Our mission points toward three domains: the domain of language, the domain of concepts, and the domain of the so-called "real world," the last of which may be defined for present purposes simply as "whatever is out there." Although these domains are functionally interwoven, they can, and indeed must, be intellectually separated to avoid confusion. If the reader doubts this, let him try to determine whether the statement "2 + 2 = 4" states an objective truth and, if so, concerning which worlds (the real world or the conceptual world of mathematics?) and in what respects.

Let us consider briefly how these domains relate to each other. To know a language is, to a comparable extent, to know a culture. There are also sublanguages and subcultures. In each case, the pertinent language is a kind of cultural map of experience. A culture, in turn, is a loose, complicated

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7. Dialectic apparently includes generalization, definition, and "division into species." For a short summary, see R. WEAVER, THE ETHICS OF RHETORIC (1953). The sensitive accommodation of rhetoric to dialectic is well discussed by Peter Goodrich in *Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language,* 4 OXFORD J. LEGAL STUD. 88 (1984). Rhetoric draws heavily on dialectic, but only so far as it helps to persuade. Goodrich finds it hard to think of rhetoric-free operations in the law. A good place to start is the codification of statutes without substantive changes (the British call it "consolidation").

network of ideas (or "concepts"). What concepts are relevant to a culture depends on the real-life problems with which the culture must cope.

The Eskimos have no word for snow. Why? It serves no practical Eskimo purpose to have a concept of snow as we know it. Instead, they have words denoting kinds of snow, because in their way of life only those distinctions are significant.

Even more enlightening are the lessons learned by the people who have translated the Bible into more than 200 languages.[8] They have found that accurate translation cannot be achieved merely by substituting for a local word its foreign counterpart. The trouble is that the corresponding word often designates a concept that is not wholly congruent with its conceptual counterpart. Also, one culture may recognize distinctions that another does not.

This is why computer translation has never worked well. For example, suppose we have the American language statement that "the deccdent jumped out of a third-story window." How do we translate that into French? Because the French word for third is "troisieme," we might be tempted to write a French sentence with "troisieme" in it. Why would that be wrong? Because, unlike Americans, the French do not treat the ground floor as one of the numbered floors. The same kind of confusion plagues words describing gestures (such as kissing or shaking hands) that have a different significance in some other cultures.

To a sophisticate, using language means more than working with words. It means working simultaneously with corresponding concepts. Moreover, it takes high sophistication to know when we have a concept problem and when we have only a word problem. Many things that appear to be substantive problems are only word problems. For example, many pseudoproblems are caused by ambiguities. We have all heard this one: Does the acorn that drops unhcard in the forest make a "sound"? This is a non-question that disappears when the semantic ambiguity is identified and the apparent single meaning is resolvcd into its two competing ones.[9]

SOME DIALECTICAL PREREQUISITES TO RATIONALITY

It is important that we consider the theoretical underpinnings of the rationality needed for legal planning and rational legal rhetoric. Theory is intriguing, but it is best when it works, and this theory works. First, let us look at semiotics.

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8. E. NIDA, MESSAGE AND MISSION xiii, 189-205 (1960).

9. That is, "sound" as sound waves and "sound" as a human reaction. J. MACKAYE, THE LOGIC OF LANGUAGE 135-36 (1939).

Briefly, semiotics is the study of theories of meaning. According to Charles W. Morris,[10] a disciple of the seminal C.S. Peirce, it has three main branches:

> Semantics, which deals with the relations between words and the concepts that they respectively designate.
>
> Syntactics, which deals with the relations among words.
>
> Pragmatics, which deals with the relations of words to their users or their audiences.

Recently, I have come to doubt that Morris's three dimensions of semiotics, as so described, are adequate to accommodate all the significant aspects of meaning. Although his domain of syntactics covers the micro-context that we call "syntax," it says nothing about the equally important domain of general context, which includes materials far beyond syntax.

We always express ourselves in a context broader than that immediately provided by the express message. Effective communication necessarily takes place in a culture shared by the members of the audience. Everyone concedes this, but very little has been written about what external context consists of. What has been written seems to suggest that it consists mainly of the unstated assumptions that underlie a communication.[11] These are the relevant propositions that the author and presumably the reader take for granted. They include the unstated assumptions in the kinds of incomplete syllogisms that Aristotle called "enthymemes"; that is, syllogisms in which a premise is unstated. Communication without tacit assumptions would be either impossible or intolerably prolix.

By general current consensus, the tacit assumptions of external context have been routinely tucked into the psychologically oriented area that constitutes pragmatics, where it is occasionally mentioned and widely taken for granted, but rarely analyzed. But despite a stronger affinity to internal context and syntax[12] and because not all tacit assumptions qualify as context, external context deserves a focal emphasis of its own, where this vital aspect of semiotics is more likely to get the attention it needs.[13] I suggest, therefore,

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10. C. MORRIS, FOUNDATIONS OF THE THEORY OF SIGNS 6-9 (1 International Encyclopedia of Unified Science No. 2 (1938)).

11. R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 21 (1965); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 105, 108-09, 111, 117 (1975); F. LIEBER, LEGAL AND POLICITAL HERMENEUTICS 18 (3d ed. 1890); B. SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES 330, 331 (1951).

12. That a person's thought and action can be significantly affected by unstated assumptions of which he may even be unaware appropriately attracts the attention of psycholinguists and others who inhabit the domain of pragmatics. What is of greater importance here is that, once shared relevant assumptions are in place, they condition utterances in the same way as internal context and syntax do. Accordingly, external context would seem to have closer affinity to syntactics than to pragmatics.

13. *See, e.g.*, Dickerson, *Obscene Telephone Calls: An Introduction to the Reading of Statutes*, 22 HARV. J. ON LEGIS. 173, 175-80 (1985).

the creation of a fourth branch of semiotics ("contextics"?). Only a current convention of classification stands in the way.

Notice that Morris's breakdown plays down the "real world." So far as meaning and the efficacy of communications are concerned, existence in the real world is irrelevant, except as to the nature of the legislative audience. For example, we can talk meaningfully about unicorns, even though they do not exist, and about round squares, even if they *cannot* exist. This makes it possible also to talk about the past or the future. The importance to communication of existence in the real world is that it determines, not the meaning, but the significance of what is being said. The important thing is that words and other signs designate only concepts and thus relate only indirectly to the corresponding aspects, if any, of the real world.[14]

Although legal dialectic can benefit much from semiotics, it must not be confined to it. Semiotics is sign-oriented and communication-oriented and therefore meaning-oriented, but these orientations, standing alone, are not enough to serve the law. Legal dialectic cannot operate adequately without the principles of concept formation and the concepts that define the existing culture. Communication is not the main thing. How many lawyers or semioticians realize that the skillful manipulation of language and other signs can make as great an impact on the author's own understanding as it does on an audience's?[15] The focus of dialectic is rationality itself, as enhanced by attempts to articulate it. That is why it may be the most pervasive and intellectually liberating of all disciplines.

Let us turn now to some of the basics of semantics. First of all, how do names get attached to the concepts they denote? Plato's dialogue *Cratylus*[16] shows that the problem is an old one. This dialogue reflects several common points of view. One view is that words have natural affinities with the things they designate.[17] A variant of this is that they respectively imitate or picture those things.[18] Another view is that words are mainly man-made.[19] Under this approach, words are either conventions or stipulated ad hoc.[20]

What makes language? Did God go around looking at lions and attaching the word "lion," and doing the comparable thing for telephone poles? That

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14. "Symbols are not proxy for their objects, but are *vehicles for the conception of objects . . . [I]t is the conceptions, not the things, that symbols directly 'mean.'* " S. LANGER, PHILOSOPHY IN A NEW KEY 60-61 (3d ed. 1957) (emphasis in original); *see also* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES app. C 291-95 (1975).

15. R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING §§ 2.2, 2.3, 4.14 (2d ed. forthcoming 1986).

16. PLATO, *Cratylus,* in 3 THE DIALOGUES OF PLATO (B. Jowett trans. 4th ed. 1953), *excerpted in* R. DICKERSON, *supra* note 2, at 43-45.

17. PLATO, *supra* note 16, at 41, 98.

18. *Id.* at 93, 98.

19. *Id.* at 42, 43, 98; *see also* J. MACKAYE, *supra* note 9, at 95, 96; L. STEBBING, A MODERN INTRODUCTION TO LOGIC 12 (7th ed. 1950).

20. C. CHERRY, ON HUMAN COMMUNICATION 71 (2d ed. 1966).

seems to have been the assumption of the lady who said to an astronomer, 'You astronomers are wonderful! How did you ever find out that the name of Mars really *is* "Mars" '?[21]

There is some truth in the imitation theory for onomatopoeic words such as "buzz." We also have iconography, a form of imaging or approximate representation. Primitive picture writing is an example.

What we mainly have to work with is convention and stipulation. We start with convention, because it is the backbone of language. If we cut loose from it entirely, we simply fail to communicate[22] or we commit the sin of "Humpty-Dumptyism,"[23] which impairs thought by misleading it. This limitation on the philosophers', scientists', and lawyers' valued "freedom of stipulation"[24] is mandated by principles of pragmatics, which includes psycholinguistics.

Let us now consider some basic semantic fallacies:

(1) "If you don't know what a word means and a dictionary definition is unavailable, the most reliable thing to do is to ask people how they use the word." This method is highly unreliable because, although most people believe that they know what they mean by a word, observation shows that they in fact often use it to refer to something else. We best learn what a person means by a term by observing how he uses it. Indeed, the supposed incompatibility of determinism with free will exists only because of the failure of most philosophers to recognize this basic principle of lexicography. Prevailing usage of "freedom" reflects a human concern only with fulfilling existing wants, not with how they came to exist.

(2) "A word's origin is a reliable guide to its meaning." Instead, origin is highly unreliable. Etymology is often helpfully suggestive, but never controlling. Only established current usage in the given speech community controls.

(3) "The meaning of a composite term is the sum of the meanings of the separate words." But, in George Gershwin's immortal words, "It ain't necessarily so."[25]

Dean John Wade arrived at several questionable conclusions respecting products liability because he assumed that "negligence per se," which in one form is strict liability, had to be "negligence" in its normal culpability sense and that, therefore, strict products liability was really a form of

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21. *See* J. MACKAYE, *supra* note 9, at 95-96.

22. *See* C. CHERRY, *supra* note 20, at 19, 69, 107.

23. Humpty Dumpty's adoption of new, confusingly unfamiliar meanings. *See* L. CARROLL, ALICE IN WONDERLAND 163 (W.W. Norton & Co. Gray ed. 1971); *see also* R. DICKERSON, *supra* note 14, § 7.3.

24. Freedom to adopt and announce new meanings. *See* R. DICKERSON, *supra* note 14.

25. G. Gershwin & I. Gershwin, *Porgy and Bess,* Act 2.

negligence.[26] Such an approach could well assert that "Boston cream pie" is a kind of pie and that "root beer" is a kind of beer. This is called "word peeling."

(4) "If an author uses a word whose express referent has no counterpart in the real world, we can conclude that the referent does not exist." For example, the general counsel of one of America's largest food companies once told me that there was no such thing as ptomaine poisoning, because ptomaines are not poisonous. However, the important fact is that something that we called "ptomaine poisoning" was making people sick. The term thus meant whatever that something was. For the same reason, the fact that a legislature has no collective mind does not necessarily mean the term "legislative intent" has no significant referent.[27] This is the "there-is-no-such-thing-as" fallacy.

(5) "If two things carry the same name, it is safe to assume that they may be treated the same way." Many lawyers use "ambiguity" to cover not only equivocation but the fuzziness at the outer limits that we call "vagueness."[28] This is unfortunate, because equivocation is almost always undesirable whereas vagueness is often desirable. Such usages produce what have been called "degenerate" definitions, because they tend to obscure valuable distinctions.[29]

(6) Here is a semantic fallacy that is based partly on context: "If two statements are grammatically parallel, we can assume that they are conceptually parallel." Ask someone to tell us "the difference between a steam locomotive and a diesel locomotive." The immediate reaction of many people will be that the difference obviously lies in the difference between steam and diesel oil, on the assumption that, because "steam" and "diesel" are here used correlatively as adjectives, what they respectively refer to are correlative functionally, which they are not.

Each of these locomotives has a fuel and a propellant. The steam locomotive has coal for its fuel and steam for its propellant. The diesel locomotive has oil for its fuel and electricity for its propellant.[30] It makes little sense to contrast the fuel of one type with the propellant of the other.

As for legal dictionaries, I wish we had the space to explore the art of lexicography (the main tool of semantics) as it struggles to explain legal meanings. David Mellinkoff recently blasted the ineptitudes of the current

26. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974), *criticized in* Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. REV. 205, 217-24 (1977).

27. *See* R. DICKERSON, *supra* note 15, at 73-74.

28. *Id.* at 48.

29. R. DICKERSON, *supra* note 14, § 7.6.3.

30. 28 THE NEW ENCYCLOPAEDIA BRITANNICA 788 (1985).

legal dictionaries,[31] urging that they purge themselves of historical junk and become true mirrors of current American legal usage, concentrating "on those words that call for discrimination or explanation not ordinarily available to the perplexed reader or writer."[32] This fascinates me greatly. The key word is, of course, "usage," and I am moved to wonder how the conscientious legal lexicographer can hope to wade through the swamp of ad hoc legislative and judicial fiats and Humpty-Dumptyisms to determine in what instances fiat or misuse has become or affected general usage. Remember that not even the Emperor Augustus could effectively mandate the meaning of a word.[33] Sometimes fiat generates general usage and sometimes it does not. Dictionaries should reflect nothing else.

Even metaphors, which while normally foreign to definitive legal documents appear often in other expository legal writings, can pose a threat to reason. In discussing the "mists of metaphor," Judge Cardozo, in a statement that included at least two additional metaphors, once wrote, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[34]

To communicate metaphorically is to use words that expressly refer only to something analogous to what we are ultimately referring to, but in a context that steers the reader to the intended meaning. ("He is a bag of wind.") A dead metaphor is one in which the original express allusion has disappeared and the expression now refers directly to the analogue. ("He came to a fork in the road.") A metaphor dies when the audience gets the intended meaning without adverting to the original meaning. Dead metaphors are easier to understand than live ones, because they dispense with the need for conversion. This is why a student learns a foreign language faster by being immersed in the new culture without benefit of his accustomed language. It forces him to think in the new language. This may help to exorcise the pangs of lawyers who remain bothered by dead sexism.[35]

CONCEPT FORMATION AND THE REAL WORLD

What about the domain of concepts? We may be in serious trouble if we think that as planners all we have to do is discover the concepts implicit in the problem we are trying to solve. Even when finding them is not a problem, they may turn out to be inadequate. In some cases, we may even have to

31. Mellinkoff, *The Myth of Precision and the Law Dictionary,* 31 UCLA L. REV. 423 (1983). I hope Mellinkoff will find time to evaluate Professor Leff's monumental *The Leff Dictionary of Law: A Fragment,* 94 YALE L.J. 1855 (1985).

32. Mellinkoff, *supra* note 31, at 441.

33. *See* R. DICKERSON, *supra* note 15, at 270.

34. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

35. *See* R. DICKERSON, *supra* note 14, ch. 10.

create concepts. Words are important, but if we botch the underlying concepts we have seriously compromised our chances of producing a good result.

We have already considered the relation of words to the concepts they designate. We need to consider also the relation of concepts to the real world that they are supposed to reflect.

Plato thought that categories were real in the sense of having an existence independent of human beings. If his views were correct, it would make sense to ask whether a tomato "really" is a vegetable and to conclude that the planner's job is one only of discovery. Whatever validity Plato's views may have, today's generally accepted view is that all or most categories are human constructs designed to help people cope with a real world that they cannot comprehend or handle directly.[36] Without necessarily committing us to being all-out nominalists, it is certainly true of most of the concepts lawyers rely on. They are, at best, only caricatures of reality.

A baby is born with this problem. Its responses to its environment are very crude. It will instinctively respond to a bright light or a whack on the bottom; otherwise, it has a rough time discriminating. As it matures, it begins to develop a world of concepts constituting a sort of map of experience.[37]

Language represents many such maps. There are political, geological, meteorological, navigational, military, and many other kinds of maps, each useful in its own way and each representing a highly selective abstraction of reality, whatever its incomprehensible nature. The main point is that maps are man-made, and their validity rests ultimately on their usability. Utility is the central idea here. Utility depends partly on the nature of whatever is "out there," partly on the nature of man as a congeries of purposes, and partly on the problem at hand.[38]

As philosophy, this is low-level stuff. Even so, we do not need courses on Aristotle, Kant, Hegel, or Locke to get the hang of what is basic here. Pragmatically, the modern view works in this field, and that should be enough for present purposes. This selective abstraction of brute reality is not necessarily a conscious process.

When we teach a language we implant a network of concepts. Shifting to Roger Brown's metaphor, we pour our infants' minds into existing language molds.[39] But it is wrong to assume that these molds define the ultimate structure of reality. French minds are poured into different conceptual molds

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36. *See id.* § 2.5. Concepts arise from a sense of sameness, where differences are unobserved, irrelevant, insignificant, uncritical, or (conceivably) nonexistent. "A polyp would be a conceptual thinker if a feeling of 'Hollo! thingumbob again!' ever flitted through its mind." W. JAMES, PSYCHOLOGY: BRIEFER COURSE 211 (ed. 1984).

37. E. NIDA, *supra* note 8, at 80.

38. R. DICKERSON, *supra* note 15, § 2.5.

39. Brown, *Language and Categories*, in J. BRUNER, J. GOODNOW & G. AUSTIN, A STUDY OF THINKING 304 app. (1956).

from Chinese minds, and this happens a little differently all over the world depending on the differences in the concepts underlying the languages or in the problems to which they are addressed. We address the same world, but we look at it through different eyes and we think of it with brains that have been differently programmed.

Robert Pirsig's *Zen and the Art of Motorcycle Maintenance*[40] is relevant here. The book is only incidentally about motorcycles and very little about Zen. It is in one aspect the novelized autobiography of a man wrestling with his philosophical doubts while trying to develop a working rapport with his young son. More specifically, it is the story of a motorcycle trip. Most important, it is a book on philosophy, which is remarkable if only for the fact that it avoids philosophical jargon.

Among other things, Pirsig talks about the emergence of concepts,[41] a notion that is neither new nor unique. What is striking is his discussion of the birth of new facts.[42] Here he does not focus on occurrences in the real world. He talks, instead, about our crude perceptions of them—in other words, about the emergence in each case of our perception of an underlying reality that may have been around for a long time. The birth of a fact may thus be our first awareness of something that we find useful to treat as a separate piece of the real world. Accordingly, if classes are concepts, so also are facts. In that sense, we create much of what we seem only to have found.[43]

Professor Irvin Rutter distinguishes two kinds of facts: type facts and unique facts.[44] Type facts are statements about how kinds of things tend to behave. ("Objects tend to fall at the same speed.") Unique facts are statements about what happened on a particular occasion. ("I killed Cock Robin.")

Type facts, as we know them, are concepts. So are unique facts. To know is to have a concept that serves well as a model of reality. Different judges addressing themselves to the same case will carve out differently shaped chunks of reality. Someone's bicycle collided with an automobile. Is that a brute fact that judges merely recognize? Hardly. They cannot cope with it until they abstract it (abstraction is what makes precedent possible). If seven judges write seven opinions based on their own statements of what happened, each will conceptualize the facts differently, although not always significantly so.

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40. R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1974).
41. *Id.* at 304.
42. *Id.*
43. R. DICKERSON, *supra* note 14, § 2.5.
44. Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 9, 85 (1968).

However much they may take them into account, legal planners do not ordinarily deal directly with facts of the latter kind. The generalities that constitute legal statements closely match the generalities that constitute type facts and, in any event, rely heavily on them.

To say that all classes, entities, and facts as we know them are conceptual constructs is not to deny the "non-me" that comprises the real world. Although concepts are man-made, the harmonizing thing is the shared reality underlying them. Communication depends on how fully we carve out the same conceptual pieces, and attach the same names, as our audiences. The values that we identify help us determine the configurations of thought that we want to use as concepts. This makes it important, before we use a concept, to ask, "What is our problem? What is our purpose in dealing with it?"

Once we realize this, there is no reason to feel confined by traditional concepts. Instead, we are free to recognize that many of them are, for current purposes, inadequate. That is why the competent legal planner is not only an appraiser, but a sculptor, of concepts.

Concepts live and die[45] just as the names live and die. Does the underlying reality also die? Not necessarily. A word may die, a concept may die, or a reality may die. They are often, but not necessarily, conjoined. Determining which is which is not always easy. Here, we are concerned mainly with concepts.

Stating the problem in terms of the "*purpose* sought to be achieved" or the values we are trying to advance involves selecting "a limited number of characteristics of nonverbal experience . . . common to a number of similar experiences."[46] The same is true in science. Many scientists believe that they are dealing directly with reality, when they are dealing, rather, with caricatures ("models") of reality. They do what we do, but they do it with much greater precision. But when they have finished, they have only a description of perceived tendencies that they can verify but never prove. That is one reason why the physical sciences constantly obsolesce.

The legal planner does not look for ultimate fact or "truth." Instead, he tries to conceptualize as best he can to achieve a continuing or recurrent purpose. Ask somebody this question: "Which is correct, that the earth goes around the sun or that the sun goes around the earth?" The "fact" is that each goes around the other. Both descriptions are verifiable, but they are not equally useful. The Copernican (former) view is much more useful, because it is a much simpler way to describe the same relevant phenomena; stating it requires less surface information.[47]

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45. S. SPERLING, POPLOLLIES AND BELLEBONES 89-113 (1977), *excerpted in* R. DICKERSON, *supra* note 16, at 70.

46. Rutter, *supra* note 44, at 83. I would add "as conceptualized."

47. Lamb, *Stratification Linguistics as a Basis for Machine Translation,* in READINGS IN

There is a special lesson here for the legal planner: When reaching for the concepts implicit in a practical problem, he should look for its lowest common denominator. The client often, if not usually, conceptualizes his problem inadequately. He may mention only part of a larger problem, within his objective, that he failed to recognize or articulate.

Here is another practical question: What does it take to have an "entity"?[48] (Is a corporation a "real" entity or an artificial one?) A pair of shoes is an entity, but a pair of crutches often is not. The difference lies not in the real world of tangibles, but in the concepts that normally reflect recurrent human need.

This is illustrated in the marketing of farm products, where a mixed car of vegetables is a recognized commercial entity in some circumstances and not in others.[49] Also, this insight reduces the problem of corporate entity from a pseudophilosophical investigation of reality to one of determining how the law should, as a matter of social policy, treat corporations in the particular context. This decision may be influenced by how persons in the trade or market look at corporations in that context.

What makes this hard for some people to understand is that most things we consider entities are, like billiard balls, discrete. It suggests that an entity must be either in one piece (however complicated) or made of picces that are physically connected. But if this is true, try to buy a left shoe, less than all of a matched set of wrenches, or volume 7 of the *Oxford English Dictionary*.

The most practical view is that, as with a class, an entity is a congeries of physical or functional phenomena that human purposes make it useful to treat as a unit. Although in this sense it is always possible to create new entities, the law is reluctant to accept what is claimed to be an entity, unless the claim reflects an established attitude in the culture or subculture concerned.

The practical significance of this analysis was solidly established in dealing with "tie-in" sales.[50] In 1942, Congress created the Office of Price Administration (OPA) to protect the war economy against disruptive imbalances between supply and demand resulting from the diversion from civilian uses of materials used in making products needed to win World War II. OPA's Administrator did this by setting ceiling prices for most products.

Because many products became scarce, it was common to refuse to sell such a product unless the buyer also bought another product that the seller

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STRATIFICATIONAL LINGUISTICS 34, 35-36 (1973); *see also* M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 223-24 (1934); Williams, *Language and the Law—II*, 61 LAW Q. REV. 179, 189 (1945).

48. Williams, *Language and the Law—III*, 61 LAW Q. REV. 293, 298 (1945).

49. Memorandum from R. Dickerson, Chief Counsel, Fruits and Vegetables Section, to All Regional Price Attorneys (April 12, 1945), *reprinted in* R. DICKERSON, *supra* note 2, at 71-74.

50. *Id.*

wanted to unload and buyer might not need or even want. Under OPA regulations, such a transaction violated the applicable price regulation whenever the aggregate price for the two products exceeded the ceiling price for either. On the other hand, no violation occurred when the two items combined to constitute a recognized product in the relevant market. This was true even where there was an established practice (as with table place settings) of selling both ways. OPA's approach curbed tie-in sales without disrupting established business practice.

STRUCTURE

Most of what we have considered so far are negatives. On the positive side, we need deeper insights into the principles of hierarchy by which we develop taxonomies and, more broadly, the principles of classification and arrangement that constitute the architecture of ideas.[51]

We need, for example, to investigate the working relationships between specific taxonomies and the values of the domains in which they are intended to operate. We need also to investigate the extent to which overlapping taxonomies create language problems. That a tomato is botanically a "fruit" and gastronomically a "vegetable" (where neither is more "real" than the other) creates no language difficulties, because the term "tomato" fits comfortably into both domains. This is not so true of "peanuts," a term that might bother word peelers because in the botanical sense peanuts (not being seeds) are not nuts, but a vegetable. On the other hand, peanuts function gastronomically as nuts and in that domain of interests constitute nuts in the fullest sense (except in places in the South where they are cooked and served as a vegetable). There is no occasion, therefore, to debate the pseudoquestion of whether peanuts are "really" nuts.[52]

False notions of what knowledge consists of tend to arise because much scientific investigation, commonly labelled "pure science," is done in the abstract without reference to specific human needs and values. Accordingly, the resulting taxonomies, appropriately refined, are easily considered uniquely definitive of "reality."

The underlying fallacy, of course, is to assume that taxonomies are discovered rather than created. "Discovery" is a comfortable notion, because it tends to forestall conceptual arguments on the merits of what works best.

Confusion plagues much of modern legal theory because new conceptual "discoveries" are constantly resulting in new taxonomies that overlap established ones without adequate precautions to adapt established terminologies

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51. *See* R. DICKERSON, *supra* note 14, ch. 5.

52. Letter from H.L. Crane, Principal Horticulturist, United States Department of Agriculture, to National Food Bakers Association (May 28, 1943), *reprinted in* R. DICKERSON, *supra* note 2, at 218-19.

to their new conceptual environments. Some of this confusion is caused by retaining old terminology but using it in significantly different, but unexplained, senses. Some of it is caused by borrowing terms from other domains without regard to whether the accompanying connotations are compatible with their new environment. This is a practical problem, because established connotations tend to pursue their parent terms into special, uncongenial settings (one of the risks of metaphor). A good example is the practice of modern constitutional lawyers to class what is plainly judicial lawmaking in the context of constitutional principles as "interpretation,"[53] thus conferring apparent constitutional respectability on judicial lawmaking that the Constitution may imply only for the judicial ascertainment of its meaning. The judicial supplementation of constitutional meaning deserves its own adequate rationalization.

A Parting Comment

This concludes a sampling of the kinds of matters that are worth keeping straight if the law and other disciplines with pretensions of rationality are to avoid the fallacies and pseudoquestions that have long plagued human thought, especially thought about law.

There is solid intellectual fare here, and it is time the legal profession took it seriously.

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53. *See* R. Dickerson, *supra* note 15, ch. 3.