SOME REALISM ABOUT REALISM — RESPONDING TO DEAN POUND *

FERMENT is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch. The field of Law reaches both forward and back from the Substantive Law of school and doctrine. The sphere of interest is widening; so, too, is the scope of doubt. *Beyond rules lie effects* — but do they? Are some rules mere paper? And if effects, what effects? Hearsay, unbuttressed guess, assumption or assertion unchecked by test — can such be trusted on this matter of what law is *doing*?

The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words — placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble. So other fields of thought have spilled their waters in: the stress on behavior in the social sciences; their drive toward integration; the physicists' reëxamination of final-seeming premises; the challenge of war and revolution. These stir. They stir the law. Interests of practice claim attention. Methods of work unfamiliar to lawyers make their way in, beside traditional techniques. Traditional techniques themselves are reëxamined, checked against fact, stripped somewhat of confusion. And always there is this restless questing: what *difference* does statute, or rule, or court-decision, make?

* Jerome Frank refused me permission to sign his name as joint author to this paper, on the ground that it was my fist which pushed the pen. But his generosity does not alter the fact that the paper could not have been written without his help. I therefore write the first sections, in partial recognition, as "We," meaning thereby Frank and myself. In the description of the realists, I turn to the first person singular, partly because any alignment of such diverse work is individually colored; partly because any phrasing which would seem to suggest a non-existent school would be unfortunate.

Whether this ferment is one thing or twenty is a question; if one thing, it is twenty things in one. But it is with us. It spreads. It is no mere talk. It shows results, results enough through the past decade to demonstrate its value.

And those involved are folk of modest ideals. They want law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles — not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life. This is a question in first instance of fact: what does law *do*, to people, or for people? In the second instance, it is a question of ends: what *ought* law to do to people, or for them? But there is no reaching a judgment as to whether any specific part of present law does what it ought, until you can first answer what it is doing now. To see this, and to be ignorant of the answer, is to start fermenting, is to start trying to find out.

All this is, we say, a simple-hearted point of view, and often philosophically naïve — though it has in it elements enough of intellectual sophistication. It denies very little, except the completeness of the teachings handed down. It knows too little to care about denying much. It affirms ignorance, pitched within and without. It affirms the need to know. Its call is for intelligent effort to dispel the ignorance. Intelligent effort to cut beneath old rules, old words, to get sight of current things. It is not a new point of view; it is as old as man. But its rediscovery in any age, by any man, in any discipline, is joyous.

Speak, if you will, of a "realistic jurisprudence." And since the individual workers who are the cells of ferment cry their wares, find their results good, see the need for more workers, more results, speak, if you will (as Dean Pound has) of a *Call for a Realist Jurisprudence*.[1] If advance is insistent on advancing

[1] (1931) 44 HARV. L. REV. 697.

further, such a call there is. But it is a call which rests on work done as well as on work to do, on experience as well as on hope, on some portion of past experiment proved useful as well as on perceived need for further experiment.

Dean Pound has discussed the call and the ferment. One portion of his discussion calls in turn for our attention. He welcomed the ferment. He described it. The general terms in which he described the fermenters we seemed to recognize: "the oncoming generation of American law teachers";[2] "our younger teachers of law" who are insistent on a realistic jurisprudence;[3] "the new juristic realists";[4] "the new school . . . current juristic realism."[5] These general designations we say, we seemed to recognize (except the "school"). There were more specific attributes which also struck responsive chords: "By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be."[6] "Insistent . . . on beginning with an objectively scientific gathering of facts."[7] "Psychological exposure of the rôle of reason in human behavior, of the extent to which so-called reasons come after action as explanations instead of before action as determining factors, has made a profound impression upon the rising generation of jurists."[8] "Looking at precepts and doctrines and institutions with reference to how they work or fail to work, and why."[9] "There is a distinct advance in their frank recognition of the alogical or non-rational element in judicial action which the legal science [philosophy?] of the nineteenth century sought to ignore."[10] If these were the attributes of the "new realists," we knew who they were. We rejoiced that a scholar of Dean Pound's standing and perspective found much in their fermenting to appreciate. We agreed with him that it was important for the older thinking and the newer to make contact.

But the Dean's description did not stop with the points mentioned. It continued. On bones we knew was built a flesh we knew not of. An ugly flesh. The new realists, or "most of them,"

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[2] *Id.* at 697.
[3] *Ibid.*
[4] *Ibid.*, and *passim.*
[5] *Id.* at 701.
[6] *Id.* at 697.
[7] *Id.* at 700.
[8] *Id.* at 705.
[9] *Id.* at 706.
[10] *Ibid.*

had, as the Dean read them, been guilty of a goodly number of things that careful thinkers would in the main not be proud to be caught doing. These intellectual offenses Dean Pound criticized. He criticized them tellingly. The question is one of fact: whether the offenses have been committed. For if they have, the Dean's rebukes are needed. Spare the rod and spoil the realist.

The question is one of fact. By fact it must be tried. And tried it must be. When Dean Pound speaks on jurisprudence, men listen. The profession has too long relied on him to discover, read, digest, classify and report on jurists foreign and ancient not to rely again when he speaks of would-be jurists modern and at home. We regret, therefore, peculiarly that he departed in this paper from a practice he has often followed,[11] of indicating, in each instance when he presented a view, precisely whose view it was, and precisely where that person had set it forth. Freed of the check of the concrete, the most learned err. And error in perceiving or describing the attributes of these new fermenters would be unfortunate. For "here is an important movement in the science of law, and it behooves us to understand it and be thinking about it."[12]

Into a series of further points in his description — points he does not approve of — we have inquired, and present the results.[13] We speak, be it noted, for ourselves alone, and for the facts alone, not for the men whose work we have canvassed. Interpretations, judgments, and responsibility are ours. We are no spokesmen for a school.

The method of the inquiry is set forth in a note. The detailed results are printed in part in an appendix. We indicate the results here in summary, to clear up some things that realists are not. There will then be set forth an interpretation of the new ferment and its bearings, by way of contrast, along lines of organization independent of the points made by the Dean.

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[11] *The End of Law as Developed in Juristic Thought* (1914) 27 HARV. L. REV. 605; (1917) 30 *id.* 201; *The Progress of the Law — Analytical Jurisprudence, 1914-1927* (1927) 41 *id.* 174; LAW AND MORALS (1924); INTERPRETATIONS OF LEGAL HISTORY (1923). AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1924) contains only a general bibliography.

[12] Pound, *supra* note 1, at 697.

[13] One matter we reserve for treatment in a later portion of the paper: the repeated suggestion of the Dean as to "a school" of realists.

One further preliminary needs mention. Dean Pound was careful to recognize that "one may point out work to be done in the progress of a school without implying that those engaged in the task are ignorant thereof, or that they do not intend to direct their energies thereto in due time." [14] And to recognize that "it is unfair to take any one item, or even set of items, from one or more of its adherents and assume that it may be fastened upon the formative school as characteristic dogma." [15]

Nonetheless, he states: "five items are to be found so generally *in the writings* of the new school, *that one may be justified in pronouncing them, or most of them, the ideas of current juristic realism.*" [16] The points of description here involved are taken with three exceptions from these five items or from their detailed development in his paper.

I

The trial of Dean Pound's indictment is not easy. It is a blanket indictment. It is blanket as to time and place and person of each offense. It specifies no one offender by his name.

We have the general indications above-mentioned: "new realists" and the like. We have the more specific indications also mentioned. Taken together, they narrow the class that may come in question.[17] We can, therefore, check the items against a reasonable sampling of the men whom the rest of the description fits.[18]

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[14] Pound, *supra* note 1, at 709.

[15] *Id.* at 700.

[16] *Id.* at 701 (our italics).

[17] We had hoped to be more precise. We wrote Dean Pound to ask whom he had had in mind when he wrote his article. The cumulation of his work at Washington and his regular work was the reason of his not going into detail. He did mention three names specifically. Bingham and Lorenzen he had had in mind. C. E. Clark he definitely had not.

[18] *The sampling of men.* We set up the following criteria: (a) those chosen must fit the general and the more specific items set forth above; (b) they must include the leading figures in the new ferment; (c) in order that we may turn up most passages supporting the items we challenge, the men chosen must include all who may be reputed to have taken extreme positions; (d) a wide range of views and positions must be included.

(1) Bingham and Lorenzen are included as of course. (2) We add those whom we believe recognized as figures of central stimulus in the new ferment: C. E. Clark, Cook, Corbin, Moore, T. R. Powell, Oliphant. (3) We add further men peculiarly vocal in advocating new or rebellious points of view: Frank, Green,

We have chosen twenty men and ninety-odd titles; representative men and pertinent titles. These we have canvassed in order to ascertain the extent to which the evidence supports the Dean's allegations. The results of our investigation are presented in summary under each point.

Radin. (4) We stir in all others whom we have heard criticized as extremists on one or another point mentioned by the Dean: Hutcheson, Klaus, Sturges. (5) We fill out with as many more as time permits: Douglas, Francis, Patterson, Tulin, Yntema — chosen partly because their writing has explicitly touched points of theory, partly because their writing was either familiar to us or not too bulky. (6) We throw in Llewellyn, as both vociferous and extreme, but peculiarly because he and he alone has issued a "Call for a Realist Jurisprudence" under that peculiar label. *A Realistic Jurisprudence — The Next Step* (1930) 30 COL. L. REV. 431. This gives us twenty names. There are doubtless twenty more. But half is a fair sample. We check back and find that our men range from right to the four or five prevailing lefts. They are either characteristic or extreme. They are in print more fully than most on these matters. If they do not bear out Dean Pound's challenged points of description, we feel safe in saying that those points can not stand. — (Dean Pound to the contrary notwithstanding, we must include Clark. His thirst for facts and influence in procedural research force his inclusion. Corbin, *The Law and the Judges* (1914) 3 YALE REV. 234, is, we think, the first rounded presentation of the realistic attitude, except for Holmes and Bingham. Frankfurter we do not include; he has been currently considered a "sociological jurist," not a "realist." It profits little to show that one not thought a realist does not fit an alleged description of "realists.")

The sampling of writings. We selected such writings as seemed to speak most directly to points of legal theory, or most likely to contain evidence on any of the Dean's allegations. We wrote to the men, requesting from each his suggestion as to where he had expressed himself, and were thereby led to a number of papers we might otherwise have missed. Bingham, Clark, Corbin, Douglas, Green, Klaus, Patterson, Powell, Radin, and Sturges were generous enough of their time to supply such references, often to specific pertinent passages. They are in no way responsible for what we say, or for our plan of organization. In every case, moreover, we are solely responsible for including or excluding the passages they referred us to, or any others from their works, and for the classification thereof, and especially for the general judgments expressed. But their references greatly lightened our labor. A complete list of the authors and titles is given in Appendix I, *infra*.

Procedure of testing. Each paper listed, whether quoted from or not, has been read or reread entire for the present purpose, to make sure that countervailing evidence was not present, and to make sure that any passage cited was in key with the whole. If nothing to the contrary is said, passages quoted or cited *against the Dean* are offered as in substantial harmony not only with the whole of the paper in which they appeared, but also with the author's work in general. Passages cited in the Dean's favor are often unfair to the men cited, for which we tender our apologies. Judgments as to general tone or afterglow of a writing (a matter sometimes very different from its specific phrasing) are ours.

We had prepared for use in Appendix II, in Dean Pound's language, the state-

THE RESULTS OF THE TEST

These statements of the Dean's points here set out are *in our language, not his.* We have done our best to reach and state his meaning. But we may misinterpret. We purport therefore to give *not what Dean Pound meant but what a reasonable reader may be expected to understand from his language.*[19]

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ment of the positions here challenged, which in his view the realists, or many of them, or some of them, hold. Under each such point the evidence was arranged. (a) *All* passages we have found which support the Dean's description. (b) Such passages as might colorably be adduced in support, and our judgment as to writings whose general flavor or afterglow might be colorably adduced in support. In each such case further passages from the same author which clarify his position were adduced, if found. (c) Some of the passages which display inappropriateness in the Dean's description. These were so many that they often required to be merely cited or even disregarded. Of the passages truly supporting the Dean's description we do not believe we have missed many. They stand out, to readers of our leanings. But the "colorable, but rebutted" passages here given are probably only a fraction of those present in the materials we have canvassed. Colorable passages take color from the mind of the reader. They camouflage themselves to one who (however he tries to find them) colors them with the meaning of the whole paper in which they are found.

As indicated in Appendix II, space forbade the printing of all of this material. Its form was mainly that of Point 11, there set forth, which must serve as a sample.

Each point was closed with a nose-count summary of results, under the rubrics: (a) Supporting; (b) Colorable: (i) unrebutted, (ii) rebutted; (c) Negating; (d) No evidence noted. The category "No evidence noted" is almost as significant as any other: the Dean's description is expressly rested *on the writings* of the "new realists."

Passages published after Feb. 1, 1931, were canvassed. They are significant of the newer thinkers' views, which we wish to present. Such passages can not, however, be regarded as accessible to the Dean when he wrote. They bear only on the accuracy of his diagnosis of trends of thought.

Frank is responsible for errors and omissions as to Bingham, Green, Frank, and Radin; Llewellyn as to the others.

Finally, we write, as the men whose work we are discussing wrote, for readers patient and careful enough to *read* what stands on the page. Gratuitous implications are air-castles. There is no arguing with persons who insist on building them. Realists write for the literate. We take a writer's words in first instance for what, under reasonable and careful reading, they appear to say. We attempt to take separate account of general tone and after-impression.

[19] For Dean Pound's language in points 1, 10 and 11 together with a detailed account of the results of our investigation concerning those points, see Appendix II, *infra.* To avoid misinterpretation by us, we asked Dean Pound for permission to submit our manuscript to him and have misinterpretations corrected. His time,

Point 1. Much of the realists' discussion of judges' thinking sets forth what such thinkings "must" be, under some current psychological dogma, *without investigation of what recorded judicial experience reveals.*[20]

(a) Supporting: perhaps Bingham, Francis, Yntema: 3;
(b) Colorable: None;
(c) Negating: 16;
(d) No evidence noted: 1.

Point 2. One of the most common items found in the writings of the new school is *faith in masses of figures as having significance in and of themselves.*[21]

(a) Supporting: None;
(b) Colorable: (i) Unrebutted: None; (ii) Rebutted: 1;
(c) Negating: 9;
(d) No evidence noted: 10.

Point 3. Much insisted on is the *exclusive* significance of an approach to law by way of exact terminology. Some realists believe problems are solved by terminology.[22]

(a) Supporting: None;
(b) Colorable: (i) perhaps Unrebutted: Cook, Moore:[23] 2; (ii) Rebutted: 1;
(c) Negating: 14;
(d) No evidence noted: 3.

Point 4. A strong group of realists expect rigidly exact and workable formulas about law to be developed in ways analogous

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unfortunately, did not permit. So that misinterpretation is undoubtedly present, for we have as much trouble at times in getting the Dean's meaning as he at times has in getting the meaning of realists. Which is inevitable. Words are read against the reader's background, and distorted accordingly.

[20] See p. 1260, *infra.* Since this paper was prepared Yntema has given some warrant for being shifted into the Negating column. Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869, esp. 881–86. And the internal evidence is abundant in the same direction, as to all three men named.

[21] See Pound, *supra* note 1, at 701, lines 1–5; 703, lines 13–15.

[22] See *id.* at 702, first full paragraph.

[23] The colorable passages (all cited in Appendix I) are Cook, *Scientific Method and the Law* 233; *The Alienability of Choses in Action,* II 452, 461, 462, 481 (but *cf. ibid.* 484); *The Logical and Legal Bases of the Conflict of Laws* 473, 484, n.75 (but *cf. ibid.* 475, 479, n.60). Colorable from Moore is only the afterglow of such writings as *An Institutional Approach to the Law of Commercial Banking.*

to mathematical physics; and these formulas are expected to be workable without more as rules of what to do.[24]

(a) Supporting: None;

(b) Colorable: (i) Unrebutted: Cook: 1; (ii) Rebutted: 1;

(c) Negating: (i) As to expecting any results *via* techniques closely analogous to mathematical physics: 5; (ii) As to awareness of great limitations on what may be expected from quantitative methods: 4 (one duplication).

(d) No evidence noted: 10.

Point 5. Many of the realists insist *that the rational element in law is an illusion.*[25]

(a) Supporting: Conceivably Frank: 1;

(b) Colorable: (i) Unrebutted: Green: 1; (ii) Rebutted: 4;

(c) Negating: 13;

(d) No evidence noted: 1.

Point 6. Realists usually have a presupposition that some one of the competing psychologies is the *unum necessarium* for jurisprudence.[26] (The theory of rationalization is, we believe, employed by all our subjects. It is employed by none of them as an exclusively valid attack.) We read "competing psychologies" as referring to general bodies of doctrine: *e.g.*, behaviorism or psychoanalysis in some brand. As to this:

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[24] See Pound, *supra* note 1, at 702, lines 4–5, 25–26, last full par.; 703, lines 13–15. Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* 380: "The postulates in question contain inherently contradictory assertions, *and so can never furnish a satisfactory basis for sound doctrine* in the field of the conflict of laws." (Our italics.) Somewhat allied in implication, *Privileges of Labor Unions in the Struggle for Life* 785; and on the *descriptive* side only, *The Utility of Jurisprudence in the Solution of Legal Problems* 337; *Scientific Method and the Law* 233; *The Jurisdiction of Sovereign States and the Conflict of Laws* 371, n.12; *The Logical and Legal Bases of the Conflict of Laws* 457–58. On the *normative* side, *cf. The Utility of Jurisprudence in the Solution of Legal Problems* 365; *Scientific Method and the Law* 230–31; *The Logical and Legal Bases of the Conflict of Laws* 485–86. But compare *ibid.* at 470, defining what he means by "sound theory." And in the context even the main passage means only that Story's postulates fail *when tested by their own premises.* (Complete citations in Appendix I, *infra.*)

[25] See Pound, *supra* note 1, at 698, lines, from bottom, 7–3; 705, lines 4–6; last 5 lines; 707, last par., first three lines. Supporting: Frank, LAW AND THE MODERN MIND, the afterglow (but *cf. id.* at 37, 121, 138, 152, 169, 288, 343, 362, and esp. 155–59; Frank informally repudiates any such opinion, and denies that his writings warrant this classification). Colorable: Green, JUDGE AND JURY, *e.g.*, at 145, 146, 148, 151, and the afterglow.

[26] See Pound, *supra* note 1, at 705, first full par., first sentence; 706, same.

(a) Supporting: None;
(b) Colorable: (i) Unrebutted: None; (ii) Rebutted: 2;
(c) Negating: 4;
(d) No evidence noted: 14.

Point 7. Many of the realists seek to ignore the traditional common-law technique "of application."[27]

Examination develops that no triable issue of fact, as distinct from opinion, is joined here, since the Dean apparently conceives the traditional techniques primarily as techniques *of applying rules,* whereas the realist would include *all* the traditional techniques of deciding cases, or of the lawyer's art.

The canvass shows only that our subjects are much interested in study of the traditional techniques, so far as they can get at them, and that they weight the rule-applying aspect less heavily than does Dean Pound.

Point 8. Realists are blind to how far the administration of justice *attains certainty through rule and form.*[28]

Again no triable issue of fact, as opposed to opinion, is joined. The canvass shows that our subjects are much concerned with how far justice obtains certainty, and with how far it is attained — or hindered — through rule and form. But that they tend to differ with the Dean on the "how far" in both cases.

Point 9. A characteristic of the realist is conceiving of the administration of justice rather as a mere aggregate of single determinations than as an approximation to a uniform course of behavior.[29]

Our evidence is directed to the proposition that our subjects do not conceive of judicial (and other legal) behavior as involving uniformities.

(a) Supporting: Frank: 1;
(b) Colorable: (i) Unrebutted: Green: 1; (ii) Rebutted: 4;
(c) Negating: 14;
(d) No evidence noted: None.

Point 10. Many of the realists have an exclusive interest in

[27] See *id.* at 706, last par. to its end. [28] See *id.* at 707, lines 4–9.

[29] See *id.* at 707, first full par., first sentence; 708, lines 1–8. The supporting material: FRANK, *op. cit. supra* note 25. But see *ibid.* at 104, 130–32, 166–67, 251–52. GREEN, *op. cit. supra* note 25. Green insists on predictability of procedure and formula, as distinct from outcome. Both Frank and Green are focussing on the trial court.

the business aspects of the law, and this exclusively from the standpoint of the purposes of business, rather than of society as a whole.[30]

This could, of course, apply only to the ten commercial lawyers among our subjects:

(a) Perhaps supporting: Sturges: 1;
(b) Perhaps colorable: (i) Unrebutted (in print): Moore: 1; (ii) Rebutted: None;
(c) Negating: 7;
(d) Inadequate evidence noted (in print): 1.

Point 11. By clear implication: the work of the realists is not concerned with questions of what ought to be done by way of law.[31]

(a) Supporting: None;
(b) Colorable: (i) Unrebutted: None; (ii) Rebutted: 3;
(c) Negating: 17;
(d) No evidence noted: None.

Point 12. By clear implication: the realists, *in their attempts at description,* disregard the effects of the judges' own ideal pictures of what they ought to do.[32]

(a) Supporting: None;
(b) Colorable: (i) Unrebutted: Moore: 1; (ii) Rebutted: None;
(c) Negating: Passages adduced from 11; but they are not particularly significant.

What counts here is the whole tone of a man's work. We should have thought the realists' concern as to the effects of the court's ideal picture of delusive certainty would be enough to negate.— Significant in this canvass is chiefly the absence of positive support.

Point 13. By clear implication: the realists are unmindful of the relativity of significance, of the way in which preconceptions necessarily condition observation, and are not on their guard against their own preconceptions, while investigating.[33]

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[30] See p. 1261, *infra.* [31] See p. 1262, *infra.*

[32] See Pound, *supra* note 1, at 700 from line 3 through the par. Colorable: Moore, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 555, 563. See Pound, *supra* note 1, at 698, lines 3–7; 699, lines 1–16; 700, second par. [33] See *id.* at 698–700.

(a) Supporting: None;
(b) Colorable: None;
(c) Negating: 12;
(d) No evidence noted: 8.

SUMMARY: Of eleven points on which evidence in support could be diagnosed and counted, we find such evidence as to seven — but how much? We can adduce some support for *one* point from *three of our twenty men,* for each of four further points from two of our twenty, for each of two further points from one of our twenty. *One of our twenty men* offers some support for *three of the eleven points,* three offer some support each for two of the eleven points, four offer some support each for one point. *In no instance is the support offered strong, unambiguous, or unqualified,* even on the printed record.

Let it be conceded that we have missed men or evidence which would support these points of description on which so much of the Dean's criticism of realists is based. Let it be conceded that (though aided by his lines of criticism) we have in part misinterpreted what it was that he was criticizing. We submit, nonetheless, that *any* description of what "realists" think, or what "most of them believe" or what "many of them write" — and especially any description made the basis of criticism — will in the light of our canvass need evidence by man and chapter and verse before it can be relied on as meaning more than: *the writer has an impression that there is someone, perhaps two someones, whose writings bear this out.* We accept the implications of this statement for ourselves. What we here further say of realists is, where no evidence is cited, to be read as giving a vague and very fallible impression.

II

REAL REALISTS [34]

What, then, *are* the characteristics of these new fermenters? One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group

[34] Both Adler (*Law and the Modern Mind — Legal Certainty* (1931) 31 COL. L. REV. 91) and Cohen (*Justice Holmes and the Nature of Law* (1031) 31 *id.* 352)

with an official or accepted, or even with an emerging creed. There is no abnegation of independent striking out. We hope that there may never be. New recruits acquire tools and stimulus, not masters, nor over-mastering ideas. Old recruits diverge in interests from each other. They are related, says Frank, only in their negations, and in their skepticisms, and in their curiosity.[35]

There is, however, a *movement* in thought and work about law. The movement, the method of attack, is wider than the number of its adherents. It includes some or much work of many men who would scorn ascription to its banner. Individual men, then. Men more or less interstimulated — but no more than all of them have been stimulated by the orthodox tradition, or by that ferment at the opening of the century in which Dean Pound took a leading part. Individual men, working and thinking over law and its place in society. Their differences in point of view, in interest, in emphasis, in field of work, are huge. They differ among themselves well-nigh as much as any of them differs from, say, Langdell. Their number grows. Their work finds acceptance.

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have discussed " realism " adversely, Cohen addressing himself especially to Frank, Moore (uncited specifically), Bingham, and Oliphant; Adler to the same (except Moore), especially Frank, and to Cook, Yntema, and Green (all uncited) as well. Dickinson, *Legal Rules: Their Function in the Process of Decision* (1931) 79 U. OF PA. L. REV. 833, bases his criticisms (especially of Cook, Frank, Llewellyn) largely on specific citations. Radin and Yntema publish admirable papers on the matter with which I concur almost *in toto*. Radin, *Legal Realism* (1931) 31 COL. L. REV. 824; Yntema, *The Rational Basis of Legal Science* (1931) 31 *id.* 925. Citations of realists are lacking in their papers also: they speak not of or for a school, but for themselves. So far as the present paper purports to be descriptive, it sins in non-citation. (As did my controversial paper, *supra* note 18, in non-specificity as to where the views criticized might be found. *Mea maxima culpa!* and may whoever feels that he was caricatured forgive me. Preparing the present discussion has shown me that error of my ways.) I had hoped in this part to build a fair bibliography of the literature but time has not served. Felix Cohen has been kind enough to aid me in this and I include his references, marked " (C)."

[35] Names for them vary. I call them realists (so do Frank, Radin, and often, Yntema; Bingham also recognizes the term. And I find it used in the same sense in the work of Cook, Douglas, Frankfurter) — stressing the interest in the actuality of what happens, and the distrust of formula. Cook prefers to speak of scientific approach to law, Oliphant of objective method — stressing much the same features. Clark speaks of fact-research, Corbin of what courts do. " Functional approach " stresses the interest in, and valuation by, effects. Dickinson speaks of the skeptical movement.

What one does find as he observes them is twofold. First (and to be expected) certain points of departure are common to them all. Second (and this, when one can find neither school nor striking likenesses among individuals, is startling) a cross-relevance, a complementing, an interlocking of their varied results "as if they were guided by an invisible hand." A third thing may be mentioned in passing: a fighting faith in their methods of attack on legal problems; but in these last years the battle with the facts has proved so much more exciting than any battle with traditionalism that the fighting faith had come (until the spring offensive of 1931 against the realists) to manifest itself chiefly in enthusiastic labor to get on.

But as with a description of an economic order, tone and color of description must vary with the point of view of the reporter. No other one of the men would set the picture up as I shall. Such a report must thus be individual. Each man, of necessity, orients the whole to his own main interest of the moment — as I shall orient the whole to mine: the workings of case-law in appellate courts. Maps of the United States prepared respectively by a political geographer and a student of climate would show some resemblance; each would show a coherent picture; but neither's map would give much satisfaction to the other. So here. I speak for myself of that movement which in its sum is realism; I do not speak of "the realists"; still less do I speak *for* the participants or any of them. And I shall endeavor to keep in mind as I go that the justification for grouping these men together lies not in that they are *alike* in belief or work, but in that from certain common points of departure they have branched into lines of work which seem to be building themselves into a whole, a whole planned by none, foreseen by none, and (it may well be) not yet adequately grasped by any.

The common points of departure are several.[36]

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[36] As to each of the following points I have attempted to check over not only the general tone of work but several specific writings of the twenty men named and a number of others — *e.g.*, Kidd, Maggs, Breckenridge, Morse, Durfee, Bohlen, Bryant Smith and Goble — and to make sure that each point was applicable to each. Errors may have crept in. Note how closely the description fits Holmes' work as early as 1871–72: "It commands the future, a valid but imperfectly realized ideal."

On the common points of departure see especially Corbin, *The Law and the*

(1) The conception of law in flux, of moving law, and of judicial creation of law.

(2) The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other.

(3) The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reëxamination to determine how far it fits the society it purports to serve.

(4) The *temporary* divorce of Is and Ought for purposes of study. By this I mean that whereas value judgments must always be appealed to in order to set objectives for inquiry, yet during the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be. More particularly, this involves during the study of what courts are doing the effort to disregard the question what they ought to do. Such divorce of Is and Ought is, of course, not conceived as permanent. To men who begin with a suspicion that change is needed, a permanent divorce would be impossible. The argument is simply that no judgment of what Ought to be

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Judges; LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES, Introd.; Oliphant, *A Return to Stare Decisis*; Patterson, *Can Law Be Scientific?*, all cited in Appendix I. See also Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 YALE L. J. 53; Arnold, *The Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 800; Clark, Douglas and Thomas, *The Business Failures Project—A Problem in Methodology* (1930) 39 YALE L. J. 1013; Douglas and Thomas, *The Business Failures Project—*II. *An Analysis of Methods of Investigation* (1931) 40 *id.* 1034; Burch, *The Paradoxes of Legal Science: A Review* (1929) 27 MICH. L. REV. 637; Radin, *The Permanent Problems of the Law* (1929) 15 CORN. L. Q. 1; Yntema and Jaffin, *supra* note 20; Yntema, *supra* note 34. And see (C) Isaacs, *How Lawyers Think* (1923) 23 COL. L. REV. 555; Laski, *Judicial Review of Social Policy in England* (1926) 39 HARV. L. REV. 832.

On checking rules descriptive against the facts of the decisions, see especially Corbin, Douglas, Klaus, Tulin, *infra*, Appendix I; (C) Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338; Finkelstein, *Further Notes on Self-Limitation* (1925) 39 *id.* 221; Isaacs' more recent work in general, but especially *The Promoter: A Legislative Problem* (1925) 38 *id.* 887; Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 *id.* 943; Hamilton, *Affectation with a Public Interest* (1930) 39 YALE L. J. 1089.

done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing. And realists believe that experience shows the intrusion of Ought-spectacles *during the investigation of the facts* to make it very difficult to see what is being done. On the Ought side this means an insistence on informed evaluations instead of armchair speculations. Its full implications on the side of Is-investigation can be appreciated only when one follows the contributions to objective description in business law and practice made by realists whose social philosophy rejects many of the accepted foundations of the existing economic order. (*E.g.*, Handler *re* trade-marks and advertising; Klaus *re* marketing and banking; Llewellyn *re* sales; Moore *re* banking; Patterson *re* risk-bearing.)

(5) Distrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing. Hence the constant emphasis on rules as "generalized predictions of what courts will do." This is much more widespread as yet than its counterpart: the careful severance of rules *for* doing (precepts) from rules *of* doing (practices).

(6) Hand in hand with this distrust of traditional rules (on the descriptive side) goes a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions. This involves the tentative adoption of the theory of rationalization for the study of opinions. It will be noted that "distrust" in this and the preceding point is not at all equivalent to "negation in any given instance."

(7) The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. This is connected with the distrust of verbally simple rules — which so often cover dissimilar and non-simple fact situations (dissimilarity being tested partly by the way cases come out, and partly by the observer's judgment as to how they ought to come out; but a realist tries to indicate explicitly which criterion he is applying).

(8) An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.

(9) Insistence on *sustained and programmatic attack* on the

problems of law along any of these lines. None of the ideas set forth in this list is new. Each can be matched from somewhere; each can be matched from recent orthodox work in law. New twists and combinations do appear here and there. What is as novel as it is vital is for a goodly number of men to pick up ideas which have been expressed and dropped, used for an hour and dropped, played with from time to time and dropped — to pick up such ideas and set about *consistently, persistently, insistently to carry them through.* Grant that the idea or point of view is familiar — the results of steady, sustained, systematic work with it are not familiar. Not hit-or-miss stuff, not the insight which flashes and is forgotten, but sustained effort to force an old insight into its full bearing, to exploit it to the point where it laps over upon an apparently inconsistent insight, to explore their bearing on each other by the test of fact. This urge, in law, is quite new enough over the last decades to excuse a touch of frenzy among the locust-eaters.[37]

The first, second, third and fifth of the above items, while common to the workers of the newer movement, are not peculiar to them. But the other items (4, 6, 7, 8 and 9) are to me the characteristic marks of the movement. Men or work fitting those specifications are to me "realistic" whatever label they may wear. Such, and none other, are the perfect fauna of this new land. Not all the work cited below fits my peculiar definition in all points. All such work fits most of the points.

Bound, as all "innovators" are, by prior thinking, these innovating "realists" brought their batteries to bear in first instance on the work of appellate courts. Still wholly within the tradition of our law, they strove to improve on that tradition.

(a) An early and fruitful line of attack borrowed from psychology the concept of *rationalization* already mentioned. To recanvass the opinions, viewing them no longer as mirroring the process of deciding cases, but rather as trained lawyers' arguments made by the judges (after the decision has been reached),

[37] Since everyone who reads the manuscript in this sad age finds this allusion blind, but I still like it, I insert the passage: ". . . Preaching in the wilderness of Judea, And saying, Repent ye. . . . And the same John had his raiment of camel's hair, and a leathern girdle about his loins; *and his meat was locusts* and wild honey." Matthew III, 1, 2, 4.

intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable — this was to open up new vision. It was assumed that the deductive logic of opinions need by no means be either a *description* of the process of decision, or an *explanation* of how the decision was reached. Indeed over-enthusiasm has at times assumed that the logic of the opinion *could* be neither; and similar over-enthusiasm, perceiving case after case in which the opinion is clearly almost valueless as an indication of how that case came to decision, has worked at times almost as if the opinion were equally valueless in predicting what a later court will do.[38]

But the line of inquiry via rationalization has come close to demonstrating that in any case doubtful enough to make litigation respectable the available authoritative premises — *i.e.*, premises legitimate and impeccable under the traditional legal techniques — are at least two, and that the two are mutually contradictory as applied to the case in hand.[39] Which opens the question of what made the court select the one available premise rather than the other. And which raises the greatest of doubts as to *how far* that supposed certainty in decision which derives merely from the presence of accepted rules really goes.

(b) A second line of attack has been to discriminate among rules with reference to their relative significance. Too much is written and thought about "law" and "rules," lump-wise. Which part of law? Which rule? Iron rules of policy, and rules "in the absence of agreement"; rules which keep a case from the jury, and rules as to the etiquette of instructions necessary to make

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[38] *E.g.*, Tulin, *The Role of Penalties in Criminal Law* (1928) 37 YALE L. J. 1048; Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 *id.* 584, 720; Corbin, *Contracts for the Benefit of Third Persons* (1930) 46 L. Q. REV. 12. Moore and Oliphant certainly, and I think Sturges, would differ from me, to a greater or less extent, as to how far this is "over-enthusiasm." Moore's three years' quest reached for some more objective technique of prediction. Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 381, 555, 752, 928. And Oliphant, *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 159, n.5.

[39] For a series of examples, see Cook, *The Utility of Jurisprudence in the Solution of Legal Problems* in 5 LECTURES ON LEGAL TOPICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1923–24) 335; Powell, *Current Conflicts Between the Commerce Clause and State Police Power, 1922–1927* (1928) 12 MINN. L. REV. 470, 491, 607, 631.

a verdict stick — if one can get it; rules "of pure decision" for hospital cases, and rules which counsellors rely on in their counselling; rules which affect many (and which many, and how?) and rules which affect few.[40] Such discriminations affect the traditional law curriculum, the traditional organization of law books and, above all, the orientation of study: to drive into the most important fields of ignorance.

(c) A further line of attack on the apparent conflict and uncertainty among the decisions in appellate courts has been to seek more understandable statement of them by grouping the facts in new — and typically but not always narrower — categories. The search is for correlations of fact-situation and outcome which (aided by common sense) may reveal *when* courts seize on one rather than another of the available competing premises. One may even stumble on the trail of *why* they do. Perhaps, *e.g.*, third party beneficiary difficulties simply fail to get applied to promises to make provision for dependents; [41] perhaps the pre-existing duty rule goes by the board when the agreement is one for a marriage-settlement.[42] Perhaps, indeed, contracts in what we may broadly call family relations do not work out in general as they do in business.[43] If so, the rules — viewed as statements of the course of judicial behavior — as *predictions* of what will happen — need to be restated. Sometimes it is a question of carving out hitherto unnoticed exceptions. But sometimes the results force the worker to reclassify an area altogether.[44] Typically, as stated, the classes of situations which result are narrower, much narrower than the traditional classes. The process is in

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[40] Compare the work of Bohlen and Green on torts; Llewellyn on contracts, for attempts to carry this type of old insight through more consistently.

[41] Note (1931) 31 COL. L. REV. 117.

[42] An unpublished study by Moore. Another example is Handler and Pickett, *Trade Marks and Trade Names — An Analysis and Synthesis* (1930) 30 COL. L. REV. 168, 759.

[43] Perhaps they should not — but that is an Ought question. One will be forced to raise it, if he finds courts in their results persistently evading the consequences of what accepted doctrine declares to be the general rule. Compare Moore and Sussman, *supra* note 38, at 555, 557; Oliphant, *supra* note 38, at 159, 160.

[44] Sometimes the effort fails. Durfee and Duffy, *Foreclosure of Land Contracts in Michigan: Equitable Suit and Summary Proceeding* (1928) 7 Mich. St. B. J. 166, 221, 236. It is a grateful sign of a growing scientific spirit when *negative* results of investigation come into print.

essence the orthodox technique of making distinctions, and reformulating — but undertaken systematically; exploited consciously, instead of being reserved until facts which refuse to be twisted by "interpretation" force action.[45] The departure from orthodox procedure lies chiefly in distrust of, instead of search for, the widest sweep of generalization words permit.[46] Not that such sweeping generalizations are not desired — *if they can be made so as to state what judges do.*

All of these three earliest lines of attack converge to a single conclusion: *there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose*[47]

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[45] It may not be *convenient* to draw rules *for* courts to use in terms of these narrower categories. Williston argues that the set of official formulas must not be too complex; they are for "application" by ordinary men, not intellectual giants. WILLISTON, SOME MODERN TENDENCIES IN THE LAW (1929) 127. That does not touch the present point. Even with broad formulas prevailing, as at present, one still gets better results in *describing* where courts get to if he thinks in terms of narrower classifications of the facts. But a fair portion of present unpredictability is certainly attributable to the fact that the courts are using official formulas which fit, only part of the time, what the facts seem to call for. Sometimes the facts win, sometimes the formula. See note 46, *infra.*

[46] When this procedure results in a formulation along lines strikingly unorthodox (*cf.* my own approach to title — CASES AND MATERIALS ON THE LAW OF SALES (1930)) but one which the worker finds helpful in prediction or in generalizing results, Dean Pound's query as to *how far* courts achieve certainty by traditional rule and form becomes pressing. At times Moore (chiefly in conversation), Oliphant (*supra* note 38, conversation, and theory of contracts), and Sturges (*Legal Theory and Real Property Mortgages* (1928) 37 YALE L. J. 691), seem to me to verge upon a position which escapes my understanding: that the judges' reactions to the facts in such cases are only negligibly influenced by the orthodox rules. My experience is that when measures (here "the rule") do not fit purposes (here the line of discrimination discovered by the fact-issue-judgment approach) the result is *always* some inadequacy in accomplishing purposes. And my experience is that when purposes do not become conscious, there is commonly inadequacy at times in locating a measure for their adequate accomplishment. (Compare Corbin's results on the English cases: Corbin, *Contracts for the Benefit of Third Persons* (1930) 46 L. Q. REV. 12.) What one has gained by the new formulation, if it proves significant, seems to me to be a tool for clarifying the situation and the purposes; a means of bringing a hidden factor, perhaps *the* hidden factor in past uncertainty, into view; perhaps also a new insight into wise objectives, and so a key for reform. Compare Llewellyn, *What Price Contract? — An Essay in Perspective* (1931) 40 YALE L. J. 704, 732, n.62.

[47] Partly, as I have tried to develop elsewhere (Llewellyn, *Legal Illusion* (1931) 31 COL. L. REV. 82, 87; PRÄJUDIZIENRECHT U. RECHTSPRECHUNG IN AMERIKA (1931) § 52 *et seq.*), because the "certainty" sought is conceived verbally, and in terms of lawyers, not factually and in terms of laymen. Neither can commonly

(and what possibility there is must be found in good measure outside these same traditional rules). The particular kind of certainty that men have thus far thought to find in law is in good measure an illusion. Realistic workers have sometimes insisted on this truth so hard that they have been thought pleased with it. (The danger lies close, for one thinking indiscriminately of Is and Ought, to suspect announcements of fact to reflect preferences, ethically normative judgments, on the part of those who do the announcing.)

But announcements of fact are not appraisals of worth. The contrary holds. The immediate result of the preliminary work thus far described has been a further, varied series of endeavors; *the focussing of conscious attack on discovering the factors thus far unpredictable, in good part with a view to their control.* Not wholly with a view to such elimination; part of the conscious attack is directed to finding where and when and how far *un*certainty has value. Much of what has been taken as insistence on the exclusive significance of the particular (with supposed implicit denial of the existence of valid or apposite generalizations) represents in fact a clearing of the ground for such attack. Close study of particular unpredictables may lessen unpredictability. It may increase the value of what remains. It certainly makes clearer what the present situation is. "Link by link is chain-mail made."

(i) There is the question of the personality of the judge. (Little has as yet been attempted in study of the jury; Frank, *Law and the Modern Mind*, makes a beginning.) Within this field, again, attempts diverge. Some have attempted study of the particular judge [48] — a line that will certainly lead to inquiry into

be had save at the cost of the other. We get enough of each to upset the other. One effect of the realist approach is to center on certainty for laymen and improve the machinery for attaining it. The present dilemma is quickly stated: if there is no certainty in law (rules and concepts *plus* intuition *plus* lawmen's practices) why is not any layman qualified to practice or to judge? But if the certainty is what the rule-believers claim, how can two good lawyers disagree about an appealed case? *Cf. also* (C) Isaacs, *supra* note 36, at 890 *et seq.*; Isaacs, *infra* note 61, at 211–12.

[48] *E.g.*, Powell's insistence on the particular judges in successions of decisions. *Supra* note 39; *Commerce, Congress, and the Supreme Court, 1922–1925* (1926) 26 COL. L. REV. 396, 521; (C) *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545; *The Nature of a Patent Right* (1917) 17 COL. L.

his social conditioning.[49] Some have attempted to bring various psychological hypotheses to bear.[50] All that has become clear is that our government is not a government of laws, but one of laws through men.

(ii) There has been some attempt to work out the varieties of interaction between the traditional concepts (the judge's "legal" equipment for thinking, seeing, judging) and the fact-pressures of the cases.[51] This is a question not — as above — of getting at results on particular facts, but of studying the effect, *e.g.*, of a series of cases in which the facts either press successively in the one direction, or alternate in their pressures and counteract each other. Closely related in substance, but wholly diverse in both method and aim, is study of the machinery by which fact-pressures can under our procedure be brought to bear upon the court.[52]

(iii) First efforts have been made to capitalize the wealth of

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REV. 663; Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges* (1922) 17 ILL. L. REV. 96; Brown, *Police Power — Legislation for Health and Personal Safety* (1929) 42 HARV. L. REV. 866; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737; FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1928), and the supplementary series of articles in (1928) 42 HARV. L. REV. 1; (1929) 43 *id.* 1; (1930) 44 *id.* 1.

To be added, especially, is the growing volume of judicial self-revelation: Cardozo's work: Hutcheson, *infra* Appendix I; Judge Amidon's beautiful opinion in Great Northern Ry. v. Brousseau, 286 Fed. 414 (D. N. D. 1923); and parts of such earlier work as Young, *The Law as an Expression of Community Ideals and the Law Making Functions of Courts* (1917) 27 YALE L. J. 1.

[49] Nelles, Book Review (1931) 40 YALE L. J. 998.

[50] Freudian: beginnings in Frank, LAW AND THE MODERN MIND (1930). Behaviorist: an attempt in Patterson, *Equitable Relief for Unilateral Mistake* (1928) 28 COL. L. REV. 859. Semi-behaviorist, via cultural anthropology: Moore and Sussman, *supra* note 38.

[51] Llewellyn in 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (1930) 249; LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930); PRÄJUDIZIENRECHT U. RECHTSPRECHUNG IN AMERIKA (1931). With which last compare Pound, *A Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 802, esp. 940; HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925); Corbin, *supra* note 37; Haines, *supra* note 48; Berle, *Investors and the Revised Delaware Corporation Act* (1929) 29 COL. L. REV. 563; Finkelstein, *supra* note 36; Hamilton, *Judicial Tolerance of Farmers' Cooperatives* (1929) 38 YALE L. J. 936; Patterson, *infra* Appendix I.

[52] The famous Brandeis brief and its successors mark the beginning. In commercial cases both Germany and England have evolved effective machinery.

our reported cases to make large-scale quantitative studies of facts and outcome; the hope has been that these might develop lines of prediction more sure, or at least capable of adding further certainty to the predictions based as hitherto on intensive study of smaller bodies of cases. This represents a more ambitious development of the procedure described above, under (c); I know of no published results.

(iv) Repeated effort has been made to work with the cases of single states, to see how far additional predictability might thus be gained.[53]

(v) Study has been attempted of "substantive rules" in the particular light of the available remedial procedure; the hope being to discover in the court's unmentioned knowledge of the immediate consequences of this rule or that, in the case at hand, a motivation for decision which cuts deeper than any shown by the opinion.[54] Related, but distinct, is the reassertion of the fundamental quality of remedy, and the general approach to restating "what the law is" (on the side of prediction) in terms not of rights, but of what can be done: Not only "no remedy, no right," but "precisely as much right as remedy." [55]

(vi) The set-up of men's ways and practices and ideas on the subject matter of the controversy has been studied, in the hope

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[53] Here, as throughout, one notes the contact of the realist movement with a tradition of practice (single state law, interest in procedure, "automobile jurisprudence" and the like, damage and procedure points treated in conjunction with the relevant substantive law, interest in the facts and atmosphere) which the older academic tradition was prone to scorn. But this progress backwards takes with it, and fertilizes the practical tradition with, the interest in theory, generality of outlook, and long-range thinking of the older academic tradition. Fortunate media for this type of work are the local law reviews. Such work, long continued, will force a radical revision of thought about "the common law" and, one may hope, educate the "national" reviews. See also (C) Kales, *An Unsolicited Report on Legal Education* (1918) 18 COL. L. REV. 21.

[54] *E.g.*, Tulin, *supra* note 37; Pound, *supra* note 51, at 649 *et seq.* on the art of administrating justice through damages. And *cf.* the remedy canvass in Patterson, *Equitable Relief for Unilateral Mistake* (1928) 28 COL. L. REV. 859; Durfee and Duffy, *supra* note 44.

[55] *E.g.*, Klaus, *Identification of the Holder and Tender of Receipt on the Counter Presentation of Checks* (1929) 13 MINN. L. REV. 281; Handler, *False and Misleading Advertising* (1929) 39 YALE L. J. 22; Handler and Pickett, *supra* note 42; *cf.* Tulin, *infra* Appendix I; LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES c. III.

that this might yield a further or even final[56] basis for prediction. The work here ranges from more or less indefinite reference to custom (the historical school), or mores (Corbin),[57] through rough or more careful canvasses[58] of business[59] practice and ideology (*e.g.*, Berle, Sturges, Isaacs, Handler, Bogert, Durfee and Duffy, Breckenridge, Turner, Douglas, Shanks, Oliphant, and indeed Holmes) to painstaking and detailed studies in which practice is much more considered than is any prevailing set of ideas about what the practices are (Klaus) or — even — to studies in which the concept of "practice" is itself broken up into behavior-sequences presented with careful note of the degree of their frequency and recurrence, and in which all reference to the actor's own ideas is deprecated or excluded (Moore and Sussman). While grouped here together, under one formula, these workers show differences in degree and manner of interest in the background-ways which range from one pole to the other. Corbin's main interest is the appellate case; most of the second group mentioned rely on semi-special information and readily available material from economics, sociology, etc., with occasional careful studies of their own, and carry a strong interest into drafting or counselling work; Klaus insists on full canvass of all relevant literature, but-

[56] Moore, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703; Moore and Sussman, *supra* note 38, might be so read; or rather, so misread. His study of behavior is not based on a belief that it will by itself lead to final results; it is rather (as is the intelligent behaviorist program in psychology) a "Let us see how far we can get with this" approach. And it is hard to justify a quarrel with that. See Moore and Sussman, *supra* note 38, at 556–64, esp. 561. And though prediction should be achieved, there still remains the question of Ought — if in no other guise, then as a legislative matter. Compare also L. K. Frank, *An Institutional Analysis of the Law* (1924) 24 COL. L. REV. 480 (a magnificent example of what the outsider can contribute); Moore, *Rational Basis of Legal Institutions, infra* Appendix I; (C) Ketcham, *Law as a Body of Subjective Rules* (1929) 23 ILL. L. REV. 360.

[57] Recently becoming much more specific — see *Third Parties as Beneficiaries of Contractors' Surety Bonds* (1928) 38 YALE L. J. 1.

[58] Ideals here largely outstrip scholarly achievement. But most realist scholars are in their work materially ahead of what they have printed. It should be noted that Douglas' business failures study, *supra* note 36, proceeds to a level comparable to Klaus or Moore.

[59] Or practice in criminal law administration, as in the crime surveys; or on family matters: JACOBS AND ANGELL, A RESEARCH IN FAMILY LAW (1930); Powell and Looker, *Decedents' Estates — Illumination from Probate and Tax Records* (1930) 30 COL. L. REV. 919.

tressed by and viewed in the light of intensive personal investigation; Moore's canvass and study is so original and thorough in technique as to offer as vital and important a contribution to ethnology and sociology as to banking practice. This is not one "school"; here alone are the germs of many "schools."

(vii) Another line of attack, hardly begun, is that on the effect of the lawyer on the outcome of cases, as an element in prediction. The lawyer *in litigation* has been the subject thus far only of desultory comment.[60] Groping approach has been made to the counsellor as field general, in the business field: in drafting, and in counselling (and so in the building of practices and professional understandings which influence court action later), and in the strategy of presenting cases in favorable series, settling the unfavorable cases, etc.[61]

All of the above has focussed on how to tell what appellate courts will do, however far afield any new scent may have led the individual hunter. But the interest in *effects* on laymen of what the courts will do leads rapidly from this still respectably traditional sphere of legal discussion into a series of further inquiries whose legal decorum is more dubious. They soon extend far beyond what has in recent years been conceived (in regard to the developed state) as law at all. I can not stop to consider these inquiries in detail. Space presses. Each of the following phases could be, and should be, elaborated at least into such a rough sketch as the foregoing. Through each would continue to run interest in what actually eventuates; interest in accurate description of what eventuates; interest in attempting, where prediction becomes uncertain, some conscious attack on hidden factors whose study might lessen the uncertainty; and interest in effects — on

[60] One exception is Sturges, *Law's Delays, Lawyers' Delays, and Forwarded Cases* (1928) 12 MINN. L. REV. 351; *cf.* Wickser, *Bar Associations* (1930) 15 CORN. L. Q. 390. Yet no more vital field exists. Consider merely the effect of skilful or dumb-skulled presentation on the growth of case-law.

[61] Something of this in Elizabeth Sanford's forthcoming THE UNIT RULE; something in LLEWELLYN, BRAMBLE BUSH (1930) c. X; and Frederick, *The Trust Receipt as Security* (1922) 22 COL. L. REV. 395, 546, is not only itself a step in such a sequence, but esp. at 409 *et seq.* presents, in the Farmers and Mechanics Bank cases, thence to importing, and thence to the automobile line, both materials and suggestion for such a study. And see Isaacs, *Business Security and Legal Security* (1923) 37 HARV. L. REV. 201; (C) Isaacs, *How Lawyers Think* (1923) 23 COL. L. REV. 555.

laymen. Finally, insistence that Ought-judgment should be bottomed on knowledge. And that action should be bottomed on all the knowledge that can be got in time to act.

I. *There is first the question of what lower courts and especially trial courts are doing, and what relation their doing has to the sayings and doings of upper courts and legislatures.*

Here the question has been to begin to find out, to find some way, some ways, of getting the hitherto unavailable facts, to find some significant way or ways of classifying what business is done, how long it takes, how various parts of the procedural machinery work. (*E.g.*, Warner, Sunderland, Millar, Clark, Yntema, Marshall, Oliphant, Douglas, Arnold, Morgan, Frankfurter, Greene, and Swazie.) Another attack begins by inquiry not into records, but into the processes of trial and their effects on the outcome of cases. (Frank, Green.) This, on the civil side, where we have (save for memoirs) been wholly in the dark. On the criminal side, beginnings lie further back. (Pound, Frankfurter, Moley and the Crime Surveys; where lawyers have drawn on the criminologists.) All that is really clear to date is that until we know more here our "rules" give us no remote suggestion of *what law means* to persons in the lower income brackets,[62] and give us misleading suggestions as to the whole body of cases unappealed. Meantime, the techniques of the social sciences are being drawn upon and modified to make the work possible.[63]

II. *There is the question of administrative bodies* — not merely on the side of administrative law (itself a novel concept recently enough — but including all the action which state officials take "under the law" so far as it proves to affect people.[64] And with this we begin departing from the orthodox. To be sure, the practicing lawyer today knows his commission as he knows his court.

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[62] Little has been done in print to follow up REGINALD SMITH'S path-breaking JUSTICE AND THE POOR (1924); but allied is the growing literature on poor man's financing and Bradway's work.

[63] Especially useful W. Clark, Douglas and Thomas, *supra* note 36; C. E. Clark, *Fact Research in Law Administration*, *infra* Appendix I.

[64] One may cite generally Freund, Frankfurter, Henderson, Dickinson, Landis, Magill. Also PATTERSON, THE INSURANCE COMMISSIONER (1927); *cf.* Stason, *Judicial Review of Tax Errors — Effect of Failure to Resort to Administrative Remedies* (1930) 28 MICH. L. REV. 637. And much of the Crime Survey and criminological work fits here. So, *e.g.*, Sheldon Glueck, Fosdick.

But the trail thus broken leads into the wilds of government, and politics, and queer events in both.

III. *There is the question of legislative regulation* — in terms of what it *means in action, and to whom*, not merely in terms of what it says. And with that, the question of what goes into producing legislative change — or blocking it [65] — especially so far as the profession participates therein; legislative history on the official record; but as well the background of fact and interest and need. And, no less vital, there is the fact-inquiry into areas of life where maladjustment capable of legal remedy exists.[66]

IV. Finally, and cutting now completely beyond the tradition-bounded area of law, there is the matter not of describing or predicting the action of officials — be they appellate courts, trial courts, legislators, administrators — but of describing and predicting *the effects of their action on the laymen of the community*.[67]

[65] See (C) Berle, *supra* note 51; CHILDS, LABOR AND CAPITAL IN NATIONAL POLITICS (1930).

[66] In general *cf.* Berle and Weiner in the corporate field; FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930); Clark, *infra* Appendix I; Sunderland. In brief, who not, realist or non-realist, who has ever touched facts and found no solution in case-law? What the realist offers is only thirst for *more* facts, better gathered, more clearly interpreted. And *not* selected (though accurate) to point an argument. For which reason not all the work just mentioned, despite its value, can count as fully "realistic."

[67] I quote Felix Cohen: "In the economic analysis of judicial rules and theories much valuable work has been done by Hale, Bonbright, Richberg, Henderson, Julius Cohen, Goddard and Weiner, particularly in the field of public utility valuation. Otherwise there is simply the call for facts, *e.g.*, Weiner, *Payment of Dissenting Stockholders* (1927) 27 COL. L. REV. 547." Except that the "otherwise" comes several lines too soon, I concur *in toto*. As to the point of difference, before I even open the books to search I think, *e.g.*, of Breckenridge, J. M. Clark, J. R. Commons, Douglas, Fredericks, Herman Finkelstein, Handler, Kidd, Klaus, Patterson, Radin, Ripley, Roscoe Turner, Vold, Wilbert Ward, all (save Clark and Commons) as to work inside the field of private commercial law.

Such analysis seems to be on the increase. Comparing, *e.g.*, the Cornell Law Quarterly, vols. 14–16 with vols. 4–6, and the Michigan Law Review, vols. 27–29 with vols. 17–19, one finds both reference to facts and analysis of effects of rules of private law increasing — not so much in frequency as in scope and care and objectivity, and integration into the essential framework of the papers. (On public law the older material often rivals the recent; the fact-impetus developed there earlier.) Striking in the earlier materials is Rogers, *An Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement* (1919) 18 MICH. L. REV. 75; but perhaps even more striking is that in the later, Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413 (and compare Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of*

"Law" without effect approaches zero in its meaning. To be ignorant of its effect is to be ignorant of its meaning. To know its effect without study of the persons whom it affects is impossible. Here the antecedents of court action touch its results. To know law, then, to know *anything* of what is necessary to judge or evaluate law, we must proceed into these areas which have traditionally been conceived (save by the historical school) as not-law. Not only what courts do instead of what courts say, but also what difference it makes to anybody that they do it. And no sooner does one begin such a study than it becomes clear that there can be no broad talk of "law" nor of "the community"; but that it is a question of reaching the particular part of the community relevant to some particular part of law. There are persons sought to be affected, and persons not sought to be affected. Of the former, some are not in fact materially affected (the gangster-feud); of the latter, some are (depositors in a failing bank which the banking laws have *not* controlled).[68] There is the range of questions as to those legal "helpful devices" (corporation,[69] contract, lease) designed to make it easier for men to

Recent Cases (1930) 78 U. OF PA. L. REV. 293) using figures and more systematic approach to facts and effects, does not stand alone, but stirs up prompt and competent discussion of his *data*, not merely of his conclusions; Gamer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1930) 16 CORN. L. Q. 35. Competent discussion is to the single study what the incorporation of a new tool of approach into a thinker's standard working kit is to the insight which once came and then was forgotten. Compare my own use of risk-allocation as early as 1920, *Implied Warranties of Wholesomeness Again* (1920) 29 YALE L. J. 782, only to wholly overlook it in 1922 in a problem that shrieked for its use (*Certified Altered Checks Under the Negotiable Instruments Law* (1922) 31 *id.* 522) and to almost disregard it in two papers in 1923, both in fields where it yields results. *Supervening Impossibility of Performing Conditions Precedent in the Law of Negotiable Paper* (1923) 23 COL. L. REV. 142; *C. I. F. Contracts in American Law* (1923) 32 YALE L. J. 711. In short I did not *have* the idea in 1920; I *had had* it then — once. Contrast its consistent employment, wherever it promised help, since 1925. It is the growing *normality* of appeal to facts and of their critical use which marks the intrusion of this aspect of realism into the literature.

[68] Further developed in Llewellyn, *Law Observance and Law Enforcement infra* Appendix I.

[69] The literature here is vast. Peculiarly striking Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 COL. L. REV. 132; Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations* (1930) 39 YALE L. J. 193; Posner, *Liability of the Trustee Under the Corporate Indenture* (1928) 42 HARV. L. REV. 198; Berle, *Corporate Powers as Powers in Trust* (1931) 44 HARV. L. REV. 1049.

get where they want and what they want. There is all the information social scientists have gathered to be explored, in its bearings on the law. There is all the information they have not been interested in gathering, likewise to be explored — but first, to be gathered.

Here are the matters one or another of the new fermenters is ploughing into. Even the sketchy citations here are enough to make clear that their lines of work organize curiously into a whole.

But again rises the query: are the matters *new*? What realist knows so little of law or the ways of human thought as to make such a claim? Which of the inquiries has not been made, or started, or adumbrated in the past? Which of the techniques does not rest on our prior culture? New, I repeat, is one thing only: the *systematic* effort to carry one problem through, to carry a succession of problems through, to *consistently*, not occasionally, choose the best available technique, to *consistently* keep description on the descriptive level, to *consistently* distinguish the fact basis which will feed evaluation from the evaluation which it will later feed, to *consistently* seek *all* the relevant data one can find to *add* to the haphazard single-life experience, to *add* to general common sense.

Is it not obvious that — if this be realism — realism is a mass of trends in legal work and thinking? (1) They have their common core, present to some extent wherever realistic work is done: recognition of law as means; recognition of change in society that may call for change in law; interest in what happens; interest in effects; recognition of the need for effort toward keeping perception of the facts uncolored by one's views on Ought; a distrust of the received set of rules and concepts as adequate indications of what is happening in the courts; a drive toward narrowing the categories of description. (2) They have grown out of the study of the action of appellate courts, and that study still remains their potent stimulus. Uncertainty in the action of such courts is one main problem: to find the why of it; to find means to reduce it, where it needs reduction; to find where it needs reduction, where expansion. (3) But into the work of lower courts, of administrative bodies, of legislatures, of the life which lies before and behind law, the ferment of investigation spreads.

Some one or other of these realistic trends takes up the whole time of many; a hundred more participate in them to various degrees who yet would scorn the appellation "realist." The trends are centered in no man, in no coherent group. There is no leader. Spokesmen are self-appointed. They speak not for the whole but for the work each is himself concerned with — at times with little or no thought of the whole, at times with the exaggeration of controversy or innovation. Yet who should know better than lawyers the exaggeration of the controversy; who should have more skill than they to limit argument and dictum to the particular issue, to read it in the light thereof. One will find, reading thus, little said by realistic spokesmen that does not warrant careful pondering. Indeed, on *careful* pondering, one will find little of exaggeration in their writing. Meantime, the proof of the pudding: are there results?

There are. They are results, primarily, on the side of the descriptive sociology of law discussed thus far. They are big with meaning for attack on the field of Ought — either on what courts ought to do with existing rules, or on what changes in rules are called for.

Already we have a series, lengthening impressively, of the *more accurate* reformulations of what appellate courts are doing and may be expected to do. We are making headway in *seeing* (not just "knowing" without inquiry) what effects their doing has on some of the persons interested. We are accumulating some *knowledge* (*i.e.*, more than guesses) on phases of our life as to which our law seems out of joint.

We have, moreover, a first attack upon the realm of the unpredictable in the actions of courts. That attack suggests strongly that one large element in the now incalculable consists in the traditional pretense or belief (sometimes the one, sometimes the other) that there is no such area of uncertainty, or that it is much smaller than it is. To *recognize* that there are limits of the certainty sought by verbalism and deduction, to seek to define those limits, is to open the door to that other and far more useful judicial procedure: *conscious* seeking, *within the limits laid down by precedent and statute,* for the wise decision. Decisions thus reached, *within those limits*, may fairly be hoped to be more certainly predictable than decisions are now — for now no man

can tell when the court will, and when it will not, thus seek the wise decision, but hide the seeking under words. And not only more certain, but what is no whit less important: more just and wise (or more frequently just and wise).

Indeed, the most fascinating result of the realistic effort appears as one returns from trial court or the ways of laymen to the tradition-hallowed problem of appellate case-law. Criticized by those who refuse to disentangle Is and Ought because of their supposed deliberate neglect of the normative aspect of law, the realists prove the value, for the normative, of temporarily putting the normative aside. They return from their excursion into the purest description they can manage with a demonstration that the field of free play for Ought in appellate courts is vastly wider than traditional Ought-bound thinking ever had made clear. This, *within* the confines of precedent as we have it, *within* the limits and on the basis of our present order. Let me summarize the points of the brief:

(a) If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion — then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy — for the authoritative tradition speaks with a forked tongue.[70]

(b) If (i) the possible inductions from one case or a series of cases — even if these cases really had each a single fixed meaning — are nonetheless not single, but many; and if (ii) the standard authoritative techniques [71] of dealing with precedent range from limiting the case to its narrowest issue on facts and proce-

[70] *Cf.* Radin, *The Theory of Judicial Decision: or How Judges Think*; Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*; LLEWELLYN, THE BRAMBLE BUSH cc. IV, V; FRANK, LAW AND THE MODERN MIND; GREEN, JUDGE AND JURY; Corbin, *Contracts for the Benefit of Third Persons*; Powell, *The Logic and Rhetoric of Constitutional Law*, all *infra* Appendix I. See also Radin, *supra* note 36; (C) Dickinson, *The Law Behind Law* (1929) 29 COL. L. REV. 113, 285, 296–99; Brown, *supra* note 36; Waite, *Caveat Emptor and the Judicial Process* (1925) 25 COL. L. REV. 129.

[71] I mean not those approved by the schoolmen, but those *used* by authoritative courts in dealing with "authority." On this as on other matters, the rules of the schoolmen are to be subjected to the check of fact — here, of what courts do. See LLEWELLYN, BRAMBLE BUSH (1930) c. IV. Contrast Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 YALE L. J. 161.

dure, and even searching the record for a hidden distinguishing fact, all the way to giving it the widest meaning the rule expressed will allow, or even thrusting under it a principle which was not announced in the opinion at all — then the available leeway in *interpretation of precedent* is (relatively to what the older tradition has *consciously* conceived) nothing less than huge. And only policy considerations and the facing of policy considerations can justify "interpreting" (making, shaping, drawing conclusions from) the relevant body of precedent in one way or in another. And — the essence of all — *stare decisis* has in the past been, now is, and must continue to be, a norm of change, and a means of change, as well as a norm of staying put, and a means of staying put.[72] *The growth of the past has been achieved by "standing on" the decided cases;* rarely by overturning them. Let this be recognized, and precedent is clearly seen to be a way of change as well as a way of refusing to change. Let this be recognized, and that peculiar one of the ways of working with precedent which consists in blinding the eyes to policy loses the fictitious sanctity with which it is now enveloped *some of the time*: to wit, whenever judges for any reason do not wish to look at policy.

(c) If the classification of raw facts is largely an arbitrary process, raw facts having in most doubtful cases the possibility of ready classification along a number of lines, "certainty," even under pure deductive thinking, has not the meaning that people who have wanted certainty in law are looking for. The quest of this unreal certainty, this certainty unattained in result, is the major reason for the self-denying ordinance of judges: their refusal to look beyond words to things. Let them once see that the "certainty" thus achieved is *un*certainty for the non-law-tutored layman in his living and dealing, and the way is open to reach for *layman's* certainty-through-law, by seeking for the fair or wise outcome, so far as precedent and statute make such outcome *possible.* To see the problem thus is also to open the way to conscious discrimination — *e.g.*, between current commercial dealings and conveyancing — in which latter the *lawyer's* peculiar

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[72] See especially Corbin, *The Law and the Judges*; *Contracts for the Benefit of Third Persons*; Llewellyn, *Legal Tradition and Social Science Method*; Tulin, all *infra* Appendix I.

reliance on formulae may be assumed as of course; whereas in the former cause must be shown for making such an assumption.

Thus, as various of the self-designated realistic spokesmen have been shouting: the temporary divorce of Is and Ought brings to the reunion a sharper eye, a fuller equipment, a sounder judgment — even a wider opportunity as to that case-law which tradition has painted as peculiarly ridden by the past. That on the fact side, as to the peculiar questions, the temporary divorce yields no less gratifying results is demonstrated by the literature.

When the matter of *program in the normative aspect* is raised, the answer is: *there is none.* A likeness of method in approaching Ought-questions is apparent. If there be, beyond that, general lines of fairly wide agreement, they are hardly specific enough to mean anything on any given issue. Partly, this derives from differences in temperament and outlook. Partly, it derives from the total lack of organization or desire to schoolify among the men concerned. But partly, it is due to the range of work involved. Business lawyers have some pet Oughts, each in the material he has become familiar with; torts lawyers have the like in torts; public lawyers in public law. And so it goes. Partly also, the lack of programmatic agreement derives from the time and effort consumed in getting at facts, either the facts strictly legal or the "foreign" facts bearing on the law. Specialized interests must alone spell absence of group-program. Yet some general points of view may be hazarded.

(1) There is fairly general agreement on the importance of personnel, and of court organization, as essential to making laws have meaning. This both as to triers of fact and as to triers of law. There is some tendency, too, to urge specialization of tribunals.

(2) There is very general agreement on the need for courts to face squarely the policy questions in their cases, and use the full freedom precedent affords in working toward conclusions that seem indicated. There is fairly general agreement that effects of rules, so far as known, should be taken account of in making or remaking the rules. There is fairly general agreement that we need improved machinery for making the facts about such effects — or about needs and conditions to be affected by a decision — available to courts.

(3) There is a strong tendency to think it wiser to narrow rather than to widen the categories in which concepts and rules *either about judging or for judging* are made.

(4) There is a strong tendency to approach most legal problems as problems in allocation of risks,[73] and so far as possible, as problems of their reduction, and so to insist on the effects of rules on parties who not only are not in court, but are not fairly represented by the parties who are in court. To approach not only tort but business matters, in a word, as matters of *general* policy.

And so I close as I began. What is there novel here? [74] In the ideas, nothing. In the sustained attempt to make one or another of them fruitful, much. In the narrowness of fact-category together with the wide range of fact-inquiry, much. In the technique availed of, much — for lawyers. But let this be noted — for the summary above runs so largely to the purely descriptive side: When writers of realistic inclination are writing in general, they are bound to stress the need of more accurate description, of Is and not of Ought. There lies the *common* ground of their thinking; there lies the area of new and puzzling development. There lies the point of discrimination which they must drive home. To get perspective on their stand about ethically normative matters one must pick up the work of each man in his special field of work. There one will find no lack of interest or effort

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[73] *E.g.*, Patterson, *The Apportionment of Business Risks Through Legal Devices*; Douglas, *Vicarious Liability and Administration of Risk*, both *infra* Appendix I. See also Isaacs, *supra* note 61. Contrast Breckenridge and Llewellyn (1922) 31 YALE L. J. 522 with Breckenridge, *The Negotiability of Postdated Checks* (1929) 38 YALE L. J. 1063, and LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930). Or Corbin's earlier work with his article *supra* note 57. Compare the work of Green, Y. B. Smith, Turner, Weiner; BRANNAN, NEGOTIABLE INSTRUMENTS LAW (Chafee's ed. 1926) 572; Clark's conception of procedural handicapping. CODE PLEADING (1928); Holmes, as usual, set the mark. THE COMMON LAW (1881) cc. VIII, IX.

[74] Reports Felix Cohen: "Pound can be cited for all the planks for the realistic platform — and against many of them." My unchecked memory would endorse this (save for the rigorous temporary severance of Is and Ought?). But it is also probably true (perhaps in lesser degree because they have written less) of most realists who did not happen to be laid and hatched by other realists. Our good fortune is that the world we live in is neither static, nor, as to those who people it, too consistent.

toward improvement in the law. As to whether change is called for, on any *given* point of our law, and if so, how much change, and in what direction, there is no agreement. Why should there be? A *group* philosophy or program, a *group* credo of social welfare, these realists have not. They are not a group.

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APPENDIX I

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OLIPHANT, H.: *Mutuality of Obligation in Bilateral Contracts at Law* (1925) 25 COL. L. REV. 705; (1928) 28 *id.* 997; *Trade Associations and the Law* (1926) 26 *id.* 381; *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 159; (with Hewitt) *Introduction* to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1929).

PATTERSON, E. W.: *The Apportionment of Business Risks Through Legal Devices* (1924) 24 COL. L. REV. 335; *Equitable Relief for Unilateral Mistake* (1928) 28 *id.* 859; *The Transfer of Insured Property in German and in American Law* (1929) 29 *id.* 691; *Can Law be Scientific?* (1930) 25 ILL. L. REV. 121; (with McIntyre) *Unsecured Creditors' Insurance* (1931) 31 COL. L. REV. 212; *Hedging and Wagering on Produce Exchanges* (1931) 40 YALE L. J. 843.

POWELL, T. R.: *The Study of Moral Judgments by the Case Method* (1913) 10 J. PHIL. PSYCH. 484; *Law as a University Study* (1917) 19 COL. U. Q. 106; *Law as a Cultural Study* (1917) 4 AM. L. S. REV. 330; *The Nature of a Patent Right* (1917) 17 COL. L. REV. 663; *The Logic and Rhetoric of Constitutional Law* (1918) 15 J. PHIL. PSYCH. 645; *The Changing Law of Foreign Corporations* (1918) 33 POL. SCI. Q. 549; *How Philosophers May be Useful to Society* (1921) 31 INT. J. ETHICS 289; *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89; *An Imaginary Judicial Opinion* (1931) 44 HARV. L. REV. 889.

RADIN, M.: *The Disseisin of Chattels: The Title of a Thief* (1923) 11 CALIF. L. REV. 259; *The Theory of Judicial Decision: Or How Judges Think* (1925) 11 A. B. A. J. 357; *Scientific Method and the Law* (1931) 19 CALIF. L. REV. 164; *Legal Realism* (1931) 31 COL. L. REV. 824.

STURGES, W. A.: *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383; *Commercial Arbitration or Court Application of Common Law Rules of Marketing* (1925) 34 *id.* 480; Book Review (1926) 35 *id.* 776; Book Review (1927) 40 HARV. L. REV. 510; (with S. O. Clark) *Legal Theory and Real Property Mortgages* (1928) 37 YALE L. J. 691.

TULIN, L. A.: *The Role of Penalties in Criminal Law* (1928) 37 YALE L. J. 1048.

YNTEMA, H. E.: *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468; Book Review (1929) 39 *id.* 140; *The Purview of Research in the Administration of Justice* (1931) 16 IOWA L. REV. 337; *Mr. Justice Holmes' View of Legal Science* (1931) 40 YALE L. J. 696; *The Rational Basis of Legal Science* (1931) 31 COL. L. REV. 925.

APPENDIX II

DETAILED RESULTS OF THE INVESTIGATION

This appendix includes the results of the investigation concerning points 1, 10, and 11 only. An account as to the other ten points similar to that on point 11 (*i.e.*, including detailed quotations) was also compiled and submitted. Unfortunately the space reserved at the author's request was insufficient to permit its publication. The portion here printed was selected at the author's suggestion as exemplifying the method of investigation. For full citations of the writings listed see Appendix I, *supra*. — Ed.

As printed, the paper, thanks to the Editor's courtesy, already materially exceeds the space I had asked for. The choice of points 1 and 10 was therefore dictated by their comparative brevity; that of 11 by its importance and representative character. The unprinted results are available to any one interested in obtaining them from me. — K.N.L.

Point 1

Pound, *supra* note 1, at 704–05: "Another mode of approach to jurisprudence, *often asserted to be the one path to reality*, is psychological. *Psychological exposure of the rôle of reason in human behavior, of the extent to which so-called reasons come after action as explanations instead of before action as determining factors, has made a profound impression upon the rising generation of jurists.*" (Italics ours).

Pound, *supra* note 1, at 706: "Nor is the psychological neo-realism of the moment wholly emancipated from the *a priori* dogmatism with which it reproaches older types of juristic thought. *Much of it consists in setting forth what it seems the course of judicial action or juristic thinking must be, in the light of some current psychological dogma, rather than investigation of recorded judicial experience and juristic development thereof in order to see what they reveal.*" (Italics ours).

Interpretation. Exactly what these passages may mean we do not know. We gather, however, certain fairly clear elements: (1) The rising generation of jurists are deeply impressed by the theory of rationalization. (2) *The theory is largely accepted a priori, and unchecked by investigation of recorded judicial experience.*

That the theory of rationalization is very widely used, is clear. Our evidence centers on the proposition numbered 2: the failure to check that theory by investigation, or its acceptance as dogmatically given. We cite pertinent instances where writers who have written about rationalization have printed such an investigation of recorded judicial experience with reference to what it reveals. The citation in parenthesis is of a theoretical setting forth of the process of decision along lines akin to the theory of rationalization.

BINGHAM, W.: (all the works cited): *None* located.

COOK, W. W.: (*Scientific Method and the Law* 231); *Privileges of Labor Unions in the Struggle for Life*; *The Logical and Legal Bases of the Conflict of Laws* 470 *et seq.*; *cf. The Utility of Jurisprudence in the Solution* of *Legal Problems.*

CORBIN, A. L.: (*The Law and the Judges*); *Contracts for the Benefit of Third Persons.*

FRANCIS, J.: (*Domicil of a Corporation* 335 *et seq.*); *none located.*

FRANK, J.: (LAW AND THE MODERN MIND c. III; 104–05, and throughout); see *ibid.* at 110, 144–47, 170–01, calling for such testing; and c. XII, making a beginning at investigation.

GREEN, L.: (JUDGE AND JURY *passim*); *ibid. passim.*

HUTCHESON, J. C.: (*The Judgment Intuitive — The Function of the "Hunch" in Judicial Decisions*); *ibid. passim.*

KLAUS, S.: (*Introduction* to EX PARTE MILLIGAN 54 *et seq.*); *Sale, Agency and Price Maintenance.*

LLEWELLYN, K. N.: (THE BRAMBLE BUSH cc. II–V); CASES AND MATERIALS ON THE LAW OF SALES 336, 341–42, 573; PRÄJUDIZIENRECHT u. RECHTSPRECHUNG IN AMERIKA.

MOORE, U.: (with Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* 561, 566–67); *ibid.* at 381 *et seq.*

OLIPHANT, H.: (with Hewitt, *Introduction* to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES); *Trade Associations and the Law.*

PATTERSON, E. W.: (*Can Law be Scientific?* 135); *The Apportionment of Business Risks Through Legal Devices*; *Hedging and Wagering on Produce Exchanges.*

POWELL, T. R.: (*The Logic and Rhetoric of Constitutional Law passim*); *The Business Situs of Credits.*

RADIN, M.: (*The Theory of Judicial Decision: Or How Judges Think*); *Statutory Interpretation* (1930) 43 HARV. L. REV. 863.

STURGES, W. A.: (*Unincorporated Associations as Parties to Actions* 397); *ibid.*; with S. O. Clark, *Legal Theory and Real Property Mortgages.*

TULIN, L. A.: (*The Role of Penalties in Criminal Law* 1059), but the paper itself builds the foundation.

YNTEMA, H. E.: (*The Hornbook Method and the Conflict of Laws* 480 *et seq.*); *none located*; the Ohio Study may be considered pertinent.

In addition we note as pertinent studies: Douglas, *Vicarious Liability and Administration of Risk*; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, though no full theoretical discussion of the judicial process by these writers has been located. We recall nothing by Clark in either field; he has worked in both.

SUMMARY: (a) Supporting: Perhaps Bingham, Francis, Yntema: 3; (b) Colorable: None; (c) Negating: 16; (d) No evidence noted: 1.

Point 10

Pound, *supra* note 1, at 708: "Many of the new juristic realists conceive of law as *a body of devices for the purposes of business instead of as a body of means toward general social ends.* They put *the whole emphasis* on the exigencies of one phase of the economic order. To them *the significant feature* of law is as a body of devices for enabling business and industry to achieve certain purposes. *They give us a juristic version of what I have called the entrepreneur attitude toward law . . .* this program of means of enabling business organizations to function and business plans to go forward." (Italics ours).

Interpretation. We understand this passage to attribute to many of the realists (1) an exclusive interest in the business aspects of law; (2) such an interest from the standpoint of the enterpriser, as distinguished from such an interest from the standpoint of society as a whole.

Features of negation will be found (a) in non-business interests; (b) in an interest in business or industrial problems from the angle of social policy and critique of the law with an eye to making business or industry serve general needs. We set on one side the non-business lawyers in the group

under consideration, as not being contemplated: Bingham, Clark, Cook, Green, Hutcheson, Lorenzen, Powell, Radin, Tulin, Yntema. The material cited under Appendix I is enough to show the inapplicability of the description to them. As to the business lawyers, the test is in whether they have done work which does *not* fit the description.

Corbin in *Contracts for the Benefit of Third Persons* is as much concerned with beneficiaries inside the family as *Third Parties as Beneficiaries of Contractor's Surety Bonds*, is with business; and the latter takes (as always) the base-line of policy-judgment of not the enterpriser, but the public interest. *Cf. The Law and the Judges.* Douglas, in all three works cited, is concerned expressly and persistently with the social bearings of the problems. Francis (*Domicil of a Corporation*) manifests a major interest in jurisprudence, but does not touch general policy; neither does that paper support the Dean's position. Frank's whole zeal is for justice and the improvement of its administration. Klaus in *Introduction* to EX PARTE MILLIGAN, *Introduction* to PEOPLE V. MOLINEUX is engaged in the study of constitutional and criminal law. Llewellyn (*Free Speech in Time of Peace*; *Law Observance and Law Enforcement*; THE BRAMBLE BUSH cc. VIII, X; *What Price Contract? — An Essay in Perspective*) seems hardly bound to the enterpriser point of view. Moore (*The Rational Basis of Legal Institutions*; with Rosenberg and Klaus supervising editor of the AMERICAN TRIALS) carries his interests into cultural anthropology, applied to law; but in most of his work stresses investigation of practice, with the suggestion that norms of (not for) decision will derive from norms of action. Oliphant (*Trade Associations and the Law* 383; *A Return to Stare Decisis* 160, drawing in family, political, constitutional and law administration questions) displays interests both wider than business and critical of the enterpriser. Patterson (*Equitable Relief for Unilateral Mistake* 880) remarks: "Except on *a priori* grounds it is difficult to see why only economic behavior is significant, though such is the inference to be drawn from the decisions," and ranges in *Can Law Be Scientific?* and THE INSURANCE COMMISSIONER (1927) into control over business. Sturges may lend color to the Dean's position.

Of the ten commercial lawyers in our group, one (Sturges) may support; one (Moore) may give colorable support; one (Francis) shows nothing to sustain the Dean's positive allegation; and seven, though some of their specialized work in the business field has proceeded on business premises, have definitely shown their wider-than-enterpriser point of view.[1]

Point 11

Pound, *supra* note 1, at 697: "After the actualities of the legal order have been observed and recorded, it remains to do something with them."

"Let it be repeated. Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law."[1] *Id.* at 700.

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[1] This limitation to what is printed in the man's own name leads to curious results, in some cases: *Cf.* the omission of Oliphant's interest in family law (somewhat noted, JACOBS AND ANGELL, A RESEARCH IN FAMILY LAW (1930) 8) and in procedural reform (pending studies); or of Moore's work on the Committee on Amendment of the law.

[1] The central position that "faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law," needs definition at three points. (1) Most realists would insist on extending the portrayal *beyond these officials* into both the societal background and the societal effects of their action. (2) Most realists would insist upon the need for "significantly" classifying and arranging descriptive material and for a constant quest for regularities, sequences,

"They [statistics] are expected also to show how justice must (in a psychological sense) be administered, and so to dispense with the question how it ought to be administered. . . . Inclined to seek exactness by excluding this hard problem [of Ought] from jurisprudence altogether." *Id.* at 703.

Interpretation. We understand the above passages and the tone of the Dean's article as a whole to indicate that the realists are intent upon description of the actualities of law *to the substantial exclusion of interest in determining what Ought to be done by way of law.*

(a) *Supporting:* None.

(b) *Colorable:* CORBIN, *Contracts for the Benefit of Third Persons* 13: "In so far as there is uniformity in decision and application there is law. . . . The rules are merely a statement of the uniformity of the stream."

Book Review (1928) 38 YALE L. J. 270: "The judges' uniformities of action constitute the 'principles' of which that law is composed." But see Corbin's work in restating the law for the American Law Institute, and the tone and emphasis of any of his writings. *E.g., Third Parties as Beneficiaries of Contractors' Surety Bonds* 15: "The words reasonably permit it, *and social policy approves it.*" (Italics ours.) See especially *The Law and the Judges*, in regard to the wilful judge. *Rebutted.*

LLEWELLYN: Afterglow of such a paper as *A Realistic Jurisprudence — The Next Step*, insisting on the study of facts as the center of needed work. (But *cf. ibid.* at 442, 446, 463, n.12.) *The Conditions for and the Aims and Methods of Legal Research* 670: "So often in the past, such results have in due course made affairs more manageable than before. That, however, is as little an immediate concern of the scientist as is the dogmatic or moral 'rightness' or 'wrongness' of the phenomena he is observing." But surely the emphasis here is on "immediate." And compare *ibid.* at 671: "[Lawyer or legal scientist] will do well in his research *and his action* to mark off what he knows from what he believes, *to separate his legal science from his legal prudence . . .*" with the note: ". . . Of course, too, a technical expert sometimes develops peculiar intuitions for policy in his field. *Both these matters are so clear and familiar as to require no emphasis.*" And compare the material cited below. *Rebutted.*

OLIPHANT, *A Return to Stare Decisis* 73: "One can embrace skeptical empiricism as a method of work without embracing it as a philosophy of life."

"Unless the common law is to be capricious, it must lag a bit. It must lag enough for the fitful actions of men to disclose trends of customary practice." *Id.* at 76. Even if this passage be not read as expressing a normative judgment, see the whole tone of *Trade Associations and the Law*, and of *Mutuality of Obligation in Bilateral Contracts at Law, e.g.*, at 1005, n.16, 1000, n.8: "The writer is opposed to the proposed Uniform Obligations Act, which he believes is a rash over-generalization in the opposite direction since it overlooks the beneficent effects of the doctrine of consideration one of which is

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"causal relations," in the phenomena observed. (3) Many, if not most, would urge that the *science* of law, *as distinct from either the practical art or the relevant social philosophy* (both of which we understand the Dean to include in "science"), would not be concerned with ethical evaluations, but at the most with evaluations of the adequacy of particular means to achieve ends either assumed or given. Resulting propositions would take a form similar to this: if X be the end sought, the legal rule or institution Y is (or is not) reasonably adapted to its accomplishment. The *philosophy* would wrestle with the *desirability* of the end X; and the *art* would wrestle with what to do next, pending disputes of philosophers and inquiries of scientists.

We do not, however, understand the Dean to be addressing himself here to these issues. And our concern is to test whether the *implication that realists are not concerned with what ideals and objectives in the law should be*, will hold.

that it acts as a check upon over-reaching by those possessing superior bargaining power." See also *A Return to Stare Decisis* 159: "The decision of a particular case by a thoughtful scholar is to be preferred to that by a poorly trained judge. . . ." *Rebutted.*

(c) *Negating:* [2] KLAUS: *Identification of the Holder and Tender of Receipt on the Counter Presentation of Checks* 283: "What standard pattern of conduct on the part of banks do we desire to set up? The second question, what are the sanctions, legal or non-legal, direct or non-direct, which under all the circumstances, it is best to impose in order to enforce the standard chosen?"

RADIN, *Legal Realism* (1931) 31 COL. L. REV. 825: "They cannot be realists unless they are well aware either as judges or as critics of judges, that the business of judgment is to decide between a better and a worse readjustment of the human relations disturbed by an event, and that the terms better or worse imply an evaluation and a standard."

YNTEMA, *The Rational Basis of Legal Science* (1931) 31 COL. L. REV. 925, 935: "The scientific movement in law in this country is obscured by its empirical devices, if there be not seen beneath them the quest of science to ascertain justice." Book Review 142.

SUMMARY: (a) Supporting: None; (b) Colorable: (i) Unrebutted: None; (ii) Rebutted: 3; (c) Negating: 17; (d) No evidence noted: None.

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[2] Compare also in negation: Bingham, *What is the Law?* 93; Cook, especially *The Logical and Legal Bases of the Conflict of Laws* 463, 467, 480, 488; *Scientific Method and the Law* 231; Douglas, *Vicarious Liability and Administration of Risk* 584–85, 594, 598; Frank, LAW AND THE MODERN MIND 119, 134, 168, 243, 281; Green, JUDGE AND JURY 225; Hutcheson, *The Judgment Intuitive — The Function of the "Hunch" in Judicial Decisions passim*; Klaus, *Sale, Agency and Price Maintenance* 333; Moore, *The Rational Basis of Legal Institutions* 611, 612; *An Institutional Approach to the Law of Commercial Banking* 703 ("The *central* problem"); Patterson, *Hedging and Wagering on Produce Exchanges* 877, 879, 884; *The Transfer of Insured Property in German and American Law* 234; *The Apportionment of Business Risks Through Legal Devices* 359; Powell, *The Study of Moral Judgments by the Case Method* 484, 493; *Law as a Cultural Study passim*; *Law as a University Study* 121; *The Business Situs of Credits* 19 *et seq.*; Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing passim*; *Unincorporated Associations as Parties to Actions passim*; Llewellyn, *Free Speech in Time of Peace*; *What Price Contract — An Essay in Perspective* 732, 733; *A Realist Jurisprudence — The Next Step* 446, n.12, 463, 477; CASES AND MATERIALS ON THE LAW OF SALES; *The Effect of Legal Institutions on Economics* 670, 674, 676; Clark, CODE PLEADING *passim*; Lorenzen, *The Statute of Frauds and the Conflict of Laws* 311, 324, 327, 334, 337, *Causa and Consideration in the Law of Contracts* 643; Tulin, *The Role of Penalties in Criminal Law* 1052, 1059, 1069. It does not follow from the specific citations that the *major* emphasis of all of these men either in their writing or in their doing rests on the side of ethical evaluation or reform. In any particular case or paper the emphasis for the moment is often upon the work of getting the facts straight, a necessary preliminary to intelligent critique. What is contended is that *within the limits consistent with specialization of effort* each of them has *demonstrated* his awareness of, and interest in, such problems.

See also Francis, *Do Some of the Major Postulates of the Law of Bills and Notes Need Re-examination* (1928) 14 CORN. L. Q. 41.