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Retrospective (A Self-Analysis Summary)

SOME YEARS AGO, *WHO'S WHO IN AMERICA,* WHERE MY biography appears, invited biographees to submit a short statement of a personal, basic life theme. Mine reads:

> The obvious is too often overlooked. Find it. Identify it. Explore it. There is much that lies hidden in the fundamentals and complexities of the obvious.

The notion of the obvious is consistent with many of the starting points to my own thinking and observations. Early in my explorations of the preventive law content of law practice, lawyers remarked, "You are just talking about commonsense things." "The principles you are trying to state are plain." "Nothing new about that. We all do it." These observations were made when I asked whether our profession helps clients pursue client objectives. "Of course, lawyers do. What's such a big thing about that? Don't bother your head about such a common and frequent thing."

Yet, simultaneously, I heard the opposite reaction when I pressed to explore possible methods for lawyers to improve the self-evident. I asked whether it is possible for us to have a procedure, or process, to keep our clients from getting into legal trouble. I asked whether we could perform useful service for the hypothetical client who, without any present identifiable problem, enters and declares that his purpose is to make relatively certain that he has no present legal problems, and

will have none in the future. "Oh, that's impossible. You can't do anything for that sort of client. What do you think you can do? I've never had a client like that."

I worried about the obvious and the implications of the obvious. I still do. Sometimes small incidents in one's life have a way of becoming important bench marks. An analogous obviousness struck me with unexpected forcefulness. It is the story of Eugene Murphy. I may have written elsewhere that Gene, a childhood chum of Hermione's, visited us at our home in Los Angeles many years ago. He was at that time in a government position concerned with the development of artificial limbs. Gene had been afflicted with polio as a child. He was able to get around using crutches. He was an engineer who had devoted considerable time, thought and attention to the development of artificial limbs. At that time, effort was devoted to develop artificial limbs to assist walking. He told me that one of the first things was to determine how we, in fact, walk. Until the necessity to develop artificial limbs came along, apparently scientists paid very little attention to the actual mechanics of walking. This seems like an odd thing in a way, because human beings have been walking ever since we have been human beings, and yet we have never really taken the time to delve into the "obvious."

Early in life, perhaps in a schoolroom, gravity was the subject being considered. The teacher said that the basic principle of gravity was discovered by watching apples fall from a tree. As I thought about it from time to time, that discovery came to mean to me that someone reflected on that common event, wondered about it, turned it around in his head, observed repetitive instances of the event, compared each instance with each other instance, tried to identify any similarities and differences, and strove to derive some general principle.

Another collateral circumstance, something of a personal moral, philosophical, almost religious significance, seems constantly to set a common denominator of my interests. It is the distinct importance of the individual human being. The relevance of the individual person comes out whenever I am sincerely asked, mostly by lawyers and law students, to try to explain my interest in preventive law. The inquiry is often made in the context of a discussion of lawyering functions to achieve the objectives of preventive law. On the surface, it appears that my purpose may be to indulge the profession. Not so. My striving concerns people, individuals. It concerns a distaste for trouble, especially preventable trouble. It concerns a desire to improve the lot of people. It concerns a desire to afford each person the opportunities society permits. These I translate to mean an effort to strive for human

happiness. In a sense it is not the legal profession that draws my first attention. But strive as I would to accomplish the human goals of respect for the individual and of affirmative well-being, I have come to believe that in matters where law is, or may be involved, people need the help of lawyers, whose purpose should be to seek to assist the individual achieve desired objectives in appropriate ways. In other words, the lawyer should assist each person to minimize legal risk and maximize legal opportunities at, or before, the time the individual is legally committed to a course of action. I have come to believe that in our complex society a profession of lawyers is needed, not for the sake of lawyers, but for the persons the profession is here to serve.

Attention to the obvious, the commonplace, is not, in the minds of many, the cornerstone of academic erudition. Rather, in the academy, one should best be concerned with the obscure, the extraordinary, the exceptional situation, and the isolated depths of thought.

Relating such thoughts to my law school education and legal education generally, the study of the appellate case is not the study of the obvious. It is, rather, the study of the unusual, the extraordinary, and the exceptional circumstance in our society. It lends itself beautifully to academic scholarship. Yet most of what goes on in society never reaches that unusual situation.

In the inner depths of my ego, I have sometimes compared myself to that illustrious originator of the case method of study, Christopher Columbus Langdell. There are similarities and differences. The chief similarity is that I, like he, came to teaching after first experiencing the law office. But our experiences were vastly different. So far as I can determine, he was an appellate law lawyer. He concentrated on the appellate case which is, for me, and most practicing lawyers, a rare experience. For me, such involvement has occurred about half a dozen times in decades of law practice. And only once, and then for ten minutes, was my voice heard in an appellate argument. Somewhat more frequently, yet only under extraordinary circumstances, was my voice even heard in a trial courtroom. My voice was heard in the law office. The awesome responsibility of advising a client to sign, or not sign, a document was in the law office. There is no judge to turn to in order to make the final decision. The decision that the client should now do a legally binding act ("sign the paper") was mine in the law office. So, to teaching I, like Langdell, brought my experiences. And, in my ego dreams I sought, and still seek, to influence legal education as effectively, as permanently, and as universally as did C. C. Langdell. I wrote all this in the impersonal way that meets law review standards.

The flavor of the personal inward burnings is captured only if the reader reads deeply between the lines. "The Law Office—A Preventive Law Laboratory" (104 U. Pa. L. Rev. 940 (1956)).

Bringing the law office to the classroom is not done by a single stroke of the pen; nor is it a single idea. The law office is too complex, and academe is too intransigent. There is, it should now be clear, a high correlation between preventive law and the law office. The professional place for the practice of preventive law is the law office.

My first book in preventive law was directed not to the law office, but to people generally. That appeared to me at the time to be a more difficult task than would be a discussion of the professional role, though of this I may now have a different view. Another, and perhaps more important, reason was that I was, and still am, more interested in people generally than in the profession. A third factor was that I was then (1945–47) teaching law to non law students and wanted to show a different approach—my approach—to that group of students whom I regarded as both lawyers on their own, when appropriate, and potential clients.

Beginning in 1950, I was concerned with further ideas and applications of preventive law. My second book, *How to Negotiate a Successful Contract* (1955), followed the first in being another treatment of the theme of lawyers on their own and clients who employ lawyers. This book was confined to certain business transactions. But law teaching also came in for some share of my thinking before I began to try to teach about preventive law. By the time 1963 arrived (my first serious course in preventive law), I had some notions of where I might be going.

An interest in first causes (at least first causes in a time sequence)—how do lawsuits really get started, why did people come to lawyers' offices, and so on—coupled with family conversations in which my father prided himself on not going to court (by which I think he meant that he solved disputes mostly without lawyer help) leads into preventive law. Staying away from lawyers meant to my father (and still means to many) staying away from the courtroom. How do some people avoid trouble where others run to be the first to file a lawsuit? What are the principles by which my father and like-minded others stay out of legal trouble? There must be some relation in principles that underlie those who cause lawsuits to be started. For staying out of trouble evidences itself in two aspects. It means that one does not become a plaintiff—a circumstance that seems in the control of a potential plaintiff. It also means that one does not become a defendant—a circumstance that seems in the control of another. So preventive law must try to discover

and state the principles that govern the commencement of a lawsuit by another, and then try to discover and state the principles that enable the avoidance of such legal trouble. It seems to me that if my law school education, and its examinations, had been geared to matters of this sort, I would have done much better. I also believe that there are students in law school today who do better on issues of this sort than on the technical legalistic appellate court reasoning processes with which legal education generally is still largely concerned.

If, as has been said of me, creativity is a characteristic, then I have wondered whether law school education gives adequate recognition to it and its potential in students. There is some element of creativity in the way a brilliant lawyer tackles an appellate argument: issues not otherwise recognized are identified; analogies that seem remote are tied together; analogies are used that may escape the imagination of lawyers of lesser capacity; and a picture is painted that captures attention. Such capabilities are recognized on law school examinations, but that is only part of the performance of a lawyer, a part often remote from the needs of clients.

I was, and continue to be, as interested in developing law school teaching of preventive law and use of the law office as I am in leading lawyers to develop and improve their practice of preventive law and other law office practices. For me, these two—law school teaching and lawyers' practices—go together. As nearly as I can observe, most law school teachers do not put these two together. The common view is that lawyers' practices are to be learned in practice. The false assumption is that lawyer practices are without concepts and without worthwhile teachable principles. So the going for me was, and is, rough. I felt not only confronted with the ingrained reluctance to regard law practice as having a theoretical base, but also by my inwardly felt personal limitations.

I was not endowed with brilliance and never felt that I was. There were many times I felt disadvantaged by the lack; yet at the same time—as I often reflect on it—perhaps that fact was turned to advantage. There was always the drive—the effort—to make up for the deficiency. It seems plausible to suggest that had I made it while young, i.e., had I sufficiently excelled in law school so that in my early professional years some doors to academe had been opened for me, then the vast experiences, and the drives and stirrings which came with the effort to push, might never have occurred. This is a guess; yet the constant effort to make up for the deficiencies I felt was no guess; it was (and is) real. All along I admired, and often was a bit jealous, of those who were better endowed

than I. The same was true, in some measure at least, of my efforts in law practice. In the office where I devoted most of my practice life, I was, for many years, the only lawyer who in law school did not make law review. That deficiency I had to make up for. I did so by pursuing a number of activities—writing, primarily. Sometimes I observed that others, with higher academic accomplishments, seemed to limit their scope. I sought to broaden; to develop a sweep across the landscape of law, to know more about a variety of subject matter, to fear no challenge for new legal territory, to delve into the relationship of law to areas that touch it and are touched by it.

From time to time I would reflect on the drive within me. That striving was occasionally brought to my attention by comment, or inquiry, from people I met who wondered about the effort I projected—the evangalism within me. "Where did I get all that energy?" It never seemed like so much energy to me. Yet my answer is simple—I can no more shut it off than, apparently, can others with less strivings generate it.

The ego is complex and simultaneously unfathomable and understandable. The self within me comes naturally, as if predetermined. Yet I am no fatalist. Free will, and not determinism, is the paramount creed with which I live. There may be a mixture of both free will and determinism; but I must live as though free will is possible. Yet my behavior sometimes comports more with predetermination than it does with open choice. I cannot relax the drive. It comes naturally from within. It is, in that sense, not to my credit. It is not as though I must force myself—though force myself I must. I best explain this apparent contradiction merely by asserting that it is no contradiction. It is simply the way of my being.

Perhaps the picture becomes clearer if we recognize that the view from the outside differs from the view from the inside. To the outside observer, my personal efforts seem creditable, as though I went beyond the call of duty; as though I am to be commended for having accomplished an objective worthy of some recognition. While I appreciate and understand such an outsider's observation—the appearance of accomplishment and perhaps real accomplishment is there—the "credit" for the effort is built in the genes. I could no more stop the striving than I could accomplish objectives outside my scope.

If certain goals—notably academic achievement—had come more easily or more naturally, it may be that ultimate results would not have happened. Was it not the felt necessity to push forward that enabled experiences to be accumulated? The start of law practice in modest surroundings—modest as compared with, say, a favored judicial

clerkship, gave me experiences which later became central to ideas that developed. My refusal to separate the theoretical and the practical (a dichotomy glibly separated by many academics and by many persons of practical affairs) comes, in part, from a refusal to give up the theoretical while engaging in practical affairs, and a similar refusal to forgo the practical when permitted to speculate in an ivory tower. It is not that I believe that basic research and basic speculations must always exhibit a practical counterpart, for I believe that theoretical speculations do have an inherent value. As humans we do not know when offbeat philosophic wanderings will someday have practical human value.

My striving evidences itself in many of the relationships I sought to develop. Meeting one's future spouse may, in part, be accidental—a chance circumstance. Yet, for me, there was a predetermined measure. My eye strove for beauty of mind as well as body. Hermione caught my fancy because of her brilliance of mind and outstanding academic achievement. She was, when I met her on a blind date, a graduate of Wellesley College, the valedictorian of her class at the relatively young age of eighteen. Her dual major in chemistry and French never became her central interest. She was, at the time of our first meeting, employed at Twentieth Century Fox as a reader; a position which later became known as story analyst. My mother, being a fine housekeeper and cook, wondered about my interest in Hermione, a girl she said who could not cook. My father went about his business as though his business was the only concern of his life. Truth is, it probably was.

Hermione's background and accomplishments were in keeping with the ideal I hoped I could achieve—some adequate accomplishment of the intellect.

It was not my lot to find early employment in keeping with that ideal, yet my early experience was perhaps better. I was closer to the average person—the average client—than might have been the situation had my academic standing been as I had wished.

Later, when I could, I associated with lawyers of the highest scholastic standing. Both my partners, Lawrence Irell and Arthur Manella, had been first in their law school class. Fine lawyers they were, and are. I was older in age, and brought a mixture of experience that I felt rounded out our early law practice. I was then almost fifteen years out of law school. Writing, teaching, and lecturing, along with the strong careers of my partners, were the means by which I tried to develop. In the law office we became surrounded by students of high scholastic accomplishment. That too was planned. If the law office was lifting itself by its bootstraps, I was able to keep up and to help it.

In the academic world there was no need to search for persons of intellectual acumen. They are plentiful, though each may go a separate way. It was often my pleasure to work with others, from which some joint writings were produced. But here I must mention, even if repeated, that the most intensive of those joint undertakings was my work with Ed Dauer, who is three decades younger, with scant lawyering experience. In his administrative organization, he resembles my former partner, Arthur Manella. In his intensity and his pushing deeper and deeper, in his unwillingness to accept anything as axiomatic, in his endeavors to press me with gentle pressure to as to get at the underpinnings and general principles, he is much like my ideal of the philosophers I once studied when in college. Though distance separates us, it is still his prodding which, even as I write this, suggests that I try to dig deeper in order to spell out what he believes is within me. So I try. And so, too, I keep endeavoring to make up for an inferiority which I trust did not, however, become a complex.

The striving burst out in several ways. I could think of ideas that I hoped would improve the profession's practices for clients and others. Frequently, the medical model came to mind. Though I might try to get action, I often met with little or no interest. Without active interest, experiment could not take place. Without experiement, or initial trial, there could be no further accomplishment. If I could not gain attention of the organized profession to institute an idea, I could at least write about it for publication. The pen may not be mightier than the project-in-action, but at least it could paint the picture. I could arouse scant interest initially in: Will-for-21, Will for Newlyweds, Staying Open One Night a Week, Legal Cost Insurance, Law Offices for Middle Income Clients, Periodic Checkup, or in other projects. But I could, and did, write about them and get the ideas published. An underlying motivation in my endeavor to influence the profession snapped forward at an early date into a common denominator of my thinking. That common thread was that I believed that the preventive law lawyer practices constructive ongoing activities for clients and people. The litigating lawyer, necessary as is that function, is not that sort of positive constructive influence. I saw the distinction best in business transactions. Business activity goes on to produce goods and services; for example, to build a building that was not there before. A dispute is distracting. When that dispute reaches litigation with the trappings of the courts and lawyers, it diffuses the constructive ongoing efforts for which the business primarily exists. Dispute always has an historical origin. Litigating lawyers, it dawned on me, are essentially historians who recreate in the

courtroom the history of the dispute. That essential function cannot, in the long run, be regarded as constructive or as helpful to society as the building blocks of ongoing activities. The preventive law lawyer is more forward-looking. That sort of lawyering participates in ongoing constructive functions which society must generally regard as improvement, as benefit, as helpful, as positive. No wonder the public relations image of the lawyer (remember that I served the profession in several public relations capacities and thought much about the look of the profession in the eyes of the public) has too much of a negative look. It is extremely difficult to demonstrate to the public that lawyers—especially those who lose lawsuits and seemingly extend the litigation processes—perform a socially useful task. It is, I continue to believe, less difficult to demonstrate that the preventive law function is positive, helpful, and healthy. The talk I gave in 1953 to a small group of Bar presidents at an annual meeting of the American Bar Association was, to my surprise, picked up for publication in its national journal. The title was chosen not by me, but by the editor—"Preventive Law and Public Relations—Improving the Legal Health of America" (39 A.B.A. J. 556 (1953)).

As a public relations project, preventive law has its limitations. There can never be total absence of legal trouble; nor total exercise of legal opportunities. While I believe that we can improve legal health, we can never achieve it absolutely. People must live and act now with great amounts of uncertain futures. We must act now with certainty (either "sign" or do not "sign on the dotted line") although the future consequences of that action (or inaction) cannot now be wholly predicted. Inaction (failure to proceed with a proposed course of action) may be more costly than proceeding with knowingly ambiguous, or knowingly troublesome action. The inaction may be more costly than even predictable future trouble. That is a hard point to make to the public and to lawyers. A limitation that preventive law lawyers may impose on clients is the utter desire for future certainty; the wish for an absolute avoidance of future trouble. Where this is the professional requirement, the client is either left actionless, or inclined to reject preventive law professional guidance.

The limitation of preventive law practice that stems from the public's image of the lawyer as troubleshooter (or worse still, trouble-maker) is translated by the public into believing that preventive law practice is also troubleshooting. Unfortunately, there may be some truth in this because lawyers, too, (especially lawyers whose outlook is largely confined to litigation) come to preventive law limited by a

litigation outlook. For example, they may treat a business negotiation as a cross-examination of an opposing litigant or witness.

Correction of this situation should take place first, I believe, with the profession. While it is true that lawyers cannot practice preventive law unless clients see the lawyer "in time," that is, before the client does a law-creating act, I have staunchly taken the position that the first effort must be made in the profession. We must first be able to practice preventive law. The most dramatic illustration of my point of view came when some bar associations started to "sell" (advertise, exploit) the periodic checkup project. I guess it sounded great. But the profession was unprepared for it. It still needs further preparation. For me, the start must be the development of preventive law knowledge and techniques, and professional education about preventive law. That education should start in law schools. Law students, through Langdellian influence, get indoctrination in the adversary process. Langdellian methods give students nothing of preventive law approaches. I felt this early in my preventive law teaching. It still remains my impression of the second- and third-year law students I continue to teach. There is, I tell my students, a vast difference in approaches, in methods, in thinking, and in materials used in education between the win-lose game of adversary litigation and the win-win game of preventive law lawyering. The switch is not easy for students to accomplish in a semester course of two or three units. The switch may be next to impossible for the litigating lawyer indoctrinated by adversarial learning and whose practice may be confided to the win-lose game. It may be that the client who desires preventive law guidance can be disappointed, and even misguided, when the client asks the litigating lawyer to serve the preventive law functions.

I have an ability to generalize from the particular. I observe particular items of the practice of lawyers and drive toward finding the underlying general principles. Teaching material, I believe, consists of generalized concepts. When applied to the law office, teaching materials should include specific instances from which general principles are derived. Effective teaching and learning occur when general principles are used, illustrated by specific instances. One reason that academe has discounted and neglected the law office as source material for study is that generalized concepts concerning law practice have not been sufficiently developed.

One limitation of clinical legal education is that insufficient attention has been given to the discovery and teaching of general

principles of actual practice. There are principles concerning law office procedure and process, as well as principles regarding the substance of practice. For example, there are principles concerning decisions made by lawyers, decisions made by clients, and rules to determine whether a decision is appropriate for the lawyer to make or the client to make. There are processes by which lawyers make lawyer decisions. There are factors which are or should be taken into account.

Law practice is a complex of activities. I have not given equal attention to all of them. Rather, I seem to have concentrated much attention on the lawyer-client relationship. This is a neglected field in law school education. It is also a rich mine to be dug and analyzed. The fact that lawyers have been engaged in lawyer-client relationships for decades does not mean that it is unworthy of study. The study of that relationship requires an ability to observe it in a fashion to derive general principles from such observation. I credit myself with such an ability and with a desire—almost a demand on myself—to bring the general principles to the surface. I feel as driven to do so as any scientist who seeks to derive general principles from an observed event in nature or in a laboratory.

Such a drive takes time. While it often happens that ideas and solutions occur when eyes open in the morning, it is misleading to believe that the ideas come without prior effort. Effort takes time. Time, for me, is one of the most important commodities I have. And one of the scarcest. Life lasts just so long. The day has a measured number of hours. We cannot recall time. Time lost is lost forever. Other commodities we can duplicate. Never so with time. Stretching time is a neat trick. There is, for me, a way of achieving more time. I buy it. I pay good money in order to get time to try to devote efforts to objectives that I deem worthy. I give up remunerative tasks in order to have time for nonremunerative ones. Within limitations I do as little as possible that others can do for me, even if money is required to encourage others to help. I do so not solely because others can do some of these tasks better than I could, for example, preparing my income tax returns, but mainly because I prefer to devote my energies to the studies, the observations, the writing, and the thinking that will benefit more people. That, for me, is the principal use of money and the principal reason for abstinence from certain money making pursuits. Of course, the scheme does not work perfectly. Nor is it always evident to others. To others it may appear that because I seem not to have the need to make money, I, therefore, do other things. It is rather the other way around. I prefer

to do other things and, therefore, I do not devote energies primarily to money making activities. It takes time and energy to make money, which time and energy I prefer to devote to other things.

It is clear to me that I would not have my life otherwise. The ego within me drives me to want to contribute my life to improving the lot of mankind at least in some small way. The ego within me tells me that I may be doing so. This is satisfaction. This is my compensation. The circumstances were stacked so I could do this. I see others who must devote themselves to problems at home. Married life for many becomes a draining experience when dissension arises. There is none of this in my relationship with Hermione. Rather, the reverse. Children often can be a drain because of poor health, or social circumstances, or chance happenings. We have been favored in that respect. Health, though sometimes causing me detours, has had no serious long-time drawbacks. So, taking everything into account, my life, I believe, is worthwhile to me and to others.

Happy is the individual who finds a purpose in life to help others; and then through good fortune, or otherwise, pursues that purpose. So measured, mine is a happy life. The pursuit can, for some, be fraught with obstacles. Most of those hindrances and detours were not put into my path. For me, family life, so smooth, so positive, and so supportive, could for other humans I have observed have been, by contrast, a strain in many ways. Financial ability was sufficient though it alone is not the key. Many are those with ample resources whose lives seem empty of dedication to humanity. My regret is that I sometimes observe others with dedication whose fortunes—or lack thereof, keeps away the possibilities of the full bloom of their potential contribution. Children, too, serve needs and many blossom forth. Ours do so; each in his own way makes contributions, as they see them, to the improvement of the lot of mankind. Health and energy are vital necessities for continued human contribution. Though there have been periods, some very long, of weakened energy, on the whole I have had my ample share of good health.

There is in me an obstinance; an unyielding drive to fulfill my life's purpose as I see it. That purpose took many early years—half the ordinary life—to become known to me. Once revealed, it propelled me forward. The stick-to-itiveness was, I sometimes felt, part of my ancestry. I am part of a people—a group—that has for centuries not given up. However accounted for, my genes contain a stubborness of life's purpose.

Perhaps this puts too high a regard for the central drive of my life. I have the faith that it is worthy though I sensed that colleagues and others have, at times, doubted the singleness of purpose. Even so, no one put a high hurdle in my path. Preventive law is the outlet of life's purpose. The objective is to help people in the way I know through a profession and learning that I have studied and experienced. It should be clear that I care more, much more, for the people that the profession is here to serve, than I do for the profession itself. Yet I believe that the help the profession can supply gives the profession a basis for its existence in our complex society of people.

Mine has been, and continues to be, a happy and fulfilling life.