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1-1-1978

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Recommended Citation

Christenson, Gordon A., "Irvin C. Rutter" (1978). *Faculty Articles and Other Publications*. Paper 152.
http://scholarship.law.uc.edu/fac_pubs/152

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IRVIN C. RUTTER

*Gordon A. Christenson**

While at Columbia Law School, Irvin Rutter partook of the fruits of one of the most creative periods in the history of American legal education. Those exciting days were just after the formative twenties and thirties, when such American legal realists as Karl Llewellyn, William O. Douglas, Herman Oliphant and Walter Wheeler Cook reconstructed the relationship between law in action and law in the books.

Professor Rutter's jurisprudence reflects not just this realist tradition but also his own eclectic attitude toward the complexities of skills that lawyers need. In his jurisprudence of legal operations, each practical, concrete operation of skill applies not only to the task at hand but also to the tasks that lie ahead. After a love affair with clinical education, legal educators are now returning to the basic skills introduced by Rutter in the early 60's. Fresh, new scholars quote him;¹ after the fads have passed, the need remains to go beyond the clinical education to a theoretical mode. The return to Rutter's insights provides a superstructure for applied skills.

In contrast to Laswell's and McDougal's comprehensive, value-oriented (or configurative) jurisprudence, Irvin Rutter's approach is skeptical of the grand abstractions and obscure language of the social scientist, preferring growth through the cases of the common law judge and lawyer.² This contrast is misleading in its simplicity, however, for Professor Rutter's practical jurisprudence approach involves more than simply resolution of the particular decision. Operations of jurisprudence should inform each concrete and particular point of decision to resolve the point of dispute or tension, so that the result becomes greater than the specific event. The event can then be related by operation of mind and thought to the next day's event. This continuity gives stability to change and relates the particular to enduring principles.

Professor Rutter's simplicity in working these operations into the applied skills of legal education constitutes what Karl Llewellyn termed the technology of law, in contrast to the philosophy of law. Every law school and legal education program likewise must translate

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1. E.g., Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALBANY L. REV. 198, 306 (1980).

2. See Redmount, *Book Review*, 53 N.Y.U. L. REV. 677, 682-83 (1978).

its premises into operations, through the technology of legal education. While doing so, a faculty must never lose sight of the other side of the coin, the philosophy of law, which Llewellyn also clarified in his lectures on jurisprudence. While Professor Rutter has never developed an express "philosophy of law," the legal operations and skills that he teaches are grounded on tacit assumptions that deserve explicit attention. These underpinnings might be summarized as follows:

1. Abstractions, and abstractions of rules, are not just misleading, they are dangerous. Only when the mind's eye is fixed by imagining precise images of fact patterns made concrete through a series of repetitive intellectual operations can a student come to understand law.
2. The capacity of all of us for self-delusion renders suspect any legal abstraction unless we carefully derive it from a particular decision in relation to the prior case. A fact pattern plus one is the narrowest abstraction possible and the barest meaning of the doctrine of *stare decisis*. Thus, the danger of delusion in reasoning is reduced when the prior case is construed to its narrowest pattern of generality.
3. If this operation of mind were not possible and pure human skepticism were to deny that any prior case applied to any facts other than its own, no case would serve as authoritative guidance to any other case, and each case would be as good as any other. This atomistic self-indulgence would negate the structure of legal thought entirely and lead to a purely subjective choice for every case, with law being simply a *post hoc* rationalization for judicial decisions. Professor Rutter rejects this nihilism by insisting on careful linkage to patterns of fact and authority.
4. Translating these principles of operation into applied skills beginning with perceptions of fact, Professor Rutter includes insights of psychology and other sciences, again implicitly and with some skepticism about how questions of law and fact appear in the particular operations the lawyer performs. In these operations the lawyer must take the greatest care not to impose unconsciously his subjective preferences, oblivious of the arrogance or hubris of unexamined premises. More importantly, he must disdain the pure subjectivism of those who use law only to justify their conscious preferences.

Professor Rutter's operational jurisprudence utilizes linguistics quite explicitly as a major foundation, dovetailing with learning theory. The "existence precedes essence" of the existentialists is

transformed, in less Delphic terms, into the simpler point that all theorizing, including the grandest philosophical systems, must originate of necessity out of the experience of life. This experience consists of the events of daily existence, and immediately or remotely the theorizing must be about these events. When the abstract generalizations lose touch with the daily "trivia" of life, they become meaningless. But so long as the nexus with reality is retained, the theorizing, in a subtle r'envoi, will illumine and affect the "trivia."

While grounded on a thorough knowledge of structural and semantic linguistics, Professor Rutter's interest in language is also "operational" in the sense that he insists on its practical utility. The connection with the learning process derives from the proposition that it is the unique human capacity for language, inseparable from what we call "thinking," that makes the generalizations of theory possible. As applied to the educational process, by utilizing our knowledge of the structure and function of language it becomes possible to enhance the effectiveness of its "thinking" counterpart, thus approaching that educational will-o'-the-wisp called training in thinking, and for the lawyer, "thinking like a lawyer."

True to his objective, Professor Rutter does not stop with this generalizing, and, as he has put it, in concrete implementation lies proof of the pudding. He presses on to use it in raising the level of effectiveness in the concrete and specific details of the operations of lawyers, and this lies at the foundation of his "jurisprudence of lawyers' operations." Preliminary descriptions have appeared in the course of years, intertwined with his many implementations.³ Since he is concerned with reaching law students and lawyers, he has recognized that it is not enough to address himself to philosophers. In one notable published example, he has combined the theoretical and down-to-earth elements in applying them to the process of analysis and synthesis of cases and the "anatomy of rules of law," addressed to first-year law students.⁴ Throughout his writings and his teaching, he uses the approach, often without explicit reference to the theoretical underpinnings.

3. Rutter, *A Jurisprudence of Lawyers' Operation*, 13 J. LEGAL EDUC. 301, 318 (1961); Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 9, 78, 82 (1968); Rutter, *Law Teaching and the Curriculum*, 1963 A.A.L.S. REP. 81; Rutter, *The Trial Judge and the Judicial Process*, 15 J. LEGAL EDUC. 245 (1963).

4. Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 9, 82 (1968).

While his *magnum opus*, entitled "Law, Language and Thinking Like a Lawyer," has been published preliminarily and used in some of his courses, we eagerly await its more general availability.⁵

Recently, in recognizing Rutter's work, Llewellyn's biographer, William Twining, has written:

At the University of Cincinnati Professor Irvin C. Rutter in conjunction with a series of particular courses developed the best theoretical analysis of lawyers' operations that has yet appeared in print.⁶

Now, when the new generation of scholars seeks to transcend the narrowness and boredom of the clinical method, Rutter's work emerges after a quarter-century, providing a sounder intellectual base than much of what popularly is offered as clinical education. Especially in writing, drafting, and the facts process, he is eternally fresh. He is truly the father of the theory of the applied skills of legal education.

5. Comments by some who have studied this work include those by Myres S. McDougal of the Yale Law School: "The most profound study of law and semantics I have seen. It makes most of the points the American legal realists made, but much more clearly and persuasively than they ever made them."; and by Charles D. Breitel, former Chief Judge of the New York Court of Appeals: "Magnificent, and as important as was Llewellyn's *The Bramble Bush*."

"Linguistics and the Law" was the subject of a series of seminars conducted by Professor Rutter as a Visiting Scholar at the University of Iowa. From a different perspective, it was the subject of his address at an International Conference on Legal Writing at Indiana University.

6. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 355-56 (1973).