Political Science

Course:
Law & Justice Around the World
PERS 2640

Instructor:
Dr. Marc–George Pufong

Valdosta State University
Department of Political Science

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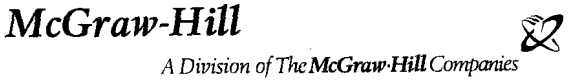

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Introduction

The Role of Law

M. Ethan Katsh

William Rose

Two hundred years ago, Edmund Burke, the influential British statesman and orator, commented that "in no other country, perhaps, in the world, is the law so general a study as it is in the United States." Today, in America, general knowledge about law is at a disappointing level. One study conducted in the late 1970s concluded that "the general public's knowledge of and direct experience with courts is low."[1] Three out of four persons surveyed admitted that they knew either very little or nothing at all about state and local courts. More than half believed that the burden of proving innocence in a criminal trial is on the accused, and 72 percent thought that every decision made by a state could be reviewed by the Supreme Court. In a 1990 study, 59 percent could not name at least one current justice of the Supreme Court.

One purpose of this volume is to provide information about some specific and important legal issues. In your local newspaper today, there is probably at least one story concerning an issue in this book. The quality of your life will be directly affected by how many of these issues are resolved. But affirmative action (Issue 18), the insanity defense (Issue 5), drug legalization (Issue 12), abortion (Issue 1), legal ethics (Issue 4), and other issues in this book are often the subject of superficial, misleading, or inaccurate statements. *Taking Sides* is designed to encourage you to become involved in the public debate on these issues and to raise the level of the discussion on them.

The issues that are debated in this book represent some of the most important challenges our society faces. How they are dealt with will influence what kind of society we will have in the future. While it is important to look at and study them separately, it is equally necessary to think about their relationship to each other and about the fact that there is a tool called "law," which is being called upon to solve a series of difficult conflicts. The study of discrete legal issues should enable you to gain insight into some broad theoretical questions about law. This introduction, therefore, will focus on several basic characteristics of law and the legal process that you should keep in mind as you read this book.

The Nature of Law

The eminent legal anthropologist E. Adamson Hoebel once noted that the search for a definition of law is as difficult as the search for the Holy Grail. Law is certainly complicated, and trying to define it precisely can be frustrating. What follows, therefore, is not a definition of law but a framework or perspective for looking at and understanding law.

Law as a Body of Rules

One of the common incorrect assumptions about law is that it is merely a body of rules invoked by those who need them and then applied by a judge. Under this view, the judge is essentially a machine whose task is simply to find and apply the right rule to the dispute in question. This perspective makes the mistake of equating law with the rules of law. It is sometimes even assumed that there exists somewhere in the libraries of lawyers and judges one book with all the rules or laws in it, which can be consulted to answer legal questions. As may already be apparent, such a book could not exist. Rules alone do not supply the solutions to many legal problems. The late Supreme Court justice William O. Douglas once wrote, "The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed." As you read the debates about the issues in this book, you will see that much more goes into a legal argument than the recitation of rules.

Law as a Process

A more meaningful way of thinking about law is to look at it as a process or system, keeping in mind that legal rules are one of the elements in the process. This approach requires a considerably broader vision of law: to think not only of the written rules but also of the judges, the lawyers, the police, and all the other people in the system. It requires an even further consideration of all the things that influence these people, such as their values and economic status.

"Law," one legal commentator has stated, "is very like an iceberg; only one-tenth of its substance appears above the social surface in the explicit form of documents, institutions, and professions, while the nine-tenths of its substance that supports its visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotions and aspirations of men."[2]

In reading the discussions of controversial issues in this book, try to identify what forces are influencing the content of the rules and the position of the writers. Three of the most important influences on the nature of law are economics, moral values, and public opinion.

Law and Economics

Laws that talk about equality, such as the Fourteenth Amendment, which guarantees that no state shall "deny to any person . . . equal protection of the laws," suggest that economic status is irrelevant in the making and application of the law. As Anatole France, the nineteenth-century French satirist, once wrote, however, "The law, in its majestic equality, forbids the rich as well as the poor

to sleep under bridges, to beg in streets, and to steal bread." Sometimes the purpose and effect of the law cannot be determined merely from the words of the law.

Critics of law in capitalistic societies assert that poverty results from the manipulation of the law by the wealthy and powerful. It is possible to look at several issues in this book and make some tentative judgments about the influence of economic power on law. For example, what role does economics play in the debate over drug legalization (Issue 12)? Is the controversy over the fight against drugs one of social concerns or one of economics, in that it costs the government billions of dollars each year? In considering whether or not access to the Internet can be regulated (Issue 9), is the controversy purely over morality and values, or is it related to the proliferation of pornography up for sale on the Internet?

Law and Values

The relationship between law and values has been a frequent theme of legal writers and a frequent source of debate. Clearly, there is in most societies some relationship between law and morality. One writer has summarized the relationship as follows:

1. *There is a moral order in society.* Out of the many different and often conflicting values of the individuals and institutions that make up society may emerge a dominant moral position, a "core" of the moral order. The position of this core is dynamic, and as it changes, the moral order of society moves in the direction of that change.
2. *There is a moral content to the law.* The moral content of law also changes over time, and as it changes, the law moves in the direction of that change.
3. *The moral content of the law and moral order in society are seldom identical.*
4. *A natural and necessary affinity exists between the two "bodies" of law and moral order.*
5. *When there is a gap between the moral order of society and the law, some movement to close the gap is likely.* The law will move closer to the moral order of society, or the moral order will move closer to the law, or each will move toward the other. The likelihood of the movement to close the gap between law and moral order depends upon the size of the gap between the two bodies and the perceived significance of the subject matter concerning which the gap exists.[3]

Law and morality will not be identical in a pluralistic society, but there will also be attempts by dominant groups to insert their views of what is right into the legal code. The First Amendment prohibition against establishment of religion and the guarantee of freedom of religion are designed to protect those whose beliefs are different. Yet there have also been many historical examples of legal restrictions or limitations being imposed on minorities or of laws being ineffective because of the resistance of powerful groups. Prayers in the public

schools, for example, which have been forbidden since the early 1960s, are still said in a few local communities.

Of the topics in this book, the insertion of morality into legal discussions has occurred most frequently in the abortion and capital punishment debates (Issues 1 and 10). It is probably fair to say that these issues remain high on the agenda of public debate because they involve strongly held values and beliefs. The nature of the debates is also colored by strong feelings that are held by the parties. Although empirical evidence about public health and abortion or about deterrence and capital punishment does exist, the debates are generally more emotional than objective.

Public Opinion and the Law

It is often claimed that the judicial process is insulated from public pressures. Judges are elected or appointed for long terms or for life, and the theory is that they will, therefore, be less subject to the force of public opinion. As a result, the law should be uniformly applied in different places, regardless of the nature of the community. It is fair to say that the judicial process is less responsive to public sentiment than is the political process, but that is not really saying much. What is important is that the legal process is not totally immune from public pressure. The force of public opinion is not applied directly through lobbying, but it would be naive to think that the force of what large numbers of people believe and desire never gets reflected in what happens in court. The most obvious examples are trials in which individuals are tried as much for their dissident beliefs as for their actions. Less obvious is the fact that the outcomes of cases may be determined in some measure by popular will. Judicial complicity in slavery or the internment of Japanese Americans during World War II are blatant examples of this.

Many of the issues selected for this volume are controversial because a large group is opposed to some practice sanctioned by the courts. Does this mean that the judges have taken a courageous stand and ignored public opinion? Not necessarily. Only in a few of the issues have courts adopted an uncompromising position. In most of the other issues, the trend of court decisions reflects a middle-of-the-road approach that could be interpreted as trying to satisfy everyone but those at the extremes. For example, in capital punishment (Issue 10), the original decision declaring the death penalty statutes unconstitutional was followed by the passing of new state laws, which were then upheld and which have led to a growing number of executions. Similarly, in affirmative action (Issue 18), the *Bakke* decision, while generally approving of affirmative action, was actually won by Bakke and led to the abolition of all such programs that contained rigid quotas.

Assessing Influences on the Law

This summary of what can influence legal decisions is not meant to suggest that judges consciously ask what the public desires when interpretations of law are made. Rather, as members of society and as individuals who read newspapers and magazines and form opinions on political issues, there are subtle

forces at work on judges that may not be obvious in any particular opinion but that can be discerned in a line of cases over a period of time. This may be explicitly denied by judges, such as in this statement by Justice Harry A. Blackmun in his majority opinion for the landmark *Roe v. Wade* abortion case: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection." However, a reading of that opinion raises the question of whether or not Blackmun succeeds in being totally objective in his interpretation of law and history.

Do these external and internal influences corrupt the system, create injustice, inject bias and discrimination, and pervert the law? Or do these influences enable judges to be flexible, to treat individual circumstances, and to fulfill the spirit of the law? Both of these ends are possible and do occur. What is important to realize is that there are so many points in the legal system where discretion is employed that it is hopeless to think that we could be governed by rules alone. "A government of laws, not men," aside from the sexism of the language, is not a realistic possibility, and it is not an alternative that many would find satisfying either.

On the other hand, it is also fair to say that the law, in striving to get the public to trust in it, must persuade citizens that it is more than the whim of those who are in power. While it cannot be denied that the law may be used in self-serving ways, there are also mechanisms at work that are designed to limit abuses of discretionary power. One quality of law that is relevant to this problem is that the legal process is fundamentally a conservative institution, which is, by nature, resistant to radical change. Lawyers are trained to give primary consideration in legal arguments to precedent—previous cases involving similar facts. As attention is focused on how the present case is similar to or different from past cases, some pressure is exerted on new decisions to be consistent with old ones and on the law to be stable. Thus, the way in which a legal argument is constructed tends to reduce the influence of currently popular psychological, sociological, philosophical, or anthropological theories. Prior decisions will reflect ideologies, economic considerations, and ethical values that were influential when these decisions were made and, if no great change has occurred in the interim, the law will tend to preserve the status quo, both perpetuating old injustices and protecting traditional freedoms.

Legal Procedure

The law's great concern with the procedure of decision making is one of its more basic and important characteristics. Any discussion of the law that did not note the importance of procedure would be inadequate. Legal standards are often phrased not in terms of results but in terms of procedure. For example, it is not unlawful to convict the innocent if the right procedures are used (and it is unlawful to convict the guilty if the wrong procedures are followed). The law feels that it cannot guarantee that the right result will always be reached and that only the guilty will be caught, so it minimizes the risk of reaching the wrong result or convicting the innocent by specifying procedural steps to be followed. Lawyers, more than most people, are satisfied if the right procedures

are followed even if there is something disturbing about the outcome. Law, therefore, has virtually eliminated the word *justice* from its vocabulary and has substituted the phrase *due process,* meaning that the proper procedures, such as right to counsel, right to a public trial, and right to cross-examine witnesses, have been followed. This concern with method is one of the pillars upon which law is based. It is one of the characteristics of law that distinguishes it from nonlegal methods of dispute resolution, where the atmosphere will be more informal and there may be no set procedures. It is a trait of the law that is illustrated in Issue 4 (*Should Lawyers Be Prohibited from Presenting a False Case?*).

Conclusion

Law is a challenging area of study because many questions may not be amenable to simple solutions. The legal approach to problem solving is usually methodical and often slow. We frequently become frustrated with this process and, in fact, it may be an inappropriate way to deal with some problems. For the issues in this book, however, an approach that pays careful attention to the many different aspects of these topics will be the most rewarding. Many of the readings provide historical, economic, and sociological data as well as information about law. The issues examined in *Taking Sides* involve basic cultural institutions such as religion, schools, and the family as well as basic cultural values such as privacy, individualism, and equality. While the law takes a narrow approach to problems, reading these issues should broaden your outlook on the problems discussed and, perhaps, encourage you to do further reading on those topics that are of particular interest to you.

Notes

1. Yankelovich, Skelly, and White, Inc., *The Public Image of Courts* (National Center for State Courts, 1978).
2. Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press, 1980), p. xi.
3. Wardle, "The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions," *Brigham Young University Law Review* (1980), pp. 811–835.

ISSUE 4

Should Lawyers Be Prohibited from Presenting a False Case?

YES: Harry I. Subin, from "The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case," *Georgetown Journal of Legal Ethics* (vol. 1, 1987)

NO: John B. Mitchell, from "Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's 'Different Mission,'" *Georgetown Journal of Legal Ethics* (vol. 1, 1987)

ISSUE SUMMARY

YES: Professor of law Harry I. Subin examines the ethical responsibilities of criminal defense lawyers and argues that greater responsibility should be placed on lawyers not to pervert the truth to help their clients.

NO: Attorney John B. Mitchell disputes the contention that the goal of the criminal justice process is to seek the truth and argues that it is essential that there be independent defense attorneys to provide protection against government oppression.

In 1732 Georgia was founded as a colony that was to have no lawyers. This was done with the goal of having a "happy, flourishing colony... free from that pest and scourge of mankind called lawyers." While there are no serious efforts to abolish the legal profession today, public opinion surveys reveal that lawyers still are not held in the highest esteem. The public today may feel a little more positive about lawyers than did citizens of colonial America, and large numbers of students aspire to become lawyers, but hostility and criticism of what lawyers are and what they do are still common.

Part of the reason for the public's ambivalent attitude about lawyers concerns the adversary system and the lawyer's role in it. The adversary system requires that the lawyer's main responsibility be to the client. Except in rare instances, the lawyer is not to consider whether the client's cause is right or wrong and is not to allow societal or public needs to affect the manner in which the

client is represented. The adversary system assumes that someone other than the client's lawyer is responsible for determining truth and guaranteeing justice.

The code of ethics of the legal profession instructs lawyers not to lie. However, it is permissible to mislead opponents—indeed, to do anything short of lying—if done to benefit the client. We have a system of "legal ethics" because some things lawyers are obligated to do for their clients would violate traditional standards of ethical behavior. As one legal scholar has written, "Where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not, do" (Richard W. Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 *Human Rights* 1, 1975).

In a highly publicized case that occurred a few years ago, two criminal defense lawyers learned from their client that, in addition to the crimes he was charged with, the client had murdered two girls who were missing. The lawyers discovered where the bodies were but refused to provide the parents of the missing children with any of this information. There was a public outcry when it was later discovered what the lawyers had done, but their position was generally felt to be consistent with standards of legal ethics.

Why do we have a legal system that allows truth to be concealed? Is a diminished concern with truth necessary in order to preserve the status and security of the individual? What should be the limits as to how one-sided legal representation should be? Would it be desirable to require lawyers to be more concerned with truth, so that they would be prohibited from putting forward positions they know are false? In the following selections, Harry I. Subin and John B. Mitchell debate whether or not increasing the attorney's "truth" function would be both desirable and feasible. As you read the selections, determine whether Subin's suggestion is a dangerous first step toward a more powerful state and less protection for the individual or whether it would increase public respect toward the legal system and the legal profession with little cost.

At the heart of the adversary system's attention to the relationship between client and counsel is the belief that there is something more important than discovering truth in every case. Finding the guilty and punishing them is not the sole goal of the criminal justice process. We rely on the criminal process, particularly trials, to remind us that our liberty depends on placing restrictions on the power of the state. The argument on behalf of the adversary model is that increasing the power of the state to find truth in one case may hurt all of us in the future. As you read the following selections, it will be difficult not to be troubled by the lawyer's dilemma; you may wonder if there is any acceptable middle ground when state power and individual rights clash.

Harry I. Subin

YES

The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case

I. The Inquiry

Should the criminal lawyer be permitted to represent a client by putting forward a defense the lawyer knows is false? . . .

Presenting a "false defense," as used here, means attempting to convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known to the attorney to be false are true. While this can be done by criminal means—e.g., perjury, introduction of forged documents, and the like—I exclude these acts from the definition of false defense used here. I am not concerned with them because such blatant criminal acts are relatively uninteresting ethically, and both the courts and bar have rejected their use.[1]

My concern, instead, is with the presently legal means for the attorney to reach favorable verdict even if it is completely at odds with the facts. The permissible techniques include: (1) cross-examination of truthful government witnesses to undermine their testimony or their credibility; (2) direct presentation of testimony, not itself false, but used to discredit the truthful evidence adduced by the government, or to accredit a false theory; and (3) argument to the jury based on any of these acts. One looks in vain in ethical codes or case law for a definition of "perjury" or "false evidence" that includes these acts, although they are also inconsistent with the goal of assuring a truthful verdict.

To the extent that these techniques of legal truth-subversion have been addressed at all, most authorities have approved them. The American Bar Association's *Standards for Criminal Justice,*[2] for example, advises the criminal defense attorney that it is proper to destroy a truthful government witness when essential to provide the defendant with a defense, and that failure to do so would violate the lawyer's duty under the *Model Code of Professional Responsibility* to represent the client zealously.[3] The *Standards for Criminal Justice* cite as authority for this proposition an opinion by Justice White in *United States v. Wade,*[4] which, in the most emphatic form, is to the same effect. In *Wade,* the Court

From Harry I. Subin, "The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case," *Georgetown Journal of Legal Ethics,* vol. 1 (1987), pp. 125–138, 141–153.

held that in order to assure the reliability of the pretrial line-up, the right to counsel must be extended to the defendant compelled to participate in one.[5] Justice White warned that the presence of counsel would not necessarily assure that the identification procedure would be more accurate than if the police were left to conduct it themselves. The passage dealing with this issue, which includes the phrase that inspired the title of this piece, is worth repeating at length:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but... we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[6]

... The article begins with a description of a case I handled some years ago, one that I believe is a good illustration of the false defense problem. I next address the threshold question of the attorney's knowledge. It has been argued that the attorney cannot "know" what the truth is, and therefore is free to present any available defense theory. I attempt to demonstrate that the attorney can, in fact, know the truth, and I propose a process to determine when the truth is known.

I then analyze the arguments that have been advanced in support of the "different mission" theory: that the defense attorney, even if he or she knows the truth, remains free to disregard it in presenting a defense. I argue that neither the right to a defense nor the needs of the adversary system justify the presentation of a false defense. Finally, I describe a new standard that explicitly prohibits the defense attorney from asserting a false defense. I conclude with some thoughts as to why this rule would produce a generally more just system.

II. Truth Subversion in Action: The Problem Illustrated

A. The Accusation

About fifteen years ago I represented a man charged with rape and robbery. The victim's account was as follows: Returning from work in the early morning hours, she was accosted by a man who pointed a gun at her and took a watch from her wrist. He told her to go with him to a nearby lot, where he ordered her to lie down on the ground and disrobe. When she complained that the ground was hurting her, he took her to his apartment, located across the street. During the next hour there, he had intercourse with her. Ultimately, he said that they had to leave to avoid being discovered by the woman with whom he lived.[7] The complainant responded that since he had gotten what he wanted, he should give her back her watch. He said that he would.

As the two left the apartment, he said he was going to get a car. Before leaving the building, however, he went to the apartment next door, leaving her to wait in the hallway. When asked why she waited, she said that she was still hoping for the return of her watch, which was a valued gift, apparently from her boyfriend.

She never did get the watch. When they left the building, the man told her to wait on the street while he got the car. At that point she went to a nearby police precinct and reported the incident. She gave a full description of the assailant that matched my client. She also accurately described the inside of his apartment. Later, in response to a note left at his apartment by the police, my client came to the precinct, and the complainant identified him. My client was released at that time but was arrested soon thereafter at his apartment, where a gun was found.[8] No watch was recovered.

My client was formally charged, at which point I entered the case. At our initial interview and those that followed it, he insisted that he had nothing whatever to do with the crime and he had never seen the woman before.[9] He stated that he had been in several places during the night in question: visiting his aunt earlier in the evening, then traveling to a bar in New Jersey, where he was during the critical hours. He gave the name of a man there who would corroborate this. He said that he arrived home early the next morning and met a friend. He stated that he had no idea how this woman had come to know things about him such as what the apartment looked like, that he lived with a woman, and that he was a musician, or how she could identify him. He said that he had no reason to rape anyone, since he already had a woman, and that in any event he was recovering from surgery for an old gun shot wound and could not engage in intercourse. He said he would not be so stupid as to bring a woman he had robbed and was going to rape into his own apartment.

I felt that there was some strength to these arguments, and that there were questionable aspects to the complainant's story. In particular, it seemed strange that a man intending rape would be as solicitous of the victim's comfort as the woman said her assailant was at the playground. It also seemed that a person who had just been raped would flee when she had the chance to, and in any case

would not be primarily concerned with the return of her watch. On balance, however, I suspected that my client was not telling me the truth. I thought the complaining witness could not possibly have known what she knew about him and his apartment, if she had not had any contact with him. True, someone else could have posed as him, and used his apartment. My client, however, could suggest no one who could have done so.[10] Moreover, that hypothesis did not explain the complainant's accurate description of him to the police. Although the identification procedure used by the police, a one person "show up," was suggestive,[11] the woman had ample opportunity to observe her assailant during the extended incident. I could not believe that the complainant had selected my client randomly to accuse falsely of rape. By both her and my client's admission, the two had not had any previous association.

That my client was probably lying to me had two possible explanations. First, he might have been lying because he was guilty and did not see any particular advantage to himself in admitting it to me. It is embarrassing to admit that one has committed a crime, particularly one of this nature. Moreover, my client might well have feared to tell me the truth. He might have believed that I would tell others what he said, or, at the very least, that I might not be enthusiastic about representing him.

He also might have lied not because he was guilty of the offense, but because he thought the concocted story was the best one under the circumstances. The sexual encounter may have taken place voluntarily, but the woman complained to the police because she was angry at my client for refusing to return the valued wrist watch, perhaps not stolen, but left, in my client's apartment. My client may not have been able to admit this, because he had other needs that took precedence over the particular legal one that brought him to me. For example, the client might have felt compelled to deny any involvement in the incident because to admit to having had a sexual encounter might have jeopardized his relationship with the woman with whom he lived. Likewise, he might have decided to "play lawyer," and put forward what he believed to be his best defense. Not understanding the heavy burden of proof on the state in criminal cases, he might have thought that any version of the facts that showed that he had contact with the woman would be fatal because it would simply be a case of her word against his.

I discussed all of these matters with the client on several occasions. Judging him a man of intelligence, with no signs of mental abnormality, I became convinced that he understood both the seriousness of his situation, and that his exculpation did not depend upon maintaining his initial story. In ensuring that he did understand that, in fact, I came close enough to suggesting the "right" answers to make me a little nervous about the line between subornation of perjury and careful witness preparation, known in the trade as "horseshedding."[12] In the end, however, he held to his original account.

B. The Investigation

At this point the case was in equipoise for me. I had my suspicions about both the complainant's and the client's version of what had occurred, and I supposed