LEGAL SCHOLARSHIP AND THE STUDY OF AFRICAN LEGAL SYSTEMS: A RESPONSE TO PROFESSOR ABEL

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Whatever a reviewer has to say, the ordinary author is always flattered, I presume, to have his work reviewed at all. This was my reaction, at any rate, upon discovering Professor Abel's review at 8 African Law Studies 97 (1973) of the study "One Nation, One Judiciary": The Lower Courts of Zambia, 2 Zambia Law Journal 1 (1970) which I co-authored with two young American lawyers, Earl L. Hoover and John C. Piper, who were then my students. Flattery growing out of notice should increase as the subject noticed becomes more arcane--and on this count I could not have been more flattered by Professor Abel's review.

The author gains pleasure in other dimensions when the review is addressed to the most appropriate of all audiences; when the review is a thoughtful one which avoids the "Chapter 1 says . . . Chapter 2 says . . . This is certainly a useful addition to the field" syndrome which is too common in law review-book reviews; and when the reviewer finds some genuinely complimentary things to say about the work reviewed. On each of these counts I was further pleased by Professor Abel's review.

To one of the basic attacks in Professor Abel's review--that

> the authors have so unnecessarily limited their ambitions to pure description, and have declined to attempt . . . the explanation of legal institutions as social phenomena.[1]

--there is not much of a defense to be made. We did proceed

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[1] Abel, Book Review, 8 AFR. L. STUDIES 97, 100 (hereinafter cited as Abel).

subject to limitations--leave and money enough for only six months in the field, which in turn generated enough data to fill only 300 pages of "pure description." We would have been glad enough if we could have treated these limitations as "unnecessary." Likewise we acknowledged and confessed--as Professor Abel points out[2]--our lack of expertise outside of the normal fields of endeavor of lawyers and legal scholars. These omissions would have been unnecessary, of course, if someone else who had our expertise and those skills we lacked had been ready, willing and able to undertake our work when we did it in 1970;[3] or if we had taken the time and money to acquire the missing skills before doing our work. Whatever the reality, neither of these appeared to us as possible alternatives when we planned our work in 1969.

But there are certain aspects of Professor Abel's review which do prompt comment--comment which I submit to Professor Abel's audience for two reasons. First, I feel entitled to set straight several patent errors in Professor Abel's description of what we had to say. Second, and more important, I believe that the disagreements I share with Professor Abel--disagreements illustrated by and probably responsible for his errors--may help to identify some tactical positions on an intellectual battleground upon which substantially all of this audience has taken some position. To the victors of this field will go the prize we all seek: effective contribution to the body of knowledge which will shape the development of legal systems, in Africa and elsewhere. The whole prize of victory will surely fall neither to Professor Abel nor to me, but it may shorten the struggle to identify and locate the high ground we each occupy.

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[2] Id.

[3] As pointed out in our preface, Spalding, Hoover and Piper, "One Nation, One Judiciary": The Lower Courts of Zambia, 2 ZAMBIA L. J. vii (1970) (hereinafter cited as Lower Courts), our work in Zambia occupied most of the first six months of 1970 and our editing of the report was completed during the second six months of that year. Owing to the press of subsequent events in Zambia, the volume of the Zambia Law Journal dated 1970 did not go the printer until late 1971. It came off the press in mid-1972.

Professor Abel, having commended our general choice of subject,[4] and having said tolerant things about our "explication of the legal doctrines which state the norms of operation"[5] and kind things about the study's "outstanding description of the law in action--the actual structures and operations of the lower courts"[6], proceeds to take the rest of the study to severe task on two different but related grounds:

1. He first mounts a swift but slashing attack on the last quarter of the study,[7] which consists of an analysis of the 100-odd published Northern Rhodesian/Zambian cases in which issues of jurisdiction of the lower courts are raised.[8]

2. He then turns somewhat more reflectively to the question of hypotheses and values, lodging essentially three complaints:

    a) that we failed adequately to formulate hypotheses--for reasons which we stated but which he finds "nugatory"[9], resulting from "oversights [which] are unfortunate in the extreme;"[10]

    b) that having failed to formulate our hypotheses, we "fall prey to the technocratic

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[4] Abel at 97-98.

[5] Id. at 98.

[6] Id. at 100.

[7] Lower Courts at 219-82.

[8] Abel at 98-99.

[9] Id. at 101.

[10] Id. at 102.

delusion that it is possible to make policy recommendations without choosing between values";[11]

c) and that, although we did not formulate--or, he implies, even recognize--our hypotheses, we in fact conducted our study in pursuit of a pre-conceived set of values which add up to an expression of "an idealization of the American judicial system".[12]

For all this it is somewhat surprising that Professor Abel gives our report as much as he does:

> Despite [its] flaws, the report will be an invaluable source of data for the comparative social study of judicial institutions even if, because of them, it is not itself such a study.[13]

But the defects he finds he obviously views as major, if common, ones:

> This study of the lower courts of Zambia, then, though animated by the best intentions and executed with great energy and intelligence, is marred by two flaws common to contemporary legal scholarship. One is the belief that legal institutions can be understood in isolation from other social institutions, uninformed by the insights obtained from comparative data, and in ignorance of the burgeoning theories of social science. The other is the delusion that a scholar can avoid expressing his own values in designing the problems he studies, choosing the kind

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[11] Id. at 103.

[12] Id. at 106.

[13] Id.

> of explanations he seeks, and making recommendations.[14]

Turn about may be fair play in these circumstances. Professor Abel does not fully articulate *his* values either.

He is clear, of course, in stating that the operations of legal institutions ought to be explained as social phenomena.[15] This hypothesis is one which is "claimed to have general acceptance;"[16] in any event, Abel's support for it is conclusory in character.[17]

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[14] *Id.* The order of the quotations cited in notes 13 and 14 is the reverse of their order in Professor Abel's review. I hope that this reversal is fairer and less misleading than the reversal of our text in which Professor Abel engages at 105 n. 26. *See* note 27 *infra.*

[15] Abel at 98, 100 and 106.

[16] *Id.* at 104 (borrowing the phrase Abel uses to refer to our purported claim of general acceptance of the notion that the rule of law is preferable to the rule of men; Abel, however, gives some evidence of having read us incompletely on this point. *See* *Lower Courts* at 59-69, 123-24, 155 and especially 175-76).

[17] *See,* e.g., Abel at 102: "Students of the American legal system increasingly realize that it is impossible to understand that system without paying attention to unofficial or informal legal processes, as well as to the society in which they operate." (No citation).

This statement is followed by this sentence:

> This is true a fortiori in Zambia, where the government legal system is a callow newcomer among the numerous indigenous legal institutions which continue to serve the vast majority of the population.

Id. (No citation). Abel does make it clear elsewhere (*id.* at 101 n. 14) that he is disconcerted by such things as "collections of citations and authorities" and "a pedantic concern for citation form." But the student of the Zambian

But two other values obviously animate his analysis, although neither is made quite express:

(1) A formal, official legal system should not be studied unless, a) the entire fabric of society, contemporary and historical, of which it is a part is also studied; and b) appropriate intersocietal comparisons are made a part of the same study; and c) unless the study uses all the skills and tools of all social sciences.

> [T]he authors' boast to have exhausted "substantially all published learning in the field" reveals itself, upon scrutiny, to be grounded either in ignorance or in a philistine rejection of several significant sources of data and theory . . . [T]he lower courts are studied in isolation from other social institutions . . . I find it incredible that the authors choose to pass over Max Gluckman's classic studies of Barotse legal institutions with a single cavalier footnote . . . Moreover the wealth of anthropological literature produced by Gluckman, his students and others at the Zambian Institute for Social Research is largely ignored. . . . [T]he authors specifically avoid comparison between legal developments in Zambia and those in other African countries . . . [T]hey appear to be unacquainted with the

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legal system can be forgiven his regret that Abel has offered no support for this statement. Perhaps his unpublished or forthcoming manuscripts, <u>id.</u> at 102 n. 18 and 103 n. 20, cite the data in his own field research or in the work of others, completed, say, since Zambia's independence in 1964, which would support the full breadth of this assertion.

> growing body of social science theory concerning legal institutions.[18]

One corollary of this posture is:

> (A) Study of legal institutions is justified only if it proceeds upon a general theory which explains the behavior of the institutions and advances general understanding of such institutions. Generation of specific policy recommendations is incompatible with these goals.

The authors take the official legal

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[18] Id. at 101. The "one cavalier footnote" appears in a section which summarizes the principal sources relied upon; the footnote in effect explains why Gluckman's work is not among the principal sources:

> Gluckman, though remarkably sensitive to the legal viewpoint, is not a lawyer; nor were the Barotse courts, during the period of his study at least, really modern courts as that term is here used.

Lower Courts at 31 n. 192.

The Barotse Native Courts Ordinance was repealed in 1966, Local Courts at 22, and in 1970 the last small vestige of difference between official courts in Barotse (now Western) province and elsewhere was removed.

In any event, Abel is wrong in his specific charge about our non-reliance upon Gluckman and his disciples. For reasons stated, not much of Gluckman's work seemed relevant to our study as we defined it. But we do refer to Gluckman more than once. See, e.g., Lower Courts at 7 n. 20; 15 n. 86; 17 n. 94; 30 n. 218; 55 n. 263; 59 n. 281; 67 n. 298; 76 n. 340; 84 n. 372; 91 n. 409; 95 n. 431; 99 n. 449; 110 n. 494; 182 n. 777. We searched the entire output of the Rhodes-Livingstone Institute/Institute for Social Research and cited or quoted from at least nine of its publications. See, e.g., id. at 7 n. 20; 31 n. 191; 49 n. 249; 49 n. 251; 50 n. 255; 51 n. 258; 80 n. 353. A. L. Epstein, Gluckman's most important student, is cited and quoted (both from his three Rhodes-Livingstone publications and from several other of his works) more extensively than any other single authority with the exception of Lord Hailey. See id. at 31 n. 191 and passim.

> standards as a model of what the lower courts ought to be doing . . . Among the many disadvantages of this approach is a disturbing constriction of vision: the researcher is directed toward departures from the legal standard, and thereby distracted from developing a more general theory which would explain the behavior of judicial institutions in terms of the structure of those institutions.
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> This formulation of the central problem of the study is in turn an outgrowth of the authors' primary interest in recommending policies rather than advancing our general understanding of judicial institutions. . . .[19]

A second corollary is:

(B) "Exegesis of [legal] doctrine"[20] and the skills it requires, since they are of interest and use only to lawyers, have no place in a study of legal systems.

> [T]he concept [of jurisdiction of courts] would seem to be of singularly little use in understanding judicial behavior. Why, then, does Spalding spend his time analyzing it? Apparently because of the delight he takes in applying the

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[19] Abel at 103.

[20] *Id.* at 98.

> skills of a highly competent American lawyer to virgin territory . . . .[21]

This corollary leads directly to Professor Abel's second major unstated hypothesis, which is:

(2) An American legal scholar undertaking studies of legal institutions in Africa, unless he shares the powers of clairvoyant introspection and the complex of interests and skills possessed by Professor Abel, cannot avoid "designing the problem he studies, choosing the kind of explanation he seeks, and making recommendations"[22] which lead to his expressing "an idealization of the American judicial system."[23]

> [Spalding makes the] effort to construct a typically American legal product--"an extensive, reasonably cohesive, reasonably harmonious body of case law of the jurisdiction of courts."[24]
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> [W]hat right do American lawyers have to make recommendations for the development of African legal institutions? The authors are highly sensitive to this dilemma, but I do not find their solution very satisfactory . . . .[25]

Now these may be fine hypotheses. Although I do not subscribe to them, I hope that legal scholars can continue generally to avoid the pattern of thought prevalent in some other disci-

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[21] Id. at 99.

[22] Id. at 106.

[23] Id.

[24] Id. at 99, quoting Lower Courts at 220.

[25] Abel at 103.

plines which says, in effect, "If you disagree with me you are not only wrong--you are evil." But I do protest the distortion of our ideas which Professor Abel works in order to try to make them support parts of his hypothesis.

Thus, for example, Professor Abel asserts that one of our unstated hypotheses is that "Reform of judicial institutions is important for national development."[26] To prove this he quotes two sentences of what we have to say in a section of our report entitled "The Magistracy Beyond 1970."[27] But all that we say there is that a breakdown in the functioning of the magistracy during the first six years of Zambia's independence--years during which the magistracy ranging in size from 30 to 70 in fact dealt with something like 350,000 cases--would have had social consequences which might have threatened national development outside the judicial sphere.[28] In fact, we did not deal in any

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[26]*Id.* at 105.

[27]*Id.*, quoting *Lower Courts* at 151.

[28]Professor Abel does confess (Abel at n. 26) to having "reversed the order to these two sentences." In the fuller text, quoted in the following, the sentences quoted by Abel are italicized, and the bracketed numbers show the order in which Abel quotes them:

> [T]hese six years [1964-70] have shown that it has been possible to build the new Zambian magistry into a viable component of the judicial branch . . . . [T]he collective ability has been sufficient to get the job done. [2] *The consequences of success in this respect may not seem large, given the benefit of hindsight; but the consequences of failure, had it occurred, could have been devastating to much of the rest of the nation's effort toward self-development*.
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> [1] *And the magistracy has unquestionably made substantial contributions to the overall long-term development of the Zambian legal system--albeit that the precise nature and dimensions of the contribution are not now easily perceived* . . . . [U]nquestionably the reservoir of experience which the magistracy collectively has built up in this busy period can be one of the most important assets when and as attention can be

significant way with the general role of the law or the legal system in national development--although we did tacitly recognize the patent fact that talk of development in a country like Zambia can push almost any other subject into the shade and that our generally unexciting conclusions stood a better chance of being talked about if we suggested such possible relationships as there might be between our work and national development.[29]

Another value with which Professor Abel asserts that we loaded our study was that "Judicial institutions ought to be unified."[30] Here, regrettably, he has simply failed to read us carefully. We devote nearly 50 pages[31] to a discussion, gently but persistently critical, of the froth of words which has been generated by at least two generations of scholars about "unification" and "integration" of courts, laws and legal systems in Africa. We end[32] with a plea for the greatest care in deciding what should be unified, when and how. And of the specific suggestions we advance for Zambia, the only one which could possibly be characterized as entailing "unification"--a plan for the local courts in fact suggested and largely worked out not by us but by a Zambian Local Courts Officer[33]-- is justified not because unification is an abstract good, but as a specific means of dealing with a number of problems which now

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turned to necessary or desirable changes. Lower Courts at 151-52. The reviewer's constant risk of alteration of meaning by quotation out of context is of course vastly increased, as here, by use of such devices as reversal of sentence order. For statistics on the size of the magistracy see Lower Courts at 123-26 and 297; for statistics on the caseload of the magistracy see id. at 135-39 and 284-85.

[29] See, e.g., Lower Courts at 3, 117-18, 156 and 217.

[30] Abel at 105. The quotation Abel cites to support his assertion is one of those cited in note 28 supra.

[31] Lower Courts at 69-118. In particular see id. at 78-79.

[32] Id. at 115-16.

[33] The Mwamba Plan, Lower Courts at 206-18.

plague the lower courts of Zambia and which may not await the development of a global understanding of judicial institutions to be solved: staffing and career track difficulties in the local courts;[34] gross inefficiency and inordinate expense in the existing structure;[35] inadequate education and training among those now staffing these courts;[36] and an absence in the magistracy, which must deal with appeals of customary law cases, of any training or significant experience in dealing with customary law[37]--to name just a few of the most pressing matters.

A third value which Professor Abel credits to us is that "The judiciary should be professionalized."[38] Here the problem is partly one of lack of care in reading us, but partly as well one of definition, distinction and articulation. For a start, Professor Abel seems to have missed the drift of our discussion of the idea of professionalization as it was developed before

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[34] Id. at 174-88 and 208-15.

[35] Id. at 195-97 and 209-10.

[36] Id. at 177-81 (pointing out, inter alia, that under existing arrangements local justices who can neither read, write nor speak English routinely decide cases enforcing penal statutes which are written only in English), 209-10 and 213-15.

[37] Id. at 147-49 and 216.

[38] Abel at 106. He also ascribes to us a fourth value--that judicial and executive power should be separated. Id. at 105. We did point out that the idea of separated powers seems to have had no pre-colonial roots in Zambia, Local Courts at 59, and that in the colonial period there was more veneration than application of the principle. Id. at 59-69. There was, however, some evidence of potential abuse in non-separation of powers in the colonial period, id. at 175, and we found some too in 1970. Id. at 176. Perhaps we were predisposed to favor a separation of powers, id. at 155 (but cf. id. at 59-60 and 176); but so too were the Zambians, apparently, if we may judge by the speed with which they attempted to separate powers at their independence. Id. at 20-22, 123 and 151.

the decade of African independence.[39] There our emphasis was, first, on what an imprecise term "professionalization" is; second, on how little that could be called professionalization by any definition actually took place in the colonial period, for all the large amount of talk there was about it; and third and most important, how terribly difficult, time-consuming and expensive professionalization of a lay judiciary is.[40]

But to confound matters, Professor Abel goes on to indulge a penchant to ignore distinctions within the court structure when this serves his purpose. Although at the outset of his review he lays out the Zambian court structure with considerable clarity and accuracy,[41] he never once thereafter distinguishes between the 60-man magistracy and the 825-man judiciary of the local courts. In order to prove that we are predisposed to professionalization of the judiciary, he lifts a quotation out of our discussion of the future of the magistracy.[42]

Now it happens that the Zambian magistracy is already about twenty per cent professionalized (or was when we were there) and that young professionals newly graduated from the Law School of the University of Zambia are beginning to come into service as magistrates.[43] This has created morale problems among the lay magistrates and particularly among the most valuable of these--those with long years of experience who are, under the present structure, destined to be forever junior to the rankest green law school graduate in the service.[44]

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[39] Lower Courts at 36-52. Earlier Professor Abel quotes us in a way which suggests that we and all the authorities we consulted agreed that professionalization is a favored idea: "[E]veryone talks about professionalization--and favourably." Abel at 104, quoting Lower Courts at 52. He does not, however, give us the benefit of our next sentence: "The only problem has been in doing something about it."

[40] Lower Courts at 45-48.

[41] Abel at 97.

[42] Id. at 106, quoting Lower Courts at 156.

[43] Lower Courts at 129.

[44] Id. at 157.

The business of the magistracy, furthermore, is 85 to 90 per cent criminal,[45] with total reliance put upon a thick volume of statutory law, with a heavy gloss of interpretation laid on by way of precedent, and with rights and liberties of individuals in issue in nearly every case. Beyond this, every Zambian magistrate must be prepared to serve not only as trial judge but also as appellate judge of courts inferior to his--a combination of function, as we pointed out, which is used sparingly if at all in countries where the bench is fully professionalized.[46] In this context I make no apology whatsoever for having recommended in the strongest terms that the Zambian _magistracy_ be fully professionalized--albeit by means quite un-American.[47] That recommendation, in my view, stands quite apart from the desirability of an improved general understanding of legal institutions; if there is something in the literature of anthropology, sociology, or political science which bears upon the wisdom of it, I shall be glad to have citations from Professor Abel.

On the other hand, we said nothing about "professionalizing" the 825-man _local courts_--unless "professionalizing" be read to mean putting judges who can read and write on the local court bench, a step which we did recommend.[48] If it is not demagoguery then it is surely shocking carelessness to extract from this a conclusion that we were precommitted to recommend professionalization of the _judiciary_ in pursuit of an idealization of the American judicial system.

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Of course, we did bring hypotheses/values to our study.

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[45] _Id._ at 135.

[46] _Id._ at 156.

[47] _Id._ at 157-59, where suggestions include one- and two-year programs of subsidized University study leading to a law degree, for experienced lay magistrates--in place of the O-levels required for normal University admission and four years of study. A careful reader might even conclude that we thought the professional shingle on the wall of the lay magistrate to be more important than any additional education he might receive.

[48] _Lower Courts_ at 206-15.

They are not quite set out all in one place, but they are all clearly enough stated in our opening pages:

(1) On our view of the kinds of research which it is appropriate for lawyers (of whatever nationalities are welcome) to do in a country like Zambia:

> There has been some tendency in the years of emerging interest in African law to treat in continental generalizations and summaries on the one hand, or to focus on a tiny detail . . . in the panorama of African culture on the other. . . .
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> But one of our theses has been that the time is now to begin to treat each national legal system in Africa--or at least the legal system of Zambia--as a distinct entity, fully deserving of the kind of scholarly study which has played an important role in the development of national legal systems having longer written traditions. . . .[49]
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> We hope, too, that the papers taken together may exemplify the variety of kinds of lawyer's research which can usefully be undertaken, in this and in other fields of inquiry, in Zambia. Our work led us into historical materials, into studies by social scientists . . . into the case law . . . and, perhaps most importantly, into the field. . . .[50]

(2) On our view of the exhaustiveness of our work:

> Our study, to paraphrase a famous countryman of ours, has sometimes seemed to require a giant step of us but is only a small

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[49] Id. at ix-x.

[50] Id. at 2.

> step for Zambian legal research. . . .[51]
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> [W]e think that . . . it is worth gathering everything we have to say on [this] subject in one place to facilitate the reflection, criticism, and further research which we think the subject deserves.[52]

(3) On the evolutionary character of the development of Zambian legal institutions, which led us to favor further evolutionary development (rather contrary to what Professor Abel seems to think we said):

> An understanding of the Zambian court system as it exists today is dependent, in large measure, upon an understanding of its history. For perhaps even more than most institutions, Zambia's courts are a product of their history. Almost every feature of the system today can either be traced back to an historical origin a generation or more ago; or can be accounted for as a latter-day attempt to be rid of some offensive aspect of the colonial administration of the courts.[53]

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Lawyers and social scientists are not fungible. Social scientists can do some things which lawyers cannot; the reverse is also true. Modern societies may or may not be able to function without social scientists. But modern legal systems cannot function without lawyers, and this is as true of legal systems in Zambia's stage of development as it is of systems more "advanced." Collectively, lawyers have taken on the job of making most aspects of most modern legal systems work.

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[51] *Id.* at x-xi. *See also id.* at viii.

[52] *Id.* at 1.

[53] *Id.* at 4.

Perhaps lawyers are not best qualified to do this. Perhaps they are even incompetent by some lights. Or perhaps there is a better substitute for modern legal systems. These are important questions, more fundamental than any we undertook to consider. We would surely encourage any scholars--including Professor Abel--who may be qualified to do so to address these questions and to answer them if possible. But we ourselves did not try to do this. Pending the answering of these questions, institutions of society, including legal institutions, do exist and do function however imperfectly. If, before arrival of the millennium of general understanding which Professor Abel foresees, those who have tended existing institutions to the best of their ability were to back out of the fray, the social consequences could be considerable. Lawyers pour into legal systems their professional services as counselors, advocates and officers of the courts. But lawyers also pour in the so-called scholarly skills. Historically, these have included both "the exegesis of doctrine"--an enterprise admittedly of little apparent significance to non-lawyers but in the aggregate of considerable use to lawyers in their professional and social roles--and a concern for systemic functioning and the reform thereof.

More recently, some lawyers have become as much interested in the social impact of legal systems as in their inner intra-professional workings. This is a new field for lawyers. Undoubtedly they come into it unskilled, and they have fumbled and erred as they proceed--and they will continue to do so, at least for a time.

Meanwhile, non-lawyer social scientists have become interested in various aspects of the law. Many lawyers, including most of those interested in the social impact of the law, genuinely welcome this development. Not surprisingly, some of these social scientists fumble and err too. Not long ago, for example, I came into contact with a social scientist, whose competence in his field I do not doubt, who had made considerable progress in securing funding for an empirical study which, according to his proposal, was to include as an important component an analysis of the divorce business done by the federal district courts in several states.

While lawyers, social scientists and those (like Professor Abel) who have some training in both spheres are fumbling and

erring and learning to live and work with each other, we would proceed more usefully, I would have supposed, if we were to avoid defining the problems in our common field in such a way as to permit the claim that only one segment of us has anything useful to contribute.