# TOWARDS AN INTEGRATIVE JURISPRUDENCE * [1]

JEROME HALL,
professor of law, University of California,
U. S. A.

The cultural changes discussed in Chapter One, especially the dominance of modern physics and biology, have made an interest in fact and empirical knowledge characteristic of "the modern mind"; inevitably, this has influenced many legal philosophers. Accordingly, I shall first supplement the preceding chapters by summarizing salient features of empirically oriented legal philosophies; then I shall discuss the construction of a concept or model that will take account of the empirical as well as the structural and qualitative features of the subject-matter of jurisprudence. [2]

## *Empirical Theories of Law—The Forerunners*

Since rules of law refer to action and since actions are performed in a world of fact, the traditional legal philosophies, unlike logic or mathematics, had to include some factual references of the rules. The purest legal conceptualism posits the efficacy of the legal system, "sanction" denotes coercion,the *Grundnorm* and the political sovereing have empirical connotations; plainly, in order to understand rules of law as "action-concepts", it is necessary to say something about the relevant facts. The empiricism of recent legal philosophies represents much more than a spelling-out of the factual assumptions and implications of the traditional legal philosophies. Instead, the underlying purpose, especially in this century, has been to effect a basic change in the meaning of "law".

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[1] The writer discussed this subject in "Integrative Jurisprudence", *Interpretations of Modern Legal Philosophies* 313 (P. Sayre ed. 1947), *Living Law of Democratic Society* Ch. 3 (1949), "From Legal Theory to Integrative Jurisprudence" 33 *U. Cin. L. Rev.* 153 (1964), and *Comparative Law and Social Theory* Chs. 4 and 6 (1963). The "law-process" was discussed in *Theft, Law and Society* 164-173 (1st ed. 1935, 1952). "Integrative" is used to emphasize what is presently neglected in current specialization in jurisprudence. See note 103 in Ch. 2 for references to Latin-American legal philosophers.

[2] "Subject-matter of jurisprudence" is discussed and distinguished from "law" at pp. 157-158 *infra.*

Savigny's jurisprudence is the bridge between the traditional legal philosophies and the new perspective. In his theory, the Kantian idea of law was wrapped in myth and feeling to constitute the *Volksgeist;* positive law was, at bottom, the ethos of a people and, later, it became the 'living law" elaborated sociologically by Ehrlich. With Durkheim and Duguit, the mystique of the *Volksgeist* gave way to a theory of social attitudes, *representations collectives;* positive law was comprised of those attitudes focused on the performance of social functions arising from human interdependence. In later theories these attitudes were ascribed to individuals rather than to an objective social "entity" and sometimes, as we have seen, they were discussed in terms of "disinterested attitudes", "impulsions" or "recognition". The result, is sum, is that law is factual or has a factual dimension because law consists of, or includes, attitudes which are factual or partly factual. That was the first major step from the concentration on rules of law to the inclusion of fact in law or in the subject-matter of jurisprudence, and occasionally, to the mistaken reduction of law to fact.

Before Durkheim wrote his sociology, American jurists and scholars were making important contributions to empirical theories of law; their interest was primarily in behavior, action or process. I believe this movement, especially characteristic of American thought, will become increasingly important in the development of jurisprudence; it merits close study.

The American movement can be conveniently dated from Holmes' essays beginning in 1897, and specifically, from his famous epigram, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". He also said, "The actual life of the law has not been logic: it has been experience". He referred to the law "as a great anthropological document" and said, "we must think things not words".[3]

James C. Carter, a distinguished New York lawyer whose confrontation with David Dudley Field (called by Carter "the worthy disciple of Jeremy Bentham") paralleled that of Savigny and Thibault,[4] said, in criticism of Austin, "in particular the definition of law as a *command* . . . seemed to me to be a fundamental error". This leader of the Bar also criticized "the common notion . . . that a legislative enactment is necessarily a *law* . . . whereas such an enactment, when never enforced, does not deserve the name of law at all, and when the attempted enforcement of it is productive of the mischiefs above-mentioned, it is not so much law as it is tyranny".[5] For Carter,

> The law being the science of conduct of men in their relations and dealings with each other, the facts of that conduct, that is, human transactions of every description are the arena of fact which that science embraces. The

[3] *Reprinted* in Hall, *Readings in Jurisprudence* 672, 673 (1938).
[4] J. Carter, *The Proposed Codification of Our Law* (1883).
[5] J. Carter, *Law: Its Origin, Growth and Function* vi, 3 (1907). ". . . such a law is no law at all." Douglas J. in Poulos v. State of New Hampshire, 345 U. S. 395, 423, 73 S. Ct. 760, 775 (1953).

> multitude of cases which have been adjudicated and reported are but the records of conduct... And then too there is the internal world, the realm of consciousness, equally necessary to be studied and equally fruitful in results, for it is here that the secret springs, the real causes of all conduct are discerned. [6]

Arthur F. Bentley, belatedly recognized as having anticipated much of the later American Legal Realism, developed an empirical theory of law in greater detail than did the eminent judge and barrister discussed above. Bentley, not a lawyer, but a sociologist and a philosopher, published *The Process of Government* in 1908. He was a "political behaviorist" who viewed law and government as a "process" in which "group", "interests", "activities", and "transactions" referred to the ultimate data of his discipline. Bentley's "emphasis... is always on *process*, action, change..." [7] 'In the broadest sense... government is the process of adjustment of a set of interest groups..." It is "a certain network of activities". [8]

Addressing himself directly to the question "What is the law?" [9] Bentley said he was not referring to "what is the meaning of the word, nor... what lawyers say about it, but what is the solid ground for our study of the law as it exists in the life of social men". Thus, law is certainly not an "attested document"; it "is not the theorizing activity of any group... of men", that is, it is not verbal or written arguments. "The law is not primarily what the governor does, nor what the sheriff does, nor what the judge does, nor what the lawyer does... nor what the criminal does..."

> The law at bottom can only be what the mass of the people actually does and tends to some extent to make other people do by means of governmental agencies... The law, then, is specified activity of men —that is, activity which has taken on definite social forms— embodied in groups which tend to require conformity to it from variant individuals (these themselves appearing in groups...) and which have at their disposal, to help them compel these variants to adapt themselves to the common type, certain specialized groups... certain organs of government... Every bit of law activity may... be stated as a sum of individual 'acts'; but every bit may also be stated in group terms, and this latter is our method of statement here. [10]

Bentley speaks of "murdering activities" and "non-murdering activities" as equally "social". He discussed Sunday closing laws in terms of a network of activities including that of saloon-keepers, their patrons, members of the

[6] J. Carter, *supra* note 5, at 338-40.
[7] P. Odegard, *Introduction* to Bentley, *The Process of Government* at xvi, xxxvii (1967).
[8] Bentley, *id.*, 260, 261.
[9] *Id.* 272, 274.
[10] *Id.* 277.

public, drunkards and their families, fights, wife-beatings, and official intervention. Similarly, commercial law is "a way of acting". He distinguished "formal law" from "actual law" and emphasized "the deeper-lying groups which support the law". "The whole is a matter of observation, as activity, at every stage and at all stages of development and operation". Even when representative groups appear "to be taking and independent initiative, it is still the group activities as actually observable in the population that carry forward, support, and *are* the law".[11] Not only lawyers' activities, but also "the court process" reflect their respective group interests.[12]

In 1910, in an article that became a classic, Roscoe Pound used the phrase "law-in-action".[13] His thesis is that the actions of judges, administrators and police often diverge from the law in the books. "Law-in-action" represents practice influenced by public opinion, the jury's view of justice, and social theories of justice. He wrote of "distinctions ... between the rules that purport to govern the relations of man and man and those that in fact govern them ...", and of "the actual practice" of "the third degree", the divergence between the legal rules and police practice. He commented on "jury lawlessness" and "collusive divorce" —the gap between the law in the books and what happens in divorce courts, in sum, the "divergence between the nominal and the actual law ..."[14] Pound's essay influenced many American scholars but it did not (and could hardly have been expected in 1910 to) provide a critical analysis of "law-in-action" as a jurisprudential concept. The disparity between the law in the books and actual judicial decisions was later emphasized by the American Legal Realists.

In two thoughtful articles published 1912 and 1913,[15] Joseph Bingham referred to "human action" and "the intelligent direction of human action" to explicate his theory of law;[16] he stressed "the phenomena of concrete events and their governmental consequences ..." His principal thesis was that "the law consists of the flux of concrete occurrences and their legal consequences brought about through the operation of authoritative governmental law-determining machinery ..." Anticipating the Scandinavian realists and many others, he said, "Let anyone try to point with definiteness and comprehension to a thing corresponding to the phrase *legal right*."[17] He summed up his position as follows: "My main theme has been that the law, —*i.e.*, the

[11] *Id.* 280, 281, 282, 284, 286, 288, 289.
[12] *Id.* 294; *cf.* "*Action* (*Activity*): Event stressed with respect to durational transition. *Self-Action*: Pre-scientific presentation in terms of presumptively independent 'actors', 'souls', 'minds', 'selves', 'powers' or 'forces' taken as activating events." Dewey & Bentley, *Knowing and the Known* 72 (1949).
[13] Pound, "Law in Books and Law in Action", 44 Am. L. Rev. 12 (1910), *reprinted in part* in 3 Pound, *Jurisprudence* 362-369 and 4 *id.* 14-15 (1959). "The ship's captain ... lays down no written enactments but supplies a law in action by practical application of his knowledge of seamanship to the needs of the voyage." Plato, *Statesman* 297a.
[14] Pound, *supra* note 13, at 15, 18.
[15] 11 and 12 *Mich. L. Rev.*
[16] *Reprinted* in Hall, *Readings in Jurisprudence* 789 (1938).
[17] Bingham, "The Nature of Legal Rights and Duties", 12 *Mich. L. Rev.* 1, 3, 5 (1913).

thing which is the object of our professional knowledge,— is not a set of rules and principles; that not even the common law should be studied as is a dead language; that the law is an external field of concrete phenomena; . . . and that the rules and principles which may be endorsed as part of a science of law are not authoritative promulgations, but are mental generalizations evolved in a manner similar to those of any science." [18]

The year 1930 saw the publication of Jerome Frank's *Law and the Modern Mind* and K. N. Llewellyn's *A Realistic Jurisprudence—The Next Step,* and that year marks the beginning of the accelerated growth of American Legal Realism, a vague label applied to many legal scholars in the thirties. It has been discussed elsewhere in detail [19] and some of its salient features have been noted earlier in this book. The influence of the more extreme views is now shown in the publications of political scientists who are constructing a behavioral jurisprudence. [20]

Among the American legal realists the work of K. N. Llewellyn is especially important in the present discussion. His writing on law as "official action" and "official behavior" is voluminous and only a few of his statements on that subject will be reported, enough, it is hoped, to convey the gist of his contribution to an empirical definition of law. [21] Llewellyn wrote of "paper rules", "technical law", "real rules", "working rules", "practice" as "an observable course of action", and of "idealized somethings . . . which mostly do not accurately reflect men's actions". He said "rules of substantive law are of far less importance than most legal theorizers have assumed". [22] In *The Bramble Bush* (1930) he said, "What officials do about disputes is . . . the law itself". The "rules of law [are] important in so far as they give us a guide to what the officials will do or how we can get them to do something". [23] He emphasized 'the *area of contact* between judicial (or official) *behavior* and the *behavior* of laymen" or their "interactions". "The traditional approach . . . centers on words . . ." He regarded laymen's behavior as "a part of law" and he also included "in the field of law" not only the behavior of officials, their practices, and their contacts with laymen but, also, "sets of accepted formulae which judges recite, seek light from, try to follow, . . . various persons' ideas of what the law is; and especially their views of what it or some part of it ought to accomplish . . . Farther from the center lies legal and

[18] *Id.* 26, n. 24.
[19] W. Rumble, *American Legal Realism* (1968). See J. Stone's treatise and bibliographies.
[20] Schubert, Ch. 1, note 28 *supra.*
[21] Referring to Felix Cohen's report that "Pound can be cited for all the planks for the realistic platform—and against many of them", Llewellyn wrote: "My unchecked memory would endorse this (save for the rigorous temporary severance of Is and Ought?)". Llewellyn, *Jurisprudence* 73, n. (1962).
[22] Unless otherwise specified quotations are from Llewellyn's "A Realistic Jurisprudence-The Next Step", 30 *Colum. L. Rev.* 431 (1930), *republished* in Llewellyn, *Jurisprudence* 3-41 (1962).
[23] *The Bramble Bush* 3, 11 (1930).

social philosophy... Part of law, in many aspects, is all of society, and all of man in society".[24]

The above American contributions had much in common with, but also differed in important respects from, the sociology of law of Max Weber,[25] a professor of law before he turned to economics and sociology. For Weber, social action was the prime datum of sociology and he drew a hard line between the professional or doctrinal study of law and the sociology of law; the legal sociologist studies social action "oriented to law".

In taking our stance on this important question, we shall start with three points regarding Weber's theory. First, Weber was influenced by Dilthey (1833-1911) and other post-Kantian social theorists who saw history as the actualization of ideas. This meant, for Weber, in opposition to positivism and behaviorism, that action has an inner, subjective phase; to understand social action, the sociologist must understand those mental states (*Verstehen*).

Second, the influence on Weber of his training as a lawyer is an important consideration in determining what he meant when he spoke of "action oriented to law".[26] It seems clear that, for him, "law" meant normative ideas, the traditional meaning of that term;[27] this distinguishes his work from realist theories that redefined "law" by reducing it to empirical terms. "Action oriented to law", read in the light of *Verstehen*, approximates, if it is not synonymous with, interpretations of action suggested by Freud's theory of the internalization of values (the superego) and more directly by recent philosophical studies of action, in which ideas are integral.[28] Weber was familiar with Freud's work, although he made no reference to it.

The third point, to be merely noted here, concerns Weber's previously discussed theory that the social disciplines, including the sociology of law, are or should be *wertfrei*. This raises a question about his view of social action, especially the sort of action that is of central interest in jurisprudence. Such action, it will be submitted, has normative significance.

Other directions to be taken in this discussion, especially certain differences from American Legal Realism, will be briefly stated. Although there was much insight, there was little analysis of the behavior, actions, processes or

[24] *Jurisprudence* 40-41.

[25] *Max Weber on Law in Economy and Society* (Rheinstein & Shils transl. 1954); *Max Weber: The Theory of Social and Economic Organization* (Henderson & Parsons transl. 1947); Weber, *Economy and Society* 641-938 (G. Roth & C. Wittich eds. 1968). "The sociology of law is a creation of the twentieth century..." N. Timasheff, *An Introduction to the Sociology of Law* 44 (1939). For Timasheff's discussion of the forerunners, see *id* 48-62. Anzilotti "coined the term 'sociology of law' (*sociologia jurídica*)" in 1892. *Id.* 52.

[26] Weber's theory of ideal types also reflects his training in law and the particular influence of Jellinek. Weber was influenced in his theory of action by Radbruch's analysis of "act" as a concept of criminal law. Lazarsfeld & Oberschall, "Max Weber and Empirical Social Research", 30 *Am. Soc. Rev.* 185, 196 (1965).

[27] "...Weber did not, however, abandon the basic idea that legal norms control action in pursuit of interests, both economic and political." Parsons, "Unity and Diversity in the Modern Intellectual Disciplines", 94 *Daedalus* 39, 60 (1965).

[28] J. Macmurray, *The Self as Agent* (1957).

events that were equated with "law". Some of the American writing on this subject reflects behavioral or mechanical theories as well as Weber's insistence on the value-neutrality of social science, such as Llewellyn's "divorce" of the *is* and *ought* of law. As regards the use of "law-in-action", especially by Pound, it will be recalled that term referred to practice or actions that diverged from the rules in the books, *i.e.*, to deviation or violation. That presupposes the conformity of action or practice to the law in the books; it is this action that calls for study as a precondition to the study of deviation.[29] It also was submitted in preceding chapters that the Is-Ought separation is fallacious, as is the reduction of law to fact and the deprecation of legal rules and their analysis[30] and of their effect in decision-making. There is especially lacking any systematic consideration of the theoretical consequences of bringing practice or action into the center of the subject of jurisprudence. Finally, there is another very important difference in the direction to be taken here, namely, an effort will be made to avoid conceptual and verbal confusion between "law" and the "subject-matter of jurisprudence". For various reasons, especially to facilitate communication, "law" will be retained in its traditional meaning of rules, and "law" in that sense will be distinguished from "law-as-action", which is central in the subject-matter of jurisprudence. More than thirty years have elapsed since American legal realists were developing their theories. Since then a large literature on the philosophy and the sociology of action has been published. Any legal philosopher who now writes on that subject, even if he finds disappointingly few discussion that are directly usable, is bound to take a different view than those available to his distinguished predecessors.

## *Theory and Practice*

*"Praxis"*, the Greek word for action, has been anglicized as "practice" and is used in referring to the conduct of many professions and trades. The "practice of law" is usually narrowed to that of the legal profession, sometimes only to lawyers, and it has a technical connotation. Here, we shall extend "practice" to include certain actions of legislators, judges, ministerial officers, and also of laymen. Lay actions raise special questions, and their relation to the actions of officials will be discussed later. The entire chain of the above inter-related actions, "law-as-action", represents an enlarged view of practice.

This places jurisprudence and the practice of law in the general context of "theory and practice".[31] For Aristotle, "the end of theoretical knowledge

[29] In other contexts, Pound often referred to the "function" of law.

[30] "I see Kelsen's work as utterly sterile, save in by-products that derive from his taking his shrewd eyes, for a moment, off what he thinks of as 'pure law' ". Llewellyn, *Jurisprudence* 356 n. 5.

[31] See the writer's discussion and references in "From Legal Theory to Integrative Jurisprudence", 33 *U. Cin. L. Rev.* 197-200 (1964), and the essays by Charles Frankel and F. E. Sparshott in *Ethics and Social Justice* (Kiefer and Munitz eds. 1968, 1970).

is truth, while that of practical knowledge is action . . ." [32] For some later writers (Bacon and pragmatists), all knowledge is practical; practice is the application of theory and theory is the knowledge of practice. Other writers maintain that while there are close inter-relations between theory and practice, there is not a complete overlap or coincidence between the two; and this is the writer's view of the relation between jurisprudence and the practice of law. [33] In this view, some practices elude the orbit of theory, and some theoretical knowledge (jurisprudence) cannot be put to practical use. Perhaps the widest agreement regarding this important subject is that both theoretical and practical knowledge are used in the solution of practical problems.

Instead of further general discussion, it will be more helpful to describe and analyze a specific case of practical legal problem-solving. One might select the actions of police officers "applying" law or of bailiffs and sheriffs imposing sanctions, but these are among the least complicated official actions although, of course, even here questions of deviation and compliance may raise difficulties for both practice and theory. One might describe the actions of legislators trying to solve practical problems; they investigate, hold hearings, discuss and debate, draft bills, deal with constituents and lobbyists, vote on, "pass" and promulgate enactments, all in certain social-legal contexts. [34] However viewed, they form an intricate, wide-ranging network of actions intended to produce certain social changes. The specificity of those actions must be distinguished from the general significance of the enactments.

More important for the present purpose than the above types of action is judicial action. Judges do not merely subsume particular cases under general rules; they do not merely decide. They intervene by their expressed judgments to effect certain changes, first, among the litigants and the sanctions-officers, then, among larger segments of society. Instead of generalizing about judicial decision and action, it will be more helpful to discuss a particular case, and it is convenient to select the well-known *Carrier's Case* (1473). Since that has been discussed elsewhere in detail, it is necessary here only to recall the salient features of the case. The defendant, a foreigner, had received certain bales of merchandise to be carried to Southampton, apparently for shipment abroad; instead of delivering the bales as agreed, he broke into them, removed the contents, and was charged with felony. If, as seems probable, the bales contained wool, the most important economic interests of the country were involved. The latter part of the fifteenth century saw the rise of the modern commercial age; the Crown was itself engaged in

[32] Arist. *Met.* 993b 20-21. Aristotle also drew a distinction in terms of the subject studied, *i.e.* "in practical science the movement is not in the thing done, but rather in the doers. But the science of the natural philosophers deals with the things that have *in themselves* a principle of movement". *Met.* 1064a 14-16; see *De Anima* 434a 16-21; *cf.* Aquinas, *S. T.* I, q. 14, a 16 and Plato, *Statesman,* 258e-260d.

[33] See Ch. 4 *supra* especially concerning the fact that a realistic theory of criminal law does not encompass strict liability, inadvertent negligence, and certain other rules.

[34] For an application of Bentley's Theory see B. Gross, *The Legislative Struggle* (1953).

trading and in dealings with Hanseatic merchants and financiers. There were several prior decisions holding that, as regards the relevant felony (larceny), there must be trespass in the acquisition of possession; but here, the carrier had obtained lawful possession. At the same time however, *stare decisis* was far from the relatively fixed doctrine it later became, and Parliament was rarely summoned. This placed the responsibility for both decision and policy-making on the judges, and they held that a felony had been committed. The situation could be described in much greater detail, and in the analysis of recent cases, many other facts, especially about the judges, could be added. But enough has been set out as reminders, it is hoped, to suggest several possible lines of analysis of judicial decisions and to see how the judges' actions differ from jurisprudential theorizing about them.

First, the judges had to reach a decision within a short time, while a theorist has a lifetime to solve his problems. Nor is it only time that limits practice; the available alternatives are even more restricted —the defendant was or was not guilty of the felony charged against him. Theorists can provide as many explanations of judicial action as there are relevant theories. Second, the case was factually specific, it arose in a specific social context, and the judgment had to take account of those particularities. The theorist deals with classes in which particular facts, actions and contexts are included as members. Thus, while the judges hat to deal with certain past decisions, the theorist generalizes regarding them and others in terms of principles and doctrines and in terms of social hypotheses. Third, the decision, though rendered in terms that were in formal accord with precedent, actually broke new ground; *Carrier's Case* made new law. The ingenuity of some of the judges in their solution of a difficult problem and the imaginative invention of new concepts, in short, the creativity of their action, escapes the orbit of theory.

There is a great deal in practice that is important and unique which cannot be contained in the generalizations of jurisprudence. Consider the expertise of a great trial lawyer in the selection of a jury, the creation of an atmosphere, the quick thrust of a question at the precisely correct moment. Consider the creativeness of a great judge as he "feels" his way step by step through a myriad of facts and doctrinal labyrinths until he experiences the flash of illumination that bridges the gap between past law and the law that is about to come into being. So, too, the uniqueness and creativity of some legislative actions cannot be expressed in the jurisprudence of that practice.

In the discussion thus far, "theory" has been used in a wide sense and it is necessary now to distinguish *legal* theory (generalization of the rules, doctrines and principles of positive law) from the theory, namely the jurisprudence, of or about the judges' *actions* in rendering decisions, in which practice the judges use legal theory. Much of the judges' legal

theory had its origin in rules abstracted from action, but in advanced cultures professionals think about legal rules and doctrines and they invent and use theories of those concepts to aid the solution of practical problems. After a considerable body of precedent has developed and legal theories have been constructed, those more general ideas (legal theory) normally play a large role in judicial decision, such as theories of criminal or contract law. This legal theorizing and the judges' practical knowledge intermingle in the decision-making. In sum, judges act, and they are guided in their actions by rules, doctrines and principles and by relevant legal theories as well as by their knowledge of the circumstances and context of the cases.

To identify and understand official actions, it is necessary to know the mental states that form the internal side of the actions. As stated, those mental states include theorizing in which law as rules, as action-concepts, plays a large role. Thus, while the actions of legislators, judges and ministerial officers are the focal point of study, knowledge of their actions depends, in part, on knowledge of the mental processes noted above.

It depends also on knowledge of the additional factors that affect action. Legal concepts are action-concepts, but there are important differences between thinking actions, or thinking about them, and action. Action is in the world, and since the practical rules of law usually provide only a framework, not specific direction, there will be inevitable differences among the numerous actions that "conform." Those actions also are subject to the influence of physical, biological and cultural forces that are not limited to those that affect the thinking of action-concepts. The rule-aspect of the actions, their "expression" of legal and other norms, will reflect a variety of forms that more or less diverge from the action-concepts as understood by legislators and judges. The logic ("coherence") of sets of actions is not a matter of the formal consistency of propositions, *e.g.*, there are rational actions of compromise or conciliation or adaptation to particular facts that cannot be reduced to terms of a formally consistent pattern.

In the thinking that precedes action and gives it distinctive character, "law" retains its traditional connotation as "rules." As such, they serve to guide the conduct of laymen and officials and they are also the basis for distinguishing some actions from others. Just as it is unprofitable to keep in separate compartments the actions of legislators, laymen, judges and ministerial officers so, too, it is indefensible to separate the theorizing about rules, precedents and the like from the actions that to some degree reflect that thinking as their internal dimension.

In advanced societies, there are many other ideas in the minds of those who make law, adjudicate, and apply sanctions. In addition to a highly organized legal system and the attendant professional theories, there are moral principles, personal philosophies, emotional attachments, a popular view of many sciences, more or less professional skill, habit and common sense. Judges have different views of their vocation; and the vagueness of "due

process" is in sharp contrast to the specificity of "pay to the order of A.Z." There are often gaps between mental states and consequent actions, and some states of mind are not expressed in the official decisions or resolutions of practical problems. When they are, those decisions may not be acted on, and when they are acted on or "acted out", the social context may condition the action in unforeseeable ways.

Judicial decisions are sometimes not guided by precedent or other rules of law; one need merely refer to some of the decisions of the Supreme Court to see that other factors influence the justices of that unique court. The American legal realists emphasized this disparity in numerous publications. But the present need is not to augment that large literature but to delineate a pattern that is equally required in the study of judicial and other deviation; the deviation presupposes those points of reference in relation to which it takes its meaning.

Legal sociologists try to increase knowledge of legal practice by vicarious participation in the actions of the officials and by observation. The knowledge acquired by a sensitive "participant" must be checked and supplemented by what he observes and it must be coherent with his jurisprudential perspective, including his theory of social action. This includes knowledge that is of little immediate concern to a judge, lawyer or legislator, such as the stages of legal evolution, "progress from status to contract" and many co-variations that interest legal sociologists or legal philosophers but are of little practical utility.

In the preceding pages, I have discussed some relations between the practice of law and jurisprudence. The next section focuses more definitely on the practice, the actions, designated "law-as-action."

## *Action and Law-as-Action* [35]

"Law-as-action" must be distinguished from "act" as used in positive law and from various uses of "action" in the philosophical and sociological literature on that subject. "Act" is used in many statutes and judicial decisions; for example, the California Penal Code Sec. 20 states, "there must

[35] With reference to the question of terminology, it may be asked: (1) Why not say that law consists of ideas in the minds of the actors and that their actions conform with law? (2) Why not speak of law-*in*-action, and thus conform to a current use? (3) Why speak of "law-*as*-action"? The answers are: in (1), *supra*, "conformity" is ambiguous and this traditional speech also perpetuates the separation of legal ideas from action; it does not deal with action realistically. (2), *supra*, although an advance upon traditional jurisprudence, still gives primacy to the rules, and also, as stated above in the text, "law-in-action" has acquired a rather definite meaning, namely it refers to the *differences* between the law in the books and the actions of officials. (3) "Law-as-action" gives equal prominence to the ideational (rule or doctrinal), the factual, and the valuational sides of the actions that will be discussed. A distinction was made between "law as official action" and "law in discourse" by Mortimer Adler in 31 *Cal. L. Rev.* 103 (1931), *reprinted* in Hall, *Readings in Jurisprudence* 390 (1938).

exist a union or joint operation of act and intent, or criminal negligence"; and Sec. 26 exculpates "persons who committed the act charged without being conscious thereof" and "persons who committted the act... by accident..." Judicial decisions and text books on criminal law, tort and other branches of law abound in discussions of "act". Some writers speak of "negative acts"; others, of "forbearance" or "behavior" or "conduct". Some texts on criminal law or tort law resemble the discussions of "act" by Austin and Salmond, and they reflect similar differences of opinion, such as whether "act" should be narrowly or widely construed, how consequences are to be distinguished and the like. Apart from the previously discussed difference between professional and jurisprudential discourse,[36] there is the fact that the use of "act" in positive law, even if a dominant meaning were discerned, would not serve the same function as "action" in a jurisprudential sense although, as will appear, a restricted use of "act" closely resembles the jurisprudential sense of "action."

"Action" in philosophy and sociology is both ambiguous and vague, *e.g.*, thinking, willing and deciding have been called "activities", "acts" and "actions". It is sometimes said that actions are not observable, that only external movements or manifestations of action can be seen. Action is sometimes said to be not intentional, as in dancing; it has also been said that action is not always motivated and there are applications of "action" to chemical processes and inadvertent behavior.[37]

Plainly, one must select some uses, reject others and make adaptations as required by the operative jurisprudential perspective. To that end, mental states must be distinguished from actions. Thinking may influence the thinker, and if someone asked him, "What are you doing?" the answer might well be, "I am thinking." None the less, mental states alone do not produce external changes, and that is crucial both in law and in jurisprudence. Joined to effort, they are part of actions (as here used) that do produce such changes; in this view action is a fusion of certain mental states and movement. Accordingly, willing and thinking will be called "activities", and on-going action (simply "action") is to be contrasted with completed "acts".

With these preliminary indications of the preferred terminology and in accord with conclusions reached in earlier chapters, I shall proceed directly

I would not quarrel with anyone who attaches this significance (*i.e.* 3, *supra*) to "action oriented to law" of to "law-in-action". That the ideas of rules of law distinguish certain actions from all others gives those rules a very important place in those actions. But the critical point is that there is a difference between looking at rules and then at relevant actions as existing apart from the rules, and looking at those actions as the coalescence of the rules with relevant facts and values.

[36] See p. 12 *supra*.

[37] See *Readings in the Theory of Action* (N. S. Care & C. Landesman eds. 1968) which includes an extensive bibliography; John MacMurray, *The Self as Agent* (1957); A. Schutz, "Common-sense and Scientific Interpretation of Human Action", 14 *Philos. & Phenom. Res.* I-37 (1953). Schutz's studies were published in his *Collected Papers* (1964). For critical discussions of T. Parsons' theory of action, see *The Social Theories of Talcott Parsons* (M. Black ed. 1961).

to indicate the principal thrust of this discussion by submitting the following specifications regarding both "action" and "law-as-action"; then, law-as-action will be distinguished from other types of action. The action of interest here is social; it is inter-action or inter-personal action, and it is also inter-communication. *First,* action must be distinguished from behavior and from processes. The latter happen or operate; actions are performed. Thus, actions imply human agents, while processes imply nonhuman forces, and "behavior" refers simple to the movement characteristic of all animals. Actions to a significant degree are based on reasons, but action is not wholly rational or beyond the realm of causation. The human agent or person must, of course, be distinguished from the "person" or "personateness' of subjectivist legal positivism and, also, from depersonalized social science models of human beings. *Second,* since it is not possible to distinguish action from behavior by sole reliance on their external features, it is necessary to take detailed account of the mental state of the person who acts; that is the internal side of action. *Third,* action is purposive and is usually directed at objects other than itself but one often acts for the sake of the action, as in dancing. Awareness is thus characteristic of action which is "on the wing", but thinking in the sense of reflection or theorizing occurs in the absence of action. One can recall and reflect on past acts. *Fourth,* action may be both useful and inherently valuable. Although legislators, for example, are concerned with the future effect of enactments, their action may also express nonutilitarian values that are implied as well in the judges' condemnation of harm-doing by appropriate measures whose significance is not exhausted in the utility principle. *Fifth,* action is motivated, and of the principal uses of "motive" —motive as goal and motive as cause or reason— it is the former, the goal or plan to be effected, that is included in action. The "because motive", which, of course, must also be known if the action is to be fully understood, lies outside the action. *Sixth,* action represents (it is) a choice not only regarding what to do but, also and inevitably, what not to do; accordingly, there is, in action, some, but never complete, knowledge of the situation. It may be added that action takes place in a physical, biological, and social environment which suggests analysis in terms of context, problematic situation, and circumstances.

All of the above features of action also characterize the actions included in "law-as-action"; and the latter is rendered distinctive in the above described larger class of action by use of the criteria discussed in Chapter 5; the features that, taken together, distinguish law from other norms also distinguish law-as-action from other actions. While the actions are identified and understood by reference to those features, rules are obviously not actions, and the respective jurisprudential concepts differ correspondingly.

Thus, the subject-matter of jurisprudence consists of:

1) law viewed as rules (including doctrines, principles, and the like); the relevant jurisprudential construct (distinguished from practical con-

cepts of law) was discussed in Chapter 5. This serves to identify and explain.

2) law-as-action, *i.e.*, certain actions of certain officials described above. This is central in the subject of jurisprudence since the rules, important as they are, are ancillary to those actions which, for both practical and theoretical reasons, are paramount.

3) conformity and violation (both include behavior) towards which official law-as-action is directed. Additional features of the subject-matter of jurisprudence will be more fully discussed in the following sections.

It may be helpful, at this point, to call attention to an important question of terminology. In this discussion, it seemed necessary to retain "law" in its traditional connotation, as rules, and to refer to the subject of jurisprudence in terms of a construct in which law-as-action is dominant. Since law-as-action is paramount while relevant rules are ancillary, it may seem preferable to some to take the path of those who sought to redefine "law" partly in empirical terms, specifically, in the present context, to say that law *is* law-as-action and, thus, to call the relevant rules only part of law, the "conceptual part" or "formal law". Admittedly, "law" carries great weight and on that ground should be reserved for what is regarded as most important. But tradition, especially linguistic usage, also exerts great influence in restricting the connotation of "law" to rules. For reasons of communication and preservation of continuity in jurisprudence, "law" is used in this discussion in both constructs; alone, to mean "law-as-rules", and in "law-as-action", to comprise the unifying concept of integrative jurisprudence and the dominant feature of its subject-matter.

"Law-as-action" includes decision-making, which is viewed as rational and free[38] to a significant degree as contrasted with its treatment in much of the relevant literature in political science, where what is called a "decision" is seen as the inevitable effect of certain causes. For some writers, decision-making "is synonymous with he whole stream of action",[39] but since some decisions are never put into effect[40] and because decision-making connotes a mental activity, it should be distinguished from action. As has been emphasized, an integrative jurisprudence does not minimize the significance of rules of law, especially their influence on the action of officials. Observable movements as well as the use of books, court houses and other artifacts are, of course, included in the relevant actions. Their third principal feature is the value of acting to achieve a desirable goal. The above dimensions of law-as-action —its ideational, factual and valuational aspects— do not com-

[38] On the political science of decision-making, see C. J. Friedrich, *Man and His Government* 83, 199 (1963).

[39] Simon, "*The Decision-Making Framework*" in *Varieties of Political Theory* 18 (D. Easton ed. 1966).

[40] C. Lindblom, *The Intelligence of Democracy* 11 (1965) states that "government acts of policies are not simply decisions . . ."

prise a mere addition or collection of features separately treated in particularistic legal philosophies; action is a vital unity.

Held in view in the above description of law-as-action were the actions of legislators, judges and enforcement officers. In all of these cases, the actors have definite rules of law in mind; being official, they represent the legitimacy and the authority of the State (explicated above in terms of the features that distinguish the State's law from other norms). In light of that and of the distinctions drawn above, it should be possible to clarify the treatment of lay action and behavior in the empirically oriented writing on law previously discussed. Certainly, there are important reason for the inclusion of some lay action and behavior in the subject of jurisprudence, *e.g.*, it was found necessary to include a directive to all persons in the jurisprudential concept of law. There also are sociological reasons for that (rather than treating conformity as a mere presupposition of the delict) shown, for example, in Sir Henry Maine's studies, the work of Ehrlich and other legal sociologists, and the reasons that motivated Bentley to give priority to public actions and Llewellyn to include them in his concept of law. It also will be recalled that some of the criteria employed in the jurisprudential construct of positive law require reference to lay persons, like violation, attitude, sanction and effectiveness. These references bring the *interactions* of officials and laymen within the subject of jurisprudence.

Action by very large numbers of lay persons has considerable effect on official action. The extreme cases in our experience of widespread violation of the liquor prohibition law, the default of farmers in the depression and their massive resistance to enforcement of mortgage and other debts, and more recent cases of civil disobedience reveal the importance of the relation of violation to the official action that is needed to transform the law in the books into social reality. It seems equally plain that normal daily conformity to law also exerts great influence on official action. It is that, as well as the pressure of lobbyists and the clash of political parties and of many interest groups that induced Bentley to find in lay action the data of maximum importance in the "process of law."

In dealing with this subject, the following distinctions may be drawn. There is "conformity" where there is no awareness of relevant rules of law; "obedience", where there is such awareness; and "compliance", where there is not only such awareness but also approval of the rules. As regards conformity, it is necessary to distinguish merely fortuitous conformity from conformity that results from the effect of internalized norms that are moral as well as legal. For some purposes it may be desirable to distinguish cases where the actor is aware of the relevant moral principle but does not know that it is also a relevant rule of law from cases where, largely by habit or spontaneously, he acts without any awareness of the relevant morality. "Violation" parallels "conformity" and requires similar distinctions to be drawn,

*e.g.*, violation, like conformity, is conscious or inadvertent and, if conscious, may be accompanied by approval or disapproval of the law.

As is plain by reference to the above quotations from Bentley and Llewellyn, the actions of the public are diverse and wide-ranging; to sweep into it all of the lay actions mentioned by these and other writers on this subject would make any relevant concept too vague for fruitful use. Still, law has very large ramifications; the guiding line regarding the inclusion of lay conduct (conformity and violation) in the subject of jurisprudence is the relevance of law. There are, of course, lay individuals who perform temporary official functions, like the participation of laymen in official procedures such as juries; this may be included in law-as-action.

Lay action that is represented in custom that becomes law (some would say, "is law") raises a special problem. For the instant purpose, lay action and behavior may be divided into two classes: that which constitutes customs that are *potentially* law and law-as-action, and that which conforms or obeys or complies with law. This has important implications for "legislation". In the preceding discussion, that term was used in its ordinary sense to refer to certain officials. But if "legislation" in a wider sense is to include what may be called the making of the common law, the same step taken above regarding lay action, applied here, means that some of that action is potential legislation —the premise in both concepts is that official action is distinctive. Finally, it becomes necessary to distinguish law-as-action (official) from the influences on it, including the various types of violations and the conformities that are not allocated only to potential law and potential law-as-action.

Does the practice of lawyer fit into the above construct of law-as-action? The answer to that question is determined by the fact that lawyers, despite their designation as "officers of the court", are not public officials. It is not their decisions or their actions that are supreme and inexorable; indeed, many a client has not followed his lawyer's *advice*. Nor do lawyers use powers (other than those licensing them to practice) of the sort, and in the way, employed by their clients.

What lawyers do, as specialists, is to assist laymen, courts and legislatures. This service is not necessary in every society and even in complex Eastern societies their role is taken by the mediator or conciliator. But while the work of lawyers does not comprise an essential component of law-as-action, it is obviously necessary, both in its advocacy and mediation, to the correct or better conduct of lay persons and officials; lawyers' practice has an important causal relation to the respective components of the subject-matter of jurisprudence.

## *The Dynamics of Law-as-Action*

In further delineation of an integrative jurisprudence, it is important to note two characteristics of the traditional philosophies of law that have obstruc-

ted the path to dynamic theories. First, except for occasional expressions such as Aristotle's reference to the constitution as "a way of *life*", they have only legal rules or concepts as their subject matter. We have seen that some twentieth century legal philosophers challenged this concentration, and also, why their empirical theories of law, dependent as they are on either indifference to patently important characteristics of the data or on an implausible reductionism, fell short of their mark. The inevitable fact is that rules of law supply the rational factor that serves as a practical guide to officials and laymen, and more important for the present discussion, they provide the distinctive features of certain actions that otherwise dissolve in an amorphous ocean of behavior; they supply the structures that the mind grasps to give distinctive meaning to legal experience.[41] The need, therefore, is not to dismiss law as rules, but to take account of them in a dynamic theory.

The other characteristic of traditional jurisprudence, particularly of subjectivist legal positivism, that bars the construction of a dynamic theory, is its model, "rule, then action". This is especially representative of imperative theories based on statutes, but the model has become so entrenched on legal thought that one is unconsciously apt to accept not only the thesis that the subject of jurisprudence consists only of rules that govern conduct but, also, the accompanying model—"first rules, then conduct".

To test the validity of this pervasive attitude it is helpful to draw on some plausible historical hypotheses. It is probable that the earliest human beings living in the most primitive human societies were not even aware of any rules, and thinking about rules ("theory") must have been a late development. This may be gathered from data about gregarious animals whose survival is largely due to their capacity for mutual adjustment and the consequent order based on that kind of spontaneous behavior. There is also the evidence of very young children at play. Unlike their older brothers and sisters who are armed with a set of rules when they play ball, very young children simply adjust to each other, unaware of the rules that govern such games.

We also are constrained by our earlier discussion of purely factual hypotheses (reducting law to fact) to introduce into those earliest human actions a degree of rationality. To the reasons previously adduced we must add the fact that the emergence of custom as a rule involved the recognition of generality. However this primitive history may be qualified or imagined, the inevitable fact that emerges from any persuasive account of it is that social action and practical knowledge preceded awareness of rules and theoretical knowledge of them. Instead of the traditional model of "rules first, then action",

[41] Many detailed analyses and descriptions of segments of law-as-action are needed to supplement the intuitive apprehension of the structure and dynamism of that action. Some of the descriptions of action in pragmatism and in the less elusive aspects of phenomenology are suggestive. The principal difficulty, which also affects process philosophies, arises from the impossibility of visualizing action as images of things. But one can "image" successive structural changes and it should be possible to employ vivid descriptions and new terms to advance understanding of the relevant actions.

what came first was action then, much later, perception of the generality of customs and articulation of rules, and finally, theorizing about them. [42]

The next step in analysis of the prevailing model concerns an important distinction between internalized norms and technical rules. It is true, of course, that in any advanced society there are many rules that are not known even to the experts until the need to known them arises; and anyone who has filed a tax return or parked his automobile knows that he thinks of the relevant rules and then usually obeys them. These rules are not internalized in the way and sense that the simple norms concerning safety of person and property, keeping promises, and making restitution become part of the psychic processes of normal adults. One has only to think how bizarre it would be to say that in refraining from striking another person, one first thinks, "there is a rule forbidding that". A set of "basic" moral-legal attitudes is part of the structure of normal adult personality and the more they are so integrated, the less does one act by deliberate use of the code. The least that must be said, then, about the dominant model (rules, then conduct) is that, excepting problematic situations, it does not fit the most important actions, those that express internalized norms. It is this fact of social life, this feature of the most important social actions, that is one of the grounds of the doctrine, *ignorantia legis neminem excusat*. Thus, the attitudes previously discussed in connection with the "recognition" of law are now seen as internalized legal-moral norms that are expressed in action; they are part of the mental side of certain actions.

It is therefore evident that some of the criticism directed at Austin's imperative theory has obvious point if "command" is narrowly construed to mean any order by a certain living person ("sovereign") to specific individuals. But the conclusion of the usual criticism, that we should speak of legal rules as "directives" or "depsychologized commands", is not a very impressive dividend. It is only when the question is treated in a social context, when social action is the focal point, that the distinction between command and rule becomes persuasive even if the two are not mutually exclusive. A command or directive may be wholly external to the experience of the addressee; it can occur once in a lifetime. But "rule" or "norm" implies not only that persons in other relations than that of commander and addressee are involved but, also, that there is a relevant practice. [43] Accordingly, sociologists are not concerned with commands, but with norms, namely with rules that have significance in and for interpersonal actions that involve more persons than the commander and the addressee. [44] In some of that literature, "norm" is even defined in terms of expectation; however, distinctions should be drawn among the meaning of a rule or

[42] "In English law, for example, one complained to the King who gave a writ affording a remedy. Out of the writ an action developed. Behind the action men came to see a duty to be enforced and a correlative right was found by jurists behind the duty." 4 Pound, *Jurisprudence* 43 (1959).

[43] van Loon, "Rules and Commands", 67 *Mind* 514 (1958).

[44] Morris, "A Typology of Norms", 21 *Am. Soc. Rev.* 610 (1956).

norm, the relevant practice, and the consequent expectation that people will conform to it.

But what of the vast number of directives that are not internalized? Here, the traditional model "rules, then conduct", is apt for practical purposes, but the pertinent theoretical question regarding the subject of jurisprudence challenges the assumption that directives and action are separate. We speak loosely of actions that "conform" to law but, in fact, those actions are an expression of the rules. In sum, a socially oriented jurisprudence focused on certain action deals with it not only as guided by rules but also, and more importantly, as the full actual datum that expresses the rules; it is interested in that action as a kind of social reality.

The need for a dynamic theory of law has long been felt and it is significant, as an acknowledgment of its importance, that Kelsen frequently asserts that his theory is a dynamic theory of law. The fact is, however, that the "dynamism" of Kelsen's theory is based only on the consistency of legal rules with higher norms, *e.g.*, of decisions with a code, and of a code with a constitution.[45] Even if it is granted that in his view the relation of these norms to each other is not a purely logical one, the conformity of the procedure of concretization is hardly sufficient to characterize a theory as "dynamic." When Kelsen says "Law [*i.e.* pure idea] regulates its own creation...",[46] he is either implying a great deal that is illicit in his theory of the subject of jurisprudence or he is indulging in metaphor; in that theory, what do "regulates" and "creation" mean? One need only recall familiar daily experiences to see the vast difference between a theory of law focused on the structure and interrelations of legal concepts and one focused on action; it is action, not concept, that is dynamic.

In integrative jurisprudence, legal directives are viewed not only as propositions having a certain structure, but also as speech-acts.[47] In speech-acts movements are expressed in the utterance of sounds, in gestures, and in the publication of written words. Speech-acts are acts of communication. Certain persons, members of the general public and various officials, converse with each other; their communication is comprised of talk and other actions of contemporaries as they enact, interpret, apply and enforce rules of law which, though originally speech-acts, became inert as print until they were again expressed in action. Inter-communication is not restricted to an exchange of information; it may be an act of mutual commitment, as in contract, a valuation as in legislation, an expression of emotion as, to some degree, in criminal law or, usually, a combination of these. Speech-acts are intelligible as parts of a language and in social contexts, and the study of those acts as well as of the many nonverbal movements included in law-as-action can explore many of their dynamic features.

[45] Kelsen, *General Theory*, 122-123, 144.
[46] *Id.* 124.
[47] J. Church, *Language and the Discovery of Reality*, (1961).

The dynamism of those actions involves duration, sequence, causation, and change, as basic categories. Careful use of them can advance the significance of jurisprudence and solve many puzzles, such as the difficulties raised in the custom-law problem and by Gray's theory of law.

Let us first recall our earlier discussion of the ancillary-instrumental relation of powers to duties. The existence of duties presupposes not only the prior existence of powers but also the duration of the actions taken to use powers. This also is shown in the fact that powers are ancillary in the sense of having a causal relation to duties. A static capacity is fused with the dynamics of action as it moves toward the creation of duties.

In this integrative, dynamic perspective, the basic concepts have very different meanings than are assigned them in structural analysis. There, it is held that the statement "*A* has a right (or this right) against *B*" is the exact equivalent of the statement "*B* owes a duty (or this duty) to *A*". Analysis of a static concept pointed only at the logical relation ("imputation") of sanction to delict can reach no other result. But if we view action that is more or less correct, the relevant jurisprudential concepts must reflect the attributes of such action and facts other than the sanction. The actions of a right-holder are certainly different from those of the duty-bearer; description of the one's actions is coordinate, but it is not synonymous with or equivalent to the description of the other's.

In the prevailing structural analysis, privilege-no right is treated solely as the contradiction of right-duty; to say that *A* has a certain privilege is to say no more than that he is not duty-bound in that respect.[48] Again, all that is referred to is the necessary relation to the sanction. But if we look at the actions in situations to which privilege-no right is applied, there is much more to be said about them: what action is characteristic of privileged conduct, how that differs from action that is excused and from action by right-holders. It is only as a matter of convenience in conceptualistic jurisprudence that privileges are formulated as "mere exceptions" to rules stated in terms of rights and duties. Viewed as actions, privileges are just as actual as are rights, and jurisprudential concepts should take account of that.

When basic legal conceptions such as right-duty are viewed as aspects of certain actions, the traditional polarity becomes oversimple if not misleading. Unlike Hohfeld's polar correlatives and the sociological roles of ego and alter, the relationship is triadic; for every jural relation involves not only the immediate parties, it also includes their relation to certain officials. In effect, the right-holder requests certain officials to take action against the duty-bearer, and this involves summoning the defendant, investigation and extended discussions, and it terminates in critical official action. Jural relations are triadic even when the government confronts an individual, as in the collection of taxes, for "the government" must be divided into those

[48] Radin, "A Restatement of Hohfeld", 51 *Harv. L. Rev.*, 1141 (1938), *reprinted in part* in Hall, *Readings in Jurisprudence* 501 (1938).

officials claiming a tax and those who decide a dispute and impose sanctions. This applies to all jural relations, and it requires a more realistic concept than is provided by the simple model of a sovereign commanding his subjects, for as was previously seen in the structural analysis of law, it is necessary to recognize that both laymen and officials are addressed by the "sovereign". It may now be added that those addressees are also referred to each other, as the layman knows or he can discover that officials have been given certain directives, and the officials know they have been directed to act with regard to certain persons and situations. Far from effecting an artificial separation of the "Sovereign" into various organs or groups of officials, the triadic concept represents the plain fact that there are opposed parties of interest (sometimes a governmental operation) and the organ of adjudication. Within the triadic relation various sub-relations can be recognized, like the direct relation of the judge to the sanctions-officers. All of these relations are expressed in appropriate actions.

The relation of custom to law and Gray's theory also raise problems that cannot be solved by merely structural analysis. Writers differ in their adscription of "law" to custom, some holding that it is only when a custom has been accepted by a court that it becomes a law, while others hold that such recognition by the state is not necessary. Gray's theory, that law consists of rules laid down by courts, raises a similar problem; indeed, he withheld "law" from even prior judicial decisions: "statutes, precedents, the opinions of learned experts, customs and morality are the sources of the Law".[49] This elicited Cardozo's comment that "A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation, must contain within itself the seeds of fallacy and error."[50] Cardozo also criticized Gray's theory on the ground that it violates "a sense of realism"; innumerable persons guide their daily conduct by reference to rules of law, never in their entire lifetime suffering the "catastrophic experience" of a lawsuit.

The insight of this distinguished jurist is widely shared, but there remain some difficult questions about the problem raised by Gray and the still unresolved debate on the relation of custom to law. The principal difficulty is grounded in the static character of structural analysis. What is needed to solve those problems is a dynamic theory of a functioning legal system. If we focus on the dynamics of law-as-action, including its temporal dimension, we can discover explanations that are more adequate to the facts.

Lawyers in all branches of the profession deal with certain printed decisions and statutes. Let us call this "past law".[51] On the basis not only of past law but also of subsequent social and political changes, lawyers and others

[49] J. Gray, *The Nature and Sources of Law* (1909), quoted by Cardozo, *The Nature of the Judicial Process* 126 (1921).
[50] Cardozo, *The Nature of the Judicial Process* 126-27, reprinted in Hall, *Readings in Jurisprudence* 410.
[51] *See* A. Kocourek, *An Introduction to the Science of Law* 220-21 (1930).

decide what (they think) the law is at the present time. This can be viewed as prediction of what the courts will do; it comprises "probable law". Laymen who may have consulted lawyers act on probable law, and as stated above, their action, if customary, may also be regarded as *potential* law and *potential* law-as-action. Finally, there is the present rendering of judgments by courts, the emerging law, the on-going action that is decisive as regards the litigants and influential, also, as regards future action.[52] It is so important that its selection by Gray as the only datum to be designated "law" is understandable. But if we attend to what is actually involved, we must take account of, and distinguish, past official actions, predictions of their future actions, and the present expression of judgments. From the point of view of ordinary speech and also lawyers' speech, it seems odd to say that one who acts in accordance with yesterday's decision or statute is acting in accordance with only probable law. But we are required by the principle of legality[53] and the times when pertinent questions are raised to speak of "probable law" despite the fact that its probability is often of such a high degree as to engender an attitude of absolute certainty. If one ventures to generalize on this question, past judicial decisions are entitled to some priority since past law "in general" has greater weight than nonofficial "sources". Still, it is possible that after a very old judicial decision was rendered, there grew up a custom that has been in vogue for so many years that a lawyer can confidently predict recognition of it by a court. In such cases a custom may have as high a degree of probability as a past law or even a higher degree.[54]

The distinctions drawn above are apt and necessary as regards the subject of jurisprudence, outlined above. In the construction of a dynamic theory of law, one must take account of time, the duration involved in creating legal relations, the sequence of the relevant actions, their results and consequences, social change, and other aspects of the dynamics of the action previously explicated, especially its character as a coalescence; no doubt, still other

[52] "...what is done in the course of judicial decision is law because it is done, not done because it is law." Pound, *Contemporary Juristic Theory* 10 (1940). "...the practical answer is that the law is what the judge says it is." Lord Reid in 12 J. S. P. T. L. (n.s.) 22 (1972).

[53] Hall, *General Principles of Criminal Law* 382-83 (1960).

[54] There are popular customs that had their origin in the community, popular customs that arose from compliance with judicial decisions, and there are professional customs, *e.g.*, flowing from the rule of precedent as well as practices of lawyers and administrators.

There is the question whether custom is the result of accident or whether it had a rational basis, and if it did, what happens when that purpose or need no longer exists?

There are conceptual distinctions to be drawn among: (1) custom, usage, practice, mores, folkways, convention; (2) customs that are only factual and those that are also normative and (3) among the latter, those whose sanctions can be evaded and are so understood, and those that are meant to be, and usually are, inexorably submitted to and imposed.

categories will be developed as need arises.[55] The distinctions of past, probable, potential, and emerging present law can also be employed to add significant dimensions to jurisprudence. The analysis of relevant concepts can be further illustrated in a discussion of the effectiveness of law.

## *Effectiveness of Law*

Many important problems of jurisprudence concern the effectiveness of law, and the following discussion will also deal with certain collateral issues, especially the assumption that empirical research is the only way or the best way to advance knowledge of law and legal institutions. Legal philosophers agree that a system of rules must have a minimal effectiveness or "efficacy" if that system is to count as a legal system; accordingly, it was said above (Chapter 1) that concern with this question is a common feature of legal philosophies.

In Kelsen's theory, "efficacy" means that most people obey certain rules or that officials obey them, or both, but not only are these statements far from being an adequate account of efficacy, it is also said in that theory that efficacy is not a characteristic or feature of law —it is only a "condition" of the existence of law. This position, the niceties of which need not occupy us, is a consequence of the theory that jurisprudence is concerned only with pure concepts; from that perspective, the fact that laymen and/or officials conform to rules of law is extraneous to those concepts; the behavior only "parallels" them.

We have previously discussed some phases of this question —the habit of obedience, the acceptance of factual practices as normative and binding, recognition and certain moral attitudes. We must now bring other questions within the orbit of this problem. In firs instance, in formulating the problem of the effectiveness of law, it is helpful to take account of various limitations of the legal apparatus, such as the maxim *de minimis,* the more subtle aspects of interpersonal relations, complex problems that require constant management, the assumption that law can establish or maintain only the minimum of the required morality and the belief that law is only one of many agencies of social control. There is the question whether law ought to be employed in areas where harm to other persons is vague or, possibly, nonexistent, and there is the long-standing question whether law is limited to the control of external action and cannot influence conscience or volition.

After some such mapping of possible limits, one turns to a direct assessment of the problem. "Effectiveness" is obviously ambiguous. First, there is the question whether "effectiveness" is descriptive or normative or partly normative and partly descriptive. On an assumed level of pure descriptiveness, it

[55] For example, there is extensive literature on the philosophy of the person. E. Brightman, *Persons and Values* (1952) has had considerable influence in this country.

is important to distinguish results from consequences.[56] Results are aimed at, and the connection between action and result is intrinsic, while consequences are extrinsic. A legislature enacts a minimum-wage law and the result is that certain persons receive higher wages; but a consequence is that other persons lose their jobs. Was the law effective? Other social changes that were not foreseeable are bound to occur, and the very enforcement of a law changes the facts so that the situation keeps on becoming different from what it was when the law was enacted. Even if it is assumed that the end or purpose of a law is definitely known and "stays put", it is very difficult, perhaps impossible, to predict the consequences. Urban renewal laws were intended to provide decent housing for poor people, but they enriched landowners, facilitated theft, and uprooted many poor persons without providing them with better housing. Were those laws effective? It seems strange to say that a law was effective even though the harmful consequences of its enactment and enforcement outweighed the good results; and, on the other hand, if a law very substantially secured the results aimed at, it would seem equally strange to call it "ineffective".

There are other complications regarding the "effectiveness" of law. As previously noted, does it mean mere conformity or does it mean conscious obedience or does it mean compliance in the sense of knowing that the law exists and, also, approving it? Then, as regards the quantitative aspect, does effectiveness mean that, say, 80% of the population conform or obey or comply? If only 20% do that, but no one would have acted that way had the law not been passed, is the law effective? Anyone can chart a continuum on paper and say at which point he will regard a law as effective or as having a certain degree of effectiveness, but this may only add an additional subjective use that aggravates the present ambiguity.

The difficulties in the way of empirical research are considerable even after conceptual problems have been clarified. One might believe, for example, that it would be relatively easy to determine and even to measure the effectiveness of *Miranda*.[57] But there is evidence that the police sometimes (or often) evade *Miranda* by a quick perfunctory recital of the warnings; there is the tone of voice, the expression of the face and other factors that elude not only measurement but even a sound, common sense estimate of merely external conformity with the decision. And the consequences of *Miranda* are far-ranging and uncertain.

The superficiality of simple definitions of "effectiveness" built on a mechanical model is even more apparent when that term is applied to the

[56] G. von Wright, *The Varieties of Goodness* (1963); *see* H. Jones, *The Efficacy of Law* 42-66 (1969).

[57] In Miranda v. Arizona, 384 U. S. 436 (1966) the Supreme Court held that the privilege against self-incrimination requires that when an individual is taken into custody, he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

related concept of "control". What does it mean for a law to be effective in the sense of "controlling" other persons or their actions? The easiest and quickest way to see that effectiveness in that sense is a very complex matter is to think of one's own actions with regard to various laws. Even very simple actions of obedience or compliance with rules involve knowledge, motives, estimates of utility and other factors; thus viewed, "the effectiveness of law" is a simplistic symbol of what is actually a whole sweep of theories of action and theories of history. In some of those theories, law is only the product of social and economic forces; in others, law is a potent, active instrument of social and economic change. One's view of the effectiveness of law reflects his position vis-a-vis those wider theories.

In the above discussion there was some hint of a preferred normative or partly normative meaning, and indeed, there are good reasons for including a normative element in the concept of the "effectiveness" of law. Of course, it is easy enough to talk about the effectiveness of law in purely factual terms, and in that view the purpose sought need not be a good one; a sharp knife that is used to cut someone's throat is a good ("effective") knife and, similarly, as regards statutes that kept blacks out of washrooms. "Effectiveness" is sufficiently ambiguous to supply many other examples of purely factual uses of that term. But it is one thing to describe isolated facts and quite another to relate a set of empirical statements to a significant social-legal theory. Then, as was suggested above with reference to the results and consequences of minimum wages and housing laws and for other reasons discussed in Chapter 3, it is extremely difficult, if not impossible, to treat "effectiveness" in purely descriptive terms because the values that make a social theory significant intrude to qualify the factual statements. So, too, when effectiveness is examined as a phase of social control, where, as suggested, a significant degree of autonomy must be assumed, the "effectiveness" of law becomes largely a matter of self-control; again, the term has moral connotations. If, therefore, in the context of dealing with socio-legal problems, "effectiveness" has normative as well as descriptive connotations, a law is effective if it maximizes values. In integrative jurisprudence, the effectiveness of law is an aspect of certain social actions (law-as-action) discussed above, and it also signifies the maximization of value, account being taken not only of intended results but also of probable consequences. Thus, estimates of effectiveness would be rectified as the knowledge of results and consequences increased.

As implied above, "effectiveness" is not meaningful apart from the subject to which it is attached, and since we are here concerned not with the effectiveness of tools but with the effectiveness of law, we must employ concepts and theories relevant to that subject. If "law" is viewed as comprised only of rules or concepts, there is a difficult problem to be faced, the problem that puzzled Kant and continues to puzzle us, namely, how do rules ("reason") affect action? One may say that the effectiveness of law involves the

introduction or transmutation of rules into actions. But how is that possible, and if it does happen, what is the process or method wherein rules influence or become part of actions?

Next, is the problem raised by the legal positivism-natural law polemic; namely, when we ask about the effectiveness of law, are we inquiring about the effectiveness of rules that are recognized as law in legal positivism (which one?), or are we limiting the inquiry to such of those rules as are recognized as law in natural law philosophy (again, which one?). The latter direction parallels sociological and psychological discussions of the effect of internalized norms as opposed to that of technical rules. But the two are not equivalent since a moral principle sometimes has only verbal existence and, also, because a norm may be internalized (as, some whites' mores regarding blacks or vice versa) but not morally valid. Thus, the meaning, of "effectiveness of law" changes in relation to formal law, formal and ethically valid law, internalized norms and not internalized directives, sanctioned and sanctionless rules, combinations of the above and others. For example, it is important to ask whether one is concerned with law as a practical matter or as a logician or whether he is concerned with a socially significant theory of law. Finally, if "law" refers only to certain morally valid norms, the question of their effectiveness is very different from that where "law" also includes archaic, irrational and immoral commands and even, in Pollock's terms, the commands of an insane dictator. In this latter situation, it is very doubtful that any significant substantive generalizations about the efectiveness of law can be discovered.

For reasons stated above, the effectiveness of law can best be treated as an attribute of the social actions subsumed in or related to "law-as-action". It denotes a subject that can be investigated in many kinds of empirical research that may reasonably be expected to add to our knowledge. The characteristics of the relevant actions, discussed above, do not limit or exclude the discovery of correlations, but they raise questions about the use of mechanical models, the interpretation of the consequent findings, and the need to supplement such rigorous research by other methods and theories than those suggested by the model of physical science. These large questions of social science in relation to legal studies have been discussed elsewhere,[58] but certain gains are immediately evident. Instead of speculating about the effectiveness of concepts, we deal with persons and interpersonal actions. Instead of confronting the mystery of how rules or concepts influence action, we take certain actions as the given data. Instead of railing at "the law", one realizes that the rules in the books are inert and that legal ideas that never find expression in action do not produce social change. What counts not only pragmatically but also for socially significant jurisprudence is law-as-

[58] Hall, "Introduction" to *Theft, Law and Society* (1952) and Hall, *Comparative Law and Social Theory* (1963).

action. It is this action that gives point to the discussion of duration, succession, causation, person, change, and other basic categories as well as to discussions of the validity of law.

*Validity—the Correctness and Utility of Law-as-Action*

When attention is concentrated on the interrelations of rules, the restriction of "validity" to the logical meanings elucidated in positivist jurisprudence is much easier to defend than when decisions expressing those rules are viewed as proposed solutions of practical problems. Many factors are involved in the solution of practical problems, and factual and other questions concerning the rational support or justification of the moral validity of the rules must be considered in that context.[59] The question takes on additional meaning when it is seen that what counts most in the solution of social problems is action. Thus, the discussion of "validity" usually is elliptical or it consist of prognostication; it forecasts the influence of rules or it is elliptical when only the rules are approved while it is the relevant actions that are actually, but implicitly, the subject of judgment.

If we, therefore, take a further step from rules viewed as proposed solutions of practical problems to the actions that express them, several additional factors come into focus. What needed to be imagined is now observable. What was purely mental is now fused with part of the actual world and becomes subject to its laws. Since a rule is a generalization while actions are specific, there is no simple correspondence between rule and relevant actions. Since rules are general, the analysis of rules is correspondingly restricted; since actions are specific, their particularity also rises to attention. In this perspective appropriate speech is not expressed in terms of the "validity of rules" but in terms of the correctness or fittingness or utility of actions. A correct, right or useful action expresses sound values and contributes to the solution of a practical problems; it establishes and maintains decent human relations. The vast area of actions of conformity, obedience and compliance is an essential component of the legal institution, and litigation is also comprised of series of actions that are a far more significant subject for moral appraisal and theory than are codes of law and formulations of ethical principles.

The correctness or utility of certain actions is closely and rationally connected with their effectiveness. That certain actions are right or useful is necessary but not sufficient to make them part of law-as-action; they must also be done with "sufficient" frequency and be supported by a sufficiently large number of persons, law and official, to distinguish them from the actions of a martyr or a saint. Instead of separating pure rules from paralleling

[59] This was discussed in Ch. 3 especially at pp. 73-77 *supra*.

behavior, and the consequently necessary treatment of efficacy as a "condition" of law, we deal with equally important characteristics of law-as-action —its correctness or utility and its effectiveness.

In positivist perspectives where value is sharply separated from fact, there is a simple refutation of the above theory, namely, since action exists, it is factual; what ought to be does not exist and therefore is not found in action. It may be granted that despite persistent efforts to deduce ought-conclusions from is-premises, those arguments are not persuasive. It is necessary and important for many purposes to recognize the separation of the world of physical fact from the realm of value. But the present question is not one of logical implication or physical science; it concerns social action, especially action to archieve a worthwhile goal. Here, the sharp separation of is and ought, of fact and value, is misleading.

In the first place, on-going action is not a simple fact that remains fixed in its character and its course. On-going action can and does change. A champion swimmer, seeing a person drowning, may remove his coat and get ready to jump in, then change his mind, pick up his coat and walk away. He may do the opposite of that; he may stay or walk back and save the drowning person. Action, in short, is to a significant degree free; although it has a factual dimension, it also represents choice, person and mental state. It is far from being a fact in the sense that chairs and rocks are facts.

Second, on-going action is understandable only by reference to the goal that is sought. Such action therefore has a future dimension; one can think of that as what ought-to-be.

Third, if the goal is a desirable one, action partakes of that value even if it is not successful. Such action therefore has a normative dimension, discussed by Kant and others [60] interested in instruction by the examples set by moral leaders, parents and others who do what ought to be done. "Action speak louder than words"; as living fusions of fact, idea and value, *e.g.,* when a man does what he ought to do in keeping his promise, his action has moral value and is an example of what others ought to do. All of this must be taken into account in realistic descriptions of such actions. By like token, the positivist "validity" of law, whether it is reduced to factual attitudes or is restricted to the consistency of legal rules or used as a synonym of the "existence" of law, trades on the traditional connotation of "validity" but is wholly silent or misleading on questions of major concern in a social jurisprudence.

[60] "We teach how to will as we teach how to think, by fortifying and intensifying natural dispositions, by example, which suggests imitation, by difficulties to be solved (practical problems), by rousing energetic initiative and by disciplining it to persist." B. Croce, *Philosophy of the Practical* 18 (Douglas Ainslie transl. 1913).

*Conclusion*

The purpose that has motivated scholars to achieve what Professor Alf Ross calls a "monistic' legal philosophy is persistent, challenging and importtant. Notable attempts to achieve that goal fell short of the mark because they dismissed data and experience that cannot justifiably be ignored. Instead of pure concepts or rules or official behavior or factual attitudes or decision-making, the present submission is that certain series of actions designated "law-as-action" provide the unitary datum that is the necessary condition, not indeed, of a rigorously monistic jurisprudence in the degree that geometry or physics can be said to be "monistic" or "systematic" but of significant, interrelated jurisprudential knowledge in which such basic conceptions as effectiveness, validity, duration, and other categories are employed.

It may be thought that the path of further integration can be helped by using knowledge of interdisciplinary study. Unfortunately, however, theories of interdisciplinary study are conspicuous by their absence,[61] and it is possible only to venture some suggestions about what is involved in that sort of inquiry. A beginning can be made by taking a common-sense view of the procedure of teams of doctors, where a dozen or more experts contribute their various skills and special knowledge. Their reports are submitted to the leader of the team who, presumably, acts on some specific findings while he also acquires progressively increased knowledge of the person (patient) who has been examined and talked about by the specialits, each from his point of view and with respect to particular aspects of the person and the problem. As the reports come in (excluding any decisive negative report, *e.g.*, that the blood pressure is X and that no human being with X pressure can survive major surgery) the leader "pieces" them together, adding bit by bit to his understanding of the patient. Of course, his thinking is logical, *e.g.*, given a biological or medical law and a relevant datum X, Y is impossible or the probability of failure is very high. But what predominates as the distinctive feature of this sort of inquiry is the progressive imaginative construction and advance of the knowledge of the person and the problem. Although it may be possible, later, to generalize regarding some of the findings, initially there is an advance in insight and understanding rather than in general knowledge. It is the kind of knowledge that is characteristic of the expert rather than of the natural scientist.

The above example and discussion have the following implications for the advance of integrative jurisprudence and for relevant research. There

[61] "As is usual with interdisciplinary seminars, no very specific outcome was envisaged—beyond the always desirable 'interaction'." R. Brown, *Words and Things* vii (1958). A second major direction concerns the common interests of jurisprudence, political theory and science, the anthropology of law, and the sociology of law. See Hall, "Unification of Political and Legal Theory", 69 *Pol. Sci. Q.* 15 (1954), reprinted in Hall, *Studies in Jurisprudence and Criminal Theory*. Ch. IV (1958); and see A. Brecht, *Political Theory* 138n, 329n, 528, 555, 564-5 (1959).

must be a common subject; and a subject drawn from assumptions and implications of traditional legal philosophies, that builds on the work of twentieth century legal philosophers sensitive to current needs and which also invites the use of distinctive aptitudes and interests has much to recommend it. Interested legal philosophers and social scientists would recognize that the specific data they studied were part of that common subject and that the various parts or aspects of the subject interact. Knowledge of that interaction would emerge from the research on the facts, structures and values indicated by the concepts discussed above and studied from the perspective of the unifying construct. Thus, the legal philosopher particularly interested in moral problems would be constrained to focus his study on the ethical significance of certain actions; he would be influenced by their reflection of public interests, the inexorability of legal coercion, the interrelations of the effectiveness of law and the validity of law and the like. The significant demarcation of their field of interest would also facilitate the contributions of legal sociologists whose perspective was an integrative one. Not only would all logical methods be used in studies of adjudication —deductive, inductive, analogical and dialectical— some analysts would concentrate on the logic of practical reasoning, especially in decision-making, and on the logic of action.[62] Finally, there is the need for an apt terminology. Some terms must be redefined or invented to communicate the insight derived in research on a complex datum; these terms, as common symbols, would also serve to bring various contributions into rational juxtaposition. To appreciate the challenge of this task, we have only to think of the gap between insight into the unity of action and the difficulty of describing it, habituated, as we are, to treat separately what is actually an aspect of a vital union of various dimensions. But we also have abundant resources in the suggestiveness of the subject-matter of integrative jurisprudence and in the potentiality of language.

[62] Practical coherence differs from logical consistency. For example, Epimenides' syllogism, "I am a Cretan, all Cretans are liars, therefore, I am a liar", is logically valid; but if Epimenides was serious, *i. e.* if he wanted to be believe, this was contradicted by his act of saying what he said. *See* C. I. Lewis, *Values and Imperatives* 124 (1969). A person's set of actions, his "style of life", may exhibit many contradictions. In addition, since action exists in the world, it is subject to physical and biological laws, that is, there are factors to be considered in the coherence of actions that are irrelavant to the logic of sentence.