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The Myth of Objectivity in Legal Research and Writing*

ARTHUR SELWYN MILLER**

The ideal of a knowledge embodied in strictly impersonal statements now appears self-contradictory, meaningless, a fit subject for ridicule. We must learn to accept as our ideal a knowledge that is manifestly personal.

—MICHAEL POLANYI***

Introduction

There is a myth abroad in the land. Only one of many, it is particularly important because it concerns the posture by which the "new men of power" in the "post-industrial state" deal with problems of public policy, by which, that is, the intellectuals of the modern era approach their task of analysis and discussion of the abrasive problems of the human condition. The myth, in short, is this: that something often called "objectivity" in scholarly research is both desirable and attainable. Both desirability and attainability will be discussed in this article, in reverse order.

We have heard much in recent years, following publication of a well-known law journal article,1 about the need for "neutral principles" in constitutional adjudication. Much solemn talk, including nonsense, has been uttered about that essay, if it is possible to ascertain what the author meant when he used the term—which, it may be said with some assurance, is by no means self-evident. That discussion in the legal and political science periodicals and books has had the salutary effect of helping to re-examine some of the basic premises and

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*** The Study of Man 27 (1958).

underlying assumptions about the concept of judicial review. The debate is far from ended.

Relatively little attention has been accorded in legal literature to an analogous, but in many respects equally important, matter: the extent to which scholarly commentary can be "neutral," or "objective" or "unbiased" or "impartial." The assumption apparently is that the person who labors in Academia has some sort of special credentials and operates in a kind of special medium that permits him to transcend the very human limitations of his brethren in private practice or on the bench or in government. This I doubt. I think the proposition is untenable.

In what follows I should like to expand on these few introductory remarks by stating a series of propositions concerning objectivity in legal research and writing. First, however, a definition: by objectivity is meant that research and writing about legal matters can be free from value judgments of the writer or commentator. The writer, in this conception, approaches his assignment as a neutral technician, the legal counterpart of the way white-gowned scientists are alleged to act in the laboratory. Some of what is said below is drawn from previously published writings of the author. This is done not only for purposes of convenience and in accord with the principle of parsimony of effort, but also because, as Andre Gide once remarked, although it has all been said before, because no one listens it must all be said again.

I.

The first proposition is obvious but should be stated nevertheless: lawyers, simply because they are trained to be advocates—to take sides—face a particularly difficult task when called upon to shed the habits of their training (and practice) when operating either on the bench or in writing for learned journals. Settling human disputes through employment of an adversary system may, and doubtless does, have considerable merit, although certain basic flaws in that method of making public policy now seem to be more and more obvious.

In no other profession or discipline, except theology, can it be said that the very system itself is a hampering effect on the search for truth. As for theology, dogma is intellectual death; in law, the adversary system places a premium on

2. The question has been probed to some extent in political science by Professor Glendon Schubert, now at the University of Toronto. See Schubert, Academic Ideology and the Study of Adjudication, 61 AM. Pol. SCI. REV. 106 (1967); Schubert, Ideologies and Attitudes, Academic and Judicial, 29 J. Politics 3 (1967).


partisan pursuit. Truth tends to be identified with client interest. Lawyers are problem-solvers; they attempt to find a suitable resolution of those disputes that humans cannot resolve through their own informal methods. They look upon these disputes as being essentially two-sided ("there are two sides to every question"), but the hard reality is that there may in fact be many facets. Ernest Nagel, in an important book,\(^5\) has maintained that there is no such thing as a simple and, at the same time, adequate explanation of any phenomenon. If that be so, and if we transfer the idea to the realm of lawyerdom, then it may readily be seen that the adversary system tends to create simplistic "solutions" to what really are immensely complex problems.

Constitutional law furnishes ready illustrations. In racial segregation, for example, the question of whether schools may constitutionally be separate turned on a clutch of law suits involving individuals, principally Miss Linda Brown.\(^6\) So, too, with legislative reapportionment: in *Baker v. Carr*\(^7\) and *Reynolds v. Sims*,\(^8\) the significant public policies enunciated derived from the modern counterpart of private litigation in the Anglo-American legal system. The Supreme Court, it should be noted, has long since given up trying to determine national economic policies on the basis of private law suits; it no longer, for instance, tries to set monetary policy on an action involving the astronomical sum of $15.60.\(^9\)

I do not suggest a similar abdication of the Supreme Court in the fields of civil rights and civil liberties. Far from it, My point is much simpler: that the adversary system, with its insistence on partisan advocacy, helps to cloud "objective" truth. At best, it helps to attain fairness—which is not to be equated with truth. Nor is the suggestion made that the adversary system be eliminated or replaced; however, it may be said that its very nature is in need of thorough study and re-examination. An institution that derives from feudalistic days, that is pre-industrial and pre-scientific, needs such a reappraisal to make sure that it fits the exigencies of the scientific-technological age.

II.

The first proposition may be refined when one looks to the bench, members of which are taken almost entirely from the practicing bar. This means that men whose education and professional careers are strenuously devoted to the finer points of advocacy suddenly are faced with a requirement to be impartial or

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\(^7\) 369 U.S. 186 (1962).

\(^8\) 377 U.S. 533 (1964).

objective or neutral. Lawyers in the practice, private or government, take a
given result as the "given" and then reason backwards to see if there is any-
thing in that amorphous corpus called the law that can be employed to enable
the client to reach the predetermined result. When after years and even decades
of such client-oriented activity, they are placed on the bench to dispense justice
there should be little wonder that at times, perhaps often, the harsh reality is
that they do not attain that measure of invincible disinterestedness that Frank-
furter said was indispensable for a judge. (I do not suggest that Frankfurter
himself was disinterested; he too had his "can't helps," his preferences and
predilections.)

What this proposition means, in essence, is that the very reasoning process of
lawyers, including judges and law professors, is from conclusion to premise
rather than a logical deduction from major premises to conclusions. At the very
best, legal reasoning depends on choices to be made from basic value premises,
choices that quite often (perhaps usually) can only be personal and essentially
arbitrary. It has been said that "to accept this position for the judicial process
would make a mockery of the demand for reasoned, adversary participation in
adjudication, and the necessity for a legal system that its rules will be applied in
a reckonable way to settle any disputes (to say nothing of the requirements of
democratic theory)." But human shortcomings and failures must be recog-
nized, and it simply will not do to say that "the premises for judicial reasoning
can and must be found within the 'force fields of the law,' as principles that
underlie the common law, or are derived from specific statutory and constitu-
tional provisions, or form the enduring and established moral values of the
society within which the judge operates."

Furthermore, for appellate judges the written products (opinions) tend often
to be a resultant of a process of bargaining. Judges, as Professor Walter F.
Murphy has shown, want to maximize agreement and will, accordingly, change
opinions in order to gain votes. If that be so, and no serious student of adjudi-
cation would gainsay it, then the opinion at the very best is a poor vehicle for in-

10. See Grant, Felix Frankfurter: A Dissenting Opinion, 12 U.C.L.A. L. Rev. 1013
(1965).
11. Weiler, Two Models of Judicial Decision-Making, 46 Canadian Bar Rev. 406,
432 (1968).
12. Ibid. Professor Weiler cites K. Llewellyn, The Common Law Tradition 221
(1960). Professor Weiler, in the statement quoted here, merely restates the problem; he
does not answer it. The premises, principles, or values of a society are usually multiple
and in conflict; the decision-maker must perfecly choose between inconsistencies. It is
that choice about which I am talking in the text. Such a choice is not logically de-
ervicable, as Morris R. Cohen long ago said. See M. Cohen, Reason and Law 84 (1950).
Some Pervasive Myths about the United States Supreme Court, 10 St. Louis
indicating the mental processes of the judge. Opinions are negotiated documents, often desperately so, and one is ill-advised to look to them alone for what motivated the judge.

III.

If we move from the bench to the academic lawyers, the same problem exists. A legal process that makes the adversary system the ne plus ultra, a legal education system that puts advocacy at the pinnacle of skills (as witness the numerous moot court competitions), a set of legal periodicals that are edited by students (and that are largely, perhaps happily, unread and unreadable) who have seldom been exposed in law school to questions of ethics or professional responsibility—all these, and more, contribute to the difficulty of the professor of law to transcend the built-in limitations of the system. (Speaking parenthetically, just why it is that student editorship of law journals is one of the sacred cows of the law school community would itself make an interesting study. It is at least dubious that a few students should be singled out for specialized treatment, when the known result is that those students are thereby given preferential status in later professional activities. Some other method of choosing law journal editors seems to be in order. And something other than the proliferation of journals should be seriously considered.)

To my knowledge, no real effort has been made to determine the limitations of the human mind and the approach that is preferable in writing for legal periodicals. A situation of academic or intellectual laissez-faire exists, the articulated assumption of which apparently is that through a counterpart of the classical economist's "invisible hand," the general good results. That may be accurate, but we ought to make sure; at the very least, an effort should be made to examine the quality and the quantity of legal writing.

As for the quantity of law journals, now being spawned at an increasing rate, perhaps the price that must be paid for an occasional nugget that is found buried in those dry and turgid pages is that very prolixity. But it is difficult, even impossible, for one person to keep up with what is published, so it seems to be high time that some attention is paid to ways to make the sheer bulk of the literature manageable. I am not suggesting that we burn the books, although quite often that might not be a bad idea (most of the cases over thirty years old printed in the National Reporter System are useless), but that some substitute be found. Would, for example, a system of abstracts of major law journal pieces be in order, published by the Association of American Law Schools and sold to interested professors?

However, the main interest must be in the quality of writing, and more specifically, in the extent to which value judgments become buried in ostensibly objective prose. I think that we start with a handicap in the insistence of
the American legal process (and legal education) on advocacy as the main
goal. It colors all legal writing.

Members of the legal profession, the myth to the contrary notwithstanding,
are ideologues in the sense that lawyers tend to have an ideology. Rather than
"the end of ideology," as suggested by Daniel Bell, this age is noteworthy for
passionate adherence to ideology. For lawyers, the ideology is "legalism," in
the sense that Judith N. Shklar uses the term: "the ethical attitude that holds
moral conduct to be a matter of rule following, and moral relationships to con-
sist of duties and rights determined by rules." The "image" of the law is
that it is non-ideological; drawing on John Austin and his intellectual heirs,
the dominant school of analytical positivism maintains that law consists of sets
of rules divorced from ideology. The "whole theory of the separation of law
from morals" devised by the analytical positivists "is designed to achieve this
end." But ideologues we are, whether we wish to acknowledge it or not.

A consequence of present importance is the denial that law has anything to
do with politics. Law is seen by many not only to be separate from political life,
but also as a method of social action superior to "mere" politics. The result is
that law is viewed as something distinct, a thing apart; as Miss Shklar says, the
tendency is to think of law "as 'there' as a discrete entity, discernibly different
from morals and politics . . . ."

But law is not merely "there"; it does not exist apart from the warp and woof
of society. It is inextricably intertwined with politics and with ethical matters.
All this is of course familiar learning—or at least should be, were it not for the
apparent fact that a counter-revolution has set in against what the legal realists
taught. Thus one is able to observe writers in legal periodicals who stoutly
affirm belief in the creative nature of adjudication while simultaneously blast-
ing the judges for being "judicial legislators." True it is that the criticisms are
aimed at specific decisions, and only rarely at the notion of judicial law-making,
but the end result seems the same. We are witnessing a reversion to Black-
stonianism; neo-classicism is the new look in legal writing. The neo-classicists,

16. Id. at 7.
17. Id. at 9.
18. The literature is legion. See the brief discussion of the "counter-revolutionaries"
in Miller, Presidential Power to Impound Appropriated Funds: An Exercise in Consti-
tutional Decision-Making, 43 N.C.L. REV. 502, 514-19 (1965). See also T. BECKER,
POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE (1964).
to Banzhaf's Analysis, 14 VILL. L. REV. 92 (1968): "my own research suggests that
the legal community is drawing less and less on nonlegal information from disciplines
such as mathematics, economics, psychology, and sociology." In correspondence, Pro-
fessor Sickels states that the quoted conclusion comes from an analysis of the matter cited
of course, do not use the term and deny that they are thinking in terms of formalistic (i.e., mechanical) jurisprudence; they talk instead of neutral principles or impersonal principles or the law as it has been received and understood. They chop logic with judges and parse judicial opinions much like medieval scholastics argued about the meaning to be attributed to abstruse passages from Aristotle. Rather than trying to build on the shambles left by the legal realists, they are painstakingly trying to re-create the temple, stone by stone, article by article, book by book. But law is politics and courts are part of the political order, whether admitted or not.20 (Some, it should be noted, admit as much, but go on to say that such ideas should be kept from the laity—a rather odd position with little or no justification.)21

The point is obvious so far as the Supreme Court of the United States is concerned. Its decisions, and commentary on those decisions,22 are inputs into the political process in America. And it is true also for other courts and administrative agencies and legislators who are integral parts of the law-making order. Laymen know the political nature of law intuitively, and lawyers should know it simply because they are experts in the field. As Chief Justice Taft once said, in another context, of course, “[a]ll others can see and understand this. How can we properly shut our minds to it?”23 Many lawyers, many judges, and many law professors still think otherwise. Judge Charles Breitel said in 1965 that the adversary system, “with the altogether proper commitment of the lawyer to his client and his client’s cause, all but absolute, is not exactly akin to the aseptic techniques of the laboratory . . . . The popular notion that judges are mere declarers of what is in the books, all laid down clearly and simply, is not confined to the laity. It obtains too with large segments of the bar. And some judges still believe it.”24 Whether the laity is so befuddled as Judge Breitel says is questionable. The controversy over the nomination of Justice Abe Fortas to replace Chief
Justice Earl Warren clearly showed that many believed otherwise. Laymen expect courts—at least, the Supreme Court of the United States—to innovate, the ultimate question being, as always, whose ox is being gored in the process.

Legal writers, then, should and must recognize the political dimension to the legal system. Let me emphasize, however, that what is being talked about are those human disputes that get referred to lawyers for handling and perhaps for litigation. These, as has often been said, are the “hospital” or pathological disputes of the nation, those that cannot be resolved through the many methods of social control any community utilizes. The role of law, in other words, is much more than a prophecy of what a judge will do with a given dispute or what, in Holmes’ terms, the “bad man” might consider it to be. The “good man” theory of law is what is important, as H. L. A. Hart has emphasized. Furthermore, when human disputes do get to official decision-makers for settlement, the “prediction” theory of law also breaks down for the judge; it may be one thing for a lawyer to predict what a judge will do and thus to state a legal norm, but how is the judge himself to predict his own behavior?

IV.

The object of scholarship is to pursue, identify, and publish The Truth. The term is capitalized because of its importance and because it has been lost sight of in the pursuit of the aims of advocacy, overt or covert. Now truth, Henry Aiken once said, may well be subversive of the established order, unavoidably so. But that is one of the burdens that must be borne by those who labor in the fields of Academia.

I use the term “Truth” without apology and unabashedly, even though, as Thurman Arnold asserts, it may lie “at the bottom of a well.” The basic problem, to put the proposition in familiar terms, quite possibly may be the extent to which the Supreme Court’s theories about the “marketplace of truth” have any validity in the present-day world. My colleague, Jerome A. Barron, in arguing for a constitutional right of access to the press, has called present doc-


29. Arnold’s statement is taken from personal correspondence and is used with permission.
trine a “romantic” view of the first amendment. So it likely is. I am willing to agree with that; and to go further and maintain that with the growing complexity of public policy questions, with secrecy policies avidly pursued both by public and by private government, with “managed” news, and with the growth of public relations to a fine art of image-building, it is doubtful that Professor Barron’s prescription of additional access to the mass media will have much effect (even if by some miracle it were adopted). The problem goes much deeper. Perhaps some words of John Stuart Mill are apposite: Speaking in 1859, he said in his famous essay On Liberty that “the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes.” When the stream of information is polluted, as it is today, one can well be dubious about the validity or possibility of the operation of the famous Holmesian statement about how truth is generated. This is not to argue against adherence to it, but merely to point up some of the difficulties.

The objective, I say, of scholarship is to pursue the truth. And truth, I further say, does not exist as some sort of Platonic idea, but as an aspect of what Professor John Wilkinson has called “the civilization of the dialogue.” (Truth, I maintain, is “purposive,” as will be expanded below.) In many respects, the legal order and technical legal procedures differ basically from other “dialogues” in attempting to ascertain “the truth.” The commitment is not to abstract truth but to achievement of a result on the best terms possible. Justice Brandeis said the same thing, it seems to me, when he remarked that it is better for a matter to be settled than to be settled right or correctly. (Something not asked of the learned Justice is this: Better for whom? And by what criteria?)

V.

The next proposition may seem, and perhaps is, antithetical to that just stated. In whatever type of dialogue that is conducted, including law, the personal valuations of the actor unavoidably are part of his presentation. This is what I understand Thurman Arnold to mean when he remarked that truth lies at the bottom of a well. The proposition will be buttressed below, but first brief allusion to the possible inconsistency with the goal of truth. There is no one “truth” that can be stated dogmatically. Instead, truth is a tapestry of many colors; it is a

31. ON LIBERTY 34 (C. Shields ed. 1956).
goal that should be striven for in legal scholarship, with the clear recognition that there are many roads to that goal and that it is elusive and hard to corner and corral. The personal values of the actor cannot be eliminated in any final sense, but what can be done, as will be shown, is that their effect can be minimized. At the very least, we are entitled to efforts being made to minimize them. In the words of Karl Mannheim, the "type of objectivity [that is attainable] in the social sciences [and presumably this has to include law] is . . . not through the exclusion of evaluations but through the critical awareness and control of them."  

The problem of the observer permeates all study, both in and out of the laboratory, but is particularly apparent in social and legal studies. "In the realm of the social, particularly," Louis Wirth has said, "truth is not merely a matter of a simple correspondence between thought and existence, but is tinged with the investigator’s interest in his subject matter, his standpoint, his evaluations, in short the definition of his object of attention." Accordingly, it is accurate to say that in the very choice of problems for research and analysis, in the selection of data, in the methodology pursued, in the way in which the product is organized, to say nothing of the formulation of hypotheses and conclusions, "there is always manifest some more or less clear, explicit or implicit assumption or scheme of evaluation." The ideal of a knowledge that is not personal is, in point of hard fact, simply not attainable. We should face up to this and deal with it in some adequate manner.

The problem this poses is clear and insistent: How, and by what means, can the question of valuations be handled in the legal dialogue in scholarly journals? The problem obviously transcends that of disclosure of client or financial interest of the writer, although that is far from being irrelevant. Two moves, I suggest, are necessary at the minimum: (a) disclosure of client or other interest, (b) critical awareness and control of the critical awareness and control of the personal values of the actor. 

34. K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 5 (Harvest Book ed. 1936).
35. Preface to id. at x, xvii.
36. Id. at xx. See D. EASTON, THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE (1953): [It is impossible] for political research ever to free itself from involvement with values. . . [T]he goal of value-free research is a myth, unattainable in spite of the best of intentions. [p. 223.]
[N]o factual proposition uttered by a human being can be devoid of all relevance to moral preconceptions. [p. 224.]
It is only recently that this conception of the relation between facts and values has begun to be accepted generally. [p. 224.]
Values are an integral part of personality and as long as we are human, we can assume that these mental sets and preferences will be with us. The ideal of a value-free social science has revealed itself as a chimera. Even where a research worker should claim utter impartiality, there can be no doubt that he has simply driven his moral views so far underground that even he himself may no longer be aware of them. [p. 225.]
and (b) the writer openly and avowedly "facing his valuations." These require separate treatment.

The first may be the easier, although it is a complex matter. A recent report on professional standards and responsibilities rendered to the American Political Science Association reveals some of the dimensions of the problem. In that report, it is said that general agreement exists that "a scholar should be what he says he is and make known the sources of his support, and any fact or circumstance that might be thought to limit his freedom to pursue the truth."37 But agreement on the general principles clouds the specifics and how it can or should be handled in detail. The report lists some of those complexities:

a. Is disclosure enough? Are some sources of support so tainted—or at least so suspect—that support from them must simply be rejected? 

b. Is disclosure mandatory even when a sponsor wants to remain anonymous for quite innocent reasons?

c. Is disclosure mandatory against the call of moral or patriotic duty?

d. What must be disclosed? Simply the fact of sponsorship? The precise nature of the work undertaken? The outcome, or the results achieved? 38

Merely listing these serves to reveal the intricacy of the problem. How and what should be done? Some examples may help to illustrate the types of situations that are involved:

1. A member of a law firm writes an article for a law review. A client of his firm is interested in the subject matter. Should the writer reveal the fact that he has a client with such an interest? (In this connection, it may be noted that some have suggested that for a lawyer to reveal his clients or financial connections would "smack of advertising"—which of course is one of the **bete noires** of the profession.)

2. A law professor does some consulting work for a law firm, in the course of which he helps to write a brief for a pending case. Later he uses the data collected for that effort and writes an article for a law review. Should he reveal that he was once paid for the research and by whom?

3. A law professor testifies before a congressional committee in hearings concerning a certain industry being investigated to see if additional legisla-

38. Id. at 16.
tion is required. Should he reveal that he is on a consulting basis with one of the firms of that industry?

4. The United States Information Agency wishes a book written dealing with the international law aspects of the Vietnam conflict. It finds a competent scholar to do the job and also promises the publisher to buy 10,000 copies of the book when it is printed. However, there can be no mention of the fact that the book was produced under USIA auspices. What is the duty of the professor in that instance?

5. Would the answer be different in Example 4, above, if the USIA gave assurances of complete freedom to pursue the truth?

6. A law review editor-in-chief takes the position that disclosure of client or financial interest is of little importance, because the readers of the review are sophisticated enough to recognize special pleading or advocates' arguments. Is this a proper posture?

7. A periodical (not legal) publishes an article about the Viet Cong, ostensibly written by an expert in international relations. The article was in fact written by an employee of the CIA; this was known by the editors of the periodical. What duties of disclosure did the writer and the editors have?

These examples are all drawn from actual situations. They are merely illustrative. Others could have been given. Mr. Justice William O. Douglas in 1965 called attention to a number of them. And in 1968, James Ridgeway, in *The Closed Corporation*, gave numerous examples of how scholars in various disciplines had acted in similar ways.

To return to the question of valuations, it seems to me to be beyond argument that objectivity is simply not part of the picture in such instances as have been listed. But the point goes even deeper: even without known (or unknown) client or financial interest, even when an effort is made to learn "the truth," we still have the problem of personal valuations. Some system of disclosure, as a part of a writer's professional responsibilities, may well be helpful, although it is clear that the problem is easier to state than to resolve. For those who accept the fees and have the clients, a limerick quoted by Dean Don K. Price seems appropriate:

There was a young lady from Kent
Who said that she knew what it meant
When men took her to dine,
Gave her cocktails and wine,
She knew what it meant—but she went.

When we turn to the question of personal valuations outside of the disclosure question just discussed, even harder problems are presented.

VI.

The basic problem is one of maintenance of the integrity of scholarship. I have split it into two segments—disclosure of financial or client interest and personal valuations. We may begin discussion of the latter with a statement by Louis Wirth:

The fact that in the realm of the social the observer is part of the observed and hence has a personal stake in the subject of observation is one of the chief factors in the acuteness of the problem of objectivity in the social sciences. In addition we must consider the fact that social life and hence social science is to an overwhelming extent concerned with beliefs about the ends of action. When we advocate something, we do not do so as complete outsiders to what is and what will happen . . . . The most important thing . . . that we can know about a man is what he takes for granted, and the most elemental and important facts about a society are those that are seldom debated and generally regarded as settled.41

The problem is one of the "can't helps" that all carry around with them. Too much is known about human cognition and psychology for one any longer to believe that any person, even the intellectual in his ivory tower, who attempts to be detached can really be objective.42 The manifest shortcomings of the human mind must be faced and dealt with in some manner. How to do it is the problem, not whether it should be done.

In essaying an answer to that question, I suggest the necessity for the writer openly and consciously to "face his valuations." Only in that way can one be as unbiased and detached as is possible, and only in that way can fairness to the reader be achieved. This is the suggestion of Gunnar Myrdal, whose book Value in Social Theory43 is an exposition of the problem now being discussed. In that book, Myrdal adheres to "the fundamental thesis that value premises are necessary in research and that no study and no book can be wertfrei, free from valuations."44

Quite apart from drawing any policy conclusions from social research or forming any ideas about what is desirable or undesirable, we employ and we need value premises in making scientific observations of facts and in analysing their causal interrelation. Chaos does not organize itself into cosmos. We need viewpoints and they presume

41. Preface, supra note 34, at xxii-xxiii.
42. See the citations in Miller & Howell, supra note 3.
43. Value in Social Theory (Streeten ed. 1958).
44. Id. at 261.
valuations. A “disinterested social science” is, from this viewpoint, pure nonsense. It never existed, and it will never exist. We can strive to make our thinking rational in spite of this, but only by facing the valuations, not by evading them.\textsuperscript{45}

To Myrdal, value preferences cannot be divorced from the study of social phenomena, and second, it is desirable for one who labors in the field to set out the preferences he is seeking to further, for only in this way can objectivity be maximized. “Specification of valuations aids in reaching objectivity since it makes explicit what otherwise would be only implicit. . . . Only when the premises are stated explicitly is it possible to determine how valid the conclusions are.”\textsuperscript{46}

The position Myrdal takes is, to me, unassailable. It applies to law as well as the “social sciences” and the “behavioral sciences,” for law can only be understood as a part of the total social process. Law, by definition, involves choices made between conflicting values. And writing about law inevitably is colored by valuations. The legal writer is emphatically not a neutral technician.

VII.

But if a value-free social science, including law, is not possible, are the suggested remedies enough? Is it enough to make full disclosure and to maximize detachment by facing valuations? Or should the further step be made—that of consciously and openly adhering to a given ideological position? If so, what should that position be? I answer the two questions quickly and simply: first, there should be open adherence to a philosophy or position; and second, the position, in terms of highest level abstraction, is that of furtherance of a law that will maximize human dignity. I plump, in short, for a “jurisprudence of welfare,” to use Alexander Pekelis’ term, or a “law of human dignity,” to borrow from Myres McDougal and Harold Lasswell.\textsuperscript{47}

Merely stating that proposition should reveal its staggering complexity. At this time, one can do no more than to state it and then go on to indicate some of its contours. They include:

1. It is a method of thinking, not a set of conclusions. It requires that one ask the “welfare” or “human dignity” question whenever he is writing for legal periodicals, but does not give specific answers. In fact, answers may

\textsuperscript{45} Id. at 54.

\textsuperscript{46} Id. at 155.

well be quite contradictory (as is revealed in the controversy over the legal
basis for the Vietnam engagement). Professor Robert Engler has said:

Underlying the claim of scientific objectivity . . . is the proud assumption of moral detachment. This attempted emulation of the physical and natural sciences confuses thoroughly the essence of science. At its best, science is a spirit, not a technique. Trusting imagination and intuition, it is speculative and creative, tentative rather than final, while deeply committed to the continued and vigorously honest search for larger understanding.

The distorted scientism so prevalent in modern social science means that its inquiries are not guided by any sense of urgency or priority. As Robert S. Lynd concluded in Knowledge for What? "Research without an actively selective point of view becomes the ditty bag of an idiot, filled with bits of pebbles, straws, feathers, and their random hoardings." First questions are not asked, but assumed, thus feeding the myth that the new research techniques start with no a priori assumptions. Yet modes of analysis and tools are never neutral. They shape and are shaped by their cultural contexts and their users.

2. No ready set of criteria are available by which welfare or human dignity can be measured. This hard fact poses the immense intellectual task of producing such criteria.

3. The need is to look to the end of consequences of legal action, not to an alleged or desired adherence to a logically consistent edifice of legal principles. Legal thinking must become “forward” looking; it must slough off its singleminded devotion to retrospection and attempt to peer down the dark corridors of the future. Put another way, law must become instrumental as well as normative or interdictory.

4. The point, further, is that law cannot be only a set of “thou shalt nots . . . ;” it must also command some affirmative duties, duties that are tested against the welfare or human dignity standards.

5. The need, then, is to think in terms of process, rather than of static system. In a world of constant change, this is a necessity; it becomes a duty if a full understanding of law in the modern age is to be attained.

The requirement, in sum, is to perceive that not only is objectivity unattainable, but that it is not even desirable. The search for objectivity is a part of the

48. Supra note 35.
stream of pragmatism in American thought, a manner of approaching human problems and data that for many years has had the approbation of many observers. Thus it was during the years of the Kennedy administration that the highest accolade one could get as a government official was that he was a "hard-headed pragmatist," and President Richard Nixon, in introducing the members of his cabinet, made a special point of calling them "pragmatic centrists." But if pragmatism, whatever it may mean, ever was an adequate way in which to approach the abrasive questions of the human condition (which may be doubted), it no longer is. That mental attitude leads to an approach termed "ad-hocery" by the former Director of the Bureau of the Budget, Charles Schulze, and which some years ago I called "ad-hocism."

Under that "system" of thought, nothing is a problem until it is a crisis, until, that is, it is too late to do anything rationally effective about it. The need, then, is for conscious instrumentalism. And that means that lawyers, who historically have been retrospective in their thinking, must avowedly and outwardly face up to the questions of values, of goals and purposes, and of alternative ways and means of achieving them. This will require, to be sure, a different type of thinking for the lawyer, but necessary it is, particularly in this age of rapid social change. Professor Charles A. Reich of the Yale Law School has expressed a similar notion in these words:

It is important to recognize explicitly that whether he is engaged publicly or privately, the lawyer will no longer be serving merely as the spokesman for others. As the law becomes more and more a determinative force in public and private affairs, the lawyer must carry the responsibility of his specialized knowledge, and formulate ideas as well as advocate them. In a society where law is a primary force, the lawyer must be a primary, not a secondary, being.

All of this leads to the law schools' greatest responsibility and opportunity. Today we lack—and desperately need—a profession concerned with the overall structuring of society. Where most areas, even philosophy and the social sciences, have become increasingly specialized, students of law have, of necessity, remained generalists. This is so because law touches all areas of life, and because it touches life in a prescriptive sense—by the setting of standards—and thus it unavoidably treats of society as it ought to be. Hence the study of law as a subject matter must be a study of society in the moral sense of ought and

should. Herein lies law's true kinship with literature and with the other arts which seek critique and an overview of society. Herein lies law's responsibility to be, not merely in apostrophe but in reality, the queen of the humanities.56

VIII.

What, then, can be concluded about law journal editors and of those who publish in that medium? The answers seem clear and unavoidable.

For the writer, there is a duty of disclosure and of stating his valuations.

For the editors, there is the concomitant duty of facing the problem and of attempting to take measures to counteract any possible adverse effects implicit in any writing. Some law journals have already done so or plan to do so.57 Perhaps the most noteworthy example comes from the American Bar Association: In 1968 the editors of the American Bar Association Journal adopted a policy requesting authors to disclose financial support, client interest and other relevant facts and affiliations bearing on the subject matter of their manuscripts. The policy reads as follows: "Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in their articles. That he has done so is an implied representation by each author."58

Problems no doubt exist, as I have tried to indicate, but I think that all readers of all periodicals are entitled, at the very least, to know the same data about authors as the A.B.A.J. gives. All readers are entitled to know what, if any, financial or client interest the author of a legal article may have had. As matters stand now, there does seem to be what might be called an "implied warranty of objectivity" in legal periodicals. Too much is known about the human mind and human psyche for anyone any longer to adhere to such a position. But that very position does seem to be the inarticulated assumption of most legal periodical editors.

The concern one has in such situations does not go to the law professor who carefully follows all of the literature and who, for professional reasons, has at least a good idea of who is writing what in his own field. Rather, the concern is for the person, be he judge or professor or lawyer or student, in many parts of the country—and, indeed, of the world, now that American legal periodicals are used abroad—and how he is going to evaluate a given writing if (a) he does not know of financial or other affiliations (if any) of the author and (b) if he does not know, or is not apprised by the author, of that person's valuations.

56. Reich, Toward the Humanistic Study of Law, 74 YALE L.J. 1402, 1408 (1965).

57. See Report of Special Comm. on Academic Ethics, ASS'N OF AM. L. SCHOOLS PROC., pt. 1, at 11 (1968). (Fourteen law reviews have taken steps regarding disclosure, 22 reported that "action concerning disclosure was planned," and 15 said that no action was planned).

58. See ibid. or any issue of the A.B.A.J.
The matter, of course, is complex and difficult. But it should be faced and dealt with. The problem of the observer in any inquiry can no longer be ignored.

IX.

There are some, of course, who will smile derisively or who will be at least annoyed, if not angered, at the suggestions that have been made. They will attack them in an *ad hominem* manner or otherwise minimize the notion that any problem exists. I am inclined to think that a problem does exist—that the flow of scholarship stands in danger of being polluted—but could be persuaded otherwise. What are needed are hard data, a sociology of legal writing. We do not have it now, but it is high time that one was developed.

A final word: let no one think that any “policing” of the law reviews, even in the minimal sense herein suggested, will be easy. Far from it. As matters now stand, the periodicals and their editors exist as autonomous “bodies politic” in the law schools. The editors do not seem to be accountable in any formal sense to anyone; they guard their autonomy jealously, and it is protected by the alumni, particularly those who were members of the boards of editors in the past. But some policing seems necessary, and it is time that the Association of American Law Schools faced the problem. Other questions exist, including the following:

[1.] Principles to guide student editors of law journals with respect to fair dealing with authors, with emphasis upon editorial and other changes made by the editors in the manuscript;

[2.] Student (and other) comment on cases which have not been finally decided;

[3.] Copyright protection, including (a) protection of authors from reproduction without their personal permission and (b) unauthorized use of law-journal material by mimeograph or other mechanical means.\(^{59}\)

The small trickle of law reviews of the nineteenth century has now become a flood. The underlying assumptions about their publication should be re-examined in order to make sure that the reviews are fulfilling worthwhile goals.

**Conclusion**

I end as I started: We live under the myth of objectivity in legal research and writing. Is it not time that something was done about it?

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