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## THE "GOOD MAN" AND THE ROLE OF REASON IN LEGISLATIVE LAW

*Julius Cohen\**

The legal scene has changed much since John Chipman Gray took issue with Austin's brand of analytical positivism by insisting that it was the judge rather than the legislator who is at the center of our legal universe. To Gray, it is the rules that judges lay down that constitute law;<sup>1</sup> statutory legislation, at best, is merely one of the sources of law. He reasoned that, inasmuch as it is impossible to determine what statute law is before the courts interpret it, final law-making authority must therefore reside in the judicial organ of government.<sup>2</sup> The "source" theory which, in effect, formalized the primacy of judge-made law, apparently was not devoid of impact. For, just as the shift from the Ptolemaic to the Copernican theory altered our approach to the physical universe, so the view that law revolves around the judiciary, and that statutory orderings of human relationships are but emanations from a minor planet, must have done much to fashion the law training and practice in Gray's generation, and in much of the period which followed. But the "source" theory flourished in an era in which private law was in ascendance, and in which legislative controls on behalf of broader community interests were at low ebb. Today, though it is still in vogue in some quarters, it has yielded much ground to the younger generation of realists who view the study and practice of law in different perspective. It is true, to be sure, that where statutory language is vague or ambiguous, courts often do have the last say. But this is only when they are confronted with so-called "trouble cases," which represent the exception rather than the norm of law-directed behavior. Much statutory legislation is effective, *i.e.* understood and followed, without awaiting judicial implementation or approval.<sup>3</sup> In order to guide or plan his activities, even Holmes' "bad man"<sup>4</sup> will often

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\* See Contributors' Section, Masthead, p. 437, for biographical data.

<sup>1</sup> As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not Law in a community. To quote . . . the words of Bishop Hoadly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote them or spoke them."

Gray, *The Nature and Sources of the Law* 171-72 (1921).

<sup>2</sup> *Id.* at 124.

<sup>3</sup> It is surprising to find so acute an observer as Morris Cohen succumb to the view that ". . . legislation becomes effective in the body politic only after it has been digested by the process of juristic interpretation and judicial decision." Cohen, *Law and the Social Order* 252 (1933).

<sup>4</sup> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to

take his cue directly from the expressions of the legislative arm of government. It is unreal to assume, for example, that *no* advice concerning the formation of a corporation, the taxability of income, or the shipping of adulterated drugs through the channels of interstate commerce can reliably be given to a client without first obtaining a judicial determination of the meaning of the statutes that govern these activities. There are limits even to what a court may do to statutory legislation—witness the occasions in which legislative bodies have “clarified” alleged judicial misconstructions or perversions of original legislative purpose.<sup>5</sup> In terms of human impact, therefore, it would be more accurate to say that statutes *and* cases both constitute law, and that if statutes are *sources* because they feed into a final decision, so are cases.<sup>6</sup> Under a system in which the legislative branch admittedly has the power (subject to constitutional limitations) to *initiate* and *choose* legislative policy, and in which the legislative power of courts is primarily interstitial—“confined,” as it were, “from molar to molecular motions”<sup>7</sup>—it would seem anomalous, especially during a period of expanded governmental controls, to give to the judiciary so central a position in our legal universe.

But if Gray’s “source” theory unduly stressed the importance of one side of the legal prism, so Holmes’ “bad man” theory resulted in an exaggerated emphasis of another—the positive side of law. So intent was the attention on predictions of what “the courts will do in fact”<sup>8</sup> (so that the “bad man” might be properly warned of the precise spot at which he would be apt to fall off the legal cliff), that the needs of the “good man” were, for a long period, virtually ignored. Now, just as the “bad man” is concerned with the positive aspect of law, that is, with what the law is (or will be), so the “good man” is concerned with the normative aspect, that is, with what the law should or ought to be.<sup>9</sup> Recognition of

predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Holmes, “The Path of the Law,” in *Collected Legal Papers* 171 (1920).

<sup>5</sup> The history of the Clayton Act is an example. See the account in the opinion by Justice Frankfurter in *United States v. Hutcheson*, 312 U.S. 219 (1940).

<sup>6</sup> Gray admitted that “judicial precedents” also constituted one of the “sources” of law. Gray, *The Nature and Sources of the Law* 124 (1921).

<sup>7</sup> *Southern Pacific v. Jensen*, 244 U.S. 205, 221 (1917), Holmes, J.

<sup>8</sup> Holmes, “The Path of the Law,” in *Collected Legal Papers* 173 (1920).

<sup>9</sup> This is not to suggest that Holmes ignored the normative side of law, but merely that his prediction theory of law was given greater emphasis and prominence. How else account for such statements as these:

. . . the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is apt to invent, if he does not find some ground of policy for its base. . . . [An] even more important part [of the

this is implicit in the shift in emphasis of modern law teaching towards the policy aspect of law, perhaps as compensation for the excesses of positivism. The goal has been to train lawyers to deal more openly with the creative side of law, with *ought* as well as with *is* problems, with ethical as well as with existential or predictive materials. But these efforts have primarily been directed towards equipping the lawyer to represent the "good man" in *court*. There has been resistance to similar efforts to train him for the task of arguing policy on behalf of the "good man" who seeks relief in the legislative forum.

Thus, although the legal horizon has been substantially brightened by increased concern for the "good man" in law, the sun apparently has not yet broken through the Grays. This lag stems, in part, from the same short-sighted conservative outlook that considered not only legislative law, but also administrative law outside of the pale of the practice of law. But even more, it would seem attributable, in no small measure, to a commonly held notion that the legislative body does not respond to rational arguments as does a court, and that it is, therefore, fruitless for a lawyer to take seriously the task of arguing policy issues in that forum. There are many who approach the practice of legislative law with these attitudes: that rational argument serves no useful purpose, save to mask decisions based on naked power; that conflicting group interests are irreconcilable, and a resort to "higher" principles for reconciling them is fruitless; and that to be effective, the major task, indeed the *only* task, is to marshal a sufficient number of the units of power to assure victory—a task that requires the location of and mastery over those who control legislative policy, the manipulation of legislative procedures, and the mapping of parliamentary strategy. Many who hold these views regard the court, despite its many shortcomings, as a symbol of justice, as an institution which endeavors to seek the truth and to employ rigorous methods of proof. They hold the legislature in sharp contrast—as a symbol of partisan political power, a forum in which manipulation and compromise hold sway. Legislative law is accordingly conceived as the outcome of unsavory, irrational forces, where selfishness and the lust for power are the primary motivations. Under such circumstances, it is argued that to employ painstaking, rigorous arguments, and to deal seriously with ethical principles, as one presumably would in arguing policy issues before courts, is not "practical" if one is to be successful in the legislative forum. This view of the legislative process, unfortunately,

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true science of law] consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

Holmes, "Law in Science and Science in Law," in *Collected Legal Papers* 225-26 (1920).

has shaped the approach of many practitioners and students to the practice of legislative law. It has not sprung, as it were, full blown out of the head of Zeus, but has been nurtured from many sources, both old and new. Hobbes, Machiavelli, Pareto, and Mannheim may be numbered among its intellectual godfathers—Hobbes for his notion that force and not reason is the ultimate arbiter of social conflict,<sup>10</sup> Machiavelli for illuminating the importance of the tactics of power,<sup>11</sup> and Pareto<sup>12</sup> and Mannheim<sup>13</sup> for the role of myths and symbols in the power struggle. Modern political science literature that does not deal with the formal description of governmental machinery<sup>14</sup> either echoes the theme of the irrational,<sup>15</sup> of the tactics of manipulation,<sup>16</sup> or the group pressure aspect of the power struggle.<sup>17</sup> The role of reason has scarcely been considered important enough to be dealt with as a factor for dealing with the conflict of interests in our society. Four notions seem to dominate the account of the legislative process: (1) that those in control of it will respond *only* to the interests of dominant private pressure groups; (2) that, other than as manipulative symbols, argument and persuasion serve *no* useful function; (3) that force (power of the stronger) is the only *real* arbiter of group conflicts; and (4) that values are relative and subjective, and, accordingly, objective, rational criteria for dealing with conflicts between competing private group interests are unavailable. Because these views furnish the basis for much of the current attitude towards the practice of legislative law, it would seem desirable to determine whether they are products of a mind's eye in focus, or whether they suffer from distortion and exaggeration.

#### PRIVATE VS. PUBLIC INTEREST

Common experience suggests that lawmakers, though themselves identified with private group interests, sometimes rise above their narrow interests in order to realize some broader community goals. Perhaps one of the reasons is that private interests often cannot be realized unless community interests are themselves satisfied. But whether the motivation for this is altruistic or selfish is, at the moment, immaterial; what is mate-

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<sup>10</sup> Hobbes, *Leviathan* (1651).

<sup>11</sup> Machiavelli, *The Prince* (1513).

<sup>12</sup> Pareto, *The Mind and Society* (1935).

<sup>13</sup> Mannheim, *Ideology and Utopia* (1936).

<sup>14</sup> E.g., Galloway, *The Legislative Process in Congress* (1953).

<sup>15</sup> Arnold, *The Symbols of Government* (1935), and *The Folklore of Capitalism* (1937).

<sup>16</sup> *Economic Power and Political Pressures*, T.N.E.C. Monograph No. 26 (1941); Bailey, *Congress Makes a Law* (1950).

<sup>17</sup> Gross, *The Legislative Struggle* (1953); Latham, *The Group Basis of Politics: A Study in Basing Point Legislation* (1953); Truman, *The Governmental Process* (1951).

rial is that larger goals do exist, and that they sometimes play a crucial role in the decisions of lawmakers. Otherwise, why differentiate between the statesman and the politician; why the distinction between private rights and those of the state and nation in our constitutional law?<sup>18</sup> The observation that such broader community goals are, in reality, nothing more than the goals that all or most of the private pressure groups themselves selfishly seek to realize does not destroy the distinction between private group interests and community interests. Assuming for the moment that the legislative process is a *group* process, it does not follow that a labor group, a farm group, or a business organization has any better claim to *groupness* than does the larger community to which each belong. The difference between these organizations as groups, and the community as a group, is one of size and of ends. Sometimes private group interests and those of the community as a whole coincide; sometimes they do not. When they collide, considerations of *public* policy become essential; it is because there are community interests that there is *public* policy. Does not the admitted use of the "public policy" argument as a facade or propaganda symbol strongly suggest that those who manipulate the term nevertheless inferentially concede that *public* policy is something to which people really respond? This is not to suggest that legislators will respond *only* to considerations of community interest. To do so would be as erroneous as the assumption that they will respond *only* to considerations of private group interest. It is the familiar fallacy of the "all for the some." Just how much they will respond to each is, at the present state of our knowledge, a matter of conjecture. But it is nevertheless an advance in our thinking and in our approach to start with two avenues of motivation, rather than with one.

#### MANIPULATIVE SYMBOLS

If arguments on the merits or demerits of a legislative proposal were merely rhetorical devices,<sup>19</sup> or manipulative symbols to conceal or ration-

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<sup>18</sup> Note the observations of Edmund Burke:

Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, nor local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.

I Burke, Works 447 (Bohn ed. 1893).

<sup>19</sup> The great bulk of all legislative measures is wrapped up in such symbols as "our democratic institutions," "the American way of life," "national interest," "public interest," "our great traditions," "the ideals for which our fathers died," "national unity," "peace," and "national defense." Some groups concentrate on building up special symbols. The N.A.M. has made extensive use of the phrase, "the American individual-enterprise system," or in abbreviated form, "free enterprise." New Deal propaganda during the period before World War II made similar use of the term "the forgotten man." Later

alize private group ends, there would be no basis for choosing between one argument and another. Power alone would not be the basis for the choice, for it is power that is sought; if it were not necessary to seek it, then there would be no need for argument—even with rhetorical devices. The very concepts “rhetorical device” or “symbol” presuppose the existence of something that is obscured and hidden—something that itself is not a “rhetorical device” or “symbol”; otherwise the terms would have no meaning. For this reason, it is sheer nonsense to assume that all arguments are fictional, and that none can relate to a body of verifiable knowledge. Again, this is not to suggest that symbols are never used to deceive or to conceal: this, too, would be a commission of the “all for some” fallacy. But it does suggest that when so used they are subject to exposure; and the very power to expose presupposes a realm other than that of myth and fiction<sup>20</sup> or of make-believe.

#### THE ROLE OF FORCE

The view of Thrasymachus that justice is merely the interest of the stronger still prompts the Socratic reply: “Do the stronger know what is in their own interest?” Even the tyrant interested in his own selfish welfare would gain much by avoiding the enactment of legislation that cannot be enforced; and certainly the “stronger” group is more secure in its rule when it is exercised in accordance with the prevailing moral sense of the community. Force alone, then, even under the most brutish circumstances, has its limitations; consent is an element that even the “stronger” must cope with if power is to be maintained.<sup>21</sup> But who is the “stronger”? To equate the “stronger” with the dominant group is circular and meaningless. It does not tell us the source of the dominance—whether through brute physical force, or reason, through economic power, through deceit, through appeals to social ideals, through respect, consent, habit, inertia, or whatnot. Although rigorous empirical studies concerning this have

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Henry Wallace tried—not too successfully—to develop the symbol of “the common man,” and “the century of the common man.”

Gross, *The Legislative Struggle* 250 (1953).

Almost every successful propaganda effort of a major character will contain carefully slanted appeals to a large variety of groups. “Something in it for everyone” is a motto that applies to legislative propaganda as well as to political platforms. . . . [A] bill which has been worked out with the bankers and whose original title indicated that its purpose was “to relieve the banks” can be taken . . . and slanted toward a much larger group by calling it a bill to set up a Home Owners’ Loan Corporation.

Id. at 245.

<sup>20</sup> The myth and fiction vogue was given early prominence by Thurman Arnold in his *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937). More recently, it was given currency by Gross, *The Legislative Struggle* (1953).

<sup>21</sup> On the limitations of the role of force, see Goodhart, *The Nature of Law and Morals* 8-28 (1953); Laski, *Studies in Law and Politics* 274 (1932).

been unavailing, experience seems to suggest that all of these factors and perhaps more are, under different times and circumstances, controlling, and that it would be folly to rely exclusively on any single factor as a determinant of legislative power. It would also be unreal so to ignore human experience as to assume that humans generally, and legislators in particular, are never influenced by reasons and arguments. The very identification of the irrational in man happily assumes that there is also something rational that still remains in his makeup. To hold otherwise would make it impossible to distinguish between the insane and their custodians. Pareto, Sorel, Mannheim, and Freud, among others, have done much to emphasize the extent of man's irrationality, but their theories that man is motivated more by irrational than by rational factors are nevertheless themselves couched in rational terms, and presumably addressed to a rational audience. That the legislative process reflects its share of the irrational in man, no one can doubt. There is, to be sure, a great deal of selfish "logrolling" and "back-scratching"; many legislative judgments are unmistakably visceral and on-the-spot; much of the formal machinery for deliberation is facade; there are, undoubtedly, legislators who equate "public policy" with private group interest no matter how narrow or selfish it might be—there is, in other words, a darker side to the picture. But it is unreal to assume that in the operation of the process one can find no evidence of thought and deliberation, no effort to obtain reliable information with which to illumine and guide policy decisions, no soul-searching or zeal for the just settlement of conflicting claims within the framework of larger community goals. Fortunately, there are law-makers who do not share Thurman Arnold's hyperbole that "the best government is that which we find in an insane asylum," and that its aim should be "to make the inmates of the asylum as comfortable as possible, regardless of their respective moral desserts."<sup>22</sup>

#### OBJECTIVE NORMS

Granted that groups compete one with another in the legislative forum; granted also that each group proposes a different standard of what is "good," "proper," or "just," does this mean that there can be no objective norms for adjudicating group conflicts? If this means that we have not yet discovered any *final* principles that can be applied to moral conflicts at all times, in all places, and under all circumstances, the answer would undoubtedly be in the affirmative. If it means that there are no impartial criteria by which day-to-day moral choices may be critically evaluated, the answer is emphatically in the negative. Except under conditions of

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<sup>22</sup> Arnold, *Symbols of Government* 232 et seq. (1935).

extreme strife and dislocation that shake the very foundations of the organized community, many, if not most, of the group struggles in the legislative forum turn out, upon reflection, to involve disputes over methods for achieving certain ends rather than disagreements concerning the ends themselves.<sup>23</sup> In an organized community, one expects to find a core of agreement upon fundamental goals or ends of social life. Their meaningfulness, of course, varies directly with the level of abstraction in which they are formalized, but that they are there to be discovered and systematized cannot reasonably be denied: they are expressions of the community mores. Many of these fundamental goals are imbedded in the language of our various constitutions and statutes and in the judicial decisions which interpret them; many need to be distilled from those sources that reveal, though less explicitly, the moral sense of the community—from the sources of history, of religion, of philosophy, of literature, and other such expressions of our existing culture. Any particular group claim may objectively be judged against the normative backdrop of these larger goals. The procedure for this involves the drawing out of the consequences of a proposed claim, and then ascertaining whether they would be consistent or inconsistent with these goals. The first step requires resort to empirical data, the accuracy of which may objectively be tested; the second involves the application of logical tools, the validity of which may also be tested. When there is agreement concerning these basic or “higher” principles, resort to them becomes a method of demonstrating that the *immediate* claim of an interest group would, from a *longer-range* point of view, be inconsistent with what they themselves *really* desired, if they fully realized the consequences of their demands.

There is much reliable knowledge that the physical and social sciences have yielded to take many problems involving means or methods out of the realm of sheer guesswork, and where more rigorous information is unavailing, there is much that is useful to help bolster a so-called “intelligent guess.” Objective standards are thus not entirely wanting for the settlement of controversies where they involve methods of realizing agreed-upon basic goals. Of course, they are only as reliable as the state of our empirical knowledge concerning the consequences of proposed modes of action, but they nevertheless point in a direction away from a purely subjective method for resolving the conflict.

When some of the existing moral precepts are themselves challenged as being outmoded, and new moral postulates are proposed as substitutes, the normative backdrop would be the empirical evidence that the substitutes

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<sup>23</sup> In a sense, of course, all so-called “ends” are “means” to higher ends in a hierarchical order of values.

would yield consequences that would be more in tune with the new aspirations and needs of the community. And even when the severity of group conflict places the very fabric of the community in a state of jeopardy, the very fact that there might not be sufficient brute strength to ride completely rough-shod over the opposition still requires a search for new and higher "third" principles in order to permit the warring sides to live in peace. Compromise, by its very nature, assumes that there is something of greater value than the value of that which is given up. The "third" principles, which make compromise possible, are there to be dug out objectively and brought to light.<sup>24</sup>

To hold with some that all judgments concerning moral preferences are mere expressions of emotions, and, accordingly, meaningless as propositions because there is no way by which their truth or falsity may be tested<sup>25</sup> would make it impossible to evaluate the merits of conflicting moral choices. All such choices would be arbitrary—the choice between competing forms of government, between peace and war, between change and the status quo. But this need not be so if our approach is tentative and experimental, as it is in the natural sciences. Final answers cannot be obtained in the field of morals any more than they can be obtained in the physical sciences: the limitations that are inherent in the inductive method make such certainty impossible.<sup>26</sup> But much can be done on a more short-run, trial and error basis. If immediate demands would be treated as hypotheses concerning the foreseeable consequences of proposed modes of action in *specific* problem situations, there would be a basis upon which they could be judged "proper," "improper," "better," "worse," "true," or "false." Such hypotheses would be "true" if the predicted consequences were realized; they would be "false" if they were not. They would be realized if they would yield results that were in harmony with our basic system of moral judgments; they would not be realized if they were inconsistent with the basic system. The latter itself would be subject to revision if what it would permit in particular cases would not jibe with the actual felt needs and aspirations of the community. The course would be from general principles (system) to fact (the particular cases) and back again to general principles for correction and re-systematization.

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<sup>24</sup> . . . every great social conflict requires us . . . to create from contradictory claims an ideal that will satisfy both, or at least not leave either dissatisfied enough to prefer insurrection to acquiescence.

Smith, *The Legislative Way of Life* 28 (1940).

<sup>25</sup> See, e.g., Reichenbach, *The Rise of Scientific Philosophy* 280 (1951), and Stevenson, *Language and Ethics* 26 et seq. (1945).

<sup>26</sup> There are, of course, those who despair of the infirmities of the scientific method and, accordingly, seek answers to such moral problems in religion. See, e.g., Hallowell, *The Moral Foundations of Democracy* 109 et seq. (1954).

Clearly, such an approach would not yield any absolute or final rules with which to test the correctness of our more immediate moral judgments. But it would permit the light of reason to shine on the choices, and, in so doing, would aid much in clarifying what they involve. There is not always an awareness of what one's choices *really* are until one obtains a clearer picture of their consequences. Often choices which, at first blush, seem to jibe with basic values, turn out, upon reflection, actually to be out of harmony with them. Often we know whether we really want to do what we plan to do only when we are made fully conscious of the predictable consequences of our actions. Many an immediate demand has been cut down to size by the withering eye of critical perspective.

The foregoing is essentially an attack upon some of the presuppositions that underlie some current thinking concerning the nature of the legislative process. Its main burden has been to demonstrate that all is not force and symbolic sham, and that reason does and can play a significant role in its operations. Granted that there is nothing inherent in the nature of group conflict that is incompatible with the employment of rational methods to aid in their resolution, the question for the lawyer, therefore, is not whether rational methods *can* be made operative in this area of endeavor, but whether they *should*. Two considerations urge an affirmative response. On the assumption that men at times respond to rational argument, it is legitimate to assert that it ought to be employed in the legislative forum if for no other reason than that it is sometimes effective. Just when warring groups or legislators will genuinely respond to argument and persuasion cannot readily be ascertained in advance. The wiser advocate would be the one who, when the occasion so calls, would not be caught unprepared. The second consideration goes to the very roots of our democratic order. Rational argument and persuasion are consistent with a democratic way of life, and their use *ought* to be encouraged if we wish that way of life to persist. One of its basic tenets is the endorsement of argument and persuasion—not disguised or undisguised brute force—as a means for dealing with problems that involve conflicting interests. In its ideal sense, a legislative body is conceived as a representative *deliberative* assembly, working within a framework of commonly shared principles. The fact that in practice the ideal has not been realized is no reason why the deviations from the ideal must be accepted as the very ideal that should be pursued. The average courtroom lawyer would undoubtedly be shocked at the suggestion that the practice of law ought to be geared to the standard set by the shysters and ambulance-chasers, merely because shysterism and ambulance-chasing persist. There should be no difference with respect to those who view the legislative process in practice in the darkest possible light.

Now, granted that the legislative process involves the struggle over competing group interests in which irrational *and* rational forces are at work, in which legislative machinery may be manipulated for good *and* evil ends, and in which motivations are for private *and* public gain, what should be the nature of the lawyer's representational role in the legislative forum? Ideally, his function would parallel that of the lawyer in the judicial forum performing in the highest traditions of his profession. There, though he represents private clients before the court, he serves in a higher public capacity as an officer of the court. Here, too, his public duty as an officer of the legislature would transcend his immediate duty to his clients. He would lend his talents primarily to the task of helping policy-makers strike a proper balance between private group needs and the welfare of the community. Because present legislative procedures for independent fact-finding are woefully inadequate, he would bring to the legislative forum the best evidentiary materials that could be gathered for predicting the consequences of a policy proposal. He would, by logical analysis, endeavor to determine whether the consequences would be in harmony with the existing system of values; he would explore the need for correcting the existing system when it is not in tune with the basic aspirations of the community. Precedent and analogy would play an important role in helping to develop a sense of proportion and perspective,<sup>27</sup> and a critical eye would search out and expose errors and the various types of "crooked thinking"<sup>28</sup> that might be employed by the unscrupulous to influence legislative policy makers. Discounting institutional differences, this is essentially the pattern of the lawyer's role in the judicial arena whenever the court is called upon to legislate judicially—when it is asked, for example, to rule on questions concerning the meaning or the constitutionality of a statute. One of the distinguishing factors is that in the judicial forum, salient policy issues are too often beclouded by impressive legal jargon and symbolism;<sup>29</sup> in the legislative forum, the insulation of legal symbolism is more apt to be stripped off, and the policy considerations more likely to be laid bare. In addition, a lawyer appearing before a court is usually *representing* his client; but before a legislative body, he is apt to be *lobbying* for his client. But to the extent that lobbying involves alerting legislators to problems that might need attention in the legislative forum it is salutary. Petitioning for redress of grievances is, after all, a right that is granted under the Constitution. To the extent

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<sup>27</sup> See Horack, "The Common Law of Legislation," 23 Iowa L. Rev. 41, 42-45 (1937).

<sup>28</sup> This is Thouless' term. Thouless, *Straight and Crooked Thinking* (1932).

<sup>29</sup> The import of legal symbolism is developed more fully in my article on "The Value of Value Symbols in Law," 52 Colum. L. Rev. 893 (1952).

that it involves *private* hearings on the merits or demerits of pending proposals, it serves the useful function of bringing to the attention of policy makers information that could shed significant light on policy proposals. The difficulty, of course, with such a procedure is that all competing views are not given an equal chance to be heard. For private hearings require access to policy makers, and too often this is a privilege that is not accorded equally to all who knock at private legislative doors.

Besides the preparation of rigorous arguments for the justification or criticism of a policy proposal, the legislative lawyer should acquaint himself with the intricacies of legislative machinery, procedures, and sources of power. Without such knowledge, the most convincing argument could go for naught. A lack of knowledge of machinery, of "know-how," could well mean the loss of a battle, no matter how meritorious or just the particular cause might be. He must, for example, know who the real legislative judges of a policy issue would be, so as to know whom to persuade; he must have a keen sense of timing; he must be skilled in devising parliamentary strategy for use by a friendly Congressman or Senator; he must know enough about legislative draftsmanship to make sure that the policy that is sought will not be perverted or otherwise defeated by improper legislative language; finally, he must be adept in the art of compromise, of knowing how best to reach a position not as good as the one hoped for, but considerably better than if the opposition forces clearly had their way.

All this, of course, is an account of the *ideal* view of the lawyer's representational role in the legislative forum. What are the practical difficulties in fulfilling this role? There are, indeed, many. The pressure for quick decision, the low level of competence of many legislators, the elements of bias and prejudgment, the factor of manipulation, the unwillingness of many to recognize the relationship between immediate and long-range goals, the impatience with the tedium of rigorous analysis, the high-pitched, volatile emotionalism that often pervades the legislative scene all combine to discourage anyone inspired to stride forth in the role of the idealist.<sup>30</sup> Other factors becloud the scene from a practical point of view. First of all, to amass rigorous empirical data in support of a legislative cause requires financial resources that only the more wealthy clients can afford to make available; the less affluent, accordingly, must suffer. Secondly, there are too many areas—especially those involving social behavior—in which reliable information is unavailable concerning con-

<sup>30</sup> Many of these factors are discussed in Cohen, "Hearing on a Bill: Legislative Folklore," 37 Minn. L. Rev. 34 (1952), and Cohen and Robson, "The Lawyer and the Legislative Hearing Process," 33 Neb. L. Rev. 523 (1954).

sequences of proposed legislative action—areas in which conjecture and hunch must, of necessity, hold sway. This latter difficulty—one that is born out of the limitations of human knowledge—must be borne with patience and resignation. It provides some small measure of comfort to know that even one of the most gifted of minds was obliged to confide:

The simplest problems which come up from day to day seem to me to be quite unanswerable as soon as I try to get below the surface. Each side, when I hear it, seems to me right till I hear the other.<sup>31</sup>

What then must the less gifted lawyer do under such circumstances? Perhaps he is left with no other recourse save that of presenting the justification for his cause as an hypothesis, and adducing whatever evidence, however slim, is available to sustain its plausibility. He would push his case to the hilt, and so would his adversary; out of the heat of conflict might emerge some basis upon which the policy maker could fashion a reasonably intelligent guess.

These, then, are some of the practical limitations upon the role of reason in the practice of legislative law. They are often discouraging to the idealist, but no more so than is the trial of a complicated issue of fact by a jury.<sup>32</sup> To be sure, there are many shadows on the legal horizon, but where there are shadows there must also be some light. All is not unreason in the making of legislative law. Moreover, whatever the role that unreason plays, it must, at the very least, give the idealist good reason for being.

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<sup>31</sup> Learned Hand, "Democracy: Its Presumptions and Realities," *Perspectives U.S.A.* 7 (1953).

<sup>32</sup> On this latter theme, see Frank, *Courts on Trial* (1949).