LINGUISTIC ANALYSIS AND LAW, SCIENCE AND POLICY: A COMPARISON OF METHOD

JOSE C. LAURETA *

I

Of the contemporary Anglo-American legal theorists, among the most exciting figures would be Professor Hart [1] of Oxford, and the famous team of McDougal and Lasswell [2] of the Yale Law School. The outlook, the point of view, or the philosophy advocated by Professor Hart has yet to be definitely and—perhaps even more importantly—accurately labeled. Sometimes, Professor Hart is identified

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* A.B., LL.B. (U.P.); LL.M. (Yale); Associate Professor of Law, University of the Philippines.

[1] Professor H. L. A. Hart is the incumbent Regius Professor of Jurisprudence at Oxford. His more important publications to date include THE CONCEPT OF LAW (1961); LAW, LIBERTY, AND MORALITY (1963); CAUSATION IN LAW (co-authored with A. M. Honore) (1959); *The Ascription of Responsibility and Rights*, reprinted in ESSAYS IN LOGIC AND LANGUAGE, 145 (Flew ed. 1952); *Philosophy of Law and Jurisprudence in Britain*, 1945-1952, 2 Am. J. Comp. L. 355 (1953); *Definition and Theory in Jurisprudence*, 70 L. Q. Rev. 37 (1954); *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 Pa. L. Rev. 953 (1957); *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); *Legal and Moral Obligation*, in ESSAYS IN MORAL PHILOSOPHY 82 (Melden ed. 1958); *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM (Hook ed. 1958); *Acts of Will and Responsibility*, in UNIVERSITY OF SHEFIELD, THE JUBILEE LECTURES OF THE FACULTY OF LAW, 115 (Marshall ed. 1960); *Negligence, Mens Rea and Responsibility*, in OXFORD ESSAYS IN JURISPRUDENCE, 29 (Guest ed. 1961); *Kelsen Visited*, 10 U.C.L.A. L. Rev. 709.

[2] Professor Myres S. McDougal is presently Sterling Professor of Law at the Yale Law School, while Professor Harold D. Lasswell is Edward J. Phelps Professor of Law and Political Science, also at the same school. Both have worked together for over a period of twenty years now. The result of this joint effort has been a large number of published works, consisting largely of periodical articles and a number of volumes which (the former, especially) are too numerous to enumerate here. The major ones, however, are: *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L. J. 203-205 (1943); *The Identification and Appraisal of Diverse Systems of Public Order*, A.J.I.L. 1-29 (1959).

See also *McDougal, The Impact of International Law upon National Law, A Policy Oriented Perspective*, 4 South Dakota Law Review, 265-912 (1959); *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 A.J.C.L. 24-57 (1952) Reprinted in 61 Yale L. J. 915-946 (1952); *The Rolle of Law in World Politics*, 20 Miss. L. J. 264 (1949); *Law as a Process of Decision: Policy Oriented Approach to Legal Study*, 1 Natural L. F. 53-72 (1956).

The only volume in which Professor McDougal's and Lasswell's names appear together as authors is LAW AND PUBLIC ORDER IN SPACE (1963). But see also MCDOUGAL AND FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); MCDOUGAL AND BURKE, THE PUBLIC ORDER OF THE OCEANS (1962); MCDOUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER (1959); LASSWELL AND KAPLAN, POWER AND SOCIETY (1952).

as an "analytic" jurist.[3] And to the extent that this characterization suggests that he is merely a belated exponent of Austinianism,[4] it is not only misleading but erroneous. More accurately, however, Professor Hart is ticketed as a "linguistic analyst." [5] This, indeed, is a position, a method, or a "way of doing philosophy," which he shares with a band of contemporary British philosophers who fly the banner of the "Oxford" school and claim for their movement the rightful title to the appelation "modern philosophy." [6] While Professor Hart is not perhaps the leading figure of this movement, its extension into the field of jurisprudence is an achievement due largely to him.[7]

On the other hand, the philosophy espoused by Professors McDougal and Lasswell was, from the start, specifically styled "Law, Science and Policy," [8] a slogan explicitly calculated, so it would seem, to express the school's dominant temper, methodology and objective. Today, twenty-one years after its launching,[9] it is now the proud boast of its adherents that this school has at last come to be the fashion among the more forward-looking American legal scholars—at least in spirit, if not in all of its aspects. Professor Hart, however, so

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[3] See, for instance, NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE, 22 (1959); BODENHEIMER. JURISPRUDENCE. 97 (1962); FRIEDMANN, LEGAL THEORY, 208, 209-210, 225, 226-227 (1960). See also scattered comments on Hart in STONE. LEGAL SYSTEMS AND LAWYERS' REASONING. 48, 49. 52. 53, 70-76, 81, 83, 93; 104-105, 110, 131-134, 206-207, 264, 275 (1964).

[4] This is a mistake which Professor Bodenheimer, particularly, makes; but apparently, not Professor Northrop. Professor Friedmann's position is ambiguous.

[5] See, for instance, Blackshield, *The Game They Dare Not Bite: Or, What's Wrong with Linguistic Analysis*, 3 Jaipur Law Journal, 44, 66 (1963). See also NORTHROP, *op. cit. supra*. PASSMORE, A HUNDRED YEARS OF PHILOSOPHY, 453 (1957).

[6] See WARNOCK, ENGLISH PHILOSOPHY SINCE 1900 (1958); URMSON, PHILOSOPHICAL ANALYSIS (1956); AYER, *et al.*, THE REVOLUTION IN PHILOSOPHY (1956).

[7] Professor Northrop also credits Professor Glanville Williams and Graham B. J. Hughes for this achievement, *op. cit. supra*, at 22. There are, however, marked differences between Professor Hart on the one hand, and Professor Williams and Hughes on the other, not only as to method but also as to content of their respective views. It is perhaps his more acute awareness of this fact which prompted Professor Blackshield to assert rather categorically: "The credit for bringing linguistic analysis to legal philosophy must go exclusively to Professor H. L. A. Hart of Oxford." Blackshield, *op. cit. supra* at 66.

See also PASSMORE, *op. cit.*: ". . . Hart, who is now Professor of Jurisprudence at Oxford, is well known for his application of 'ordinary language' techniques to problems in legal philosophy."

Further, STONE, *op. cit. supra*, at 48, 49; and finally, Pannam, *Professor Hart and Analytical Jurisprudence*, 16 J. Legal Ed. 379-404 (1964);

[8] See particularly, *Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, supra* note 2.

[9] LSP (Law, Science and Policy, as this course is fondly referred to at the Yale Law School) issued its first "call to arms" in 1943. See article referred to in note 8.

it would seem, has yet to acquire a distinctive label as well as a coherent and an equally vociferous following.

Aside from the fascinating character and the intrinsic merit of the respective theories advocated by these two schools, interest in both has been heightened of late on account of the apparent hostility of their rival defenders. To be sure, Professor Hart himself has yet to take explicit notice of Law, Science and Policy, or if he has already done so, to express his opinion on it in print. On the other hand, Professor McDougal's views on Professor Hart's theories are well-known, particularly to those who have sat in the former's classrooms. These views consist largely of the uncomprehending accusation that Hart, like most traditional legal theorists, is hopelessly wedded to the narrow conception of law as consisting chiefly, if not solely, of a "body of rules," completely disembodied from the social process in which it functions and which it affects, and by which it is affected in turn. A customary corollary to this accusation is the charge that Professor Hart is also a subscriber to what is derisively called "mechanical" jurisprudence, which supposedly misconceives the function of the decision-making process as consisting solely of the mechanical derivation of inexorable conclusions from predetermined premises. In short, that the theory which Professor Hart offers—to borrow Laski's terse comment on Kelsen's pure theory of law—is at best a sterile "exercise in logic (but) not in life." [10] And, because of his espousal of the methods of the linguistic analysts, as amounting, at worst, to an inane and fruitless philology. Accordingly, it is not surprising that Professor McDougal is impatient even with the merest suggestion that there might be between his system and that of Hart some element of similarity or affinity.

The repudiation of any such similarity or affinity is, of course, asserted by Professor Hart's sympathizers with equal heat and vigour. This, indeed, is an assertion which they are wont to avow with matching vehemence. This is so, so it would seem, in part because they are wearied by Professor McDougal's obstinate and seemingly uncritical adherence to the epistimological principle that empiricism is the only arbiter of meaning and truth. To them this attitude is reminiscent of the extreme dogmas of the logical positivists of the 1930's who, at the inception of the movement, tended to espouse their doctrines with the exuberance and zeal of the American muckrakers of a slightly earlier period. It is now commonplace, of course, that these extreme views became outmoded very quickly, and have in fact been abandoned long ago even by its most vocal

[10] Laski, The Crisis in the Theory of the State, in II LAW: A CENTURY OF PROGRESS, 1835-1935, 1, 7 (1937).

partisan—save perhaps for the most incorrigible among the fanatics of the cause.[11]

At the same time, Professor Hart's adherents—and perhaps too, even those who might be expected to adopt a sympathetic attitude towards Law, Science and Policy—are genuinely dismayed and disheartened by the mistifying strangeness and bewildering perplexity of the jargon of the school.[12] This they see as a formidable, if not an insurmountable obstacle to understanding and comprehension. It would seem then that the hostility between these two schools has in part been generated by this ineffectiveness of communication.

Now, this is a lamentable situation for these two schools have something worthwhile to teach each other which can contribute greatly to the common effort to clarify the concept of law. Specifically, it would seem that both schools, though prompted by divergent aims, are advocating the same or equivalent methods of inquiry. Of itself, this similarity or equivalence is not remarkable. But what is so, is the fact that Professor Hart on the one hand, and Professors McDougal and Lasswell on the other, have arrived at the same methodological techniques by entirely different routes: the one, by focusing his attention on language and unraveling its characteristics, its structure, its peculiarities, and the variety of its possible uses; the other two, by their insistence on looking always behind the veil of words and focusing their gaze unblinkingly at the facts, not solely to realize whether what are being dealt with are real, actual, sensible phenomena, and not merely figments of a philosopher's dream, nor solely to see them as distinct, discrete and isolated data, but to take account of their infinite number and variety, as well as their varied and complex interrelationships, in order the more fully to apprehend their significance and relevance not only to each other, but also

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[11] WARNOCK, ENGLISH PHILOSOPHY SINCE 1900. See particularly chap. 4.

[12] For a typical reaction, see the following comment from a review of one of his works: "The writings of Professor McDougal and his various associates have been much neglected on this side of the Atlantic. Let it be said immediately that *the barrier has been more one of language than of geography;* the reasons for discarding the traditional terminology of international law have been explained by Professor McDougal before. but, however much one appreciates his aims, the simple fact is that *many readers find the sheer labour of coping with this substitute terminology too oppressive. The result is often to confuse or conceal a notion which is common ground and generally understood and to plunge the reader into a display of verbal pyrotechnics.* Nowhere is this better demonstrated than in Professor Lasswell's Introduction when we read that: 'the cruciality of the mid-elite for more distant years does not imply that the mid-elites are irrelevant today. The senior elite undergoes chronic attrition. More than that, the policies of elite individuals and factions within the senior elite are affected by the currents present among the mid-elite as these currents are perceived by seniors' (p. XXV). But, behind this jargon, at least in the main text, lies a wealth of law and of ideas . . ." D. W. Bowett, Book Review (of MCDOUGAL AND FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, *supra*), 38 B.Y.I.L., 517 (1962); emphasis supplied.

to the larger context, or variety of contexts, in which they occur, and of which they are part.

And it is by reason of this fact that both schools can be useful to each other. For by approaching the question "What is Law?" through different routes, they have each unraveled distinctive insights into the perplexities which, for so long now have impeded our effort to understand the concept of Law and have troubled our attempts to give an adequate account of it. It is precisely these distinctive insights which these two schools could teach each other, if they can but learn to listen to each other with sympathy and understanding.

What follows is an attempt to indicate what these distinctive insights are by comparing the distinctive methodology of each of these two schools.

II

> In searching for and finding . . . definitions we "are looking not merely at words . . . but also at the realities we use words to talk about.[13]

Professor Hart's suggested method of inquiry, which he first expounded in his inaugural lecture [14] at Oxford in 1953, is contrasted by him with the "common mode" of explanation which is by "definition." "Definition," or more specifically, "traditional," or "classical," or "Aristotelian," definition, or *"definition per genus et differentiam,"* [15] is rejected by him as a method of explanation for the reason that it is, so he asserts, "ill-adapted" for elucidating the concept of "law," or such logically equivalent "fundamental concepts" as "right," "duty," "corporation," "state," etc.[16] The inadequacy of traditional definition as an analytical tool for such terms as "law," "right," "duty," "corporation," "state," etc., stems from the fact that such terms partake of the nature of what Whitehead and Russell have called "logical constructs" [17] or "incomplete symbols"—or in Benthamite terminology, of "fictions." [18] "Logical constructs" or "incom-

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[13] Austin, A Plea for Excuses, 57 *Proceedings of the Aristotelian Society,* 8 (1956-1957), reprinted in AUSTIN, COLLECTED PAPERS (1961), quoted in HART, THE CONCEPT OF LAW, *supra* at 14.

[14] Hart, *Definition and Theory in Jurisprudence* (hereafter cited as "Definition"), *supra* at 37, 42.

[15] See, for instance, STEBBING, A MODERN INTRODUCTION TO LOGIC, 432 (1930); also BLACK, PROBLEMS OF ANALYSIS, 9 (1954).

[16] Hart, *op. cit. supra* note 8, at 38.

[17] See RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY, chap. XVII, 1919. For an account of the impact of this concept in legal philosophy, see NORTHROP, *op. cit., supra* at 20-24.

[18] Hart, *Definition,* at 41.

plete symbols," Russell explains, are words which have "no significance in isolation but only as part of whole sentences." [19] The reason why such words or symbols are devoid of any "significance" when considered apart from or "in isolation" of the sentences of which they are part, is due to the fact that there are no concrete or material objects in the external world to which they correspond, and to which we may appeal for the purpose of explaining them. In contrast, this relitionship of one-to-one correspondence between word or symbol on the one hand, and "referent" or "designatum" on the other, is true of ordinary words, particularly nouns or so-called material-object words, such "chair," "table," "book," etc. It is in the elucidation of such words that the technique of definition has, for some purposes, proved particularly apt.

This perplexity generated by this peculiar characteristic of logical constructs or incomplete symbols is immediately felt as soon as one attempts to explain or "define" them. Professor Hart illustrates this point as follows: [20]

> The first efforts to define words like 'corporation,' 'right' or 'duty' reveal that these do not have a straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. There is nothing which simply 'corresponds' to these legal words and when we try to define them we find that the expressions we tender in our definitions specifying kinds of persons, things, qualities, events, and processes, material or psychological, are never precisely equivalent to these legal words though often connected with them in some way.

The lawyer's perplexity over these words is reminiscent of St. Augustine's puzzlement over the question "What is time?" "What then is time?" he asked. "If no one asks me," he answered, "I know, if I wish to explain it to one that asketh, I know not." [21]

Contrasting legal concepts with ordinary material-object words, Hart points out: [22]

> It might well be said that the word 'chair' is directly aligned with and so 'means' or 'stands for' a certain type of thing, in that case an article of furniture. Similarly the word 'red' maybe said to be directly aligned with a certain discernible type of color. But legal concepts are different: their relation to fact is more complex and indirect and much in need of clarification, and if they are submitted to the usual mode

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[19] RUSSELL, PORTRAITS FROM MEMORY, 42 (1956), cited in NORTHROP, *op. cit.*, 21-22.

[20] Hart, *Definition*, at 38.

[21] CONFESSIONS OF SAINT AUGUSTINE XIV, 14, quoted in HART, THE CONCEPT OF LAW (hereafter cited as "CONCEPT"), *supra* at 13.

[22] Hart, Analytical Jurisprudence in Mid-Twentieth Century; A Reply to Professor Bodenheimer (hereafter cited as "Analytical Jurisprudence"), at 960-961.

> of definition, distortion and mystery results. The unsatisfactory use in definitions of a right, a duty or a corporate entity of the terms "fictions", "collections" or "predictions" had in part at least been due to this cramping framework imposed upon the inquiry into the character of these concepts by a method of definition which makes a frontal attack on single words. . . .

The truth of these observations is plain enough, and is at least intuitively, if not always consciously, realized. And yet, it is commonplace that when one is asked for a definition of "law," or of some other legal concept, one feels driven to search for some "plain fact," or "thing," or "event," or some unique sensible "quality," to which the term or concept being defined may be concretely matched and actually attached. And if none can be found, to invent or create one which, though cautiously qualified as "fictional," or "spiritual," or "invisible," is nevertheless vigorously asserted as "actual" or "real."

Now we are told by the linguistic—or "Oxford" or "Cambridge" [23]—analysts that this tendency is generated by the fact that the "noun" *form* of the term "law," or of such other terms as "right," "duty," or "state," insidiously imparts upon such words a seductive similarity with other material-object words, such as "chair," "table," "book," etc. This deceptive feature of the term, coupled with the suggestive form of the question "What is 'Law'?" easily beguiles into the belief that, like the words "chair," "table," "book," etc., the term "Law" must, of necessity, similarly possess some tangible or concrete "referent" or "designatum" which one may "sense," or "feel," or "take hold of," if one were minded to do so.[24]

It should not be difficult to realize that behind this conception as regards the relationship which holds between words and the things they refer to, lurks a theory as to the nature and function of language, back of which lies a theory of knowledge and of meaning, or put differently, some conception as to the nature of "reality," inarticulate and even unconscious perhaps, but still there. This theory is what has come to be known in philosophy as the "referential" or "picture" theory of meaning. The essence of this theory is the doctrine that the fundamental function of language, or of linguistic symbol systems generally, is to "refer to," or "represent," or "stand for,"—or if you will—"picture," reality.[25]

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[23] For some distinctions between these two groups of philosophers as to their practices and methods see PASSMORE, *op. cit. supra* at 425-458.

[24] See, for instance, WARNOCK, *op. cit., supra* at 73-78; also Hart, *Definition, supra* at 40-41.

[25] See Daitz, *The Picture Theory of Meaning*, in ESSAYS IN CONCEPTUAL ANALYSIS (Flew ed.) 53-70 (1956).

Impressed by the tremendous success of the empirical methodology of the sciences, as well as by the new form of logic, called symbolic logic, within which traditional mathematics and logic were shown to be merely special cases, the "picture" theory of meaning, found expression in the so-called "verifiability" principle of the logical positivists of the 1930's. According to this polemical doctrine there are only two types of "significtnt" or "meaningful" statements, namely: (1) the *synthetic* or *empirical,* which is verifiable by sense experience, and is exemplified in its highest form by scientific statements, and upon a lesser plane, by such common-sense statements as "The book is on the table"; and (2) the *analytic,* which are spoken of as "empty," and are true only by definition, a form typified by purely logical propositions or mathematical formulae. All other statements, theological positivists insisted, were "non-sensical." [26]

Now, while it may be that logical positivism in this extreme form, is no longer seriously held by anyone,[27] it cannot be denied that the introduction of its thoroughgoing empirical spirit and methods in the field of law, had had the beneficial effect of ridding jurisprudence of hoary "metaphysical" conceptions (in the traditional sense),—or at least, of undermining the respectability of such notions and thereby rendering them innocuous. However, this uncompromising anti-metaphysical bent also encouraged a slide in the opposite direction which, in turn, led to two distinct types of error. The first of these is described by Professor Northrop as "the erroneous conclusion that because many abstract nouns of legal science, such as "right," "duty," "obligation," "justice," do not refer *in isolation* to concrete objects for their meaning, they therefore have no scientific meaning whatever." [28]

The second error is perhaps the more pernicious of the two. This, however, is attributable not solely to the empirical spirit of positivism but perhaps, in larger measure, to another element of Western philosophy, namely, its pervasive *reductionist* tradition. As to this second error the main source of mischief would seem to be Russel's theory of "logical atomism." [29] Briefly, the tenet of this theory appears to be this: Differing diametrically from the earlier British philosophers, principally F. H. Bradley, who conceived of "reality"

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[26] WARNOCK, *op. cit. supra* at 44-47.

[27] The most important recantation from among the early proponents of logical positivism is that of Professor A. J. Ayer. See, for instance, his *On the Analysis of Moral Judgments* 20 Horizon, no. 117 (1949) reprinted in AYER, PHILOSOPHICAL ESSAYS, 231-249 (1963); also his *The Vienna Circle,* in AYER, *et al.,* THE REVOLUTION IN PHILOSOPHY, *supra* 70187.

[28] NOTHROP, *op. cit.* at 22.

[29] See Russell, *Logical Atomism,* in LOGICAL POSITIVISM (Ayer ed. 1960), 31-59. See also URMSON, *op. cit. supra* particularly Parts I and II.

as a "seamless undifferentiated whole," Russell postulated that the true nature of "the world of science and daily life" consists of some basic, fundamental element. Accordingly, to grasp the nature of reality, and to be able "to give an account of" it, the task of philosophical inquiry must be "to strip off the surface complexities of the world" so as "to arrive at and isolate 'the late residue in analysis'." And to this "last residue" Russell gave the name "atomic fact." [30] For Russell, therefore, analysis consisted of the breaking up, or the "reduction," of a concept or entity into its component elements until one arrives at the most basic or the most fundamental of these, namely, the no-longer analyzable or reducible "atoms" or "atomic facts." It should be easy enough to see that Russell's atoms are akin to the so-called "essences" or "ideas" of older philosophies, especially metaphysics.

Accordingly, it is not surprising that the early American legal realists, such as the still unregenerated Llewellyn,[31] and Gray,[32] prompted by this reductionist tradition, tended to overlook and even to disregard the "surface complexities" of the process of law, in their relentless quest for some simple, isolable, and no longer analyzable element. And driven by the remorseless logic of their uncompromising empiricism, they were led inexorably to identify "the last residue" of their analysis with some "verifiable," "sensible," "tangible" datum. This datum assumed varying degrees of concreteness and generality, ranging from a court "decision" [33] to "what judges do in fact," [34] or more comprehensively, to "what officials do." [35]

These, indeed, were the "great discoveries" of the early American legal realists which they triumphantly proclaimed as constituting the "true meaning" or the "essence" of law; or expressed in the contemporary jargon of the school, as the tangible "referent," or "designatum," or the "empirical indices," [36] of that concept. Indeed, in the heyday of the movement, these views were preached by them with the missionary zeal of newly repentant sinners who, having stumbled

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[30] A brief but adequate account of Russell's position may be found in WARNOCK, *op. cit.*; see particularly chap. III, which is devoted to the exposition of Russell's philosophy.

[31] See, for instance, his THE BRAMBLE BUSH, 1951.

[32] See his THE NATURE AND SOURCES OF LAW (1902).

[33] GRAY, *op. cit., supra* at 276.

[34] Holmes, *The Path of the Law*, in COLLECTED PAPERS, 173 (1920).

[35] LLEWELLYN, *op. cit., supra* at 9.

[36] "Empirical indices" is the preferred term of Professors Lasswell and McDougal. "Refererent" and "designatum" are fashionable among the adherents of the general semantics movement inspired by Kovzybski such as Walter Probert and Frederick Beutel.

at last upon the path of righteousness and salvation, and are eager to share their gift of grace.[37]

One error which unavoidably results from this reductionist predisposition is the tendency to amalgamate and, accordingly, to confuse "issues that should be distinguished." [38] For instance, it is "clear that the assertion that corporate bodies are real persons and the counter assertion that they are fictions of the law," are "ways of asserting or denying the claims of organized groups to recognition by the State." The familiar tendency, however, is that "such claims have always been confused with the baffling analytical question 'What is a corporate body?' so that the classification of such theories as Fiction or Realist or Concessionist is a criss-cross between logical and political criteria." [39]

Finally, it should also be noted that it is this reductionist tendency which continues to breed and to nurture the belief that words or concepts or things possess "true meanings" or "essences." It should not be difficult to see that it is this belief which tends to cramp the framework of inquiry by severely narrowing the focus of attenton and inducting "a frontal attack upon single words." [40] It is precisely this error which in the sciences, at first blinded the physicists to the proper context for the adequate and meaningful investigation of phenomena, and led them in the vain quest for such things as "absolute time" and "absolute space." [41] In the field of jurisprudence, we find this tendency still rampant. And the result is that while the various "elucidations" of legal concepts "spring from the effort to define notions actually involved in the practice of a legal system they rarely throw light on the precise work they do there." [42] Accordingly, such "elucidations" or "definitions" frequently "seem to the lawyer to stand apart with their heads at least in the clouds; and hence it is that very often the use of such terms in a legal system is neutral between competing theories. For that use 'can be reconciled with any theory, but is authority for none'." [43]

Inquiry and elucidation by resort to the traditional technique of definition, even if informed by empiricism, is subject to still other

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[37] The fervor with which the American legal realist preached their gospel was noted and mildly rebuked by Mr. Justice Cardozo in a speech which he delivered before the New York Bar Association in 1932, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (Hall ed. 1947) 13-14.

[38] Hart, *Definition, supra* at 40.

[39] *Ibid.*

[40] Hart, *Analytical Jurisprudence, supra* at 961.

[41] Cohen, Felix B., *Field Theory and Judicial Logic*, reprinted in his LEGAL CONSCIENCE, 121 (1960).

[42] Hart, *Definition, supra* at 40.

[43] *Ibid.*

objections. But even only those noted above should suffice to show that the analytic technique implicit in the definitional approach "is at best unilluminating and at worst profoundly misleading." [44]

Professor Hart's suggested analytical technique grew out of the insights.

III

> We are using a sharpened awareness of words to sharpen our perception of the phenomena.[45]

It is perhaps important to stress at the outset that Professor Hart does not assert that the term "law," or other legal concepts, or similar terms, have no relation whatsoever to facts. Neither does he assert that in the analysis of concepts we need to concern ourselves only with words, or solely with sentences or linguistic formulations. Rather, what he does assert is that while legal concepts are indeed related to facts this relationship "is more complex and indirect." [46] This insight, should immediately "sharpen awareness" of the fact that any effort to elucidate such concepts by resort "to the usual mode of definition"—which, as noted above, is suitable only for words or concepts of a different character—can only result in "distortion or mystery." This latter insight should in turn indicate that the first step to enlightenment lies in the abdication of the vain quest for discrete and tangible "referents" which, being non-existent, are necessarily undiscoverable.

In place of this fruitless enterprise, Professor Hart would redirect inquiry to the investigation, and consequently, the specification, of the various conditions which would be necessary and sufficient for the truth of a given statement,[47] *e.g.*, "Law is a . . ." Obviously, what these conditions are will necessarily be multifarious and variable, for language merely mirrors the infinite diversity and variety of life itself, which it is intended to reflect, and of which, indeed, it is merely part.[48]

This technique of analysis is explained by Professor Hart in some detail, as follows: [49]

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[44] *Ibid.*
[45] Austin, *A Plea for Excuses*, *op. cit.*, *supra* note 5.
[46] Hart, *Definition*, *supra* at 46.
[47] *Ibid.* at 47-49.
[48] An interesting short article on this point is Ambrose(The Problem of Linguistic Adequacy in PHILOSOPHICAL ANALYSIS (Black ed. 1962) 14-35. See also Austin, *A Plea for Excuses*, cited in note 13, *supra*.
[49] Hart, *Analytical Jurisprudence*, *supra* at 961.

> I have advocated in my lecture the application in the analysis of fundamental legal concepts of a different technique . . . The technique I suggested was to forego the useless project of asking what the words taken alone stood for or meint and substitute for this a characterization of the function that such words perform when used in the operation of a legal system. This could be found at any rate in part by taking the characteristic sentences in which such words appear in a legal system, *e.g.*, in the case of the expression "a right", such a characteristic sentence as "*X* has a right to be paid *Y* dollars". Then the elucidation of the concept was to be sought by investigating what were the standard conditions in which such a statement was true and in what sort of contexts and for what purposes such statements were characteristically made. This would get away from the cramping suggestion that the meining of a legal word is to be found in a fact-situation with which it is correlated in some way as simple and straight-forward as the way in which the word "chair" is correlated with a fact-situation and substitute for this an inquiry into the job done by such word when the word was used in a legal system to do its standard task.

The application of this method of elucidation is illustrated by him as follows: [50]

> I would tender the following as an elucidation of the expression "a legal right"; (1) A statement of the form "*X* has a right" is true if the following conditions are satisfied: (a) There is in existence a legal system. (b) Under a rule or rules of the system some other person *Y* is, in the events which have happened, obliged to do or abstain from some action. (c) This obligation is made by law dependent on the choice either of *X* or some other person authorized to act on his behalf so that either *Y* is bound to do or abstain from some action only if *X* (or some authorized person so chooses or alternatively only until *X* or such person) chooses otherwise. (2) A statement of the form "*X* has a right" is used to draw a conclusion of law in a particular case which falls under such rules.

Applying the same technique to the question "What is law?" it is clear that a meaningful answer cannot be cast in the simple and familiar form: "Law is a . . ." Rather, what needs to be done is to sort out and distinguish the "characteristic sentences" in which the word "law" is used, and as to each of these distinctive "characteristic sentences," to investigate the "standard conditions" under which each of such sentences are ordinarily considered true. What Professor Hart means by the term "standard conditions" is adverted to by him, although in a very general way only, in his references to the "sort of contexts" in which, and the "purposes" for which, the statement being analyzed is made. However, it is clear that the investigation into "characteristic" linguistic usage which Professor Hart proposes, far from requiring solely an inquiry into the dictionary meaning of words, in fact demands an examination of the

[50] Hart, *Definition*, *supra* at 49.

various and the varying situations—or if you will, "contexts"—in which the sentence is used and is ordinarily regarded as meaningful. Undoubtedly, the examination of such "situations," or "contexts," or "standard conditions," cannot be anything else surely but an inquiry into facts.

Thus, it will be seen that Professor Hart's suggested analytic technique is not only rigorously empirical: it is at the same time explicitly "contextual," and necessarily "multifactoral." However, although unquestionably empirically oriented, Professor Hart is also keenly aware of the fact that people not only communicate primarily through the use of language, but also tend to—and, indeed, can—see the world only through the interpretative frame of the particular language system into which they are born, in which they are trained, and with which they cope with the world in their daily lives. This insight, as a matter of fact, has been an abiding preoccupation of Western philosophy especially in recent years, and is the central theme of the so-called Oxford linguistic analysts.[51] In this connection, it might be recalled how the deceptive noun-form of such terms as "law," "right," "duty," "space," "time," etc., which has had men's minds bewitched for so long, has led enlightenment astray for many centuries and, indeed, continues to lo so still. It is perhaps on account of his awareness of this fact that Professor Hart never seems to tire of repeating professor J. L. Austin's illuminating stricture: "We are using a sharpened awareness of words to sharpen our perception of the phenomena." [52] This theme has also been well-expressed by Lord Russell: "With sufficient caution, *the properties of language may help us to understand* the structure of the world." [53]

While these observations should suffice to discredit the vacuous and unintelligent charge that linguistic analysis is a wasteful— or at best, is a harmless—excursion into philology, nevertheless, Professor Hart's answer to it may prove not only interesting but enlightening: [54]

> The question 'Is analysis concerned with words or with things?' incorporates a most misleading dichotomy. Perhaps its misleading character comes out in the following analogy. Suppose a man to be occupied in focusing through a telescope on a battleship lying in the harbor some dis-

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[51] See, for instance, BLACK, LANGUAGE AND PHILOSOPHY 112 (1949); also RUSSELL, AN INQUIRY INTO MEANING AND TRUTH (1940); or more recently ORDINARY LANGUAGE (Chappell ed. 1964). As regards the extension of this spirit to jurisprudence) see account in, Hart's *Definition, supra, and Analytical Jurisprudence, supra.* See also Preface of OXFORD ESSAYS IN JURISPRUDENCE (Guest ed. 1961).

[52] See note 14, *supra.*

[53] RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 429 (1910).

[54] Hart, *Analytical Jurisprudence, supra* 967.

> tance away. A friend comes to him and says, 'Are you concerned with the image in your glass or with the ship?' Plainly (if well advised) the other would answer 'Both.' I am endeavoring to align the image in the glass with the battleship in order to see it better.' It seems to me that similarly in pursuing analytic inquiries we seek to sharpen our awareness of what we talk about when we use our language. There is no clarification of concepts which can fail to increase our understanding of the word to which we apply them. The successful *analysis or definition of complex or perplexing terms or forms of expression have certainly some of the essential elements of the discovery of fact, for in elucidating any concept we necessarily draw attention to differences and similarities between the type of phenomenon to which we apply the concept and other phenomena. In so doing we gain a wider and a more detailed conspectus of both words and of things we are in effect making for ourselves a map of a wider area than that we are used to considering apart from such analytical inquiries.*

As for the crucial and decisive relevance of the context on the meaning of words and expressions, this is illustrated by Professor Hart by means of the following example: [55]

> Take the notion of a trick in a game of cards. Somebody says "What is a trick?" and you reply "I will explain: when you have a game and among its rules is one providing that when each of our players has played a card then the player who has put down the highest card scores a point, in these circumstances the player is said to have 'taken a trick'." This natural explanation has not taken the form of a definition of the single word 'trick': no synonym has been offered for it. Instead we have taken a sentence in which the word 'trick' plays its characteristic role and explained it first by specifying the conditions under which the whole sentence is true, and secondly, by showing how it is used in drawing a conclusion from the rules in a particular case. Suppose now that after such an explanation your questioner presses on: "That is all very well, that explains 'taking a trick' "; but I still want to know what the word 'trick' means just by itself. I want a definition of 'trick' . . ." If we yield to this demand for a single word definition we might reply: "The trick is just a collective name for the four cards." But someone may object: "The trick is not just a name for the four cards because these four cards will not always constitute a trick. It must therefore be some entity to which the four cards belong." A third might say: "No, the trick is a fictitious entity which the players pretend exists and to which by fiction which is part of the game they ascribe the cards." But in so simple a case we would not tolerate these theories, fraught as they are with mystery and empty of any guidance as to the use made of the word within the game: we would stand by the original two-fold explanation; for this surely gave us all we needed when it explained the conditions under which the statement "He has taken a trick" is true and showed us how it was used in drawing a conclusion from the rules in a particular case.

In this example it is plain that the word "trick" derives its whole meaning and significance solely from the particular game of

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[55] Hart, *Definition*, *supra* 47-48.

cards of which it is a part and in which it performs a specific function. And, as the tortured effort to give the term a meaning without reference to that game clearly demonstrates, any attempt to explain, or elucidate, or define it divorced from its proper context leads inexorably to distortion and mystery, or, in the very least, to something utterly senseless or devoid of meaning.

So too with similar non-material terms as "law," "right," "duty," "state," "corporation," etc. Thus, even a cursory examination of the books will show how many times the "law" has been reincarnated in the Flying Dutchman and condemned to live the life of a "homeless wandering ghost"[56] by the many efforts to explain it completely apart from the social process which is its rightful abode, and in which alone it has significance. And for how long the vagrant "spirits" of many a "corporation" or "state," which have been spawned in a similar manner, will continue to roam the earth and haunt many a legal scholar, no one can foretell.

One last observation on Professor Hart's method of analysis. In his explanation of the various factors which are relevant to the proper context of inquiry as regards the concept of law, there is one dimension which he stresses, namely, the *perspective* or the *point of view* of the inquirer. This aspect he brings out in the distinction which he draws between what he calls the "external" and "internal point of view" relative to a rule or legal system.

Professor Hart hints at this distinction in the following statement: [57]

> It is possible to be concerned with . . . rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the "internal points of view' . . .

The first point of view is further distinguishable from the second in that "the external point of view . . . limits itself to the observable regularities of behavior." In contrast, the "internal" point of view implies that the rule or system which is the object of inquiry is "generally accepted" as a "standard of behavior," and is "generally supported by social criticism and pressure for conformity." [58]

In view of this difference, it should be clear that in attempting to elucidate a particular statement about law, account must be taken of the perspective of inquiry. Unless this is done confusion and

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[56] This moving phrase is Judge Frank's.
[57] HART, THE CONCEPT OF LAW, *supra*, at 88.
[58] *Ibid.*, at 86, 88, 96, 99.

ambiguity are likely to result. In the case of the "external" point of view, moreover, Professor Hart further warns that [59]—

> Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view.

So too among those who share the internal point of view, one must distinguish between the differing perspectives of "officials, lawyers, or private persons who use" the rules "in one situation after another, as guides to the conduct of social life, as the basis of claims, demands, admissions, criticisms, or punishment, viz., in all the familiar transactions of life according to rules".[60]

From what has already been said, it should be clear that no one account, from any particular perspective, for any particular purpose or multiplicity of purposes, will suffice to exhibit the *totality* of the legal order and its various processes in all its bewildering complexity and variety. It is precisely this insight which reveals most starkly the utter poverty of many theories which have been offered as accounts of the concept of law. This is true of the natural law school which finds the essence of the process in some ultimate metaphysical or theological postulate. It is true too of the realist school to whom the process incarnates itself most truly in a "decision." And it is true as well of a whole host of others who would distill the process into an authoritative body of rules, or sublime it in the mystical folk-soul of a people, or in an inexorable historical process, or in some *Grundnorm,* or some undiscoverable sovereign brooding somewhere in universe.

Here too, it is pertinent to indicate that the source of Professor Hart's insight into the so-called "external" and "internal points of view" relative to a rule or legal system, or put differently, into the variety of the possible uses of legal discourse in varying contexts and differing perspectives, has been his preoccupation with language.

Professor Hart tells us: [61]

> . . . we have in the new analytical weapons, and in the new awareness which recent philosophy has brought of the radically different types of function which language performs, a vehicle for better understanding the world in which and about which we use language of various sorts.

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[59] *Ibid.*, at 86-87.
[60] *Ibid.*, at 88.
[61] Hart, *Analytical Jurisprudence at Mid-Twentieth Century: A Reply to Professor Bodenheimer, supra,* at 963.
[62] EINSTEIN & INFELD, THE EVOLUTION IN PHYSICS 259 (1938), quoted in Cohen, *Field Theory and Judicial Logic, supra,* note 42.

III

> A new concept appears in physics, the most important invention since Newton's time: the field. It needed great scientific imagination to realize that it is not the charges nor the particles which is essential for the description of physical phenomena.[63]

As indicated earlier, the slogan of the school, "Law, Science and Policy," is descriptive, among others, of its preferred method of inquiry. To this obviously, the term "science" is the key word. As such it is suggestive not only of a method but also of a mood, and this mood has two important facets: *firstly*, a thoroughgoing commitment to empiricism; and, *secondly*, an uncompromising aversion for metaphysics.

Understood in this general way, the methodology of the school is not really distinctive. It merely carries forward the empirical tradition which has been pervasive in the field of knowledge since the eventual triumph of the scientific age at about the time of the Industrial Revolution. This is true not only in the domain of science itself, both natural and social, and in philosophy, but in jurisprudence as well.

In this sense, the "realists" especially, may be said to be scientific, for they are without doubt uncompromisingly empirical. And it is precisely this spirit which prompted them to arrogate for their movement the title of "realism." So obsessed indeed were they with the "real"—which in the case of *law*, they equated with *perceivable behavior*, particularly "judicial" behavior—that they were unwilling to accord any value whatsoever even to what judges "say," *i.e.*, the reasons which judges tender to justify decisions. For them, the only thing significant and worthy of attention is what judges actually "do." The passionate commitment of the "realists" to this dogma is beautifully captured with all its fervor in the following passage in which Judge Cardozo summarizes the philosophy of the group: [63]

> Fundamental in the thought of the neo-realists, or of most of them, is the exaltation of what is done by a judge as contrasted with what is said. They cling to the motto that "action speaks louder than words." Indeed they go beyond it, for some of them seem to tell us, not only that conduct is the louder, but that words do not speak at all.

In the same sense the whole host of imperative or analytic jurists, who would render allegiance only to the "positive commands" of the "sovereign" and to no one else, may also be said to be "scientific," *i.e.*, empirical and anti-metaphysical.

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[63] Cardozo, *op. cit.*, note 25, *supra*, at 11-12.

But Law, Science and Policy is "scientific" in a fundamentally different sense. And it is this difference which redeems the rather indiscriminate and illegitimate use of the term "science" or "scientific" in the field of jurisprudence. Law, Science and Policy is different in the sense that its application of empirical methods in the study of law has not only been refined and systematized; for the first time the use of such techniques may be found disciplined by a method of inquiry which, in the natural sciences, particularly in physics, has come to be known as the "field theory." [64] As adopted in the social sciences, this method has been given the label "contextual approach."[65]

The fundamental insight of the "field" or "contextual" approach is the realization that an event or phenomenon is always the function of the "field" or "context" in which it occurs. This insight stemmed from the discovery that an event or phenomenon never occurs in isolation but always as part of a larger whole, with whose many elements it bears many relationships of diverse sorts. This discovery naturally gave a new and broader dimensoin to our perception of phenomena, a view which before was obscured by too narrow a focus of attention in our perception of events. Previously, it was thought sufficient to account for events in terms solely of cause and effect. Indeed, for a long time this was the only explanation which was accepted as rational. Accordingly, reality was viewed in terms of discrete, isolated phenomena which had significance only as "cause" or "effect." And all other events to which they were not so related were either completely overlooked or disregarded as irrelevant.[66]

The discovery of the "field" or "context," however, revealed the inadequacy, as well as the distorting effect of so cramped a frame of inquiry. The resulting enlargement of this frame as a consequence of the perception of the "field" or "context," gradually led to the realization that if the explanation of phenomena is to be adequate and meaningful, such an explanation must also include an account of its precise "field" or "context." And this account must, in turn, include a description of the intricate pattern of relationship between the various features of the "field" or "context" and the phenomena sought to be explained.[67]

This increasing attention of the "field" or "context," furthermore, led to a corresponding awareness of the number and variety of its components, each of which, singly or in combination, could be used as a valid starting point of inquiry. This discovery, in turn,

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[64] See *Cohen, supra,* note 63.

[65] See for instance LASSWELL AND KAPLAN, POWER AND SOCIETY (1950).

[66] EINSTEIN AND INFELD, *op. cit., supra,* see particularly chap. III. Also, Cohen, *op. cit., supra,* particularly at 152-159.

[67] EINSTEIN AND INFELD, *op. cit., supra.*

led to the realization that all explanation is relative—relative, that is, to the particular frame of reference adopted as the starting point for such explanation. Or put differently, that an event or phenomenon—or perhaps more accurately, one's perception of it—is mere-a function of some conception of its proper "field" or "context." [68]

Thus, it will be seen how the "field theory" or the "contextual approach," by compelling attention to the "field" or "context" of inquiry, led to the gradual elimination of the "essentialist," or the "reductionist" tendency in scientific explanation, and to the eventual dissipation of such meaningless questions as "What is absolute space?" or "What is absolute time?"

Because of their commitment to the scientific method, it should not be surprising that the cardinal principle which underlies the method of inquiry advocated by Professors McDougal and Lasswell is what the former is wont to call as the "contextuality principle," the application of which demands *first of all* an explicit identification of the context of inquiry, and *secondly*, a systematic and a comprehensive investigation of its many features.[69] And it is precisely for their lack of attention to the proper context of inquiry, or for their perception of it only in some dim and ambiguous manner, that the two—Professor McDougal especially—have often belabored the exponents of other schools, or dismissed their theories altogether.

Now, what do Professors McDougal and Lasswell consider as the proper context of inquiry about law, and how do they arrive at its conception? For them this context is the social process, a conclusion which they reach not so much through direct, empirical observation, but primarily by drawing heavily from the studies and findings of many disciplines, particularly, the social sciences.[70]

Professors McDougal and Lasswell "speak of a process as social when (at least) two persons influence one another . . . whether the individuals concerned are made aware of one another or not. Wherever there is influencing there is community." Viewed comprehensively, the social process is capable of being described in varying orders of inclusiveness, classified in various ways, such as the familiar geographic and political categorizations, ranging from the lowest municipal unit within the modern nation-state, to the all em-

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[68] See for instance, McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 Natural L. F. 53, 56 (1956).

[69] *Ibid.*, at 54-55.

[70] See Work Papers, Science and Policy (unpublished) 1954, particularly Part II.

bracing world community, which, for the present at least, is still mostly limited to the earth-space arena.[71]

Viewed internally, with a view to isolating and identifying its essential components, the social process will be seen to be made up of "people, with perspectives, using base values, by institutions, to shape and distribute scope values, among people."[72] "Perspectives" are defined as consisting of "identifications," "demands," and "expectations" [73] of the "participants," of the process, namely, the "people." The term "value" may be viewed in two ways: *firstly,* as designative of "broad categories of events which gratify desire", hence, are "preferred." [74] Or, alternatively, as a set of "demanded relations between human beings" relative to such "preferred events." [75] These "preferred events," or "values," are classified by Professors McDougal and Lasswell into eight basic categories, namely: power, wealth, respect, well-being, skill, affection, enlightenment and rectitude. These categories are, however, by no means regarded by them as definitive or sacrosanct.[76] As explained by Professor McDougal, "(t)he particular categorizations and the number of headings are not . . . important." It is enough that "operational indices of sufficient precision are offered in alter formulations to permit translation of equivalences in reference." [77]

Values are spoken of as "base values" when they are used to achieve other values; and as "scope values" when they are sought after.[78] Accordingly, the wealth value may be used for the pursuit of the value power, which in turn may be used for securing other values, such as wealth itself, or respect, or any one or all of the other categories of values.

By the term "institutions" is meant "the detailed pattern of practices by which values are pursued, and these may be described in terms of all relevant modalities, such as varying emphasis upon

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[71] "The community process to which we generically refer is that of individual human beings interacting in many particular communities, of varying degrees of comprehensiveness, from local through regional to national and global." McDougal, *op. cit., supra,* note 69, at 56. See also the chart of the World Power Process set out in McDougal, *The Role of Law in World Politics, supra,* at 264.

[72] See chart of Community Process, also in McDouial, *The Role of Law in World Politics, supra,* at 262.

[73] *Ibid.*

[74] Law, Science and Policy, *Glossary of Selected Terms* (Preliminary edition, 1962) 28.

[75] McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Studies, supra,* at 65.

[76] *Ibid.*

[77] *Ibid.*

[78] *Glossary of Selected Terms, supra,* note 74, at 28.

persuasion and coercion, varying bases of power invoked and applied, varying audiences to which appeals are made, and so on." [79]

It is within the context of the social process, viewed and analyzed in the manner indicated above, that we must locate the subject matter of our inquiry, namely, the "law". And it is within this context, moreover, that we must investigate and study it. Finally, the explanation of it which may be proposed must, if it is to be adequate and meaningful, include an account of such a context, as well as of the pattern of interrelationships between such context and the "law." As Professor McDougal puts it:[80]

> It is here that we come to law. To acquire the most realistic understanding of law—to obtain the control of all variables necessary to effective action—we must, I submit, define law today in terms of both values and institutions. In terms of values, law is an element of the power structures and processes of the community, but any or all of the major values of a community can be used as bases of power. In terms of institutions, law is a part of government, that structure of formal authority which includes the officials who are supposed to make the power decisions of a community, the doctrines by which they are supposed to make decisions, and the practices by which they are supposed to apply doctrines. It is common knowledge, however, in most communities that the formal facade of authority seldom represents the whole fact. Behind government or operating through government, the real rulers of a community, the people who make the important decisions, maybe located in anyone of the other types of institutions, and these rulers may be using anyone or all of the major values as bases to sanction their decisions. . . . An observer who would obtain a realistic picture of the role of doctrine, including an understanding of all the variables that affect decisions, must, accordingly, identify the structure and procedures of both formal authority and effective control. Just what is the formal structure of government in this community, who is supposed to make the important decisions, and by what doctrines and practices But formal authority without effective control is illusion. Who, on deeper scrutiny, actually makes the decisions, and what effects do they get? Shifting from a descriptive to a preferential perspective, it must be remembered, however, that effective control without formal authority is naked power and anti-democratic. Though to be effective law must include real power, to be democratic it must include formal authority, established on power widely shared. . . . (L)aw is, therefore, . . . formal authority conjoined with effective control, and both widely shared.

Conceived as an institution specialized to the power value, law is itself a distinct process. More specifically, it is a process of authoritative decision, located within and interacting with, the broader so-

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[79] McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, *supra*, at 65.

[80] McDougal, *The Role of Law in World Politics*, *supra*, 262-263.

cial process, as well as with other sub-processes.[81] These other sub-processes may be categorized according to a particular function, or some distinctive feature of the process, e.g., the process of deprivation, or the process of inter-action. From this it should not be difficult to see that these processes are many and varied, and are susceptible of classification in many different ways, determined in part by some inherent feature or characteristic of the process sought to be described, and in part by the needs, the purposes, the imagination and resourcefulness of the investigator.

The contextual approach to law, as well as the conception of it as a process, not only restrains the tendency toward "essentialism" or "reductionism," but also assures—and, indeed—requires the taking of a comprehensive view of the legal order. The contextual approach checks the reductionist tendency by constantly alerting one to the importance of the context—to the fact that any account of the law is merely a function of, and is, therefore, necessarily relative to some particular context.

On the other hand, the conception of law as a process compels a comprehensive view of the legal order by calling attention to the fact that law is not merely some one simple and supposedly distinctive element or feature of that order, but is made up of all the elements of the process taken together. This realization, in turn, coupled with the detailed examination of the various component elements of the process which it necessarily calls for, likewise curbs the reductionist tendency. Such a conception contributes to this effect for the reason that the detailed examination of the various component elements of the process cannot fail to disclose the uniqueness and distinctiveness of each of such elements, and consequently, of the essential significance and importance of each in making up the process as a whole. It is this discovery, it seems to me, which most effectively reveals the utter vacuousness of questions which the reductionist or essentialist tradition has rendered irresistible: "Yes, but which of these elements is the 'most fundamental'? Which one constitutes the essence of the process?" To such questions, the only rational answer obviously is: "Not any one, but all of them."

For the systematic and thorough investigation of any process—be it the social process itself, or any of its sub-processes—Professors McDougal and Lasswell have devised a framework of inquiry or an intellectual model.[82] The first feature of this framework or

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[81] McDougal, *Law as a Process of Decision: A Policy Oriented Approach*, *supra*, at 52.

[82] For a view of this "intellectual model" in skeletal form, see especially the table of contents of MCDOUGAL, LASSWELL & VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963), xi-xxiii.

model is the analysis and specification of the various phases of the social process. This is so for the reason that, as noted earlier, the social process is the proper context of any inquiry about law, and is, therefore, the logical starting point of an analysis of it.

The distinct phases of the process thus isolated and specified, of which there are seven in number, represent what, for Professors McDougal and Lasswell, are the essential features of the social process context. Taken together, these seven phases make up the social process in its totality. At the same time, the specification of each of them, as well as the sharp distinctions drawn between each of them, is calculated to stress the uniqueness and importance of each.

The seven phases of the social process are: (1) participants; (2) objectives; (3) arenas or situations; (4) base values; (5) strategies; (6) outcomes; and (7) effects.[83] Regarding the fourth phase, base values, it may be recalled that "value" is itself categorized into eight basic types. "Value" as "scope value" enters as a phase of the social process under the head of "objectives."

Depending upon the specific requirements of the inquiry or investigation being conducted, each of these phases may be further analyzed in varying degrees of refinement and detail.[84] For instance, *participants* may be classified into individuals or groups; the latter may, in turn, be further classified into organized or unorganized groups; or as being specialized to a particular value, or to other values but having indirect effects on the particular value being investigated.[85] *Arena* is the "situation of interaction in which the value is at stake," and is characterizable in terms of: "(1) a number of actors, a set of whose acts, in their initial or terminal phases, are comprised in the state of affairs; and (2) the environment of the acts in question," [86] for instance, in traditional terminology, the "market," with respect to the wealth value; the "state," with respect to the power value; the "court," as one of many possible arenas, with respect to law conceived as a process of authoritative decision. *Base values* which may be "brought to bear by different participants to effect outcomes in . . . (arenas) or situations" [87] may, of course,

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[83] See McDougal, *op. cit. supra* note 81, at 65-66.

[84] For an illustration as to how "refinement asd detail" may be achieved, see McDOUGAL, LASSWELL & VLASIC, *supra* also McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); and McDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS (1962). Even an examination of the tables of contents of these volumes alone will suffice for the purpose.

[85] McDougal, *Law as a Process of Decision: A Policy Oriented Approach*, *supra* at 65.

[86] *Ibid.*; also *Glossary of Selected Terms*, *supra* at 26.

[87] McDougal, *Law as a Process of Decision: A Policy Oriented Approach*, *supra* at 66.

be classified in accordance with the eight basic value categories. *Strategies,* which are conceived as "course(s) of action designed to manage base values for the achievement of policy objectives," may be categorized into *diplomatic, ideological* and *coercive.*[88] The first is distinguished by the limitedness of the participants involved, the immediacy of the interaction between them, and its reliance upon *persuasive,* as against *coercive* techniques or practices, whether economic or military, which are distinctive of the third. The second is also characterized by resort to persuasive techniques but is distinguishable from the first in that as to the second, the addressees are usually mass audiences.[89] *Outcomes* are the culminating events of the various interactions in the value shaping and sharing process.[90] As such their characterization will depend upon the particular interactions of which they are merely functions. A *decision* in a particular litigation, for example, is an instance of an *outcome.* So too the *results of an election,* in the process of interaction in the power process, and so on. *Effects* are the remoter and subsequent outcomes of specific "outcome events," such as those given above.[91] A *decision,* for instance, as the specific *outcome event* of a process of interaction in the wealth process may produce the *effect* of *value accumulation* or *dispersal.*

Professors McDougal and Lasswell have also clarified the different "functions" which are ordinarily lumped together loosely under the term "decision." In all, they have isolated seven distinct functions, namely: (1) intelligence; (2) recommending; (3) prescribing; (4) invoking; (5) applying; (6) appraising; and (7) terminating.[93]

As part of the process of authoritative decision, these different functions are described by Professor McDougal as follows:[94]

> Let us now look more closely at those interactions in which the perspectives of the parties include expectations that decisions will be taken in accordance with authoritative policy. Certain participants in the community process have deprived, or are threatening to deprive, other participants of claimed values, and one or both sets of participants, threatening as well as threatened, may appeal to the processes of community authority to facilitate or restrain the deprivation. Comprehended in such

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[88] *Glossary of Selected Terms, supra,* at 26.
[89] *Ibid.*
[90] *Ibid.,* at 19.
[91] *Ibid.,* at 10.
[92] *Ibid.*
[93] See Work Papers, Law, Science and Policy 1954, particularly the portion entitled "The Structure of Decision in a Free Society: A Consideration of Principles," chap. 1, pp. 8-10.
[94] McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study, supra* at 57; emphasis supplied.

> processes of authority one may observe a wide variety of policy functions being performed. Many different officials and representatives of effective control groups are both continuously *gathering and disseminating information or intelligence for the enlightenment of the authoritative prescribers and appliers of policy* and continuously *recommending specific policies to such prescribers and appliers.* Certain officials, both of nation-states and international governmental organization, and employing many different procedures, are continuously *formulating broad, general policies of the type in controversy and projecting such formulations in to the future as authoritative community prescription.* Still other officials, as well as effective participants, engage in the function *of invoking applications of general prescriptions to specific controversies.* Officials of both nation-states and international governmental organizations are *continuously responding to such invocation and, by many different procedures, making application of general prescriptions for the resolution of specific controversies.* By still different procedures, both officials and representatives of effective control groups are *in constant process of appraising and terminating outmoded prescriptions. The processes of authority here designated under the headings of intelligence-serving, recommending, prescribing, invoking, applying, appraising, and terminating are more conventionally described as legislative, judicial, executive, and administrative;* the common usage of these latter terms makes, however, such shifting and confusing reference from function to institution and back again, that some newer terminology seems preferable.

In addition, they have also distinguished five different activities which are ordinarily performed when one is said to be conducting a study, or investigation, or inquiry, especially, if the result of such a study is intended to produce some effect upon the social process. Depending on how one views these activities, they may be classified either as "intellectual skills", or as "intellectual tasks." As tasks, they may be classified as follows: (1) clarification of goals; (2) description of past trends in decision; (3) analysis of conditions affecting decisions; (4) projection of future trends in decisions; and (5) invention and evaluation of policy alternatives.[95] These categories are, in turn, suggestive of the specific skills which they each call for.

At this point it should already be clear that another essential part of the analytic apparatus proposed by Professors McDougal and Lasswell is its specialized terminology. However, strange and perplexing this may seem at first, we shall note later that it is intended to perform specific tasks. Indeed, one such function has already been indicated in Professor McDougal's explanation of the seven decision functions which is quoted above, namely, the avoidance of confusion generated by the "shifting" meaning or reference of most traditional legal terms.[96]

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[95] *Glossary of Selected Terms, supra,* at 14.
[96] *Ibid.,* at 30.

Now, what is the purpose of this intellectual model, this elaborate and formidable—and, at times, seemingly overwhelming—framework of inquiry?

To be sure, some of these have already been indicated or hinted at, but may nevertheless be repeated here by way of summary.

As noted earlier, this framework of inquiry, as constructed, attempts to embody all the essential features or phases of the social process context. These phases are, in turn, elaborated in great and clearly distinguished one from the other. These features, it seems, tend to assure not only that inquiry will be conducted in proper context, but also that the resulting investigation will be comprehensive and thorough, reflecting the comprehensiveness and thoroughness of the detailed specification of the various component elements of the social process. This specification is, in turn, useful not only in channeling inquiry, but also in serving as a constant reminder of what needs to be done. At the same time, the precise categorization of each of these phases, and the clear-cut differentiation established between them, are serviceable to the investigator as criteria for sorting and classifying his raw materials.

The systematic classification of the materials, in turn, tends to sharpen perception of distinctions which need to be drawn between the issues which the materials raise, facilitates their proper location in the overall scheme, and, accordingly, allows for their more precise and sophisticated treatment.

The above observations are true as well of the equally detailed categorization of and sharp differentiation between the eight basic values. And it is true too of the similar specification of and differentiation between the seven decision functions, and of the five requisite intellectual skills or tasks.

It will further be noted that these various categories are uniformly formulated in terminology which is distinctly functional in character.

As already indicated, resort to functional language is intended to highlight the basic distinctions perceived between the shifting and ambiguous meanings of many conventional legal terms,[97] in order to avoid the pernicious confusion of references, and the consequent amalgamation of "issues which should be distinguished."[98] To this end, words have been chosen which are unmistakably suggestive of their references. Note for instance, the terminology in which

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[97] McDougal, *op. cit.* at 57.
[98] *Hart, Definition, supra,* at 40.

the basic values have been categorized and differentiated. So also, the various phases of the social process context, the seven functions of the process of decision, and the five requisite intellectual skills. So precisely designative are these terms indeed that the possibility of confusion of reference is reduced to a minimum. By way of illustration, notice the clarity achieved by describing the so-called "legislative" function as "prescriptive"; or by characterizing the so-called "judicial" function as the "applying function." In this connection it begins to become clear that the resulting clarity of meaning or reference, attained through the use of functional language, has the further effect of liberating discussion from the cramping and confusing framework of the traditional terminology. It is this liberation which has serve to abate to some extent the proliferation of such meaningless yet highly troublesome questions as whether or not courts may or do legislate, etc.

Finally, resort to functional language has proved helpful in sharpening awareness of and in clarifying the differing perspectives of the participants in the process, as well as of the person seeking to describe such process. For instance, it should be immediately apparent that a judge must use language peculiar to one performing the *applying* function; that a party or counsel must resort to the language of *invocation;* that a person not directly involved in the controversy and who occupies the position of an observer may subsequently *appraise* the results of the controversy, whether or not with a view to making *recommendations* for the *termination* or continuance of the authoritative community policies involved, to persons competent to take such action.

It is true, of course, that these new and specialized terms seem at first to be strange or even puzzling, for indeed they are strikingly different and unfamiliar—different and unfamiliar, that is, in the sense that they are undoubtedly unconventional. Perhaps, too, it is true that these specialized vocabulary demand much in terms of patience and perseverance for their understanding and comprehension. But once mastered, it will become gradually apparent that they are indeed highly effective in helping us get away from the mystifying ambiguities and the deceptive connotations which, over the years, have encrusted our traditional legal language.

At this point, it is perhaps pertinent to note that resort to sharp distinctions and to functional terminology have achieved the results which Professor Hart have sought to attain by clearly distinguishing between the so-called "external" and "internal point of view" relative to a given rule or legal system, in an effort to draw attention to the

multiplicity and variety of functions which ordinary words or language perform.[99]

Two other characteristics of the terminology of the school should further be noted. The first of these is the fact that its terms are "capable both of the highest degree of abstraction and of the most minute refinement." [100] This feature is intended to allow the investigation of key terms and concepts in such depth or detail as the specific requirements of particular investigators or studies demand, or as the time, resources, imagination and skill of the investigator will allow. In other words, the technique of analysis advocated by Professors McDougal and Lasswell is suitable not only for studies demanding the most minute specificity, but also for those which may perhaps be more appropriately articulated in varying degrees of generality and abstraction.

The second characteristic of the school's peculiar terminology is its susceptibility to precise empirical verification or translation. This again is indicative of the school's firm commitment to empiricism and to the scientific method. This commitment, as we have noted earlier, is designed to obviate the surreptitious intrusion into the system of metaphysical or non-empirical elements, as these elements have generated much of the mystery and mysticism which even now are still pervasive in jurisprudence, and continue to occasion perplexity and puzzlement.

IV

And now perhaps assessment and appraisal is in order.

First of all, it seems unquestionable that both schools advocate the same technique or method of inquiry, or in any event that both share the same basic tenet, namely: a common commitment to empiricism, shorn however of its reductionist or essentialist tendency, and disciplined by the contextual approach. But as we have seen, each school discovered the importance of the context by entirely different routes: Professor Hart, through the use of "a sharpened awareness of words" which, in turn, produced a "sharpen(ed) . . . perception of the phenomena"; Professors McDougal and Lasswell, by drawing from the findings and the insights of the sciences. It is plain, however, that far from generating any difference or antagonism the insights which were discovered by these two routes tend, in fact, to buttress and fortify each other, and have increased our

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[99] *Ibid.*, at 17-19.
[100] McDougal, *supra*, note 94, at 65.

knowledge as to the sources of the perplexities which have troubled our efforts to understand and to explain the concept of law, or alternatively, of law as a process of authoritative decision.

Secondly, it seems equally unquestionable, that as a descriptive account of the law, the theory offered by Professors McDougal and Lasswell, as well as the analytical apparatus which they have devised for this purpose, is useful and adequate. This perhaps is due to the fact that Professors McDougal and Lasswell are concerned primarily with the construction and the formulation of a theory about law, an enterprise to which both have zealously applied themselves for the last twenty years now. On the other hand, Professor Hart does not seem to be concerned with providing a descriptive account of law as an actual social phenomenon or process. Rather what he is interested in is to account for it as concept.

But these two differing endeavors, far from being antagonistic are actually complimentary. Accordingly, it is hoped that the gulf which now separate them may not prove completely unbridgeable.