# On Law, Lawyering, and Law Professing: *The Golden Sand*

Walter E. Oberer

I am a hostage of time. My ransom lies in the golden sand sifting down through my hour glass. As it piles deeper, I am impelled to share my golden sand—my lifetime with the law, lawyering, and law professing. In the chaos of the classroom, in the cloister of the library, at the bar (however defined). And a golden time it has been, filtering, filtering down.

I have done my penance with the cases, the holdings, the dicta, the footnotes; with the constitutional nebulae, both profound and abstruse; with the statutes, prolixly mired in legislative history; with the articles and books of my colleagues, learned, provocative, gone. All of this is in the golden sand at the bottom of my glass—the precipitate of wisdom as I have perceived it. The hardest to teach because it is the most profound and, at the same time, profoundly obvious.

*Proposition 1:* In all of time there have never been two cases *exactly* alike.

This is the premise for sophisticated lawyering, but it is a rare law student who comprehends it, and an unrare practitioner who does not.

Why is this proposition so seminally profound? Because it articulates the truth that *your* case has never before been decided, that the cases more or less like it that have been decided are, at most, relevant. And you will never know what really moved those other courts to decision in those seemingly like cases. Not even by reading their opinions a dozen times. Indeed, the very rereading may mislead: You will never get all the facts in the record, much less those without. When a judge sits down to write an opinion in a case already, at least tentatively, decided, the judge becomes an advocate in support of that decision, and the ardency of the advocacy may vary inversely with the certitude of the propriety of the decision. This has obvious implications for the adequacy of the factual abstraction from the record found in the opinion.

The foregoing commentary has piercing relevance also for the treatment of seemingly like cases in legal treatises, encyclopedias, law review articles. These provide at best indexing systems for categorizing cases—which, like people seen from sufficient distance, look misleadingly alike.

*Proposition 2:* If a case belongs in court, it belongs in court because the legal doctrines do not decide it.

Easy cases are resoluble in lawyers' offices by the application of legal doctrines to provable facts. In such cases, the lawyer tells the client "no" or

**Walter E. Oberer** is Professor of Law, University of Utah.

"yes." Hard cases, by contrast, are hard because the legal doctrines working for the potential plaintiff encounter, head on, the counterdoctrines working for the potential defendant. Where these doctrines meet is in an area of "murk" in which legal and/or factual line drawing must be done; the case is "hard" because reasonable minds may disagree as to the drawing of those lines. In such cases, the lines are not drawn by the "law." They are drawn by human beings called "judges," sometimes aided by other human beings called "jurors."

These human beings decide the case on the totality of the relevant evidence and law, bringing to bear in their search for "justice" ("sense," "fairness") the totality of their life experiences. The case is not (should not be) decided mechanistically on the basis of some doctrinal technicality, even though, in explaining the decision after the fact, that human being, the judge—obeisant to the shortness of life and the longness of the docket —may make it seem so in the written opinion.

In these hard cases, the ones that belong in court, legal doctrine is not irrelevant. There is not, accordingly, any cynicism in my dealing with it. Indeed, the opposite is true; it is the ultimate idealism to declare that justice between and among human beings is the product of the application of human judgment to the totality of the evidence and the arguments rallied in this particular, never before decided, case.

One way of evaluating the foregoing commentary is to ask oneself whether justice will ever be producible through computerization—i.e., by programming a highly sophisticated machine with legal doctrine (from constitutions, statutes, prior cases), then feeding in the thought-to-be relevant "facts" of *this* case, pressing a button, and awaiting an ideally just decision. The answer is an unequivocal "no." Why not, we may ask, in view of the increasingly subtle technological advancement in computer design and capabilities? Because it is impossible to program a machine, however magnificently orchestrated, with the life experience of a single adult human being—to imbue in a machine the human judgment to apply standards of ultimate sense to contested facts.

Legal doctrine is, of course, highly relevant in deciding even the hard cases, despite the fact that it does not, itself, decide them. The reason lies in the next proposition.

*Proposition 3:* Tools, not rules.

Every legal doctrine exists for the sake of achieving justice, a sensible result in the context of a particular kind of problem—i.e., a particular fact pattern. And since facts permute infinitely, even in relatively narrow spectrums, the applicability of a particular legal doctrine waxes or wanes with factual change. The "bull's-eye" of the doctrine's *raison d'être* lies at one end of the pertinent factual spectrum; the *raison d'être* attenuates with movement toward the other end of that spectrum.

Moreover, legal doctrines may coexist in their applicability to a given set of facts and impinge upon one another's territory. A thorough understanding of the rationale of each doctrine is therefore of the essence in applying it. And since its ultimate rationale is to achieve justice, its force waxes or

wanes with factual permutation. It operates as a "rule" only in the easy, bull's-eye cases; in the hard cases, it is at most a "tool."

Accordingly, legal doctrines do not decide the cases that belong in court; they do, however, establish the "toolery" for seeking justice in the particular case. They represent, that is, relevant concerns, time-tested approaches for determining what facts are relevant, why they are relevant, the degree of strength of the relevance. In short, they provide time-tested *issues* for structuring a case—guides for lawyers to present the case and for judges to decide it. The doctrines thus provide the tools for winnowing through the totality of facts, for evaluating the relevance, for determining a just result, and finally, for the judge to rationalize that result in an opinion that brings the law determined to be relevant to bear upon the facts determined to be relevant.

*Proposition 4:* In the pursuit of justice, it is per se error to ride one horse all the way.

Those who seek to simplify the law misunderstand it profoundly. The complexity of law is the complexity of life. A principle of law that produces justice in a finite factual realm produces injustice when overextended. The perception of this injustice prompts lawyers, judges, and ultimately legislators to create exceptions to, variants upon, existing legal doctrine. Subrules, subdoctrines are thus created—sub*tools* for the achieving of justice in the infinitely varying circumstances of life, and therefore of cases.

Every case decided carries the seed for its own qualification and expansion. Every true lawyer is a gardener in that exciting vineyard of life—a free society, valuing above all justice under freedom. Not merely subrules, but sub-sub, sub-sub-sub, and supra-supra-supra, all conceived in one common effort, to purify, to refine, to sensitize the eternal quest for right from wrong, good from bad, better from less good in a society that not only permits but espouses such quest, and from it prospers.

*Proposition 5:* The pursuit of freedom and justice under law requires the particularization of general rules of law to the client's specific circumstances.

Because the factual permutations of life are infinite, general rules of law, however well conceived, cannot, in and of themselves, assure freedom and justice. They must be particularized to the circumstances of individual human beings. This is the function of lawyers. Whether the general rule of law is the product of constitution, statute, or judicial decision, it is neither all-encompassing nor self-actuating. It is neither of these because it is literally impossible for it to be so. The aphorism, "a government of laws and not of men," is, accordingly, grossly misleading.

A more accurate paraphrase would be: "A government of laws, interpreted and applied—i.e., brought to fruition—by law-trained people." The law-trained people are, of course, lawyers, some of whom become judges and legislators. And even when the legislators are not lawyers—a therapeutic departure incidentally for leavening the "law loaf"—their legislative product is subject to the purging scrutiny of law-trained people in the application.

The ultimate custodians of freedom and justice, of constitutional democracy, of the "rule of law," are lawyers. For better or for worse, one might add, with a sigh; yes, one might respond, with a countersigh, *but there is no other way*. A free society cannot exist without law-trained people who bring generalized rules to bear in particularized factual circumstances so as to realize, to maximize, the rights of individual human beings thereunder. We might obliterate the name "lawyers," but not the function. It is no accident that the United States has several times as many lawyers as the Soviet Union.

*Proposition 6:* The canons of professional ethics are the imperatives of lawyering in a free society.

We "professionalize" a calling because of the need to protect its beneficiaries from the failings of the practitioners of that calling. All callings are not professionalized, only those that (1) are of great importance to its beneficiaries and (2) cannot be effectively regulated without the controlling input of practitioners of that calling. In other words, we professionalize a calling when members of that calling cannot be effectively regulated by general rules of conduct applicable to society at large and must be judged by more sophisticated standards adequately known only to its practitioners.

What are the peculiar imperatives of lawyering in a free society? They begin with, indeed center around, the necessity of utter confidentiality and loyalty in the relationship with the client. The lawyer deals with matters of great importance to the client. Utter loyalty to the client is the essence of that relationship. Without full disclosure by the client of all relevant facts, the lawyer cannot do the lawyering job of maximizing the client's rights under the general rules of law that must be particularized to the client's unique circumstances. Without the protection of confidentiality, the client cannot realize the benefits of freedom and justice under the rule of law. Rights on paper (constitutions, statutes, judicial precedent) remain only "paper rights."

The lawyer is required by his very role as "legal champion" to represent the client to the fullest *arguable* extent of the "law," armed in that effort with full knowledge of the client's cause. In this role, the lawyer must be a skeptic (not a cynic; cynicism is a kind of death)—a *good-faith* skeptic, who accepts no proposition of fact or law without checking it out, but who is eager to check it out, beneath every rock, behind every tree, beyond every page.

The lawyer, as advocate, has a two-pronged responsibility: (1) to discover the *human appeal* in the client's case and to present it with the fullest force allowable under the rules of evidence and the canons of professional ethics; (2) to provide the court with a "legal handle" that will facilitate the writing of an opinion in the client's favor. Again, I say this with the highest regard for the legal process, idealistically, but, at the same time, with a realistic (not jaundiced) view of the role of legal doctrine.

That fellow human, the judge, will (should) decide the case in accordance with its total human impact, assuming that the case belongs in court in the first place, and that it, as I have previously argued, belongs there

because legal doctrine will not decide it—at least not without considerable lawyerly help (including, of course, help from the most important lawyer in the process: the judge).

*Proposition 7:* The seed of lawyering is to perceive each relevant issue and to understand why it is relevant.

A lawyer is dead, in the courtroom, in the office, with regard to issues unperceived. The perception of the possible relevance of a particular issue is the starting point of lawyering. The starting point of the perception is leaning back in one's chair, contemplating the ceiling, and reflecting upon the triggering information imparted by the client. What theories of attack or defense does this information portend? What extant legal doctrine is or may be pertinent to the development of the client's cause? What factual and legal research is thus indicated?

Once a possible issue, relevant to the client's cause, has been perceived, the next step is to deal with it speculatively, contemplatively, adding, hypothetically, still staring at the ceiling, a factual context that would resolve the issue incontestably in favor of the potential plaintiff, and then a countercontext that would resolve it incontestably in favor of the potential defendant. The relevancy of the issue, its legitimacy, is thus tentatively confirmed and the direction of further research, both factual and legal, clearly indicated. The issue, if indeed it survives this scrutiny and remains an issue, is thus framed. And if such contemplation confirms the issue as an issue, the reasons for its being an issue, both factual and legal, are established—i.e., the reasons for the "murk," the need and the criteria for the essential line drawing, as to which reasonable minds can, by definition, disagree.

The rest is follow-through lawyering—on this and other similarly perceived and surviving issues.

*Proposition 8:* One handful of mud at a time.

A case comes to a lawyer as a conglomeration of "facts," or, more accurately, as a conglomeration of factual assertions, some of which may be bitterly contested. The lawyer's job, initially, is to perceive from those factual assertions the legal yardsticks by which the ultimately provable facts will be assessed and found relevant or irrelevant in a just resolution of the dispute. The dispute, the potential lawsuit, may involve several issues, i.e., intertwined issues of law and fact, all of which have a role to play in a sensible resolution of the case.

The star strategy for lawyering on such a case is to honor the maxim "life by the yard is hard, by the inch it's a cinch." Or, in my more mundane formulation: "One handful of mud at a time."

If the case has two or more issues of potentially dispositive force, either individually or in some kind of combination, the lawyer-like response is not to be overwhelmed by the multiple issues but to deal with them one at a time. First, ascertain and sort out the facts pertinent to Issue 1, then think through the implications of those facts with regard to the justice-seeking legal doctrines pertinent to Issue 1; if there were no such legal doctrine "in the wings," there would be no such issue. When Issue 1 is in hand, i.e.,

understood and fully accommodated to the facts of your case, turn to Issue 2, giving it and any other issues the same disparate treatment.

The upshot of the foregoing treatment is a thorough understanding of the elements of your case, disparately. Now, against that background of your case, each aspect of it intimately known, put the pieces together. Ask yourself, how do they fit together? What further factual or legal inquiries are suggested by the fitting together? How may the totality be most persuasively presented?

*Proposition 9:* All lawyering boils down to four questions: (1) What does (should) the client seek? (2) What resources are available to achieve those goals? (3) What obstacles are present? (4) How can the resources be maximized for the achievement of those goals despite the obstacles?

The pursuit of a client's goal or goals in optimal fashion requires creative lawyering—i.e., the ascertaining of the relevant facts and law, and the putting together of the one with the other not only in the previously established conventional relationships but also in imaginatively new relationships.

In this process, the search for relevant facts energizes, expands the search for, the relevant law, and vice versa. Law and fact are yin and yang, each meaningless except in union. Creative expansion in the scope of one expands, reciprocally, the scope of the other.

An elegant understanding of this reciprocity of law and fact is the essence of lawyering, whether done in the office, the courtroom, the library, the classroom, or indeed on law school exams. It is also the essence of the expansion of lawmaking, both in legislatures and courtrooms, so necessary in the everlasting pursuit, sometimes mistakenly and abortively, of justice in the churning change of a free society.

When confronted with a client's cause and having done the lawyering job of ascertaining the relevant facts and law, the lawyer universally finds a finite set of options available for achieving the client's goals. Each option will possess its own pluses and minuses. These must be thought through, evaluated, measured against one another, discussed with the client, and ultimately the star option selected (or two or more star options, when they can be alternatively pursued, as with counts or defenses in a pleading).

In this regard, "constitutionalizing" an issue neither adds to the array of options available nor changes the pluses and minuses of those options; it merely heats up the controversy by adding quasi-religious overtones to some pluses, some minuses. My point is not to disparage such constitutionalizing—it has a sometimes imperative role to play in lawyering—but rather to make note of a frequently overlooked truth.

*Proposition 10:* There are linguistic dead ends in the law, and they serve a vital function.

What is a "linguistic dead end" in the law? It consists of a word or a set of words that defy a final and ultimate distillation of meaning. They take on meaning, chameleon-like, from context. A poet once made the point extravagantly with regard to *all* language: No word has ever meant the same thing twice.

Examples of dead-end words in the law are *substantial performance, material breach* (linguistic dead ends in the law are frequently, perhaps typically, alternatively statable), *proximate cause, unconscionable, impossibility, wilful, arbitrary, bad faith, implied,* and that old standby *reasonable.*

Each of these words or phrases—and many others—have core meanings that are readily understandable in extreme factual contexts, but the meaning attenuates in the hard cases to the point that "reasonable" minds can disagree. Then they become dead ends—labels for justifying results, for jury instructions. The characterization "dead end" means that the words are *ultimately* dispositive; they provide a terminal point for argument and for rationalization of decision. They are sufficiently opaque to permit: "period, next case."

They attest, in short, to the shortness of life, to the need to dispose of this case and to get on with the next, to conclude the potential foreverness of rationalization. And—remember Proposition 4—no decision is "forever" anyway. It carries within itself the seed for its own limitation and expansion in the eternal pursuit of freedom and justice under law, in later, always somewhat different, cases.

*Proposition 11:* There is a built-in competition, as well as collaboration, between lawyers and the rest of society in the mainstream of constitutional democracy.

The seminal question of which questions should be decided legislatively and which judicially is too often left at large in American legal education. Anent this, I sometimes ask my students if they would consider running for legislative office on a platform that all legislators should be lawyers. They sensibly shy away from this stance (indeed, giggle about it) but universally embrace the notion that all judges should be lawyers. Why the difference, I ask them.

Posing the question in this manner produces some uncommonly profound thinking about the profound question of how law-making responsibilities can most wisely be distributed in a constitutional democracy. It focuses analysis upon the kinds of questions law training prepares one to answer as opposed to questions that should be socially answered. Lawyers, and therefore judges, are specially trained to apply existing legal standards to varying factual patterns. The formulation of the legal standards themselves is not the special license of lawyers but of society as a whole.

The very meaning of constitutional democracy is majority rule within the constitutional confines, most specifically in the United States, the Bill of Rights. When we "constitutionalize" an issue, we take it out of the hands of the people and place it in the hands of lawyers, or, more particularly, in the hands of lawyers who have been elevated to judgeship. This is a highly sensitive social move because it should be highly sensitive. It should be done by the law-trained people who do it only when it should be done. This may seem like a feckless admonition, but its importance is inbuilt, a structural part of constitutional democracy—potentially, indeed, its "Achilles heel."

Addressing this Achilles heel does not resolve it, but it does address it. And what it addresses is the competition between, as well as the collabora-

tion between, lawyers and the rest of society in the continuing discovery and maintenance of freedom and justice.

To the extent that issues are constitutionalized, they are preempted by lawyers. The lawyers, through the oracle of the courts, declare to society at large: This is lawyers' territory, not yours; this is *our* territory. The deeper the division in society at large as to the issue, the greater the grievance felt at this preemption by lawyers of its resolution. Thus do lawyers, by the expansion of their powers, alienate themselves from society—at least from those who feel disserved by this preemption.

In contrast, a decision reached *legislatively*, by a majority of the democratically selected representatives of society at large, is relatively palatable, a *political* resolution that can be politically altered through the political process. Those who feel gored by the decision have the relatively understandable, and therefore relatively acceptable, avenue of the democratic process for redress. The "law" that results is thus society's law rather than lawyers' law, and the vindictive view of the role of lawyers in creating it is lessened.

*Proposition 12:* Law should be taught as a joint adventure in pursuit of a Utopian code.

For many years now, after earlier flirtation around the curriculum, I have been teaching Contracts and Labor Law. In each course, I propose to my students that we embark on a great adventure in quest of a "golden fleece"—in Contracts, for example, a Utopian Code that will maximize the contribution that the institution of contract can make to a society devoted to the seeking of freedom and justice under a rule of law. I urge us to accept no "stone," no principle, into our golden edifice that we do not first assay meticulously with the good-faith skepticism of pragmatic idealism. No past judicial mistakes will earn their way into our edifice by reason of mere hoariness. Similarly, no new notion will captivate us because it is new and fresh and shiny. It must be sound, as measured by *our* measurements of soundness.

In this process, what we wind up doing is recreating the existing law of contracts. But, in so doing, we make it our own. This is so because the law of contracts is the distillate of centuries of experience in the sensible management of a very important area of human affairs. It has been, accordingly, purged by time. We embrace it because it is embraceable.

Some words are in order here with regard to the role of the *Uniform Commercial Code* and of that quasi-code, the *Restatement of Contracts*. I know of no more painful way of wasting time than to read law at large. The effort to codify law is highly sensible. But, in my judgment, an effort to teach law through the codes is not—at least not the common law.

What is a "code"? It is, if well conceived, a distillation of the wisdom of many, many cases. The code does not make its postulations right any more than saintly proclamations sanctify what is proclaimed. If a proclamation is true, it was true before, not because, it was proclaimed. And the truth of the proclamations of the *U.C.C.* and the *Restatement* are the product of the crucible of decision making in judicial cases.

Why is reading law at large, in codes, a painful waste of time? Because codification entails the effort to capture in black-letter postulation the wisdom of the cases, of the ages. The reader is challenged to comprehend not only a "rule" but qualifications of that rule, and qualifications upon the qualifications. Words and phrases of "art" are of the essence of such distillation; they can be understood only against the backdrop of the cases, the decisions in factual situations that produce the "rule," and neighboring factual situations that qualify it. The factual situations that produce the rule and the qualifications upon the rule are subsumed. The foliage obscures the root, and, as an incident, defies comprehending retention.

Now, let us reverse the procedure; which is to say, let us examine the advantages of the "case method" for learning the law. The case method has been derided as repetitive and wasteful of time. What is its core justification? My answer is that it teaches the law *tentatively*, in a context that both justifies the resolution of the issue presented and confines that resolution to the factual context in which it occurs. Both the justification and the confinement are intimately related to the facts involved. The "rule of law" thus produced is inherently limited by the context of its creation and is understood by the student in a way that transcends, invades, black-letter treatment. The student so introduced to a legal "principle" goes to a code not passively but challengingly, as its master, not its minion.

In this regard, and as a culmination of my preachments, I seek to produce lawyers case-trained to an understanding of the "law" that emancipates them from feeling helpless when they represent clients whose cause they deem, after the caution and scrutiny induced by good-faith skepticism, to be meritorious. Their case has never before been decided; if they do the yin-yang job of relating relevant fact to relevant law and conclude, in that process, what the result *ought* to be, the chances are good that they can produce that result in their case.

## A Personal Note

I have advanced a dozen propositions, in the foregoing, on law, lawyering, and law professing. They are presented as personal conclusions, out of *my* golden sand—now mostly sifted down through my glass. They are intended to be provocative, but not frivolously so.

I thank my thousands of former students in helping me, unwittingly, to these insights, and also my colleagues in the neighboring offices of the law faculties I have served. But most of all, I thank a long-ago mentor who seeded my mind from an office next door at the University of Texas, 1955–64—Dean Leon Green, who had a bias for tomorrow and imparted it, impellingly, today.