TELLING THE TRUTH
OR
THE LEGAL STATUS OF THE LIAR PARADOX

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Laymen often accuse lawyers of telling lies. According to at least one concept of law,[1] however, lawyers do not need to believe in what they say. Is it any wonder, then, that laymen mistake lawyers for liars?

There are even some legal systems that equate lawyers with liars. The thirteenth century Responsa Rivash limited the use of lawyers in criminal proceedings until after the court had given the defendant an opportunity to confess the crime. Post-Talmudic authorities explain this law as limiting the propensity of lawyers to tell lies; and even where Jewish law allows attorneys, the same authorities express concern that lawyers will teach laymen to tell lies.

All the same, there is a teaching technique whereby one has to exaggerate the truth in order to tell it. Does this mean that one can go over the top to make the truth more telling? No, that would turn lawyers into advertising agents and public relations men for the truth.[2] On the contrary, if the truth can be told as simply as Wittgenstein first thought it could,[3] then there is no room for his subsequent *Philosophical Investigations.*[4]

What more can we say about the permissibility of academic exaggeration? If we consider Socrates and Solzhenitsyn (without excluding Wittgenstein) as searchers after truth, we find that they have been obliged to work away at words, stretching language near to breaking point, in order to reveal what they have been looking for. Sometimes society snaps back, for its vehicle of communication may be none too elastic, thus putting Socrates to death and spitting out Solzhenitsyn. What happens next depends on the nature of the truth revealed and whether society will eventually accept and respond to it. Indeed, the communicative process may re-employ exaggeration to produce distortion, glossing and overlaying the

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1 "There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case; whereas the accountant, who certifies the accounts of his client, is always called on to express his personal opinion as to whether the accounts exhibit a true and correct view of his client's affairs": per Denning LJ *Candler* v *Crane, Christmas & Co* [1951] 2 KB 164, 184.

2 See Rex II whose first act "was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations. This way, he explained, people could be made happy without rules": Lon L Fuller, *The Morality of Law* (Newhaven 1964) 39.

3 "What can be said at all can be said clearly": Preface to *Tractatus Logico-Philosophicus* (1922, 1971) 3.

4 *Philosophical Investigations* (Oxford 1953, 1967) on "language-games".

original exaggeration with so many subsequent exaggerations that it is no longer possible to discern the original Socrates, the radical Solzhenitsyn, the innovative Wittgenstein.

Going back to exaggeration as an innocent and only means of first telling the truth, we can ask as a matter of jurisprudence whether this technique operates in court, intensified by the adversarial system? Laymen seem to think so, for just as they see surgeons to be the acme of the medical profession, they expect lawyers to be most productive in court. It is when lawyers are wigged and gowned that laymen, unacquainted with the dialectics of strenuous pleading, see lawyers as having most trouble with telling the truth. And yet there is an irony, some would even say a paradox here; for as lawyers, we profess to appear for the public benefit, and specifically on the lay person's behalf, so surely he or she should know best whether or not we are telling the truth? Indeed we appear as lawyers in court on the basis of the facts as told by laymen. To decide whether those facts are true is the very issue before the court.

I COMMUNICATION UNLIMITED

How far can we exaggerate the truth in order to tell it without ending up by telling lies? Before answering this question it is wise to openly admit the paradoxical nature of our present discourse. We can then find a model paradox by which to compare and explicate the irony of the proverbial allegation that lawyers are liars. There are also unexpected rewards to be gained from this foray into jurisprudence. Taking our own alleged lack of truth seriously can throw light on the model paradox we chose by way of comparison.

The liar paradox is closely related to the lawyer's everyday problem of exaggerating the truth in order to tell, and so reveal and communicate, it. Indeed the liar paradox will also explain the sometimes changed personality of those who are engaged professionally in this form of exaggeration. The successful court lawyer often becomes quite a flamboyant fellow — the occupational hazard of those who are committed to exaggerating the truth. Indeed he may lose touch with truth, and be struck off the rolls as a result of forgetting the purpose of his profession. This loss of status as a lawyer, the ultimate sanction that can result from misleading the courts, affords further insight into the liar paradox first posed by Epimenides the Cretan. Epimenides undercut his own status, and in turn the status of (almost) everything he said by saying "all Cretans are liars". An analysis of the liar paradox that results from this can in turn help to resolve the lawyer's dilemma in his failing to tell the truth by refusing to exaggerate it.

The liar paradox is not just one of logic, nor is it only one of linguistics, but, more generally, one of communication. Many diverse disciplines depend for their efficacy on the status of their communication. The life scientist pores over a stained section under the microscope trying to determine whether what he sees has the *status* of being real or is merely an artefact. The logician takes a stand on the *status* of his argument as being valid as opposed to invalid. The lawyer propounds his case before the court

on the basis of what he cites as law having the *status* of authority. My friend and colleague in jurisprudence, Professor Jim Evans, writes an article on "The Status of the Rules of Precedent".[5] Does the use of the same word *status* throughout these diverse disciplines point only to a play on words or to something significantly held in common? In other words, what will be the *status* of our ensuing argument?

Status is itself a legal concept. Indeed it is the status, as a term of Roman Law, that has given rise to the modern State in its triumph over even the Crown at common law.[6] Status is usually explained as being opposed to freedom of contract. In the history of ideas, Sir Henry Maine[7] takes responsibility for this explanation by his account of social progress:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organisation can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared – it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood to persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.
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> The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term

5 P J Evans "The Status of Rules of Precedent" (1982) 41 CLJ 162.

6 See N J Jamieson "The Demise of the Crown" (1989) NZLJ 329.

7 Sir Henry Maine, *Ancient Law* (London 1861); this extract is quoted from World's Classics series (1954) 139-141.

> to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*

If the movement from status to contract explains social progress, then, in turn, it is the thesis of this paper to explain the liar paradox in terms of status and contract. The liar paradox is seen as a failure in one's fiduciary commitment to communication. What is meant by fiduciary commitment begins with the responsibility of those engaged in communication to be genuinely agreed on their level of discourse. Is it legal, literary or merely telling a joke?[8] If we are enjoined in jurisprudence what is our common ground as to what constitutes that subject? If we are all ardent searchers after truth our engagement is serious, but if one or two of us are convinced that we are only playing academic games with words and ideas, some of us can get badly hurt.

To tell the truth, the whole truth and nothing but the truth comes close to fulfilling a scriptural way of life.[9] The consequence of this responsibility is that one cannot both testify to the truth and testify against the truth-teller's status. One cannot contradict either one's own status in the case of Epimenides the Cretan, or the status of the Holy Spirit of Jesus Christ in the case of the Christian believer, by which the truth is told. It follows then that only a layman and not a lawyer can say that all lawyers are liars. The legal profession is pre-empted from attacking its own status no less than was Epimenides the Cretan in claiming all Cretans to be liars.

The liar paradox is usually portrayed in terms of conflict between two concomitant levels of one and the same discourse. "I say that I am an incorrigible liar who never tells the truth" is perhaps the simplest and most obvious presentation of the paradox. If what I say about myself in being a liar is true, this means you cannot believe what I say about myself in being a liar. It is a paradox that is commonly enough dealt with in courts where evidence for facts and, in the case of expert evidence, more so for opinions, is seen to depend on the personal creditability of the witness.

Our low level of faith in present-day politicians might habituate us to accept such a paradox without surprise. Even political movements genuinely aimed at cutting through the current malaise with bids for integrity fall victim to the same paradox.[10] Could it be that the experience of lawyers makes them more immune to this species of fallibility?

It would be nice to think that a legal education befits a legislator, judge or public servant to avoid the paradox of telling lies. We like to think a legal education gives an immunity from telling lies partly because we believe the legal profession to be sincere in its search for truth, to be most

8 Is fact or fiction the most appropriate vehicle for revealing the nature of justice and so telling the truth? In other words, will clowns be pre-eminent among theologians in being closest to God by so loving their neighbour as to enable him to laugh at the sad side of life?

9 "And ye shall know the truth, and the truth shall make you free": John 8:32, "Jesus saith . . . I am the way, the truth and the life," John 14:6.

10 See N J Jamieson, "The Trim Paradox: An Instance of Interdisciplinary Tension Between Law, Logic, and Politics" [1983] 5 Otago LR 426-441.

literate in its use of language, and to be learned enough to avoid that sort of conflict that disrupts and disunites the form from the function of communication. We also believe that lawyers are accustomed by rules of evidence to look to the ways in which the status of a speaker, such as that of a self-admitted liar, can incapacitate him from the communicative process. How then could lawyers commit the same fallacy?

Sooner or later the paradox afflicts everyone reaching that crisis of communication when, for the sake of what follows, nothing matters more than simply telling the truth. This paper suggests that some of our puzzlement over the liar paradox arises from the conflict between the status of the speaker and his capacity to communicate. Not just status but capacity too is a legal concept. One's capacity to communicate is very like one's freedom to contract, because both communicating and contracting express fiduciary relationships of commitment. And the invigoration of lay and legal language over such concepts as those of status and capacity is two-way. We talk about social status in a way that leans hard on the feudal history of legal status. We talk about someone having the capacity to do a job that has absorbed a lot from the nineteenth century movement towards freedom of contract. We talk, as Sir Frederick Pollock wrote,[11] about Maine's movement from status to contract as if it were limited to the law of property. And, as laymen we may lose a lot of what we take for granted from our legally invigorated language of social status and what it is to be capable of action, should the formula for progressive societies, hitherto moving from status to contract, be reversed.

We are not relying on a play of words to explicate the liar paradox.[12] There is more to this paper than merely conflating legal status with social status, or confusing the capacity to contract with the capacity to communicate. Status and capacity are too fundamental and share too much of the same overlap between law and society for that. We know that all attempts to draw limits between law and society give rise to intense jurisprudential dispute.[13] In one sense the dispute is outrageously un-

11 Notes to 1906 edition of *Ancient Law* 190-193. Indeed, those lawyers who agree with Pollock's dictum and construe status to contract as only affecting property (and even more so those who see the relevant law reform as being limited to land law) are going to be massively troubled by the present paper, which is primarily concerned (as was Maine) with the law of persons.

12 Nevertheless, note the priority that Maine gives to philology throughout all his writings. Etymology is more than "play with words". See the seriousness of Slavonic slovoobrazovanie or word-building: A N Tihonov, *'Slovoobraz ovatelnyi Slovar' Russkovo Yazyka (v Dvukh Tomakh) – Dictionary of Russian Word-Building (in 2 vols)* Moscow, 1990).

13 Witness the intense controversy between sociological and other competing schools of jurisprudence. Note the first outright opposition to anything like Pound's sociology of law, then the reluctant acceptance, and finally the feverish jumping on the bandwagon from all sides to espouse the concept of law as one of social engineering. These are extreme examples, but the difficulty of defining where social study ends and legal study begins, or where law and society meet for the purpose of law-making or law-enforcement is a familiarly disputatious one for the legislator, jurist, legal historian and educationalist.

rewarding.[14] It is of the sort where laymen feel that lawyers are liars and lawyers feel that laymen can thus hardly be qualified to tell the truth. In another sense, however, it is as rewarding to philosophy as the liar paradox is in providing a crisis of communication by which to reveal the truth.[15] May those for whom this paper still makes nonsense to claim that lawyers and laymen can, in talking about status and freedom, still speak something of the same language, be as wise men learning from a fool, and so, by testifying to the truth, be able to silence or amend his discourse.

It is amid the innate disputatiousness of the legal profession – for which disputatiousness Paul would dismiss us as a bunch of Cretans – that lawyers are delighted, but to others would seem doomed[16] to disagree among themselves as to what is meant by status, capacity and contract.[17] This is what one would expect – as much of lawyers as of the decisive part these fiduciary commitments play in determining legal relations. In its own way this illustrates the intense struggle for status.[18] It is this self-same status which, when viewed as the stable outcome of exercising a capacity for dynamic change, poses a paradox of equilibrium within society.[19] Perhaps this paradox of social progress, in achieving stable status through dynamic

14 "For there are many, especially among the Jews, who will not recognise authority, who talk nonsense and yet in so doing have managed to deceive men's minds. They must be silenced, for they upset the faith of whole households, teaching what they have no business to teach for the sake of what they can get. One of them, yes, one of their prophets, has said: 'Men of Crete are always liars, evil and beastly, lazy and greedy.' There is truth in this testimonial of theirs! Don't hesitate to reprimand them sharply, for you want them to be sound and healthy Christians, with a proper contempt for Jewish fairy tales and orders issued by men who have forsaken the path of truth." Titus 1, 10-14, J B Philips, *The New Testament in Modern English* 450.

15 It is in this second sense that we may go on to cite the immediately subsequent sentence from Paul's Letter to Titus after his passage on liar paradox previously quoted: "Everything is wholesome to those who are themselves wholesome. But nothing is wholesome to those who are themselves unwholesome and who have no faith in God – their very minds and consciences are diseased." Titus 1:15 ibid.

16 In the sense of "Woe unto you, lawyers! For ye have taken away the key of knowledge: ye entered not in yourseles, and them that were entering in ye hindered" Luke 11:52. See all the other scriptural admonitions, including those of Paul (Col 2:8) and others (Acts 17:18) against engaging in worthless disputations and philosophies. In the face of such admonitions this present paper takes grave risks.

17 F W Guest, "Freedom and Status" [1968] Otago LR 265; C K Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford, 1931); see citations to N J Jamieson, "Status to Contract – Refuted or Refined" [1980] CLJ 333; and Geoffrey MacCormack, "Status – Problems of Definition and Use" (1984) CLJ 361.

18 Eg, the struggle for women's rights in giving an equivalent legal status to that of men; the struggle for worker's rights in giving a status more commensurate with that of their employers; the struggle to recognise the status of minority groups as against the overwhelming status of the majority; the struggle for status by the disabled in securing their lives from the arrogance of those who pride themselves on being whole and healthy, etc, etc.

19 Infra, nn 40, 41.

contract at the expense of earlier equilibrium in human affairs,[20] is akin to some of the many variants of the liar paradox affecting lawyers.

This is the jurisprudential context in which the proverbial dispute between lawyers and laymen that lawyers are liars is invested with renewed significance. If all lawyers are liars is not a proposition that can be admitted to by any lawyer without committing the liar paradox, it can be said that all lawyers are incapacitated from admitting that allegation. But neither can the proposition be disputed, therefore, among lawyers themselves. The proposition that all lawyers are liars thus becomes immune to legal argument. This is true at least in the professional sense that only lawyers are qualified (ie have the requisite status) to engage in legal argument.[21] Sometimes a lawyer may try to avoid the allegation by educating laymen as to the more or less hypothetical way in which lawyers use the language of litigation. Heightened by an adversarial system, lawyers are required to present opposite points of view of every situation, as convincingly as possible, and leave it to judge and jury to decide the truth.

This is part of the wider and more practical context in which legal theorists dispute whether the liar paradox has any legal relevance. Because disputation is the essence of the lawyer's decision process, the very existence of the dispute over the liar paradox among legal theorists prima facie indicates its relevance, but as if this were not all, some of the disputants, even those most opposed to its occurrence in legal reasoning, are open enough to change their minds.[22] On both scores we may accept its relevance for law as a real issue. At any rate, this paper does not find any of the innermost academic arguments,[23] which may be followed in their own press, so convincing as to prevent a new foray into applied philosophy. The thesis of this paper is that the centuries old liar paradox can be enlightened by the nineteenth century legal formula of social progress moving from status to contract.

20 Eg, the earlier equilibrium could be theocratic, autocratic, oligarchic, democratic or any permutations of these and other forms of government, besides a whole series of other factors distinguishing rural from urban, pastoral from agricultural, agrarian from industrial and ancient from medieval and medieval from modern societies. What does remain unchanging for progressive societies so far is the formula by which stable states of society (relying on status) alternate between dynamic states (relying on freedom) by which a cyclic pattern of re-structuring any society is achieved. See Lars Lindahl, *Position and Change — A Study in Law and Logic* (Dordrecht, 1977).

21 Cf the philosophy Hobbes criticising the lawyer Coke in Hobbes' *Dialogue between a Philosopher and a Student of the Common Law of England,* v.

22 See Preface to *Precedent in Law,* ed Laurence Goldstein (Oxford, 1987) v.

23 By innermost academic argument is meant the pure philosophy on the liar paradox to be found in abstract writing solely on that subject, as distinct from the applied philosophy (or, perhaps more accurately applied-jurisprudence-to-philosophy) attempted here. In the same way as Maine "believed that in seeking to understand law the best results could be achieved by making constant references to non-legal topics" (R C J Cocks, *Sir Henry Maine* (Cambridge 1988) 2) so also it is believed that the best results in philosophy can be achieved by making constant references outside philosophy — to "the real world" — and so also in a reciprocal way for jurisprudence, by applying philosophy — seen by many lawyers as the "unreal world" — to law.

II THE CONSEQUENCES OF UNLIMITED COMMUNICATION

For more than a hundred years after Sir Henry Maine propounded his formula for social progress as having been hitherto from status to contract,[24] lawyers looked askance at status as a viable concept of law. How could it be otherwise? After all, Maine was taken to be equating static and non-progressive societies with the law of status, and dynamic and progressive societies with the law of contract. Nineteenth century law reform seized on Maine's formula. The Married Women's Property Acts from 1870 onwards removed the stigma of a separate legal status for married women, and by 1935 the Law Reform (Married Women and Tortfeasors) Act had conferred upon them the same legal capacity as "any other normal person".[25] Likewise, the Infants Relief Act 1874 began to redefine the status of children until now most common law jurisdictions no longer recognise twenty-one years as any magical age of majority.[26] So, too, for mental defectives and drunkards, the Sale of Goods Act 1893 obliged them to pay a reasonable price for necessary goods even though they lacked the capacity to contract. Eventually even the legal fiction of a corporation would be empowered by a succession of Companies Acts from 1908 onwards to have all "the rights, powers and privileges of a natural person".

What would Maine himself have thought of this prescriptive use of his originally descriptive formula? R C J Cocks writes on *Sir Henry Maine — A Study in Victorian Jurisprudence* that "any lawyer who reads Maine's works is confronted with the immediate problem of ascertaining precisely what he said about jurisprudence." Cocks goes on to conclude, in complete conflict with the thesis of the present paper, that Maine "produced no equivalent to the Benthamite or Austinian analysis of law."[27] On the contrary, J H Morgan in his introduction to the *Everyman's Edition* of Maine's *Ancient Law* writes that "the revolution effected by [Darwin's *Origin of Species*] in the study of biology was hardly more remarkable than that effected by Maine's brilliant treatise in the study of early institutions." C K Allen makes much the same comparison of Maine with Darwin in his introduction to Maine's work in the *World's Classics* series. Yet almost

24 Supra n 7. For a recent discussion of Maine's thesis, see Peter Stein, *Legal Evolution* (Cambridge 1980) 84-5, 96-7, 114-115.

25 The now rather provocative phraseology "any other normal person" is quoted from G C Cheshire and C H S Fifoot, *The Law of Contract* (4th ed, London, 1956) 354. And of course today's feminist movement, would ardently dispute that the stigma of women's inferior legal status has been entirely removed.

26 New Zealand's present "study-right" legislation has reversed the role of many students over the age of 21 by making them again dependent on parental support and thus reversing the movement of Maine's formula from status to contract. See also David Halberstan, *The Next Century* (New York, 1991) 124-5 "Slowly and steadily we are creating a new class system, starting at birth, through early education, and finally through colleges and professional and graduate schools . . . a very small handful of immensely privileged people who have it very good and who plan to continue to have it very good and don't care at all about the fact that the rest of the country is doing poorly . . . that's the system we're moving toward".

27 Ibid 196.

all commentators are agreed that Maine was, for lack of a better term, "conservative". So, too, if one carefully reads word for word *The Origin of Species,* was Darwin. Every page of the *Origin of Species* (apart from the title to his work which was substituted by the publishers for his own more conservative one) is written as the work of a descriptive and conservative rather than a prescriptive and prospective thinker. There is a paradox in this, no less than in Heraclitian philosophy, where the balanced views of its founder must be distinguished from the extreme views of his followers. Just as *The Origin of Species* provoked prescriptive Darwinism among Darwin's followers – which together with Gregor Mendel's church bulletins on genetics eventually gave rise to genetic engineering, so *Ancient Law* provoked a corresponding response through law reform by way of social engineering. Darwin had in Huxley, a biologist turned sociologist, as facilitator for practical evolution. Not surprisingly, the legal theorist who gave most credence to this move from the descriptive to the prescriptive in jurisprudence was Roscoe Pound, the founder of sociological jurisprudence – botanist turned jurist.

Almost all law reform, from the date of publication of Maine's *Ancient Law* in 1861, testifies to the forcefulness of this one man's ideas over events. It is true that Dicey took over where Maine left off, and that this sweeping statement about Maine's work is most likely to be thrown overboard as arrant nonsense in the prevailing outlook of social legalism that, paradoxically as a result of Maine's work, is around today. This is partly due to our new notion of law reform which is expected to do much more than literally re-form the law. It is also due to the ebb and flow of legal values by which change and rest may be seen to reverse their roles, sometimes explicitly, sometimes implicitly, in the life of the law. But basically we have lost the abhorrence for status as that concept was regarded first by Maine[28] to be the mark of a primitive and unprogressive society:

> . . . that division into classes which at a particular crisis of social history is necessary for the maintenance of the national existence degenerates into the most disastrous and blighting of all human institutions – Caste. The fate of the Hindoo law is, in fact, the measure of the value of the Roman code . . . . We are not of course entitled to say that if the Twelve Tables have not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny.

When Maine's *Ancient Law* was a set text for first year law students as it was in this author's youth, status was seen as serfdom whereas the sanctity of contract (and the freedom of the individual[29] to enter into it) was real. It is not just the law of status that has changed during our own mid-century but the death of contract.[30]

28 Ibid 16-17.

29 See the contractual problem of school charters: N J Jamieson, "Charter Framework Offends Against Its Own Principles" (1989) NZ Tablet 13-14.

30 Grant Gilmore, *The Death of Contract* (Ohio 1974).

That Maine himself was aware of the forcefulness of events over ideas, but more particularly of ideas over events, is borne out by the full title to his book which unfortunately has become very rarely quoted: *Ancient Law — Its Connection with the Early History of Society and Its Relation to Modern Ideas.* His formula of social progress from status to contract, often grotesquely exaggerated out of its original context, provoked a revolution in the legal order of things. That social progress moves from status to contract with prescriptive force for the future rather than providing just a persuasive description of the past was for long, even if no longer now, generally assumed to be correct. Like all great ideas, from those of Copernicus onwards, however, its correctness was most taken for granted by those for whom the original ideas remained unread. It is about as hard to find someone nowadays who has read Maine's *Ancient Law* as it is to find anyone who has read Darwin's *Origin of Species,* yet the ideas of both these thinkers have permeated — almost baptised — the full fabric of contemporary thought. Indeed, a closer reading of Maine's work would be seen to stand in the way of implementing his ideas to their present extent.

Throughout contemporary society the dynamic forcefulness of contractual capacity is still equated with modernity. This is done in terms of individual freedom — the individual has laissez faire. On the other hand a legal order based on status is taken to be medieval if not feudal and perhaps even tribal by comparison. It relies on the collective responsibility of a closed society instead of the exercise of individual initiative. This nineteenth century ideology was confirmed for the twentieth by the Soviet Union's early but unsuccessful attempt to do without contract.[31] This happened not just with the rise of the welfare state but more dynamically since its fall — or is it restructuring, when the traditional movement from status to contract in western civilisation is being reversed.

How far does the traditional legal ideology, and in particular, the specific relationship of status and contract as assumed by a century and a half of law reform, underlie and explain today's society? According to Maine's philosophy, the way in which the law works, through legislation, equity and legal fictions, accounts (at least partially) for the difference between static and progressive societies.[32] Much of the history of English law since Maine's discovery proves that point.

31 This was done by a decree of 30 August, 1918 Sob Uzak RSFSR No 63, item 691 requiring manufacturers to place production at the disposal of state agencies for distribution. See Wayne R LaFave, *Law in the Soviet Society* (Illinois, 1965) 128.

32 This is often quite rightly disputed by scholars as being a common fallacy of misreading Maine's work. In the second chapter of *Ancient Law* (op cit supra n 7) Maine writes (p 19) that "The difference between stationary and progressive societies . . . one of the great secrets which inquiry has yet to penetrate." "Among partial explanations of it [he] venture[s] to place [comparing the codification of Roman Law with] the most disastrous and blighting of all human institutions — Caste" (p16). In comparing caste with codification, Maine weighs an extreme example of immutable status against the force of legislation as the most important instrument of keeping harmony with a changing society. Then (p 31) with remarkable diffidence for those who would go, and have taken Maine's ideas, further, he writes "a general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legisla-

The legal system, particularly through law reform since 1861, can be seen to have changed society instead of society changing the law.[33] This is because the initiative to change society in moving mainly from status to contract has come through law reform from within the law. For most of a century and a half public lawyers have disclaimed the almost innate conservatism by which they assumed a custodial role over social values, and have instead promoted themselves as social engineers.[34] The result has been a revolution in the public image of lawyers and the law. The image has changed from being conservators of the status quo. This late medieval image is lived out characteristically by Saint Thomas More (in Robert Bolt's *Man for All Seasons*). Then comes the image of the lawyer as a level headed traditionalist, portrayed romantically by Sir Walter Scott in the Waverly novels. Soon it appears satirically (to the immense chagrin of Sir James Fitzjames Stephen[35] and other law reformers) in the works of Dickens, from which emanates the Victorian entrepreneurial man of property as written by Galsworthy in *The Forsyte Saga.* Eventually lawyers become sacrificial champions of social change as in Harper Lee's *To Kill a Mockingbird.*[36] Bu then the traditional custodial role of lawyers has not only been transcended but reversed.

If this radical reversal of the conservative role of lawyers in society is as real as it is apparent, the explanation lies with Maine's formula for social progress in terms of the movement from status to contract. From the rest of society's point of view, it is harder to conceive of a change in social values being initiated by a change of law than it is to think of a change in legal values being insisted on by a changing society. This is partly because the rest of society still views lawyers as serving a centuries-old custodial function – an obsolete view of law which has allowed the more recent radical reform of society by the law to pass unchallenged. More importantly, however, the new-look lawyer as a radical social reformer is incapable of objective assessment until the chicken and egg paradox

tion." It is submitted that the forcefulness of these ideas has long outstripped the value that even Maine gave them. Misread or not, the equation of legislation with social engineering (that you can change society by law-making) and hiding the substantive effect of this under the purely legal rubric of law reform, has much to do with Maine's equation of progressive societies with the fully functioning instrument of legislation as a means of change. How did Maine convince his readers to go much further than he went himself? Interestingly enough he underplayed his arguments. In comparing hard-sell with soft-sell advertising Maine is master of the understatement. It is by understanding the truth that the teaching technique of scholarship is often the reverse of adversarial advocacy. Instead of exaggerating the truth in order to tell it, the scholar minimises it so that the reader believes to have discovered it for himself. This, according to Plato's *Thaeatetus,* is the Socratic method – maieutic in its midwifery of thought.

33 The paradox of which has priority – law or society – depends on where the power is seen to reside: with the people or their legal structure. Is the Rule of Law no more than a legal fiction that the ultimate power is seen to reside in the law?

34 "Dean Pound is usually credited as being the American leader in the school of sociological jurisprudence . . . . The analogy of social engineering is one which Pound uses more than once." George Paton, *Jurisprudence* (Oxford 1951) 17-18.

35 See K J M Smith, *James Fitzjames Stephen – Portrait of a Victorian Rationalist* (Cambridge 1988) 16-20, 26-30.

36 London, 1966.

can be resolved of which came first — law or society. To pose that paradox another way, in terms of academic jurisprudence, how might Moses and Bentham have disagreed about whether law or society has first priority?

Notwithstanding these conceptual difficulties of deciding whether law or society is paramount, however, if radical change to society has really been brought about by changing legal values attributable to Maine's formula of moving from status to contract, we may expect to find that these legal notions will explicate other issues of social concern and intellectual debate. If legal reasoning really does underlie the last one and a half centuries of social and intellectual change then we can expect the lawyer's vocabulary and syntax to enlighten and reveal many apparently non-legal problems.

Putting this thesis to the test leads us to examine the liar paradox. What Epimenides the Cretan meant, when he first said all Cretans tell lies, clearly has something to do with the status of Cretans to tell the truth. What Epimenides the Cretan did to himself by making the statement, however, was to undercut his own status to make the statement. He disqualified himself from communicating by the very content of his own communication.

The resulting paradox draws our attention to the different levels of participation in communication. Language operates as a personal utterance which can have public effect. This linguistic interface between private and public affairs relies on a capacity for the truth that is at least analogous to contract, and a commitment to communicate that is at least analogous to status. This is where Maine's formula of social progress from status to contract can explicate the paradox, but the formula also throws light on the relationship — which is often one of conflict — between individual (personal or private), and collective (civic or public) affairs. This is a typically legal relationship of the individual to the community (sometimes talked about in terms of civic responsibility versus personal freedom) which poses problems for minority groups in politics no less than for the human foetus in ethics, and the private language argument in linguistics. Sometimes this issue is intellectualised for our own times in terms of which is paramount — sociology or psychology. Basically it is the subjective-objective dilemma which Parmenides posed as the one and the many, and Thoreau in terms of how many it takes to make a truth. It is also interestingly related to the converse of ought entails can; for if Epimenides lacks the status to tell the truth about Cretans then he cannot enter into the fiduciary contract of communication and so ought not to try. It is the same sort of self-referentiality that is warned against by the precept "judge not that ye be not judged". Perhaps it is on this score that Paul in the first chapter of his letter to Titus concludes that Epimenides the Cretan is self-judged. That would seem to be the rub of Paul's remark in verse 13 of chapter 1 that "this witness is true". The upshot is that the public import of the statement criticising Cretans attaches itself solely to the private maker of the statement. That ought to be a sufficient warning to over zealously critical academics.

Given that warning, this is an apt point at which to make a methodological aside. We need a logic of legal relations by which to explicate the liar paradox in precise terms of the movement from status to contract. Hohfeld[37] completed this logic which Kocourek[38] applied throughout the legal system and Pörn[39] extended to social relations at large. Dias[40] drew attention to the need for a temporal jurisprudence by which to distinguish prior from posterior relations particularly in giving rise to contracts, and Jamieson[41] showed that this temporal perspective reveals certain paradoxes, not unlike the liar paradox, when applied to Maine's famous formula of social progress being from status to contract. To shortcut this scholarship, particularly the opposing views of Goldstein[42] and Evans,[43] obviously takes risks, but there is also a feedback from the present paper into the existing academic argument that amends that argument still further. This means that it is clearer for the purposes of applied philosophy to stick to this single issue, namely the novelty of relating status and contract to the liar paradox, rather than to try defining the exact nexus of that relationship by reviewing and carrying forward an already complex academic argument.

We conclude simply therefore by drawing closer attention to the fiduciary concept of communication. This clear level of linguistic consciousness at which man freely communicates his innermost thought can be distinguished from the cynical and somewhat subversive alternatives, that man just as often communicates for the purpose of hiding his thought, or, as it may be, even to hide the fact that he is not thinking at all. At the first level of linguistic consciousness, there is some sort of contract of communication, some sort of fiduciary relationship that is presumed to understudy the exchange of information. It is at this point of distinguishing between the first level of innocence and the subsequent levels of cynicism in communication that we can go on to distinguish by way of a very important aside, between theories of legal positivism and natural law in so far as they relate to language. Thus Fuller's morality of law relies for its status on that article of faith whereby we live in order to communicate,[44] whereas Hart's legal positivism, in allowing for only a minimum content of natural law, stresses instead that we communicate only in order to survive.[45]

37 W N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16, (1917) 26 Yale Law Journal 712.

38 A Kocourek, *Jural Relations* (Indianapolis 1927).

39 I Pörn, *The Logic of Power* (London 1970).

40 R W M Dias, *Jurisprudence* (London 1976) 64-65.

41 N J Jamieson, "Status to Contract – Refuted or Refined" (1980) 39 CLJ 333.

42 Laurence Goldstein, "Four Alleged Paradoxes in Legal Reasoning" (1979) 38 CLJ 373.

43 Idem (see n 2 supra).

44 Lon Fuller, op cit n 2 supra, 186.

45 H L A Hart, *The Concept of Law* (Oxford 1961) 189-207. How can this argument, by way of comparing Fuller with Hart, be adduced without degenerating, first into *ad hominem,* and then, worse still, into *ad personam* assertions? The trouble is that to premise any communicative theory on human survival, whether collective or personal, is going to result in a vastly different society than one which subserves survival to communication as an end in itself. Because the issue is one of metaphysics, each of these societies

III THE LIMITS OF LEGAL COMMUNICATION

When survival is made the end and not the means of communication we are quickly subverted into believing that there is no fiduciary concept of communication and that we are perfectly at liberty to use language so as to disguise our deficiencies of mind. We all too readily believe that our fight for status can be excused and even defended by our struggle for survival, and that the substantive content of what we say, by reason of its truth or falsity, is subservient to the fight for status in our struggle for survival.

This is immediately obvious in the use of propaganda by totalitarian governments. Unfortunately, however, we do not always so readily recognise ourselves as participants in the propaganda process. Look at the Auschwitz Lie.[46] In 1985 the Federal Republic of Germany made it a crimi-

will give rise to reciprocally different cultures. "In contrast with the more grandiose and challengeable constructions" (idem) of a society living to communicate, "other thinkers, Hobbes and Hume among them, have been willing to lower their sights" seeing only "in the modest aim of survival the central indisputable element which gives empirical good sense to the terminology of Natural Law" (ibid, 187). It is not surprising that the legal and ethical systems that pertain to such intrinsically diverse societies conflict with one another. So also will any profession of scholarship between societies that differ in deciding whether to give the struggle for survival first priority over the communication of truth. That "we are normally vulnerable to bodily attack" (ibid, 190), but that "even the strongest must sleep at times" (ibid, 191) and "if men are not devils, neither are they angels" (ibid, 191) even where resources – physical, mental and volitional – are limited (ibid, 192-3), all loom larger than life where only survival rather than what we do with our survival is the issue. It is bound to be even more telling at an *ad personam* level. If the bottom line of my academic occupation is communication for survival ("publish or perish" as it is colloquially called) then I shall communicate what best suits my survival in terms of academic promotion and advancement. This means following the fashion and keeping the conventions of the times, and avoiding and concealing what may be the unpleasant truth of whatever academic study I may be engaged in, for that sort of truth is often going to get me into trouble. This conclusion tempts one to advance *ad personam* argument against those who, like Hobbes, Hume, and Hart, "lower their sights" to make human survival the chief aim of man. Socrates who willingly drank the cup of hemlock, Spinoza who refused a professorship because it would get in the way of his work, and Carlyle who continued his work even though denied the academic status that Spinoza refused, all stand apart. They are exceptions to the general rule that accepts academic work as being so remote from action that it can even be divorced from the academic's own life. None can doubt the impartiality of Hobbes, the genuine love for humanity of "Saint David" Hume, the sincerity of Hart in what they profess – even to the extent of self-admitting their own "lowered sights". One has only to compare the death of Hume with that of Socrates to find just as much that is heroic in both. So divorced has academic work become from action that it is possible to live quite contrary to one's own work. Fortunately, or unfortunately as the paradox of *ad personam* argument may have it, this means in colloquial terms that none of those people with "lowered sights" practise what they preach. Their communication is not confined by human vulnerability, limited resources or any other truism of positivist thought. To carry out those precepts immediately presents problems, however, as can be seen from those who not only take aim but fire through lowered sights. Then limited altruism becomes, like selfish-unselfishness, something of a contradiction in terms, and the fear of human vulnerability prevents all hope of social security. Of course to attack Hart's scholastic (even if upholding his personal) integrity is likewise to take risks with one's own academic survival – but then one survives to communicate and not the other way round.

46 Eric Stein, "History Against Free Speech: The New German Law Against 'Auschwitz' – And Other 'Lies' " (1986) 85 Michigan Law Review 277.

nal offence for anyone to dispute the official history of the Second World War by repudiating the existence of the Nazi holocaust. This provides an interesting obverse to the liar paradox, particularly so because it extends the ambit of the liar paradox from that of private discussion to public affairs. Epimenides tells us that we may not believe what he says – but in order to understand the significance of what he tells us we have to be told, and believe that what he tells us is true, and so come to know that he himself is a Cretan. The West German Republic would have us believe the official history of the holocaust, but in order to understand the forcefulness of that command, we have to accept that the West German Republic invests it with the authority of law and imposes sanctions for its breach.

In the liar paradox the personal status of Epimenides the Cretan is undermined by his own public statement. He thereby demonstrates an incapacity to make the statement he attempts. This is basically a personal and contractual incapacity, because the resulting paradox demonstrates that it takes more than one person to make a truth. And the very nature of the utterance divorces every other person's commitment from the content of the Cretan's statement. In the West German case, the government commits a counter crime against freedom of speech by outlawing revisionist legal history. It does so in an unmistakably authoritarian and even totalitarian fashion. Basically its position is this: because I am in authority and so have legal power to make you conform, you shall believe in what I say as being true because I say so and because of the authority or status with which I have to say so.

In the Epimenides statement, the credibility of the communication is undercut by the communicator's loss of status. In the West German situation, the credibility of the communication (at least for the lawyer) relies solely on the communicator's (legal) status. Because the resulting paradox of the latter case is one of public life, it is likely to provoke a Socratic response.[47] Just as Thoreau went to prison rather than pay taxes, so those who insist on speaking their mind are likely to protest against the curtailment of free speech – and that even if they believe in the official history of the holocaust. The paradoxical result of the West German legislation can be to promote the Auschwitz lie. This is something all governments should keep in mind about the logic of legislation. All legal command, whenever it relies solely on legal status and ignores the social compact on which all communication is founded, or the political basis on which all law-making is founded, commits the obverse of the liar paradox, and so confuses rather than clarifies the social situation.

It is because we are not always wholly conscious of the conflict between our fight for status in the struggle for individual survival and our commitment to communication as a means of enhancing collective security that our fear of failure, whenever we engage in speaking or writing, is invariably translated into some sort of inner shame at outward success.

47 "Think not of life and children first, and of what is right afterwards, but of what is right first, so that you may be justified before the rulers of the other world": Socrates in Plato's *Apologia, Crito.*

It is just when we have most convinced both ourselves and others that what we say is true that we see through what we say and resile from it. Wittgenstein's life and works provide a prime example of this conflict. The paradox is also typified by Kafka's testamentary instruction to burn his writings. Maine is also said to have expressed mystification in later life as to what really accounted for the difference between static and progressive societies. But the phenomenon also occurs very frequently in the promulgation of legislation, where this after-shock of shame at the political success with which controversial legislation has been enacted can produce a vastly different administration and enforcement of the legislation than was originally intended.[48]

Although promoting many problems of statutory interpretation, this phenomenon of personal shame experienced at public success is a fortunate one. Equivalent to the shady trader turned public benefactor,[49] the syndrome is symptomatic of imbalance between the personal status of private life and the social compact (for the purposes of this paper considered at the level of commitment to communication) in public life. Every expression of this imbalance reveals enough to any neutral observer to enable him to find the real nexus of the relationship between status and contract. Unfortunately there are few neutral observers, however, for we are all more or less imbalanced by the conflict between our struggle for status and the leverage this gives to enhance our commitment to communication. Yet this invariably human experience whereby our fear of failure in communication is translated into our shame at its success provides one of the most convincing psychological substantiations of the conflict between the fiduciary foundation of communication and the struggle for personal status. Is it a fact of experiential philosophy that he who has never felt this shame, but only pride in his own success, has never succeeded?[50] The saints might be seen to provide some exceptions to the usual rules of worldly success, but a study of the apostolic writings suggests that they are most ashamed of themselves where others would be proud, and when they boast, do so only by way of glorifying their guiding spirit or muse.[51] Is it theologically arguable that even Jesus does the same in voicing a sense of his own self-failure in the midst of success? What does it mean when he cries "Father, Father, why hast thou forsaken

48 This is my experience of legislation as a parliamentary counsel from 1968-1975 engaged in the preparation of legislation – that what is bull-dozed through the political process in the face of the intense opposition is frequently but weakly enforced, soon ameliorated by subsequent amendment or even outrightly repealed – and just as often by the same party in power. What hope then for our present policies of perestroika? This seesaw of shame at success has consequences especially for governments where the separation of legislative, judicial and executive powers is minimally constituted.

49 See Naomi Mitcheson's novel *Jacob Ussher* for an account of this syndrome.

50 See N J Jamieson, "The One and the Many" (1984) 5 Otago LR 554, 567.

51 "With God inside them", as Socrates literally says of poets in Plato's *Apologia*. "If I must boast, I will boast of things that show how weak I am" 2 Cor 11:30. See also the spectacle of the apostles described in 1 Cor 4:9-14 by which they are counted worthy to suffer shame "the scum of the earth to this very hour" in Christ's name: Acts 3:41 (The Good News Bible).

me?"[52] What does it mean in the context of the crucifixion to be thus forsaken — for Christ cannot, without losing his own status as the Son of God, be mistaken. Doubtless this paradox is too deep for human intellect to fathom.

Need it then cause us so much perplexity when Epimenides the Cretan attacks his own status to tell the truth? Epimenides overlooks the limits on communciating his own lack of status. The resulting paradox lies in the conflict between his own admitted lack of status and his contract or fiduciary commitment to communication. His private life is at odds with his public life. That leads us towards a deeper study of what underlies freedom of communication in terms of a logic of social relations. As Pörn concludes,[53] the Hohfeldian logic of legal relations is suitable for this purpose. This enables us to equate freedom of communication with freedom of contract, and to employ the concept of status to explain the curtailment of that freedom. As to what is involved by this exercise of legal reasoning, laymen may see lawyers to be liars. This is hardly surprising because lawyers are forever engaged in the close conflict between status and contract as these concepts relate to the struggle for freedom. Whatever truth may be conveyed by the accustomed cliché, therefore, though lawyers be liars[54] they can hardly admit it without opening a breach by way of the liar paradox between their profession and practice of law.

It is much the same for the professional academic in seeking freedom of communication as it is for the lawyer seeking freedom of contract. Every lawyer learns that the law has limits, and that it is only within these limits that freedom of contract can be secured. It is the same for freedom of communication. Like the law, scholarship, too, has limits, and it is only within these limits that one has any status as a scholar to communicate. Epimenides overstepped these limits. To understand his case more thoroughly in terms of legal reasoning would lead us into the metaphysics of existence and the jurisprudence of survival as already indicated by the conflict between Hart's legal positivism and Fuller's natural law.[55] It is not proposed to follow these leads in his paper. That would water down the novelty of the main idea no less than by debating its academic context. Those philosophers who are in any way convinced by the part played by the conflict between status and contract in the liar paradox, however, are exhorted to read the jurisprudence that deals with these legal concepts, by which they will realise that lawyers persistently run the gauntlet of this

52 Matthew 27:46, Mark 15:34.

53 Note 39 supra, 46.

54 Interestingly enough, neither Henry Drinker's *Legal Ethics* (1953 Columbia), nor Hoffman's *Famous Fifty Resolutions* in his *Course of Legal Study* (1836 Baltimore) nor the American Bar Association's *Canons of Professional Ethics* and *Canons of Judicial Ethics* specifically bind lawyers to tell the truth. That obviously is the layman's calling.

55 See notes 44 and 45 supra.

paradox in their profession and practice of law. It is no accident that Protagoras,[56] who reinvested the liar paradox as a compound dilemma, was a lawyer engaged in teaching the law.

56 J C Hicks "The Liar Paradox in Legal Reasoning" (1971) 29 CLJ 275. A classicist from whose comments this paper has benefited takes exception to Protagoras being called either a lawyer or a teacher of the law. His view is that there were no lawyers nor law teachers in Greek society. I can take his point in comparison with Roman society. And as a matter of logic, in any society where every man is his own lawyer there are no lawyers as we know them at all. But here again (quoting Hicks after Northrop and Tammelo) is the legal basis on which Protagoras propounds the liar paradox: "Protagoras taught law and because Eulathus was a promising student, but poor, agreed to postpone payment of tuition fees until Eulathus had qualified. Then, Eulathus was to pay Protagoras on winning his first case. Eulathus duly qualified but did not start to practise, so Protagoras sued him for his fees, arguing: 'If I obtain judgment I shall be entitled to enforce it; if not, you will have won the action and must pay me under our bargain.' 'Not so,' replied Eulathus, who had not failed to profit from the instruction of the Master, 'If I lose, the condition precedent to my liability will not have been fulfilled; if I win, I rely on the ruling of the court that I owe you nothing.' " On this account, whether apocryphal or not, I rest my case that Protagoras the Greek was both a lawyer and a teacher of the law.