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INSIGHT INTO LAWYERING: BERNARD LONERGAN'S CRITICAL REALISM APPLIED TO JURISPRUDENCE†

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I. INTRODUCTION

In his thoughtful commentary, *FOUNDATIONS OF JURISPRUDENCE*,¹ Jerome Hall discusses the adequacy of several legal philosophies which serve as foundations for contemporary jurisprudence. Hall opines that a legal philosophy is only adequate:

- (1) [i]f it is relevant to current social-legal problems and intellectual interests;
- (2) if it clarifies legal concepts. . . ;
- (3) if it is internally consistent; and
- (4) if it comprehends "the variety of [legal] experience within the limits of one scheme of ideas."²

Hall notes that natural law,³ legal positivism,⁴ and legal realism⁵ each provide an uncertain foundation for an adequate jurisprudence. What is needed, says Hall, is a dynamic theory which can take into account the existence of "law as rules" in our society.⁶ Critical

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¹ J. HALL, *FOUNDATIONS OF JURISPRUDENCE* (1973).

² *Id.* at 19 (quoting A. WHITEHEAD, *PROCESS AND REALITY* 4 (1930)).

³ See *infra* text accompanying note 150.

⁴ See *infra* text accompanying note 152.

⁵ See *infra* text accompanying note 155.

⁶ J. HALL, *supra* note 1, at 161.

realism, as developed by Bernard J.F. Lonergan,⁷ provides such a dynamic theory.

Although Lonergan has taken into account most of the scientific and philosophic achievements of the preceding centuries, his approach to philosophy differs radically from that of his predecessors.⁸ This is so because Lonergan has recognized that human knowing "is not some single operation or activity but, on the contrary, a whole whose parts are cognitional activities."⁹ Human knowing is composed of three distinct yet interrelated operations: experience, understanding, and judgment. Thus, in order for a person to know how it is that he or she knows, he or she cannot just "look" at understanding.¹⁰ Rather, it is Lonergan's position that if the reader is attentive to and reflects upon his or her cognitional operations, he or she will find that knowledge comes not through mere "sense experience" or "taking a look" as many legal philosophers maintain,¹¹ but through affirmations which are made on the level of judgment. Accordingly, this article has been structured to provide the reader an occasion to reflect upon his or her cognitional processes and then *judge* for himself or herself whether Lonergan's position is correct.¹²

Because the article is intended in the first instance to reach lawyers and those interested in legal philosophy, it deals with what it is that lawyers are *doing* when they *do* lawyering. Jurisprudence based on Lonergan's critical realism is to be done by all persons in the legal community and not just to be studied by academics. Such participation is needed because as Professor Van Doren notes, it is inevitable that a lawyer employs some type of jurisprudential foundation,¹³ and, accordingly, each lawyer should look to see whether or not that foundation is a solid one.

⁷ (1904-1984). Lonergan was born and raised in Canada. After entering the Society of Jesus (Jesuits), he received the following academic degrees: University of London, A.B. (1930); Gregorian University (Rome), S.T.L. (1937), S.T.D. (1945). He has held academic positions at: Gregorian University (Rome), 1953-1965; Regis College (Ontario), 1965-1975; Boston College, Visiting Distinguished Professor of Theology, 1975-1984; Harvard University Divinity School, Stillman Professor, 1971-1972.

⁸ B. TYRRELL, *BERNARD LONERGAN'S PHILOSOPHY OF GOD* 4 (1974).

⁹ B. LONERGAN, *Cognitional Structure*, in *COLLECTION* 224 (1967).

¹⁰ *See id.*:

Where knowing is a structure, knowing knowing must be a reduplication of the structure. Thus, if knowing is just looking, then knowing knowing will be looking at looking. But if knowing is a conjunction of experience, understanding, and judging, then knowing knowing has to be a conjunction of (1) *experiencing* experience, understanding, and judging, (2) *understanding* one's experience of experience, understanding and judging, and (3) *judging* one's understanding of experience, understanding, and judging to be correct.

(emphasis added).

¹¹ The naive realists and the empiricists hold the former view, while the idealists hold the latter.

¹² The examples employed in this article should not be seen as having any special significance. The beauty of Lonergan's position is that while the examples may change, the cognitional structure remains constant.

¹³ Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin — A Critique*, 29 CLEV. ST. L. REV. 279 (1980). Professor Van Doren states:

In the United States, jurisprudence has long been believed to be esoteric and lacking in practical significance. However, if it is true that every law professor teaches jurisprudence, then it is also true that every lawyer practices it. Conscious and unconscious decisions made by professors, judges, and practitioners reflect jurisprudential preferences.

Id. at 279.

To begin at the beginning is to begin with the basics, thus the first section will discuss the notion of experiential or empirical consciousness.

II. EXPERIENCE

On the level of experiential or empirical consciousness, a human being experiences the world as an "already out there now real."¹⁴ When operating solely on this level of consciousness, he or she does not seem to differ from the higher animals. Lonergan notes that such experiential consciousness is analogous to that of a kitten.¹⁵ A kitten is awake, and its stream of consciousness basically involves a higher technique for achieving biological ends. This extroverted consciousness is directed toward possible opportunities or means to satisfy appetites. It is spatial, temporal, and concerned with the "real." Thus, the kitten is interested in lapping real milk and is disappointed when confronted with a realistic photograph of a saucer of milk.¹⁶

A human being as "animal" is similarly situated. On this level he or she lives in a world unmediated by meaning.¹⁷ It is a world of "pleasure and pain, hunger and thirst, food and drink, rage and satisfaction and sleep."¹⁸ As Lonergan notes, this level is most easily recognized and isolated in the world of the infant:

[t]he world of the infant is no bigger than the nursery. It is the world of what is felt, touched, grasped, sucked, seen, heard. It is a world of immediate experience, of the given as given, of image and affect without any perceptible intrusion from insight or concept, reflection or judgment, deliberation or choice.¹⁹

It is on this level of empirical consciousness that all human beings, infant or adult, experience data. This data may be introverted or extroverted, for a human being experiences his or her own emotions and feelings as well as all that he or she hears, smells, sees, and touches. But, as Lonergan points out, empirical consciousness and intentionality only provide a basis for further activities.

III. INSIGHT

"Insight," as referred to by Lonergan, is an act of understanding which unifies the data of sense and consciousness by placing them in a single explanatory perspective. Insight can be described as follows: (1) It comes as a release to the tension of inquiry; (2) it comes suddenly and unexpectedly; (3) it is a function not of outer circumstances but of inner conditions; (4) it pivots between the concrete and the abstract; (5) it passes into the habitual texture of one's mind.²⁰

Insight occurs routinely in all the different activities and areas of our lives. By way of an easily understood example, J. Fitzpatrick describes insight occurring in the context

¹⁴ B. LONERGAN, *INSIGHT: A STUDY IN HUMAN UNDERSTANDING* 251 (1958).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See generally B. LONERGAN, *METHOD IN THEOLOGY* 57-99 (1972).

¹⁸ *Id.* at 76.

¹⁹ *Id.*

²⁰ B. LONERGAN, *supra* note 14, at 3-4.

of a man confined in a prison who is seeking to escape.²¹ In Fitzpatrick's scenario, a prisoner desperately wants to know how to escape. He sees a few loose bricks, a wooden plank and a rope. On a purely experiential or empirical level, each of these objects would be merely "bodies;" they would be "already out there now real" as sense data, but they would have no meaning to the subject. Because of past insights, however, the prisoner now understands them to be "things" which can be used for certain purposes. For example, the rope can be thrown or attached and then used for climbing up and down.

In response to the tension of inquiry, the prisoner unifies his accumulated insights and comes to a higher viewpoint or new unifying insight: "an escape route!"²² As Fitzpatrick points out, this insight does not just "fall out of the sky" — that is, the experiencing of the data alone does not produce the insight. Rather, the desired insight occurs as a unified result of previous insights which coalesce to yield an answer to the question of the search.

Once this insight has been reached by the subject himself, or reached by another and communicated to him, it does not have to be made again. Thus, when identical circumstances arise in the future, the prisoner will realize that an escape route is present without having to reach the insight all over again. As Fitzpatrick puts it, "[o]ver a period of time insights accumulate and cognitive dispositions and habits are built up enabling us to 'read off' facts or situations without apparent effort; or we commonly take over the insights of others and these become part of our habitual mental furniture."²³

As one might guess, insight occurs in many other contexts besides that described in the above hypothetical. The law student, for example, in order to accomplish his first research project, must grasp, acquire, and accumulate many insights. Thus, if the student has not gained insight into how to use the West digest system²⁴ or the Shepards system,²⁵

²¹ Fitzpatrick, *Loneragan and Hume*, 63 NEW BLACKFRIARS 122-30, 219-28, 275-86, 364-72 (1982).

²² *Id.* at 126. Here the insights would be that: a plank can be propped up against the wall for a boost up; the loose bricks can be removed for toe holds; the rope can be used to climb down the other side.

²³ *Id.* at 127. The notion of direct insight differs from that of inverse insight:

While direct insight grasps the point, or sees the solution, or comes to know the reason, inverse insight apprehends that in some fashion the point is that there is no point, or that the solution is to deny a solution, or that the reason is that rationality of the real admits distinctions and qualifications.

B. LONERAGAN, *supra* note 14, at 19. Lonergan uses the example of an irrational number as an instance where inverse insight reveals a "surd." *See id.* at 20.

²⁴ "The most well-developed and probably still the most widely used method of case location is the one developed by the West Publishing Company." M. COHEN & R. BERRING, *HOW TO FIND THE LAW* 100 (8th ed. 1983).

²⁵ *See id.* at 250:

[C]onstant change is a basic characteristic of our legal system. With courts and legislatures at the federal and state levels producing 50,000 new appellate decisions and many thousands of new statutes every year, the standing and authority of previous cases and laws are always subject to either sudden change or gradual erosion. Decisions may be reversed, overruled, criticized, questioned or distinguished. Similarly, statutes may be repealed, amended, superceded, or declared unconstitutional. The researcher must therefore determine the current status of every primary legal source which appears to be relevant to the issue at hand. This function is usually performed by an ingenious series of citators called *Shepard's Citations*. These citators trace the judicial

disaster is likely to strike. If no insight is present to unify the data, the numbers and letters in these systems are virtually meaningless.

How would insight into these systems occur in a law student? First, a number of underlying insights would have to have been made or acquired. At a very basic level, a student must understand the meaning of the numbers and language employed within the systems. Next, he or she would have to understand the way the respective systems are organized, such as key numbers²⁶ and citator columns.²⁷ Finally, he or she would have to have gained insight into those situations where the systems can be effectively utilized. These insights could then coalesce into a higher unifying insight as to what each system is and what it can do.

Insight also occurs in virtually every facet of law practice, including trial work. A good trial attorney will have made, acquired, and accumulated insights into how judges handle cases. For example, a lawyer might feel free to omit laying a foundation for evidence involving inconsequential or uncontroverted matters. The insight acted upon is that the judge will want to speed the trial along and will overrule objections made by opposing counsel.

Although insight is common in the legal context, so too is that which Lonergan refers to as "oversight."²⁸ Oversight is the converse of insight; it involves activity which is unintelligent rather than intelligent; missing the point rather than getting the point.²⁹

history of every published decision, and the later legislative and judicial treatment of every enacted statute.

²⁶ See *id.* at 100:

[John] West [the founder of West Publishing], divided all foreseeable legal situations into seven major categories: Persons; Property; Contracts; Torts; Crimes; Remedies; and Government. These seven areas were then subdivided into more than 400 individual legal topics. Each of the topics was then further sub-divided into sub-topics, and even narrower refinement, with each of the resulting sub-topics assigned a classification number, which West called a "key number." Some of the larger or more complex topics had thousands of key numbers for their numerous sub-topics and finer subdivisions, while smaller topics had only a few. West thereby created a subject framework that sought to provide a particular topic and a key number subdivision to cover every conceivable legal situation that could be treated in a case. To some observers, this was an impressive effort of enormous intellectual import for American jurisprudence, while to others it represented an oversimplification and potential distortion of the legal universe.

²⁷ See *id.* at 250:

Having located, read, and established the relevance of a primary authority (whether a decision, a statute or an administrative regulation or ruling), the researcher must then ascertain the current status of that text. This is done by searching the history of the source in a citator. Since the most comprehensive system of citators are SHEPARD'S CITATIONS, the process is called *Shepardizing* a case, statute or administrative document. Shepardizing is simply a way of verifying the current authority of the legal source . . .

Shepard's citators facilitate this verification of authority by listing the citation of every published decision, and then following that entry with the citation of every subsequent decision which has mentioned the cited decision. If the court in the subsequent decision indicated some specific action or attitude with regard to the earlier case (e.g., reversed or affirmed it, criticized or questioned it, overruled it or followed it), that action or attitude is noted by one of a series of alphabetic symbols representing that treatment. The same method is used for statutes . . .

²⁸ B. LONERGAN, *supra* note 14, at xiv.

²⁹ Oversight differs from inverse insight. See *supra* note 23.

For example, the first-year law student, when embarking upon a research assignment, may not get the point that cases are sometimes reversed or overruled. Thus, oversight into researching would involve not using the Shepard's system to check to see if the cases he or she is relying upon are still "good law."

Oversight, or not getting the point, can also occur when practicing lawyers venture into unfamiliar legal terrain. For example, the practitioner who ordinarily deals with criminal matters may be totally lost when he or she tries to interpret the Internal Revenue Code and the accompanying tax regulations. Thus, the lawyer goes to a BNA Portfolio³⁰ for a discussion of the particular tax question. After reading the material, something clicks, insight occurs, and the Code section seems the easiest thing in the world to understand.

IV. UNDERSTANDING

As noted above, insights occur as a release from the tension of inquiry. This tension or "drive to understand" is an attribute or characteristic of intelligence which is uniquely human. When allowed free reign, this drive pushes us to ask all the relevant questions and seek all the relevant answers. The human being, when confronted with the world of experience, asks who? what? why? where? how? how many? As Lonergan puts it:

Deep within us all, emergent when the noise of other appetites is stilled, there is a drive to know, to understand, to see why, to discover the reason, to find the cause, to explain. Just what is wanted, has many names. In what precisely it consists, is a matter of dispute. But the fact of inquiry is beyond all doubt. It can absorb a man. It can keep him for hours, day after day, year after year, in the narrow prison of his study or his laboratory. It can send him on dangerous voyages of exploration. It can withdraw him from other interests, other pursuits, other pleasures, other achievements. It can fill his waking hours, hide from him the world of ordinary affairs, invade the very fabric of his dreams. It can demand endless sacrifices that are made without regret though there is only the hope, never a certain promise, of success. What better symbol could one find for this obscure, exigent, imperious drive, than a man, naked, running, excitedly crying, "I've got it?"³¹

Within the broader context of "understanding," there are two types of insight that can be distinguished; one does not go beyond the present concrete situation, and one

³⁰ The Bureau of National Affairs (BNA) publishes "Tax Management Portfolios," which are described by BNA as follows:

The heart of the [BNA] Tax Management Program is in its continuing series of individual Portfolios, each dealing in depth with a deliberately narrowed area of corporate, estate, or personal tax problems.

Examples of the subject matter of individual Portfolios are "Estimated Tax," "Deferred Compensation Arrangements," "Estate Tax Marital Deduction," or "Foreign Tax Credit."

Each Portfolio is prepared by one or more active practitioners carefully chosen for recognized expertise in the subject area, and each is designed to bring together in one place the information and guidance needed to solve a particular tax problem, develop effective tax strategies, and implement decisions.

Tax Management, (BNA) Master Binder, at 4 (Dec. 23, 1980).

³¹ B. LONERGAN, *supra* note 14, at 4.

does. Thus, the hypothetical prison inmate may confine his escape plan to his original circumstance only, or he may apply the insight conceptually, by analogy or generalization,³² to other situations. In both generalization and analogy, "what is at work is the law, immanent and operative in [the] cognitional process, that similars are [to be] similarly understood. Unless there is a *significant* difference in the data, there cannot be a difference in understanding the data."³³

As Lonergan points out, it is natural for all human beings to generalize and analogize. What is taught in law school, therefore, is not the ability to generalize, but the ability to recognize *significant* differences in legal data. Thus, one case is seen as "controlling" a latter case while another is distinguished. Some facts are deemed relevant, while others are not, depending upon the context.

For example, in a case dealing with a car collision where a personal-injury theory is involved, the place where the plaintiff lives is probably not significant in relation to the merits of the case.³⁴ Conversely, in a case involving a personal injury where a person has been struck by a golf ball while mowing her yard, the location of the plaintiff's home along the back nine of a golf course may be highly relevant.³⁵ Thus, to a great extent,

³² Analogy and generalization are described by Lonergan as follows:

An argument from analogy assumes that some concrete situation, A, is correctly understood. It argues that *some other* similar situation, B, is to be understood in the same fashion.

A generalization makes the same assumption to argue that any other similar situation, X, is to be understood in the same fashion.

Id. at 287-88 (emphasis added).

³³ *Id.* (emphasis added). In the legal context, John Austin says much the same thing as Lonergan, although employing slightly different language. Analogy and generalization for Lonergan are, respectively, specific analogy and generic analogy for Austin:

In truth, when it is said that a litigated case is *analogous* to another case, one of the following meanings is commonly imported by the phrase. It is meant that the litigated case bears to the other case, a specific and proximate resemblance; and that the former ought to be decided, on account of the alleged resemblance, by a given statute or rule in which the latter is included. Or else it is meant that the litigated bears to the other case a generic and remoter resemblance; and that the former should be brought or forced, on account of the alleged resemblance, within a statute or rule by which the latter is comprised: that is to say, that a new rule of judiciary law, resembling a statute or rule by which the latter is comprised, ought to be made by the Court, and applied to the case in controversy.

J. AUSTIN, LECTURES ON JURISPRUDENCE 1039 (3d ed. 1869), *reprinted in* J. HALL, READINGS IN JURISPRUDENCE 566 (1938).

³⁴ At issue in such a case would be whether the defendant negligently struck another car while driving down the street. Assuming that jurisdiction and venue are not a problem, the place where the plaintiff lived at the time of the accident, although perhaps mentioned in the judge's opinion, probably had no bearing whatsoever on the outcome of the case.

³⁵ The location of the plaintiff's home may be highly relevant because of the doctrine of "assumption of risk," which is a defense to negligence. Prosser describes the doctrine as it probably would be applied in the golf-course situation as follows:

[Assumption of risk can occur] where the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against one or more future risks that may arise from the relation. He may then be regarded as tacitly or *impliedly* consenting to the negligence, and agreeing to take his own chances. Thus, he may . . . enter a baseball park, sit in an unscreened seat, and so consent that the players may proceed with the game without taking any precautions to protect him

learning to "think like a lawyer" for purposes of law school really means learning to recognize what lawyers, judges, and law professors consider to be "significant" differences in the data and what they do not.³⁶

While law school and lawyering do involve abstract or purely logical generalization, much of the cognitive activity performed by law students and lawyers involves "common sense" insights and generalizations. According to Lonergan, "[c]ommon sense is that vague name given to the unknown source of a large and floating population of elementary judgments which everyone makes, everyone relies on, and almost everyone regards as obvious and indisputable."³⁷ It is a specialization involving practical intelligence which deals in the particular and concrete. Lonergan points out that common sense is common without being general, because

[i]t consists in a set of insights that remain incomplete, until there is added at least one further insight into the situation at hand; and, once that situation has passed, the added insight is no longer relevant, so that common sense at once reverts to its normal state of incompleteness.³⁸

While common sense may seem to generalize, a generalization proposed by common sense differs from a generalization proposed by science³⁹ or formal logic. Lonergan notes that "[t]he scientific generalization aims to offer a premise from which correct deductions can be drawn. *But the generalizations issued by common sense are not meant to be premises for deductions.* Rather, they would communicate pointers that ordinarily it is well to bear in

from being hit by the ball. Again, the legal result is that the defendant is simply relieved of the duty which would otherwise exist.

W. PROSSER AND W. KEETON, ON THE LAW OF TORTS, § 68, at 481 (5th ed. 1984). In the hypothetical golf-course situation, assumption of risk may come into play if the plaintiff's home was built *after* the golf course was operating. The argument would be that the homeowner took the risk that golf balls would enter her backyard.

³⁶ Almost all law schools employ the "case method" as the predominate means of instruction. This method has been in existence in the United States since the latter half of the nineteenth century. According to William Langdell, its founder, "What qualifies a person to teach law, . . . is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law." J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 226 (1949). This learning involves studying the "law" as a science: "[L]aw is a science; [and] all the available materials of that science are contained in printed books." *Id.* (quoting Dean Langdell).

In evaluating this "scientific" method of teaching, Jerome Frank observes:

Langdell invented, and our leading law-schools still employ, the so-called "case system."

That is, the students are supposed to study cases. They do not. They study, almost entirely, upper court opinions. Any such opinion, however, is not a case, but a small fraction of a case, its tail end. The law students are like future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings. They resemble prospective dog-breeders who never see anything but stuffed dogs. [Says Frank,] (Perhaps there is a correlation between such stuffed-dog legal education and the over-production of stuffed shirts in my profession.)

Id. at 227 (footnote omitted). The thrust of Frank's argument is valid, since as shown in this article, the view of "law" as a "pure science" is totally inadequate.

³⁷ B. LONERGAN, *supra* note 14, at 289.

³⁸ *Id.* at 175.

³⁹ Scientific generalizations are usually expressed as classical or statistical laws. Classical laws are universal and constant, e.g., all other things being equal: Force = Mass x Acceleration. Statistical laws, on the other hand are concerned with the probabilities from which relative actual frequencies of events may diverge at random. *See id.* at 63-69.

mind."⁴⁰ These "pointers" do not aim to express the scientist's rounded set of insights that either holds in every instance or none at all. But rather, they aim to express the incomplete set of insights which is called upon in every concrete instance but becomes proximately relevant only after a good look around has resulted in additional insights.⁴¹

Much of a law student's education, as well as a lawyer's practice, involves common sense, rather than purely logical or scientific understanding. As was noted earlier, law school teaches the student to "generalize like a lawyer." While this education seems at times to involve purely logical or abstract generalization, it also provides the student with a group of common-sense insights which enable him or her to make common-sense generalizations.

For example, a first-year student, George, has just received from his adjunct professor his first legal-writing assignment after it has been graded. There are numerous red marks on the paper, the thrust of which could be summarized as follows: 1) improper Blue Book⁴² citation form and 2) sentences are too long. George looks his paper over and comes to the common-sense insight that in order to receive a better grade on his next assignment he must be more careful with his citation form and write more terse sentences. Because his research and analysis seemed to provoke no comment, he concludes that the methods used in that regard were adequate.

Armed with his previously acquired common-sense insights, as well as his new ones, George proceeds to tackle his next assignment. He uses proper citation form and writes his memo in a style analogous to "See Spot and Jane run." George hands his paper in and is pleased when he learns that he received an "A" on his assignment.

One would think that after the accumulation of the insights noted above, George now has legal writing mastered. Alas, the world of common sense, of practical living, is not so easy. For the next semester rolls around, and once again George is given a legal writing assignment. This time, however, George is assigned to a different adjunct professor. Without really considering this change in personnel, George completes his assignment and anticipates another "A" on his paper. Thus, George is horrified when he receives his paper, covered with red marks, captioned with a grade of "C." Somewhat irate, George goes to the next meeting of his legal writing section. At the meeting, the adjunct announces to the class, with great consternation, that it is obvious to him that schools are no longer teaching the youth of America how to read and write. Says the professor, "most of these papers look as though they're written for a sixth-grade audience."

George is simply flabbergasted. Why? Because he did not recognize how common-sense generalizations function. They are necessarily incomplete and only become complete when the data and insights of the situation at hand are considered. Once the situation at hand is past, the common-sense generalization again becomes incomplete, awaiting its next application. The generalization is merely a pointer, not a conclusion deducible from premises.

Common-sense generalizations certainly are not confined to law school. Rather, they permeate the entire "legal world." Trial lawyers, for example, operate on many common-sense insights and generalizations. The lawyer recognizes that Judge Smith likes an

⁴⁰ *Id.* at 176 (emphasis added).

⁴¹ *Id.*

⁴² A UNIFORM SYSTEM OF CITATION (14th ed. 1986), more commonly known as the "Blue Book," is a legal style book published by the Harvard Law Review Association.

intellectual argument but also understands that this generalization does not necessarily apply to Judge Jones. Thus, Jerome Frank notes:

Practicing lawyers, therefore, attempt to learn the idiosyncracies of particular trial judges: Judge Brown is known as a former railroad lawyer, who, fearful of showing favoritism, leans over backwards and is likely to be unduly hostile to railroads. Judge Green, who for years had served in the office of the city's Corporation Counsel, is partial to municipalities. Judge Blue is markedly puritanical. Armed with such information, lawyers try to have (or avoid having) some cases tried before certain judges.⁴³

Again, this type of generalization differs completely from scientific generalization, for the incomplete set of insights which is called upon in every concrete situation becomes proximately relevant only after a good look around has resulted in the additional insights. For example, a student should look at the scouting report on his new legal-writing adjunct before leaping into a new project.

V. THE WORLD MEDIATED BY MEANING

But if common-sense insights and generalizations occur often in the practice of law, they do not occur in a vacuum. Rather, they occur within a common context, which is "[t]he world mediated by meaning."⁴⁴

Loneragan describes four unique but interrelated functions or aspects of meaning: cognitive, constitutive, communicative, and effective. Cognitive meaning takes us out of the infant's world of immediacy and places us in an adult's world, which is a world mediated by meaning. The immediate world of the infant is very limited; "[i]t is the world of what is felt, touched, grasped, sucked, seen, heard."⁴⁵ It is a world of immediate experience where the operations of insight or concept, reflection or judgment, deliberation or choice do not seem to be present.⁴⁶

As a child develops, however, his world expands enormously. The use of language usually marks the entrance into this larger world, for, as Lonergan points out, "[w]ords denote not only what is present but also what is absent or past or future, not only what

⁴³ J. FRANK, *supra* note 36, at 155.

⁴⁴ See generally B. LONERAGAN, *supra* note 17, at 57-99. The sections dealing with meaning follow the discussion of insight and understanding, but precede the section dealing with judgment. The sections have been so ordered because meaning can involve either the level of understanding, or judgment, depending upon the context:

The formal act of meaning is an act of conceiving, thinking, considering, defining, supposing, formulating. There has emerged the distinction between meaning and meant, for the meant is what is conceived, thought, considered, defined, supposed, formulated. However, the precise nature of this distinction has not yet been clarified. One is meaning precisely what one is thinking about, but one has yet to determine whether the object of one's thought is merely an object of thought or something more than that.

The full act of meaning is an act of judging. One settles the status of the object of thought, that it is merely an object of thought, or a mathematical entity, or a real thing lying in the world of human experience, or a transcendent reality beyond that world.

Id. at 74.

⁴⁵ *Id.* at 76.

⁴⁶ *Id.*

is factual but also the possible, the ideal, the normative."⁴⁷ Thus, words express not only what each person has found out for himself or herself, but also what he or she can learn "[f]rom the memories of other men, from the common sense of the community, from the pages of literature, from the labors of scholars, from the investigations of scientists, from the experience of saints, from the mediations of philosophers and theologians."⁴⁸

This larger world — the real world in which we live our lives — does not lie within anyone's immediate experience, for meaning is an act that does not merely repeat but goes beyond experiencing. Thus, there is a second function or aspect of meaning, that of meaning as constitutive: "[j]ust as language is constituted by articulate sound and meaning, so social institutions and human cultures have meanings as intrinsic components."⁴⁹ Thus, families, the state, and the law are all inextricably involved in acts of meaning. Each of these institutions or systems or relations "is," but only insofar as persons judge or accept them to be so.

A third function or aspect of meaning is communicative. As Lonergan notes "[w]hat one [person] means is communicated to another intersubjectively, artistically, symbolically, linguistically, incarnately."⁵⁰ While meanings originate in single minds, they become common only through successful and widespread communication. Thus, Lonergan points out that meanings can be and are transmitted to successive generations by way of formal and informal education and training: "[s]lowly and gradually they are clarified, expressed, formulated, defined, only to be enriched and deepened and transformed, and no less often to be impoverished, emptied out and deformed."⁵¹

Finally, a fourth function of meaning is efficient or effective meaning. As human beings, we build, act in, and create our world. We produce concrete or actual "effects" in our world not only in the physical realm, but also in the social or institutional realm. As Lonergan notes, "men work. But their work is not mindless."⁵² The projects men undertake, they first intend. They imagine, they plan, they do research, they weigh pros and cons, they enter into contracts. Lonergan notes, "[f]rom the beginning to the end of the process, we are engaged in acts of meaning; and without them the process would not occur or the end be achieved."⁵³ Thus, the whole of the effective man-made artificial world is "[t]he cumulative, now planned, now chaotic, product of human acts of meaning."⁵⁴

Each of the above-mentioned functions of meaning is present in the "legal world" or "legal process." Our whole legal "system" is a world of meaning. What is, for example, a "corporation?" Is it the main business office, the employees, or the officers? It is none of these. A "corporation" is something beyond the mere physical realities. It is a legal construct which somehow extends beyond each person's experience of it. A "corporation" denotes a legal "entity" characterized by persons treating each other and the physical world in a certain manner, each one employing the cognitive function of meaning, inasmuch as he or she intends or judges "corporation" to have a certain meaning.

⁴⁷ *Id.* at 76-77.

⁴⁸ *Id.* at 77.

⁴⁹ *Id.* at 78.

⁵⁰ *Id.*

⁵¹ *Id.* at 78-79.

⁵² *Id.* at 77.

⁵³ *Id.* at 78.

⁵⁴ *Id.*

Furthermore, the corporation has meaning and "exists" only as constituted. Without a commonly recognized mode of social interaction or meaning there would be no "corporation." Its existence is entirely dependent upon individuals in the society or community thinking, judging, and acting in a certain manner. Thus, a corporation as constituted can differ over time. For example, at the present time an element of the meaning of a corporation as constituted by our society or culture is that its shareholders, generally speaking, are only potentially liable for damages against the corporation to the extent of their investment.⁵⁵ However, if this mode of social interaction were to change within society or the community, then the "corporation" would be constituted differently. Such a change in constitution could occur in a variety of ways. Everyone could informally or spontaneously change social relationships and ways of acting, or more likely, legislation or court decisions could evoke a new mode of social interaction.

If "corporation" is constituted throughout our society differently than before, a change in meaning will have to have been communicated. This communication, as noted above, could be accomplished informally as a "grass roots" movement, or formally, through the institutional mechanism of government. In either case, what is involved is the communication of a new mode of social interaction, which spreads by example, custom, or instruction.

Finally, as persons become aware that "corporation" as previously constituted no longer "exists," the effective function of meaning comes into play, and the new meaning as constituted becomes effective. Persons having dealings with the corporation will recognize that the dynamic meaning structure or mode of social interaction which constitutes "corporation" has changed, and their actions will produce concrete effects that might otherwise not obtain.⁵⁶

The above illustration has been "plucked" out of the "legal world" without regard to that larger context. For the corporation exists within the larger world mediated by meaning. Our entire legal "system" or "institution" involves countless meanings which are cognized, constituted, communicated, and made effective. A "court" is a court, a "legislature" is a legislature, and a "lawyer" is a lawyer only because human beings in particular, and society in general, both today and in the past, have constituted and made effective a certain meaning structure or mode of social interaction. Thus, Lonergan points out that "[t]he family, the state, the law, the economy are not fixed and immutable entities. They adapt to changing circumstances; they can be reconceived in the light of new ideas; they can be subjected to revolutionary change."⁵⁷ For change to occur in any

⁵⁵ "Statutes often provide that a shareholder is under no obligation to the corporation or its creditors with respect to one's shares other than the obligation to pay to the corporation the full lawful consideration for such shares." H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 202 (3d ed. 1983).

⁵⁶ It could be objected that the four functions or aspects of meaning discussed above do not seem readily distinguishable. This is in some sense a valid criticism. However, the distinction seems to be one of emphasis rather than a strict demarcation. The cognitive function emphasizes the individual thought process of meaning. The communicative function emphasizes the transference of meaning from one person to another person or persons. The constitutive function emphasizes the role of meaning in the individual and culture defining who or what they are. And finally, effective meaning emphasizes the concrete results of meaning. While each of the functions do emphasize a different aspect of meaning, it is apparent that there could be many instances where several of the functions would be present in a single meaning act.

⁵⁷ See B. LONERGAN, *supra* note 17, at 78.

of these institutions, there must be an accompanying change in meaning. Lonergan notes that "[t]he state can be changed by rewriting its constitution. More subtly but no less effectively it can be changed by reinterpreting the constitution or, again, by working on men's minds and hearts to change the objects that command their respect, hold their allegiance, fire their loyalty."⁵⁸

VI. THE WORLD OF COMMON-SENSE MEANING

Previously, common sense was discussed as one of the ways in which the lawyer relates to or understands his world. This section will analyze common sense from another viewpoint. Common sense will be viewed as an object or principle which shapes the world in which we live.

Lonergan notes that "common sense is practical. It seeks knowledge, not for the sake of the pleasure of contemplation, but to use knowledge in making and doing."⁵⁹ According to Lonergan, common sense can be seen as a principle which has been present throughout the development of human society. He notes that practical intelligence produces practical ideas which are in turn manifested by technology. As technology develops, goods are first bartered, then bought and sold, and an economy is born. The existence of an economy evokes the political society. And finally, since the problem of effective agreement in that society is recurrent, the political or legal specialization of common sense develops.⁶⁰

This legal/political specialization of common sense both initiates and coordinates social responses in order to effect social change. Lonergan points out that while this specialization involves some understanding of industry and of commerce, its special field is dealing with people: "[i]t has to discern when to push for full performance and when to compromise, when delay is wisdom and when it spells disaster, when widespread consent must be awaited and when action must be taken in spite of opposition."⁶¹ And, perhaps having the trial attorney in mind, he states further that this common sense must also "[b]e able to command attention and to win confidence, to set forth concretely the essentials of a case, to make its own decisions and secure the agreement of others, to initiate and carry through some section of that seriation of social responses meeting social challenges"⁶²

Perhaps the most profound insight in relation to traditional jurisprudence involves Lonergan's recognition that the common-sense "world" within which the legal/political specialization of common sense operates cannot be scientifically analyzed in the same way that the nonsentient world can. For, as seen below, the world of common sense is intelligent as well as intelligible and thus does not operate in the same manner as, for example, a planetary system.

[A] planetary system results from the conjunction of the abstract laws of mechanics with a suitable concrete set of mass velocities. In parallel fashion, there are human schemes that emerge and function automatically, once there occurs an appropriate conjunction of abstract laws and concrete circum-

⁵⁸ *Id.*

⁵⁹ See B. LONERGAN, *supra* note 14, at 207.

⁶⁰ *Id.* at 209.

⁶¹ *Id.*

⁶² *Id.*

stances. But, as human intelligence develops, there is a significant change of roles. Less and less importance attaches to the probabilities of appropriate constellations of circumstances. More and more importance attaches to the probabilities of the occurrence of insight, communication, agreement, decision. Man does not have to wait for his environment to make him. His dramatic living needs only the clues and the opportunities to originate and maintain its own setting. The advance of technology, the formation of capital, the development of the economy, the evolution of the state are not only intelligible but also intelligent. Because they are intelligible, they can be understood as are the workings of emergent probability in the fields of physics, chemistry, and biology. But because they also are increasingly intelligent, increasingly the fruit of insight and decision, the analogy of merely natural process becomes less and less relevant. What possesses a high probability in one country, or period, or civilization, may possess no probability in another; and the ground of the difference may lie only slightly in outward and palpable material factors and almost entirely in the set of insights that are accessible, persuasive, and potentially operative in the community . . . ⁶³

Thus, while the world of human activity can be analyzed from a scientific point of view, it cannot be described *adequately* in some abstract relation characterized by definitions, postulates, or deductions. Lonergan states that "[t]he practical common sense of a group, like all common sense, is an incomplete set of insights that is ever to be completed differently in each concrete situation. Its adaptation is too continuous and rapid for it ever to stand fixed in some set of definitions, postulates, and deductions."⁶⁴ Thus, Lonergan concludes that "to understand the working of even a static social structure, one must inquire from many men in many walks of life and, as best one can, discover the functional unity that organically binds together the endlessly varied pieces of an enormous jig-saw puzzle."⁶⁵

The existence of this "jig-saw puzzle world," composed of pieces that are "vast structures of interdependence," forces a new notion of human good upon society: the good of order. Lonergan points out that "[t]his good of order is not some entity dwelling apart from human actions and attainments. Nor is it any unrealized ideal that ought to be but is not."⁶⁶ Rather, it is a single "order" which "ramifies through the whole community to constitute the link between conditioning actions and conditioned results and to close the circuit of interlocked schemes of recurrence."⁶⁷ Thus, economic breakdown and political decay are at bottom the breakdown and decay of the good of order; the failure of schemes of recurrence to function.⁶⁸

⁶³ *Id.* at 210-11.

⁶⁴ *Id.* at 211.

⁶⁵ *Id.*

⁶⁶ *Id.* at 213.

⁶⁷ *Id.* A brief summary of the notion of a scheme of recurrence is as follows:

[C]lassical and statistical laws can coalesce into a single, unified intelligibility commensurate with the universe of our experience. . . . On the one hand, the world of our experience is full of continuities, oscillations, rhythms, routines, alternations, circulations, regularities. On the other hand, the scheme of recurrence not only squares with this broad fact but also is related intimately both to classical and to statistical laws Abstractly, the scheme itself is a combination of classical laws. Concretely, schemes begin, continue, and cease to function in accord with statistical probabilities.

Id. at 117. See *id.* at 115-28, for a more in-depth discussion.

⁶⁸ *Id.* at 213.

Lonergan reiterates that "[t]he good of order is not some design for utopia, some theoretical ideal, some set of ethical precepts, some code of laws, or some super-institution."⁶⁹ Rather, it is concrete: "[i]t is the actually functioning or malfunctioning set of 'if — then' relationships guiding operators and coordinating operations. It is the ground whence recur or fail to recur whatever instances of the particular good are recurring or failing to recur."⁷⁰ Again, as noted above, the good of order is not equated with a code of laws or a super-institution, because included in the notion of the good of order is that all-encompassing network of informal relations which spontaneously occur among persons throughout society who are attempting to live in harmony with one another apart from or even in spite of the established legal system.

But, the concrete good of order could not exist without human beings first knowing the world in which they live and then acting to shape it. Thus, the next two sections deal with judgments of fact and judgments of value.

VII. FACT JUDGMENT

In the previous sections, the cognitive levels of experience and understanding have been discussed. Knowledge does not occur, however, on the level of experience, for experience merely involves the perception of the raw sense data which is then unified on the level of understanding. On the level of understanding, insights are formed, ideas formulated, hypotheses expounded, meanings and ideas understood. Knowledge of the "real," however, does not result on this level either. Purely logical coherence, although a necessary condition, is not a sufficient condition to prove that a situation obtains in the real world.

Knowledge of the real can only be attained on the level of critical judgment, where the subject asks, "is it so?" and "is my understanding of the data a correct one?" According to Lonergan, in order for a person to make such a fact judgment, the subject must perform a mental operation which involves his moving from a "conditioned" to a "virtually unconditioned whose conditions have been fulfilled."⁷¹ At first blush this statement may seem utterly facile, or at the other extreme, utterly incomprehensible to the reader. Happily, J. Fitzpatrick presents a concise but articulate discussion of this important aspect of the Lonerganian position.⁷²

As Fitzpatrick notes, attached to every prospective judgment of fact are certain conditions; verification or validation consists precisely in determining whether these conditions are satisfied. Before the subject can move from the level of understanding to the level of judgment, the hypothesis, concept, or supposition supplied on the level of understanding must first be put to the test. This "testing" is accomplished by the subject reverting to the "givenness" of the data:

⁶⁹ B. LONERGAN, *supra* note 17, at 49.

⁷⁰ *Id.*

By [a particular good] is meant any entity, whether an object or action, that meets a need of a particular individual at a given place and time. Needs are to be understood in the broadest sense; they are not to be restricted to necessities but rather to be stretched to include wants of every kind.

Id. at 48.

⁷¹ *Id.* at 280.

⁷² Fitzpatrick, *supra* note 21, at 220.

It is precisely the givenness of the data that will test the bright idea put forward to explain the data. This is a further rational demand before anything can be affirmed as fact; it is, if you like, a further demand for coherence though the coherence in question at this stage is not logical coherence but the coherence involved in the suggested explanation or interpretation fitting the data, cohering with the data. And so it is that to test an explanation or idea we go back to inspect the data to see if the data confirm or weaken the explanation or idea.⁷³

As a means of clarifying his discussion, Fitzpatrick again uses the hypothetical involving the prisoner attempting to escape.⁷⁴ In the hypothetical case of the prisoner who thought that he had discovered an escape route, a number of "givens" had to be taken into account. For example, was the plank of wood strong enough to support the prisoner's weight when propped up against the wall? Were some of the bricks in the wall removable so as to allow the prisoner adequate footing to scale it? Was the rope long enough and strong enough for the prisoner to lasso a spike on the top of the wall? As Fitzpatrick points out, each of the above questions was a condition which must have been fulfilled before the prisoner could make a secure judgment "[t]here is an escape route."⁷⁵

While each of us, as an enquiring subject, can make fact judgments and thus know "the real," this does not mean that such judgments can be made in every situation. In some situations the subject makes the judgment that there simply is not enough data available to make a judgment of fact. In other situations, only a "probable" judgment may be appropriate.⁷⁶ Where an incorrect judgment of fact occurs, however, it only means that in that case, the subject's understanding of the data was incorrect, or that the data were insufficient, *not* that a correct judgment of fact can *never* be made.⁷⁷

⁷³ *Id.* at 221.

⁷⁴ See *supra* notes 21-22 and accompanying text.

⁷⁵ Fitzpatrick, *supra* note 21, at 221. Lonerger uses the example of affirming the existence of a typewriter in order to refute the relativist's view of the world. See B. LONERGER, *supra* note 14, at 343-45. Also, the cognitional structure, which culminates in an act of judgment, cannot be refuted in a consistent manner. See *infra* note 141.

⁷⁶ B. LONERGER, *supra* note 14, at 299. Lonerger describes a probable judgment of fact as follows:

When the virtually unconditioned is grasped by reflective understanding, we affirm or deny absolutely. When there is no preponderance of evidence in favour of either affirmation or denial, we can only acknowledge our ignorance. But between these extremes there is a series of intermediate positions, and probable judgments are their outcome.

....

Probable judgments differ from guesses. In both cases knowledge is incomplete. In both cases reflective understanding fails to reach the virtually unconditioned. But the guess is a non-rational venture beyond the evidence that resembles the non-systematic aspect of events. On the other hand, the probable judgment results from rational procedures. Though it rests on incomplete knowledge, still there has to be some approximation towards completeness. Though it fails to reach the virtually unconditioned, still it has to be closing in upon that exigent norm. Thus, one may say that guesses are probably true only in the statistical sense of diverging non-systematically from true judgments; but probable judgments are probably true in the non-statistical sense of converging upon true judgments, of approaching them as a limit.

Id. at 299-300.

⁷⁷ See *infra* text accompanying note 101 for a discussion of interference with judgment.

A common example of judgment occurring in the legal world is a lawyer's preliminary evaluation of a client's case. A lawyer acting on a contingent-fee basis must judge whether or not the case is "a winner." When a lawyer thinks he has "a winner," a number of givens are taken into account. Are the documents genuine? Will the opposition be tough? Will the case settle or go to trial? If the case goes to trial, can it be won on the merits? Each of these questions involves "a conditioned" whose "conditions must be fulfilled" before a secure judgment, "it's a winner," can be made. In almost all cases, such a prospective judgment would involve a vulnerable insight.⁷⁸ Thus, the lawyer either would have to suspend judgment or limit judgment to one that is merely probable.

Again, knowledge of the real occurs as a synthesis of the "givenness" of the data and the subject's cognitional processes. As Fitzpatrick notes, the value of the Lonerganian analysis is that it shows that reality, in the context of critical realism, exists independently of the knower: "[t]he fact that conditions which are independent of the subject have to be met before judgment can validly be made indicates that there is an impersonal, detachable quality about what is affirmed in judgment — it is independent of the subject who affirms it."⁷⁹ Thus, he concludes that what is known is not something that simply *appears* to the subject, or *seems* to him or that he *would like*, but rather, "knowing is a self-transcending activity and what is known is potentially public and can become a shared possession."⁸⁰

VIII. MORAL JUDGMENT

Fact judgments, however, do not determine whether or not a person acts or does something in a given situation. Rather, moral judgment, which combines a judgment of fact with feelings and value, determines the subject's actions. According to Lonergan,

⁷⁸ See B. LONERGAN, *supra* note 14, at 286–87, for a discussion of insights and judgment in relation to concrete situations:

Judgment on the correctness of insights supposes the prior acquisition of a large number of correct insights. But the prior insights are not correct because we judge them to be correct. They occur within a self-correcting process in which the shortcomings of each insight provoke further questions to yield complementary insights. Moreover, this self-correcting process tends to a limit. We become familiar with concrete situations; we know what to expect; when the unexpected occurs, we can spot just what happened and why and what can be done to favour or to prevent such a recurrence; or, if the unexpected is quite novel, we know enough to recommence the process of learning and we can recognize when, once more, that self-correcting process reaches its limit in familiarity with the concrete situation and in easy mastery of it.

....

[Finally,] [t]here occurs a reflective insight in which at once one grasps

(1) a conditioned, the prospective judgment that a given direct or introspective insight is correct,

(2) a link between the conditioned and its conditions, and this on introspective analysis proves to be that an insight is correct if it is invulnerable and it is invulnerable if there are no further, pertinent questions, and

(3) the fulfillment of the conditions, namely, that the given insight does put an end to further, pertinent questioning and that this occurs in a mind that is alert, familiar with the concrete situation, and intellectually master of it.

Id.

⁷⁹ FITZPATRICK, *supra* note 21, at 222.

⁸⁰ *Id.*

value is a transcendental notion.⁸¹ It is what is intended in questions for deliberation. Rather than asking, "is it so?," the subject asks "is this action worthwhile for me?" Or, put another way, "judgments of fact state or purport to state what is or is not so; judgments of value state or purport to state what is or is not truly good or really better."⁸²

According to Lonergan, when a judgment of value occurs, three components unite. First, there is knowledge of reality and especially of human reality. Second, there are intentional responses⁸³ to values.⁸⁴ Third, there is the initial thrust towards moral self-transcendence constituted by the judgment of value itself. Thus, Lonergan avers:

⁸¹ B. LONERGAN, *supra* note 17, at 34. Value is one of several transcendental notions:

Value is a transcendental notion. It is what is intended for questions of deliberation, just as the intelligible is what is intended for questions of intelligence, and just as truth and being are what are intended in questions for reflection. Such intending is not knowing. When I ask what, or why, or how, or what for, I do not know the answers, but already I am intending what would be known if I knew the answers. When I ask whether this or that is so, I do not as yet know whether or not either is so, but already I am intending what would be known if I did know the answers. So when I ask whether this is truly and not merely apparently good, whether that is or is not worth while, I do not yet know value but I am intending value.

....

Not only do the transcendental notions promote the subject to full consciousness and direct him to his goals. They also provide the criteria that reveal whether the goals are being reached. The drive to understand is satisfied when understanding is reached but it is dissatisfied with every incomplete attainment and so it is the source of ever further questions. The drive to truth compels rationality to assent when the evidence is sufficient but refuses assent and demands doubt whenever evidence is insufficient. The drive to value rewards success in self-transcendence with a happy conscience and saddens failures with an unhappy conscience.

Id. at 34-35 (footnote omitted).

⁸² *Id.* at 37.

⁸³ Lonergan distinguishes non-intentional states or trends and intentional responses:

[Non-intentional states] may be illustrated by such states as fatigue, irritability, bad humor, anxiety, and the latter by such trends or urges as hunger, thirst, sexual discomfort. The states have causes. The trends have goals. But the relation of the feelings to the cause or goal is simply that of effect to cause, of trend to goal. The feeling itself does not presuppose and arise out of perceiving, imagining, representing the cause or goal. Rather, one first feels tired and, perhaps belatedly, one discovers that what one needs is a rest. Or first one feels hungry and then one diagnoses the trouble as a lack of food.

Intentional responses, on the other hand, answer to what is intended, apprehended, represented. The feeling relates us, not just to a cause or an end, but to an object. Such feeling gives intentional consciousness its mass, momentum, drive, power. Without these feelings our knowing and deciding would be paper thin. Because of our feelings, our desires and our fears, our hope or despair, our joys and sorrows, our enthusiasm and indignation, our esteem and contempt, our trust and distrust, our love and hatred, our tenderness and wrath, our admiration, veneration, reverence, our dread, horror, terror, we are oriented massively and dynamically in a world mediated by meaning. We have feelings about other persons, we feel for them, we feel with them. We have feelings about our respective situations, about the past, about the future, about evils to be lamented or remedied, about the good that can, might, must be accomplished.

Id. at 30-31 (footnote omitted).

⁸⁴ Intermediate between judgments of fact and judgments of value lie apprehensions of value. *Id.* at 30. Such apprehensions are made up of intentional feelings. According to Lonergan, these feelings respond to values in accord with some scale of preference, and, while feelings are usually

[t]he judgment of value presupposes knowledge of human life, of human possibilities proximate and remote, of probable consequences of projected courses of action. When knowledge is deficient, then fine feelings are apt to be expressed in what is called moral idealism, i.e. lovely proposals that don't work out and often do more harm than good.⁸⁵

Loneragan also insists, however, that knowledge alone is not enough: "[m]oral feelings have to be cultivated, enlightened, strengthened, refined, criticized and pruned of oddities."⁸⁶ Finally, the development of both knowledge and moral feeling can lead to the discovery of oneself as a moral being and "[t]he realization that one not only chooses between courses of action but also thereby makes oneself an authentic human being or an unauthentic one. With that discovery, there emerges in consciousness the significance of personal value and the meaning of personal responsibility."⁸⁷

As in other areas of human living, the legal profession involves numerous value judgments. The profession is unique, however, in that its members are commonly trying to say "we don't make value judgments," or that "we don't impose our value judgments on others." Such statements at best involve self-delusion. An example using an attorney in private practice is illustrative. When a lawyer files suit on behalf of her client, and against another party, she is performing a human act. A choice is involved, and an action is either executed or not. Lawyers will often say, "my role as a lawyer is to function as an advocate, and *therefore* I have no choice other than to do what my client dictates within the bounds of professional responsibility and legality." Such lawyers are not being honest with either themselves or those to whom they are communicating. For upon critical reflection, the lawyer knows that she chooses to act or not act, file or not file, based on a judgment of value involving her knowledge of the world, values, and feelings. In carrying out the wishes of her client, she has chosen a particular "good."

In so doing, the lawyer only acts authentically if she has opted for that which is truly worthwhile, rather than only the apparently worthwhile. For, according to Loneragan, only insofar as a person regularly opts not for the apparently good, but for the true good, is that person thereby achieving moral self-transcendence. Loneragan goes on to point out, "[o]n the other hand, insofar as one's decisions have their principal motives, not in the values at stake, but in a calculus of the pleasures and pains involved, one is failing in self-transcendence, in authentic human existence, in the origination of value in oneself and in one's society."⁸⁸

Thus it is apparent that contrary to the assertions of the logical positivists, moral language and moral judgment are inexorably bound up in the law and the legal process.

understood as being spontaneous, they can be developed since they can be reinforced or curtailed by the subject. "Such reinforcement and curtailment not only will encourage some feelings and discourage others but also will modify one's spontaneous scale of preferences." *Id.* at 32.

In regard to the scale of value preferences, Loneragan delineates several categories. Vital values include such items as health and strength, grace and vigor. Social values, such as the good of order, condition the vital values of the community. Also in the community, cultural value involves the quest for meaning and value by each person. "It is the function of culture to discover, express, validate, criticize, correct, develop, improve such meaning and value." *Id.* Finally, personal and religious values involve each person in his self-transcendence. *Id.*

⁸⁵ *Id.* at 38.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 50. See *supra* note 70 for a discussion of particular goods.

Contrary to the assertions of the legal realists, such value judgments are not necessarily arbitrary, but only become so if not in accord with the transcendental precept of seeking that which is truly worthwhile. Thus, as will be seen later, at bottom, moral judgment involving moral transcendence is what makes laws valid or legitimate — not logical consistency.

IX. BELIEF

Closely related to, but distinct from judgments of fact and judgments of value is Lonergan's notion of belief. In the course of living, there is much that each person finds out for himself, that he knows simply because of his own inner or outer experience, such as his own sense experiences, insights, and judgments of fact and value. However, such immanently generated knowledge is but a small fraction of what a person in our society considers himself to know. As Lonergan points out, "[a man's] immediate experience is filled out by an enormous context constituted by reports of the experience of other men at other places and times. His understanding rests not only on his own but also on the experience of others . . ."⁸⁹ This understanding involves presuppositions that he has taken for granted because they commonly are assumed to be correct and he has neither the time nor perhaps the ability to investigate for himself. Accordingly, "the judgments, by which he assents to truths of fact and of value, only rarely depend exclusively on his immanently generated knowledge, for such knowledge stands not by itself in some separate compartment but in symbiotic fusion with a far larger context of beliefs."⁹⁰

Belief comes into play in virtually every area in which the lawyer practices. We all "know" that statutes, regulations, cases, and transcripts depict past actions or events even though we did not participate in those actions or events. After all, we read these and take them for granted all the time. But, in each of these circumstances, was the transcript or the printed case an accurate representation of what really was said or written? The lawyer only "knows" this through belief.

What then is belief? Lonergan outlines five steps which make up the notion of belief. The first step is taken not by the subject who believes, but by the person in whom the subject believes. The source makes possible the process of belief because that which he tells the subject is true — true in an independent and detachable sense when the source has exercised the cognitional self-transcendence involved in the true judgment of fact and the moral self-transcendence involved in the true judgment of value: while the self-transcendent person cannot transfer to another his own powers of judgment, he can report what he affirms and what he denies, and that the subject can believe in him.⁹¹ The second step which makes up the notion of belief involves a general judgment as to the value of belief for society:

[This general judgment of value] approves man's division of labor in the acquisition of knowledge both in its historical and in its social dimensions. The approval is not uncritical. It is fully aware of the fallibility of believing. But it finds it obvious that error would increase rather than diminish by a

⁸⁹ B. LONERGAN, *supra* note 17, at 41.

⁹⁰ *Id.* at 42.

⁹¹ *Id.* at 45.

regression to primitivism. So it enters into man's collaboration in the development of knowledge, determined to promote truth and combat error.⁹²

The third step is a particular judgment of value involving the trustworthiness of a witness, a source, or a report, the competence of an expert, or the soundness of judgment of a teacher, a lawyer, a judge, a statesperson, or a politician. The trustworthiness of the source, according to Lonergan, can involve the following criteria: (1) Whether the source reached cognitional self-transcendence in his or her judgments of fact and moral self-transcendence in his or her judgments of value; (2) whether one's source was critical of her sources; (3) whether she was truthful and accurate in her statements; (4) whether her statement is consistent with her prior statements; (5) whether her statement is consistent with other sources; (6) when everything favors belief except the intrinsic probability of the statement to be believed, one can ask oneself whether the fault is not in oneself, whether it is not the limitation of one's own horizon that prevents one from grasping the intrinsic probability of the statement in question.⁹³

The fourth step which makes up the notion of belief — the decision to believe — involves the choice which follows upon the general and particular judgments of value. According to Lonergan, "the combination of the general and the particular judgment yields the conclusion that the statement ought to be believed for, if believing is a good thing, then what can be believed should be believed. Finally, what should be so, actually becomes so, through a decision or choice."⁹⁴ The fifth and final step is the act of believing. Each person, in his own mind, judges to be true the communicated judgment of fact or value.⁹⁵

A common illustration of belief in the legal "world" involves the use of a form book. A lawyer commonly will turn to a form book in order to draft documents or pleadings for a specific purpose. In many instances the lawyer has not researched the law relating to the particular form which she intends to use. She has no doubt as to the validity of the form, but the absence of doubt is not due to any immanently generated knowledge, but to belief. In doing so, is the lawyer acting unreasonably or irresponsibly? Is anyone willing to defend the thesis that each lawyer should generate her own form from scratch each time a new form is required, even though another attorney in the office or a reliable commercial service has already generated a similar form in the recent past?

While science is often contrasted with belief, belief plays as large a role in science as it does in other areas of human activity. Lonergan points out that when a scientist "[r]epeats for himself another's observations and experiments, when he works out for himself the theorems needed to formulate the hypothesis, its presuppositions, and its implications, when he grasps the evidence for excluding alternative views, then he does not believe but knows."⁹⁶ But scientists do not spend all their time repeating these procedures when they have already been performed by colleagues. Rather, "[n]ew results, if not disputed, tend to be assumed in further work. If the further work prospers, they begin to be regarded with confidence."⁹⁷ Only if the further work runs into difficulties, however, will the results relied upon come under suspicion and further scrutiny. Thus,

⁹² *Id.*

⁹³ *Id.* at 45-46.

⁹⁴ *Id.* at 46.

⁹⁵ *Id.*

⁹⁶ *Id.* at 42.

⁹⁷ *Id.* at 43.

Loneragan concludes that the aim of the scientist is the advancement of science through a group process which "is operative only slightly as immanently generated knowledge but overwhelmingly as belief."⁹⁸

Finally, while there exists in principle a distinction between immanently generated knowledge and belief, it does not follow that two "compartments" exist in anyone's mind and the person could retain what he "knows" and throw out what he believes. The solution to the existence of mistaken beliefs is not to reject belief altogether. Rather, the solution involves knowing what belief is and then reflecting critically upon its constituent elements in each instance, such as the reliability of the source, information which the subject obtains from other sources, or other conflicting beliefs or immanently generated knowledge which the subject has acquired.⁹⁹

Thus, the lawyer, like the scientist, learns not only from the use of her own senses, mind, and heart, but she also learns from others; not solely by repeating the operations they have performed, but, for the most part, by taking their word for their results. According to Lonergan, the result of such learning is that

[t]hrough communication and belief there are generated common sense, common knowledge, common science, common values, a common climate of opinion. No doubt, this public fund may suffer from blindspots, oversights, errors, bias. But it is what we have got, and the remedy for its short-comings is not the rejection of belief and so a return to primitivism, but the critical and selfless stance that, in this as in other matters, promotes progress and offsets decline.¹⁰⁰

⁹⁸ *Id.*

⁹⁹ Since mistaken beliefs are possible, it is important to discuss further how they can be eliminated:

Mistaken beliefs exist, and the function of an analysis of belief is overlooked if it fails to explain how mistaken beliefs arise and how they are to be eliminated.

...

[T]he problem of eliminating from one's own mind the rubbish that may have settled there in a lifelong symbiosis of personal inquiry and believing [raises no new issues]. For learning one's errors is but a particular case of learning. It takes as its starting-point and clue the discovery of some precise issue on which undoubtedly one was mistaken. It advances by inquiring into the sources that may have contributed to that error and, perhaps, contributed to other errors as well. It asks about the motives and the supporting judgments that, as they once confirmed one in that error, may still be holding one in others. It investigates the consequences of the view one now rejects and it seeks to determine whether or not they too are to be rejected. The process is cumulative. The discovery of one error is exploited to lead to the discovery of others; and the discovery of the others provides a still larger base to proceed to the discovery of still more. Moreover, this cumulative process not only takes advantage of the mind's native process of learning, in which one insight leads on to other insights that open the way to still further insights, but it also exploits the insistence of rational consciousness on consistency; for just as our love of consistency, once we have made one mistake, leads us to make others, so the same love of consistency leads us to reject other mistakes, when one is rejected and, at the same time, it provides us with abundant clues for finding the others that are to be rejected.

B. LONERGAN, *supra* note 14, at 713-15. See also, W. QUINE, *THE WEB OF BELIEF* (1970). While Quine makes some valid observations, his work is deficient in that it operates on idealist assumptions of reality. The levels of experience, understanding, judgment of fact, and moral judgment, as well as belief are all "looked at" as one operation.

¹⁰⁰ B. LONERGAN, *supra* note 17, at 44.

Thus it is apparent that belief is inexorably involved in every facet of our world, including that of the lawyer. Belief is not something to be mocked or scorned as infantile or unscientific. Rather, only that belief which is not in conformance with the above criteria should be discouraged. Belief which is based on the criteria should be encouraged as an enlightened and progressive phenomenon.

X. INTERFERENCE WITH JUDGMENT

If fact judgments, value judgments, and belief judgments occur, they do not always occur without some interference. Lonergan points out that while "everyone has some acquaintance with the spirit of inquiry and reflection, few think of making it the effective centre of their lives; and of that few, still fewer make sufficient progress to be able to withstand other attractions and persevere in their high purpose."¹⁰¹ Several forms of bias, including what Lonergan refers to as dramatic, individual, group, and general bias, interfere with judgment.

Lonergan denominates one such form of interference "dramatic bias." Dramatic bias is a type of interference with judgment that occurs where elementary passions bias understanding in practical and personal matters. Such feelings can operate to exclude an insight, and also "[t]o exclude the further questions that would arise from it and the complementary insights that would carry it towards a rounded and balanced viewpoint."¹⁰² The presence of this biased, incomplete viewpoint may result in "a withdrawal from the outer drama of human living into the inner drama of phantasy."¹⁰³ Such a result is a condition which Lonergan labels "scotosis."¹⁰⁴ The presence of scotosis results in a "blind spot" in understanding which prevents a person from judging the world as it really is. Jerome Frank has noted the presence of scotosis or what he denominates "prejudice" in the arena of judicial decisionmaking.¹⁰⁵

¹⁰¹ B. LONERGAN, *supra* note 14, at 225.

¹⁰² *Id.* at 191.

¹⁰³ *Id.*

¹⁰⁴

[A scotosis is] a weakening of the development of common sense, a differentiation of the *persona* and the *ego*, an alternation of suspicion and reassurance, of doubt and rationalization. There follow an aberration of the censorship, the inhibition of unwanted imaginative schemes, the disassociation of affects from their initial objects and their attachment to incongruous yet related materials, the release of affective neural demands in dreams, and the functionally similar formation of screening memories.

Id. at 197.

¹⁰⁵ Jerome Frank has observed:

Ranyard West, a practicing psychiatrist and also a close student of matters legal, makes some comments pertinent here. He writes of the "formation of prejudice from fantasy, a process deeply hidden from all but the most penetrating introspection . . ." The "mental processes involved" have two stages: In early life, each person has fantasies "compounded out of (a) genuine observations made by him as a young child, (b) perversions of truth introduced by misapprehended observations, and (c) pure inventions of the mind, imposed by the early emotional life of the child upon the real or semi-real figures around him" which "arouse his primitive and incoherent passions." In the adult period, "the unconscious mind" achieves an "identification . . . between personalities of . . . adult experiences and these . . . fantasy figures of infancy." The "realities of infancy . . . bias the tastes and judgments" of the adult, providing the "unconscious prejudices" of adult life. "We meet the persons, situations, and causes, X, Y, Z of our adult life; and to our conscious appraisal of them is contributed a

Individual bias can also interfere with judgment. Individual bias — egoism — is an incomplete development of intelligence which occurs when a person sees himself as the center of the universe.¹⁰⁶ Such egoism results in an exclusion of correct understanding precisely because the person refuses to inquire and to ask additional questions which could lead to answers that conflict with his self-interest. This is not to say, however, that the person operating under individual bias, who engages in one type of "flight from understanding," is less intelligent than others. As Lonergan points out, the opposite may in fact be the case:

[m]ore than many others, [the egoist] has developed a capacity to face issues squarely and to think them through. The cool schemer, the shrewd calculator, the hardheaded self-seeker are very far from indulging in mere wishful thinking. Without the detachment of intelligence, they cannot invent and implement stratagems that work.¹⁰⁷

The problem remains, however, in that the egoist refuses to give free reign to his intelligence and to ask the further questions that would lead to a profound modification of his solution.¹⁰⁸

It almost goes without saying that individual bias is present in many lawyers. There are many shrewd and hardheaded lawyers whose paramount goal is economic self-interest. The result is that these lawyers refuse to ask further questions about the legal system in general, or certain laws in particular, because these lawyers possess political and financial power which is dependent on the status quo. Any change is perceived as a threat to their self-interest. Lonergan notes that this "flight from understanding," which stems from the presence of individual bias in our society, results in unintelligent policies and inept courses of action: "[t]he situation deteriorates to demand still further insights and, as they are blocked, policies become more unintelligent and action more inept."¹⁰⁹ According to Lonergan, even worse is that "the deteriorating situation seems to provide the uncritical, biased mind with factual evidence in which the bias is claimed to be verified. So in ever increasing measure intelligence comes to be regarded as irrelevant to practical living."¹¹⁰

Interference with judgment can also result from the presence of "group bias."¹¹¹ Group bias occurs where members of various groups see their respective groups as superior and others as inferior. The group tends to project its own inadequacies onto other groups and treat them with hostility or contempt. The classic example of this phenomenon is the "master race" mentality exhibited by the Nazis earlier in this century. Groups can also be distinguished, however, along the lines of technological, economic,

factor from our unconscious memories, which judges them as if they were the A B C of some forgotten, far-off experiences of childhood." Many of us therefore often "do not see things and people as they are." . . . It is, says West, by no means easy for a man to "realize and feel the scope of his own prejudicial judgments," to "appreciate fully the measure of . . . prejudice" in his own life.

J. FRANK, *supra* note 36, at 151-52.

¹⁰⁶ B. LONERGAN, *supra* note 14, at 220.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at xiv.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 222.

and political aspects, to name a few. The role of groups and thus of group bias in society becomes significant in the context of social progress.

Social progress is a succession of changes brought about by the functioning of common sense in the community. Lonergan notes, "[h]owever, while the practical common sense of a community may be a single whole, its parts reside separately in the minds of members of social groups, and its development occurs as each group intelligently responds to the succession of situations with which it immediately deals."¹¹² Thus, Lonergan notes that if all group responses were made by "pure intelligences," seeking to implement that which is truly worthwhile for society, then continuous social progress might be inevitable. Instead, group responses are usually made by persons whose intelligences are affected or even warped by their membership in and allegiance to the group: "[j]ust as the individual egoist puts further questions up to a point, but desists before reaching conclusions incompatible with his egoism, so also the group is prone to have a blind spot for the insights that reveal its well-being to be excessive or its usefulness at an end."¹¹³

Again, it hardly needs to be said that group bias is present within lawyers as a group. Questions relating to availability of legal services, legal reform, and professional reform are consistently ignored by many lawyers because further inquiry could lead to questions and conclusions which threaten the economic well-being or prestige of lawyers as a group within our society. As Lonergan notes, the presence over time of this type of bias in society results in an unhealthy social distortion:

Society becomes stratified; its flower is [lawyers are] far in advance of average attainment; its roots appear to be the survival of the rude achievement of a forgotten age. Classes become distinguished, not merely by social function, but also by social success; and the new differentiation finds expression not only in conceptual labels but also in deep feelings of frustration, resentment, bitterness, and hatred.¹¹⁴

Finally, general bias can interfere with judgment.¹¹⁵ This bias occurs when the person makes common sense the sole object of inquiry and action. According to Lonergan, this interference with judgment results because common sense is by definition incapable of

¹¹² *Id.* at 223.

¹¹³ *Id.*

¹¹⁴ *Id.* at 224. Lonergan states further:

While the individual egoist has to put up with the public censure of his ways, group egoism not merely directs development to its own aggrandizement but also provides a market for opinions, doctrines, theories that will justify its ways and, at the same time, reveal the misfortunes of other groups to be due to their depravity. Of course, as long as the successful group continues to succeed, as long as it meets each new challenge with a creative response, it feels itself the child of destiny and it provokes more admiration and emulation than resentment and opposition. But development, guided by group egoism, is bound to be one-sided. It divides the body social not merely into those that have and those that have not but also makes the former the representatives of the cultural flower of the age to leave the latter apparent survivals from a forgotten era. Finally, in the measure that the group encouraged and accepted an ideology to rationalize its own behavior, in the same measure it will be blind to the real situation, and it will be bewildered by the emergence of a contrary ideology that will call to consciousness an opposed group egoism.

B. LONERGAN, *supra* note 17, at 54.

¹¹⁵ B. LONERGAN, *supra* note 14, at 225-42.

analyzing itself. Common sense "[i]s incapable of coming to grasp that its peculiar danger is to extend its legitimate concern for the concrete and the immediately practical into disregard of larger issues and indifference to long-term results."¹¹⁶ The most obvious example of general bias occurs in politics. In many instances, the officeholder is found to be concerned only with stopgap measures which may work in the short term but are doomed to fail in the long run. This occurs because common sense is only concerned with the immediately practical, such as getting "results" before the politician is up again for re-election.

General bias also permeates the legal profession through the unreflective acceptance of "role" by many lawyers. These lawyers learn their role within the legal system and then perform, albeit brilliantly, in many instances. Nevertheless, their only concern is with winning *this* case, planning *this* estate and pleasing *this* client. While such common-sense insights, judgments, and activities are important, such practicality cannot be the guiding principle in our society because, by its very nature, it is incapable of planning for the long term.

The presence of the above-stated biases in society results in still another problem. A lawyer seeking to remedy the distortions which exist in his community is confronted with the phenomenon of "ressentiment."¹¹⁷ The notion of resentment is described by Lonergan:

[R]essentiment is a re-feeling of a specific clash with someone else's value-qualities. The someone else is one's superior physically or intellectually or morally or spiritually. The re-feeling is not active or aggressive but extends over time, even a life-time. It is a feeling of hostility, anger, indignation that is neither repudiated nor directly expressed. What it attacks is the value-quality that the superior person possessed and the inferior not only lacked but also feels unequal to acquiring. The attack amounts to a continuous belittling of the value in question, and it can extend to hatred and even violence against those that possess that value-quality.¹¹⁸

Thus, the lawyer who seeks to transcend individual and group interest to achieve change for the good of society as a whole may find that those around her react with feelings of hostility, anger, and indignation. While nothing might be said directly to her, the values possessed by the lawyer would still be subject to continuous belittling. As Lonergan notes, "[p]erhaps [the] worst feature [of resentment] is that its rejection of one value involves a distortion of the whole scale of values and that this distortion can spread through a whole social class, a whole people, a whole epoch."¹¹⁹

XI. UNIFICATION BY WAY OF EXAMPLE

Some of the points made earlier in the article may be collectively illustrated through an example involving a civil-bench trial. In essence, the role of a judge in a bench trial involves reaching a decision or judgment as to the disposition of the parties involved in the case, such as the amount of damages to be paid by one party to another. Such a decision involves a judgment of value. For the bottom line is that the judge decides the

¹¹⁶ *Id.* at 226.

¹¹⁷ B. LONERGAN, *supra* note 17, at 33.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

case based on a judgment which combines a knowledge of the human world, including the legal world, with his or her feelings and value preferences.

There are many factors which enter into a judge's decision in a given case. First, there is the judge's knowledge of the human world or the real world mediated by meaning. As Jerome Frank notes in *COURTS ON TRIAL*,¹²⁰ one important aspect of the "human world" is the facts of the case at hand.¹²¹ Frank characterizes the "facts" deduced by the judge from the witnesses' testimony as merely a judicial "guess." Employing Lonerganian terminology, however, it would be more accurate to characterize this fact-finding process as one involving belief. Again, belief involves a value judgment as to the trustworthiness or competency of the witness, which can be de facto absolute, or, as in most cases, merely probable.

An additional element of the human world which the judge considers is statutes as well as prior judicial decisions.¹²² Minimally, statutes and opinions contain value judgments and common-sense generalizations regarding how to order society. These judgments and generalizations are expressed as rules, procedures, policies, and principles.¹²³ Finally, a very important element of the "human world" which the judge considers is the larger all-encompassing context of the "jig-saw puzzle" of the world of common

¹²⁰ J. FRANK, *supra* note 36.

¹²¹ *Id.* at 61.

¹²² Judge Hutcheson and Max Radin state that in many instances, statutes and rules only consciously come into play after the decision has been made:

[Max Radin] tells us, first, that the judge is a human being; that therefore he does not decide causes by the abstract application of rules of justice or of right, but having heard the cause and determined that the decision ought to go this way or that way, he then takes up his search for some category of the law into which the case will fit.

He tells us that the judge really feels or thinks that a certain result seems desirable, and he then tries to make his decision accomplish that result. "What makes certain results seem desirable to the judge?" he asks, and answers his question that that seems desirable to the judge which, according to his training, his experience, and his general point of view, strikes him as the jural consequence that ought to flow from the facts, and he advises us that what gives the judge the struggle in the case is the effort so to state the reasons for his judgment that they will pass muster.

....

[Hutcheson concludes,] [t]here is nothing unreal or untrue about this picture of the judge, nor is there anything in it from which a just judge should turn away. It is true, and right that it is true, that judges really do try to select categories or concepts into which to place a particular case so as to produce what the judge regards as a righteous result, or, to avoid any confusion in the matter of morals, I will say a "proper result."

Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929) (quoting Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925)).

¹²³ In regard to such legal principles or rules, Jerome Hall notes:

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.

J. HALL, *supra* note 1, at 153 (emphasis added).

meaning. This involves the judge's participating in a court, a legal system, a state; as well as his or her place in a family, a community, a culture.¹²⁴

The judge is aware that his or her actions will affect the common world of meaning and conversely, that that world will affect him or her. For example, a controversial decision, for whatever reason, may provoke the indignation of the judge's peers in the bar association and the community as a whole. Or, in some instances, it may be clear that an appellate court will reverse the decision. The decision also could be seen as "breaking new ground," and the community could receive it in a positive manner. Finally, the decision might "fit" within the existing "order" and raise no comment whatsoever. In each instance, the action of the judge always occurs within a larger context — the common-sense world of meaning.

Along with the judge's knowledge of his or her world, of no less importance are his or her feelings and value preferences. The values which the judge prefers and feels to be important may not have been reflected upon and thus may be distorted. Interference with a proper apprehension of values could result from any of the biases previously discussed. Because of the presence of general bias, the judge may continually view the practical, short-term result as controlling. Individual and group bias may result in the judge's decision being biased by what is most advantageous for him or her, either as an individual or as a member of a group. Finally, dramatic bias involving repression, inhibition, and transference of neural stimuli may result in a decision which is biased.¹²⁵

Whether or not bias is present, the judge will have to make a decision, and that choice necessitates a value judgment as to what that judge at that time decides is worthwhile for him or her to do. Given that the judge has made a decision, he or she still must write the opinion, making findings of fact and law. Once again the judge is faced with a value judgment, for he or she either must choose to frame those "findings" in language which reflects the fact and value judgments he or she has made or choose not to. While no judge can describe fully the constituents of his or her value judgment, certainly some description is possible. However, a judge normally describes, and the "legal world" expects him or her to describe, his or her particular value judgment in terms of prior written value judgments/common-sense generalizations, such as, statutes, policies, rules, or opinions. Because the judge's decision and opinion involve *his or her* value judgment in *those* concrete circumstances, the judgment cannot be articulated fully by employing statutes, rules, definitions, and policies which are necessarily abstract.¹²⁶ Nevertheless, such an abstract logical characterization is expected, and therefore, in many situations the judge employs linguistic manipulation in order to maintain "logical" consistency.¹²⁷

¹²⁴ See *supra* text accompanying notes 44–70.

¹²⁵ See *supra* note 104 and accompanying text.

¹²⁶ Again, abstract rules cannot take into account the dynamic nature of society, nor the judge's feelings and therefore cannot adequately describe the concrete value judgment made by the judge in a particular situation. In the judicial process, the only concepts which remain invariant over time are the transcendental notions. See *supra* note 81.

¹²⁷ By common consent, contracts is the most confused and most uncertain area in conflict of laws. American courts, to be sure, frequently purport to apply some hard-and-fast rule, as that a contract is governed by the law of the place of contracting, which is the place where the last act that is necessary to make the contract binding took place, or by the law of the place of performance. But the judges who adopt this approach rarely practice what they preach. Sometimes they evade the rule they have

Finally, the judge's opinion illustrates the different aspects of meaning. The opinion handed down by the judge involves several meaning functions. First, the cognitive function is present; the judge is able to formulate an opinion, and the parties as well as others are able to understand that formulation (in most cases). Second, the decision as it exists at that moment, in that court, becomes constituted and effective through communication. The opinion will have both a proximate and a remote effective meaning. Its proximate effective meaning is that a party reads the opinion and then pays damages or obeys an injunction (with or without the help of the sheriff). Its remote effective meaning is that many people will plan and litigate in the future only after considering the published opinion.

XII. THE PROBLEM

The principles discussed previously can now be placed within the larger perspective of history and social change. Lonergan points out that the course of history is in accord with emergent probability. That history, according to Lonergan, "is the cumulative realization of concretely possible schemes of recurrence in accord with successive schedules of probabilities."¹²⁸ Human history, however, differs from history involving nonsentient life forms in that among the probable possibilities relating to human history is man's ability to form insights and take the initiative in bringing about material and social conditions which make certain schemes concretely possible, probable, and actual.¹²⁹

announced by giving a different meaning to some key term, as the place of contracting. More frequently, they change the rule itself from case to case, and yet talk in each individual opinion as if the rule relied upon in that particular instance stood alone without competitors. So, for example, the New York courts formerly relied on whichever one of four inconsistent rules as to the law governing the validity of a contract was best suited for the purpose at hand. This practice, however, was not frankly recognized in the opinions; each customarily mentioned but a single rule and simply ignored what the courts had said on other occasions. A similar approach has been taken in other States.

Reese, *Power of Parties to Choose Law Governing their Contract*, PROC. AM. SOC. INT'L L. 49-50 (1960) (footnotes omitted).

¹²⁸ B. LONERGAN, *supra* note 14, at 227.

¹²⁹ See *supra* note 67 for a definition of a scheme of recurrence. Lonergan observes that the world in process involves conditioned schemes of recurrence. Thus the distinction is made between the actual seriation, the probable seriation, and the possible seriation of schemes of recurrence:

The actual seriation is unique. It consists of the schemes that actually were, are, or will be functioning in our universe along with precise specifications of their places, their durations, and their relations to one another.

The probable seriation differs from the actual. For the actual diverges non-systematically from probability expectations. The actual is the factual, but the probable is ideal. Hence, while the actual seriation has the uniqueness of the matter of fact, the probable seriation has to exhibit the cumulative ramifications of probable alternatives. Accordingly, the probable seriation is not a single series but a manifold of series. At each stage of world process there is a set of probable next stages, of which some are more probable than others. The actual seriation includes only the stages that occur. The probable seriation includes all that would occur without systematic divergence from the probabilities.

The possible seriation is still more remote from actuality. It includes all the schemes of recurrence that could be devised from the classical laws of our universe. It orders them in a conditioned series that ramifies not only along the lines of probable alternatives but also along lines of mere possibility or negligible probability.

B. LONERGAN, *supra* note 14, at 119.

According to Lonergan, it is "[i]n this fashion [that] man becomes for man the executor of the emergent probability of human affairs. Instead of being developed by his environment, man turns to transforming his environment in his own self-development."¹³⁰

Although man remains under emergent probability, this subjugation differs from the subjugation of electrons or of evolving species. First, man can anticipate possible schemes or scenarios and then "make" them happen, at least to some degree. Second, man can work out the manner in which prior insights and decisions determine the possibilities and probabilities of later insights and decisions. Lonergan comments that

[t]his control of the emergent probability of the future can be exercised not only by the individual in choosing his career and in forming his character, not only by adults in educating the younger generation, but also by mankind in its consciousness of its responsibility to the future of mankind.¹³¹

Thus, Lonergan emphasizes that "[t]he challenge of history is for man progressively to restrict the realm of chance or fate or destiny and progressively to enlarge the realm of conscious grasp and deliberate choice."¹³²

While common sense is an important part of this endeavor, it cannot be the guiding principle. For when common sense runs amok and is not guided by a higher principle, incoherent policies and enterprises abound. As Lonergan notes,

the general bias of common sense involves the disregard of timely and fruitful ideas; and this disregard not only excludes their implementation but also deprives subsequent [historical] stages both of the further ideas, to which they would give rise, and of the correction that they and their retinue would bring to the ideas that are implemented.¹³³

There are three major consequences which result from human history being controlled by general bias. First, the social situation deteriorates cumulatively, for "just as progress consists in a realization of some ideas that leads to the realization of others until a whole coherent set is concretely operative, so the repeated exclusion of timely and fruitful ideas involves a cumulative departure from coherence."¹³⁴ Thus, Lonergan observes that "[t]he dynamic of progress is replaced by sluggishness and then by stagnation. In the limit, the only discernible intelligibility in the objective facts is an equilibrium of economic pressures and a balance of national powers."¹³⁵

A second consequence which results from general bias is the mounting irrelevance of detached and disinterested intelligence. As culture, religion, and philosophy become divorced from the world of man, the world becomes less and less intelligible. More and more events occur which seem to be senseless and irrational; these events seem to compound themselves and multiply. This is what Lonergan labels the "social surd."¹³⁶

The increasing presence of the social surd — the senseless, the irrational — promotes the third consequence of general bias: the surrender of detached and disinterested intelligence. According to Lonergan,

¹³⁰ *Id.* at 227.

¹³¹ *Id.*

¹³² *Id.* at 228.

¹³³ *Id.* at 229.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 230.

The fragmentary and incoherent intelligibility of the objective situation sets the standard to which common-sense intelligence must conform. [Thus] men of practical common sense become warped by the situation in which they live and regard as starry-eyed idealism and silly unpracticality *any* proposal that would lay the axe to the root of the social surd.¹³⁷

XIII. THE SOLUTION

What then is needed to reverse social deterioration and the social surd? According to Lonergan, what is needed is a higher unifying viewpoint which man can operate under and thus use to control his history. This higher, unifying cultural viewpoint is what Lonergan denominates the "cosmopolis" or critical culture.¹³⁸ In our society today, however, Lonergan points out that culture is not acting as a reflective vehicle which passes judgment on the human world and the human institutions and systems contained therein:

[Culture has ceased] to be an independent factor that passes a detached yet effective judgment upon capital formation and technology, upon economy and polity. To justify its existence, it had to become more and more practical, more and more a factor within the technological, economic, political process, more and more a tool that served palpably useful ends. The actors in the drama of living become stage-hands; the setting is magnificent; the lighting superb; the costumes gorgeous; but there is no play.¹³⁹

What then is this higher, unifying cultural viewpoint which is needed? It is a critical culture that

is neither class nor state, that stands above all their claims, that cuts them down to size, that is founded on the native detachment and disinterestedness of every intelligence, that commands man's first allegiance, that implements itself primarily through that allegiance, that is too universal to be bribed, too impalpable to be forced, too effective to be ignored.¹⁴⁰

This independent critical culture or "cosmopolis" is brought into existence through the *intellectual, psychic, and moral* conversion of each person in society. In other words, each person is asked to affirm and then continually reflect upon her own cognitional processes, such as, knowing how she knows, how she feels, and how she comes to act.

Intellectual conversion involves the affirmation that knowing does not involve simply "taking a look." Rather, *knowing* involves the interrelated moments of experiencing, understanding, and judging. Intellectual conversion occurs when the subject affirms herself as a knower; that is, if she affirms herself to be an intelligible concrete unity-identity-whole, characterized by acts of sensing, perceiving, imagining, enquiring, understanding, formulating, reflecting, grasping the unconditioned, and judging. The fulfillment of these conditions are given in the subject's own consciousness.¹⁴¹

¹³⁷ *Id.* (emphasis added).

¹³⁸ *See id.*

¹³⁹ *Id.* at 237.

¹⁴⁰ *Id.* at 238.

¹⁴¹ TYRRELL, *supra* note 8, at 91. If one attempts to deny this immanent cognitional structure, an internal contradiction develops. For in order to deny the structure the subject would have to employ it. As Tyrrell states:

As Lonergan points out, the intellectual conversion necessarily entails the rejection of the philosophical counter-positions of the naive realist, the empiricist, and the idealist:

The naive realist knows the world mediated by meaning but thinks he knows it by looking. The empiricist restricts objective knowledge to sense experience; for him, understanding and conceiving, judging and believing are merely subjective activities. The idealist insists that human knowing always includes understanding as well as sense; but he retains the empiricist's notion of reality, and so he thinks of the world mediated by meaning as not real but ideal. Only the critical realist can acknowledge the facts of human knowing and pronounce the world mediated by meaning to be the real world; and he can do so only inasmuch as he shows that the process of experiencing, understanding, and judging is a process of self-transcendence.¹⁴²

Psychic conversion differs from intellectual conversion inasmuch as the former notion involves the subject getting in touch with her emotions and integrating them into consciousness.¹⁴³ She must be attentive and open to her feelings rather than reject or suppress them. She must try to understand what is going on in terms of her feelings and then try to judge what actually is the situation. On the basis of her judgments, the subject may then decide that she must either change those feelings or change some external relation or action.

[S]elf-affirmation is an immanent law of intelligence . . . any attempt to deny that one is a knower in the sense specified is to involve oneself in a contradiction between statement and performance. . . . [For] to deny that one is a unity-identity-whole characterized by acts of sensing, perceiving, inquiring, understanding, reflecting, and judging, one must appeal to one's own experience, elucidate one's understanding, indicate sufficiency of evidence for judgment, and claim personal responsibility for the judgment one makes. Self-affirmation accordingly, in Lonergan's analysis, cannot ultimately be avoided by anyone who endeavours to operate in full accord with the exigencies of intelligence and rationality and on the basis of his own cognitive experience.

Id. at 92-93.

¹⁴² B. LONERGAN, *supra* note 17, at 238-39. See *supra* text accompanying note 79.

¹⁴³ See generally TYRRELL, *On the Possibility and Desirability of a Christian Psychotherapy*, in LONERGAN WORKSHOP (1978). But see J. STONE, *LAW AND THE SOCIAL SCIENCES IN THE SECOND HALF CENTURY* (1966). Stone states that if introspection was to be undertaken by judges, those judges, as well as the legal system as a whole, would probably collapse:

[The] demand for complete judicial awareness and articulation of all factors entering into judgment, if we tried to build these into institutional arrangements, would vastly increase the internal and external stresses upon judges. Save with the very ablest this would lead, in day-after-day, year-after-year functioning, to increasing stress, delay, faltering of decision, and even breakdown. And the recruiting of abler men would become progressively more difficult. So that the judicial institution would be threatened both in its incumbents and the succession after them.

Id. at 84 (footnote omitted). It is unclear to the author what Stone means when he speaks of "institutional arrangements." Stone is right in saying that standardized psychological exams, given at intervals during a judge's tenure on the bench, may not be a good idea. Also, he is correct in saying that a judge could not be expected to articulate *all* the factors which entered into his decision. However, if Stone means that judges should *not* reflect upon their cognitive operations and thus should *not* try to adhere to the transcendental precepts, then Stone is proposing that the judge accept biases and engage in flight from understanding. In the author's view, it is not reflection but flight from understanding which threatens the judicial institution, "both in its incumbents and the succession after them." *Id.*

In this way, the person can avoid the influence of dramatic bias. Such self-evaluation is by no means an easy process and in certain situations may be difficult or impossible to achieve without help. As Lonergan notes, "[i]f we would know what is going on within us, if we would learn to integrate it with the rest of our living, we have to inquire, investigate, seek counsel."¹⁴⁴

Finally, moral conversion involves changing the criterion of one's decisions and choices from mere satisfactions to values, from what is only apparently worthwhile to what is truly worthwhile. As Lonergan puts it, "[m]oral conversion consists in opting for the truly good, even for value against satisfaction when value and satisfaction conflict."¹⁴⁵ He continues, "by deliberation, evaluation, decision, action, we can know and do, not just what pleases us, but what *truly* is good, worthwhile."¹⁴⁶

This of course raises the question of what is truly good or worthwhile. Lonergan describes the human good as follows:

The human good . . . is at once individual and social. Individuals do not just operate to meet their needs but cooperate to meet one another's needs. As the community develops its institutions to facilitate cooperation, so individuals develop skills to fulfill the roles and perform the tasks set by the institutional framework. Though the roles are fulfilled and the tasks are performed that the needs be met, still all is done not blindly but knowingly, not necessarily but freely. The process is not merely the service of man; it is above all the making of man, his advance in authenticity, the fulfillment of his affectivity, and the direction of his work to the particular goods and a good of order that are worth while.¹⁴⁷

When moral conversion occurs, "[l]ears of discomfort, pain, privation have less power to deflect one from one's course. Values are apprehended where before they were overlooked. Scales of preference shift. Errors, rationalizations, ideologies fall and shatter to leave one open to things as they are and to man as he should be."¹⁴⁸

The above conversions do not involve merely assenting to certain propositions at a moment in time. Rather, they denote an approach to living which must be constantly striven for, year in and year out. Such an approach involves *knowing* what it is to know, to feel, and to choose, and reflecting on those cognitional processes. The subject can thus recognize and deal with those biases, beliefs and feelings that interfere with judgments of fact, value, and belief.

In order to reverse social decline or deterioration — the social surd — it is essential that lawyers as individuals undergo these conversions and participate in the cosmopolis. In our society lawyers function as parents, members of their respective communities, legislators, judges, businesspeople, government policymakers, professors, and private practitioners. As such, each must bring his or her self-appropriated mind and heart to bear on the problems which confront our society. Lawyers must execute value judgments and actions based on what the lawyer judges to be truly good and truly worthwhile.

¹⁴⁴ B. LONERGAN, *supra* note 17, at 122–23.

¹⁴⁵ *Id.* at 240.

¹⁴⁶ *Id.* at 35 (emphasis added).

¹⁴⁷ *Id.* at 52.

¹⁴⁸ *Id.* Although the topic will not be discussed here, religious conversion can affect moral conversion, since according to Lonergan, it is only through God's love and grace acting within us that we are able to sustain a lasting moral conversion.

Rather than owing his or her first allegiance to common sense, institutions, or the "rule of law," the lawyer must owe his or her allegiance to the transcendental precepts:

Progress proceeds from originating value, from subjects being their true selves by observing the transcendental precepts, Be attentive, Be intelligent, Be reasonable, Be responsible. Being attentive includes attention to human affairs. Being intelligent includes a grasp of hitherto unnoticed or unrealized possibilities. Being reasonable includes the rejection of what probably would not work but also the acknowledgment of what probably would. Being responsible includes basing one's decisions and choices on an unbiased evaluation of short-term and long-term costs and benefits to oneself, to one's group, and to other groups.

Progress, of course, is not some single improvement but a continuous flow of them. But the transcendental precepts are permanent. Attention, intelligence, reasonableness, and responsibility are to be exercised not only with respect to the existing situation but also with respect to the subsequent changed situation. It spots the inadequacies and repercussions of the previous venture to improve what is good and remedy what is defective. More generally, the simple fact of change of itself makes it likely that new possibilities will have arisen and old possibilities will have advanced in probability. So change begets further change and the sustained observance of the transcendental precepts makes these cumulative changes an instance of progress.¹⁴⁹

¹⁴⁹ *Id.* at 53. The author also interprets Roberto Unger to say that the exercise of power in society can be justified when such power is guided by a critical culture or cosmopolis:

Unless people regain the sense that the practices of society represent some sort of natural order instead of a set of arbitrary choices, they cannot hope to escape from the dilemma of unjustified power. But how can this perception of immanent order be achieved in the circumstances of modern society?

The mere existence of moral agreement within a particular association would not bring about this end. First, it would be necessary for the subversion of inequality to proceed to such a point that people would be entitled to place greater confidence in collective choices as expressions of a shared human nature or of the intrinsic demands of social order rather than as a product of the interests of dominant groups. Second, it would be indispensable that this experience of increasing equality also make possible an ever more universal consensus about the immanent order of social life and thus help refine further the understanding of what equality means. The first condition without the second is empty. The second without the first is dangerous because it threatens to consecrate the outlook of the most powerful and articulate elements in the society.

Even if one assumes that the vision of an indwelling pattern of right [can] be created and justified, one may still wonder whether this vision could be kept from stifling criticism and change. To preserve the possibility of transcending the present, it is important to remain aware of the inherent imperfection of any one system of community practices as a source of insight into the requirements of social life. For if one takes seriously the notion that men make themselves in history, these requirements develop over time rather than remain static. Openness toward the future means that one must value the conflictual process by which communities are created over time and satisfactory relations are established among them as much as the internal cohesion of any communal group.

Such a reconciliation of immanent order and transcendent criticism would imply a greater replacement than we could now comprehend of bureaucratic law or the rule of law by what in a sense could be called custom. This customary law would have many of the marks we associate with custom: its lack of a positive and a public character

XIV. CRITICAL REALISM AS A FOUNDATION FOR JURISPRUDENCE

It is apparent from the preceding discussion that the classicist's, legal positivist's, and the legal realist's theories provide an inadequate account of the legal process. The classicist or natural-law approach involves a philosophical stance which views society and law as static, universal concepts:

It is limited to the essential, necessary, universal; it is so phrased as to hold for all men whether they are awake or asleep, infants or adults, morons or geniuses; it makes it abundantly plain that you can't change human nature; the multiplicity and variety, the developments and achievements, the breakdowns and catastrophes of human living, all have to be accidental, contingent, particular, and so have to lie outside the field of scientific interest as classically conceived.¹⁵⁰

Such a classically oriented stance does not provide an adequate foundation for jurisprudence, for jurisprudence should be interested in every human phenomenon. Not abstract or ideal man, but, at least in principle, "the men of every time and place, all their thoughts words and deeds, the accidental as well as the essential, the contingent as well as the necessary, the particular as well as the universal, are to be summoned before the bar of human understanding."¹⁵¹

The legal-positivist perspective does not provide an adequate foundation for jurisprudence because it fails to provide for the dynamic role of human intelligence and common-sense meaning in shaping the human world. The positivist perspective provides a view of the world and the legal process based on inductive reasoning and premised upon a mechanistic world:

"The common law," wrote Hammond in 1880, "must be learned, like the laws of the world, inductively. The decided cases of the past are so many observations upon the practical workings of these laws, from which the true theory is to be inferred, — precisely as the astronomer infers the planet's orbit from his observation of its position at many different times. The observed facts are authoritative: our inferences from them are theory; but it is the formation of that theory which enables us to carry our observations farther and more intelligently, and thus to arrive gradually at the true understanding of the laws that govern the moral as well as those that govern the material universe."¹⁵²

Yet, as noted earlier, as human intelligence develops, there is a significant change of roles. According to Lonergan, "[l]ess and less importance attaches to the probabilities of appropriate constellations of circumstances. More and more attaches to the probabilities of occurrence of insight, communication, agreement, decision. Man does not have to wait for his environment to make him."¹⁵³ Again, the world of common-sense meaning

and its largely emergent and implicit quality. Yet it would differ from custom in making room for a distinction between what is and what ought to be. It would become less the stable normative order of a particular group than the developing moral language of mankind.

R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 240-41 (1976).

¹⁵⁰ B. LONERGAN, *Dimensions in Meaning*, in *COLLECTION* 262 (1967).

¹⁵¹ *Id.*

¹⁵² J. FRANK, *LAW AND THE MODERN MIND* 96 (1930).

¹⁵³ *Id.* at 210.

is not a static world: "[t]he advance of technology, the formation of capital, the development of the economy, the evolution of the state are not only intelligible but intelligent."¹⁵⁴

Finally, the legal realists would confine their scope of inquiry to the observation of behavior. As Justice Holmes stated, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."¹⁵⁵ This perspective, which restricts the legal "science" to "observable" or "tangible" facts only, is not adequate to provide a foundation for jurisprudence because it also ignores the common-sense world of meaning.¹⁵⁶ As Professor Kantorowicz points out,¹⁵⁷ the realist position fails to recognize that the essential relations in law are never observable. Kantorowicz notes, for example, that "at the same moment that a man dies in an accident without having made his will, his new born child may have become a rich man by having inherited the deceased's property without anybody knowing it."¹⁵⁸ He concludes that "[n]othing in this important legal change is in any way observable — and so it is everywhere in law. It is the *meaning* of observable realities with which the lawyer is concerned but meanings are not observable, still less tangible."¹⁵⁹

Given the inherent inability of classical science (natural law), legal positivism, and legal realism to give an adequate account of the "legal world," Jerome Hall states that what is needed is a dynamic theory which can take into account "law as rules":

The inevitable fact is that rules of law supply the rational factor that serves as a practical guide to officials and laymen, and . . . 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. The need, therefore, is not to dismiss law as rules, but to take account of them in a dynamic theory.¹⁶⁰

It is the author's thesis that critical realism can provide a theory which can take into account law as rules and provide a foundation upon which an adequate jurisprudence could be built.

First and foremost, critical realism recognizes that the world of common-sense meaning is much more intricate and complex than the world of scientific meaning. Thus, legal models which are based upon mechanistic or natural-science models are at best misleading.¹⁶¹ Instead, the law must be seen as a conglomeration of common-sense generalizations which are necessarily incomplete until applied in a specific instance. As seen earlier, the precise meaning of a law at any given time is dependent upon the value judgments and actions of judges, lawyers, and laypersons at that time.

Thus, "the law" can be described most accurately as a facet of the common-sense world of meaning, which provides a common meaning framework through which the

¹⁵⁴ *Id.*

¹⁵⁵ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

¹⁵⁶ See *supra* text accompanying notes 59–70.

¹⁵⁷ Kantorowicz, *Some Rationalism about Realism*, 43 YALE L. REV. 1240 (1934).

¹⁵⁸ *Id.* at 1249.

¹⁵⁹ *Id.*

¹⁶⁰ J. HALL, *supra* note 1, at 161.

¹⁶¹ Instead, the law must be seen as a conglomeration of common-sense generalizations which are necessarily incomplete until applied in a specific instance. For as seen earlier, the precise meaning of a law at any given moment is dependent upon the value judgments and actions of judges, lawyers, legislators, officials and laypersons at the time.

community orders itself. Viewed from another perspective, "the law" as we know it in America is a complex system of meaning relations whereby social change occurs within a context of stability. Thus, the statement that ours is a country governed by laws and not men is true, but only in the sense that "law" is defined as an ever-changing, relational-meaning framework. The notion that "the law" is a logically consistent and autonomous entity must be put to rest.¹⁶²

Since "the law" is a relational-meaning framework and not an independently existing entity, it follows that its legitimacy can only be derived from the legitimacy of the judgments and actions of those persons who function within the relational system. In America, lawyers acting as practicing attorneys, judges, legislators, and government officials play a crucial role in that regard. The judgments and actions of these lawyers are "illegitimate" or "arbitrary" to the extent that they do not involve the "truly worthwhile."¹⁶³ Thus, the ultimate grounding and legitimacy of the legal system will hinge upon the existence or nonexistence of psychic, intellectual, and moral conversion among those decisionmakers.¹⁶⁴

Recognizing that a legal system based upon a rigid classical or positivistic theory cannot deal adequately with the world of common-sense meaning, critical realism envisages a system which is flexible enough to deal with the human world as it actually exists in the concrete and particular. Rather than trying to fit every case into the existing legal rules or categories, the legal system should simply recognize that in certain situations what is truly worthwhile will not be achieved by such a mechanistic approach. Instead, invoking the fundamental notion of equity jurisdiction, a court could simply hold, in order to achieve the truly worthwhile in a given situation, that a rule does not apply. Such a notion of equity is nothing new and in fact was present in England during the century when Sir Thomas More was Chancellor.¹⁶⁵

¹⁶² That "the law" is *not* an autonomous entity is demonstrated by Girardeau A. Spann, in an article dealing with *INS v. Chadha*, 462 U.S. 919 (1983) (the legislative veto case). Spann states that indeterminacy characterizes every effort made to arrive at a principled resolution of every legal problem because if courts only refer to legal principles, then they end up employing circular arguments in order to justify their decisions. Spann denominates this circularity "analytical spin":

Analytical spin is the doctrinal paralysis that results when a principle acquires meaning only by feeding on itself. Such circular reasoning makes the principle indeterminate. When one of the terms in a formula for applying a principle is the very principle being applied, the formula prescribes no result and the principle does not control the outcome. The only way to break out of analytical spin is to assign the principle some meaning, which ultimately can be derived only from a subjective preference.

Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 520 (1984) (footnote omitted).

Of course, what Spann refers to as "subjective preference" would be more accurately described in Lonerganian terminology as a value judgment which *could* be "objective" to the extent that the judgment is based upon the truly worthwhile rather than upon only that which is apparently worthwhile.

¹⁶³ See *supra* text accompanying notes 81-88.

¹⁶⁴ See *supra* notes 149 & 162.

¹⁶⁵ Christopher St. German, a legal scholar and contemporary of Sir Thomas More, wrote the following around 1530:

Be not over legalistic for extreme justice is extreme wrong And for the plainer declaration what equity is, thou shalt understand that, since the deeds and acts of men for which laws be ordained happen in divers manners infinitely, it is not possible to make any general rule of the law but that it shall fail in some case. And makers of law

In such a system, instead of torturing facts and legal rules to achieve a given result "logically," judges would reaffirm the classical legal formulation but would have the discretion to recognize that in an exceptional case the formulation just does not fit. Thus, judges would be encouraged to state the real reasons for their decisions, rather than being forced to cite rules which were not really considered in the decisionmaking process. The result would be a critical dialectic between judges and legal academics centering around the real issues involved in a judge's decision. This system thus would promote a better understanding of both the decision itself and the legal rules involved.

It may be objected that such a relational model would place too much power in the hands of judges and promote abuse. While abuse is possible in any system, judicial power constrained by "hard and fast" rules within a climate of intellectual dishonesty and unconverted consciousness would be more open to abuse than judicial power constrained by open and honest dialectic within the context of the cosmopolis.¹⁶⁶

While a system of law based upon critical realism and the relational model will not spring to life overnight, that does not mean that one could not evolve. Some change, however, will be inevitable precisely because the current legal system is part and parcel the product of classical culture. Because the classical mediation of meaning has broken down and is being replaced by a modern mediation of meaning which deals with people and legal rules *both* in the abstract and the concrete, change in our legal system will occur. How this change will occur will depend in large part upon the actions of lawyers who work within the system. As Lonergan notes, however, classical culture cannot be jettisoned without being replaced and what replaces it cannot but run counter to classical expectations:

There is bound to be formed a solid right that is determined to live in a world that no longer exists. There is bound to be formed a scattered left, captivated by now this, and now that new development, exploring now this and now that new possibility. But what will count is a perhaps not numerous center, big enough to be at home in both the old and the new, painstaking

[only] take heed to such things as may often come, and not to every particular case, for they could not though they would. And therefore to follow the words of the law were in some case both against Justice and the commonwealth: wherefore in some cases it is good and even necessary to leave the words of the law, and to follow that [which] reason and Justice requireth; and to that intent equity is ordained, that is to say to temper and mitigate the rigour of the law.

CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 97 (T.F.T. Plucknett & J.L. Barton ed. 1974) (language and usage modernized by the author).

Thomas More's tenure as Chancellor of England was characterized by a very different notion of equity jurisdiction than is currently practiced in the courts of the United States and England. Equity jurisdiction came into its own under More, and, he exercised that jurisdiction freely to prevent injustices resulting from absurd or unjust decisions in the common law courts. After More's time, the power of the chancellor to do equity was increasingly narrowed and straitjacketed until today a judge's discretion to do equity is confined to categorized rules which do not differ significantly from other legal rules. See generally J. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* (1980).

¹⁶⁶ If the legitimacy of the legal system is derived from the existence of intellectual, moral, and psychic conversion among lawyers and not merely the ability to exercise logical reasoning, then the question arises as to the adequacy of the approach and curriculum maintained in law schools. Contrary to what many law professors tell freshmen law students, it would appear that the law cannot be separated from judgments of fact and judgments of value at any level. Thus every law-school curriculum should stimulate value-oriented discussion in general and contain a course offering dealing with the self-appropriation of consciousness in particular.

enough to work out one by one the transitions to be made, strong enough to refuse half-measures and insist on complete solutions even though it has to wait.¹⁶⁷

Thus, the implementation of a relational system of law does not mean that the present system should be abandoned, but rather means that each of us should do his or her part within the larger context of the cosmopolis to effect an ordered transition.

XV. CONCLUSION

It is important that we as lawyers know what it is we do when we think and act "as lawyers" as well as human beings. If each of us refuses to know and to reflect upon our thinking, feeling, and choosing, then a critical independent culture or cosmopolis will not come into being. To paraphrase Lonergan, to justify his or her existence the lawyer will become more and more practical, more and more a factor within the technological, economic, political process, and more and more a tool that serves palpably useful ends. The actors/lawyers in the drama of living become stagehands; the setting is magnificent; the lighting superb; the costumes gorgeous; but there is no play.

¹⁶⁷ B. LONERGAN, *supra* note 150, at 266-67.