GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR
Course: Sociology of Law
Semester-III (Batch: 2019-24)
End Semester Online Examination: December 2020

Date: 27th December, 2020

Duration: 8 hours **Max. Marks: 50**

Instructions:

- The respective marks for each question are indicated in-line.
- Indicate correct question numbers in front of the answer.
- No questions or clarification can be sought during the exam period, answer as it is, giving reason, if any.

Marks

Answer all the questions (in 1500 words)

Q. 1 Critically review the article "Law as a function of the social order" written by Jose P. Bengzon in contemporary times. (Attachment Number 1) (10)

Q. 2 Critically review the article "The Cultural Defense in the Criminal Law" focusing on the Indian Society. (Attachment Number 2) (10)

Q. 3 Critically review the article "India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization". Also discuss the impact of global pandemic impact on the legal profession. (Attachment Number 3) (10)

Q. 4 How does the Sociologist analyse the concept of conflict? Explain the various processes of resolving conflicts in the society? Provide necessary support for your answer. (10)

Q. 5 Explain the various theories of women empowerment. Critically review the situation of women empowerment among the subaltern women. Provide necessary support for your answer. (10)

LAW AS A FUNCTION OF THE SOCIAL ORDER†

Jose P. Bengzon*

I

Sociology of Law

The term "sociology of law" was first used by D. Anzillotti in 1892 in his text of jurisprudence La Filosofia Del Diritto E La Sociologica, dealing with what he called "sociologia juridica".[1] Sociology of law, however, is to this day not a term of precise and accepted meaning. For it is a cross of two of the broadest fields of intellectual concern — sociology and law. Sociology is the science of human behavior. As such, it covers law or the area covered by law. The sociologist is concerned with the facts of human behavior, including the fact that people have values and attitudes and the fact that they reason logically.[2] Law, in turn, is the broadest of social studies. As Ganong and Pearce said:[3]

> "Relationship between persons, and relationships between persons and things, constitute the subject matter of the law; there is no relationship of either kind that does not come within its purview. There is nothing it does not command, prohibit, or permit. In its overall aspects the law — with the possible exception of history — is the broadest of social studies, and, apart from the description of wars, history is in large part but the story of the rise and fall of legal institutions."

Roughly defined, therefore, I would say that sociology of law is the science or study of law as a function of the social order.

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[1] Dror, *Prolegomenon to a Social Study of Law*, 13 J. Legal Ed. 131-156. (1960-61).

[2] Sawer, Law in Society 7 (1965).

[3] Ganong & Pearce, Law and Society 4-5 (1965).

I said roughly defined, because a definition is supposed to delimit the precise scope and extent of the thing defined. Neither law nor sociology, however, admits of such precision. *A fortiori,* neither does "sociology of law".

It is in this sense that Sawer tells us[4] that sociology of law is sociology including law in its scope; the study of law in its social context. This social approach to law is but one of several approaches. As Dror pointed out,[5] the special character of law opens three main avenues to approach its study. *First,* law constitutes a system of norms and can be studied as such. This is what Kelsen did, and this sort of study is called "Normative Jurisprudence", dealing with the internal consistency and structure of legal norms. *Second,* the internal relation between legal norms and other normative systems, such as ethics and religion, can be studied, and this falls under "Philosophy of Law". A *third,* approach is to look at law from the outside, with special interest in the relation between legal norms and social phenomena. This is the approach of the social study of law or "sociology of law". And hereunder, the legal norms themselves are regarded as social and cultural phenomena conditioned by society and fulfilling various functions in it.

The search for law in its social context can be seen, among others, in Savigny's "Volksgeist", in Montesquieu's "relation of things", in Maine's correlations of social and legal growth, and in Ehrlich's "living law". And it can be seen throughout Roscoe Pound's work. Pound, says Sawer, keeps coming back to the question — what is the social end, nature and scope of law?[6] It is to this recurring question that sociologists of law address themselves.

The relevance of their findings is far too dangerous to overlook. Philippine society is today confronted by the threat of rampant deviation from, and even defiance of, law. We need no Myrdal to realize that social indifference, inequality and corruption are central in the Asian crisis, including the Philippines. To tackle these problems, the relation of society and law must first be fully grasped; the functions and workings of law in society, first be understood. The disparity between law and social behavior can only be effec-

[4] SAWER, *op. cit.* at 16.
[5] *Supra,* note 1 at pp. 146-147.
[6] SAWER, *op. cit.* at p. 24.

tively dealt with in the light of a keen awareness of forces underlying their relationship. Furthermore, the Philippines faces the problems of development. As a developing country, she finds law among the available instruments of social change. To what extent and how law should be used to attain development, likewise require insight into the sociology of law.

The role of assessing law as a function of the social order falls heavily on the legal profession. Said Friendmann[7]: "The legal scholar has the complete freedom — and it is his principal opportunity — to survey and appraise the legal system, both as a whole and in its individual manifestations, as an instrument and function of social order."

The starting point of sociology of law is the proposition that law is fact. The foundations of such a theory goes back to the rise of the German historical school, represented in Savigny's jurisprudence.[8] As Hall says: "Positive law is social conduct expressing norms that imply values, deviation from which, implying a judicial process, causes harms that are and must be met by the imposition of sanctions."[9] As such, law is, in the phrase of Holmes, not a "brooding omnipotence in the sky", but a flexible instrument of social order, dependent on the values of the society it regulates.[10] Sociology of law has thus emphasized the view that law is an agency of social control and that law functions in a social context. And for this reason, Ehrlich said that the core of the development of law lies in our days, or any other time, neither in legislation, nor in theory and practice of law, nor with the judicature, but in society itself.[11]

Savigny's doctrine led to the modern correlation of law with "the trends of justice in society" or "socio-ethical conviction".[12] N. S. Timasheff, among this century's sociologists of law, held that law is the product of the psychological interaction of members of large groups on what he calls "the dual level of socio-ethical conviction

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[7] Friedmann, *The Role of Law and The Function of The Lawyer in The Developing Countries*, 17 VAND. L. REV. 181 (1963-64).

[8] HALL, LAW AND SOCIAL THEORY, 22. (1963).

[9] *Ibid.*, 78.

[10] FRIEDMANN, LAW IN A CHANGING SOCIETY viii (1959).

[11] BOASSON, SOCIOLOGICAL ASPECTS OF LAW AND INTERNATIONAL ADJUSTMENT 26 (1950).

[12] STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 470 n. 1 (1966).

and submission to power."[13] Stated otherwise, law is the interpermeation of group conviction and power relationship. Law embodies social power, for it is imposed by a minority group on the acquiescent majority. But it is also more and less than power, for its force depends on support by the ethical convictions of the whole group, including those who wield power.[14] As Julius Stone aptly summed up the thrust of these theories, *social norms binding under institutionalized force, constitute law.*[15] Such process of institutionalization provides law its distinctiveness, as through it the prevalent social norms receive a coercive form and are raised to distinctive modality of legal bindingness.[16]

Thus, law is a specialized form of social control. It is not, however, the *only* form of social control. It is a regulating force amongst other regulating forces, in the framework of social control as a whole.[17] Law reaches indeed into nearly all social activities, but only *as a part* of such activities, so much so that some writers say it is unlikely to have as yet a "sociology of law" in the fullest sense.[18] Recognizing, however, the fact that law is not the only regulating force at work in society, the social study of law should go on, the development of sociology of law should be pursued. For law arises from the pressure of social needs[19] and we cannot rest content to simplify legal theory by differentiating law from the facts of life, by depersonalizing the legal process in terms of agencies by which it is conducted, rather than as a function of the needs of human beings whom they are supposed to serve.[20] There is, Da Cunha reminds us, the permanent need to know the "what" of what we are doing; to ask for the goals we are heading towards.[21] The study of law not as the principle in the books, but as the principle in action; not as mere positive enactments but as principles inherent in social conduct; not as mere norms in a formalistic "heaven of concepts" but as a function of the social order, this — which I call "sociology of law" — is a pressing necessity in a developing

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13 *Ibid.*, 643.
14 *Ibid.*
15 *Ibid.*, 470.
16 *Ibid.*, 470.
17 *Ibid.*, 471; BOASSON, *supra* note 11, at p. 22.
18 SAWER, *op. cit.*, 201.
19 GRAVESON, CONFLICT OF LAWS 7 (1960)
20 HALL, *op. cit.*, fn. 149,
21 Da Cunha, *Efficacy In Law And Social Change*, 37 REV. JUR. P. R. 81 (1968)

society such as ours, in fast transition, faced by the problems of social injustice and the need for social and legal reforms.

What, then, has "sociology of law" to say?

II

Social Functions of Law

A. *Social Postulates: The Requirements of Social Life*

Any study of law in its social context must have some starting points on the requirements of social life, some postulates. Roscoe Pound calls these the "jural postulates" but the more accurate term is "social postulates".[22]

The social postulate as identified by Pound, are in summary form, as follows: (1) Security of the person from intentional aggression; (2) Security of possession and property in things discovered and appropriated, created by one's own labor, or acquired under existing social and economic order; (3) Assumption of good faith in the making of representation and promises; and (4) Assumption that things inherently dangerous unless controlled will be kept under control.[23]

Pound referred to twentieth century North American society. These postulates, however, are so fundamental in any form of social living that it is safe to say that they hold true in any society whose aim is to survive rather than to perish. And these are basically the same points that Hart calls "the minimum content of natural law" referring to rules which both law and morals perforce always provide *in any society,* given that men grouping together prefer survival to extinction: There must be "some form of prohibition of the use of violence, to persons or things, and requirements of truthfulness, fair dealing and respect for promises."[24]

Referring to his own assumptions regarding law in society, Boasson said: "(a) Each group and each community of groups living a life of tolerable peace, must adjust disharmonious individual conduct to a tolerably harmonious whole. (b) Many persons, bodies and institutions are working towards establishing that harmony.

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[22] Sawer, *op. cit.* at p. 148.
[23] *Ibid.,* 147-148.
[24] Hart, Concept of Law 176, 189 (1961)

When engaged on that job they make use of means of social control. (c) It is the function (the job) of the law to deal exclusively with the prevention of disharmonies."[25]

Starting, then, with the principle that social life requires security of *persons, property* and *promises* from violation, let us now examine the tasks of law within the framework of that life.

B. *The Role of Law in Society*

Sociologists of law differ in formulating the social functions of law, ranging from Boasson who recognizes only one, to Dror, who mentions eight. Sampling through them, however, will reveal that they speak of the same things in a different way:

Roscoe Pound emphasizes the function of law to satisfy social wants.[26] Boasson says it is "adjustment for the sake of adjustment".[27] The Continental *Interessenjurisprudenz* emphasize the balancing of various social interests.[28] Social integration, says Evan, is the primary function of law: to regulate social interaction, thereby mitigating potential elements of conflict and oiling the machinery of social intercourse.[29] Paul Vinogradoff regards law as a means for redistribution of social energy.[30] And Hall says it is to achieve the actualization of the values implied in the normative structure of social action.[31]

Among those who mention several functions are:

Timasheff: To produce *peace* and *security;* to create and enforce *organization.*[32]

Llewellyn and Hoebel: To define relationships, direct the use of force, dispose of trouble cases, and maintain adaptability.[33]

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25 SOCIOLOGICAL ASPECTS 28, note 15.

26 Dror, *Prolegomenon* 139, note 20, citing ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 et seq. (1954).

27 SOCIOLOGICAL ASPECTS, 29, n. 16.

28 Dror, *Prolegomenon* 139, n. 20.

29 EVAN, LAW AND SOCIOLOGY 6, 58 (1962).

30 COMMON SENSE IN LAW; *See* Dror, *op. cit.*, 139, n. 20.

31 HALL *op. cit.*, 110.

32 TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 334-340; (1939) *See* Dror, *op. cit.*, 139, no. 20.

33 Llewellyn, The Normative, the Legal and The Law-Jobs: The Problem of Juristic Method, 49 YALE L.J., 1355-1400 (1940); HOEBEL, THE LAW OF PRIMITIVE MAN, Ch. 11; *See* Dror, *loc. cit.*

Hurst: The release of energy, the control of environment and the balance of power.[34]

Weber: To provide security and to enable prediction.[35]

Dror: Reinforcement of norms at potential points of stress; predetermining patterns of behavior; resolving conflicts between parties; reconciling parties and educating them; to define the basic framework of social action and legitimize the political institutions; satisfaction of expressive needs; providing continuity of the self-image of society and its value system; and serving as an instrument of organized social action.[36]

All the foregoing can be summed up, thus: The function of law is to regulate and control social interaction thereby to render the social existence *tenable* and *successful*. Thus, the social ordering by law is designed to achieve firstly, the survival and continuance of the social community and secondly, the fulfillment of its purposes and needs.

The nature of law as social fact, however, should not be forgotten. Law is a part, a function of the social order; but it is a special part with the special function of social regulation and control to the end that social life may both be possible and fruitful.

For this reason, law has to keep pace with a fast-changing society. As Jones observes:[37]

> "Society changes, typically faster than law. *Law's function is the ordering of life in the real world; its imperatives become a dead language when they are no longer relevant to contemporary needs and conditions.* Technological advances, population trends, what Professor Selznick called the waning influence of the family and other non-legal controls — these and kindred forces keep society forever on the move, and law must move with the society it serves."

All finite life is a continuing adjustment. And law, as it deals with life, performs the function of adjustment, not alone for the sake of adjustment, but in final analysis, for the realization of society's values as well. Apropos this point is Rostow's proposition that in a society that seeks to govern itself through law,

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[34] HURST, LAW AND THE CONDITIONS OF FREEDOM (1956); *See* Dror, *loc. cit.*
[35] Dror, *loc. cit.*
[36] Dror, *Prolegomenon* 139-141.
[37] Jones, *The Creative Power and Function of Law In Historical Perspective*, 17 VAND. L. REV. 135 (1963); underscoring ours.

legal institutions must perform three functions: "They must endlessly adjust the formal, stated rules of law to the pace of social and moral change. They must seek to raise the level of social behavior, and of the law in practice, up to that of the accepted standards of law. And thirdly, the law fails in its most important function unless all its agencies strive, through their own approved procedures, and according to their accepted rules, to bring the standards of the law closer to those of the ideal for law cherished by those with authority to speak for our culture in stating its law."[38]

III

SOCIAL NORMS AND SOCIAL CONTROL

A. *The Shaping of Norms: Stages of Evolution*

Socialized experience in the process of personal inter-actions is the root of legal institutions. Norms are expressed in social action — in conforming conduct, in deviant conduct, and in the social group's reaction imposing sanctions. This is the social reality of law.[39]

Sociology of law discovers that the norms of positive law can be abstracted from the social reality to form the concepts by reference to which conformity and deviation are judged.[40]

As a set of norms rooted in society and its experience, law is shaped and develops in social framework and context. Studies have thus been made of the stages of social and legal evolution. Kovalevsky mentions five stages: horde, gens, partriarchal nomadism, feudalism and democracy.[41] Pound gives five also: primitive or archaic law, strict law, equity (Natural law), the maturity of law, and the socialization of law.[42] Bucher has this: hunting and fishing, pastoral, agricultural, commercial, industrial, financial, and governmental economics.[43] Sir Henry Maine listed: themistes (customs), unwritten case law interpreted by an elite, codification, fiction, equity and legislation.[44] The famous generalization of Maine that the law

38 ROSTOW, THE SOVEREIGN PREROGATIVE 4 (1962).
39 HALL, *op. cit.*, 80-81.
40 *Ibid.*, p. 80.
41 *Ibid.*, p. 24.
42 *Ibid.*
43 *Ibid.*
44 *Ibid.*

of progressive societies has evolved from a law of status to that of contract is often challenged and was not meant by him to refer to Asian societies whose social and economic structures he found relatively stable.[45] As this stability has given way to ferment and change, however, the shift observed by Maine may become evident even in Asian legal systems.

B. *The Shaping of Norms: Folkways, Law-ways and Stateways*

The prescripts or norms that people are required to follow are of necessity shaped by the facts of social reality. Any exhortation to conform to a preconceived order must refer to one that fits with the social situation.[46] A legal norm is a legal norm when its conceptual references find in the real world the corresponding factual conduct.[47]

Savigny and Ehrlich, having this in mind, emphasized the "living law of the people" based on social behavior rather than the compulsive norm of the State. In this sense, norms observed by the people, whether in religious habits, family life or commercial relations, are law, even if they are never recognized or formulated by the norm of the State. For Ehrlich, the main sphere of the compulsive State norm is in the fields specifically connected with the purposes of the State, i.e., military organization, taxation and police administration.[48] For Ihering, also, customs are part of the living social process.[49] The prevailing customary law after all reflects, *par excellence,* the people's own choice of legal system, their daily practices, and the normative rules founded on such practice and enforced by their courts.[50]

Sumner focussed on "folkways", the modes of acting that are shared by the members of a group, produced by persons acting in the same way when faced with the same need and often by great numbers acting in concert.[51] Sumner observes that in time these

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45 *Ibid.*; SAWER, *op. cit.*, 65.
46 BOASSON, *op cit.*, 15, 18.
47 Da Cunha, *op. cit.*, 91.
48 FRIEDMANN, *op. cit.*, 4.
49 STONE, *op. cit.*, 471.
50 HALL, *op. cit.*, 146 n.
51 Ball, *A Re-Examination of William Graham Sumner on Law And Social Change*, 14 J. LEGAL ED. 301 (1961-62).

folkways, because *they exist in fact* and because *they are traditional,* become the right ways to satisfy all interests. And when these elements of truth and right are thus developed into doctrines of welfare, the folkways have become *"mores"*. Sumner defines mores as the ways of doing things which are current in a society to satisfy human needs and desires, together with the faiths, notions, codes and standards of well living which inhere in those ways.[52]

Acts of legislation, in turn, Sumner continues, come out of mores: "Legislation has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores."[53]

Sumner distinguished between law made by judges and that made by legislatures, and suggested that the former is by its method of growth necessarily related to the mores. Thus, the "folkways" include the "law-ways", the law developed by organized legal professions in the course of advising their clients and devising transactions and forms of association to satisfy the needs of those clients, by legal commentators and teachers, and by courts in the course of deciding specific cases. Sumner sets off the "folkways" and the "law-ways" against the "stateways", conscious creation by legislatures of legal rules created as the expression of a social policy which may or may not be related to existing folkways.[54]

Sumner's thesis on law and social change is sometimes given in rather too simplified a form, thus "stateways cannot change folkways". The point he wanted to make was that persons can seldom be restrained or made to do something which they believe to be wrong, unjust or unwise *and* unnecessary or unexpedient *solely* by being told to do so by legislature.[55] Stateways *could* profoundly affect folkways and thereby change them. How? Sumner says by bringing effort to bear on the ritual, not the dogmas. "Ritual", he says is something to be done, not something to be thought or felt. A fundamental change in culturally supported patterns of conduct may to some extent be induced, but only by "slow and long-continuous effort" in which "ritual" is changed by minute variations.

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[52] *Ibid.*
[53] SAWER, *op. cit.*, 172.
[54] *Ibid.*
[55] BALL, *supra,* note 51 at 315.

To the extent that the change sought is consistent with the central elements in the culture, or based correctly on a new "group interest", to this extent will the pace of the arbitrary change be more rapid.[56] The thrust should be directed at "ritual" because ritual, which is connected with external conduct, words, symbols and signs, is the process by which mores are developed and established, so that by affecting ritual, new mores are built.[57] To summarize, the thesis of Sumner is that: Stateways can change folkways through social change by ritual alteration.

Sawer tells us that:[58]

> "It is not, then, possible to make simple statements about the relations between folkways, law-ways and state-ways. Excepting in societies effectively controlled by the terror weapons of a dictatorship or oligarchy in the grip of an ideology, it can be expected that law will be in accord with folkways in two senses; first, there will be a body of lawyers' law, probably the result of a long process of evolution, in which both the basic postulates of existence in society (such as laws restraining physical aggression) and postulates of the culture of the time (such as laws facilitating commercial dealings in liberal capitalist societies) will be strongly represented; secondly, there will be a process of legal change in which the main initiative may come directly from the folk, or a section of it, but even if the initiative comes from the lawyers or the political leaders it is unlikely that any widely held and deeply felt value of the folk will be disregarded, and likely that the change will be proposed as a means of advancing or better protecting some interest which has a good deal of popular support. But the range of possibilities which this situation leaves open is enormous."

Against the foregoing view, however, is the opposite one that courts are deficient in the shaping of norms because of their slowness of response to change and their having no adequate means for discovering social realities.[59] Furthermore, the role of law is far more creative than merely responding to social and cultural facts. It is itself a social and cultural force with a distinct positive role.

As Jones attests, quoting Young:[60]

> "The creative work of legislators, administrators, judges, and practicing lawyers is far more than a 'response' to social change.

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[56] *Ibid.*, 314.

[57] *Ibid.*

[58] SAWER, *op. cit.*, 189.

[59] Gellhorn, *The Law's Response to the Demand For Both Stability and Change: The Legislative and Administrative Response*, 17 VAND. L. Rev. 92. (1963).

[60] JONES, CREATIVE POWER OF LAW 135 (1963); Young, *The Behavioral Sciences, Stability and Change*, 17 VAND. L. REV. 57, 58-59 (1963).

> Throughout recorded history, law itself has been one of the greatest of the forces of social change. Change and stabilization are, as Donald Young has reminded us, part of the same social process and law is the heart of that process."

Not only this, but frequently the task of law goes beyond mere response to that of anticipation:

> "When issues of grave public concern are at stake, law's intervention must be forward-looking and well timed... [T]here are occasions when law cannot wait until a social institution or a societal pattern has become hardened and irreversible. Many failures of law in recent history...have been situations in which law took indecisive or temporizing action until society was committed to an unsound solution."[61]

This brings to the fore the role of administrative law, the study of which has become increasingly important. As our Philippine Supreme Court, through Chief Justice Roberto Concepcion, recently stated in *Philippine Air Lines v. Civil Aeronautics Board*:[62]

> "The . . . policy and practice underlying our Administrative Law is that Courts of justice should respect the findings of fact of . . . administrative agencies, unless there is absolutely no evidence in support thereof or such evidence is clearly, manifestly and patently insubstantial. This, in turn, is but a recognition of the necessity of permitting the executive department to adjust law enforcement to changing conditions, without being unduly hampered by the rigidity and the delays often attending ordinary court proceedings or the enactment of new or amendatory legislations."

The shaping of norms by folkways, law-ways and stateways is therefore a process of social change. To a large degree, being a social process, lawmaking is evolutionary; changes in belief bring changes in the way men live and thus make changes in the law necessary. To this extent, laws should reflect the prevailing ethics or beliefs, otherwise they become unenforceable.[63] At other times, however, there is a need for law making to anticipate the future, not merely respond to present forces; there is a need for norms of law to shape other social realities, not merely be shaped by them. To this extent, law is truly creative and, in a sense, sometimes arbitrary, but it must never disregard the central elements of the particular society's culture if it seeks to govern that society, to be a "living norm".

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61 JONES, *op. cit.*, 137.
62 G.R. No. 24219, June 13, 1968.
63 GANONG AND PEARCE, *op. cit.*, 45-46.

C. *Social Control: Recognition and Adjustment of Interests*

Rudolf von Ihering tells us that: "The process of legal evolution is not a matter of mere knowledge as in the case of truth but is the result too of a struggle of interests and the weapons by which the fight is won are not reasons and deduction but the action and force of the people's will."[64]

And indeed a foremost function of law as an instrument of social control is to classify these interests, to decide in the light of some system of values which interests should be given effect and to what extent, and if some interests conflict so that there has to be a choice among them, to make this choice.[65] In short, the task of law in this regard is *to recognize and adjust* interests.

What is an interest? Roscoe Pound conceived interests as existing independently of law and spoke of them as "pressing for recognition and security". As understood by him, then, an interest is a claim actually advanced by defined individuals or groups, and considered and dealt with by defined lawmakers and courts.[66]

An illuminating classification of interests is that of Pound. In his presentation, interests are divided into INDIVIDUAL, PUBLIC and SOCIAL.[67]

Pound further subdivided INDIVIDUAL INTERESTS, as follows: (1) interests of personality, (2) domestic (family) interests, and (3) interests of substance. In turn, *interests of personality* are subdivided into (a) the physical person, (b) freedom of the will, (c) honor and reputation, (d) privacy and (e) belief and opinion. *Domestic interests* are subdivided into those of (a) parents, (b) children, (c) husbands and (d) wives, with further subdivisions in each case and with a cross-division of claims of the members of the family against each other and against outsiders. *Interests of substance* meaning interests concerned with livelihood, are subdivided into (a) property, (b) freedom to carry on enterprises and enter into contractual relations, (c) promise-reliance, (d) protection of enterprise relations against interference, (e) freedom of association, and (f) continuity of employment.

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[64] STONE, *op. cit.*, 471.
[65] SAWER, *op. cit.*, 150.
[66] *Ibid.*
[67] For an excellent summation of Pound's treatment and classification of interests, *see* SAWER, *op. cit.*, 153.

PUBLIC INTERESTS, on the other hand, are the interests of the State or of organized government, and are subdivided into (1) *Interests* of the State *as a juristic person* and (2) *interests* of the State *as a guardian* of social interests. The *juristic person aspect* is subdivided into (a) integrity of the State "personality", (b) protection of the machinery of government and (c) State claims of substance corresponding to the first four individual claims of substance.

And, finally, SOCIAL INTERESTS, which are those of society as a whole. These are subdivided into (1) *General Security,* (2) *Protection of Social Institutions,* (3) *General Morals,* (4) *Conservation of Social Resources,* (5) *General Progress* and (6) *The Individual Life.*

Aside from Pound, we may mention other writers, such as Sumner, who stressed that the foremost right to be secured by law is equality. As an analysis of Sumner put it: "Foremost among the rights to be secured by law [is] 'equality of opportunity', of the 'chances' of each to secure 'happiness'. Each 'social class' owed it to the other to 'increase, multiply, and extend the chances' of all, though he [Sumner] personally abhorred any attempt to 'guarantee equality' as regards results."[68]

All the foregoing can perhaps be reduced to the same rights and interests that the Romans and Greeks of old preoccupied themselves with — Justice and happiness. For *Justice,* to the Romans, is "the constant and perpetual will to give to everyone his due". And *happiness,* to the Greeks, is "the exercise of vital powers, along lines of excellence, in a life that affords them scope."[69] And all this comes to the same points that we said are the two-fold aim of law: the *survival* and *fruition* of the social polity.

As Justice Frankfurter once remarked, in law as in life, lines have to be drawn. So, also choices have to be made. The choices in law are varied, some are important, others not. In some laws the choice one way or the other is irrelevant, as long as the choice is clear, such as right-hand traffic v. left-hand traffic. Other laws, however, take sides in social issues, so the utmost importance at-

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68 Ball, Simpson and Ikeda, *A Re-examination of William Graham Sumner on Law and Social Change,* 14 J. LEGAL ED. 315 (1962).

69 *See, passim,* INSTITUTES OF JUSTINIAN, and EDITH HAMILTON, THE GREEK WAY.

taches to the choice, such as rules about marriage and divorce, prosecution and treatment of criminals, labor and trade conditions. And it is in these sensitive areas, regrettably, that the choice is often far from clear, the distinctive lines not only between habits, inchoate customs and statutes, but among different statutes themselves, are frequently blurred.[70]

No hard and fast rule, however, has been devised to render the choices of law more often clear than not. The problem is how to determine the ends to be served, in the conflict of ends that life provides. Rudolf von Ihering says that there are some guides, reasoning thus: All social action is purpose-directed; in choosing purposes, men have wide freedom of choice; four considerations guide them in this choice: The social levers of *reward* and *coercion;* the ethical levers of a feeling of *duty* and *love.*[71] In contrast, a case-to-case approach is suggested by Geny, who says that each specific problem will provide its own solution, if thoroughly and objectively examined.[72]

D. *Social Control: Rule Observance and Sanctions Against Deviations*

A rule is meaningful only where there is a choice. One or more alternatives never need much stress when there is no significant urge tending towards the antithesis of the legal rule.[73] Social regulations on human conduct, specific and general, today form in most jurisdictions of the world the bulk of law.[74] And human life being existential, presents a multitude of different choices. The rules of society serve to direct or limit the choices, by prescribing or setting a standard of conduct. Not every rule, however, is obligatory. Rules are conceived and spoken of as imposing obligation when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.[75] The rules supported by this serious pressure are regarded as important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.[76]

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[70] BOASSON, *op. cit.*, 26, n. 7.
[71] SAWER, *op. cit.*, 20.
[72] *Ibid.*, 22.
[73] BOASSON, *op. cit.*, 21.
[74] Da Cunha, *Efficacy In Law And Social Change, loc. cit.*, 82.
[75] HART, *op. cit.*, 84.
[76] *Ibid.*, 85.

A society's rules of obligation are not all prescription of law. As already intimated, law is but a regulating-force amongst others. Other factors than law hold groups together. Attempts to solve social problems are tried by methods and activities that often do not even reflect prescriptions and rules of law. The range of such non-legal forces is far and wide. Says Boasson: "Such activities are embodied in the development of technics and art, in reasoned science and symbolical rites, in culture and religion: in short in the whole fabric of social enterprises and mental pursuits of which 'law' is only a fractional component."[77]

This brings us to the problem of *rule or norm conformity,* as far as sociology of law is concerned. The Scandinavian legal theory otherwise known as the Uppsala School was among the first to recognize this problem when it dealt with the concepts of social norms, social control and uniform behavior. Rules and decisions of law were thereunder regarded as instances of social norms which contribute to the creation of uniform behavior. Professor Segerstedt of the Scandinavian Uppsala school led in the scientific investigations of the impact of law on behavior and attitude.[78]

The fact that there exist other agencies of social control such as morals, religion, education, raises the possibility of conflicting norms. Rudolf von Ihering's juristic insight noted this. First, he said, various controls might be in head-on conflict, with the outcome not necessarily decided by law. As Ehrlich observed, a proposition may be a "legal norm" significant for lawyers and enforced by courts and officials but the same will not be law in the social sense until and unless "social relations" are actually being ordered thereby. The second point that Ihering's juristic insight spotlighted is that the non-legal controls are products of non-State group life, of the inner ordering of associations of many kinds.[79]

This does not mean that true law will reside only in the folkways and that the prescripts of stateways and law-ways would ever remain as paper law. For as shown earlier, the latter can be absorbed into the so-called inner ordering of associations so as to

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[77] BOASSON, *op. cit.*, 24.
[78] Eckhoff, *Sociology of Law In Scandinavia,* in 4 SCANDINAVIAN STUDIES IN LAW 34 (1960).
[79] STONE, *op. cit.*, 472.

become living law, provided it is attuned to the realities of said associations. Sawer cites an instance of such a transformation, saying that law is often first an imposed social policy — such as the Statute of Frauds in England in 1677. Later, they are identified with the social order rather than with social control.[80]

Rule observance, in short, tends to become institutionalized:

> "The regular active enforcement of the law (mainly the criminal law) by appropriate state authorities does not necessarily justify a view that the whole body of the law is constantly adopted and enforced by the governing group for the time being as a matter of conscious social policy. Once a modern society has reached a reasonable state of complexity and stability much of this sort of enforcement is institutionalized, and so far as possible separated from the questions of social administration which are the concern of daily politics and legislation."[81]

A rule of law will be generally obeyed, or the rules of a legal system will generally be observed, if that rule or that system gives effect to the primary needs of society and is consistent with its socio-ethical convictions. An alien rule or system, therefore, if incapable of being assimilated into the society's culture, will perforce be breached or simply disregarded as a dead law, unless the same is imposed by the sheerest physical power in which case there may be external observance. As Sumner, however, pointed out, the power to control ritual or external conduct can ultimately lead to the power to control belief or socio-ethical conviction.

Short of ruthless totalitarianism, the rules of a legal system have to express the most delicate adjustment of power to men's ethical convictions.[82] Rules of this sort are observed because they have what is called an *internal* aspect. The persons or groups they bind are rule-conscious; they accept said rules as intended to be observed. For the most part, therefore, they obey these rules not because sanctions are attached to them in case of disobedience, but because they are convinced that the rules are sound and good and ought to be observed. Sanctions are nonetheless attached to them because of the fact that there will always be exceptions in a group who, for lack of ability to see in rule observance their long-range self-interest, as against the tempting and immediate self-interest in its violation, will

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[80] SAWER, *op. cit.*, 136.
[81] *Ibid*, 137.
[82] STONE, *op. cit.*, 644.

be too disposed to break the rule unless such deterrence exists. As a corollary, where the rules possess no internal aspect, relying only on sanctions, their observance cannot be expected, since a general violation of the rules will render the application of the sanctions impossible. A system whose rules, or most of them, are thus being generally disobeyed is a dying one. Rule-observance, then, is a test of the "livingness" of a law or set of laws.

The power of law should not be underestimated, however. No other social institution has so profound an educational influence, for social good or for social evil.[83] And the fact of the matter is that law has not been content with a minimal role and has never been a bystander in the process of social change.[84] *Prima facie* the imperatives of law reflect ethical rightness to most members of the community. To the ordinary citizen, the law does indeed, as Blackstone put it, "command what is right and forbid what is wrong".[85] And even where the breach of relevant rules has become frequent or occurs in circumstances that threaten the existence of the social relation in question or is felt to threaten social stability generally, the society's governing associations may call upon the political institutions or the State to vindicate the law by vigorous enforcement policy, thereby renewing the relevant law, actively adopting it as current policy and in this way asserting social control.[86]

Summarizing, then:

There is a pressing need and reason to study law as a function of the social order. This approach leads to a sociology of law.

The sociology of law stresses the factual context of norms of law. As such, law is found to be not an abstract principle or command, but a norm of conduct arising out of and responsive to social facts, needs and realities. Sociologists of law even go so far as to state that the nature of law is not norms expressed in social conduct but social conduct expressing norms.

The foregoing then underscores the urgency of seeing a rule in its social setting and understanding its development in that light.

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83 Jones, *The Creative Power and Function of Law in Historical Perspective*, 17 VAND. L. REV. 139 (1963-64).
84 *Ibid.*, 136.
85 *Ibid.*, 138.
86 SAWER, *op. cit.*, 136.

Thus, we must examine the social postulates — those assumed requirements of the social life as well as the aim and purpose of our association.

In the frame of the social postulates, we assess the role of law, and we find that it has a two-fold task, namely, to assure the society's continuing *existence* and to achieve *fulfillment* of its ends.

This function the law performs as a social norm for social control. The shaping of this norm is traced to society's inner life itself, to the people's mores and folkways, to their social-ethical convictions. Further changes may be made by legislation and court rulings but all this must be consistent with the dynamism, culture and identity of the people sought to be governed.

As a special instrument for social control, law does what other social forces do, but with a difference, that it has the power to apply and use force or what we call sanctions in support of its norms. In so doing, it can and has to recognize and protect some interest as against others. This entails a system of value, a schedule of priorities, a rationale for making choices.

Several interests press for recognition, their range and diversity rendering it so difficult to fully classify them. Roscoe Pound's classification, however, is a rewarding guide in this regard.

As life goes and norms are shaped, the recognition and choice of interests have to be made, sometimes by following a general policy, often on a case-to-case approach.

All the laws form a system, consisting of all its rules. The system and the rules are obeyed if and only if they have an internal aspect, that is, they are true to their social context. If not, they will be disregarded as alien to the life it seeks to regulate, and will remain paper rules, unless enforced by sheerest physical force, which would do violence to the nature of law as rules flowing out of the needs, aspirations, beliefs and culture of the people in the social community.

As a norm for social control, the power of law is great for good or for evil. Its fidelity to the social postulates and to its twofold role of securing the *survival* and *fruition* of the social life depends on how attuned its rules and institutions are to the social facts and changes; how readily it can respond to them; and in some

cases, how able it is not only to respond but to anticipate and lead in a creative formulation of a social policy which, if attuned to the central elements of the society's beliefs and culture, will easily be assimilated in its inner life and transformed into part of its social order.

IV

SPECIAL PROBLEMS AND APPLICATION

After having dealt with the principles and tenets of sociology of law, we would naturally want to consider their practical application in the social reality around us. I propose to take up in this regard two specific areas that I feel are of sharp and vital relevance to the Philippines now. The first is the problem or task of embodying social justice in our laws. The second, which has to do with our being a developing country, is the problem of direction and assistance through law in the tasks of development and growth. The timeliness and urgency of these selected problem areas have since been recently confirmed by the nation's political departments. The President, in his State of the Nation Address, stated that the primary tasks facing us are "first to lay the groundwork for the industrialization of the economy; second, to bring about social justice." And Congress has lately announced that its Economic Planning Office is currently studying and drafting a program of legislation aimed at the twin goals of social justice and industrialization.

The so-called Asian dilemma or crisis involves many ingredients, such as social indifference, injustices, lack of social discipline, personalism and corruption, fast-rising population, inflation, poverty, need for development, etc. The developments, changes, and adjustments in the law throughout the spectra of diverse social phenomena involved in these crises are far too manifold for us to consider here. The response of the law has been far-ranging. It includes for instance the Supreme Court's increasing of the minimum amount of damages payable for the death of a person and the amount of income deemed lucrative for purposes of naturalization, both on the basis of an awareness of social and economic changes in living conditions and currency values; it can be seen in the passage by Congress of new laws to remedy the backlog in the administration of justice by the courts, such as that creating the new Criminal Circuit

Courts and those redefining the appellate jurisdictions of the Supreme Court and the Court of Appeals; it is evident in the President's search for new directions in foreign policy and national defense as well as in his forty proposals submitted to Congress in this year's State of the Nation Address. The private sectors, too, are deeply involved as instanced by student and youth activism, the recent allocation by sugar farmers of ₱30 Million as bonus to sugar farm workers, the sense of looking forward with hope to the 1971 Constitutional Convention, where even the most radical system change can be peacefully made. All these are parts of the ferment and milieu that are shaping law and are shaped by law. For our purposes, I will focus on social injustices and need for developments as encountered in the recent decades by the Philippines as a young Republic.

A. *The Problem of Social Justice*

The Philippine Constitution, adopted in 1935, declares that: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."[87] Aside from this broad pronouncement, it specifies certain aspects of social justice in a further provision, thus: "The State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and agriculture."[88]

The recognition and adjustment of specific interests, therefore, are at the heart of the need and task to embody social justice in the laws. Speaking precisely of this crux of social justice, the Supreme Court in *Calalang v. Williams*,[89] through Mr. Justice Laurel, stated its concept, as follows:

> "Social justice is . . . the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures, calculated to insure economic stability of all the competent elements of society, through the maintenance of a proper economic and social equilibrium in the interrelation of the members of the community, constitutionally, through the adoption of measures legally jus-

[87] PHIL. CONST., art. II, sec. 5.
[88] PHIL. CONST. art. XIV, sec. 6.
[89] 70 Phil. 726, 734-735 (1940).

> tifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est suprema lex*."

The first aspect of social justice provided for by Philippine laws was the need for industry to compensate for death, accidents and illness arising out of employment. And thus even before the present Constitution was adopted, we already had the *Employers' Liability Act* (1908)[90] and the *Workmen's Compensation Act* (1927).[91] These pieces of social legislation formulated in response to social evils were thus bestowed a distinct recognition of legitimacy in the provisions of the Constitution.

After the Philippine Constitution took effect, the legislative body adopted more social legislation to promote the ends of social justice. To mention only some of the more prominent ones: (1) An Act creating the Court of Industrial Relations;[92] (2) the Industrial Safety Act;[93] (3) the Government Service Insurance Act;[94] (4) An Act providing for the time of payment of salaries and prohibiting certain abuses in regard to the form and manner of paying salaries and wages;[95] and (5) the Eight-Hour Labor Law.[96]

The period, however, that saw the rise of social legislation is that of the present Republic. In the last decade or two, we saw the emergence of statutes aimed at social justice, covering diverse matters. This can be attributed to several factors, such as social change and its concommitant train of friction and tension; and, it should be added, the increasing awareness and recognition of social problems. This, too, explains why the action and initiative are found primarily in the legislative body, not in the courts, because the former has the facilities and means for discovering and perceiving the prevailing and changing social realities all over the country.[97] As we have noted, law should be "prescripts moulded by the facts of social reality".[98] The position of Congress as a political department that

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90 Act No. 1874, (1908).
91 Act No. 3428, (1928).
92 Com. Act No. 103, (1936).
93 Com. Act No. 104, (1936).
94 Com. Act No. 186, (1936).
95 Com. Act No. 303, (1938).
96 Com. Act No. 444, (1939).
97 See Gellhorn, *The Law's Response to the Demand for Both Stability and Change*, 17 VAND L. REV. 92 (1963-64).
98 BOASSON, *op cit.*, 15.

not only can feel the pulse of the nation, but can truly speak for the different elements as well as the totality of the country, should render it the most competent body to adopt such needed measures to embody social justice in our laws.

The social legislations enacted under the present Republic generally fall under the following types: (1) agricultural or land reform; (2) labor relations and (3) standards and welfare.

The first type, agricultural or land reform, includes the statute creating the Court of Agrarian Relations,[99] the Agricultural Tenancy Act,[100] and the Agricultural Land Reform Code.[101]

The second type, labor relations, are exemplified by the Civil Code, specifically its provisions on contracts involving labor,[102] the Industrial Peace Act,[103] the Anti-Scab Law[104] and the Anti-Picketing Law.[105]

The third class, standards and welfare, is the most far ranging, covering such laws as the Minimum Wage Law,[106] and the new Minimum Wage Law (₱6 a day) for Non-Agricultural Workers,[107] the Woman and Child Labor Law,[108] the Blue Sunday Law,[109] the Emergency Medical and Dental Treatment Law,[110] the Social Security Act of 1954,[111] and the law exempting retirement benefits from attachment, levy, execution and taxes.[112]

A survey of such legislations will readily show that there has been no single program of social justice legislation, deliberately planned, formulated and implemented. Rather, for the most part these are *ad hoc* statutory measures, making direct assaults on the points where maladjustment is immediately manifest, providing for *ad hoc* remedies for many particular defaults of the legal order. This is not unusual, and social legislation frequently develops this

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99 Rep. Act. No. 1267 (1955).
100 Rep. Act. No. 1199 (1954).
101 Rep. Act No. 3844 (1963).
102 Rep. Act No. 386 (1950).
103 Rep. Act No. 875 (1953).
104 Rep. Act No. 3600 (1963).
105 Rep. Act No. 1167 (1954).
106 Rep. Act No. 602 (1951).
107 Rep. Act No. 4180 (1965).
108 Rep. Act No. 679 (1952).
109 Rep. Act No. 946 (1953).
110 Rep. Act No. 1054 (1954).
111 Rep. Act No. 1161 (1954).
112 Rep. Act. No. 4917 (1967).

way.[113] The social legislators of the future, however, as Stone pointed out, have to approach the problem through a vast effort at understanding, seeking by the light of available social knowledge the key points of the systems of action from which adjustment can be effectively made.[114] This much is definite, however: That the trend is towards an increasing range of legal intervention in relations or matters affected with social interests. This is a drift away from a system of *laissez faire* or pure capitalism to one of socialization of laws. For instance, the Civil Code, has modified the traditional concept of a right by adopting the concept of abuse of right.[115] The principle of abuse of right in effect introduces the social element to the idea of a right, so that the exercise of a right is prohibited when it exceeds in a manifest way the limits prescribed by good faith, or the *bonos mores* or the social or economic aim of said right.

So, also, the freedom of the parties to stipulate on whatsoever they desire, the so-called liberty of contract, has yielded to socialization in the form of legal intervention due to the need to interfere where gross inequality of bargaining power makes the abuse of liberty likely. Instances of this are the prohibition by law of waiver of certain rights and benefits accorded to laborers or tenants, and the mandatory nature of statutory provisions on minimum wages, minimum hours of work, emergency medical and dental services, social insurance coverage, and the imposition of statutory duties in landlord-tenant and labor-management relationships. And in the case of the Agricultural Land Reform Code, it has gone so far as to prohibit the specific contract itself, sharehold tenancy. Social legislation has thus shown its power to decisively influence the patterns of relationship in work, land ownership and other rights.

A note of caution must however be added. Social reform laws are not self-executing. "Social reforms" says the Scandinavian juristic writer Tornstein Eckhoff, "are not carried out automatically by the enactment of a law in which the goals are stated."[116] The formulated social reforms must be pursued and carried out, administratively

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113 STONE, *op. cit.*, 42.
114 *Ibid.*
115 Arts. 19, 20 & 21, Rep. Act 386. (1949).
116 *Sociology of Law In Scandinavia,* in 4 SCANDINAVIAN STUDIES IN LAW 40 (1960).

and judicially. It is here that the roles of courts and the administrative or executive department come in. Courts must give life to the provisions of the law and administrative agencies must continually apply them to a vast array of changing situations. The problem of how to produce or evoke such a creative response from these coordinate branches of government is in itself a complicated matter, extending to appointments, procedure, salaries, facilities, anti-graft and continuing legal education.

The responsibility, therefore, is in the final analysis, that of the State whom people — as Friedmann observed — now invariably hold responsible for ensuring conditions of stable and full employment through public works and relief schemes, tax policies and other instruments of public policy. It is expected by the community to provide minimum standards of living, housing, labor conditions and social insurance.[117]

It would not be fair to the Philippine judiciary, especially its Supreme Court, to pass over its remarkable performance in regard to giving life to social legislation. As early as 1938, the Supreme Court, in *Cuevo v. Barredo,*[118] fulfilled its part of the task, in that case regarding the Employers' Liability Act which it sustained and applied to a worker who drowned in the process of trying to salvage his employer's log drifting in a river. The Supreme Court in *Gamboa v. Pallarca,*[119] among other cases, upheld the statutory right of a tenant under the Agricultural Tenancy Act to change his system of tenancy from sharehold to leasehold. Regarding security of employment, the same was held to extend to seasonal workers in sugar plantations, in the case of *Industrial-Commercial-Agricultural Workers Organization v. Court of Industrial Relations.*[120] Presumptions of the law in favor of the laborer, such as on the compensability of death, illness or accident, under the Workmen's Compensation Act, were given strength, force and life in *Agustin v. W.C.C.*[121] In *Maquera v. Comelec* and *Aurea v. Comelec,*[122] the Supreme Court declared unconstitutional a statute requiring candidates for public office to post a bond.[123] The Court stated, among others, the reason

117 FRIEDMANN, *op. cit.*, 5.
118 65 Phil. 290 (1938).
119 G.R. No. 20407, March 31, 1966.
120 G.R. No. 21465, March 31, 1966.
121 G.R. No. 19957, September 29, 1964.
122 G.R. Nos. 24761 & 24828, September 7, 1965.
123 Rep. Act. No. 4421 (1965).

that said law runs counter to the principle of social justice embodied in the Constitution.

The role of the administrative agencies is more extensive, including such diverse agencies as the Social Welfare Administration, recently changed into the Department of Social Administration, the Department of Labor, the Presidential Arm on Community Development, the Philippine Housing and Homesite Corporation, the Social Security Commission, the Government Service Insurance System, etc. Their performance is difficult to assess, since their best work is done in day-to-day activities that often go unnoticed and seldom make the headlines.

It cannot be seriously denied, however, that they have performed a necessary function in realizing social justice in our laws, and that our system of government is increasingly depending on them for the implementation of the social reforms that have been enacted by legislation. For it is here in this administrative level that the application of the adopted social remedies and the pursuit of the pronounced social policies in said laws, become institutionalized as they bear on real and living relationships in that delicate process of social ordering.

The problem in this regard is how to structure and streamline these agencies so as to more fully attain their objectives. A thorough and in-depth study of these bodies, with a view to adoption of needed re-structuring or changes, avoidance of overlapping functions, their placement beyond partisan politics and, in general, of rendering them truly dynamic, efficient and flexible, is highly commendable.

The need for studied reforms is indeed found in a broader scale. The Philippine Christian Social Movement, a newly-formed group or newly-launched movement that has set itself to strive for the realization of a Philippine society built on justice,[124] has advocated the use, among others, of tax legislation to effect social justice. Noting that there still abounds numerous social injustices in our midst, one of its spokesmen proposed that "we turn to government, not in the sense of management (as in nationalization), but in the sense

[124] See *A Christian Social Movement: Ideology and General Information*, 11 (1968).

of direction as in law."[125] Said this spokesman, Mr. Edgardo T. Kalaw, in his paper entitled *Christian Humanism*:

> "And the answer lies in many little things that we have to define by law, that we as a people will have to learn to rule and be ruled by.
>
> "First. There are laws that control resources that are scarce, such as foreign exchange, credit, and natural resources — and give new enterprises direction and protection, such as investment incentives and tariffs.
>
> "Second. There must be a massive emphasis on taxation, especially on values that do not originate from work, e.g.,
>
> a. Inherited property;
> b. Profits arising from appreciation of land;
> c. Excess profits of public utilities;
> d. Excess profits of enterprises using natural resources — such as logging and mining;
> e. Excess profits arising from preferred markets granted as a concession to the nation, and not to a particular industry.
>
> With the exception of inherited property, these profits belong to the community.
>
> "Third. There are the many laws that deal with pure government — peace and order, public works, hospitals, schools, adult education, and social security.
>
> "Lastly. There are the laws that deal with human relations — those between employer and employees, landlord and worker, manufacturer and consumer, management and minority stockholder — realizing all the while that some of these laws, designed in developing countries, may not fit the conditions existing in our country today, and the temperament and culture of our people."[126]

Rewards of enterprise should indeed be more equitably distributed by legislation. The right to use one's labor and skill, and to be protected in the exercise of these capacities, has to a substantial extent been recognized in our laws, through minimum wage statutes, the protection of collective bargaining agreements between employers and labor organizations covering matters such as seniority rights, pension claims, grievance procedures, redress against arbitrary dismissal, etc.

Tax legislation has yet to be transformed into an instrument of social justice. Recent tax laws passed near the end of last year, however, such as Republic Acts 5447 and 5448, show a trend along this direction. Republic Act 5447 creates a Special Education Fund to be constituted from proceeds of an additional one per cent real

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[125] *Ibid.*, 25.
[126] *Ibid.*; Also in Bank of Asia Report, Supplement, July, 1968, p. 3.

property tax and a certain portion of taxes on Virginia-type cigarettes and duties on imported leaf tobacco. Republic Act 5448 imposes a tax on privately owned passenger automobiles, motorcycles and scooters, and a science stamp tax, to constitute a Special Science Fund.

There is likely to be increasing importance in the role of taxation as one of the State's policy-shaping instruments to mitigate the objectionable aspects of unrestricted private property, such as sharp and gross inequalities of wealth and the power to use property for private profit without regard to community purposes.

Not only the legislature but administrative bodies are exercising more and more important functions in the socially just redistribution of property. As Friedmann says, and the same practically holds in our system today, as witnessed by the Philippine Central Bank's regulatory circulars:

> "Public control of financial credit is another means by which the State curtails privately financed capital. Low interest rates may limit the income from private credit and other banking transactions, but by far the more important aspect of official credit restrictions is the curtailment of the power of private capital to influence the national economy, through the expansion or restriction of credit."[127]

And for this reason, he stresses the increasing importance of the role of administrative law:

> "Since most of the important planning decisions, both nationally and internationally, involve the relations between governments and private legal subjects (corporate or individuals), and since many of the major planning decisions inevitably involve some interference with property and other private interests, a study of administrative law becomes increasingly important. . . . [A]dministrative law will be the principal instrument of adjusting the interests of the public, as represented by the government, and of private citizens, as represented by contractors, foreign investors, and the like."[128]

As a whole, therefore, the Philippine legal system has at least recognized, albeit in an *ad hoc* fashion rather than in one systematic program, the need to do social justice through law. The concept of social responsibility of private ownership has been reflected in our laws, although their being carried out in the daily lives of the

127 FRIEDMANN, *op cit.*, 86.
128 *Ibid.*, 190-191.
129 GANONG & PEARCE, *op cit.*, 95.

people is lagging behind the formulation of such laws. It will serve us well to remember what sociologists of law have stressed that "the right of private property in things in excess of individual needs is not recognized by law for the benefit of the owner only."[129] Rather, there is in such cases, a responsibility to society, to produce socially beneficial results superior to those which would be achieved under public ownership.[130]

As tenets of sociology of law attest, law regulates almost any relationship. Renner calls such a governing legal relationship a "legal institution".[131] In the Philippines the legal institutions in the field of social justice are principally landlord-worker, labor-management, master-servant relationships. To succeed in realizing social justice, such institutions must be relevant to their subjects and responsive to the needs in their areas. There is a continuing necessity to change the policy as the need arises, as social purpose requires. There is a never-ending task of balancing the different interests involved. Such laws can balance effectively only if they are socially just. As Boasson reminds us:[132]

> "The enforcement of black-out regulations, traffic-rules and those prescripts which are not kept when the consciousness of 'danger' is not uppermost in the public's mind, is usually enhanced by admonishing punishments. The enforcement of rules which on the other hand are not a matter of disciplined attention alone, but are related to economic, social and moral situations, require an all-embracing policy of enforcement, where the role of deterrent punishment is of minor importance. Black-marketing, smuggling and bribery can never be met with mere threats of punishment, if those sanctions are not coupled with fair distribution, reasonable import-tariffs and decent pay of officials. The control of gambling, alcoholism or prostitution does not depend on simple prohibitions but more on economic, social and sexual education of a persuasive character."

Social legislation's unswerving aim should therefore be to embody social justice in our laws. And the fullest meaning of justice is social order: "The observance of the actual system of rules, whether strictly legal or customary, which bind together the different members of any society into an organic whole, checking malevolent or otherwise injurious impulses, distributing the different objects

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130 *Ibid.*, 95-96.
131 SAWER, *op cit.*, 165.
132 BOASSON, *op. cit.*, 17-18.

of men's clashing desires, and exacting such positive services, customary or contractual, as are commonly recognized as matters of debt."[133]

I have no hesitation in stating that this is foremost among the social postulates of Philippine society. The preamble to the Philippine Constitution, a formulation of our social postulates, speaks of "a government that shall . . . secure the general welfare . . . under a regime of justice."

B. *The Problem of Development*

1. Social Change And Law

The specific problem of development and law must be seen from the context of the larger problem of law and social change. The rules of law are framed in general terms, so as to be able to subsume social changes and flexibly apply to varying situations. "Law", as Sawer puts it, "has to be to some extent in general terms, and it must provide for equality of treatment for reasonably comparable cases over appreciable periods of time."[134]

Stability and change are therefore both needed by law. Stability of a dead text is not sufficient for law.[135] Any positive law system must therefore leave considerable room for further law-making.[136] Resistance to needed change in fact imperils stability. Says Jones:

> "Law loses its power and abdicates its ordering function when it loses touch with the dynamics of social life. In aggravated situations, as when the essential rules of a whole legal system are outmoded and the body of ordinary people denied effective opportunity to change them, uncompromising opposition to change can lead to political revolution and so to the loss of all stability in the society."[137]

Rules of law can subsume factual changes only up to a limit. As this limit is exceeded, tension develops:

> "Tensions develop because legal relation fails to correspond with social relation, even within the elastic degrees of tolerance permitted by human conduct; then adjustment of the law becomes inevitable,

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133 Sidgwick, *The Utilitarian Theory of Justice*, in OLAFSON, JUSTICE AND SOCIAL POLICY 29 (1961).

134 SAWER, *op cit.*, 191.

135 See Jones, *The Creative Power and Function of Law In Historical Perspective*, 17 VAND. L. REV. 142 (1963-64).

136 SAWER, *op. cit.*, 17-19.

137 Jones, *op. cit.*, 140.

> in ways beyond conceptual manipulation. Even where a legal rule or concept is in terms sufficiently abstract or generalized to extend to a new development, there may be so strong an identification of the rule or concept with its original social interest or institution that the extension of the rule would be considered, at least by laymen, as a legal fiction."[138]

The foregoing is a rejection of the so-called jurisprudence of concepts or the attempt to treat the law as a closed system of definitions, rules of operation, and substantive major premises such that any specific legal problem can be solved by deductive reasoning from the propositional system so established.[139] There must always be an attitude of preparedness in the sense of readiness to lay new foundations in an orderly lawful fashion.[140] And laws must change with the beliefs and way of life of the people or of the society that they govern. The process of law-making is thus evolutionary. Said Ganong and Pearce:

> "Changes in belief bring changes in the way men live and thus make changes in the law necessary. For this reason, law making is an evolutionary process. Laws that reflect the beliefs of today, and are therefore enforceable, may well become, because of changed beliefs, unenforceable tomorrow, whereas laws that would be unenforceable today may well be enforceable tomorrow."[141]

Failure of law to keep pace with social change will damage law's integrity. The disregard of a legal norm that has become outmoded but remains unchanged tends to generate public cynicism towards all phases of the legal order. This is the consequence when practice and preachment bear little similarity. Jones says that: "In default of proper and workable law, decisions of profound importance to society and its members are inched out lawlessly."[142]

Regarding the adoption of such needed changes, sociological jurists agree that law can and should be developed by judges as well as legislatures, in order to meet changing social needs.[143] Since this change often involves shifts and adjustments in social policy, the focus has to be on the legislative body rather than on the judiciary because under the Philippine legal set-up, Congress is the policy-making body. And moreover, as stated earlier, the facilities

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138 SAWER, *op. cit.*, 169.
139 *Ibid.*, 17.
140 BOASSON, *op cit.*, 23.
141 GANONG AND PEARCE, *op cit.*, 45-46.
142 Jones, *Creative Power of Law*, *op. cit.*, 144.
143 SAWER, *op. cit.*, 17.

of Congress to fully inform itself of the social facts underlying any situation and its ability to tackle a problem from several angles at the same time (such as providing for both the financial and penal angles), render it the most fitted State organ to adjust the laws to social changes.

2. The Philippine Congress and Development

Some patterns may be discerned in the statutory output of the Philippine Congress in the field of national development.

Firstly, there is a pattern of promoting regional development.

As instances of this, we have the statutes creating the Mindanao Development Authority,[144] the Panay Development Authority,[145] the Mountain Province Development Authority,[146] the Northern Samar Development Authority,[147] the Laguna Lake Development Authority,[148] the Hundred Islands Development Authority,[149] the Catanduanes Development Authority,[150] and similar other measures covering other regions in the Philippines.

This type of legislation is based on the favorable nature of the chosen region, as found by factual study, to be treated as a unit in socio-economic development. And the statute creates a Development Authority charged with the primary role of assisting in carrying out said development. A typical regional statute further provides for a survey to be made of the region's social, economic and cultural conditions, physical and natural resources, industrial and agricultural potentialities. And, on this basis, it calls for the formulation of an integrated, practical, feasible, workable and detailed plan and program for development of the region concerned.

Aside from such regional attention, however, Congress has dealt with the problem of development from another angle, on the basis not of region but of industry. *Secondly,* there are the statutes designed to foster the different industries, including in this term those engaged in agriculture and natural resources, trade, commerce and manufacturing, science and technology, fishing and navigation, etc.

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144 Rep. Act No. 3034 (1961).
145 Rep. Act No. 3856 (1964).
146 Rep. Act No. 4071 (1964).
147 Rep. Act No. 4132 (1964).
148 Rep. Act No. 4850 (1966).
149 Rep. Act No. 4777 (1966).
150 Rep. Act No. 4412 (1965).

A full coverage of the laws adopted in this area is not the purpose of this present discussion. It will suffice to mention a sampling of them so as to suggest the pattern of these measures.

There is Republic Act 3127, promoting the "basic industries" by a grant of tax exemptions directed at accelerating the pace of economic and social development of the country.[151] Said law classifies 19 industries as basic, starting with basic iron, nickel, alumina and steel, basic chemicals, then ranging from deep-sea fishing to cattle industry, from cigar manufacture to refining of gold, from pulping and paper manufacturing to production of agricultural crops.

Aside from this broad grant, there are specific legislations for a particular industry only. Thus, there are the Acts promoting, assisting and/or strengthening the textile industry,[152] the Virginia tobacco industry,[153] the gold mining industry,[154] the metals industry,[155] the abaca and other fibers industry,[156] the cottage industry,[157] and the dairy industry.[158]

The development of science, through the governmental agency thereby created, the National Science Developmnt Board, was provided for in the Science Act of 1958.[159] Applied researches in the fields of rice and coconut were further specifically treated in other laws.[160] Still another law grants special privileges to inventors of new processes.[161]

The rest of legislation hereon are varied: statutes declaring specific places as tourist spots and appropriating funds for the purpose to promote and develop tourism;[162] statutes to encourage cooperative marketing;[163] statutes on sugar quota allocation;[164] the statute providing for the exploration and utilization of the Surigao

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151 Rep. Act No. 3127 (1961).
152 Rep. Act No. 4086 (1964).
153 Rep. Act No. 4155 (1964).
154 Rep. Act No. 3089 (1961).
155 Rep. Act No. 4724 (1966).
156 Rep. Act No. 4721 (1966).
157 Rep. Act No. 3470 (1962).
158 Rep. Act No. 4071 (1964).
159 Rep. Act No. 2067 (1958).
160 *See* Rep. Act No. 2707 (1960); Rep. Act No. 4059 (1964).
161 Rep. Act No. 1287 1955).
162 *See, e.q.,* Rep. Act 4884 (1967); Rep. Act No. 5066 (1967).
163 *See, e.g.,* Rep. Act No. 702 (1952).
164 *See, e.g.,* Rep. Act No. 4160 (1964).

mineral deposits;[165] the Non-Agricultural Co-operatives Act;[166] the Act to facilitate entry into the Philippines of International traders and investors of foreign nationality;[167] the Act authorizing the Philippine National Railways to operate railroads between any points in the Philippines;[168] the Cattle Dispersal Act of 1964;[169] and statutes regulating mining such as the Mining Act[170] and the Petroleum Act.[171] And there is, finally, Republic Act 5186, the Investments Incentives Act, providing for registration and priorities of investments in connection with tax-exemption and other incentives.[172]

Aside from regional development and development of industries, Congress has adopted numerous legislation having to do with the *financing* of development.

This has taken different forms: floating and sale of bonds, such as the Public Works and Economic Development bonds;[173] foreign loans, by authorizing the President to obtain the same;[174] sale of government properties;[175] taxation;[176] and the provision for special funds, like the Special Mines Fund[177] and the Special Trust Fund for Agricultural Development.[178] Foreign investments are regarded as a necessary source of financing but the same should fit with our program and interests; hence, the Investment Incentives Act favors the placements of foreign investments in pioneer and preferred areas. And recently Republic Act 5455[179] was adopted to limit foreign equity holdings in domestic enterprise to 30%, excepting such "permissible investments" as defined by the law, in the pioneer or preferred area of investments, subject to registration with and permission from the Board of Investments.

Special mention should be made of development banking, notably through the Development Bank of the Philippines which pro-

165 *See* Rep. Act No. 1828 (1957); Rep. Act No. 2077 (1958) and Rep. Act No. 4167, (1964).
166 Rep. Act No. 2023 (1952).
167 Rep. Act No. 5171 (1967).
168 Rep. Act No. 4156 (1964).
169 Rep. Act No. 4069 (1964).
170 Com. Act No. 137 (1936).
171 Rep. Act No. 387 (1949).
172 Rep. Act No. 5186 (1967).
173 Rep. Act No. 1000 (1954); Rep. Act No. 4861 (1966).
174 Rep. Act No. 4853 (1966); Rep. Act No. 4860 (1966).
175 Rep. Act No. 5169 (1967).
176 Republic Acts Nos. 5447 and 5448 *supra*, p. 9. (1968).
177 Rep. Act No. 4793 (1966).
178 Rep. Act No. 4693 (1966).
179 Rep. Act No. 5455 (1968).

vides credit facilities for development and expansion of agriculture and industry and promotes the establishment of private development banks throughout the country.[180]

The foregoing specific laws are a sampling review of the responses of the Philippine legislative body to the need to adjust law to social change. In the field of social and economic development, it appears to be more than that, for it strives to effect the social changes. Actually, it is both a response to social changes that demand further social changes which the law, together with non-legal forces, in turn bring about.

For as the Scandinavian jurists tell us, law is both a product of social forces and a factor that influences social life. In *Sociology of Law In Scandinavia,* Tornstein Eckhoff writes:

> "A Common feature of most new theories of law that have emerged in Scandinavia in this century is the strong emphasis on the relationship between law and society. It is frequently stressed that law is both a product of social forces and a factor that influences social life. This theory of the nature of law is often combined with a preference for teleological reasoning. In legal reasoning, evaluations of the supposed social consequences of the different rules or interpretations of law have largely replaced deductions from abstract principles."[181]

The task of law is thus unique, as can specially be seen in the problem of social and economic development: to build on an accepted foundation. As afore-stated, however, there should ever be the attitude of preparedness to lay on new foundations, as soon as the social changes have rendered such new grounds factually accepted or necessary and consistent with the society's culture, beliefs, way of life or its principal elements.

Still, because of this unique task of achieving stability while giving room for change, the pace and substantive reach of legal change is limited. Says Jones in this regard:

> "Pace and substantive reach of legal change have their limits. Bentham put security of expectations first in his hierarchy of legal values; Aristotle and Thomas Aquinas warn that the observance of law is achieved largely thru 'habit', and undue change in legal rules may deprive law of the precious support of moral obligation and make law enforcement a matter of pure coercion; reasonable assurance that rules will not be changed after a commitment or in-

[180] Rep. Act No. 2081 (1958).
[181] *See* 4 SCANDINAVIAN STUDIES IN LAW 33 (1960).

> vestment is made is necessary in any society for men to plan their future conduct and providing such assurance has been throughout history one of the major tasks of law and lawyers. Finally, and most significant, unconsidered change in the fundamental law, as in a constitution or long-maintained organic statute, may undermine the public consensus on which an entire nations's legal order is built. Safeguards against this abound: non-retrospective operation of laws; non-impairment of contracts; reasoned judicial decisions — so that new legal departures be announced, explained and justified."[182]

The difficulty met by the writers of the Asian Conspectus of Contract is in large measure due to the problem of adaptation of an "alien" legal system that said writers encountered. Such "alien" legal systems, mostly "inherited" from the developed Western societies, are not easily adapted to meet the particular needs of Asia's now independent States and the problems of their development.[183] This is because such "alien" legal system does not suit the needs of these developing countries and their social conditions. As much as possible, therefore, Asian legislators, specifically those in the Philippines, should fashion new laws suited to the facts of our social existence.

And there is often danger when the law goes wrong. If the same, not being a living law, is totally disregarded, then the gap between practice and preachment, as stated earlier, generates public cynicism that erodes the people's faith in the law. If, on the other hand, it is followed, whether by force or by habit, then it is liable to degrade community values. Jones explains this second effect, thus:

> "Because of widespread popular identification of the legally imperative with the morally right, law, when it goes wrong, can bring about the malformation of community institutions and the degradation of community morality."[184]

A system that was designed to avoid this mistake and assure that the laws do not run counter to the underlying mores of the social group, is instanced in Section 106 of the Revised Administrative Code of Mindanao and Sulu. For certain offenses, penalties on non-Christians in Mindanao and Sulu are thereunder left to the sound discretion of the Court, but not to be higher than that fixed by law; and the Court is required to consider *inter alia,* "the degree of moral turpitude which attaches to the offense among his own

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182 *Jones, op. cit.,* 142-143.
183 *See* 1 LAWASIA 11. (1968).
184 Jones, *op. cit.,* 138.

people." Such a form of legislation distinctly recognizes the relationship of law and social values. The application of this provision, however, is itself discretionary on the Court, as the Supreme Court held recently in *Lumiguis v. People*.[185]

The area in which law specially avoids imposing a policy not accepted by the people is in what is called "lawyer's law": the basic system of criminal law, law concerning the family, property and contracts outside the sphere of social-justice interests. Legislatures are usually slow to effect fundamental changes in these areas. The Civil Code has been practically unamended since its enactment in 1949, with few exceptions, such as the portions thereof inconsistent with the relatively new Philippine Condominium Law,[186] introducing a new concept of co-ownership and adding a new kind of real right to those stated in the Civil Code. The reason for this reluctance to change "lawyer's law" is the feeling that this part of law is associated with enduring features of the social order which should not be frequently altered.[187]

This reluctance, however, does not extend to the area covered by the problems of social justice and development, the so-called "law of social administration." In this sphere, the legislative policy changes frequently with shifts in social factors. In one case, lawyer's law was invoked to apply to a situation falling under social administration. Aliens invoked Civil Code provisions on family relations to defeat immigration laws and evade deportation. The Supreme Court through Justice J. B. L. Reyes, in *Vivo v. Cloribel*[188] ruled that said Civil laws govern relations between husband and wife *inter se* or between private persons, not relations between visiting aliens and the sovereign host country.

In the realm of social change and development, then, the law cannot afford to be separated from the facts. Again, to quote Ganong and Pearce:

> "Our laws are but the reflection of our beliefs. Before a right is recognized by the law it must be established as a matter of belief. We believe the promotion of human welfare involves the recognition of individual worth and the use — as opposed to the abuse — of private property. And inasmuch as the promotion of

185 G.R. No. 20338, April 27, 1967.
186 Rep. Act No. 4726 (1966).
187 SAWER, *op. cit.*, 127-128.
188 G.R. No. 25411, October 26, 1968.

human welfare is the criterion by which we judge morality, we, as a society, believe that voluntary intentional acts that result in injury to the person or property of another are wrong and/or immoral. This is why persons and property are given legal protection. Man-made laws are necessary only when beliefs are not strongly or widely enough held to motivate conformity with them to the degree that we, as a society, deem desirable."[189]

As society changes, so too its laws should change. Friedmann has observed that this process is true in all fields of law, even in lawyer's law. Thus, he says that *in the fields of contract*:

"It is evident that the *Idealtyp*, the contract as an instrument of free bargaining between parties on the basis of equality, has been largely displaced by the standardised contract, the collective agreement, and the impact of the public law, either through the imposition of statutory conditions or the still-insufficiently analysed-phenomenon of the public law contract."[190]

Since the changes in society are continuing, it is necessary to fasten one's attention to new demands for further changes in the law. A method that may well be worth considering for adaptation here in this regard is that found in the New Criminal Code of Greenland. Said law provides for a continuing research on its social effects. Says Eckhoff, who credits the Danish scholar Verner Goldschmidt for his part in drafting this Code:

"A similar model of social impact on decision-making processes is applied in the last piece of work to be mentioned here: a general study of official behaviour in the field of law, written by the Danish scholar Verner Goldschmidt. Observations made in Greenland, where Goldschmidt has been engaged in a unique chain of activities, constitute the empirical basis of his work. In 1948-49 he visited Greenland with a group of experts studying the legal customs of the indigenous population, as well as the impact of Danish legal regulations and Danish culture in general. On the basis of this research work a new criminal code for Greenland was enacted in 1954. This code is in many respects remarkable. It makes use of a flexible reaction system with a variety of different sanctions, adapted to the Greenlanders' conditions of life and their ways of thinking. From the point of view of social science it is also noteworthy that the code has a clause providing for regular research into the effects of its provisions. Goldschmidt took part in drafting the code, and he has since as a civil servant and as a judge in Greenland been engaged in its administration, as well as in the research into its effects."[191]

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189 EVAN, *op. cit.*, 36.
190 Friedmann, *Op. cit.*, xi.
191 4 SCANDINAVIAN STUDIES IN LAW 52-53 (1960).

And, finally, law in pursuing the expression of social values in its norms should do so in order, as we have said in the beginning, to render the social existence both *tenable* and *fruitful*. To achieve this, law has always to aim at normative consistency. The rules must somehow all build up to a single, relatively consistent system. Says Parsons in Evan's book:

> "Normative consistency may be assumed to be one of the most important criteria of effectiveness of a system of law. By this I mean that the rules of law formulated in the system must ideally not subject the individuals under their jurisdiction to incompatible expectations or obligations — or more realistically, not too often or too drastically."[192]

I should like to sum up the points in this discussion by referring to Justice Arthur J. Goldberg's statement a few months ago:

> "Law rests on much more than coercion. Law must have the police power, but it is by no means synonymous or coterminous with police power. It is much larger in its conception and in its reach. It builds new institutions and it produces new remedies. It tames the forces of change and keeps them peaceful. People obey the law not only out of fear of punishment but also because of what law does for them: The durability and reliability it gives to institutions; the reciprocity that comes from keeping one's word; and the expectation, grounded in experience, that the just process of law will right their wrongs and grievances. Whenever just expectations go unrealized — whenever legitimate grievances go unredressed — confidence in the law declines; people become alienated from authority and from the law; and instability and even violence become widespread. All the police power in creation could not long uphold a system that did not meet the reasonable expectations and legitimate needs of people and correct their legitimate grievances."[193]

I hope that our discussion of law as a function of the social order will stimulate us to consider afresh the relation between law and social phenomena, to embody social justice in our laws and to achieve development through the law.

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[192] EVAN, *op. cit.*, 58.

[193] *Criminal Justice in Times of Stress*, 52 JUDICATURE, 55 (1968).

THE CULTURAL DEFENSE IN THE CRIMINAL LAW

The values of individuals who are raised in minority cultures may at times conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law. Two recent cases in the United States illustrate this conflict and the difficult issues it raises for American jurisprudence. In *People v. Kimura*,[1] a Japanese-American woman's children died when she attempted to commit oyako-shinju — parent-child suicide — after learning of her husband's extramarital affair. According to the defense attorney and members of the Japanese community, in traditional Japanese culture, the death ritual was an accepted means for a woman to rid herself of the shame resulting from her husband's infidelity.[2] A second example of cultural conflict arose in a case in which a member of the Hmong tribe from the mountains of Laos living in the United States exercised his right under Hmong culture to execute his adulterous wife.[3] In both of these cases, the defendants were confronted with charges of felony homicide. Should cases like these proceed to trial, the defendants may attempt to raise an affirmative defense based on their cultural backgrounds — a "cultural defense."

This Note explores the possibility of developing a "cultural defense" in the criminal law. Part I sets forth how the current criminal justice system takes into account cultural factors. Part II presents the debate over the cultural defense as a conflict between America's commitment to individualized justice and cultural pluralism on the one hand, and society's interests in establishing common values among its members on the other. Part II concludes that the balance of these principles supports the recognition of a cultural defense. Finally, Part III enumerates factors that help define the proper scope of a cultural defense — factors that suggest when and to what extent a cultural defense should apply.

I. THE CURRENT ROLE OF CULTURAL FACTORS IN THE CRIMINAL LAW

Both American and British courts have been largely unwilling to allow variations between a defendant's culture and her society's majority culture to constitute an independent, substantive defense in

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[1] No. A-091133 (Los Angeles Cty. Super. Ct. filed Apr. 24, 1985), *cited in* Sherman, *Legal Clash of Cultures*, Nat'l L.J., Aug. 5, 1985, at 1.

[2] *See id.* at 1, 26.

[3] *See Cultural Defense Fails to Mitigate Wife-Slayer's Sentence*, L. A. Daily J., Nov. 29, 1985, at 15, col. 1.

criminal trials.[4] Cultural factors, however, may be relevant insofar as they establish a case for one or more traditional criminal law defenses. Further, they may be important during the charging and sentencing phases of the criminal process when the prosecutor and judge can exercise discretion.

The role of cultural factors in establishing traditional criminal defenses is limited by their admissibility as evidence of the defendant's state of mind at the time of the crime.[5] First, it may be possible in some cases to introduce cultural factors into court under the rubric of the insanity defense.[6] The defendant might argue, for example, that his cultural values were so different from the majoritarian values reflected in the criminal law that "he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[7] Second, under existing legal doctrine, cultural factors may be relevant insofar as they negate the intent required to satisfy the definition of a crime.[8] Thus, the defendant's cultural background could entitle her to recognized defenses that go to the question of intent; cultural factors could, for example, help establish a defense of mistake of fact[9] or diminished

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[4] *See* Samuels, *Legal Recognition and Protection of Minority Customs in a Plural Society in England*, 10 ANGLO-AM. L. REV. 241, 241–43 (1981) (observing that under England's criminal law, a minority custom cannot be raised as a defense to a criminal prosecution); Sherman, *supra* note 1, at 26 (explaining that U.S. courts do not recognize a specific "cultural defense"). *But cf.* Regina v. Muddarubba (Austl. 1956) (unpublished decision), *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, CRIMINAL LAW 989 (1974) (instructing the jury that in deciding whether an aborigine who killed a woman was sufficiently provoked to reduce the crime from murder to manslaughter, the jury should consider how the average person *in the defendant's culture* would have reacted).

[5] *See, e.g.*, *Profile*, L. A. Daily J., Oct. 25, 1985, at 1, col. 3 (describing a case in which the jury absolved an Ethiopian man of attempted murder after the judge admitted evidence that the defendant assaulted the victim because he believed that she had cast a voodoo spell on him); *see also* Sherman, *supra* note 1, at 26 (quoting the deputy district attorney in *Kimura* as acknowledging that the defendant's cultural background may be relevant to the question of her mental state at the time of the crime).

[6] *See, e.g.*, Lewis, *The Outlook for a Devil in the Colonies*, 1958 CRIM. L. REV. 661, 663, 673 (suggesting that English colonials who murdered in the belief that their victim was a supernatural being might be categorized as insane).

[7] MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (formulating a modern insanity test).

[8] *Cf.* Mull v. United States, 402 F.2d 571, 575 (9th Cir. 1968) (characterizing as "intriguing" the suggestion that a Native American lacked criminal intent when he assaulted a person whom he believed was exercising witchcraft over his mind, but rejecting the argument in the instant case because the defendant had not testified to such a belief at trial), *cert. denied*, 393 U.S. 1107 (1969).

[9] People from a foreign culture may perceive reality so differently from those raised in the majority culture that their assessment of a situation may be tantamount to a mistake of fact. *See, e.g.*, Lewis, *supra* note 6, at 665–67 (discussing arguments in support of a defense of mistake of fact for English colonials who killed in the belief that their victim was a supernatural being). A recent case in which a mistake of fact defense arguably could apply is People v. Moua, No. 315972-0 (Fresno Cty. Super. Ct. filed Aug. 8, 1984), *cited in* Sherman, *supra* note

capacity.[10]

The American legal system also provides discretionary procedures that permit prosecutors and judges to take account of cultural variations. The prosecutor may consider extenuating circumstances when charging the defendant with a crime or when plea bargaining with the defense attorney.[11] In *Kimura*, for example, the prosecutor allowed the defendant to plead guilty to voluntary manslaughter,[12] even though the prosecutor believed that the deliberate, premeditated killing satisfied the technical definition of first-degree murder.[13] The sentencing process also allows extenuating cultural variables to be considered. Sentencing statutes commonly give judges considerable latitude in fixing appropriate sentences.[14] Courts have used this discretion in recognizing culture as a factor to be considered before imposing sentence.[15] Cultural factors, in this context, serve not to exculpate the defendant, but to mitigate her punishment. Thus, even when the substantive law does not acknowledge the role of cultural factors, these alternative mechanisms may allow the legal system to consider such factors in determining the ultimate sanction to be applied.[16]

1, at 27, in which a Hmong tribesman from the mountains of Laos was charged with kidnaping and rape after he mistook a woman's rejection of his advances as a display of proper coyness in his culture's traditional ritual of marriage-by-capture. *See id.*

[10] The diminished capacity defense recognizes that at the time the accused engaged in the proscribed conduct, she was not in control of her conduct even though she was not technically insane. *See* Fingarette, *Diminished Mental Capacity as a Criminal Law Defense*, 37 MOD. L. REV. 264, 266, 274–75 (1974). To prove diminished capacity, the defense attorney in People v. Kimura, No. A-091133 (Los Angeles Cty. Super. Ct. filed Apr. 24, 1985), was planning to use the defendant's cultural background to show that it had "'led to her deteriorating mental condition.'" Galante, *Mother Guilty in Drownings*, Nat'l L.J., Nov. 4, 1985, at 10 (quoting defense attorney Gerald H. Klausner).

[11] *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 446–47, 464–69 (10th ed. 1978).

[12] *See* Galante, *supra* note 10, at 10.

[13] *See* Sherman, *supra* note 1, at 26. Ultimately, the judge ordered the defendant to undergo psychiatric treatment and sentenced her to one year in jail. *See Woman Gets Probation for Children's Deaths*, L. A. Daily J., Nov. 22, 1985, at 17, col. 1.

[14] *See* Frankel, *Lawlessness in Sentencing*, 41 CIN. L. REV. 1, 4 (1972).

[15] *See* State v. Etchison, 188 Neb. 134, 137, 195 N.W.2d 498, 501 (1972) (noting that the defendant's cultural background is relevant to sentencing); State v. Curbello-Rodriguez, 119 Wis. 2d 414, 439–40, 351 N.W.2d 758, 770 (1984) (Bablitch, J., concurring) (arguing that the sexual mores of the defendant's Cuban culture were relevant factors in sentencing for a rape conviction); E. SUTHERLAND & D. CRESSEY, *supra* note 11, at 454–58.

[16] In addition to influencing the discretionary decisions of prosecutors and judges, cultural factors may informally influence the decisions of juries at the trial stage. In accordance with its traditional power to nullify a law that it considers unjust, *see* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972), a jury can convict a defendant for a lesser included offense or acquit her altogether on the basis of cultural factors, even when such factors do not appear relevant to any established substantive defense. Of course, a jury's ability to use its nullification power in this way depends on whether the trial judge has allowed it to hear evidence relating to the defendant's cultural background.

II. THE RATIONALE FOR THE CULTURAL DEFENSE

This Part argues in favor of the recognition of a cultural defense.[17] First, it explains why the current state of the law, even taking into account the degree of discretion allowed during prosecution and sentencing, is not functionally equivalent to a formal, substantive defense. Second, it justifies the cultural defense as a manifestation of America's commitment to the principles of individualized justice and cultural pluralism. It recognizes that this commitment must be weighed against society's interests in imposing certain common values on all of its members — interests that include maintaining order and forging bonds between its people. This Part concludes, however, that on balance the principles that justify a cultural defense outweigh the arguments against it.

A. Functional Differences Between a Formal Cultural Defense and the Informal Consideration of Cultural Factors

Although the current law permits courts to consider cultural factors in criminal cases, the existing legal framework does not provide the functional equivalent of a formal cultural defense. The insanity defense, for example, provides a tempting way to accommodate cultural factors within the bounds of established doctrine. But for a number of reasons, the insanity defense would frequently produce a less desirable outcome than a cultural defense. First, all of the insanity tests that are currently applied require that the proscribed conduct stem from a mental disorder.[18] In most cultural defense cases, however, the defendant would qualify as insane only under a strained definition of mental disease, which courts are unlikely to accept.[19] Second, a judgment of insanity, like a conviction, is an affront to the dignity of the accused because it condemns conduct deemed acceptable by her culture. Indeed, being labeled a lunatic may be more degrading than

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[17] More specifically, this Part argues for a cultural *excuse*. Criminal law defenses can be broadly divided into two categories: justifications and excuses. An act that would otherwise be criminal is justified when the law recognizes that the act was the proper thing to do under all of the circumstances. When a criminal act is excused, the law still regards the act as wrongful, but forgives the actor because she lacked the requisite culpability. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213–29 (1982). It is doubtful that courts would ever accept a cultural defense as a justification: to do so would be to aver that following the dictates of one's culture is more important than obeying the law. Thus, any cultural defense recognized by courts would realistically operate only as an excuse.

[18] *See, e.g.*, M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843) (establishing the M'Naghten insanity rule); MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

[19] *Cf.* Chase v. United States, 468 F.2d 141, 148 (7th Cir. 1972) (upholding the trial court's exclusion of testimony by an anthropologist that "the same conduct might be considered sane in one culture and insane in another," which had been offered by the defense to prove that the defendants were incapable of distinguishing right from wrong and were therefore insane) (footnote omitted).

being branded a criminal.[20] Finally, whereas criminal incarceration has a fixed term, civil commitment following a determination of insanity can, in practice, be indefinite.[21]

Similarly, arguing that the defendant lacked legal intent because of cultural factors, like arguing the insanity defense, is unlikely to prove as effective as a substantive cultural defense. In most cases in which a cultural defense could be raised, there is little question that the defendant actually intended to commit the act for which she is being tried. For example, in *State v. Butler*,[22] members of an American Indian tribe deliberately killed an intruder who had desecrated their tribe's sacred burial grounds. Even if it could be shown that the defendants' cultural values differed significantly from those of the majority, it would be difficult to argue that the defendants did not intend to kill a human being. But if the trial court were willing to recognize an independent cultural defense, and if the defendants could demonstrate that under their tribal law the killing was considered condign punishment for an act of desecration[23] and that they were entitled to inflict that punishment, then the defendants would have a defense to a crime that would otherwise qualify as murder.

Prosecutorial charging and judicial sentencing, although important devices for dealing with cultural factors, differ from the cultural defense because they allow the exercise of greater discretion by government officials. They are by nature ad hoc, offering neither guarantees of procedural safeguards nor guidelines on the relevance of cultural factors.[24] This absence of procedural safeguards and guidelines leads to inconsistency in the treatment of cultural factors from case to case. The combination of covertness and unfettered discretion is a partic-

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[20] *See* Morris, *Persons and Punishment*, in HUMAN RIGHTS 121–22 (A. Melden ed. 1970) (characterizing the attempt to treat all criminals as mentally ill as worse than punishment, because therapy assumes that the person is abnormal, even if she feels that her actions were "right," and thus denies the person the freedom to make her own value judgments).

[21] *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (noting that an appellant who had been acquitted of a crime by reason of insanity and subsequently confined to a mental hospital for four years with no release in sight would have served only one year in prison if he had been found guilty of the crime). Typically, a person committed to a state institution following an acquittal by reason of insanity is not eligible for release until some state official determines that she has regained her sanity and is no longer dangerous. *See, e.g.*, D.C. CODE ANN. § 24-301(d), (e) (1981).

[22] No. 44496 (Lincoln Cty. Cir. Ct. filed Mar. 11, 1981), *cited in* Sherman, *supra* note 1, at 27.

[23] According to the defense attorney, some members of the tribe consider the killing to be punishment for an act of war, an act of self-defense aimed at protecting tribal burial grounds, or punishment for an act of desecration. *See id.* at 27.

[24] The wide-ranging discretion of both prosecutors and judges outside of the confines of the courtroom has frequently been noted. *See, e.g.*, B. JACKSON, LAW AND DISORDER 138 (1984) ("'The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.'"(quoting Justice Jackson)); Frankel, *supra* note 14, at 4–6, 9–10 (characterizing the uncontrolled discretion of the sentencing judge as a lawless process).

ularly troubling method for dealing with cultural factors because this combination has historically presented an opportunity for officials to exercise prejudice against cultural minorities. Statistics on the sentencing of criminals, for example, indicate the existence of systematic discrimination against minorities.[25] It is indeed ironic to leave the "cultural defense" to discretionary procedures that have traditionally been biased against the very groups that the defense is intended to benefit. Finally, unlike excuses such as the cultural defense, these procedures do not subject cultural factors to scrutiny before a public forum,[26] thus making it more difficult for the legal system to evaluate how justly and effectively it is dealing with cultural factors.[27]

B. Balancing Individualized Justice and Cultural Pluralism Against Common Values

The American criminal justice system is committed to securing justice for the individual defendant.[28] In the context of the criminal law, the ultimate aim of this principle of individualized justice is to tailor punishment to fit the degree of the defendant's personal culpability.[29] The American legal system recognizes that, because of mitigating circumstances, it may be unjust to punish a particular defend-

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[25] *See, e.g.*, B. JACKSON, *supra* note 24, at 160–62.

[26] *See* Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1307 (1974) (arguing that excuses provide a more "public and visible forum for the process of individualized assessment in the criminal law" than do prosecutorial charging, sentencing, and pardoning).

[27] Reliance on a formal cultural defense would also differ from reliance on the jury's power to nullify the law because of the defendant's cultural background. First, jury nullification can only occur when the judge has admitted cultural factors into evidence during the course of the trial. Second, jury nullification is an entirely discretionary procedure unconstrained by legal guidelines or instructions by the judge. A formal cultural defense would ensure that juries have the opportunity to consider cultural factors in all cases, while offering greater assurance that their consideration of such factors remains within specified and determinate parameters laid out by the judge in her instructions.

[28] *Cf.* J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 395 (1949) (noting that one of the principal functions of trial courts is the "understanding of the unique, in order to do justice"). Our legal system's commitment to securing justice for the individual is evident in cases in which an accused is acquitted or convicted on a reduced charge, notwithstanding clear evidence that she committed the more serious crime for which she was charged, because circumstances indicate that she does not deserve all of the consequences of a conviction for the original offense. *See* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 139 (1966).

[29] *See* Gardner, *The Renaissance of Retribution — An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 808 (suggesting that an inquiry into a defendant's culpability "should be framed in terms of whether, based on the whole background and character of the individual, it is just to punish him for his actions"). The Model Penal Code declares that one of its general purposes in defining offenses is "to differentiate among offenders with a view to a just individualization in their treatment." MODEL PENAL CODE § 1.02(2)(e) (Proposed Official Draft 1962).

ant to the limits of the law.[30] Consistent with the principle of individualized justice, courts have recently recognized new criminal defenses. The battered spouse defense, for example, was created in response to situations in which convicting the defendant would be unfair, but traditional defenses of self-defense and insanity would not be entirely appropriate.[31]

Similarly, the principle of individualized justice militates in favor of the cultural defense. There are two situations in which strict application of the law might be unfair to a person raised in a foreign culture. First, such a person may have committed a criminal act solely because she was ignorant of the applicable law. Although ignorance of the law is generally no excuse in a criminal prosecution,[32] fairness to the individual defendant suggests that ignorance of the law ought to be a defense for persons who were raised in a foreign culture. Treating persons raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather as a vindication of the principles of fairness and equality that underlie a system of individualized justice.[33] It may be fair to impute knowledge of American law to persons raised in this country: various socializing institutions such as the family, school, and place of worship can reasonably be expected to have instructed these persons about the norms upon which society's laws are based. A new immigrant, however, has not been given the same opportunity to absorb — through exposure to important socializing institutions — the norms underlying this nation's criminal laws. The principle of individualized justice demands that the law take this factor into account.[34]

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[30] This notion of justice may be phrased in terms of the formal principle of equality, which requires that equals be treated equally and unequals unequally. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 993 (1978) (discussing the notion that equality sometimes requires the state to treat people in unlike situations differently). For an illustration of the judicial application of this principle, see State v. Wanrow, 88 Wash. 2d 221, 239–41, 559 P.2d 548, 558–59 (1977), in which the Supreme Court of Washington held that a female defendant's right to equal protection of the laws was violated when, at the conclusion of her trial for homicide, the judge instructed the jury to evaluate her claim of self-defense in light of a reasonable man standard rather than a reasonable woman standard.

[31] *See* Frank, *Driven to Kill*, A.B.A. J., Dec. 1984, at 26; Vaughn & Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399, 410–13, 419 (1983).

[32] *See* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 451 (2d ed. 1983).

[33] *See supra* note 30 (stating the formal principle of equality); *cf.* Vaughn & Moore, *supra* note 31, at 411–12 (asserting that the battered spouse defense "is not a plea for special treatment, but equal and individual treatment").

[34] This conclusion is consistent with Professor H.L.A. Hart's general principle of criminal law, which asserts that liability should be imposed only if the defendant had a "fair opportunity" to conform her conduct to the law. *See* H. HART, PUNISHMENT AND RESPONSIBILITY 180–83 (1968).

Of course, the principles that justify recognizing the cultural defense for immigrants suggest that the defense may also apply to some native-born Americans. When a person is raised in a strongly ethnic, segregated community, she may also be denied the benefit of exposure to the

Second, an ordinarily law-abiding person raised in a foreign culture may have committed a criminal act solely because the values of her native culture compelled her to do so. Mere awareness that her act is contrary to the law may not be enough to override her adherence to fundamental cultural values. Laws are more effective in commanding obedience when individuals internalize the underlying norms to the point where they believe that the law embodies morally correct values.[35] A society's socializing institutions not only make its members aware of its norms, but also instill in its people a sense that they are morally obligated to abide by their culture's norms. Thus, persons raised in other cultures, who are subject to influences that inculcated in them a different set of norms, will likely feel morally obligated to follow those norms. Once norms have acquired this moral dimension, conformity with conflicting laws becomes more difficult.[36] For this reason, a person's cultural background represents a relevant individual factor that a just legal system should take into account.

Through its commitment to individualized justice, the legal system advances a second principle that favors the recognition of a cultural defense: cultural pluralism.[37] By judging each person according to the standards of her native culture, the principle of individualized justice preserves the values of that culture, and thus maintains a culturally diverse society. The United States should remain committed to cultural pluralism for several reasons. First, pluralism maintains a society's vigor.[38] John Stuart Mill believed that "what the improvement of mankind and of all their works most imperatively demands is variety, not uniformity."[39] By absorbing cultural elements from a broad spectrum of ethnic groups, American culture has remained

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socializing institutions that serve to transmit majoritarian values. If this is indeed the case, then under such circumstances the reason advanced above for recognizing the defense for the immigrant while denying it to the native-born no longer exists.

[35] *See* Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 386–87 (1976); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 997 (1940); Williams, *Authoritarian Morals and the Criminal Law*, 1966 CRIM. L. REV. 132, 141.

[36] *See* Zimring & Hawkins, *The Legal Threat as an Instrument of Social Change*, in THE PURSUIT OF CRIMINAL JUSTICE 104–05 (G. Hawkins & F. Zimring eds. 1984) (observing that a criminal prohibition is more difficult to enforce if it is aimed at behavior that is dictated by a sense of morality); *cf.* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969) (arguing that the actions of an individual who is motivated to violate the law by her conscience "may be inevitable, and therefore in some perhaps unusual sense of the word, involuntary").

[37] As used in this Note, "cultural pluralism" is a model of American life that "postulate[s] the preservation of the communal life and significant portions of the culture of the later immigrant groups within the context of American citizenship and political and economic integration into American society." M. GORDON, ASSIMILATION IN AMERICAN LIFE 85 (1964).

[38] *See* H. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES 209–10 (1924); *cf.* J. FRANK, *supra* note 28, at 398–99 (discussing the theories of David Riesman and Erich Fromm, which contend that the transformation of American society from one of difference and individuality to one of sameness and "interchangeability" threatens to make America a "sick society").

[39] J. MILL, *Endowments*, in ESSAYS ON ECONOMICS AND SOCIETY 617 (J. Robson ed. 1967).

dynamic and creative, continually evolving as it weaves threads of various immigrant cultures into its fabric.[40] Second, cultural pluralism emanates from the principle of equality underlying the American system of justice. Equality among different ethnic groups ultimately requires that each group respect other groups' right to be different and that the majority not penalize a minority group simply because it is different.[41]

A third justification for encouraging cultural pluralism is that the amount of diversity in the United States measures, in part, the value that the majority places on liberty. Cultural pluralism is an inevitable product of this nation's commitment to liberty.[42] In a nation with members drawn from diverse backgrounds, allowing people the freedom to live by their values will lead to a culturally pluralistic society. By quashing cultural values that diverge from mainstream norms, the majority foists upon all others a single orthodoxy — a result repugnant to the American political paragon. Finally, cultural pluralism not only reflects American ideals of liberty, but also may stand as a bulwark against despotism. As Judge Frank once observed, modern dictators have been quick to exploit societies in which the individuality of people's ideas and lifestyles is subordinated to the impulse for a conformist, monolithic society.[43]

The cultural defense is integral to the United States' commitment to pluralism: it helps maintain a diversity of cultural identities by preserving important ethnic values. The cultural values that conflict with criminal laws are often among the most fundamental, involving questions of life, death, and morality.[44] In traditional Lebanese Mus-

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[40] *See* E. BRUNNER & W. HALLENBECK, AMERICAN SOCIETY: URBAN AND RURAL PATTERNS 26–28 (1955); M. GORDON, *supra* note 37, at 68. During the early part of the century, Judge Julian Mack responded to the "Americanization" movement, *see infra* note 66, by noting that "each of the older nations, through its emigrants, can contribute in the future as [it] contributed in the past elements of value: spiritual, moral, mental, physical, and aesthetic, essential for the realization of an ideal America." G. ABBOTT, THE IMMIGRANT AND THE COMMUNITY vi (1917).

[41] *See* M. GORDON, *supra* note 37, at 145–46 (presenting Horace Kallen's theory that the concept of equality in the Declaration of Independence and in the Constitution "'is an affirmation of the right to be different: of the parity of every human being and every association of human beings according to their kinds, in the rights of life, liberty, and the pursuit of happiness'") (quoting H. KALLEN, AMERICANISM AND ITS MAKERS 8 (1944)).

[42] *See* J. HALL, LAW, SOCIAL SCIENCE AND CRIMINAL THEORY 76 (1982) ("[G]enuine toleration [for alternative systems of belief] . . . is based on the value of freedom and, ultimately, on respect for the individual person."). Horace Kallen analogizes cultural pluralism to our federal system of government and argues that cultural pluralism is the inevitable outgrowth of democratic ideals. *See* H. KALLEN, *supra* note 38, at 115–16. He reasons that the "spiritual autonomy" of cultural groups arises from the political autonomy that the United States accords to the individuals who belong to those groups. *See id.* at 117.

[43] *See* J. FRANK, *supra* note 28, at 398 (discussing the work of sociologist David Riesman).

[44] To the extent that these fundamental values may qualify as a religion, a first amendment issue arises regarding the defendant's right to the free exercise of her religion. *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066–67, 1075 (1978) (contending that religion should be defined as any personal belief that is an "ultimate concern" to

lim communities, for example, the ideology of honor is a fundamental precept to which people look for guidance and around which they structure their social relations.[45] Blanket repudiation of a cultural defense in a case in which a person's attempt to uphold that honor collides with the criminal law might be perceived as an official indictment of the principle of honor, rather than as a denunciation of the particular means of vindicating that ideal. If the United States wishes to remain a culturally diverse nation, it must be alert to this danger of overkill: in the zeal to quash certain undesirable values or manifestations of those values, the majority may inadvertently destroy desirable values as well. More disturbing perhaps than the risk of overkill is the possibility that repudiation of a cultural defense may send out a broader message that an ethnic group must trade in its cultural values for that of the mainstream if it is to be accepted as an equal by the majority.[46] It is hard to imagine a system more likely to convince a person that the majority regards her culture as inferior than one that punishes her for following the dictates of her culture.

Individualized justice and cultural pluralism, however, are not the only ideals that are fundamental to society. Any commitment to these ideals must be constrained by a conflicting objective in the law: the desire to lay down a set of common values that society considers important for everyone to share. Perhaps the principal reason for imposing a set of common values is to maintain social order. Societies usually regard the preservation of social order — societal self-protection — as a primary aim. To maintain this order, it has been argued, societies must lay down a body of positive law that compels the obedience of all regardless of individual notions of morality:[47] if each person were required to adhere to the law only to the extent that it was consistent with her own values, societies would tend toward anarchy.[48] Legal systems attempt to compel this obedience by imposing punitive sanctions in order to deter people from breaking the law.

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the individual). These potential constitutional questions, however, are beyond the scope of this Note.

[45] *See* Humphrey, *Community Disputes: Violence and Dispute Processing in a Lebanese Muslim Immigrant Community*, 22 J. LEGAL PLURALISM 53, 54 (1984).

[46] *See* G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 28–30, 57 (1985) (suggesting that America's "melting pot" tradition views the submission of immigrants to dominant American values as the quid pro quo for equality, thus making equality attainable only at the price of "cultural subjugation").

[47] *See* H. GROSS, A THEORY OF CRIMINAL JUSTICE 401 (1979) (noting that "the rules of conduct laid down in the criminal law are a powerful social force upon which society is dependent for its very existence"); I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 6–11, 111–112 (1980) (asserting that law establishes and maintains social order); B. WRIGHT & V. FOX, CRIMINAL JUSTICE AND THE SOCIAL SCIENCES 38 (1978) (arguing that rules are necessary for "the survival and continuity of the social order").

[48] *See* United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) (admonishing that "[t]o encourage individuals to make their own determinations as to which laws they will obey and

Deterrence can be divided into specific (or particular) and general deterrence. Specific deterrence is achieved when punishing the defendant discourages her from engaging in similar conduct in the future.[49] General deterrence is accomplished when punishing the defendant dissuades others from emulating her conduct.[50] Courts may oppose the cultural defense because they feel that it would undermine the specific deterrent effects of the law. A person punished for breaking a law would normally be less likely to misbehave again than one who received no punishment. Courts may also resist a cultural defense because they suspect that the defense would detract from the law's general deterrent effects. According to some observers, general deterrence is most effective when punishment for committing a proscribed act is certain.[51] Thus, members of immigrant groups might be less deterred by the law if their transgressions could be excused by their cultural values.[52]

In many cases, however, it is questionable whether recognition of the cultural defense would significantly impair the deterrent capacity of the law. Specific deterrence will often be needless in cases of culturally motivated crimes. In situations in which the defendant's conduct was triggered by extraordinary circumstances that are unlikely to recur, specific deterrence is unnecessary. More important, because these criminal acts often stem solely from ignorance of the existing laws — and not from any malevolent motive — punishment is unnecessary to deter similar conduct in the future: the mere invocation of the criminal process is likely to have a normative effect on the accused such that she will not commit similar violations in the future. Particularly if the defendant is informed that her ignorance will excuse her only once, then much of the specific deterrent effect of the law will be preserved. The defendant will know that she faces the regular punishment should she repeat her actions.

Punishing the defendant in cultural defense cases will serve as an effective *general* deterrent in only one of the two categories of culturally related crimes. In the first category — in which members of an ethnic culture commit crimes out of ignorance of the law — punishing the defendant may serve to instruct other members of her culture of the law, and thus may advance the goal of general deterrence. In

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which they will permit themselves as a matter of conscience to disobey is to invite chaos"); Sherman, *supra* note 1, at 26 (quoting the prosecutor in *Kimura*, who remarked that allowing a cultural defense might lead society to anarchy).

[49] *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5, at 22 (1972).

[50] *See id.* at 23.

[51] *See, e.g.*, E. VAN DEN HAAG, PUNISHING CRIMINALS 115 (1975).

[52] Judicial opposition to the cultural defense may also be based on misgivings about the administrability of the defense. Courts may fear, for example, that a cultural defense would bog down the judicial process in protracted evidentiary inquiries into cultural norms, involving contests between experts and assessments of the sincerity of the defendant's cultural beliefs.

such cases, however, punishment may not be necessary to accomplish this educational function. Efforts of local government agencies targeted at informing recent immigrant communities of the laws and other social norms would be a more far-reaching method of deterrence than punishing those few individuals who come in contact with the law.[53] Moreover, such programs would avoid the unnecessary practice of making examples of the first few members of an immigrant community who violate the law. Such needless exemplary punishment "conflicts with the moral principle of not deliberately causing human suffering where it can possibly be avoided."[54]

In the other category of culturally related crimes — those motivated by a sense of moral and social compulsion — punishing the defendant may only marginally deter others in her culture whose actions are similarly motivated.[55] Further, to the extent that extreme acts induced by adherence to cultural mores, such as oyako-shinju, are relatively rare, the threat to social order, and thus the need for deterrence, becomes less pressing. Although these extreme cases are highly publicized when they occur, it seems unlikely that many American women of Japanese origin will commit oyako-shinju upon learning of their husbands' infidelity or that many Hmong tribesmen living in America will actually exercise their cultural right to execute an adulterous wife.

An argument that might be raised against the cultural defense is that it would have a counter-deterrent effect, thus encouraging crime by its implicit guarantee of an excuse. As contended above, however, the threat of punishment may have only a marginal deterrent effect in many cases of culturally motivated crimes. Therefore, any loss in deterrence from a cultural defense would be, at most, minimal. Moreover, this argument about the counter-deterrent impact of the cultural defense could be leveled against every existing defense. The criminal law has been able to maintain social order despite the availability of defenses such as insanity and diminished capacity.[56] In recent years, concern over deterrence has not prevented courts from recognizing several new defenses, including the battered spouse defense[57] and the

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[53] *See* Sherman, *supra* note 1, at 27 (stating that "[c]ommunity outreach is one way local officials are educating refugees and immigrants about American laws").

[54] Gardner, *supra* note 29, at 798 (footnote omitted).

[55] *See* Zimring & Hawkins, *supra* note 36, at 110; *cf.* J. HALL, *supra* note 42, at 71–73 (stating that religious tolerance is often justified on the ground that coercion of thought and conscience is futile).

[56] Further, the legal system's experience with these defenses answers the concern that the cultural defense would be administratively unworkable. The ability of courts to handle the difficult evidentiary inquiries involved in allowing the insanity and diminished capacity defenses at trial strongly suggests that the legal system would not become paralyzed if it were to recognize the cultural defense.

[57] *See* Frank, *supra* note 31, at 25–26; Vaughn & Moore, *supra* note 31, at 425–26 & nn.90–91.

Vietnam veterans' defense.[58] Experience with these and other defenses reveals that their acceptance by the judiciary has not undermined the ability of the criminal law to protect society.

Indeed, the protection of cultural beliefs through a cultural defense may actually further the goal of maintaining social order. A stable, respected order requires a system of internal norms that reinforce the law's external dictates.[59] The American legal system must rely on moral restraints to guide behavior in the interstices where the criminal law is vague, ambiguous, or altogether silent. Cultural values provide norms of conduct to fill the gaps in the criminal codes: such values serve independently from legal sanctions as a check on undesirable behavior.

Recognition of a cultural defense is one way of preserving this nucleus of values that, although leading to undesirable behavior in some contexts, is conducive to law-abiding conduct in many others. For example, the emphasis that traditional Japanese culture places on living according to a principle of honor may create occasional tragedies in exceptional cases like *Kimura*, but it often serves to encourage desirable conduct.[60] In addition, denial of a cultural defense may be perceived as evidence of disdain for an ethnic minority's cultural values. When an ethnic group's cultural values are ignored by the mainstream society, the group is likely to become alienated from the majority culture.[61] Alienation could, in turn, engender hostility and intergroup conflict that disrupt social order.[62]

However important societal self-protection may be as a reason for members of a society to share values, having a set of common values may also serve a more transcendent purpose. Common values may

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[58] *See* Schulz, *Trauma, Crime and the Affirmative Defense*, 11 COLO. LAW. 2401, 2402 & n.9 (1982).

[59] *See* sources cited *supra* note 35.

[60] *See* T. SELLIN, CULTURE CONFLICT AND CRIME 73, 106 (1938) (suggesting that both the emphasis on upholding family honor and the "strength of the moral fabric" in immigrant Japanese communities in the U.S. may account for the the low juvenile delinquency rates in those communities).

[61] Charles Evans Hughes, for example, warned that "the impatient disregard of an immigrant's ignorance of our ways and language, will daily breed Bolshevists who are beyond the reach of your appeals." Address to the 42d Annual Meeting of the New York State Bar Ass'n (Jan. 17, 1919), in 42 REP. N.Y. ST. B. ASS'N 224, 240 (1919). *See* G. ABBOTT, *supra* note 40, at 105 (observing that an immigrant's respect "not only for our judicial system but for the Government as a whole is largely determined by the treatment" that she receives in our courts); Humphrey, *supra* note 45, at 65–71, 78–83 (discussing cases in which the inability of courts to vindicate cultural values in Lebanese Muslim communities in Australia has led to antagonism toward and alienation from the legal system).

[62] *See* J. DOUGLAS & F. WAKSLER, THE SOCIOLOGY OF DEVIANCE 42–43 (1982) (describing Durkheim's theory of "social disintegration," which posits that deviant social behavior is attributable to the breakdown of "communication and involvement" among members of society); *id.* at 53 (arguing that alienation of members from society creates societal conflict).

help to create a broad sense of community and common purpose among a society's people. Cultural pluralism run rampant may destroy any possibility of forging these bonds among a nation's cultural subgroups.[63] Further, some argue that certain values represent a standard of morality to which all persons, regardless of upbringing, should aspire.[64] The values that the criminal law seeks to impose on all ethnic groups may reflect fundamental aspects of a society's dominant moral code. Suicide rites involving children and rituals of marriage-by-capture, for example, may so shock moral sensibilities as to make the majority insist that the defendant's culture immediately abandon such practices regardless of how little impact isolated incidents of such acts have on social order.[65] To the extent that a cultural defense preserves the cultural values of immigrant groups, the defense can be seen as inimical to any attempt to establish a set of common norms.

But insofar as society desires that ethnic communities accept a set of common norms, this objective may be hampered by disregarding a cultural group's fundamental values. Ethnic groups may adjust more readily to the majority culture when the majority respects their ways and when the majority recognizes that their cultures have something to offer.[66] Given time, this approach will result in the acceptance of fundamental American values,[67] but without the social costs that are

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[63] Even as ardent a supporter of diversity as Mill recognized that without this sense of common purpose binding together the people of a nation, "the united public opinion, necessary to the working of representative government, cannot exist." J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 230 (C. Shields ed. 1958).

[64] *See* D. NEWMAN, *supra* note 28, at 124; *see also* Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359–60 (1985) (describing one legal theory that portrays the law as serving a "moralizing, educative function" for the public).

[65] Outrage over such acts, of course, may also reflect a concern about self-protection. To the extent that the public identifies with the victims of such crimes, it may feel the need for security against similar incidents in the future. If this is indeed the case, then punishing the defendant may serve to restore faith in the legal system's ability to preserve social order.

[66] The "Americanization" movement in the early twentieth century, during which the American public attempted to force each immigrant from Southern and Eastern Europe to "divest himself at once of the culture of his homeland," created a backlash against the movement. *See* M. GORDON, *supra* note 37, at 136–37. Among other things, the countermovement — comprised of social workers, earlier immigrants who had adjusted to American life, and academics — sought to remedy a common result of "draconic Americanization": the creation of "[e]thnic 'self-hatred' with its debilitating psychological consequences, family disorganization, and juvenile delinquency." *Id.* at 138.

[67] *See* Gordon, *Models of Pluralism: The New American Dilemma*, 454 ANNALS 178, 182 (1981) (concluding from the American historical experience that the cultural patterns of second-generation Americans is characterized by "the overwhelming dominance of Anglo-conformity"); Sherman, *supra* note 1, at 26 ("'Word spreads pretty quickly [in immigrant communities] about what is legal and illegal.'" (quoting the project director of Adult Refugee Services, a public

incurred whenever the majority attempts to impose its values all at once on other cultures.[68]

The desire to establish common values must also be constrained by America's commitment to cultural pluralism, which entails a belief that acceptance of all mainstream values is undesirable. The very meaning of cultural pluralism is that each ethnic group is entitled to retain certain cultural values, thereby maintaining its own identity. Although society would ideally reap only the benefits of diversity, avoiding the dark consequences seen in cases like *Kimura*, it may prove difficult to carve out of a culture particular values deemed "undesirable," or acts motivated by such values, without destroying other values that society should not disrupt through the criminal law.[69] In order to maintain pluralism within the context of a society united by common values, immigrant groups must be given time to assimilate those common values. The cultural defense, meanwhile, would function as a buffer, protecting those ethnic values implicated by the criminal law.

America's commitment to the ideals of individualized justice and cultural pluralism justifies the recognition of the cultural defense. Although society has countervailing interests in imposing common values on all of its members, including the preservation of social order and the forging of common bonds, an appropriately defined cultural defense is consistent with the objectives behind these interests. The following Part attempts to define parameters that will make an accommodation of these competing objectives possible.

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interest group)). Based on an empirical study of ethnic intermarriage, Julius Drachsler concluded that there is a tendency for most ethnic groups, particularly those of European origin, to "amalgamate" into a single culture. *See* J. DRACHSLER, DEMOCRACY AND ASSIMILATION: THE BLENDING OF IMMIGRANT HERITAGES IN AMERICA 146–49 (1920). Experience has shown, however, that this "melting pot" process is not perfect. In 1964, Nathan Glazer and Daniel Patrick Moynihan concluded from a study of the ethnic patterns in New York City that, despite the passage of many generations, Americans continue to retain elements of their ethnicity. *See* N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT 288–91 (1964); *see also* Gordon, *supra* at 182 (observing that second and succeeding generations of immigrant communities retain "symbolic elements of the ancestral tradition").

[68] *See* J. DRACHSLER, *supra* note 67, at 157–63 (noting that some view the process of assimilation in the U.S. as occurring too quickly, thereby creating the risk of demoralizing ethnic groups, depriving their children of a cultural identity, and denying the American culture the opportunity to absorb the beneficial elements of foreign cultures); T. SELLIN, *supra* note 60, at 87–88, 100–01 (suggesting that "[a]n undue eagerness to 'Americanize' the children of immigrants" may exacerbate delinquency problems attributable to the confusion that these children face regarding which conduct norms they should follow).

[69] *See supra* TAN 45–46; *see also* Humphrey, *supra* note 45, at 58–59 (1984) (observing that official intervention into family matters in Australia's Lebanese Muslim communities upsets their patriarchal family and social structure by "radically undermining the social position and honour of the male head of household").

III. Defining the Scope of the Cultural Defense

Judicial rejection of a cultural defense may rest on the concern that once the defense is introduced, it will be impossible to define its proper scope. Thus, before courts recognize the defense, they must first identify factors that delineate its boundaries. These factors must determine in a principled way under what circumstances and to what extent a cultural defense should apply.[70] Some of these factors can be derived from the principles of individualized justice and cultural pluralism. Other factors follow readily from the interests, such as societal self-protection and sense of community, that are promoted by common values. The crucial objective in defining the scope of the defense is to advance the goals of individualized justice and cultural pluralism while recognizing the concerns reflected in the desire for common values.[71] The factors proposed below are each intimately tied to one or more of these three principles. The task of the courts would be to balance these factors in each case in order to arrive at the appropriate scope of the cultural defense.[72]

The interest in societal self-protection directs courts to evaluate factors such as the probability of recurrence and severity of the crime

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[70] It is neither necessary nor desirable that cultural factors completely exculpate the defendant in every case. Cultural factors in many instances can serve more appropriately to reduce the charge against the defendant or to mitigate her sentence.

[71] *Cf.* M. Gordon, *supra* note 37, at 68 (propounding a theory of ethnic "integration," which "'recognizes the right of groups and individuals to be different so long as the differences do not lead to domination or disunity'" (quoting W. Bernard, The Integration of Immigrants in the United States 2 (unpublished Unesco document 1956)).

[72] The judicial role in cultural defense cases would be similar to the judicial role in first amendment free exercise cases. The free exercise cases also raise the issue of when and to what extent a person's exercise of particular deeply held values should be exempted from specific laws. *See, e.g.*, Clark, *supra* note 36, at 337. In the free exercise cases, courts have adopted a balancing approach in deciding whether certain religious practices should be removed from the purview of a particular law. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1384, 1389–90 (1967); Clark, *supra* note 36, at 329–44. Courts have recognized that an individual's right to the free exercise of her religion cannot be absolute; rather, it must be balanced against the government's legitimate interest in enforcing certain laws. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (rejecting a free exercise claim by Mormons who sought to practice polygamy in violation of state law); Leary v. United States, 383 F.2d 851, 861 n.11 (5th Cir. 1967) (denying an exemption from the drug laws to a person who alleged that marihuana use was part of his religious practice).

Although it may be tempting to apply the precedents developed in the free exercise context to cultural defense cases, this approach does not strengthen the argument in favor of the defense. Unlike religious values, secular cultural values are not explicitly protected by the Constitution. And even if cultural values were accorded constitutional protection, courts would likely hold, as they have in the free exercise cases, that a state's interest in protecting personal safety is so compelling as to outweigh a group's right to live according to its own values. *See* cases cited *supra*. The cultural defense therefore must exist as a doctrine whose justification lies beyond the Constitution.

in determining whether and to what extent to recognize a cultural defense in a particular case. Judicial receptiveness to a cultural defense should vary inversely with both the likelihood of recurrence and the severity of the crime. The greater the likelihood of recurrence of the proscribed conduct, the greater is the need to deter such conduct if social order is to be maintained; consequently, courts should be less receptive to a cultural defense. With respect to the question of severity, at least three variables are relevant. First, courts should consider whether the crime is victimless. Prohibition of self-regarding acts cannot readily be justified by considerations of societal self-protection.[73] Second, if there is a victim, courts should inquire whether the crime is confined to voluntary participants within the defendant's culture. A cultural defense should more readily be admitted when the crime is limited to persons capable of meaningful consent who belong to that culture and subscribe to its tenets.[74] Third, when there is a victim, courts should ask whether serious bodily or emotional harm was inflicted.[75]

The desire for social order further demands that courts consider factors such as the identifiability,[76] degree of self-containment,[77] and size of the defendant's cultural group. Identifiability is important because membership in the exempted group would otherwise be difficult to ascertain, thus complicating the task of applying the defense. Self-containment is important because it tends both to insulate the rest of society from harm and to minimize the loss of general deterrence that may accompany a judicial decision excusing a particular forbidden act. Finally, the size of the exempted group is significant because exempting a large percentage of the population from a law would itself impose significant costs[78] and would also send a conspic-

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[73] *See* J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R. White ed. 1967) ("A law which enters into a direct contest with a fierce imperious passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others, will generally do more harm than good . . . ."); *cf.* Clark, *supra* note 36, at 348 (suggesting that when the personal well-being of a Jehovah's Witness is at stake, the free exercise balancing test would probably militate against the administration of an involuntary blood transfusion).

[74] *Cf.* J. MILL, ON LIBERTY 13 (D. Spitz ed. 1975) (arguing that society has only an "indirect interest" in self-regarding or consensual acts); Clark, *supra* note 36, at 361–62, 365 (establishing as the guideline for the free exercise clause the principle that the state may not prohibit positive acts compelled by an individual's conscience that are performed against himself or another fully consenting person, but that the state can prohibit other acts compelled by conscience).

[75] Even in free exercise cases, the risk of grievous bodily harm to the religious adherent or to a third party may be a relevant consideration. *See* Clark, *supra* note 36, at 334.

[76] "Identifiability" refers to the existence of cultural attributes that give an ethnic group an identity that sets it apart from other groups.

[77] "Self-containment" refers to the extent that an ethnic community is physically segregated from other communities.

[78] Courts have expressed similar concerns in the free exercise and conscientious objector cases. Because the cost to the government of exempting claimants from a given law is directly

uous signal to the remaining population that the proscribed conduct is acceptable. When recognizing the cultural defense is likely to create any of these dangers, courts will understandably be loath to do so.

Consistent with the goals of individualizing justice and fostering cultural pluralism are factors that direct an inquiry into the influence of the defendant's culture on her behavior. Courts might, for example, measure the degree of the defendant's assimilation into the mainstream culture.[79] The less assimilated the accused, the more compelling are justice-based arguments that it is unfair to punish her for not complying with the law.[80] Moreover, the less assimilated the accused, the more a cultural defense will encourage pluralism by maintaining a spectrum of widely divergent values.

A desire to maintain pluralism should further lead courts to assess the importance of the cultural value that impelled the prohibited act. Because a cultural defense confers a partial "exemption" from an otherwise legitimate law, only values of sufficient importance to the defendant's culture should be protected.[81] Honor, for example, is considered a fundamental principle in the Japanese and Lebanese Muslim cultures. Thus, individuals in these cultures who are motivated by honor to commit prohibited acts may well be entitled to a cultural defense — subject, of course, to appropriate regard for social order and the desire to build a sense of community among all members of society.[82]

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proportional to the number of potential claimants, their number may figure into a decision regarding whether to protect the exercise of their beliefs against statutory infringement. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 399 n.2 (1963) (exempting Seventh-day Adventists, after noting that the number of potential claimants was very small, from the requirement that one be willing to accept Saturday work as a precondition to receiving state unemployment compensation); United States v. Leary, 383 F.2d 851, 861 (5th Cir. 1967) (observing that because of the large number of youths eager to experiment with marihuana, allowing an exemption from criminal statutes for those claiming religious use would pose too great a threat to the effectiveness and enforceability of those laws); *see also* Clark, *supra* note 36, at 332 (arguing that "the cost to the government [of a religious exemption] frequently depends on the number of persons who can lay claim to the exemption").

[79] Factors that are relevant to the degree of the defendant's assimilation include the extent of her exposure to the American educational system, her involvement with employment or other activities outside her ethnic community, and her membership in a traditional Western religion.

[80] *See supra* pp. 1299–1300. In particular, courts might consider whether the influence of the defendant's cultural values was so overwhelming that her ability to control her conduct was overborne. *See supra* note 36 and accompanying text; *cf.* sources cited *supra* note 10 (discussing the diminished capacity defense). Courts should, of course, also look into the sincerity of the defendant's beliefs, as they do in the religion cases. A discussion of the sincerity requirement in the religion cases is provided in L. TRIBE, *supra* note 30, §14-11, at 859–62.

[81] In the context of the free exercise clause, the Supreme Court has similarly looked into the "centrality" of a religious group's beliefs as a factor in determining whether a particular practice should be removed from the purview of an otherwise valid statute. *See* L. TRIBE, *supra* note 30, § 14-11, at 862–64.

[82] Courts that are concerned about maintaining cultural pluralism while implementing com-

By considering these factors, courts will be able to determine when and to what extent a cultural defense should apply. The precise way in which courts will balance these factors will, of course, vary from case to case. But as long as the evolutionary process of identifying and refining relevant factors is based on an accommodation of society's several interests in establishing a set of common values with the ideals of individualizing justice and maintaining cultural pluralism, courts can minimize interference with society's diverse cultures while preserving the stability of community life.

IV. CONCLUSION

Neither the current law nor discretionary procedures within the criminal justice system are adequate vehicles for dealing with cultural factors: what is needed is a formal cultural defense within the substantive law. It is often all too tempting for a society to betray its underlying values when confronted with overstated fears of violence and anarchy. In the case of American society, blanket repudiation of the cultural defense sacrifices two very important values — individualized justice and cultural pluralism. Perhaps more telling, the American legal system's rejection of the cultural defense reveals an underlying fear of beliefs that are different from ours. Immolating one's own children for the sake of honor, executing an adulterous wife, and lashing out at someone in order to break a voodoo spell may seem very bizarre — indeed barbaric and disturbing — to the majority. But this is no reason to attempt immediately to quash the values of foreign cultures. American society has thrived on tolerance, curiosity toward the unknown, and experimentation with new ideas. The legal system, however, recognizes that if tolerance, curiosity, and experimentation are carried too far, social disorder and disintegration of common values may result. The cultural defense would give courts an opportunity to strike the necessary balance among these competing interests.

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mon values should also consider whether punishing to the limits of the law is truly necessary to achieve these goals. For example, the mere operation of the criminal process up to the time of trial may have a sufficiently educational effect on the defendant and other members of her culture that conviction and punishment are unnecessary. Likewise, courts might consider whether less severe means of teaching societal values, such as the use of community task forces, have been implemented. *See supra* note 53 and accompanying text.

India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization

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India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization[1]

Marc Galanter[2] and *Nick Robinson*[3]

Abstract: This article examines a flourishing group of elite litigators, that we call 'Grand Advocates', who practice before the Indian Supreme Court and some of India's High Courts. In a court system marked by overwhelmed judges with little assistance, multiplicity and blurriness of precedent, and by the centrality of oral presentation, the skills and reputational capital of these lawyers enables them to play a central, lucrative, and unique role. Indeed, it is often the Grand Advocates, as much as the judges, who lead and propel forward the Indian judicial system. We argue that our exploration of Grand Advocates provides a counter-example and an analytical framework to understand why the homogenizing forces of globalization may not necessarily lead to a convergence in the structure of the legal professions in different countries.

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Introduction

An observer of the legal scene in contemporary India quickly becomes aware of the presence of a stratum of legal superstars—advocates based at the Supreme Court and some of the High Courts who are very much in demand and widely known. These 'Grand Advocates,' as we call them, are the most visible and renowned legal professionals in present day India. Stories abound of their strategic acumen, their preternatural articulateness (speaking for hours and days without notes), their esoteric quirks and outsized incomes, and their contributions to the 'rule of law.' This elite handful of lawyers is involved in almost every high-profile case in what is one of the most active and powerful higher judiciaries in the world (Rajamani & Sengupta: 2010; Robinson: 2009). Their clients include India's new uber-rich, major multinational corporations, and the country's political class.

We argue that Grand Advocates (GAs) have not only survived, but flourished in the age of globalization – benefiting from, while resisting absorption by, the rising law firm sector. A series of structural features of litigation and the judiciary in India have played a dominating role in perpetuating this unique set of lawyers, and the culture they inhabit. Litigation in India tends to be less about money (as there are fewer deep pockets, judges rarely grant large monetary compensation, and it is difficult to collect an award), and more about control. Given the backlogged courts, cases may drag on for years and so it is necessary to secure beneficial interim orders as they relate to the ownership of property, command over an organization, or the validity of government regulation. To achieve these ends, Grand Advocates use the extensive human capital they have developed within the court system and their nuanced knowledge of both formal and informal judicial procedure. These assets are in many ways positional goods–particularly their reputational capital before certain judges–that are difficult to share with juniors or partners. They are also assets that can be used in a wide range of cases, thus lessening the pressure to specialize amongst this select group of lawyers, who are still largely generalists.

We know of no close parallels to Grand Advocates amongst lawyers in other countries, at least outside South Asia. Unlike the venerated French or Brazilian jurists, who flourish in a system where judicial precedent is less decisive, the GAs are not based in or linked to academic institutions, nor do they produce books or concepts (Sweet: 1992: 30-35). They are not "authorities" whose intellectual products are considered authoritative like the eminent British barristers who furnish "opinion of counsel" memoranda (Niles: 1963: 86). Like the increasingly exclusive US Supreme Court bar whose lawyers' name recognition increases the chance their clients' cases are granted *certiorari*, Grand Advocates in India are known for securing hearings for their clients (Sundquist: 2010). However, the US Supreme Court bar handles far fewer cases than the Grand Advocates and does not wield the same dominating influence in their relationship with judges.

The Grand Advocate's relative uniqueness when compared to their potential peers elsewhere is worth noting as one of the central debates in comparative law is the degree to which legal systems around the world are converging. For example, scholars have examined whether and to what extent constitutions are converging (Tushnet: 2009; Posner & Dixon: 2010), or whether convergence is occurring between civil law and common law traditions (Merryman: 1987; Mattei & Pes: 2009). Meanwhile, few

systematic comparative studies of the legal profession have been undertaken (Dias et al.: 1981; Abel & Lewis: 1988; Burrage: 2006; Dezalay and Garth: 2010; Halliday and Karpik: 2011) and much less attention has been paid to the question of whether the structure of the legal profession is converging. If globalization is creating increasingly similar laws, regulations, and adjudicatory proceedings one might expect the legal profession to also become more alike across countries as lawyers adapt to increasingly analogous contexts.

Answering this larger question about whether the structure of the legal profession is converging across countries is beyond the scope of this chapter. Instead, we provide a counter-example to the convergence thesis and, by detailing how Grand Advocates shape and are shaped by distinct features of the legal system in which they operate, show how unique forms of legal practice may be perpetuated even in the face of potentially homogenizing forces.

We begin our study, which is based on interviews with more than fifty legal professionals in Delhi, Mumbai, and Madras, by analyzing the structure of the legal system and the Indian bar in which Grand Advocates flourish.[4] We then turn to examine the type of work Grand Advocates do, the arc of their careers, and the impact they have on the legal system. Although the structure of this section of the bar has witnessed notable continuity, we conclude by finding that a new set of demands from clients, judges, and other lawyers may in the future fundamentally alter the space Grand Advocates currently occupy. This will likely not erase the distinctiveness of the Grand Advocates, but will certainly shape their evolution.

I. Background

Pre-British India had learned specialists in law, but nothing that corresponded to the legal professions of the modern world, which are made up of qualified practitioners who earn a living by representing clients before courts and tribunals and designing transactions that are affected by legal rules (Rocher 1968-69; Calkins 1968-69). Today's Indian legal profession is a product of the complex of British-style legal institutions imposed on India in the 18th and 19th centuries (Setalvad 1960), but lawyers in India developed along different lines than their counterparts in Britain or elsewhere in the common law world.[5]

The professional pattern as it crystallized in the late 19th century was a composite, drawing upon two main streams: (1) the royal courts in the Presidency towns (Bombay, Madras, and Calcutta), which were ruled by the British crown and English law administered by British judges and there was a dual profession, with barristers briefed by solicitors. (2) Until 1857 most of India (i.e., the mofussil or interior) was ruled by the East India Company, which operated courts staffed by civil servants and which licensed indigenous vakils (a Persian word that earlier referred generally to an agent or emissary) to represent clients in those courts. The two systems

[4] Interviewees are kept anonymous in this article. Many of the interviewees would themselves be considered Grand Advocates. We also interviewed younger litigators, advocates-on-record, law firm partners, general counsel, and other legal professionals with knowledge of these advocates.

[5] The reference to India here is inclusive of all of British India. To a considerable extent our observations about Indian lawyers apply to Pakistan and Bangladesh, whose legal institutions also derive from those of colonial India.

of courts were merged when the British government displaced the East India Company after the 1857 rebellion (Derrrett: 1963).

Recruitment to the profession was through multiple sources: British barristers arrived from the UK to enjoy the higher fees that could be earned in India; elite Indians went to the Inns of Court in London to secure qualification; others acquired on-the-job training at the Indian courts; and (after the establishment of Universities in India starting in 1857) these were joined by those who had attended law courses in India (Galanter: 1968-69; Gandhi: 1988).

There was not a single hierarchy of courts in British India. Instead, there was a hierarchy within each province, culminating in a High Court (or in a few cases, a Court of the Judicial Commissioner). Appeal from these courts lay to the Privy Council in London and was expensive and rare. In 1935, under the Government of India Act, a federal court was established with a narrow jurisdiction over all of British India (Gadbois 1963: 19). After Independence in 1947, the Constitution (1950) brought unification into a single hierarchical system of courts, headed by a Supreme Court with an expansive jurisdiction and wide powers of judicial review.

With the passage of the Advocates Act (1961) all the old grades of practitioners (vakils, barristers, pleaders of several grades, and mukhtars) were abolished and consolidated into a single body of advocates who enjoy the right to practice in courts throughout India. The only *formal* distinctions that remain within this body of advocates are:

(1) Lawyers can be designated as senior advocates by the Supreme Court or any of the 21 High Courts. This is an elite stratum along the lines of the British Queen's Counsel (QCs). But the Indian distinction is far more selective: QCs make up almost 10% of British barristers, while senior advocates are less than one percent of Indian lawyers (The Bar Council: 2013). Senior advocates enjoy priority of audience; they cannot appear without a separate "briefing" advocate (or, in the Supreme Court, an Advocate on Record). Seniors are foreclosed from doing pleadings, drafting, and conveyances (Bar Council of India Rules 2009, part 6, ch. 1). We estimate that there are about a thousand senior advocates, including some four hundred designated by the Supreme Court (Supreme Court of India). A senior advocate designated by one court is recognized as a senior in other courts as well. Senior advocates may be attached to firms, not as partners or employees, but on retainers or fee arrangements. Few of the most prominent are so attached.[6]

(2) The requirement that an advocate on the Original Side of the Bombay and Calcutta High Courts be briefed by a solicitor was abolished in 1976, but it is still possible to qualify as a solicitor. This requires an extended apprenticeship as an articled clerk and passing an examination. Of those who seek this qualification only a small portion (5 or 10%) pass the examination. For example, in 2010 in Bombay only 11 of the 171 candidates (and none of the 30 first-time takers) passed (Ganz: 2010). Some elite advocates in Bombay still insist on being briefed by a solicitor (Int32), but this is a mandate of custom rather than law.

[6] There is no specific prohibition of a partnership between a firm and a senior counsel, except many senior counsel argue that if a firm they were part of met with a client it would be perceived as them meeting with a client thus violating provisions under the Advocates Act barring seniors from meeting directly with clients.

(3) The Supreme Court early on enacted rules requiring that all matters at the Supreme Court be filed by an Advocate on Record (AOR). AORs can argue matters, but frequently they serve in a solicitor-like role, briefing advocates. In all cases they perform the various formalities of registration and scheduling of the case. One becomes an AOR by passing an examination administered by the Supreme Court.[7] In 2011 there were some 1872 AORs. Estimates of the number actively engaged in practice range from 400-500 to 1000 (Shrivastava: 2012).

The number of persons admitted to practice law in India has increased from about 70,000 at time of Independence in 1947 to some 1.2 million today. No one knows how many of these are actually engaged in the practice of law. Our guess is that at least one-third and possibly one-half are *not* practicing law.

Table 1
The Lawyer Population

Number of Practitioners Enrolled with the State Bar Councils	
Year	Number
1952	72,425
1985	290,676
1999	626,603
2011	1,273,289

Source: Report of the All-India Bar Committee (1953), Institute of Developing Economies: 2001: 72; Ganz (2013)

Less than 1% of these advocates are admitted to practice at the Supreme Court. As of 2013 the Supreme Court Bar Association lists 6806 active resident members, 908 active non-resident members, and 2701 temporary members.[8] The fraction of these with a substantial practice at the Supreme Court is not known.

II. The "Basic Structure" of the Indian Legal Profession

Most of the old categories and grades of practitioners have been abolished, but new forms of diversity amongst lawyers have emerged. Lawyers may be found in firms, as in-house counsel (Wilkins: 2012), and in legal process outsourcing (Weiss: 2008). All of these have proliferated in the last twenty years, but the great bulk of India's lawyers

[7] An AOR must practice as an advocate for four years, train with a senior AOR for one year, then appear for an examination conducted by the Supreme Court. An AOR must maintain a registered office within 16 kilometers of the Supreme Court building. Supreme Court of India Rules, Order IV (2010)
[8] Supreme Court Bar Association Members Directory, *available at* http://scbaindia.org/Web/aspx/directory.aspx

remain attached to the dominant model of professional life – the free-standing advocate who practices mainly, if not exclusively, at a single court. This model, formed in colonial times, was firmly institutionalized by the early 20th century. In spite of the vast political and social change India has undergone, if we were to go around India in 2013 and observe lawyers, we would find a set of distinctive and characteristic features of professional life that are surprisingly similar to what we would have found in 1913.

We might think of these features as the 'basic structure' of the Indian legal profession. A schematic portrait of the modal organization of legal services in India, then or now, would include:

- Individualism: lawyers practice by themselves, usually assisted by clerks, and sometimes by juniors in a casual and temporary apprenticeship arrangement. There are few firms or other enduring units for coordination and sharing among lawyers. Firms are proliferating but still involve only a tiny fraction of practicing lawyers—perhaps 2 or 3%—and the larger firms are rarely focused on litigation.
- Lawyers are oriented to courts (and other court-like forums) to the virtual exclusion of other legal settings. The orientation to courts is displayed spatially: lawyers spend much of their working day at a particular court. They typically see clients in home offices or in chambers near or attached to the court, or simply at the verandah or a corridor of the court. The identification of the lawyer with a particular court goes back to the earliest days of British rule (Sahay: 1931: 24, 26, 33).
- The performance of the lawyer is overwhelmingly oral rather than written. With occasional exceptions, advocates focus on courtroom advocacy rather than advising, negotiating or planning. That is, they are *de facto* barristers who operate in a setting in which the 'solicitor' functions of advising are far less developed. Judges frequently cite oral argument in their judgments and advocates feel little constraint in making arguments that were only partially developed in the written submissions, or that were not mentioned at all. The dominance of the barrister model is displayed in, and reinforced by, the structure of remuneration. Lawyers are typically paid by the "appearance"—that is, for court work in a particular case on a given day. (Moog: 1992: 26)
- Lawyers are relatively unspecialized. Although some advocates have a special expertise in tax or criminal matters, few lawyers limit themselves to one area of law.

One significant consequence of the thick and continuous interaction of lawyers at the court premises is that the lawyers at each court form a guild with a capacity for collective action. This was displayed dramatically in the resolute and persistent actions of the Pakistani lawyers – who occupy a social world similar to that of their Indian counterparts – who struck and demonstrated when judges of the Pakistan Supreme Court were removed by President Musharraf in November 2007 (Ghias: 2010). The Indian examples of lawyers' strikes and boycotts are generally less inspiring. The first such assertion of lawyer muscle at the Supreme Court took place in 1982, when the Supreme Court Bar Association staged a strike in response to a judicial memorandum that suggested eliminating oral argument in certain categories of cases (Dhavan: 1986: 55-56). The strike action was called off when the judges reassured the lawyers that the

suggested changes, which would have undercut a major source of income for lawyers, were merely proposals (Hindustan Times: 1982). In 2012, the district court in Delhi was brought to a halt by lawyers protesting a rule that placed a monetary limit on cases that could be heard by the district courts (IBNLive: 2012). In the same year lawyers in Karnataka boycotted courts across the state after a police attack on lawyers at the civil courts complex in Bangalore, where lawyers had attacked journalists covering a politically important trial, claiming that the journalists had portrayed them poorly in connection with earlier encounters (Daily News and Analysis: 2012).

While Grand Advocates frequently hold bar offices, they are remote from involvement in such direct action. They typically disapprove of exercises of lawyers' street power although as we will see the bar's militant opposition to reform helps to preserve many features of the setting in which the Grand Advocates flourish.

III. Steep Hierarchy

The pre-eminence of the Grand Advocates is a contemporary expression of a long-standing and pervasive pattern of steep hierarchy at the bar. At every level, the provision of legal services was (and is) dominated by a small number of lawyers with outsized reputations, who have the lion's share of clients, income, prestige, standing and influence.

The pre-eminence of the Grand Advocates is a contemporary expression of a long-standing and pervasive pattern of steep hierarchy at the bar. At every level, the provision of legal services was (and is) dominated by a small number of lawyers with outsized reputations, who have the lion's share of clients, income, prestige, standing and influence

This pattern has been noted by a number of observers of the Indian legal scene over the last half-century. For example, in his late 1960s study of a district bar of about a hundred lawyers in Haryana, Charles Morrison (1968-69: 261) identified "five or six" who are "recognized as 'leading lawyers." In his (late 1970s) study of a district court in the Punjab, J.S. Gandhi (1982: 79) reports that the 12 "specialist" lawyers (in a bar of over two hundred) "handled among themselves at least fifty percent or more of the total practice." Robert Moog (1997: 73-74)in his mid- 1980s account of the Varanasi bar describes how, of the over 3000 advocates in Varanasi, "[a]pproximately two dozen senior advocates…dominate the civil practice…. It is not unusual for members of this elite group to have as many as twenty-five matters scheduled in court on one day." In his 1991 study of lawyers in a Haryana District, Hans Nagpaul (1994: 59) found that 10% of the 300 lawyers enjoyed some 75% of the legal business.

Upon the establishment of the Supreme Court of India in Delhi in 1950, lawyers were drawn to the new court from cities where there were existing High Courts. At first these lawyers commuted to Delhi to argue their cases. Later many shifted to the capital-- as prominent lawyers at the High Courts have continued to do. Before long, the Supreme Court had its own steep hierarchy of practitioners headed by an entourage of 'leading lawyers', much along the lines familiar in High Courts and district courts throughout the country.

We estimate that the number of pre-eminent seniors – those we are calling Grand Advocates—at the Supreme Court today is something on the order of 40 to 50. If we add those of comparable status at the High Courts, there are at most a hundred that make up what one observer refers to as the "giants and legends of the litigation

system."[9] This shape—very steep hierarchy, with a concentration of prestige, authority, and prosperity in a narrow group of senior lawyers—has been a constant feature of law practice in India in colonial times and after Independence, in the highest courts and in local courts, when the bar was flourishing and when it went through difficult times.

Back in 1983 T.K. Oommen (1983), a leading sociologist, provided a shrewd assessment of the profound consequences of the steep and pervasive professional hierarchy in the Indian bar. The concentration of business in a few hands, he observed, underlies a culture of postponement in the judiciary. Judges give postponements to eminent lawyers, who are constantly juggling more courtroom obligations than they can possibly attend, meaning that cases are dealt with in disconnected bits over a long period of time. As one young lawyer observed —this was almost thirty years later—, "There is a cartelization of litigation by the senior counsel. They take on more cases than they can deal with. This leads to delays in the courts because the seniors don't make it for appearances. . . . As a result, the quality of litigation suffers overall and it gets more expensive."[10]

Oommen (1983:24) concluded his study by remarking that "most importantly, the leading lawyers rather than the judges, emerge as norm-setters and value-givers in the Court system. Interpreted meanings provided by the lawyers in support of their clients rather than interpretations by judges assume importance in the application of law." Oommen made these observations about the dominant position of the top lawyers compared to the judges in the 1980s, before liberalization. But this sense of the dominance of the top lawyers is if anything more pronounced today. One leading lawyer observed: "The judges are almost irrelevant. We all know some man has to do it. It's good if they are good, but [it is] not expected. The counsel have learned to treat them with kid gloves. To guide them. I think the judges have a deep rooted inferiority complex."[11] As this suggests, at least some Grand Advocates perceive themselves as positioned further up in the hierarchy than most judges. This sense of superiority may be reinforced by the social backgrounds of many of the Grand Advocates and judges. While Grand Advocates are almost always from a cosmopolitan background and well versed in English, judges come from a variety of settings, with many raised in non-English speaking households in more provincial settings.

We might think of the dominance of the lawyers as an instance of regulatory capture (Bernstein: 1977), in which the agenda and decisions of an agency (the courts in this instance), established to regulate an industry (here, litigation) in the light of external standards, instead reflects the perspective of the industry it is supposed to regulate (especially in relation to courtroom management). This is especially likely where, as here, the agency decision makers are recruited from among the regulated.

But the capture metaphor may lead us to overlook a more fundamental point. Thomas Reed Powell (1880-1955), a Harvard law professor, is credited with the observation that "If you think you can think about a thing that is inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." (Simpleman: 1986: 545) In this spirit we can appreciate the artificiality of thinking about the institution of the Grand Advocates without thinking of the judicial setting in which they flourish. Indeed, we might imagine the Grand Advocates and

[9] Email from Nikhil Chandra, 12 Apr. 2012.
[10] Interview 18
[11] Interview 23

India's higher courts as the inextricably attached parts of the same creature. In a setting where oral presentation overshadows written submission and where the judges have insufficient time and resources for independent research, the GAs enjoy the esteem of the judges, who give them more "face time" to argue and who rely on their accounts of the law and the facts. The GAs play an oversized role and their presence thus helps to maintain the acephelous system in which similar legal questions are decided in slightly different ways by multiple small benches of judges of the Supreme Court and High Courts.

As far back as 1977, Rajeev Dhavan (1977: 415) observed the phenomenon of "different judges deciding the same point of law as part of differently constituted Benches [of the Supreme Court] reach[ing] different results." Since then, departure from uniformity has been aggravated by the multiplication of judges and benches and the reduction in the number of larger benches (Robinson: 2013a: 173). When the Supreme Court was established in 1950 there were just eight judges. In the 1950's they sat on five-judge or larger benches for 13% of published decisions, and otherwise regularly sat on three judge benches. By the first decade of the 2000's the designated strength of the Court had grown to 26 justices, increasing to 31 in 2008. Some 40,000 admission matters are now heard on admission days (nowadays Monday and Friday) by over a dozen division benches that typically consist of just two judges each. Similarly, the 5,500 or so regular hearing cases (heard on Tuesday, Wednesday, or Thursday) are decided by these smaller division benches. (Robinson: 2013b; Robinson: 2011: 28).

The presence of so many benches, and the resulting pervasive (though mild) indeterminacy of precedent, increases the chances that representation by a GA may make a difference in outcome. At least it is perceived to possibly make a difference by significant numbers of clients with deep pockets engaged in controversies where the stakes make irrelevant the size of legal fees. The standing of GAs with the judges is a positional good in limited supply (Hirsch: 1976)—there can only be so many top lawyers familiar to the judges and so lawyers with reputations of being top lawyers have enhanced value to many clients. We might think of litigation in India as a kind of fabulous beast guided by modest and quickly-replaced judicial forelegs and driven by powerful Grand Advocate hind legs. The outcomes are, as Dhavan observed, "technically unpredictable" (Dhavan: 1977: 461) and invite investment in high end advocacy to further destabilize the results.

IV. The Seniority Factor

Seniority is a major theme that surfaces at many points in our scan of the profession. Seniority works differently for judges than for lawyers. On the bench, adherence to seniority in promotion (senior judges of the High Courts are generally elevated to the Supreme Court) is combined with a rigid and early retirement age, 65 on the Supreme Court, 62 on the High Courts, and 60 in the lower courts. Seniority makes retirement and promotion predictable and means that most judges will not serve on the Supreme Court for more than five years (Chandrachud: 2012).[12]

[12] Although it is a matter of custom rather than law, the power of the seniority norm was enhanced by the "supercession" of three more senior Supreme Court Judges in 1973. A succinct account is found in Lee 2010. During the Emergency (1975-77), Indira Gandhi superseded Justice HR Khanna who was next in line to become Chief Justice after he dissented in *ADM Jabalpur v. Shukla* A.I.R.1976 S.C. 1207 which held that because of the Emergency citizens did not have a right to petition the courts for their habeas corpus

Some distinguished advocates decline to ascend to the bench, many because of the money, but others because compulsory early retirement diminishes the attraction. One GA told us that he turned down a judicial appointment because he could predict that he would eventually be Chief Justice of India for but one year (Int32). For those on the bench seniority is a wasting asset that affords standing, influence and a privileged lifestyle but then suddenly disappears. The forcibly-retired judge is then dependent on political figures who can bestow appointments to commissions, tribunals, etc. or on private parties—including at times Grand Advocates—who can then engage the former judge for lucrative arbitration assignments. It is difficult for retired judges to serve, even as volunteers, with their former courts, for it is not clear how they are to be placed on the all-important seniority ladder.

For the GAs, on the other hand, seniority brings with it not only enhanced standing, but an enlarged fund of human capital in the form of contacts, experience and reputation. Often Supreme Court judges are not only younger than the senior advocates who argue before them, but the judges may have looked up to these advocates when they themselves were young lawyers. The judge almost undoubtedly has had his post for less time than the GA has been practicing in the Court meaning that the GA may feel more at home in the institution than the judge.

By tradition, senior advocates enjoy a right of pre-audience according to seniority, defined by the date they became senior—that is, they are entitled to be heard before those junior to them. If two advocates are briefed on a matter and they must meet for a conference tradition dictates the junior lawyer should go to the senior lawyer's office. Punctiliousness about seniority may limit collaboration. In a famous instance, in Mrs. Gandhi's 1975 election case, "she wanted [famed advocate Nani] Palkhiwala to come to Allahabad to represent her" but Satish Chand Khare, her senior counsel objected. "He said that Palkhiwala was junior to him and he would withdraw from the case if Palkhiwala was brought in. Since Khare had been involved from the very beginning and was familiar with all the facts, Mrs. Gandhi did not want to run the risk of his withdrawing and dropped the idea of bringing Palkhiwala to Allahabad." (Bhushan: 2008: 131) After she lost at the High Court in Allahabad, Palkhiwala did represent her on appeal to the Supreme Court.

V. Grand Advocates' Clients

Jawaharlal Nehru's father, Motilal Nehru, became one of the wealthiest men in Allahabad litigating the disputes of the zamindars (wealthy aristocratic landowners).[13] After independence, the zamindars disappeared with land reform, but other clients, like industrialists and banks, multiplied. Compensation remained high for top advocates, but given the sluggish pace of national growth and the government's large hand in the economy, fee increases remained tempered. In fact, law was seen as one of the least attractive career choices for promising young students, who instead flocked to more

rights. When he was not made Chief Justice, Khanna resigned in protest. With the end of the Emergency, Indira Gandhi and many of her policies, including her political manipulation of the judiciary fell into disrepute. Since then the government had adhered faithfully to the seniority norm.

[13] Advocates in India have long been paid at high rates. Indeed, part of the appeal for British barristers to come from England to India was the higher rate of compensation. Schmitthener 1968-69: 346.

desirable professions like medicine, engineering, or the civil service.[14] However, this changed as liberalization opened up abundant new revenue streams for lawyers – multi-national corporations began to eye India as a prime global site for investment, India minted thousands of new millionaires and billionaires, and law firms rose to prominence to cater to the businesses that were helping drive the country to the 7 to 9% growth rates it witnessed in the first decade of the 2000s.

As a result, today's top counsels' fees are exceptionally high. As of 2012, leading advocates not infrequently charged 500,000-600,000 Rupees per appearance ($10,000-12,000) at the Supreme Court. In the Supreme Court's hallways, Grand Advocates can be seen moving briskly from court room to court room with a flock of juniors, clerks, and clients in tow as they proceed from argument to argument. This is a business plan in action. On an admission day at the Supreme Court, sometimes referred to amongst top lawyers as "harvest days", an advocate is often able to appear in as many as five to eight arguments. Many of these arguments may last just a few minutes, allowing the advocate to reap substantial monetary rewards in the course of just a few hours. On regular hearing days, advocates usually have far fewer matters, which they argue at greater length and more substantively, although counter-intuitively they charge about the same for these matters as for the shorter admission hearings. To prepare for admission and regular hearing arguments lawyers hold conferences with their clients for which they charge an hourly fee. Otherwise, all preparation costs are incorporated into the appearance fee. It should be emphasized that the earnings of these advocates do not derive from their ownership interest in a business (i.e., a law firm) with salaried workers, but are payment for services rendered by them personally. Unlike the partners in law firms they do not collect payments for leasing their reputational capital to subordinates who can then command enhanced fees (Galanter & Palay: 1991). Instead, they pay their juniors, clerks, and other staff out of their own pockets for the marginal contribution of the latter to the bundle of services delivered to clients by the senior advocate.

Top advocates in India enjoy incomes that rival the most highly remunerated lawyers anywhere in the world.[15] Abhishek Manu Singhvi, who along with being a top litigator is also a member of the Rajya Sabha, reported his annual income at 50 crore (about $10 million) in 2010-2011. Ram Jethmalani, another leading lawyer who is a member of the Rajya Sabha, reported his at 8.4 crore ($1.7 million) (Dhawan 2011). Shanti Bhushan, a leading advocate who was on a public committee to design a new anti-corruption agency, disclosed an annual income of 18 crore ($3.6 million) (Hindu 2011). Both Jethmalani and Bhushan are well over 80 and no longer litigate as much as they once did. One advocate estimated that top Supreme Court lawyers are generally earning between 10 and 50 crore a year (i.e. $2-10 million annually) (Int25). Leading lawyers that appear before the Bombay and Delhi High Courts have comparable fees, while those elsewhere in the country usually charge considerably less.

[14] As Schmitthener noted in the late 1960s "The legal profession no longer offers the most honored and profitable work that can be attained in India. It no longer draws the best students, and it no longer dominates the social and political life of the country. The monopoly it had on the leadership of the country for over a century is now gone. In a way the rest of society has caught up with the profession." Schmitthener 1968-69: 47

[15] See Sahgal and Bamzai 2010; Bar & Bench News Network 2010.

Despite their high rates, client demand for these select lawyers is robust. Most of the leading advocates we interviewed conceded that their fees were exorbitant, but justified continuously raising fees as a mechanism to keep their workload manageable. As one Supreme Court lawyer explained, "Lawyers like me charge the sky. It is a way of filtering clients." (Int14)

Risk aversion often brings cases to senior counsel, especially those with big names. As one lawyer who worked at a distinguished law firm stated, "The head of legal at a large corporation wants to ward off blame. They first hire a large firm like Amarchand so they can say 'Amarchand told me.' The firm doesn't want the responsibility so they then hire a grand advocate so they can say they had the best. Everyone just keeps passing on risk." (Int24) On a similar note, explaining why 10% of the lawyers got 90% of the work, a top Supreme Court lawyer noted, "When the stakes are high you get the best surgeon. It's the same in law."[16]

Under the Advocates Act, senior counsel are not permitted to have their own clients. Instead, they must be approached by a briefing counsel who is retained by the client and who actually files the case. Briefing counsel are often solo practitioners who argue smaller matters themselves, but for larger cases enlist a senior counsel. Other times briefing counsel are attached to law firms. Senior counsel are traditionally not attached to law firms, and some senior counsel interpret the law as barring them from being a part of a law firm.[17] One prominent lawyer at the Indian Supreme Court estimated that about 70% of his work came through individual advocates, while about 30% came from law firms (Int10). Most large law firms in India do not have extensive litigation practices, perhaps in part because they anticipate senior counsel would take up too much of the firm's profit margins.

Clients who have had positive experiences with certain seniors commonly request their briefing counsel to hire those seniors. At the Supreme Court, clients from particular regions of the country often seek out top advocates from their region. Other times, clients request a top advocate who is from the same region as the judge hearing the case or is otherwise perceived to have a particularly good rapport with the judge. Some leading advocates seem to cultivate relationships directly with clients, although under the Advocates Act and Bar Council Rules (Part VI, Ch. 1) they cannot deal with clients directly. As one top Bombay lawyer suggested, "If a senior has a good client – say Reliance [a major Indian Corporation] – they aren't going to let them go away, so they will keep a junior as an AOR for that client." (Int21) In-house counsel frequently demand that their briefing counsel ensure certain senior advocates argue their cases, and more generally work with these senior advocates on their matter. As a leading lawyer noted, "The growth of in-house counsel has been positive. Often the associate of the law firm is clueless and you get your real briefing from the general counsel." (Int10)

Firms and briefing counsel often have a strong role in guiding clients towards their favorite seniors. As a partner in a leading solicitor firm in Bombay explained,

[16] Interview 9; In the US context, Frank and Cook have commented that top lawyers receive salaries far higher than their social value would justify because everyone wants the "best" lawyer, particularly for high stakes litigation. Frank and Cook, 16 (1995)

[17] There is no specific prohibition of a partnership between a firm and a senior counsel, except many senior counsel argue that if a firm they were part of met with a client it would be perceived as them meeting with a client thus violating provisions under the Advocates Act barring seniors from meeting directly with clients.

"There are 7 to 8 top arguing counsel in Bombay that I would trust a brief with. At the Supreme Court, to be honest, it is only 5 to 6. In the Delhi High Court it is larger. I judge a good counsel on (1) competence level (2) how much time we can get with the senior (3) their face value, particularly for [admission matters] in the Supreme Court where at most you will have 10-15 minutes in front of the judge." (Int20) One well known High Court lawyer estimated 75% of his work came from 20-25 law firms and briefing counsel, who kept returning to him for work. He described how ""Each senior counsel has favorite briefing firms. Particular law firms use "x" or "y" as senior counsel." (Int8)

Top senior counsel are notoriously inaccessible and this is one of the largest complaints from briefing counsel and clients. As a lawyer at a solicitor's firm in Bombay lamented, "Half my job is chasing senior counsel." (Int19) Some firms are known to designate young lawyers to follow seniors while they argue matters in court so that the firm can keep track of where the senior is and remind him to attend their client's hearing.

Indeed, seniors will frequently miss hearings because they are arguing another case in a different courtroom. This results in part from the unpredictability of a chronically backlogged and poorly managed judicial system. In this context, judges will often allow advocates (or their juniors) to reschedule matters, requesting a "passover" if the senior is either not available or inadequately prepared. As a top senior in Bombay explained, "It's fair when clients complain that we aren't there for hearings, but I think we make reasonable estimates about what matters the judges will and will not reach."(Int21) Another argued, "When I have 5-6 matters on a day I think only one or two will go forward meaningfully. The system allows this. There is no penalty from the court or client if I miss a hearing. There isn't good scheduling so there is the possibility to have a lot of flexibility." (Int23) Other seniors countered that their colleagues booked too many matters, and even charged for hearings that they actually missed. A handful of leading advocates have a reputation for taking fewer cases, despite the loss in income, because they feel taking too many matters would be unfair to the interests of their clients.

Since at least the 1980's, litigants with deep pockets have used "blocking" or "negative retainers" to disqualify the major top advocates from being engaged by opponents (Int10). Back in 1986 a distinguished academic reported that "Resourceful clients, especially big corporations and universities make it a practice to offer a retainer to expert lawyers, not so much with a view that they will act in the case but with the view that their services do not become available to the other side….Wholesale buying of legal services in this way is now a standard strategy for corporate clients…." (Baxi 1986: 459) These litigants identify the top lawyers in the court who would be ideal for their case and then "block" them, usually by paying them for a conference to discuss the case. Since the advocate has been retained by one party he can then not appear for the other side, limiting the talent the opposition has to choose from. This practice is controversial and some lawyers will back out if they feel they are being used for blocking, or will require that they be given the first chance to argue. Others view it as an acceptable form of business and will accept a negative retainer without even holding a conference or insisting that they argue part of the matter. In a major case, it is not uncommon for a litigant to block, or attempt to block, five or six lawyers.

For large matters, litigants frequently retain more than one senior, not only to "block" the other side, but because there is no assurance that their counsel will actually

be available for the hearing, given lawyers' propensity to overbook and the unpredictability of the Court's scheduling.[18] Some sought after lawyers are even rumored to charge a double rate to guarantee their appearance. One Supreme Court lawyer recalled a joke told about Ashok Sen (a very prominent Supreme Court advocate and one-time Law Minister who practiced up until his death in 1996) that Sen required a triple fee – "one for the case, one for the promise to appear, and the third to keep the promise." (Int27)

One of the largest sources of litigation work is the Government. Top Supreme Court lawyers will often serve as an Additional Solicitor General, Solicitor General, or Attorney General at some point in their careers, taking a sharp cut in their income to do so. A handful of top lawyers are also closely related to political parties. For example, Ram Jethmalani and Shanti Bhushan were law ministers, Abhishek Manu Singhvi is a Rajya Sabha member, Arun Jaitley is the leader of the opposition in the Rajya Sabha, Kapil Sibal is Minister of Communications and Technology, and P. Chidambaram is Finance Minister.[19] Some leading advocates also engage in lobbying work, but most official lobbying is done by law firms.

VI. Grand Advocates' Work

Advocates at the Supreme Court have strikingly wide-ranging practices. As one quipped, "We are all generalists here." (Int12) GAs almost all have a portfolio that includes a substantial amount of corporate work, but usually also some combination of tax, constitutional law, intellectual property, government employment law, property, and criminal law. Leading lawyers tend to be focused in the Supreme Court or one High Court, but will travel to other cities to argue in another court for their client, charging a much higher rate to do so. Work before tribunals–such as the securities appellate tribunal, the competition appellate tribunal, the national green tribunal, the income tax appellate tribunal, the central administrative tribunal, and appellate tribunal for electricity–has made up a growing portion of these lawyers work as these forums have multiplied and gained prominence post-liberalization. Some top advocates we interviewed also reported that they now spend 5 to 15% of their time on arbitration. Indian Supreme Court and High Court judges often serve on tribunals or as arbitrators post-retirement so it is not surprising that litigants seek out Grand Advocates, who have established reputations before these judges, to represent them.

Most of the Grand Advocates' work at court is dominated by more procedural aspects of law. For example, one leading Supreme Court lawyer speculated that 70% of his work came from admission day (Int10). Pleading for stays and interim relief accounts for a substantial part of these advocates' work in court. During these shorter hearings, top lawyers face-value is at a premium. One lawyer explained, "Face value matters in matters like SLPs [i.e. admission hearings] at the Supreme Court where a decision is made in a minute. A man that regularly appears will matter to that judge. That lawyer will know what that judge considers worth hearing." (Int16) For the actual full hearing clients will

[18] Interview 12 ("Here you have to engage at least two seniors to make sure you'll have one. . . . This is because in the Supreme Court everyone keeps papers as you never know when the case will reach. It can be about to reach for three months. The system accommodates you if you have a conflict.")

[19] Note that Jaitley, Sibal and Chidambaram cannot currently practice before the Court because of their political positions.

frequently enlist another, less expensive, lawyer who will go into the details of the case. A top advocate's chief asset in many ways is the time and sustained attention he can obtain for the client before a congested and otherwise impatient court.

In Delhi and Madras lawyers typically operate out of offices in their homes or in chambers near the High Court or Supreme Court. In Bombay, lawyers tend to have their offices outside their homes. These offices, which usually have a conference room, an extensive law library, and a large, wide desk at which the senior sits, bustle with juniors, clerks, briefing counsel, and clients. Clients (and their briefing counsel) typically come to the lawyer's office because as one top lawyer explained, one "shouldn't go to a client's office"[20] as that indicated a degree of eagerness to please the client that denigrated the profession.

A top advocate might have anywhere from 3 to 20 juniors. A junior may work on one type of matter more than others, but explicit specialization is rare although not unheard of. In Bombay, juniors are traditionally not paid, and instead use their senior's chambers to become known amongst briefing counsel by giving noteworthy comments during conferences with clients. They use the infrastructure of their senior's chamber for their own work in their first years. In Delhi and Madras juniors generally do receive a salary, although they also take on their own work. Some seniors pay their juniors just a token salary while others pay the equivalent of salaries of junior associates at law firms. Historically in Madras pay for juniors has been higher on average even though seniors themselves are generally paid somewhat less there.

Briefing counsel drafts the initial brief, or at least set out the facts of the case. The senior then examines the draft, revising it with the help of juniors and the briefing counsel. In general the brief is given limited attention by the senior since the argument in court often deviates from it: instead he generally focuses on preparing his own notes for oral argument.

As already noted multiple senior lawyers will often be hired by a client to argue a case together. They may coordinate strategy in advance on the telephone. However, this coordination is frequently minimal and sometimes non-existent. As one Supreme Court lawyer explained, "I find there is a bizarre situation where sometimes you don't even know which lawyers are on your side. . . . The solicitor often won't tell the senior who is on their side. Maybe it's because they feel the lawyer won't study as much if they know another big gun is coming." (Int12)

Many seniors and other lawyers we interviewed commented on the lack of professionalism in litigation, which they felt meant that the quality of the work often suffered. As one rising lawyer surmised, "The expectations for work here are different [than in the West]. There doesn't need to be a high level of refinement. When you reach 85% you are good to go. The judges aren't great lawyers. The opposition lawyer will not be well prepared. It's not worth putting in the extra 15%, which takes 50% of the time. It's not that the lawyers couldn't perform, but there is no incentive."(Int23)

[20] Interview 9. Compare the observation of Theron Strong (1914: 378) who traced the transformation of the legal profession in early 20th century New York. Relations with clients, he reports, had "undergone a complete and marvelous change. …. The lawyer no longer receives the obsequious client hat in hand, but is subject to the beck and nod of the great financial magnate, who, whenever he desires to see his lawyer 'sends for him.' It would never do for the lawyer who values his practice to insist that his client should call upon him, instead of he calling upon the client."

VII. Entry and Ascent

Young lawyers often complain about how difficult it is for them to break into the elite world of litigation. Some of these barriers to entry are obvious. For example, the Grand Advocates operate in an English speaking world, where fluency is a necessity and British diction lauded. Only a minority of lawyers in India grew up in English-speaking households. Others struggled to gain the necessary command over language to become a Grand Advocate. However, language is not the only filter restricting entry into this high-end world.

Family connections, or being part of certain social stratum, have clear benefits for a young litigator. As one leading Bombay advocate recounted, "My father was a lawyer so (A) you get familiar with terms; and (B) socially you meet successful lawyers and judges. It demystifies everything. Many of the big names were my dad's close friends. The original side of the Bombay High Court is like one big family. Everyone knows everyone professionally and socially. Being part of that makes it easier." (Int17) With a family member in the profession, clients and briefing advocates become aware of you more quickly and one can use the office space and library of one's family member. All of this helps in the early years of litigation when paying briefs are rare and income negligible. Indeed, being able to make it through the early bare bones years as a litigator is perhaps the most formidable screening mechanism for the profession, favoring the survival of those who come with wealth and connections.

Being part of the same social milieu also helps in arranging to junior with a leading senior. Most of today's prominent seniors had themselves juniored for a prominent senior, and older seniors we interviewed spoke proudly of their "alumni" who had gone on to become successful lawyers themselves. There is a feeling that if you don't have an actual father in the profession you at least need a "godfather" (i.e. a prominent senior that you junior with) who can help guide you in the early years and raise your profile, bringing you critical early cases. However, most seniors said they accepted juniors on the request of friends, retired justices, or colleagues–there was no formal selection process. Thus it is beneficial, if not essential, to be located in this social stratum in order to elicit the needed referral to a senior.

The powerful role of social networks in acquiring clients and setting up a practice helps perpetuate the disproportionate presence of certain ethnic and religious groups in the profession. For example, in Madras elite Brahmins dominate the upper ranks of the bar because of their tight networks and long-standing proficiency in English. In Bombay, the Parsis, Gujratis, and Bohra Muslims were early first movers in the profession and continue to dominate its upper reaches.[21] In the Delhi High Court, post-partition refugees, particularly Sikhs from the Lahore High Court had an advantage, and their descendants continue to be disproportionately represented in the top ranks of the bar. The Supreme Court bar tends to be an amalgam of these privileged groups from around the country. Despite repeated inquiries we could not identify any Scheduled Caste, Scheduled Tribe, or Other Backward Class advocates who were regarded as part of the elite stratum of lawyers.[22]

[21] Marathi speakers dominate the bar of the less prestigious appellate side of the Bombay High Court

[22] Scheduled Caste is the official term for the groups formerly referred to as 'untouchables' or Depressed Classes and more recently as Dalits; Scheduled Tribe is the official term for the many aboriginal peoples of India; the "Other Backward Classes" are a set of groups officially determined to be underprivileged and, like the SC and ST, entitled to be beneficiaries of government "affirmative action" programs, typically in

Women also have had a difficult time breaking into the small group of Grand Advocates and into the upper ranks of litigation more generally. Of the 81 senior advocates designated by the Bombay High Court in the 20 year period, 1991-2010, only three were women. No women have been designated since 2006 (Menon: 2011). Historically, women have faced discrimination from colleagues, judges, and clients, even if there are signs such barriers may be lessening. As one seasoned woman lawyer explained, "Women lawyers before me were not married. Clients didn't use to take you seriously then. If you did get married then you moved with your husband so you couldn't set up a practice. . . . Some judges treated us well. Others were patronizing. [The discrimination] . . . isn't as bad now, but it hasn't totally vanished. I find if a woman raises her voice they don't like it, even though a male could do the same thing." (Int5) In 2012, after a woman lawyer was slapped by a male colleague in the Delhi High Court, 63 women lawyers successfully petitioned the Supreme Court to set up a committee to hear complaints of sexual harassment at the Supreme Court and in the lower courts (Times of India: 2012). More women are entering litigation, but clearly discrimination and obstacles still remain.

Many leading lawyers we interviewed bemoaned the deficiency of their own formal schooling, although it frequently did provide them with future networking resources. For example, many Bombay High Court lawyers are graduates of the Government Law College, while many Delhi High Court lawyers are graduates of Delhi University. During the 1990s, as law became a more fashionable field of study as liberalization provided increasing opportunities for graduates, the National Law Schools achieved prominence in legal education. These schools were originally created to produce high quality publicly-minded litigators to strengthen the "public interest" salient of the bar (Menon: 2009). However, graduates of the National Law Schools were in marked demand by law firms and corporations flourishing in the post-liberalization economy and many entered practice as in-house counsel or with firms in India and abroad. Some though have entered litigation and are becoming an increasingly prominent network in the courts.

In earlier generations, aspiring lawyers like Motilal Nehru, Mohandas Gandhi, and Mohammed Ali Jinnah pursued a university education abroad (almost always in Britain) and enrolled at the Inns of Court to qualify as barristers. But few of today's top advocates were educated in other countries, perhaps in part because in the decades after Independence, there were severe restrictions on foreign exchange and law had lost its standing as a path for ambition. In recent years, far more rising lawyers have gone abroad for education, particularly to obtain an LLM in the United States or United Kingdom, perhaps signaling that foreign credentials are returning in importance.

Several top advocates used government positions to further their careers. In their early years being a panel lawyer or standing counsel for a state government or public sector undertaking could bring assured income and visibility. Later, being Assistant Solicitor General, Solicitor General, or Attorney General often cemented an already prominent reputation and brought advocates into the elite heights of the profession. One lawyer discussed how he, "used these government jobs to work my way up." (Int8) Many

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the form of "reservations" (i.e., quotas) in educational institutions and government jobs. These groups comprise somewhere between one half and two thirds of the entire population of India. On the programs for their advancement, see Galanter 1984; Mendelsohn and Vicziany 1998; Thorat and Kumar 2008; Deshpande 2011, Verma 2012.

lawyers claimed they were simply asked one day to take on such a government appointments, although others suggested securing such appointment required significant networking. One well-known lawyer even cast aspersions on those taking political appointments, saying, "For a political appointment you have to hob-nob with industrialists and politicians. It's crony legalism." (Int9)

Another, less frequently taken, path to the upper ranks of the profession is to become known for one's academic work, usually by writing a treatise in an area of law.[23] As one lawyer who took this route explained, "When my first book came out my income went up four times." (Int9) No full-time academic is known as a leading lawyer, likely in part because academics are prohibited from practicing law in India (although practitioners can and do hold appointments to teach) (Bar Council of India Rules, Part VI, Ch II, Sect VII).

Public interest litigation (PIL), though only a tiny fraction of what the higher courts do, plays an important role in the public image of the judiciary and in the self-perception of the bar. Of the small set of lawyers who have a practice focused on public interest cases, variously defined, there is a tiny subset who are regarded as peers of the GAs. Such lawyers may be supported by a NGO or may be able to fund their operations from their personal wealth. A few other GAs combine extensive PIL with a commercial practice, while a large number of the top lawyers engage in occasional pro bono work that may include PIL or a prominent constitutional law or environmental matter. This pro bono work can help to establish an advocate's reputation in high profile matters and later helps maintain public visibility while supporting a cause lawyers are passionate about.[24] Relying too much on engaging in pro bono type work though has potential pitfalls for an aspiring senior lawyer. Advocates are designated Senior Advocates by the bench. This means that lawyers that are perceived to be too far outside the mainstream may be overlooked for this designation by the judges.

For many GAs, the media offers an important means to gain and maintain visibility. Advocates can be found regularly giving interviews on the news channels, which have multiplied since liberalization. This practice is controversial amongst some GAs who prefer to keep a low and, they argue, more dignified profile. They view interviews as a form of advertisement, which is banned for lawyers in India. Yet, such publicity, either through direct interviews or simply through newspaper reports about their cases, has assured that many advocates have become familiar presences in middle class households. For example, Ram Jethmalani, a well known criminal lawyer, had his name referenced in 499 articles between 2009 and 2012 in the *Times of India*, a leading English daily that also sets story trends for many local language papers. This was a comparable amount of reporting to the most covered judges on the Court and far more coverage than prominent law firms or law firm partners receive.

Table 2
Public visibility of various sectors of the legal profession:

[23] Such treatises, typically organized around the annotation of a statute, are the mainstay of the working library of most Indian lawyers. Many of the classics of the genre were produced by practitioners.
[24] As a side effect PIL cases provide work for other lawyers representing concerned clients. As one prominent PIL lawyer recounted, "The big commercial lawyers are happy with me because I bring them business. They have told me this several times. They must have earned crores from me." Interview 12.

Number of Articles in the Times of India from 2009 to 2012 Referencing (Source: Factiva):

Judges		**Top Advocates**		**Prominent Law Firms/ Partners**	
Justice Sathisivam	524	Prashant Bhushan	638	Amarchand Mangaldas	27
Chief/Justice Kapadia	491	GE Vahanvati	568	J Sagar	16
Justice Aftab Alam	408	Ram Jethmalani	499	AZB	10
Justice Singhvi	369	Harish Salve	385	Zia Mody	9
Justice Kabir	265	Gopal Subramaniam	368	Trilegal	5
Justice DK Jain	213	Shanti Bhushan	233	Cyril Shroff	2
Justice Dattu	147	Mukul Rohtagi	147		
Justice Lodha	147	KK Venugopal	145		
		Abhishek Manu Singhvi	139		
		Darius Khambata	133		
		Colin Gonsalves	88		
		PP Rao	83		
		Indira Jaising	81		
		Soli Sorabjee	70		
		Fali Nariman	43		

A few GAs contribute occasional op-ed articles to the English-language newspapers. Lawyers and judges in the upper reaches of the system are avid readers of these papers, whose contents become generally known in these circles. Other lawyers have used professional associations as part of their rise or as a signal of their clout. Many leading advocates are or were Presidents of their respective High Court Bar Associations, the Supreme Court Bar association, or the Bar Association of India.

VIII. The Impact of GAs

The flourishing of Grand Advocates is intertwined with other features of the Indian legal system, such as congested courts, insular social networks, overwhelmed and under-resourced judges, and the centrality of the judiciary to Indian political life. And their out-sized presence has numerous consequences for the legal system itself.

Many younger lawyers and briefing counsel view Grand Advocates with resentment. One rising advocate repeated a common refrain that many of the top lawyers are unnecessarily idealized by clients and judges, noting that, “We have given up maharajas on elephants, but we still have this.” (Int6)

Lawyers that we interviewed at law firms and in other practice settings often reported that at the outset of their careers they had considered litigation, but thought the field would be too difficult to break into given the social connections that were

perceived to be a prerequisite. They viewed workplaces like firms as providing a more professional and meritocratic environment. Even as globalization has channeled more money into the legal profession, the top rungs of litigation are still seen as an old boys' network where social connections amongst a select community, and face value with judges, are put at a premium. Indeed, these networks may be getting further entrenched instead of swept away (Dezalay and Garth: 2010).

An older lawyer lamented what he saw as the decline of the profession led by the Grand Advocates, "There is a lack of competence and discipline amongst the lawyers. They no longer tell clients they have a frivolous case. They don't try to figure out the best remedy based on cost-benefit analysis. Now it's just about familiarity of faces in the Supreme Court and who can speak best." (Int7) As one senior commented, "In the old days our role models were people like Seervai and Gupte[25] who didn't have massive work or the most earnings. Now the role model is the lawyer who is earning most." (Int27) A younger top leading lawyer described his generation as more "client and service oriented while the older seniors are more classical. We are more aggressive in my generation, less moral and not as much about the jurisprudence." (Int14)

Because their attention is spread so thinly amongst so many cases, some view the GAs as hurting the quality of jurisprudence as they do not spend as much time as they should developing their oral and written arguments resulting in poorly briefed judges (Int33). Further, since GAs often have multiple matters scheduled on the same day, they frequently have conflicts requiring judges to reschedule matters, contributing to delays in the judicial system overall. GAs also price out many clients, meaning only those who can afford these lawyers benefit from the distinct advantage they bring in either receiving admission for their matter or more favorable orders (Galanter: 1974).

Despite these complaints, senior counsel frequently noted their positive impact on the judicial system, upholding the rule of law. They commended themselves as a check on overstepping or unaccountable judges. The GAs prize their independence from firms and other corporate and government interests, which they view as giving them the ability to speak out more readily if they see problems in the justice system.

Their generalist knowledge and prominent stature also enables GAs to more actively push novel lines of argument in court, pushing jurisprudence in new directions. Perhaps the best known example of this is the celebrated role senior advocate Nanabhoy Palkhivala had in shaping the basic structure doctrine in the landmark Supreme Court case *Kesavananda Bharati v. Union of India,* AIR 1973 SC 1461 (Andhyarujina: 2010: 19). In that case the Court held that there was a certain "basic structure" to the Indian constitution that could not be amended, including its democratic, federal and secular nature. Arguably having a preeminent lawyer advocating for a controversial position allows judges more intellectual and reputational cover to take a new jurisprudential initiative, particularly if the judges do not feel confident in their own standing.

Conclusion

[25] H.M. Seervai (1906-1996) was a distinguished Bombay lawyer and Constitutional scholar whose highly respected commentary on the Indian Constitution, was first published in 1967. S.V. Gupte was a distinguished Bombay lawyer who served as Attorney General of India during the 1977-79 Janata government and was the author of a leading commentary in the field of Hindu law.

If Motilal Nehru or Muhammad Ali Jinnah[26] visited the Supreme Court today they would find a Court not altogether different than the Allahabad or Bombay High Courts in which they argued in the early years of the 20th century. The multiple court rooms, buzz of lawyers and clients in the hallways, and the structure of the bar would all seem quite familiar. Independence, liberalization, and globalization may have changed some of the clients, key provisions of law, and office technology—briefs are now neatly typed on a computer—but many elements of the culture of the justice system have remained surprisingly constant. In particular, the steeply hierarchical structure of the bar has endured, suggesting that it is an expression of more deeply entrenched features of Indian social life, or at least of Indian legal institutions. The reputational capital of the Grand Advocate remains one of his primary assets in a court system marked by overwhelmed judges with little assistance, the multiplicity and blurriness of precedent, and the centrality of oral presentation. In such a context, being known and trusted by judges is a positional good of which there can only be so much, placing those who have it in both a potentially lucrative and commanding position in relation to the rest of the bar.

Yet, there are signs that larger structural shifts are afoot that may affect the Grand Advocate's privileged position in this system. Law firms are increasingly looking for ways to bypass senior advocates. As one top firm partner indicated, "We have taken the step of encouraging our own inhouse lawyers to argue. There are two reasons. First, arguing counsel are hugely expensive and really unreliable. . . . Second, it adds value for money." (Int20) As more firms develop more of their own competent lawyers to argue for them this may undercut some of the business of Grand Advocates. Eventually, senior lawyers may even be brought into law firms where they can be given more extensive infrastructure for research and case management. Currently, there is little incentive for GAs to agree to such an arrangement because they would then lose the clients who come to them through other law firms or briefing counsel and their reputational capital is not shareable in the same way as a law firm partner's.

Meanwhile, the courts themselves are becoming less the exclusive site for litigation, affecting the business model of the Grand Advocates. The development of tribunals for tax, competition, telecom, airports, and other areas means that advocacy is becoming increasingly specialized. It is more difficult for a GA to visit all these venues compared to going from courtroom to courtroom in a High Court or the Supreme Court. These tribunals are developing specialized bars and although some tribunal judges are former High Court or Supreme Court judges, many of the other judges on the tribunal are not even legally trained, meaning they are not well acquainted with the reputations of the top lawyers, thus depriving them of much of their face value. Arbitration is also increasingly attracting lawyers' time as companies try to avoid the delays and unpredictability of the courts. Harish Salve, a prominent Indian senior advocate, joined Blackstone Chambers in London in 2013 in a move designed to allow foreign companies to more easily approach him to represent them in international arbitration or to consult him regarding the Indian market.[27]

[26] Muhammed Ali Jinnah (1876-1948) was a prominent lawyer in Bombay, a founder of the movement to partition British India and create Pakistan, and that country's first Governor-General.

[27] Ganz 2013. Salve continues to maintain a flourishing Delhi practice where he is well-known for representing and advising Indian and multi-national corporate clients.

The proliferation of forums and the attendant specialization in the law is inducing more lawyers to become experts in certain areas of law. Generalist advocates may increasingly be relegated to procedural matters and points of natural justice, while more substantive arguments about intellectual property or competition law gravitate to specialists. Meanwhile, some Grand Advocates may voluntarily turn away from litigation and spend less time in the courtroom, acting more as advisors or consultants to a client. As one leading advocate explained, "Today where law ends is not clear. It is becoming a mesh of consultancy and law. It's about policy." (Int10)

In addition, there are new pressures on GAs to increase the quality of their work. As one lawyer noted, "It might not be specialization that brings the leading lawyers down, but professionalization which requires more time on each case–briefing, preparing argument, and the court limiting its time so it's more content, less fluff." (Int13) Such professionalization might be prompted by the entry of foreign law firms. These firms would likely not litigate directly themselves and instead the initial effect of their arrival would likely be an initial upsurge in demand for the service of the GAs. But over the long run, as increasingly important customers of top advocates, they might demand higher standards and more emphasis on reliability, leading to a narrowing of grand advocates' famously sweeping portfolios.

A demand by clients for enhanced professional performance of GAs would be more likely if it was also demanded, or at least rewarded, by judges. For example, if judges admitted cases more selectively, punished lawyers for failing to appear at hearings, and placed more reliance on written arguments (and less on often repetitious oral advocacy) this might push GAs to more finely tune their briefs and schedules. Yet, given the pay disparities between the bar and the bench, it is unlikely in the near-term that a widespread improvement in the quality of judges will occur that might push for more professionalization amongst GAs.

The increasing number of talented students entering legal education means that there is a larger group of high quality young lawyers graduating each year. This group of rising lawyers may eventually help professionalize standards in litigation. More broadly, since so many of these top law graduates are now entering firms rather than litigation, the balance of power within the profession may eventually shift away from litigators and towards law firms and other forms of legal practice.

Studying the continuing vitality of segments of the bar like Grand Advocates allows us to better understand how the law is actually practiced, applied, and produced in India today. While some aspects of the legal profession may seem to be outwardly "converging" in a country like India – such as the increasing presence of domestic law firms that look like those found elsewhere in the world - the comparative uniqueness of Grand Advocates demonstrates how certain structural features of a nation's legal system can also generate and support a markedly divergent pattern of legal practice.

Glossary

Admission (miscellaneous) Days At the Supreme Court justices hear requests for the admission of a petition (generally on Monday and Friday). If accepted regular hearing is (generally) on Tuesday, Wednesday, and Thursday. Currently, all filings are heard by a

bench of at least two judges to decide whether a matter should be admitted for regular hearing. If a case can be disposed of quickly through a short order it may be done so during the admission hearing, instead of waiting for a regular hearing.

AOR [Advocate on Record] An advocate of at least four years experience who has passed a specially designated exam that enables him or her to act and plead for a client in the Supreme Court of India. The advocate must have an office within 16 kilometers of the Supreme Court. Only AORs may file a case in the Supreme Court under the Supreme Court Rules of 1966.

Blocking – negative retainer When an advocate is paid a fee by a litigating party to not appear for the opposing party.

Briefing or Instructing Counsel An advocate who does not argue a matter in court, but instead briefs the arguing counsel on the matter, and is often charged with writing the brief.

Constitution Bench – A Supreme Court bench of five judges or more which hears a substantial question of constitutional law

Crore A unit of 100 lakhs or ten million.

Division Bench A bench of two judges, the standard format in the High Courts and now the Supreme Court.

Face Value A colloquial term used to describe the perceived respect and deference a judge treats an advocate with by way of his or her reputation

Full Bench A bench of three judges

Juniors Advocates who typically work for a senior advocate at the beginning of their career in a type of mentoring or apprenticeship relationship.

Lakh Unit of 100,000. See also *Crore*

Leading lawyer A lawyer recognized by other members of the legal community (judges, lawyers, clients) to being one of the preeminent practicing attorneys at a given court.

Mukhtar In British India, originally unauthorized law agents, eventually recognized in 1879 as the lowest grade of lawyers, merged into the advocate category by the Advocates Act, 1961.

Original Side The jurisdiction of some of the High Courts extends to certain original civil and criminal cases as well as to appeals and the Courts have separate rules, procedures and dockets for these "original side" cases.

Panel lawyer. A lawyer who is on a panel of lawyers who is contracted to a public or private entity to appear, for a fee, on its behalf upon request.

Passover. A judge's indulgence of a lawyer's non-appearance or unpreparedness when his case is called, agreeing to call it again later in the session.

PIL [Public Interest Litigation]. A writ petition brought in the public interest in a High Court or Supreme Court to enforce a fundamental right of any citizen.

Pleader. One of the several grades of legal practitioners before the profession was unified by the Advocates Act, 1961. The pleaders practiced in the district courts, but could not appear in the high courts without becoming an advocate.

Rajya Sabha The upper house of the Central legislature. Members of the Rajya Sabha are predominantly selected by state legislative assemblies. Service in the upper house is not considered a full time government job and those who serve there are not disqualified from practicing law.

Regular Hearing Day. Generally Tuesday, Wednesday, and Thursday at the Supreme Court. When judges hear admitted matters to dispose of them through final orders. Judges typically hear more cases on admission days than regular hearing days. Miscellaneous matters (which might involve requests for interim orders, the addition or subtraction of parties, or other "miscellaneous" matters) may be heard on either admission or regular hearing day. The Supreme Court at different times in its history has heard admission and regular hearing matters on the same day or on different days than it does now.

Senior Advocate A honorific designation, conferred on an advocate by a High Court or the Supreme Court under the Advocates Act of 1961, based on the advocate's high standing in the Bar or special knowledge or experience in law.

SLP [Special Leave Petition] A petition to the Supreme Court under Article 136 of the Constitution of India by which the Supreme Court through its discretion can choose to hear any appeal.

Vakalatnama. Letter of authority from client to attorney.

Vakil. Originaly an agent, a person invested with authority to act for another, an ambassador or representative. In British India a practitioner authorized to appear in law courts, a grade of legal practitoners lower than barristers and advocates, but higher than pleaders. Merged into the advocate category by the Advocated Act, 1961 but the term is in wide use as a synonym for lawyer.

Zamindar A landlord (usually large), who had duties to collect revenue from, and rights of governance over, his tenants. Zamindars were abolished by various land reform acts in the 1950s and 1960s.

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