

The Portable Soc 2; or, What to Do until the Doctrine Comes

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You are not expected to complete the work,
but you are not free to desist from it.
—Rabbi Tarfon, Pirke Avot 2:16 (first century)

When David Orlinsky told me in 1982 that his research revealed that Soc 2 was then really in its early fifties rather than its early forties, I felt an even greater sense of affinity to it. But the forty motif emerged even more clearly, for I was with Soc 2 up to its fortieth year—which was my own. So I clung to the image of “notable forties,” as I shall for a moment now, though the course enters its early sixties as this volume appears.

There is a long association of forty with the idea of a period of arduous preparation and testing, with ordeal and endurance followed by renewal, even rebirth.¹ In that first deluge, “the rain fell on earth for forty days and forty nights” (Genesis 7:12), the same period that Moses labored on Mount Sinai (Exodus 24:18). The people of Israel were condemned to wander in the desert for forty years (Numbers 14:33–34). The fortieth year marked their triumphant entry into the promised land and a new beginning. But the forty years were necessary, we are told, to allow for the disappearance of those who had been slaves and retained slavish habits of mind.²

If we think of Soc 2's forty years (any of its several forty years) as a crossing we may ask ourselves what is the desert? Conventional views of social life? Normal disciplinary social science? The fashionable ideologies of the time? And what is the promised land? There have, it

1. We refresh ourselves with forty winks; life begins at forty. Forty is the maximum number of lashes permitted as punishment by Deuteronomy 25:3. Forty is the number of days allowed Ninevah in which to repent (Jonah 3:4).

2. I.e., all but Joshua and Caleb who had been tested during the forty days that the Israelite spies spent in the land of Canaan (Numbers 13:25).

seems to me, been many separate journeys to separate destinations. What, if anything, they share is explored in various ways in this volume and in the wider expanse of conversations it represents.

I want to tell you about the land to which I crossed over—without claiming that it is the land of milk and honey. I want to talk about the kind of intellectual enterprise I have been engaged in since leaving Chicago and to explore how it relates to the Soc 2 project.

How I Got Here from There (or There from Here)

My connection with Soc 2 came about through Soc 3, a cognate enterprise called “Freedom and Public Policy” which was merged into (or swallowed up by) Soc 1 and Soc 2 in the early 1960s. In my later years of teaching in the College, my connection took the form of teaching a variant of Soc 2 entitled “Law, Justice, and the Social Order,” which is the direct ancestor of much of the teaching I do today.

I ended up in a sister inter- or multidisciplinary enterprise which goes by several names—“law and society” studies, the sociology of law, sociolegal studies, law and behavioral science. Let me call it social inquiry on law or SIL for short. By this I mean a second kind of learning about law, one that seeks explanation rather than justification, that emphasizes process rather than rules, and that tries to appreciate the distinctiveness of law against the background of larger patterns of social behavior rather than as autonomous and self-contained. What I have been doing in SIL, it turns out, is working through some of the themes that were central to Soc 2.

As I look back to see how I arrived here, I undoubtedly absorbed some of these intellectual dispositions during my time in the College during the Late Hutchins Age (although I never took Soc 2) and during my three years in the Philosophy Department which in my case amounted to extending my stay in the College from two years to five. Then I went to law school, for reasons that are still obscure to me, from which I emerged with an ample portion of the law school view of the world. In this view, law is an integrated purposive system comprising a hierarchy of agencies moved by and applying a hierarchy of norms. It draws on the power of the state but disciplines that power by its own autonomous and internally derived norms. The central legal institution is the court, and the central and typical activity of courts is adjudication. With some slippage and friction, social behavior is aligned with and guided by legal rules. Moreover, that behavior can be deliberately modified by appropriate alterations of these rules.

When I went off to India on a Fulbright scholarship in 1958 to study

the abolition of untouchability, I encountered a world vastly different from what my training had led me to expect. Viewed through the lenses of my American legal education, the profound dissociation between legal norms and social reality in India violated my sense of how law was supposed to be. Looking back, I see there were at least two ways to react: one, to regard the Indian case as pathological and deviant and to take my model as a prescription for its cure. (This option was taken by the "law and development" movement.) The other was to consider the possibility that there might be something amiss in the law school view of things: My emphatic identification with India (much stronger then than now) and perhaps a residue of skepticism induced by my earlier training inclined me toward the latter path, but it was a slow cumulative process of constructing an alternative way of making sense of that Indian experience. It was my association with the College that provided the opportunity for constructing that alternative. I came to the College in 1959 after a frustrating year at Stanford Law School, working on a program for South Asian government lawyers (thus starting out on the law and development tack). I returned to the College for a year to teach Soc 3. One thing led to another and I ended up spending the next ten years teaching Soc 2 (and Indian Civilization).

What did Soc 2 teach me? Beyond all the things, true and false, that I learned from texts and colleagues and students, there is a residue of intellectual disposition that has remained with me. I suspect it is partly shared, partly idiosyncratic and misremembered. Let me try to set out my catalog of the components of the Soc 2 project. My version of the party line may strike you as the worn commonplaces of general education, but looking from the professional school, they retain for me a freshness and critical power (as evidenced by their continuing power to provoke unease in law students).

The first commandment was not to take too seriously the claims of the disciplines to exclusive possession of any methods, subject matters, or theories. Indeed, one suspected that loyalty to these claims was purchased at the cost of disablement from rendering social life in its full complexity. We learned to cross disciplinary boundaries freely, but to respect them as convenient features of the landscape, not likely to be dissolved soon into a universal social science. We learned to appreciate the disciplines not as domains of knowledge, but as campaigns of inquiry attached to job markets. We were respectful of their accomplishment and disrespectful of their claims for turf.

Second: We were also disrespectful of the boundary between student and teacher, novice and expert. We were colearners, and if we were more advanced than our students, we were as acutely conscious of our

nakedness in encountering what we didn't know. We argued that any inquiry, if pursued far enough, arrived at questions of perspective, meaning, and principle that could be informed but not resolved by expertise. We were committed to pushing on to those questions where we could not wrap ourselves in the garments of expertise and could not make arguments from authority.

Third: We tried to convey an appreciation of the accomplishments of social science. But we erected imposingly high standards. We brought to bear on the claims of social science all the critical scrutiny that social science itself could muster, exposing the hollowness of received wisdom and the pretensions of daring new formulations, turning solutions into problems. We were critical of explanations at any level of analysis, but we were not reductionists who thought there was a single set of fundamental elements by which everything could be explained. It was an article of faith that everything was connected, but in some more complex way. Until the arrival of the Messiah, we were resigned to a world of incomplete and inconsistent explanations.

Fourth: Similarly, we took policy seriously. We thought that the design and implementation of policy has to be informed by the multiple and complex reality that theory reveals to us, but they were different enterprises or at least distinct moments of a common enterprise. We rejected the notion that science could supply neutral technical solutions to social problems. We eschewed any notion that practice could be derived deductively from theory.

Fifth: We practiced loyalty to the text. The avoidance of textbooks in favor of original texts implied that reading of the big world out there depended on mastery of the world of the text. Probably nowhere has a group devoted to the understanding of the world out there lavished such attentive regard on a series of texts—not because the text contained the truth about what was out there, but because it was the unavoidable instrument of our understanding. Since there was no single text, we were propelled into a world of plural understandings. There was no single amalgam in which jarring views were united, conflict resolved. We lived with alternative readings that didn't fit together. In this world of plural understandings, we were constantly reminded of the stratagems of interpretation and choice that were involved in knowing about the world.

In short, the Soc 2 line was to learn to live with a set of permanent and intractable oppositions, to accept the open texture and problematic character of knowledge about society, without despair—to cultivate an appreciation of what we do know while recognizing its flawed and contingent character.

The Received Paradigm of Legal Learning

I mentioned that social inquiry into law was a *second* kind of learning about law. In order to see these Soc 2 themes being played out in SIL, it is necessary to appreciate that SIL is a minority taste. It exists at the periphery and in the interstices of a formidably established realm of legal learning, a realm which includes both academic and practice precincts as well as its own suburbs of popular culture. Let me try to sketch this realm of learning. In doing so I shall overgeneralize outrageously and omit many needed qualifications and disclaimers. I argue that, for all its protestations of its lack of theory, contemporary American legal learning proceeds on the basis of a discernable "paradigm"—i.e., a series of assumptions about the major contours of "law" and the major regularities in the relation of law to social life. Legal scholars and professionals, while accentuating various differences with one another, display a broad agreement about the nature of legal phenomena. I refer not to concurrence in some body of tested propositions, but to adherence, usually tacit, to a set of presuppositions which,³ taken together, provide a cognitive map, or paradigm,⁴ of legal reality. This paradigm provides a lens through which legal phenomena are perceived and suggests how these perceptions are to be arranged.⁵ By suggesting what are worthwhile and important questions and what are suitable answers, it shapes our view of what are worthy scholarly endeavors and educational experiences.

For purposes of this discussion, I have artificially isolated the "model" component of the paradigm from consideration of the exemplars (literary and pedagogic) in which these assumptions are embodied (e.g., the

3. These assumptions or basic perspectives are sometimes explicitly articulated, but usually are present as what Alvin Gouldner, in *The Coming Crisis of Western Sociology* (New York: Equinox, 1971), 29ff., refers to as "domain assumptions," i.e., tacit background assumptions about the characteristics of a class of phenomena in which explicit theory is embedded.

4. The paradigm concept is taken from Thomas Kuhn, read in Soc 2 for a time in the 1970s, who uses it to denote "the entire constellation of beliefs, values and techniques and so on shared by the members of a given [scientific] community (*The Structure of Scientific Revolutions* [Chicago: University of Chicago Press, 1970], 175)]. The paradigm constitutes a "disciplinary matrix"—a constellation of group commitments made up of conventions of symbolism, shared values for judging scientific work, exemplars of successful problem solution and shared commitment to a variety of models, ranging from heuristic to ontological, that "supply the group with preferred or permissible analogies and metaphors, . . . help to determine what will be accepted as an explanation and as a puzzle solution [and] assist in the determination of the roster of unsolved puzzles and in the evaluation of the importance of each."

5. I emphasize that the paradigm need not be articulated as "theory"; rather I suggest that it functions as the tacit theory in most "untheoretical" legal research.

appellate opinion, the brief, the law review article, the casebook, "Socratic" teaching) and from the shared values by which these are judged (e.g., comprehensiveness, fidelity to sources, concreteness, relevance to policy, moderation, etc.).

The components of the received paradigm are familiar and by no means startling.⁶ They are not so much affirmed as assumed: not assumed to be literally true—their inapplicability in particular instances may be conceded—but to partake of a general correctness that is usually thought to require neither explanation nor investigation. But they are not assumed to be merely a set of normative propositions. They have a composite character, fusing both descriptive and normative, to which we shall return.

The common paradigm, if stated in propositional form, would include inter alia, something like the following:

1. Governments are the primary (if not the exclusive) locus of legal controls; that part of the legal process which is governmental is the determinative source of regulation and order in society.

2. The legal rules and institutions within a society form a *system* in the sense of a naturally cohering set of interrelated parts articulated to one another so that they form a coherent whole, animated by common procedures and purposes.

3. The central and distinctive element of this system is a body of normative learning, consisting, in various versions, of *rules*, and/or standards, principles, policies—and of procedures for discerning, devising, and announcing them.

4. Legal systems are centered in and typified by *courts*, whose function is to announce, apply, interpret (and sometimes

6. Much of this portrayal of the paradigm was anticipated by Llewellyn's 1930 critique of received thinking about law, "A Realistic Jurisprudence—The Next Step," reprinted in his *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962). He attacks the use of rules as the central reference point of thinking about the law; the "tacit assumption" of correspondence between rules and behavior (i.e., both that rules describe behavior and that they control it); the separation of courts from other officials and from lay practice, etc. Curiously, after a devastating critique aimed at expanding the field of legal study to include "everything currently included and a vast deal more," organized in a series of concentric circles: official behavior, views of what the law is, social arrangements, social philosophy, etc., he remarks: "At the very heart, I suspect, is the behavior of judges, peculiarly, that part of their behavior which marks them as judges—those practices which establish the continuity of their office with their predecessors and successors, and which make official their contacts with other persons; but that suspicion may be a relic of the case law tradition in which we American lawyers have been raised" (pp. 40–41). For an assessment which emphasizes carryovers of paradigm assumptions in Llewellyn's critique, see Carl J. Friedrich, "Remarks on Llewellyn's View of Law, Official Behavior, and Political Science," *Political Science Quarterly* 50 (1935): 419–31.

change) rules on the basis of or in accordance with other elements of this normative learning.

A. The basic, typical, decisive mode of legal action is *adjudication* (i.e., the application of rules to particular controversies by courts or courtlike institutions in adversarial proceedings).

5. The rules (authoritative normative learning) represent (reflect, express, embody, refine) general (widely shared, dominant) social preferences (values, norms, interests).

A. Broad participation in rule making (by adjudication and by representative government) insures that the rules embody broad social interests.

6. Normative statements, institutions, and officials are arranged in hierarchies, whose members have different levels of authority.

A. "Higher" elements direct (design, evaluate) activity; "lower" ones execute activity.

B. Higher elements control (guide) lower ones.

7. The behavior of legal actors tends to conform to the rules (with some slippage and friction).

A. Officials are guided by the rules.

B. The rules control the behavior of the population.

C. Conformity is the result of assent and the (threat of) application of government force.

8. If the above obtain, then

A. the authoritative normative learning generated at the higher reaches of the system provides a map for understanding it; and

B. the function of legal scholarship is to cultivate that learning by clarification and criticism.

C. Legal scholarship directs itself to remedy imperfections—to bring legal phenomena into conformity with paradigm assumptions.

It may justly be asked "How do you *know* that is what American legal scholars believe? My treatment of these as a single cluster may seem a perverse refusal to make important distinctions among legal scholars. For example, I make no distinction between believers in the model of rules and instrumentalists; nor between formalist believers in autonomous rule development and their realist critics. Thus, where some observers detect a radical break, I see a striking continuity. For present purposes at least, if the mix has changed, the basic ingredients are the

same. I am not talking about a set of theoretical propositions but about a set of intellectual commitments.

No one is likely to affirm these propositions, or all of them, quite so baldly.⁷ If forced to be explicit about one or another, taken as factual propositions, they are subject to qualifications and exceptions. But their distinctive character is missed by regarding them simply as a series of descriptive generalizations. They are not simply asserted as factual generalizations, nor are they taken to be merely a set of normative prescriptions. They have a dual, composite character, fusing both descriptive and normative. They are thought to state what is normal and typical in legal systems—to reflect the inherent and proper shape of legal reality. This fusion of factual and normative assertion (made explicit in some of the items listed, but implicit in all) establishes them as ideological statements—statements about what a legal system and a society (and a scholarly career) ought to be like.⁸

Constructing a Second Learning about Law

These affirmations don't "fit." Although each has some power to describe some areas and strata of legal activity in the contemporary American scene, they are unsatisfying depictions of what is typical and normal in it. Let me take just two examples: the exclusive predominance of official law and the treatment of bargaining.

Mainstream legal learning embodies a kind of "legal centralism"—a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of hierarchic control over the regulation that goes on in other social settings. The institutional-intellectual complexes that we identify as national legal systems did indeed, as Weber saw, consolidate and displace the earlier array of normative orderings in society, reducing them (in theory) to a subordinate and interstitial status.

But of course, these other orderings continue to exist. Counterparts or analogs to the institutions, processes, and intellectual activities that are located in national legal systems are to be found at many other locations in society. Some of these lesser legal orders are relatively independent, institutionally and intellectually, of the national legal system; others

7. Indeed, I am not sure they would be explicitly affirmed at all. For present purposes it is sufficient that legal scholars tend to act "as if" they affirmed them.

8. I employ "ideology" here in the sense of an assertion with both descriptive and normative referents. The ideology is not of course confined to legal scholars or to lawyers but is widespread in our society. Here, the stress is not on legalism as a consciously held moral philosophy, but on many of the same features as components of a cognitive map.

are dependent in various ways. That is, societies contain a multitude of partially self-regulating spheres or sectors, organized along spatial, transactional, or ethnic-familial lines, ranging from primary groups in which relations are direct, immediate, and diffuse to settings (e.g., business networks) in which relations are indirect, mediated, and specialized.

The enunciation of norms and application of sanctions in these settings may be more or less organized, more or less self-conscious, more or less consensual and so forth. For convenience I use the term "indigenous law" to refer to social ordering that is familiar to, and applied by, the participants in the everyday activity that is being regulated. By indigenous law I refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety of institutional settings—in universities, sports leagues, housing developments, hospitals, etc. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity—home, neighborhood, workplace, business deal, and so on (including a variety of specialized remedial settings embedded in these locations).

Official institutions then are not the only sources of normative messages, just as they are not the only arenas in which controls are applied. To examine the rivals and companions of official law we must put aside our habitual perspective of legal centralism, a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of hierarchic control to other, lesser normative orderings, such as the family, the corporation, the business network.

Legal centralism has impaired our consciousness of indigenous law. The mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings of society. Social research on law has been characterized by a repeated rediscovery of this other hemisphere of the legal world. This has entailed repeated rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character, and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation.

Let me elaborate another example. Shortly before this essay was originally composed, I attended a workshop, sponsored by the Association of American Law Schools, on Negotiation and Alternative Dispute Resolution. The title of the workshop reveals something about the picture of the legal work that permeates American legal education. It links negotiation with alternatives and implicitly juxtaposes them to something unspecified! Alternatives to what? To adjudication, to courts. Even while affirming that negotiation is important, it reflects the view

that negotiation (and mediation and so forth) occupy the outer edges of the legal realm—they are the soft periphery as opposed to the hard core of legal doctrine. Negotiation is something apart from the real law that occupies legal educators.

This picture misleads in several ways. It implies that negotiation (and other so-called alternatives) are infrequent, new, unproved, marginal. But the gravitation to a mediative posture by judges and other decision makers armed with arbitral power is surely one of the most typical patterns of disputing on the American scene—as an examination of our courts and administrative agencies will attest. The linking of negotiation to "alternatives to litigation" is misleading in another sense. On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation, it *is* litigation. There is a single process of disputing in the vicinity of official tribunals that we might call "litigotiation"—that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of a dispute—running the whole course—is one infrequently pursued alternative, the cost and risk of which are compelling presences throughout.

The settlement process in not some marginal, peripheral aspect of legal disputing in America; it is the central core. Over 90 percent of civil cases are settled (and of course many more disputes are settled before reaching the stage of filing). Lawyers spend more time on settlement discussion than on research or on trials and appeals. Much of the other activity that lawyers engage in (e.g., discovery) is articulated to the settlement process. Even in the case that departs from the standardized routines of settlement, negotiation and litigation are not separate processes, but are inseparably entwined. Negotiation is not the law's soft penumbra, but the hard heart of the process. The so-called hard law turns out to be only one (often malleable) set of counters for playing the litigation game.

The courts are central to the litigation game not only because of what they do in specific cases, but because of the "bargaining endowments" that they bestow on the parties. That is, what might be done by or in or near a court gives the parties bargaining chips, or counters. Bargaining chips derive from the substantive entitlements conferred by legal rules and from the procedural rules that enable these entitlements to be vindicated. But rules are only part of the endowment conferred by the law—the delay, cost and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants.⁹ Everything

9. Delay, cost, and uncertainty may themselves be the product of rules—e.g., a discretionary standard involving the balancing of many factors and requiring detailed proofs is more costly, time-consuming, and uncertain in application than a mechanical rule. But

that might affect outcome counts—all of the outcome for the party, not just that encompassed by the rules. The ability to impose delay, costs, embarrassment, or publicity comes into play along with the rules. Rules are important but they interact with a host of other factors in ways that do not correspond to the neatly separated background and foreground of the law school classroom.

In short, there is a lot of stuff out there that legal learning doesn't account for very well. Legal learning's ventures as explanation track the law's assertion of "hierarchic control" over other social institutions. That these aspirations for control are frequently thwarted is no secret. Actual patterns of legal activity depart from the authoritative learning of the law. The presence of the departures is commonly acknowledged under the rubric of the "gap" between "the law on the books and the law in action" (a locution that has endured since first formulated by Roscoe Pound in 1910). I shall use the term "gap" as shorthand for this perceived dissociation between legal learning's model of what is supposed to be and what is experienced. There are a variety of things we can do with these perceptions. I want to sort them into three major approaches. For short I will call them denying the gap, filling the gap, and crossing the gap.

Denying the gap does not mean denying that it exists, but that it requires us to question our received view of legal reality. Particular anomalies may be interpreted in ways that forestall challenge of paradigm assumptions: they may be regarded as inevitable frictions; they may be relegated to interstitial status; they may be read as a list of unmet needs; they may be regarded as atypical pathology. Within the perceived paradigm, each instance of the gap tends to be dismissed as an exception—something atypical, peripheral, and transient. That is, awareness of such discrepancies does not induce professionals (or others) to relinquish their model of the legal system. Rather it spurs them to add ad hoc explanations to account for these irregularities.¹⁰ As Jerome Frank

cost, delay, and uncertainty also result from such nonrule factors as, for example, the number and organization of courts and lawyers. The meaning of the endowment bestowed by the law is not fixed and invariable but depends on the characteristics of the disputants: their preferences, risk-aversiveness, ability to bear cost and delay, etc. A different mix of disputant capabilities may cause a given endowment to take on very different significance.

10. Llewellyn (*ibid.*, 18) observes that when votaries of conventional legal thought are presented with instances of the gap between the "law-in-books" and "law-in-action": "any one of them will proceed to remodel his emphasis *ad hoc*; he will, for a moment, fix his stress on the remedy, even on the effects of the remedy, as used in life. *But it is an ad hoc remodeling.* It is forgotten when the immediate issue is passed. It is no part of the standard equipment of investigation, discussion, synthesis; it is a part only of the equipment

once said of Morris Cohn, "he shut his eyes to the usualness of what he desired to think the unusual."

Those who find this unsatisfying seek a revised or second body of learning about law. The response that I call *filling the gap* takes seriously the notion that there are major parameters of legal life unaccounted for in legal learning and that it is necessary to extend and enrich traditional legal scholarship by adding an empirical dimension. If the basic cartography is sound, what is needed is exploration into uncharted territories and detailed surveying. The routes of exploration are set by legal doctrine. But this filling-the-gap response has itself been challenged for its dependence on received notions of legal learning and for inhibiting the development of alternative theoretical formulations. The perception of a "gap" proceeds from and expresses an expectation of harmony or congruence between authoritative normative learning and patterns of action. As Richard Abel has written:

This continuing preoccupation with the gap problem has had unfortunate consequences for the development of a social theory of law. Scholarship is confined to a single question, seen from two perspectives: why does behavior deviate from law; why does law mandate a conformity which is not forthcoming? We are thus directed to particular gaps between law and behavior, and how we may close them. But we cannot entertain the possibility of another relationship between law and behavior, or begin the construction of a more complex model in which law and behavior interact without a one-to-one correspondence.¹¹

The "gap" perspective circumscribes the search for regularities or patterns by elevating the authoritative normative learning—"the law on the books"—into a map to guide our exploration. It is as if we attempted to understand language behavior by focusing on the differences between written and spoken English, assuming harmony or congruence as the normal condition and devoting our attention to explaining the special cases in which we found some discrepancy. Indeed, the visualization of the "law in action" as representing a deviation from or debasement of the "law on the books" parallels folk belief about language usage.

of defense. When used apart from combat . . . it flares like a shooting star, and disappears. Always the night of words will close again in beauty over the wild, streaked disturbance."

11. Richard Abel, "Law Books and Books about Law," *Stanford Law Review* 26 (1973): 175, 189.

The poverty of the "gap" as a way of describing our legal experience is suggested by a comparison with the much more differentiated way we, as amateurs, have of recording and remembering language usage. We recognize the coexistence of formal literary language, colloquial varieties along local, class, and ethnic lines, occupational jargons, not to mention in-group argots, pidgin, slang, sign language, baby talk. Even these crude folk taxonomies suggest the possibility of formulating a variety of questions about regularities in the way the common code is refracted by different groups and in different settings, about patterns of mutual influence (or lack of it) among these sectors, about their change and persistence. We need to supply ourselves with concepts for a differentiated description, or mapping, of the legal process. But the "gap" perspective is an obstacle to this: the "law in action" collapses an immense variety of phenomena into a single undifferentiated mass; the "law on the books" provides an inadequate map to that mass; and the underlying expectation of harmony narrows the range of questions that we ask.

Among those unsatisfied by a project of filling the gap, some imagine a second (or revised) body of learning about law that would construct the word of law on lines independent of the professional paradigm. I refer to this response as *crossing the gap*. But to where? There are several destinations.

One destination is a pure scientific positivism which would build a science of legal behavior quite independent of both consciousness of the actors and the institutionalized learning of the law. Another road across the gap is what might be called left insurgency, which would link the construction of new learning about law to the dismantling of repressive legal institutions and to the fostering of new legal (or nonlegal) institutions that would express a new (or refound) state of community. Each of these shares some affinities with a third path that, for want of a better term, I shall call liberal eclecticism, and of which I confess to being a practitioner.

Let me try to locate it by thinking of these three as rival ways of dealing with the perception that mainstream legal studies fail to account for much of the life of law in contemporary society. We may think of legal learning as the affirmance of one term in each of a series of oppositions or polarities. It upholds the official law of the state as opposed to indigenous regulation; it views law as self-contained and autonomous rather than socially situated and permeated; it views law as imposed rather than interactive; it affirms adjudication as central and bargaining as peripheral.

Scientific positivism proposes to chart from afar the actual patterns and discover the laws underlying them; left insurgency would abandon

differentiated formal law (or reconstitute it by making it responsive to truly popular or indigenous elements). The approach of liberal eclecticism shares with the positivists a drive toward explanation detached from the imperatives of prescription and policy. It shares with the left a drive to rediscover and resuscitate the suppressed, discreditable side of each of these oppositions. It embraces them not only to acknowledge that they retain operative force, but because they may be a source of value.

Legal Studies, Social Theory, and General Education

This embrace reflects one enduring theme in social science and in the Soc 2 course at Chicago: the theme of unending hierarchic systems, showing that what appears to be top down is really bottom up, that it is the unconscious, the folkways, the proletariat that are the dwelling place of the forces that move (or should move) and shape the social world. It is the romance of the underside: the less formal, the less organized, the less respectable is seen not as mere material to be ruled, shaped, tamed, but as another, perhaps principal, source of value and meaning. I see this in my own inclination to attack the pretensions of legal centralism and argue for openness to the value of indigenous regulation, and in the insistence that the results of bargaining are not inferior to those of adjudication. At the same time, I am aware of the dangers of romanticizing the bottom—there are lots of nasty things about indigenous regulation and many reasons to doubt the fairness of many bargaining outcomes.

Once we acknowledge that the answer is not to be found in our authoritative learning about society, then what? As we turn from the narrowness and abstraction of that learning to embrace the world, we may be tempted to think that uninstructed flesh has answers. (Are we sure these are good proletarians who will go to workers' education classes rather than staring at the TV and swilling beer?) It is not unlike an old Soc 2 problem. We want to throw off the yoke of the repressive super-ego without giving free reign to anarchic id; we want the form, direction, acuity of ego. We want to be rid of tyrants without loosing mobs—we want to create constitutional monarchies with broad participation and responsible citizenship.

The liberal eclectic program—which some have called postmodern law—turns out to be a similar bourgeois compromise. It seeks to recapture the energy, participation, and variety of indigenous regulation, of bargaining and so forth, but wants them informed, monitored, and refined by a continuing dialogue with formal legal institutions, who become teachers rather than controllers.

Alongside its other roles, general education may provide a vital function as a repository of skeptical regard from which to mount challenges to the received wisdom and ruling paradigms of the professions. In it can be institutionalized stances that enable people to gain distance, stand outside the ruling paradigm. Among such stances are some closely related to the kind of intellectual commitments that I earlier labeled the Soc 2 party line. It involves the maintenance of ironic distance from the claims of the profession—an ability to see it as another indigent system of learning, one that deserves appreciation without granting its claims for hegemony.

Soc 2 was certainly not the only road to SIL. My companions arrived there by many other paths, by breaking out of the textual tradition of legal studies or broadening a tradition of empirical study to encompass the inescapably normative world of law. In retrospect Soc 2 proved a remarkably auspicious path. One who traveled by that route was untroubled by the absence of a disciplinary catechism, by the marginality of the enterprise, or by the dizzying spiral of text and context. Like Soc 2, SIL was moved by a genuine hunger to know about the world out there, combined with an awareness of the frailties of the enterprise of knowing about it. Soc 2 provided a model for appreciating the achievements of positive social science without ignoring the imperfections and ironies that prevailed it. It showed how to be mindful of the problems of the enterprise without sinking into hermetic absorption with the enterprise itself.

Reflecting on my own course over the past years, I am struck by a series of recurrent zigs and zags—between law and social science, between domestic and comparative interests, between the detached quest for explanation and concern with policy. I like to think that this restless movement mirrors some duality lurking in the subject matter that continues to absorb me: the tension between the aspiration for a universalistic and inclusive legal order and the varied normative life of composite societies. If so, perhaps these zigs and zags can be counted as gropings upward along a spiral of understanding rather than as blind oscillations between fixed poles. My moments of optimism are animated by a feeling that my years of immersion in India emboldened me to discard much of the law school view of the world and to develop a fresh perspective from which to view the legal process in America. Similarly I think that my “frolic and detour” into Soc 2 prepared me to contribute to the construction of a second body of learning about law.

Social inquiry on law has aspired to promote the emergence of legal doctrine that is informed and inspired by systematic knowledge of its context. Now, in the early 1990s, there are signs that, as legal life has expanded and the system of knowledge about it has changed, the hold

of the paradigm of legal thought described here has loosened. Much professional discourse proceeds as if the paradigm were intact. At the same time lawyers are awash in information that does not fit comfortably into the received picture of legal normality. The paradigm is surrounded by increasingly diverse and assertive rival views of the legal process.¹² Whether and how it will be transformed or displaced remains to be seen.

12. Some of these developments are traced in M. Galanter, “Presidential Address: The Legal Malaise, or Justice Observed,” *Law and Society Review* 19 (1985): 537; and in M. Galanter and T. Palay, *Tournament of Lawyers* (Chicago: University of Chicago Press, 1991).