Lawyers above the Law

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I. Introduction

The trouble with legal education is that it prepares students to be lawyers — as the legal profession wants them; and the trouble with the legal profession is that it is above the law and alienated from it.

Legal education and practicing lawyers are above the law because the predominant teaching predicate is that lawyers are to be taught to serve the "interests" of clients. This places lawyers above the law, because the pursuit of "interests," and assistance in aid of them, are what law or legal experience is not. To the extent these emphases are predominant in teaching, it is not essentially guided by law. Instead, law or the legal process becomes another technological tool used in furtherance of control, power, and private "interests."

If the terms "law" and "legal process" have any distinct meaning, they involve normative conceptual constructs and their experiential counterparts, the essential functions of which are to characterize pursuits of "interests" as lawful or not and to delimit or guide these pursuits in directions which are "legal." This means that law and legal process (or experience) necessarily involve evaluative or "normative" concepts and premises as their essential, inherent and distinctive characteristic, and they, by definition, may not be secondary.

The practical result of confusing the pursuit of interests with the application of law, or the experience of legal process, and of defining the lawyer's role as assisting the pursuit of clients' interests, is that law becomes irrelevant to the role except when disregarding the law would
be an undue risk, i.e., would undermine interests. The lawyer, then, does not function "within" the law in terms of operationally sharing its concepts cognitively or being part of the "experience of law." To control and exploit, rather than to be "within," immediately sets the lawyer apart from the process and experience.

If these premises are valid, and the implications for lawyers are unacceptable, then the entire restructuring of legal education in fundamental respects is necessary. Current legal education, for the most part, implicitly prepares lawyers for this alienated role. Instead, legal education ought to define its own function and define the role of the lawyers, rather than the reverse. Most critically, this should proceed on the basis of an articulated theory of law. Without the latter as a method for redefining roles and consciousness of them, legal education will continue in terms of "interests" as the predominant predicate. Ironically, this also alienates the lawyer from the client, and the result is often a dysfunction in terms of clients' interests. All players in the game become "objects."

In the analysis below, a *structural* definition of law is proposed in an effort to demonstrate that definitionally it is a self-contradiction to predicate the pursuit of "interests" as primary. It is a theory from which a lawyer's role "within" the law can be deduced, without embracing substantive values as preconditions. On the basis of this "structural" definition, some of the key implications for lawyers' roles and professional responsibility will be outlined.

A key implication is that, when the lawyer is above and alienated from the system in which he works, intense conceptual and psychological contradictions result. One of the results is the effort to develop insulating mechanisms. These tend to separate the lawyer's work from his own judgment about, and responsibility for, actions taken as the agent for clients.

These insulating mechanisms raise far-reaching questions in many contexts and may signal one of the most disturbing psychological, ethical and legal issues in contemporary experience. This is the problem of determining the genesis and scope of individual responsibility for those who have furthered the actions of collective entities or of other individuals. In general terms, this problem involves acts by agents who are constituents of a legal entity, or acts by agents on behalf of a principal, which have furthered the interests of and are attributed to the principal or entity. Insulating mechanisms are generated when furthering these *interests* in the performance of these roles contributes to ethically unjustifiable results or illegality. Clarifying the criteria for, and removing
psychological blocks to, individual responsibility of agents generally, and of lawyers specifically, in these situations requires a revision of the conceptual constructs defining their roles. In a legal framework, these revisions necessitate the development of an antecedent jurisprudential theory.

In addition, the conclusion developed here indicates that legal education ought to stimulate and teach the theoretical bases of law not only as a framework for lawyers’ roles, but also as the direct and effective way of explicating and revising the prevailing teaching consciousness of lawyers’ roles and responsibilities. Through this method, students and lawyers can come to share the experience of a legal system and relate to its participants and themselves as humans instead of objects.¹

II. Outline Of A Structural Definition Of Law

A. Scope of Definition

A structural definition of “law” or a “legal system” implies a delineation of the formal components or characteristics which are necessary yet sufficient to identify these phenomena without reference to the specific content of any particular system.

The terms “law,” “legal system,” “legal process,” and “legal experience” will be used alternatively to refer to the same phenomena. They are here used, in the first instance, to denote “normative conceptual constructs.” The phrase “conceptual construct” refers to an interrelated set of propositions and premises which employ and are expressed through certain key concepts.

¹. The single source, which has influenced the theoretical portions of this essay generally, are the works of F.S.C. Northrop, particularly The Meeting of East and West (1946); The Logic of the Sciences and Humanities (1947); and The Complexity of Legal and Ethical Experience (1959).

Northrop, a philosopher, was one of my teachers in law school; he left a lasting impression, of which I was only dimly aware until I started teaching some twenty years later. He is, I believe, one of the seminal thinkers of our time, who started as a philosopher of science and then moved on to social, ethical, legal and human philosophy on all levels. In response to an analysis made by Northrop of some of Albert Einstein’s observations, Einstein wrote:

Northrop uses these utterances as point of departure for a comparative critique of the major epistemological systems. I see in this critique a masterpiece of unbiased thinking and concise discussion, which nowhere permits itself to be diverted from the essential.
The premise here is that the conceptual construct, or conceptualizing process, involved in "law" or a "legal system" is normative in character, in that the function of its organizing concepts is an evaluative one. This evaluation refers to certain social interactions in terms of "justifications" of, or "obligations" with respect to, them.

The subject matter of these social interactions consists of empirical events or processes in which the exercise of power, or the use of coercion, in these interactions occur. The terms "power" or "coercion" are used to refer to social interactions in which an individual or group causes another individual or group to comply with its desire, despite a desire by the latter not to comply.

These legal evaluations of "power" are implicitly in terms of relations. The "actors" involved in these relations, when made reference to in the context of a legal normative construct, are concepts. These concepts will be referred to generically as "terms," "persons" or "parties." As such, a legal system is a normative conceptual construct, which is distinct from the empirical events being evaluated. In legal discourse, normative evaluations of power relations are expressed in terms of the concepts "right" and "duty."

The essential definitional premise is that a "legal system" exists when a particular set of legal evaluations, or a legal normative construct, is deemed to be shared in a particular social context, and it relates to and accounts for all power exercised within that social context.

While "law" or a "legal system" are conceptual constructs, the function of which is not only to evaluate, but to control the exercise of power, this does not mean that a "legal system" is definitionally one which must effectively control all power; nor does it mean that the effective control of all power in a given context is a "legal system." Rather, the meaning is that no exercise of power in a given social context is definitionally "exempt" from or outside of the scope of the legal normative construct employed, and that the system is normatively shared and "accountable" for all exercises of power.

The term "legal process" is used as an alternative to "law" and "legal system," to assure that no inference is drawn that the latter necessarily comprises a system or body of "rules" or "laws". Rather, the proposed structural definition of law is equally consistent with the premise that a legal system, in theory, requires no more than one "rule" or "law". This could be the rule that all relations in the system are to be normatively defined by the decisions of one particular "ruler". But for this one procedural premise, the system could be characterized as
wholly "process" rather than "rule" related. The definition does not result in characterizing a legal system as either "rule" or "process" related, but encompasses any and all combinations of these functions.

The term "legal experience" is used as a synonym for "law," "legal system" and "legal process" to assure the inclusion, in the structural definition of law, of two basic components or dimensions, which together more fully express the nature of the subject. While "normative conceptual constructs" are conceptual preconditions of "legal systems," these systems also encompass concomitant psychological or emotive experiences in the social processes to which they apply. The objective in analytically separating these components is to stress the dual character of a legal system. In one dimension it remains "conceptual" in character, as when an observer cognitively constructs concepts and premises. In another dimension it is "experiential," in that in addition to the conceptual component there are ongoing emotive-affective-aesthetic, psychological experiences. While these components coexist, it is useful to distinguish them and to refer, alternatively, to the "conceptual" and "experiential" components. A legal system, however, encompasses both dimensions and they are inseparable counterpart components.

B. The Presuppositions of a Structural Definition of Law

The defining structural characteristics of a legal system as developed here entail three essential presuppositions. These pertain to the mode of cognitive experience involved in normative discourse, the implications of this mode for evaluating the exercise of power, and the conclusion that a legal system exists in a social context when the participants in it relate to a given normative construct in a particular way.

The first presupposition is that normative discourse in general implies that it is meaningful to characterize or measure human conduct in terms of it being "obligatory" or "justified."

The second presupposition relates to the subject matter of normative legal discourse, i.e., specifically, power relations. This presupposition is that, normatively, every exercise of power or coercion requires a "justification."

Together these two presuppositions mean that evaluating or measuring power relations in terms of normative constructs is a defining condition for the understanding of a legal system, and that it is not meaningful to conceive of a legal system except in terms of this condition. They also mean that legal normative discourse has its inception in, and remains wholly focused upon, the justification of power. The con-
trary conclusion, that it is meaningful to speak of the exercise of power as normatively legal or illegal only after a “legal system” has been instituted through a substantial monopoly of power, is a contradiction in terms. Instituting a system of controls cannot induce a normative mode of thought or experience because this mode of thought is intrinsic to cognitive experience and is distinct from power processes. By virtue of this cognitive experience, power is perceived as requiring a justification.

The third presupposition is that a “legal system” is instituted when the participants in a social unit or process identify as, or are normatively identified as, “members” of the unit or process, or when they share, or are normatively deemed to share, the normative conceptual construct invoked. Depending upon the particular normative construct, this identification or sharing may be experienced by or imputed to the participants.

This presupposition clarifies an apparent inconsistency in the dynamics of a legal system, i.e. that the individuals or entities which have a legal “obligation,” by virtue of such a normative construct, to comply with an exercise of power despite a desire not to, and despite their personal “justifications” for not doing so, are still legally obligated. They are normatively reconciled to compliance with a particular exercise of power because it conforms with the shared normative construct, which conceptually precedes their individual or personal preferences. However, this presupposition does not necessarily imply the literal “consent” of all members to a normative construct. While, in a particular legal theory, “consent” noting “acceptance” by the participants may be deemed necessary to satisfy this presupposition, it is not the only manner in which it may be satisfied because the normative legal construct may be shared by them without an articulated consent, or may be inferred because they are deemed “members” of a system.

An example in which this presupposition has been deemed satisfied by “consent” is the Declaration of Independence. Implicit in the Declaration’s concern for justifying the Colonies’ dissolving an established normative legal power relation with the British Crown is a specific theory of law. This theory presupposes the first two presuppositions stated above and constitutes one specific way of satisfying the third. The Declaration presupposes that power must be justified, which includes the presuppositions as to both the normative mode of thought and power, and it specifically declares that the power relation involved in the institution of government requires the “consent of the governed.”

It should be observed, however, that the Declaration not only involves a basic procedural presupposition, it accepts a substantive pre-
condition as well. Its procedural antecedent is "consent," and its substantive antecedent is that "all men are created equal" and that they are endowed "with certain unalienable rights." This antecedent illustrates how the essential presuppositions of a definition of "law" can be derived from substantive premises. The broad range of specific substantive criteria in legal systems, which normatively evaluate and functionally control power relations in social contexts are not, however, antecedent to them. The essential point is that the "sharing" of the normative system's first principles is conceptually antecedent to specific uses of power, whether the sharing is acknowledged or inferred.

III. "Rights" and "Duties" as Conceptual Tools For Valuing and Controlling Power

Two basic conceptual tools in legal discourse are used to express normative evaluations in the power context. These are the concepts "right" and "duty". These concepts are abstract symbols which express normative conclusions with respect to power relationships. As symbols for the expression of normative evaluations, they relate or attach to other concepts, i.e. "terms" within a conceptual framework, and do not inhere in empirical interactions in social processes. The concepts to which "right" and "duty" relate, are here referred to as "persons," "parties," "entities" and "terms." The word "term" is most generally utilized as it is least suggestive of an empirical counterpart. The empirical counterparts of "terms" are "individuals," and (individuals in organized activities) "organizations." When it is concluded in legal discourse that, for example, an individual has a "right" or "duty," the meaning is that, in applying the conceptual juridical framework, a shorthand conclusion as to the individual's normative status in a power relation is expressed (symbolically, in terms of "rights" and "duties").

While "rights" and "duties" are distinctive concepts, they each express the same normative conclusion as to any particular power relation, but do so from contrasting perspectives. One perspective is that of the term or party which, in a power relationship, is empowered or permitted to enforce its preference or interest, or have it enforced. This perspective is symbolized by the concept "right". The commensurate perspective is that of the term in the relationship from which compliance is required. This perspective is symbolized by the concept "duty". Because both concepts make reference to the same relationship, they can be referred to as a "two-term" relationship. The "rights" and "duties" in this relationship are commensurate concepts, having meaning in terms of each other, and each has an incomplete meaning without reference to the other.
In every instance in which a legal system is operative in defining relationships between parties in terms of rights and duties, it is necessarily defining the scope and manner in which the system recognizes, permits or implements an exercise of power. In a metaphorical sense, every legal “right,” no matter how complex, represents the power of the system, and it may be said that a person or entity that has a “right” attributed to it enjoys the support and the power of a “public” dimension.

This characteristic distinguishes legal from ethical normative concepts and experience. Ethical discourse does not denote concepts of public enforcement nor, therefore, concepts of “rights”. Rather, it focuses on definitions of “responsibility,” e.g., the “Lawyer’s Code of Professional Responsibility.”

The functions of “right” and “duty” in normatively characterizing legal relations is also distinctive in that, in evaluating relations between any two terms in a conceptual construct, reference is definitionally made to a third term. This third term represents the method for evaluating power relationships in the system. A legal system, then, can be referred to as a “three-term relation.” All legal systems, processes or experience are, therefore, structurally “three-term relations.” While the conceptual normative premises constituting the third-term can identify and justify the exercise of power by specific, organized governmental institutions, they are distinct from these empirical processes. The third-term normative premises and methods are conceptual in character and do not inhere in the empirical processes of counterpart governmental institutions.

It is by virtue of the “third-term” sharing that participating “terms” are part of, or members of, a single legal system. The role of the “third-term” in normatively resolving conflict between other terms can, then, also be understood as investing legal experience with a “public” character. The distinctiveness of “legal” experience, in relation to “ethical” experience or discourse, is also unique in this function. In legal experience or discourse, while interrelating parties or terms may have conflicting interests and may retain conflicting normative convictions, the third-term nevertheless normatively resolves the conflict. Ethical experience does not entail a separate criterion for resolving such conflicts. Where the conflict-resolving term is not present, there may be “ethical” or “moral” discourse, but not legal experience. Legal experience, definitionally, entails such conflict-resolving criteria and methods.
IV. The Public or Governmental Function of the “Third-Term”

As delineated above, rights and duties denote not only relationships between two or more terms in the system, but also their mutual relationship to a third-term, which represents a method and/or criteria for resolving power conflicts. This, again, gives “law” its “public” or “governmental” character.

As noted, for purposes of a structural definition, it is not necessary to consider whether there are substantive preconditions, e.g., a “consent” or “acceptance” explicitly by individuals to justify third-term coercion or power. Rather this definition focuses upon the explication and clarification of cognitively necessary concepts in relation to the indicated subject matter. “Sharing” a construct is a defining condition.

The concept “right” may be described as the “empowerment” of a particular term in the system. By definition, the empowerment is authorized or circumscribed by the third-term normative construct. Therefore, every “right” denotes third-term support of the exercise of power, that implies third-term “permission” to exercise power.

Rights may be substantively defined directly by the third-term normative construct, or this function may be relegated by it, within parameters, to particular entities or persons in the system. The only distinction is that, when power is delegated to a person or entity in the system, it is a discretionary. There is, otherwise, no essential distinction in character between the two forms of normatively authorized power.

Similarly, no distinction can logically be made on the basis of whether a “permission” to substantively define “rights” is given to an empirically functioning “public” governmental institution (third-term equivalent), or to an empirically participating non-official “private” person. The progression in permissions to exercise power, from a third-term “public” or “governmental” entity or subdivision, to non-official “private” entities or persons, does not affect the structural dynamics described above. Both empowerments stem from the same (“public”) third-term conceptual construct in the three-term relationship. Therefore, a distinction cannot be logically made between “officially” prescribed rights and duties and those prescribed non-official “private” parties, since all devolve from one third-term normative construct. To conceive of rights and duties as having a source in the “private” person, or outside of the third-term normative construct, is a contradiction in terms.
V. The Interrelated and Commensurate Character Of all Terms in the Three Term Relationship

Because the function of a legal system is to normatively evaluate and control the exercise of all power by all terms within the system, there are certain commensurate implications with respect to all of the terms.

As to third-term normative constructs, any empirical governmental entity designated by virtue of these normative constructs to exercise power in resolving conflicts, and to enact or enforce "laws," has the "right" to do so. However, it also has the duty not to exercise or permit the exercise of power by itself or by any term, which violates or undermines the applicable, authorizing normative construct. This is true because, by definition, the legal system limits and accounts for the exercise of all power, including the power exercised by a third-term governmental counterpart.

Similarly, for any right attributed to a participant term (i.e., any discretionary permission to exercise power) duties are entailed since, by definition, there are parameters to any such permission. The right to exercise system-supported power entails the duty not to exceed the "right" or power allocated. Because this power is derived from the third-term normative construct, the "duty" involved can be described as relating to the third-term as well as counterpart terms. Participants' use of powers or rights entail duties not to infringe, undermine or disempower the third-term normative construct, i.e., the legal system, which authorized the rights.

Accordingly, while a "right" as a juridical concept is used to symbolize the status of a particular term in a legal system, and may be described as an "empowerment," this is a description of one perspective in a three-term relation. It denotes, in addition to commensurate of "duties" to comply for the other terms, a duty for the empowered term not to exceed the parameters of the permission allocated to it.

Also, as to any "duty" attributed to a participant term to comply with the rights of other terms, a commensurate "right" is implied to resist any excess or misuse of the other's rights. When the parameters of a "permission" are violated, commensurate rights to rectify the infringement are triggered.

The result, logically and juridically, is that there is a complete and pervasive interrelationship of "rights" and "duties" among all three terms. Hence the "three term" relation (as a definition of law and legal system) means that the normative status of any term can only be un-
derstood in terms of its relations to the other terms.

It is useful, in conceptualizing the multi-faceted character and inextricable interrelations of rights and duties in legal experience, to schematically present the conceptual components and relations involved. This diagrammatically illustrates the interrelations of rights and duties and how these concepts are definitionally meaningless if contemplated out of relationship to each other.²

Basic flaws in legal analysis result from the failure to clearly distinguish between the conceptual constructs employed to normatively

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².

Schematic Presentation of a Structural Definition of Law

Shared
Third-Term
Normative Construct and Empirical “Governmental” Counterpart

[Diagram of conceptual components and relations involving rights, duties, presuppositions, and conflict]

T
Conceptual Participating Term and “Individual” Empirical Counterpart

P
Shared Normative Presuppositions and Consitutive Process

X
Conflict

NC

(Rights and Duties)

(Rights and Duties)
characterize empirical events, and the empirical events themselves. This failure results, in varying degrees, in assuming that the conceptual constructs are inherent in the empirical events, the identification procedures recurring ambiguities as to the source and meaning of legal doctrine, and rigidity in the development of its premises, categories and applications. Most significantly, it transposes “rights,” which are concepts, into “interests,” which are empirical facts and processes.

This failure to distinguish between conceptual and empirical phenomena is induced, in part, by misunderstandings of the character of the concepts “right” and “duty”. It must be understood that the concepts “right” and “duty” do not evaluate individuals out of the context of a relationship, and that the terms “right” and “duty” have meaning only as commensurate evaluative concepts which pertain to the same relationship. A failure to recognize this can result in conceptually cutting off legal “rights” from commensurate “duties”. In isolating “rights” from commensurate “duties,” there is loss of limitations to and responsibilities for empowerments and loss of sight of the three-term relationship which characterizes legal concepts. This lays the groundwork for converting “interests” into “rights” and for self-contradictory doctrinal analyses.

The historical and doctrinal consequences of this ambiguity are of first-order magnitude. When juridical “rights” are confused with and defined in terms of “interests,” their development hinges upon the social recognition accorded to, and the dominance of, “interests” which
are then used as the source for defining "rights".

The dynamics involved are illustrated in American constitutional history by the genesis, development and decline of "property rights." When these were accorded "substantive due process" protection, the implicit assumption was that these "rights" were "unalienable," inherent in the "pursuit of happiness" and that they in some way had their genesis in empirical pursuits rather than in the legal conceptual constructs applied to them. This blocked a gradual, coherent evolution in the development of these rights and fostered their transformation into fighting slogans. When these "rights" were recognized as the formulations of normative conceptual constructs, a logical and definitional block to their transformation was removed.

This key distinction between normative conceptual constructs and empirical societal events is easily clarified by distinguishing the constitutive norms of a legal system from a counterpart "government," which may be identified through the normative construct. As described above, an institutionalized "government" may qualify, in terms of a basic normative conceptual framework, for the "empirical" third-term counterpart role of further defining, creating and allocating rights and duties. Its "legality", however, is not self-defining; it is derived from the constitutive normative construct. On this foundation, any permission to exercise power is implied from "third-term" conceptual norms, and only derivatively from the empirical counterpart, institutionalized "government."

"Rights," then, have meaning in terms of permissions to invoke governmental enforcement. When a legal system, via a governmental counterpart, empowers non-official persons, e.g., lawyers, with the capacity to formulate or further legally cognizable and enforceable rights and duties, the legal system is as fully involved as when it empowers "official" entities with the same capacity.

Also, while a "right," by definition, denotes a power to enforce, every "right" attributed to any term in the three term relation implies commensurate "duties" in the other terms. Therefore, the structural definition of law also makes clear that state enforcement does not simply relate to the "rights" of the parties. It relates as well to "duties". This underscores and illustrates the definitional conclusion that no term in a legal relationship can exercise a power or right which violates the rights of another term.
IV. Implications Of The Structural Definition Of Law For Lawyers' Roles And Responsibilities

It is beyond the scope of this discussion to offer a philosophic demonstration of the structural definition proposed. However, the definition is premised on the assumption that it clarifies and explicates pervasive implicit meanings historically. It is also presented with the conviction that cognitive or epistemological necessities underly this usage.

A. Rights and Duties vs. Interests

As developed above, the structural definition proceeds on the premise that all entities within a legal system are conceptual constructs, understood and defined in terms of clusters or combinations of legal rights and duties. Because a designated entity within the legal system has meaning in terms of a set or constellation of rights and duties attributed to it, it is a *symbol* (like a mathematical symbol) for expressing a given set of relationships. For example, the established terminology used to designate entities generically within a legal system is "person". This is a concept which does not have a specific or necessary one-to-one physical counterpart. It may refer to physical individual, or to a set of relationships, e.g., a corporation, or unincorporated association. These designations may also be understood as symbolizing "terms" within the system, as distinct from words which describe functions outside of it. *Interests* and wants, however, are defined by individuals *outside* of their role in the legal system; and they are delimited by the legal system.

Thus, when the term "guardian" is used, it is a legal concept representing, in symbolic form, a constellation of rights and duties. It is *not* a description of a biological or other empirical set of facts, e.g., a biological mother or father. If this concept is used in a legal context to describe the biological parent, it is a way of summarizing the legal status or position of the parent. In this way, the term "guardian" can also apply to an individual who is *not* a parent. Likewise, terms describing public offices, e.g. "president," denote a complex set of relationships — rights and duties, powers and responsibilities. Every four years or so it refers to a different biological individual.

B. The Lawyer as a "Term" in the Legal System

The question, then, is what are the defining relationships signified by the term "lawyer" in our legal system. The etiology of the term
makes it apparent that it is used to designate a “person” or “term” in the legal system which has a special relationship to the legal system; specifically, a role in implementation of the system itself. The term “lawyer” therefore, signifies an entity in the legal system; specifically one which is defined as an agent in the system which, in some way, assists in its implementations. In our system, a lawyer is designated “an officer of the court” and courts possess inherent authority to regulate and set standards for lawyers.

A “lawyer”, then, functions as an agent of the legal system in aid of clarifying, applying, and furthering the system. This role entails ascertaining for clients the implications of rights and duties and assisting clients in effecting them. Regardless of the specific way this is done, the salient point is that the lawyer’s function is necessarily defined in terms of applying legal rights and duties, and not in terms of fostering or furthering biological individual’s wants or “interests”.

This characterization of the lawyer’s role is not antithetical to an “adversary” system. An adversary system provides that “clients” have available to them (for a fee) the services of a lawyer in clarifying and defining the process accurately and having it appropriately applied in the face of opposition. This does not entail furthering the “interests” of the client, which is a function in a distinct realm of discourse making reference to empirical facts.

An individual’s “interests” may find support in the legal system, but this only constitutes a convergence of disparate factors. The salient point is that the nature of legal experience is such that it permits and may justify the negation of an individual’s wants or interests. Nor does adversarial representation entail or permit the deprivation or diminishing of another person’s rights. Because specific rights and duties are counterparts of the same concept, the appropriate application of rights and duties, as seen in the definition, cannot have the effect of undermining another person’s rights. Any inappropriate application of either rights or duties on behalf of a client results in an inappropriate application to another person, the client’s legal counterpart. Therefore, because the term “lawyer” signifies a function in terms of furthering legal rights and duties, it is a function which is, conceptually, wholly disparate and distinct from the process of furthering individuals’ empirical interests; and the incorporation of interest furthering into the generic definition of a lawyer’s characteristic role is a contradiction in terms.
C. The Lawyer and “An Independent Professional Judgement”

The codes of professional responsibility make clear that the lawyer owes his client the full, complete benefit of his “independent professional judgement.” The concept “independent professional judgement” is useful in that it aptly sums up the unquestioned fiduciary character of the lawyer’s professional obligations to the client. It was developed and is expressed largely in terms of the lawyer’s duty to avoid any influences which conflict with or may impair his ability to render a completely unbiased and totally focused professional service to the client. Accordingly, the lawyer must not be influenced by his personal interests, the interests of other clients or the interests or power of third persons. Even an “informed consent” may not ordinarily waive these requirements, for a lawyer must be dedicated to serving the client’s interests, without “conflicts of interest.”

Yet this dedication produces, in concept and in practice, a self-contained relation between lawyer and client — outside of or “above the law.” This representation of unqualified interests is translated into the duty of “loyalty.”

The client’s unqualified interests have no intrinsic or definitional relationship to the legal system and to the legal rights of other persons. Interests are wants — which are empirical events not found in or defined in terms of the legal system. Therefore, when the lawyer’s role is defined in the traditional terms of “loyalty to client,” two misconceptions are involved: that lawyers represent “interests” and that the lawyer’s fiduciary responsibility runs to the client, not to the legal system. When the role of the lawyer is understood as representing or securing legal rights, on the other hand, this duty of “loyalty” to further interests becomes a self-contradiction. Rights imply duties, and duties imply commensurate obligations to the client’s legal counterparts and, hence, to the system.

The structural definition of law, therefore, implies an “independent professional judgment” in assessing and securing a client’s legal position, not the client’s interests. The lawyer’s assessment and assistance is not to be impaired either by the lawyer’s self-interest or the client’s interests. Thus, when a lawyer’s assistance is predicated on a “calculation of risks” for the client’s interests, there is an essential disregard of the lawyer’s role and responsibilities. Actions which are the product of a computation of risks compromise and contemplate violation of the rights of the client’s counterpart, which contradict the lawyer’s function. To assist in a way which ignores or fails to involve an
independent judgment as to the client’s *legal* position is to function as a non-lawyer.

Also, a lawyer as a specially designated agent in the system is an implementer of the law in terms of the system’s internal process, i.e., its concepts and meaning. This implies that the lawyer is responsible for formulating an independent judgment as to this interpretive function and that, in formulating a judgment, the lawyer cannot ignore the *purposes* or objectives of the system. To do so would be tantamount to forfeiting professional judgment. Ignoring the purposes of the system would inevitably mean that lawyers could systematically employ tactics designed to exploit technicalities and flaws in the system on the theory that a client’s *interests* are the essential criterion for professional judgment. A lawyer who has suspended judgment as to the consequences of his actions for the system, i.e. who has suspended his own judgment as to whether actions support or undermine the system’s structure, is not acting professionally, and is acting as a non-lawyer.

While one function of the lawyer is to further or secure the client’s *legal rights*, the lawyer also has an obligation to form his own judgment and to *assist* consistently with his assessment of consequences for the client’s legal counterpart (which is the same as assessing the consequences for the system’s purposes). That is to say, if the lawyer’s function is to secure the objectives of the legal system for his client, it is also his duty to respect them for the clients’ counterpart. This means he cannot inevitably slide into a calculation of risks; and he cannot formulate a judgment which is purposefully delimited by “technical” analysis, which consequently fails to incorporate the system’s purposes. This would be a calculated *partial* judgment, rather than an independent professional one; and this delimitation is a forfeiture employed to “*beat the system,*” not to implement it.

At present, the lawyer functions in terms of the two disparate and distinct realms of “law” and “interests,” and the lawyer’s role is defined in terms of relating and negotiating these realms. Being in the middle means experiencing pervasive opposing pulls, and yielding to “interests” becomes inevitable. When a lawyer is expected to negotiate and further a client’s interests despite a professional legal judgment which would inhibit or prohibit this, the development of insulating mechanisms is also inevitable. The rationale develops that the lawyer should not be accountable in the same way if his role *requires* him to assist despite his own contrary judgment. On this basis, operational immunization is implied. On the other hand, where professional conduct is confined to assistance which is based on an independent judgment as
to legal position, this insulation vanishes because the lawyer is then expected to adhere to his judgment.

When the lawyer's function is forfeited by relinquishing judgment, the lawyer no longer functions as a lawyer, i.e., as an integral component of the legal system. The lawyer is then outside of and is using the system; thus, any “immunities” which might attach to the lawyer in the system are lifted, and the lawyer is answerable for aiding an unlawful act in the same manner as a non-lawyer.

D. Summary of the Impact of Confusion in Roles

As described above, the confusion inherent in defining lawyers' roles in terms of “interests” results in a fundamental distortion of role and in the basic pragmatic consequences for and mode of rendering professional services.

Definitionally, if the scope and the central focus for the lawyer is described in terms of rights and duties which are legal concepts, it cannot be described in terms of economic, social, political, emotional or psychological facts or wants which are “interests”. Similarly, legal concepts exist and can only be defined in terms of a legal system — not economic, business, political or psychological systems. The business of the lawyer, then, is to secure the client’s legal rights as defined by the legal system, not to manipulate the system for the client’s interests.

In addition, the securing of legal rights is, by definition, inconsistent with depriving others of their legal rights because rights are the conceptual counterparts of duties. Therefore, the lawyer, in securing rights can never assist the client in violating, disregarding, or undermining the legal rights of others, including the system itself.

For the lawyer, therefore, there is a fundamental difference between representing interests and legal rights. “Interests”, as such, are what the client wants. What the client wants does not necessarily take account of the client’s legal “rights”. When the lawyer does assist in furthering interests as such, his function involves a calculation of risks in light of the legal system's coercive potential, something quite different from representation to further and secure legal rights.

VII. Implications For Legal Education

The dilemma and ongoing intense conflict presented by the alternatives of furthering client’s “interests” in contrast to protecting their legal “rights,” needs sorting out in law school. If legal education is to
come to grips with the confusion resulting from this dilemma, it must first explicate its existing prevalent presuppositions and their implicit inferences for lawyers' roles in the legal system. When this is done, it will be seen that the most determinative inference for legal education at present is the same as it is for practicing lawyers, i.e. that lawyers are to **loyally** serve client's “interests”. This places lawyers and legal education “above the law.”

From the client’s perspective, believing, as a result of the same prevailing presuppositions, that the lawyer is there to serve clients’ interests means that no one in the system thinks in terms of “rights” but rather a low-risk calculation of “getting caught.” On this assumption, the lawyer’s analysis of risk is reported, and the lawyer is under realistic competitive pressure to comply.

The capacity to resist such pressure is basically flawed by the lawyer’s own role model. The only way to withstand this kind of pressure is to incorporate and integrate a lawyer’s role in the legal education which **conceptually** places this “risk computing” function off-limits. Where this is lacking, there is no effective method or model for withstanding concrete economic pressures. When a lawyer is clear about role, however, he can make it clear to the client, and he has an effective shield against the intrusion of expectations geared to a calculus of interests and risks.

There are implications here also for a lawyer’s self-image and the public’s low image of the profession, which are inevitable when the professional renders legal assistance in furtherance of doubtful objectives. As seen through the structural definition of law, the essential components of a legal system and legal experience contradict this possibility. The substituted presupposition for legal education would foster a role for lawyers in which both their conceptualization and experience of a legal system takes them back into it and in which law is not seen as a technological instrument for other purposes without its own internal meaning and conditions.

When the pursuit of “interests” is predominant, the lawyer is not only alienated from the legal system, he also tends to become alienated from his client, since the client may be **experiencing** the system in terms of a perception and feeling of “justice,” which the lawyer, as extrinsic technician, is not. Alternatively, when the client shares or anticipates this alienated “interest” role, the lawyer is likely to regard it exclusively, and it flows over into relations with the client. An “interest” defined role results in the profession’s gravitating toward and formulating mechanisms for limiting responsibility for the consequences of
lawyer-assisted clients' actions. This insulation is the opposite side of the coin of alienation. In this situation, when lawyers acquiesce in or effectuate objectives of the client which are antithetical to basic values of the lawyers, or which result in undetected evasions of the law or illegalities, the lawyer feels in need of a role-defined immunization from responsibility.

Clarifying the criteria for, and the parameters of, individual legal responsibility of agents generally, and of lawyers specifically, in these situations requires a revision of the conceptual constructs defining roles. These revisions in constructs necessitate the development of an antecedent jurisprudential theory, with organizing concepts which have the capacity to define roles and imply criteria for individual legal and professional responsibility.

In this context, the above analysis implies two basic objectives for legal education. One is to heighten and integrate an understanding and consciousness of the central character of law and legal theory, and the significance of their implications for the practicing lawyer. Another objective is to prepare students for the inevitable conflicts between these implications and the demands of employers or clients to serve “interests”.

In American culture, both theory and emotion (emotive-affective-aesthetic experience) are minimalized and suppressed. The focus of conscious attention has been on a pragmatic, middle level of experience which emphasizes “practical” results. On the one hand, this has produced a certain receptivity to and capacity for change. On the other, it has meant a certain impatience with and resistance to theoretical inquiries. The result is that theoretical presuppositions have remained largely unexplicated; and they have become susceptible to conscious and deliberate distortion to satisfy power or pragmatic pressures and preferences. As a consequence, “interests” tend to be seen as irreducible first principles. This has been compounded in human relations by trivializing and not developing emotional-aesthetic capacities. The result of this is to dull sensitivities to the consequences of behavior, thereby reinforcing a focus on self-interest.

The implications of these emphases for legal education have been that there is no effort to seriously study, research or teach theoretical bases of law. Even in the heyday of American legal realism (and in its aftermath), analysis was (and is) essentially relegated to the application of sociology, political science, psychology and economics to “law”. This has been done by legally-trained teachers who have acquired limited skills in these areas; rarely have there been professional philoso-
In addition, with some, though at times noticeable exceptions, other disciplines, such as political science, sociology and economics, are instrumentally applied to the study of legal processes, i.e. they are merely seen as tools for conceptual clarification of what the dynamics of law "really" are, and how it functions. This does not ordinarily entail probing into the essential presuppositions of legal experience except in an indirect way. Rather, it assumes the objective of a sophisticated understanding of legal processes for its more pragmatic application.

With regard to teaching, there is no serious effort to treat theory as an acceptable, respectable, or a necessary area of study, let alone a central one. In the main, at most, it may be toyed with in an introductory session or two to a subject. The message is that it has been used as a take-off point to stimulate some interest and has no intrinsic relevance.

There is, then, no opening up in law school to the preconceptions which necessarily underlie any field of learning or experience. There is no meaningful or sustained scrutiny of the implications of these presuppositions for the role, functions and responsibility of the lawyer.

At the same time, legal education is still largely unrelated to the functional, operational needs of the practicing lawyer and does not effectively prepare students for the practice of law. While there has been a resurgence of interest and dedication of some resources to clinical programs, these are still only available to a fractional part of the entire student population. A modified "case book" method still predominates. This method is occasionally, but not systematically, instructive with respect to skills needed in practicing law, i.e. in terms of client relations, advocacy, writing or negotiating skills, and does much less to sharpen analytic skills than it purports to do. Indeed, the traditional method is a circuitous means for conveying to students the necessary information and understanding of existing rules of law and provides very little assistance in effectively using these rules in practice.

The result is, again in a rather ironic way, that this traditional method has imposed itself as a buffer, insulating not only theory and emotive or experiential understanding of legal processes from the student, but also as an obstacle to efficiently acquiring the information and skills necessary to practice law. The traditional case book method has resulted in an inordinate waste of time in law schools.

Although taking the apprentice out of the law office and into the case-book law school has not been efficient in terms of acquiring skills necessary to practice law, it has been highly efficient in terms of instil-
ling an orientation which places lawyers above the law and in teaching them that their function is to further “interests,” in contrast to “rights” of clients. It does this in much the same way that “basic training” in the military reorients a civilian’s consciousness into a soldier’s discipline and, if necessary, the capacity to kill without reflection.

While law school does not entail the physical hardship of basic training, it is geared to accomplish the same psychological indoctrination, or consciousness revision. The traditional methods of law school accomplish this goal by rendering the student relatively powerless. Basic training does this by insulating and confining the trainee and implementing arbitrary and harsh conditions without explanation. “Civilian” identity is quickly set aside, and the ground is right for planting a different, or substantially modified, identity or consciousness. Traditional law school methods do this by causing learning to be as indirect, mysterious and as hard as possible. The result is a sense of powerlessness, which renders students ripe for the inculcation of a modified consciousness. In large measure, through the conceptional model of the “adversary system,” students are taught to understand the legal arena as one in which the lawyer furthers “interests.” In this way, also, students come to need and relish a sense of power.

In addition to the need to integrate “theory” into legal education (as one indispensible way of revising the prevalent adversary, interest-focused consciousness) it is necessary to bring “practice” back into legal education. This can result in a more realistic sense of power and less student alienation from the law. It requires comprehensive, systematic and required clinical programs, with particular emphasis on supervised internships. It also means reintroducing more direct learning of the “black letter” law for faster and more thorough learning of certain basic tools. I do not mean to imply that critical analysis is not essential; rather, I simply recognize that practicing lawyers need basic knowledge of the rules to be competent. I would prefer to see a reversion to a direct apprenticeship in the law office than the continuation of a method which wastes human resources in this way.

In law school, there is a failure to integrate the “experiential” or emotive component in law to acknowledge, for example, a “sense of justice” or injustice as central to legal experience. Instead, the student is cut off from his own feelings in this respect and confronted, from the first day in law school, with contemptuous attitudes toward “gut reactions.” The message is that these naive student reactions must undergo immediate radical surgery to disembowel them from the experience of “being” a law student and lawyer.
If the above definition of legal experience and its epistemological and psychological assumptions are valid, this failure means cutting off a basic, integral component of legal experience. The concomitant, necessary counterpart of "conceptual," cognitive experience is emotive-feeling experience. The consequence for the student-becoming-lawyer is not only to cut him off from his own feelings, but to cut him off from his client's "experiential" consciousness of law and "justice." Except for clients who are inured to ongoing legal involvement and entanglements, or those who are consciously manipulating the law as an instrument to further interests, clients usually have strong feelings — expectations, hopes, fears, consciences — in relation to their legal experience. The lawyer who is cut off from these feelings in himself is also cut off from them in clients. The result is, again, that the lawyer is outside of and above the law.

The lawyer also loses sight of some of the most significant issues for his client. The lawyer remains largely unaware of, or insulated from, feelings which may not only be significant but central to the client's experience. In response, clients "learn" that this component of experience is not relevant to the law and fail to urge their inclusion in the legal arena. As a result "legal" services rendered clients may be incomplete or may exacerbate rather than resolve the client's problems. The lawyer, then, is at odds with the client, although this may remain unarticulated.

The implication for legal education is that we must foster integration of the "experiential" component in law, and, in doing this, enable the student to retain or make contact with this component in himself and in clients. Various innovations can further this objective. First, it is necessary to inquire into and articulate theories of law which imply significance for the "experiential" component in legal processes for all participants. This means, again, that inquiry into legal theory must be a core concentration in legal education.

Pragmatically, consciousness of the emotive in legal experience means experiencing it. This implies various modalities, such as simulated exercises in attorney-client relations, negotiations, arbitration and litigation geared to heighten awareness of experiential aspects in these situations. More important than simulations, however, is supervised clinical or intern experience with real clients. To date, clinical programs, to the extent they are available to students, are largely geared to acquiring technical "practice" skills, which, in effect, means a focus on power. In this clinical context, a basic complement can be introduced by stressing the "experiential" component. Faculty and peer
analysis of and commentary on student participation in real-life situations can serve to heighten awareness in an intense manner. We must confront in clinical situations the tensions created by consciousness conflicts in order to realistically prepare students for the dilemma which will confront them.

In addition, literary and dramatic portrayals of law in human experience can have an enormous impact on consciousness revision and awareness of the emotive component in legal experience. In addition to classic and current works of literature, there is a vast store of films which have themes in this precise area. These should be viewed in the classroom. To reap the benefits that can be realized through this method, it is imperative that it be treated as seriously as any aspect of the curriculum.

VIII. Conclusion

There is a pressing need to re-define lawyers' roles and to prepare students by translating theoretical issues into a new consciousness in the performance of professional functions. This means sensitizing professionals to the profound implications of their roles.

The study of legal processes can then develop an integrated consciousness of role which is not fundamentally conflicted and which has a cohesive theoretical framework. In this way, programs can integrate and accord an appropriate significance as well as responsibility for lawyers' roles, and lawyers can become integrated in the legal system, and integrate their work with themselves.