Law, science and society

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This paper, written in the mid 1970s, evolved out of a "Law in Society" course taught by the late Dr Mummery at Auckland University. The author analyses law and legal processes in terms of the interplay between a first person and a third person sense of law, in an attempt to suggest a general approach to the study and practice of law that will be relevant to our times. The first person sense is a loose consensus among a group, which is not binding. At some stage it may be thought necessary to formalise the consensus (the third person sense).

I FIRST, SECOND AND THIRD PERSON APPROACHES TO LAW

It is being increasingly recognized that much wisdom is to be dug, in law as in other fields, out of a study of the use of language. There are strong links between law and language. Law is more than a currency. Despite an obvious difference - language is rarely "legislated" save in computers - law is nonetheless a type of language. Like any language law expresses the intuitive as well as the analytical elements in human consciousness, the inspirational as well as the structural, the creative as well as the technical, the poetic as well as the grammatical, the moral as well as the positivistic. Because languages of various kinds - including law - act as a bridge between the intuitive and the analytical, the study of the analytical element - in particular the linguistic - may throw fresh light on the intuitive or a priori element; and the study of the positivistic element may throw light, if only by a process of exclusion, on what may be called the moral.

Law, as much as any, is a language of action. Hence valuable analytical insights may be had from simple observation of that part of speech that most directly denotes action, the verb. Just as Hohfeld based his analysis of law on a series of nouns - associated with the word "right"[1] - so we may proceed by looking at the structure of the verb. In the typical case, the law says *he shall do* something or other. The wording of a statute most clearly takes the form of the third person, as our grammar texts call it: *he*, *she*, *it* or *they* shall do.

Yet analysis quickly shows that the world of the law is not confined to third person elements. The judge who individualizes a sentence to meet the demands of the particular case before him is declaring to the one convicted, in effect, *you shall*

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1 WN Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 Yale L J 16 reproduced in WN Hohfeld, *Fundamental Legal Conceptions* 23 (1923).

do - you shall pay this fine, serve this term in prison. The parent giving instruction to the child, the master to a servant, is saying "you shall do". The same is true of an act of a legislature directed towards a special exigency: to stop the exportation of corn then shipped and in port. Some would deny this statute the nature of law, as indeed they would the sentence of the judge.[2] This denial is surely wrong, the former case perhaps more clearly than the latter; but unfortunate conclusions also stem from the latter being left outside the pale of law. Even though they fit within the concept of law a little uneasily, these situations may fairly be subsumed under the heading of law if it is seen that they are the expression of law in the *second person*, or at least with strong second person elements. Admittedly to speak of a second person element in law is to extend the field of law rather more widely than may always be readily accepted; but a readiness to look at law in this sense will be seen at a later point to have some profound implications.

Is there room for a first person sense of law? What is the situation when a group of people undertake that *we shall act* in a certain way? Though it may seem on the face of it outside the pale of what is frequently considered as law, this is what is involved when a group draws up a constitutive document to govern its actions. A constitution is readily acceptable as an expression of law, and it may be seen as containing the elements of a *first person collective* approach to law. A constitution, however, is but one example of a first person collective sense. Whenever there is an element of consensus, formal or informal, within a group of individuals, there is present a "we-sense". Customary law manifests this in a measure.

This is not, of course, to say that there is inevitably *one* "we-sense" in a society, or indeed any determinate number of them - any more than there is "a" social contract in any complex society. Modern national society is certainly a congeries of overlapping, interlocking and at times clashing first person collective approaches and combinations, manifested in terms of familial, tribal, social, commercial, educational, national, international and other groupings. Each first person collective sense is of course imperfect to the extent that there is inter-group conflict, but each group seeks a first person approach of a sort, albeit at times a limited one.

Among these groupings containing varying shades of outwardness and exclusiveness is the judiciary. By its very nature it is expected to maintain, and in many instances does maintain, a sensitivity to the interests, needs and values of the society in which it holds office. This sensitivity extends not only spatially across contemporaneous society but also in time, particularly in the common law system, by virtue of the element of community which exists between judges across generations.

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2 John Austin *The Province of Jurisprudence Determined* 20 (HLA Hart ed 1954).

If a group may make a law or sense of law for itself, may an individual be said to make a law or sense of law for herself? If I decide that I shall make a rule of having lunch at 1 pm on weekdays, am I not doing this? May not a Robinson Crusoe make law for himself?

If such an element in law were recognizable, it would constitute a tendency toward a *first person individual* element. Perhaps for the purposes of discussion it may be enough to postulate a first person individual sense of law. Let us then make bold to speak of this element as the logical completion of our scheme - just as the explorer in chemistry may dimly identify an element and give it a name, leaving it to be discerned more clearly in the fullness of time.

By thus proceeding we are enabled to analyse some age-old questions from a new standpoint, particularly in that we are free in a sense, by this very postulate, to lay to one side various problems of a philosophical, psychological or religious nature, problems such as that of the freedom of the will. Much thinking in law and elsewhere is inevitably based on assumptions, one way or the other, which have not been made explicit. Here we must endeavour to make assumptions explicit recognizing that in this field progress can only be made by leaving ultimate questions to be settled elsewhere. In order to proceed, then, we merely postulate this concept as an apparently unknown or partly known quantity, just as one would use the letter x in algebra to represent a quantity sought, be that quantity positive, negative or zero.

Here, then, let the notion of total individual freedom be denominated as, or identified with, the first person sense. The first person concept is that of complete freedom in its most expansive sense. Some would deny that this concept has meaning in human experience. If it has, it is no doubt realized there but imperfectly - just as many chemical elements are observable but imperfectly in everyday working conditions.

As a rough starting point towards an exploration of the first person sense, we may exclude certain broad categories of activity from its ambit. An act which is manifestly harmful to another individual has by definition second or third person elements, for it has a direct impact on that other individual's acts or thoughts. There will be controversy over what constitutes "harm" in borderline cases; we skirt this here. Let us go further and suggest that *all* acts of coercion, howsoever defined, have second or third person elements. Every act which bears directly on another individual so as to compel him to act in a certain way has a second or third person element for our purposes - that is, it is not a purely first person act.

This is but a very rough and tentative sketch of our starting point. It leaves open many questions about freedom, responsibility and coercion, even of spiritual values, the relevance of a priori reasoning and the nature of morality. Too often discussions have proceeded with assumptions not clearly explained but asserted as established truth, and great debates have been staged from positions staked out under the banners of what is called "natural law" in its ancient, medieval or modern

variants, and its opposites, howsoever defined. The need of our time is to survey the whole ground again from a new vantage point.

The purpose of this undertaking is not to construct a great edifice of theory, but rather to suggest general approaches to the study and practice of law that will be useful in this troubled age. In these times of unrest in the institutions of society, the notion of authority is under challenge: authority which says or appears to say "she shall" or "you shall" is being challenged, as much as ever, by attitudes which manifest the urge to say *we shall* or *I shall*. There is a searching for new concepts of community to replace those which have become outworn or fossilized. This search for community is often an expression, in forms of varying integrity, of a search for the common denominators in increasingly complex and pluralistic societies, a search for what may be called the first person collective element.

If this scheme has merit, it would follow that in order to be able to grasp the nature of the first person collective we should need to discern something of the nature of the first person individual. This we may at least approach, as already suggested, tentatively and step by step by a process of exclusion: that is, to begin with, by identifying third person elements which are clearly antithetical to the pure first person sense. Because the first person collective and the third person elements bear such an important relationship to the first person individual, it may be concluded that an understanding of the first person element lies at the very basis of an understanding of law in society.

It has already been suggested that a pure first person sense must be regarded as a rare element. Indeed, the conclusion must be that in its pure form - if, indeed, this may be said to be identifiable - it must be the limiting case, the equivalent of mathematical infinity. In the day to day life of the law the traditional practitioner's concern will dwell very largely upon its third person elements. He will seek "[t]he prophecies of what the courts will do in fact, and nothing more pretentious",[3] which is what Holmes meant by the law. At the same time he will be ready with Holmes - perhaps even more ready than was Holmes in his time - to say that there may be "a wider point of view from which the distinction between law and morals becomes a secondary or of no importance, as all mathematical distinctions vanish in presence of the infinite".[4] It is at the approach to this point that the first person sense becomes meaningful.

II LAW AS THE INTERPLAY OF FIRST AND THIRD PERSON ELEMENTS

Any legal order will involve, broadly speaking, a mix of two contrasting approaches: the first person sense and the third person sense. For immediate purposes we may assimilate the second person into the third person, as a variant of it; each may be derivative from the first person sense and stands in strong contrast

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3 OW Holmes "The Path of the Law" (1897) 10 Harv L Rev 457, 461.

4 Above n 3, 459.

to the first person collective rather than in strong contrast one with another. In every system there will be an element in which the system captures, to a greater or lesser degree, a cooperative or sharing sense, a "we-sense" in that society, a sense shared by a moral community that pervades that society extensively, a *Volksgeist* or *collective conscience*. At the same time there will be third person elements present in more or less degree. This is so if only because the "we-sense" just referred to will in any society be present only imperfectly. If it exists, it may tend often to be an unstable element that breaks down easily. Thus there will be points at which certain individuals notionally within a first person community will find themselves outside the first person consensus. Any law passed as a result of that consensus will act in a third person sense upon persons who do not so approve it. The very need for a third person law, indeed, is in itself an indication of an imperfection in the first person element.

Every rule of law - that is, in this context, every third person expression of law - has its genesis in a first person sense. In the case of a dictatorship of one person, this is by definition a first person singular sense. More often the first person sense has a plural orientation - by no means a perfect first person collective sense but a tendency towards this. Within more or less definable groups of persons certain propositions emerge as those which are believed ought to govern in a given situation. These propositions are what may typically be called principles of law. The group or idea-community within which these principles emerge may be one of various kinds, and the community may (but need not) extend widely through space and time. In modern times we have come to see a proliferation of imperfect first person collectivities throughout society: groups to forward a certain line of action. They each constitute an elite of a kind, particularly, perhaps, when law is concerned. While the idea or principle may be accepted widely within the group in question, unanimity would not always necessarily be found; but there would be sufficient consensus to justify the conclusion that there was a "we-sense", a first person collective sense of a kind.

The process by which the first person plural sense of a group is ascertained and translated into third person rules will vary from group to group and, with some groups, occasion to occasion. To describe the essentials of this process is to describe an act of creativity, of genesis.

The process may be viewed in its simplest form if we take a situation where there is no pre-established rule structure. Let us then take a very simple situation - simple in that it encompasses not great issues of life but only a small band on the spectrum of human activity. Let us take several small boys who have each been given a number of marbles, but no guidance on what to do with them. They intuitively conclude that these are for their amusement by way of a game played by propelling the marbles. Initially the players may play without any rules. Later they may conclude that it is desirable, in the interests of fair competition, that the marble be propelled in a certain way and not in another. The process by which such a rule is formulated will be that of consensus formation. We may view this as having first person elements. At some point, however, there may be differences of view. Some may agree on a certain formulation; others may disagree. At this point

the "we-sense" begins to run out. Those who disagree with the formulation, if they are not to withdraw from the group and forfeit their opportunities to play, must *accept* the formulation in one state of thought or another. It is this state of thought, this mental element, that is of peculiar interest to us; for it is this that determines whether the rule is first person collective for all members of the group, or whether for some it is third person.

H L A Hart has identified this process as one of acceptance. This title he gives to the practice by which members of a group come to "look upon [certain behaviour] ... as a general standard to be followed by the group as a whole". It involves what Hart calls an *internal aspect*, that is, the existence of:[5]

> a critical reflective attitude to certain patterns of behaviour as a common standard, and [the notion] that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must' and 'should', 'right' and 'wrong'.

Hart's identification of the practice of acceptance and his observation of its close connection with the internal aspect of rules - the mental elements - was of great importance. Taken further, the phenomenon of acceptance may be defined as the interplay between what we have called the first person collective sense and the third person element.

The process by which the first person collective sense interacts with third person attitudes - and hence with "rules" in the usual sense of that word - will vary widely from situation to situation. We have observed above the process as it may occur in an utterly simple society, that of the marble-players, a group that is surely the amoeba among legal organisms. In a more advanced society the processes of transition from first person to third person are assigned to various institutions, each playing its own role. Typically these institutions are designated legislative, administrative and judicial. In each of these the interplay between first person and third person is seen.

In the legislative process there is, at least in broad terms, representation of a whole community, and out of this representation a drafting of third person rules.

In the administrative process the authorities are working with the policy of the statute, the first person community sense already crystallized in a measure into third person statutory directives; but there is scope within the discretions given by the statute for the apprehension of the first person sense of the legislature, and scope for the translation of this not only into third person guidelines (rule-making) but second person determinations to meet the demands of individual cases with or without regard for overall consistency.

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5 HLA Hart *The Concept of Law* (OUP, New York, 1961) 55, 56.

In the judicial process, historically an offshoot of the administrative process, the authorities are similarly working within the interstices of the statute where applicable. In the working out of second person rulings to meet the requirements of individual cases the judges must uphold a consistency not only with statute but also a broad first person community with other judges and courts, not only those contemporaneous but those of earlier times, departing from their views of common law or statutory interpretation only upon rationally justifiable grounds. At the same time they must uphold to every extent possible the concepts of the present day community as they see it, a duty which is at once the cause and the justification for the peculiar flexibility of the common law and a challenge to the intuitive skill of the judge.[6]

All three techniques - legislative, administrative, judicial - tend to coalesce in the administrative process. Administrative authorities may act legislatively (rule-making) and in a kind of judicial manner. This confirms that the terms legislative, administrative and judicial denote *roles* more than institutions.

A The Interplay as Seen by Austin and Hart

The analysis of law in terms of interplay of two elements is not new. It has, however, been undertaken in rather broader terms than have been employed here. John Austin spoke of a union of "two distinguishing marks": the habit of obedience to a determinate and common superior combined with lack of habitual obedience of that superior to a determinate person or body - a union of a positive with a negative element.[7] Hart speaks of a union of primary and secondary rules.[8] Lon L Fuller speaks of an interplay between the morality of duty and the morality of aspiration.[9] It may be seen that each of these dichotomies is explained by the first person/third person analysis.

Austin saw law as the epitome of what we have called the third person element; and most people still do. For him, the element of command and sanction was the very essence of law. Thus it is natural that the basic element in law for him was the "habit of obedience or submission to a determinate and common superior". At the same time, Austin saw the logical necessity of recognizing that the superior in question was not subject in turn to a third person element. Hence his recognition of an additional ingredient, namely, that there be "lack of habitual obedience of that superior to a determinate person or body".[10] In this Austin was recognizing the first person freedom of the sovereign, but expressing it in negative (third person) terms. Austin's insight into law - coloured though it was by his emphasis on the

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6 See generally B Cardozo *The Nature of the Judicial Process* (Yale UP, New Haven, 1921), and EH Lev "An Introduction to Legal Reasoning" (1948) 15 U Chi L Rev 501.

7 Above n 2, 193-95.

8 Above n 5, 77-96.

9 LL Fuller, *The Morality of Law* (rev ed --- 1969) 3-32.

10 Above n 2, 193-95.

imperative - nonetheless made allowance, albeit tenuously, for the first person element.

Hart saw, in effect, that Austin's model hardly identified adequately the first person elements of law in modern democratic society, elements far more pervasive than is indicated by a command-sanction analysis. Building on Kelsen, though differentiating from him, Hart pursued the thesis that the foundations of a legal system consisted not in a general habit of obedience to a legally unlimited sovereign but in an ultimate "rule of recognition" providing authoritative criteria for the identification of valid primary rules of the system. Thus a legal system was for him a union of primary rules - third person rules requiring individuals to do or to abstain from doing certain actions - and secondary rules, including a rule of recognition.[11]

His "rule of recognition" is, then, an attempt to identify a rule-element underpinning a society's basic, primary laws. It has already been seen, however - in observing the marbles game - that the interplay between the first person and the third person elements in law is not aptly described as a *rule*. It is rather a *process*: a process, indeed, which Hart has in effect identified by the term "acceptance". Hart indeed speaks, somewhat uneasily, of the possibility of the "acceptance" of a rule of recognition.[12] Moreover while speaking of a "rule" of recognition he nonetheless acknowledges that its existence and content is a question of fact, "empirical, though complex"; it is not, he allows, a grundnorm postulated in the manner of Kelsen.[13] Yet herein - the transitional situation of the rule of recognition on the borderland of fact and rule, having an existence in fact and yet constituting a rule in name - lies its difficulty.[14]

Here at the point of dawning of a rule from a pre-dawn of fact there is no stark dichotomy between rule and fact. As in an optical illusion a situation may appear one way at one moment and another way at another. In some highly formalized situations it may indeed be possible to speak of the point of genesis of a legal system as something identifiable as a "rule of recognition". In other contexts, however, to encapsulate the process under such a title is to look through a glass darkly in search of solutions to some of the most pressing problems of our time.

Rather than speak of a transition from fact to rule we may speak of an interplay between a first person and a third person sense. It is not a one-step transition but a constant process of interaction. This first person sense is a shared sense among the founding members of a society - a fact but hardly a rule though possibly, but only in a very general way, a sense of law. This sense may never be expressed in the form of a rule - hence its elusiveness. It is hardly to be readily discerned through a rule-oriented viewpoint. In speaking of it as a rule, Hart has seen it only after its

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11 Above n 5, 77-96.
12 Above n 5, 111.
13 Above n 5, 245.
14 See above n 9, 133-45, 192 n 11.

transmutation (for him at least) into a third person sense. Like Austin he has sought to define a first person sense *negatively* - in third person terms. It is only in certain cases, however, that a first person sense is converted into a rule. When it is so converted, whether into a duty-conferring rule or into a power-conferring rule such as a rule in a constitution, it loses some if not much of its first person colour and takes on a third person hue by reason of that very change.

B The Interplay as Seen by Fuller

The interplay between first and third person elements shows up clearly in Lon L Fuller's great study of what he calls the "two moralities" behind law: the morality of duty and the morality of aspiration.[15]

The morality of duty, says Fuller, starts at the bottom of human achievement: it lays down the basic rules without which an ordered society is impossible: 'He who steals commits a crime and shall be punished in such and such a way'. This, then, is for the most part what we have termed the third person sense: he shall, he shall not. Fuller says that this is "the morality of the Old Testament and the Ten Commandments", and no doubt it is so in a popular sense, though we shall consider below whether the Ten Commandments do not have more of the first person element behind them than is indicated here.

The morality of aspiration, on the other hand, it "the morality of the Good Life, of excellence, of the fullest realization of human powers". For Fuller its summit is to be found stated plainly in Greek philosophy and, he appears to add, in the Sermon on the Mount and the Golden Rule.

Fuller's morality of aspiration corresponds broadly to what we have called the first person sense, individual or collective. The sense of aspiration is the sense of what I or we aspire to do. To speak simply of the first person sense, however, would seem more convenient than to speak of "morality of aspiration", which defines the issue but broadly. The word "morality" is inevitably a limiting factor because of its many connotations, while the aspiration/duty dichotomy is in essence only one feature of the first/third person interplay which is infinitely various throughout the whole texture of the law.

The desert island is a convenient place to review what has just been said. Let us with Fuller[16] imagine a group of shipwrecked men isolated in some corner of the earth. Events have wiped out the memory of their previous social existence and the laws and conventions which they observed in their original homes. How will their society be founded? In order to found a structure of legal order there will have to be a sense of common purpose and aspiration, an esprit de corps, a sense of unity. This we call the first person sense. It is not yet a rule; it may or may not give rise to something that can be identified as a formal rule. No third person element has

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15 Above n 9, 3-32.

16 LL Fuller "Reason and Fiat in Case Law" (1946) 59 Harv L Rev 377.

emerged. One might speak here of a rule of recognition, but this term does not adequately describe what is not so much a rule as a *sense*, and a *process* emerging from this sense. We have called this sense the first person sense, and the process (which also begins in a mental attitude or acceptance) is the process of transition from the first person to the third person sense.

Fuller in this earlier study speaks of the foundation members of the new society having to discover "the natural principles underlying group life", "the ways in which men live together in groups"; this, he says, is the discovery of an order. This is precisely what we may call the first person sense, the "we-sense" or esprit of the society in question; it corresponds broadly to what he called in his later phrase - in some respects better, in some respects less satisfactory - the "morality of aspiration". Yet at certain points in the new society, he observes, "law cannot be discovered but must be made" by individuals who are called upon to undertake certain responsibilities, eg, to adjudicate disputes. This is the transformation of the first person sense into the third person sense. The insight - the first person sense - of the person chosen to adjudicate might make it clear, says Fuller, that certain acts would have to be punished if the morale of the group was to be preserved. But whether imprisonment should be the penalty, and whether it should be for seven days, eight days or two weeks would be matters where law cannot be "discovered" in the sense already indicated, but it would have to be made. Here the first person sense of the judge would be more individual than collective, and the sentence would be more quickly identifiable as second or third person.

If the relationship between the first person sense of law and third person sense of law is not to be described in terms of a *rule*, such as a rule of recognition, but as a process, an interplay between two senses or states of consciousness, then Fuller's work has opened the way to understanding and defining this process: in his earlier work, in seeing a legal order as an interplay between what he called "reason" and "fiat"; latterly in the interplay which he sees between what he called the morality of duty and the morality of aspiration.

The first person/third person analysis thus indicates that, despite the very different terminology, posture and style of Hart and Fuller - mutually agreed by them to be "our [different] starting points and interests in jurisprudence"[17] - and despite their apparently disparate conclusions, they are actually seeking to articulate findings on the same issue and in ways that are basically similar.

III PRINCIPLE, RULE, DISCRETION

We have looked at the first person/third person analysis primarily in its relevance to the genesis of a legal system. The analysis is also relevant, however, to creativity within the ongoing system, including the relationship between principle and rule, and the notion of discretion. A *principle* is in essence a tendency towards a first person sense that has become reasonably crystallized within a first

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17 HLA Hart "Book Review" (1965) 78 Harv L Rev 1281; above n 9, 189.

person community - be it individual or collective and, if the latter, in a legislative, administrative or judicial context or otherwise - but which has not yet become transmuted into a third person sense or *rule*.

In the legislative process the first person community may be seen as the legislature itself, or the fluctuating concurrent majority, or, more loosely, the society at large whose views are represented, albeit imperfectly, in the legislature. The task of the legislature is to transmute a first person sense, howsoever captured, into third person rules.

In the judicial process the first person community may be viewed in various ways. In terms of the law to be applied the court forms part of a first person collective community with other courts that have ruled on the same subject, a community which may on occasions extend back hundreds of years. At the same time a judge may be a first person singular community unto himself, to a limited degree, when it comes to applying the law as already declared by other courts. A judge may, by a process of correlating or distinguishing cases, actually reinterpret the law and change its content.

Again a court may, due to changing social contexts, introduce new concepts into the law. Here the court is acting partly in a first person singular sense, though it may also at this point be viewing itself in a first person collective sense with the community. Insofar as it seeks to align itself with earlier judicial decisions, it is seeking to preserve a comity or first person collective sense with the court or courts that made those decisions. Alternatively it may simply view this duty - and particularly when it regards itself as controlled by a decision of a superior court - as a matter of applying third person rules which are binding upon it.

The decision of a court has a first, second and third person aspect. Its decision must harmonize with other decisions in the judicial community across space and time - a first person collective sense. As between the parties the direct effect of a judicial decision is to say "you must do (or not do) this" - a second person impact. At the same time the rule propounded by the court is typically seen to emerge as a ratio decidendi that may read like any other third person rule of law.

In short the judicial process represents, both in its inner workings and in its output, a subtle interplay between the first and third person elements, rather more sophisticated than the interplay between these two elements in the working of a legislature, but no more subtle than a similar interplay between these elements within the life of an individual. In addition a court manifests aspects of the second person sense which again is found in the life of the individual but which is relatively rarely found in the working of a legislature (private laws are an example).

In the administrative process there are to be found at times some of the first person characteristics of the legislative process and of the judicial process. Usually in the administrative process, however, the second and third person elements bulk large.

What is described as the relationship between principle and rule is then, broadly speaking, what we have described as the relationship between the first person elements and the third person element. Explorations of the relationship between principle and rule are attempts to explain the relations between these two elements - to put it in another way, the relation, in the context of law, between the intuitive and the analytic.

The point of genesis of law is, as we have seen, where the first person sense begins to be *seen* or *thought of* as "law". For people to see a pure first person sense - unmixed with the third person sense - as *law* is very rare. Many people would find it disturbing to think that a first person sense represented anything like law at all. For many it is, indeed, the very entry in of a third person sense that constitutes the identification of a concept as being "law".

These points are relevant in considering the issue of principle and rule. The issue has been thus stated as an all-important one: are principles to be regarded as binding (ie, as law), or are they "beyond" the law?[18] In *Riggs* v *Palmer*[19] it was held that a murderer would not be permitted to benefit from the estate of the deceased. Here the court has undertaken to discern a first person sense within the community or at least within the legislature - through the technique of looking for "legislative intention" - and transmuted this into a decision or third person rule. One might say that this proposition became a rule on its adoption by the court (inasmuch as a rule of recognition indicates that courts have power to identify rules). Others would seek to go beyond this. It has been suggested that the true origin of a decision of the kind in *Riggs* would best be said to lie in "a sense of appropriateness developed in the profession and the public over a long time".[20] To say this is to attempt to define, in limited if in realist terms, a manifestation of the first person sense. The authority for continued validity of such a course is said to lie in "this sense of appropriateness being sustained".[21] The test is thus said to be one of "institutional support". Here we reach the end of the road, for, on this view:[22]

> we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle.

The first person/third person interplay may provide a more satisfactory tool of analysis. To seek to define institutional support is to seek the various manifestations of the first person element within the society in question, be this

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18 RM Dworkin "The Model of Rules" (1967) 35 U Chi L Rev 14, 29-30.
19 115 NY 506, 22 NE 188 (1889); Dworkin, above n 18, 23, 29.
20 Dworkin, above n 18, 41.
21 Above n 20.
22 Above n 20.

element the object of scrutiny of the community in general or of the elite and influential elements in it at a given time.[23]

Whether or not principles are to be regarded as "law" will depend on the readiness in the particular situation to regard the first person collective sense of law as a form of law. Discretion, by the same token, is a second person sense woven into the fabric of third person law. The debate about whether discretion involves "law"[24] is essentially a debate about whether a second person approach to law should really be regarded as law.

IV LAW, MORALITY AND SCIENCE

In recent years there has been an increasing discussion on what has come to be called the "enforcement of morals". Yet this very phrase, found in the title of Lord Devlin's Maccabaean Lecture that precipitated a distinguished debate with Professor Hart,[25] raises a number of basic difficulties under the first person/third person analysis.

The free person's moral sense is, by definition, essentially first person and individual. Few, perhaps, attain real freedom in this regard; indeed, perhaps all are striving to evaluate, in one way or another, the "traditions of the elders" - those habits and modes which have been received in more or less a second or third person way from other individuals and society at large. Just as the process of education involves much teaching that is second or third person, so it is being found that much can be learned and taught by means of individual self-discovery - a combination of the intuitive and analytic,[26] a step towards first person awareness. Similarly with true first person morality there is no need for "enforcement", for it must by definition be self-enforcing.

When, then, there is talk of the enforcement of morals the term morality is being used in other than this pure sense. "Morals" in such a context implies neither a pure first person individual sense nor a pure first person collective sense. Neither need enforcing but are attained by discovery as in the case of the initial marble-players. What is being implied in the phrase "enforcement of morals" is the first person collective sense, at most, of *some* of a community, a sense which these people wish to extend to the rest of the community not by first person sharing but by third person enforcement.

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23 Compare R Sartorius "Social Policy and Judicial Legislation" (1971) 8 Am Phil Q 151, 156; RM Dworkin "Social Rules and Legal Theory" (1972) 81 Yale L J 855, 876.

24 Compare Dworkin, above n 18, 32. On the need for developing a "jurisprudence ... of discretionary justice" see K Davis *Discretionary Justice* (Louisiana State UP, Baton Rouge, 1969) 233 ff.

25 P Devlin "The Enforcement of Morals" (1959) 45 Brit Acad Proc 129; HLA Hart *Law, Liberty and Morality* (1963); P Devlin *The Enforcement of Morals* (1965).

26 J Bruner *The Process of Education* (1960).

There is, however, one major difference between the case of the marble-players and of society generally. The marble-players are a voluntary association which individuals are free to join or quit as they will. In society generally all individuals are, for practical purposes, members of the society willy-nilly; they cannot opt out. Hence the clash between the individual first person sense - individual freedom of conscience - and third person efforts to maintain a moral code. What for some is seen as the path of freedom is for others a trend towards permissiveness. One plea is that permissiveness in its various forms does not harm the various elements in society; but there is confusion over what constitutes harm, and how it is to be measured and proved. Holmes wrote: "The law is the witness and external deposit of our moral life".[27]

The continuing choice, in determining the moral qualities to be deposited in the law, will be between the sense of individual freedom and a sense of collective integrity. Ultimately the former may be found to support the latter; but the transition to this point may be fraught with difficulty.

Summarizing the Devlin-Hart debate an observer concluded that there was still considerable scope for the entry in of the religious sense without resort to what has been called here third person enforcement. He urged, in effect, that the exalted ideals of religious teachings be pursued by those who would pursue them, but that these ideals be shown to be worthy by proof in practice: by putting them to the pragmatic test via, in particular, the rigours of the social sciences. "There is a marked reluctance on the part of some people to expose religious doctrines to this sort of test ... I believe the risk must be taken".[28] He is saying, in effect: (1) religious teachings were once accepted widely in a first person collective sense in many communities, or at least more widely then they are now; (2) if they are to be re-established as having merit this merit must be shown by scientific, pragmatic proof produced by those who accept these teachings in a first person individual sense, more than by third person argumentation and/or directive. There must be shown to be a link between religion and proof, between ideals and results.

Apart from a brief reference to the subject of marriage as a useful testing ground for his proposal, the author leaves the subject open. It is indeed a vast theme and no doubt has bearing on the increasing trend in recent times towards the involvement of the church in secular, social problems.[29] The impact of this trend, to pursue the Holmesian turn of phrase, appears to have left relatively little deposit on the life of the law to date, save perhaps in one area. This is the subject of healing by prayer. For the purpose of medical practice statutes and the like, specific provision making allowance for the work of those who heal by prayer has

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27 Above n 3, 459.

28 B Mitchell *Law, Morality and Religion in a Secular Society* (OUP, London, 1967) 118.

29 See, eg H Cox *The Secular City* (Penguin, Harmondsworth, 1965).

evidently been found desirable both in the United States and abroad.[30] In the context of externalization of first person principles, this subject may provide a sharper profile of proof than the purely moral and social field, where utility may not be as readily measurable in observed actuality. If moral progress must accompany healing by prayer - and this appears to be implicit in the Judaeo-Christian records[31] - then it may be that present day events in this category provide a profoundly important, if apparently largely neglected, datum for scientific, sociological inquiry.[32]

V DUE PROCESS AND THE CONCEPT OF MANKIND

A priori concepts typically emerge as a first person individual experience. It is only when they are seen to be efficacious in a collective experience that they become truly first person collective. Otherwise they may be transferred from one individual to another only by second person or third person processes. It is important to bear this in mind when evaluating the age-old issue of the relevance - if any - of a priori concepts to law.

"Natural law" scholarship falls very largely within the category of first person individual, second person and third person experience. Only in a very generalized sense of the term, if at all, would it be possible to say that such scholarship were based on a truly collective experience. Herein lies the difficulty of all legal thinking based on a priori concepts. On the one hand, such concepts touch upon the noblest issues of societyand civilization; on the other hand, it is a problem to evaluate them in this present scientific age, which is increasingly distrustful of dogma and demanding of proof. Not only is it difficult to make such great issues visually interesting, as Kenneth Clark found:[33] it may seem difficult at times even to make them interesting.

On the walls of a well-known law school's reading room there are inscribed texts both from the Graeco-Roman tributary to Western civilization, and from the Judaeo-Christian. "Lex est summa ratio insita in natura"[34] sits in striking contrast

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30 See, eg, Cal Bus & Prof Code §2146 (West 1962); Cal Health & Safety Code §1709 (West 1970); D C Code Ann §2-134 (1966); Ill Ann Stat ch 91, §16v (Smith-Hurd 1966); Mass Gen Law Ann ch 112, §7 (1971); NY Educ Law §6527 (4) (b) (McKinney 1972); PA Stat Ann tit 46, §601 (63) (1969), tit 63, §401 (c) (1968), tit 63, §623 (1968); B C Rev Stat c 239, §73 (1960); Ont Rev Stat c 137, §10 (d) (1970); Public Health Act 1936, 26 Geo 5 & 1 Edw 8, c 49,§193 (Gt Brit). In order to claim benefit under the New York statute the healing remedy must be sought in prayer alone, unmixed with other devices, *People* v *Vogelgesang* 221 NY 290(Cardozo J): "The sufferer's mind must be brought into submission to the infinite mind, and in this must be the healing. The operation of the power of spirit must be, not indirect and remote, but direct and immediate" (Above at 293).

31 See, eg Matthew 9:2-8.

32 See, eg Letter from Will B Davis, (1954) 60 Am J Sociol 184.

33 *Civilization* (1969) iv.

34 Cicero *De Legibus* bk I, 818.

with passages from the Hebrew Scriptures and the pronouncement, "Of law there can be no lesse acknowledged, then that her seate is in the bosome of God".[35]

Whatever else may be said about the Judaeo-Christian scriptures, the fact is that their moral pronouncements are made in the context of the first person collective experience as therein recorded. Externally viewed the record is at least one of internal consistency. Obedience to precepts laid down would, according to prophecy, give rise to events of great moment; and so it happened and was seen collectively to happen. Legal scholarship in recent decades suggests that these original documents may be a rather more fruitful source of ideas, even in this day and age, than philosophical glosses which may lack their context of collective experience.[36]

The Hebrew Decalogue, for example, though substantially phrased in second person terms - "thou shalt not"[37] - and commonly interpreted in second or third person terms to this day, may actually be taken as first person collective inasmuch as it formed one side of *berith*, or covenant, between God and the Hebrew people.[38] Even viewed in secular terms it involved the adoption of law through the we-sense of the people.[39] Christianity may be seen as a restatement, inevitably in new terms, of first person ideals which had in intervening centuries at times become enshrouded in third person formalism.

Is there anything in these original collective experiences which speaks directly to the needs of law and society at the present day, without the need of third person interpretation outside the pale of collectively seen proof? On the surface it would seem unlikely. Even the less exalted values of the secular policy-oriented approach to law[40] seem difficult to apply without the entry in of first person individual preferences, conceivably leading at time to results of a third person nature in an exercise which begins as an investigation of the first person collective.[41] The teachings of the Judaeo-Christian scriptures would seem to be even more vulnerable to such difficulty.

In one short passage in the New Testament, however, there appear propositions which run parallel to useful new initiatives in the administration of law and justice, and which by the same token would tend to uphold the intuitions of those who would expect to find the original Christian teachings having continuing, direct

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35 R Hooker *Of the Lawes of Ecclesiastical Politie* 51 (1622).

36 A Diamond *Primitive Law, Past and Present* 124 (Methuen, London, 1971); J Stone, *Human Law and Human Justice* 44 (1965); Helen Silving "The Jurisprudence of the Old Testament" (1953) 28 NYU L Rev 1129.

37 Exodus 20:1-17.

38 Exodus 19:5; H Silving, above n 36, 1136; A Phillips *Ancient Israel's Criminal Law* 1-13 (1970).

39 Exodus 19:8.

40 MS McDougal "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study" (1956) 1 Natural L R 53, 65.

41 See RA Falk "Book Review" (1961) 10 Am J Comp L 297, 303.

relevance to the needs of the at least nominally Christian-oriented culture. This canonical text records the Founder of Christianity describing proper conduct in the Christian community:[42]

> Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.

Here is a carefully graduated series of steps providing a transition from the first person sense to the third person - adjudication - which is brought in only as a last resort. The first person aspiration is to rehabilitate the offender without exposing him in any way to third person processes; hence the interplay is to be in private, a second person encounter of encouragement and persuasion.

If the exhaustion of this "remedy" meets with no success, the next stage is still second person in a measure, but with some third person elements beginning to emerge in the form of the one or two witnesses. At this stage the witnesses are essentially assistants to the second person process; but if this second step meets with no success, the process takes on more third person characteristics: "tell it unto the church". First and second person elements still remain, for the church is the first person collective community. If there is no reconciliation the process becomes entirely third person - but only in the fourth stage - with the delinquent's ouster, in effect, from the community.

This kind of procedure, which is also recorded in the Qumran *Manual of Discipline*,[43] has found modern day application in at least one code of ethics, the Honor Code of the University of Virginia,[44] and in the manual of government of at least one church, the Church of Christ, Scientist.[45] It might be called Christian due process, an ultimate recognition of the dignity of the individual that is inherent in all forms of due process. Its basis is evidently a concept that looks beyond

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42 Matthew 18:15-17 (King James).

43 Qumran Community, *Manual of Discipline* [title accorded ms by editor], col 5 , line 25 to col 6, line 1 (*circa* 30 BC to 70 AD?), in 2 *The Dead Sea Scrolls of St Mark's Monastery* (M Burrows ed 1951), Fascicle 2. *The Community Rule* [title accorded by author] in G Vermes *The Dead Sea Scrolls in English* 71, 80 (rev ed 1968). *The Rule Qumran* [title accorded by author] in A Leaney *The Rule Qumran and its Meaning* 109, 176, 180 (1966). For a comparable reference in a Zadokite ms discovered in 1910 see C Rabin *The Zadokite Documents* 44 (2d rev ed 1958).

44 University of Virginia Honor Committee, *An Explanation of the Honor System* 1 (Pub No M-9 rev 1960) (no explicit reference to Matthew 18:15-17).

45 Mary Baker Eddy, *Manual of the Mother Church, the First Church of Christ, Scientist, in Boston, Massachusetts*, art XI, pp 2, 4 (89 ed 1911) (citing Matthew 18:15-17).

externals to the "new man" in character,[46] an ideal of perfectibility. It provides a contrast of first person collective considerations - the upholding of the worth of the individual - as a counterweight to the impact of the third person, official establishment of misconduct.

Every step in the criminal judicial process is, in general, a step towards the third person element. The filing of an information, indictment, trial, sentencing, and execution of punishment each signify a progression towards third person resolution of an issue. As earlier noted, the sentencing process inevitably contains a second person orientation - a discretionary element permitting the court to take into account the peculiar characteristics and circumstances of the individual under sentence. Another traditional second person "interlocutory" procedure in some jurisdictions has been that of plea bargaining before trial, a procedure which raises even graver questions touching the exercise of discretion.[47] Prosecutors possess, rightly or wrongly, a very considerable discretion in deciding whether or not to pursue a case.[48]

Early diversion of individuals from the criminal justice system, typically through pre-trial intervention, is beginning to provide a channel of relief from third person procedures. Just as the emergence of equity was a turning from the third person rigidity of the common law towards the second person needs of the individual case and even to the first person collectively of common humanity, so the transition from formal court procedures to informal counselling and guidance, fraught as it no doubt is with grave difficulties along the line,[49] is a recognition that the mix of techniques needs more of a second person ingredient. It is the touch that reaches out to the offender, typically the first time offender, to assist him to reorder his life, emerge from the background of disadvantage and go forward with a record free from the stigma of a court conviction.[50]

For the same reason the old notion of criminal restitution is still very much a part, if an informal one, of police practice.[51] It is being recognized that great scope lies in the possibility of the alleged offender in a criminal situation being confronted, in appropriate cases, by the victim. Even when circumstances make it difficult or undesirable for the two to meet together at close quarters, there are

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46 Ephesians 4:24, Colossians 3:10.

47 See, eg D Newman *Conviction: The Determination of Guilt or Innocence Without Trial* 76-122 (1966); *President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society* 134-36 (1967).

48 See, eg K Davis, *Discretionary Justice* 188 (1969), above n 24.

49 F Allen *The Borderland of Criminal Justice* (1964); Norval Morris "Impediments to Legal Reform" 33 U Chi L Rev 627, 637 (1966).

50 Vorenberg & Vorenberg "Early Diversion from the Criminal Justice System: Practice in Search of a Theory", in American Assembly, Columbia University, *Prisoners in America* 151 (L Ohlin ed 1973). For first person (and second person) techniques contrasted with third person in police activity see James Q Wilson, *Varieties of Police Behaviour* (1968).

51 Newman, above n 47, 163-64.

plenty of possibilities by way of voice communication or even closed circuit television. For the offender to see the victim as an individual human being rather than as an impersonal object of his aggression may aid greatly in readjustment and rehabilitation. These tentative steps towards the second person element, indeed even the first person collective sense - through invocation of a sense of common humanity - may, like some other innovations, find quickest acceptance in relation to offences by children and young people, later to be applied more generally. Just as the possibility of adjustment inter parties - roughly second person though often highly institutionalized into the third person through legal professional practices - has been a traditional element in the settling of civil claims, so it is being seen to have usefulness in the criminal.

While this technique will presumably have its main usefulness in the immediate future in areas of crime and delinquency of the more fundamental kind, it is possible that it may be found to have application in those penumbra areas, such as that of obscenity, where the establishment of standards is a continuing problem.[52] Even if the initial steps of confrontation yield no settlement, they may yield material which will lend itself usefully - more pointedly in any given case, perhaps, than would general studies or commission reports - in the ultimate third person trial if it ensues.

Due process confrontation, as it may be called, involves a recognition that the second person element is a valuable if sometimes neglected factor in the processes of social control; that while it may not be possible in a day for a community to reach agreement on first person collective principles in every sphere, a community may usefully work towards these by providing for a measure of interaction between individuals prior to the invocation of formal processes of justice. If individuals are encouraged, perhaps even required to come together to review their differences before the question of third person processes is canvassed, there may be much useful working out of fundamental concepts in the life of the community and its laws.

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52 See eg, *Miller* v *California* 93 S Ct 2607 (1973) (5-4 decision).