Law as a Social Discipline

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LAW AS A SOCIAL DISCIPLINE*

Regardless of what may happen to lawyers or any system of law, or indeed any institution, legal, political or economic, men will always be concerned with justice. The most profound hopes, wishes and dreams of the human race are inextricably interwoven with justice. Ever since the curtain rose in the fascinating drama of human struggle, competition and achievement, the ideal of justice has been the goal of an unbounded ambition. That most distinguished scientist, Dr. A. J. Carlson, concluded a speech on Science and the Supernatural, at the University of Chicago, by saying:

"...there remains the endeavor towards understanding, the hunger for beauty, the urge for justice, these three, and the greatest of the three is justice."

But I do not wish to invite any invidious comparisons with the arts and sciences. The artist has brought beauty and grace into being and has enriched us all; the scientist has courageously penetrated into dark recesses with no little danger to himself, and has been the benefactor of all humanity. Indeed it is impossible to separate the various intellectual and artistic activities into air-tight, separate compartments. It is no mere accident that Einstein is an accomplished violinist; that Goethe was an outstanding scientist of his day; while Leonardo da Vinci remains a great, universal genius of all time. The scientist when he conceives of a new theory or law is at the same time an artist; the artist who translates his bounding imagination into a particular medium becomes perforce a scientist. Can anyone doubt that Justice Oliver Wendell Holmes, or indeed, any great jurist is both artist and scientist? It is all a matter of creation, whatever the medium be.

*An address delivered at the annual meeting of the Fourteenth District of the Minnesota State Bar Assn., at Warren, Minn., on May 2, 1932.

1 Science and the Supernatural, in the Feb. 27, 1931, issue of Science.

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Accordingly, if you ask me why I am concerned with law as a social discipline, I answer simply, that in my opinion, the social disciplines provide the most fundamental approach to an understanding and attainment of justice. But I am immediately concerned with law, and law does not mean, nor does it always coincide with justice. Law is organized coercion put forth by the group on behalf of one or more individuals and against one or more individuals. By social discipline I mean social science in its broadest sense, using the term as it appears in the *Encyclopedia of the Social Sciences*.

If I be asked just exactly what field does law as a social discipline include, I shall be at a loss to answer. So would the sociologist, the political scientist, and even the exact scientist with reference to their fields. Many political economists have of late become mathematicians who have carried out the postulates of the classical school to their logical limits. Newer and presumably more significant developments have turned other economists to psychology and history and towards the construction of realistic, institutional economics. The political scientist was long ago interested in psychology, law and philosophy. In the more exact sciences, biologists have long been chemists, among other things. There is no pure and certainly no simple chemist; they have all become physicists to some extent, and the physicist, alas, that former pillar of solidity, bids well to become metaphysician.

General Smuts and others have carried the thought farther, making it clear that in their minds the implications from the principle of uncertainty, the relativity and *quantum* theories are, that no permanent demarcation exists between the animate and the material worlds. I leave it to each one to decide for himself whether this be science, hope or hallucination.

It does seem reasonable to conclude that the long interaction between the various social sciences will in the near future eliminate existing classifications. Each researcher will be armed with a knowledge of all the methods and techniques in every field and

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2 Now being published by The Macmillan Co.; several volumes have already appeared.

3 See his *Scientific World-Picture of To-day* in *Science*, Sept. 25, 1931.
may invent new ones. He will also have a specialized knowledge about particular data and will be interested in certain problems.

In law, practically all of the social science techniques are being used on data having jural significance. The case method introduced by Langdell of Harvard is still the basic method of instruction, though numerous departures from it are being made in many places. Familiarity with this method and his entire training make the jurist-social scientist unquestionably the most fitted to use it with proper discrimination. The value of statistics is becoming more and more appreciated. The questionnaire and the survey are being used chiefly in criminal investigations. Psycho-analysis is being used only to a minor extent in the criminal law. The historical approach has of course, long been in vogue.

Let us examine in a most general way the relationship between some of the social sciences and law. With the very dawn of man's social life, law appeared. The most primitive tribe has need for order as it has need for the preservation of life. Accordingly just as the geologist can write the history of the earth from an examination of various natural phenomena, so should it be possible for the anthropologist to examine various bodies of laws and make deductions regarding the sort of group, the time, the organization of the group into families or otherwise, etc. Anthropology is valuable because of the light it casts upon the nature of law itself. Whereas it was long fashionable to identify law with a political organ, i.e., the state—and indeed, the entire analytical school of jurisprudence is founded upon this consideration—the anthropologists notably Malinowski 4 and Lowie, 5 have shown that primitive groups which are not sufficiently organized to have what we call a "state," nevertheless have definite, conscious, organized methods for enforcing group rules. It is a sufficiently demarked and conscious type of social control to be termed "law." In other directions the work of the anthropologist is extremely valuable. With reference to personal and real property, and the possession, ownership and descent of it, valuable contributions have been made. Marriage and divorce, the custody

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4 Crime and Custom in Savage Society (1926), Harcourt, Brace & Co.
5 The Origin of the State (1927), Harcourt, Brace & Co.
of and authority over children have been made significant. Primitive rules of barter and exchange, promises involved and the ways of sanction are important to a full understanding of our own history and law of contract.

With regard to all of these questions, sociology also has made valuable contributions. The work of Kohler and Eugen Ehrlich in Germany, and Pound, Oliphant, Llewellyn, and others in this country stands out in this connection. In sociology the idea of social control is perhaps the concept of major importance for law. In a sense all law is a type of social control. Here the jurist is concerned equally with the sociologist in studying the relationship between mores and folkways, and law. In this connection the work of Ross and more especially that of Sumner is of great importance. The relationship between these fields and the origin and development of morals is suggestive. For one thing it leads the observer to understand the functions of and limitations upon the various methods of social control. The influence of public opinion is obvious. Certain things are frowned upon and discouraged by the parent, the teacher, the minister, the press, and the courts. It is a nice problem to comprehend the value of and limitations upon each type of social control. One of the commonest mistakes is to look to law as though it were the only form of social control. Anti-social conduct is due much more to limited training, family disorganization, economic want, a disinterested or unintelligent public opinion, and failure of churches to keep abreast of the times, than to the law. I am not suggesting in the least any criticism other than the objective comment that law is only one form of social control.

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* Philosophy of Law, Vol. XII, in the Modern Legal Philosophy Series.
* Grundlegung des Soziologie des Rechts.
* See the last chapter in his Interpretations of Legal History; his article, The Scope and Purposes of Sociological Jurisprudence in Volumes 24 and 25 Harv. Law Rev., and other articles by Pound too numerous to list here.
* See, for example, his Introduction to Rutt's From the Physical to the Social Sciences (1929), The Johns Hopkins Press; and Facts, Opinions and Value-Judgments (1932), 10 Texas L. R. 128.
* His Social Control is a general treatment of the subject.
* Folkways, though old, contains an enormous amount of valuable data.
The husband who will not permit his wife to join the local bridge club; the boy who copies in examination; the business man who abuses his employees; the college boy who refuses to wear a hat—all of these must be controlled by methods other than legal ones.

Other important contributions from sociology that come to mind are—studies of family disorganization; studies of the gang and of the factors that cause delinquency, particularly that of children, are of the utmost importance in law, especially in the work of the juvenile courts. The juvenile court, in many ways the outstanding contribution of the United States to the administration of criminal law, is based upon entirely unique conceptions, the outgrowth, largely of progress in the social sciences. The juvenile is not charged with the commission of a crime at all. (I am speaking here of the juvenile court as it is organized in the large cities.) The child is brought into court only after some social worker has attempted to adjust the delinquency through contact with teacher and parent. The judge in the court is usually a broad-minded kindly individual, sometimes a woman, for in juvenile court work the woman lawyer is especially valuable. The social worker gives a history of the case; there is frequently a psychological test and if necessary a psychiatrist is consulted. The State's Attorney is not interested in a conviction here. The inquiry is concerned with the welfare of the child as a ward of the state, and he is generally placed in a new environment or appropriate institution. Here we have individualization par excellence, with the social sciences drawn upon to the fullest possible extent. It is all immensely important, not only for the children, but for all of society for many reasons. To mention one—latest statistics show that the overwhelming number of adult, habitual criminals have records of juvenile delinquency. Even more important, it is possible that the juvenile court work will be most significant with reference to suggesting the possibility of similar treatment of criminality in general. In the solution of this vast problem, the sociologist is handicapped by his lack of legal training. The work must accordingly be done by the lawyer who is also a social scientist.

It is relevant here to mention the inter-relationship between law and the general field of criminology. Many problems are
common to both. Evidence in mitigation may be introduced, and this opens almost the entire field of criminology to the lawyer. Some matters are of particular value to the prosecution and the police such as criminal identification by means of the finger print, photography, the Bertillon and other measurements, moulage—the making of a cast to preserve a foot-print, a tooth mark or other temporary form; chemical and medical analyses, and ballistics.\textsuperscript{12a}

Psychological tests have been introduced in some cases. In the law of wills with regard to mental capacity of the testator, with regard to responsibility for crimes and in countless other situations the lawyer must be a psychologist. Law was behavioristic in a great measure long before Watson was ever heard of. The act, by and large, is made the basis for inferring intent, although general circumstances are considered with reference to motives, premeditation and other concepts. In contracts the law is clear that there must be "a meeting of the minds." Yet it is the conduct of the parties that absolutely determines this question. It is what a reasonable observer would conclude and not what goes on inside of the parties' heads that counts. Similarly in the criminal law it is said that there can be no crime without a guilty mind—a \textit{mens rea}, but the \textit{mens rea} is inferred from behavior and against a background of social convention. Thus an Indian who believed in the existence of evil spirits clothed in human flesh thought he saw one and shot it, and was found guilty of homicide.\textsuperscript{13} The concept of the "reasonable man" which runs through the entire law is the creation of a mythical person in order to formulate an objective standard whereby to judge conduct.

Unfortunately again, the psychologist cannot be depended upon to supply the needs of the lawyer because he does not understand legal concepts or requirements.\textsuperscript{14} Some of the most valuable data applicable to law is being developed by the psychiatrists.

\textsuperscript{12a} Identification of fire-arms and bullets by means of microscopic examination.

\textsuperscript{13} Regina v. Machekequonabe (1896), 28 Ont. 309.

\textsuperscript{14} A recent book, \textit{Legal Psychology} (1931), by Prof. H. E. Burt, is not of great value, but deserves notice as a beginning in the right direction.
The psycho-analysts too, are making valuable contributions.\textsuperscript{15} Regardless of their frequent dogmatic assertions of theory as fact, their work is important for the following reasons: they investigate the life history of the individual in much greater detail than any other group; second, their approach is genetic; and third, they deal with the whole personality. But one notes much impatience with the law on the part of the psychiatrists, and a brief comment is accordingly in point. First, it must be clear to everyone but a narrow specialist, that the very fact that there are a dozen different schools of psychology is evidence that no one school has an exclusive claim to adoption by the courts. Indeed the diametrically opposed views of expert psychiatrists who are called upon to testify in court present a pathetic spectacle.

Permit me to state my conception of the fundamental difficulty and to indicate a way out. Psychiatry as a branch of medicine is particularly concerned with the individual organism while law cannot be conceived of apart from human relationships. The psychiatrist, like all doctors is concerned with his patient; the rest of the world exists only insofar as it indicates the cause of the disease and the cure of his patient. The jurist on the other hand, while concerned with the individual, is interested in him as a member of a group, that is as a person in relation to other persons. Here, it is suggested, are the crossroads where psychiatry and law converge and also depart. And it is the failure of the psychiatrist to comprehend the above distinction which retards progress in the adoption of psychiatric data in legal proceedings. However the problem is by no means a simple one. For a great many cases of mental disease are social in origin. That is to say that in many respects psychiatry is a branch of social psychology. The neurosis and the complex are social phenomena. Diagnosis in largely concerned with social causes, with conflict within some group, with maladjustment. All of these, it is true bear upon diagnosis, and if the distinction suggested above (the doctor's concern only for his patient) could be maintained with regard to therapy,\textsuperscript{36}

\textsuperscript{36} Perhaps the most interesting, and in many ways the most valuable book to appear is \textit{The Criminal, the Judge and the Public}, by ALEXANDER and STAUB (1931), The Macmillan Co.
the problem would still be simple. But therapy is also social. Conflict must be eliminated, the individual must be adjusted to his environment. What then remains of the distinction made? A matter of emphasis or of evaluation of ends to be served. Law and psychiatry join hands then, insofar as they both are interested in the individual; when law leaves off and interests itself primarily in others, it must part company with psychiatry and the underlying motif of that field. And this happens when for example, in the criminal law, individualization of punishment gives way to concern for the safety and welfare of society, and the law aims at deterrence, and conceivably even sacrifices the prisoner at the bar to the greater cause of suppressing criminality—a theory, which of course, has not been demonstrated. I have perhaps presented a somewhat exaggerated picture in order to develop my point. For I have no doubt that the jurist who has some understanding of psychiatry is thereby much better fitted to go about his business and effectuate the purposes he values. Indeed it will be found upon investigation, that while the law books retain their antiquated ideas about “insanity,” and “responsibility,” yet in the actual administration of the law by intelligent judges everywhere, the reputable psychiatrist is consulted and listened to with much respect. And the current collaboration of the American Bar Association, the Association of American Law Schools, the Medical and Psychiatric Associations, is even now clearing the path to a more intelligent and effective utilization of psychiatry in law.16

That law is some sort of function of economic institutions cannot be doubted. Thus it is impossible for a lawyer to understand the law of real property unless he has a thorough detailed knowledge of the feudal system. The law of contracts, sales, bills and notes, corporations, public utilities and many other broad fields cannot be understood without knowing the economic background of history and theory that gave rise to these bodies of law. Even more than the real estate practitioner, the so-called “corporation lawyer” must have an intimate knowledge of finance and

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business in general. Economics and law interlock firmly and at many points; and it is accordingly not surprising that traditional methods of presenting the commercial law are being revised along functional lines to conform to actual business practices and organization.

Of all the social disciplines, history and philosophy have in many respects been most beneficial in law, no doubt because they have been longest established. I have already touched upon the relationship of law to economic history. But just as the present status of an individual, a nation, a disease or an idea cannot be understood without a knowledge of their origin and development, so it is impossible to understand present rules of law and procedure, without knowing their sources. The genetic approach is very fundamental in every field; and the historical analysis of a rule or an institution is I suppose, one of two or three types of explanation that satisfies the human mind. Thus the distinction between torts and crimes is relatively recent. In the general field of liability for wrong there was originally absolute responsibility regardless of any violation of legal duty. The risk was placed upon action of any kind, and if the actor, his servant or his cattle without any fault of his, caused damage, liability followed. With the passage of time the idea of blame came to be recognized, and the standard of due care and negligence came into our law. This was due in part to an advance in culture, and in a lesser degree to the influence of the church which associated sin and culpability in secular affairs. In very recent years we have had a most interesting return to the doctrine of liability without fault. Workmen's Compensation is an example where payment is made regardless of due care on the part of the employer or contributory negligence on the part of the employee. It has been suggested, possibly as an offshoot partly of ideas of determinism, partly of conceptions of an alleged greater justice, that the idea of liability without fault should be extended generally to all personal injuries, the loss to be covered by insurance. In other words these losses, it is urged, are of social concern, and it is therefore desirable to distribute the burden generally.
An understanding of the development of the common law in competition with the various local laws and tribunals, and particularly of the procedure and of the organization and growth of the national courts is essential to an understanding of present-day law and procedure. Moreover it is invaluable as a prerequisite to intelligent change. It hardly supports the awful regard of many lawyers for existing law and procedure; on the contrary, it lends weight to the attitude of a western jurist who is quoted by Judge L. R. Yankwich in the current Southern California Law Review as follows 17:—

“I can only hope for a day when courts of justice will decline to dig among the tombs of a dead past for ancient and obsolete precedent, particularly a precedent adopted in a day when a majority of the people believed the insane to be possessed of the devil, and when governments hung them as witches; when they will refuse to be shackled by a procedure that finds neither reason nor justice in our day and time; when the law will be treated as a philosophy to be applied to the ever changing conditions of man, and not a straight-jacket with no leeway for the exercise of common justice.

One who opposes all change in present legal procedure needs to examine the history of the subject. The relationship of the rules of evidence to the jury and its control by the judge, of the jury itself to the Fourth Lateran Council which prohibited the clergy from further participation in the ordeal, the theretofore accepted form of trial—all of this is a story of one piece.

Ordeals and compurgation were the Anglo-Saxon forms of trial. Compurgation was the taking of oath by a number of witnesses, not to the correctness of the facts but to the creditability of the accused. It was really testimony of good reputation. This method fell into disrepute for reasons that can readily be surmised.

The Normans introduced wager of battle, where the two parties, or later, their hired champions fought it out. Presumably Providence would be on the side of the righteous. But this

method was not obligatory upon the Anglo-Saxons; besides, it was confined to civil disputes.

The remaining method, the ordeal, was the general form of trial. There were many types of ordeal, such as swallowing a bit of food in which was concealed a feather, or carrying a hot iron a number of paces. If the hand healed in a specified time, the accused was not guilty. Another was the water ordeal. The accused was bound and put into the water; if he did not sink he was guilty; if he did sink, that is, if the water “received” him he was innocent and I suppose, would be fished out before he drowned. These methods of trial seem barbaric to us who are accustomed to decisions upon the merits based upon an inquiry into the facts, although it has been suggested that our own form of trial is really a modern wager of battle. And, when it is remembered that the clergy participated in the ordeals in a customary ceremonial, it will be understood that this procedure was based upon the belief in divine intervention and manifestation by appropriate means of the desired outcome of the case. The Fourth Lateran Council in 1215 put an end to the ordeal, and the jury developed. But there were no ready made rules of evidence to direct judge and jury. Indeed the rules of evidence did not take on their present form until about one hundred and fifty years ago. No one has a finer knowledge or appreciation of our legal history or traditions than Oliver Wendell Holmes. Yet he has stated 18:

“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

If there is any doubt about the value of philosophy in some fields, it is clear that in law, philosophy is of immediate and practical importance. The layman has frequently understood this better than the lawyer himself, due in part, to the fact that legal

18 The Path of the Law, in Holmes, Collected Legal Papers, at 187.
decisions are set forth in an artificial form which disguises the premises that determine the result. The lawyer has, until recently, accepted the formula that "ours is a government of law and not men" at face value. The layman, free from any technical obsessions, has thought otherwise. Thus Roosevelt, in his message to Congress, Dec. 8, 1906, stated 19:

"The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all lawmaking. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions."

When the appointment of Holmes to the Supreme Court was recommended to Roosevelt, he was anxious to know about Holmes' "point of view." 20 Charles Beard and many others have interpreted all of constitutional law in terms of the social and political philosophies of the various justices who sat in the Supreme Court. The recent successful opposition of labor to the appointment of Judge Parker shows that this attitude is general among the laity. Accordingly there can be no more significant approach for anyone who wishes to understand the "law behind the law," to borrow an apt phrase, than comes from the correlation of philosophy and law. Philosophy has been more than a mere background against which the pattern of the law may conveniently be placed. It has been a tool in the hands of scholars and jurists throughout the ages, used on the one hand to preserve the status quo, and on the other to effectuate an inevitable series of changes

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19 Quoted by Cardozo in The Nature of the Judicial Process, at 171.
20 "Now I should like to know," he said, "that Judge Holmes was in entire sympathy with our views. . . ." Quoted by Beard in The Dear Old Constitution, which appeared in Harpers about a year ago.
in a peaceful, orderly fashion. The range of philosophic thought has been set forth by Dean Pound as follows:  

"Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability. Accordingly the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law, affording no scope for individual wilfulness, with the idea of change and growth and making of new law; how to unify the theory of law with the theory of making law and to unify the system of legal justice with the facts of administration of justice by magistrates."

Throughout all of history, philosophers have been concerned with law and justice. The greatest of the Greeks have made immortal contributions to the subject in a language of ineffable beauty. The Republic of Plato is an inquiry into social justice, and the dialogue with Thrasymachus remains a challenge to the modern jurist. Relativity is the order of our day in all departments, but if one would have a thorough application of the thought to justice and law, he must go to Aristotle for it. To him justice was equality among equals; to those unlike in circumstances there should be unlike treatment according to merit, service, worth or guilt. At present we might urge a democratic extension of Aristotle’s concept, but the kernel of his philosophy of law remains valuable. For a great many years following the Greeks, the dominant idea was that of “natural law,” or “divine,” or “higher law” as it was variously called. Hegel took up the

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thought and developed law as the evolution of right. The idea of freedom came with LOCKE and ROUSSEAU and their American adherents, who in turn, inspired the law-makers of their day and many succeeding ones. The modern philosophy of law may be said to have started in the latter part of the 19th Century, with VON JHERING who shifted the entire emphasis from the question "What is the nature of law?" to "What is the purpose or end of law?"  

I should leave a most incomplete and distorted picture of the philosophy of law, if I gave the impression that only an occasional philosopher concerned himself with the subject. As a matter of fact we can go through the whole history of philosophic thought and find in every time and place the utmost concern with law and legal ideas. For law is as broad as life itself and as old as the age of man. For purposes of convenience to the lawyer, these various philosophies of law may be grouped into four schools: the philosophical, the historical, the analytical, and the sociological.  

The analytical school deals with mature systems of law; law is defined as a command of the state, laid down by the courts and enforced by the political power of society. Legislation is the typical example of law for the analytical jurist. AUSTIN, HOLLAND and SALMOND are the outstanding European exponents of this school. In this country HOHFELD has surpassed them all in the nicety of his analysis.

The historical school was concerned with the past, with comparative legal systems and institutions. VON SAVIGNY stands out as the great founder of this school, although SIR HENRY MAINE made the viewpoint part of Anglo-American jurisprudence. To them law was found, not made. Law was determined by human experience, social, economic and political forces, and not by independent conscious human effort. As SAVIGNY put it "all law arises from custom; that is, it is produced first by custom and popular belief, then through the course of judicial decision, hence, above all, through silent inner forces, and not through the arbitrary will

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22 Law as a Means to an End, Vol. V. The Modern Legal Philosophy Series.
23 I follow DEAN POUND very closely here just as he has outlined the field in his articles, supra note 8.
of a law maker." Insofar as this school emphasized custom, public opinion, social and economic conditions, and social standards of justice, it seems to me that they made an invaluable contribution to law and called attention to the type of data which must be utilized if ever a science of law is to be had.

The philosophical school set up an ideal, an ethical standard, a natural law to which, it was said, law must conform. It is, of course, apparent that these various schools of law did not exist in air-tight compartments. The various ideas were fused into one another. They still exist today in various modern garbs. I have already intimated that the historical school is tremendously important for a modern study of law. Likewise the philosophical school which now emphasizes a limited sort of natural law is by no means passé. Indeed in some fields of law such as constitutional law, the ideas of this school are still a dominant force.

Finally, it remains to consider the sociological school, by and large the most important in this country. The emphasis of Von Jhering upon the end of law may be taken as the beginning of this school. This school received its greatest impetus from the words of Kohler, who has been called by Pound, "without question the first of living jurists." Kohler treated law as the product of the culture of a people; he differed with Savigny and thought that conscious effort does play a part in law. Kohler was concerned with "how the law has developed in the course of history, and in connection with the history of culture—how culture has been conditioned by law, and how law has furthered the progress of culture. . . . The law cannot remain the same. It must accommodate itself to the progressing culture of the time and must be so fashioned as to express the growing demands of culture."

The sociological school as developed by its great American exponent Roscoe Pound is characterized as follows:—

"1. It is concerned with the study of actual social effects of legal institutions and doctrines.
"2. It emphasizes the need for scientific legislation based upon sociological investigations.
"3. It deals with the enforcement of law rather than with logical analysis and synthesis of concepts.
4. It investigates social, economic and psychological conditions as related to law.
5. It emphasizes individualization particularly in the administration of the criminal law.
6. Finally, it insists that law must be interpreted with reference to a social purpose or end to be served.

What is going on at present in this field of law as social science? I believe that in many ways law is now the most interesting of all the social sciences. Arnold of Yale has said in the current issue of the Harvard Law Review that there is going on "an enthusiastic search for eternal verities through new methodologies . . . (which) makes the law today the most fascinating of the social sciences." Frankfurter of Harvard has said:

"Our times may well come to be named, by future dealers in half-truths, The Tired Age. Disillusionment is a mood of fashion as much as a form of ennui after the war's great effort. Whatever the cause, our politics are devoid of ardor and social reform has lost its romance. Such being the mental climate, one would expect jurisprudence to be in the doldrums and to earn its title as the dreary science. Alas for these generalizations about the main currents of thought! The waters of law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy."

In a large measure the development of law as social science in this country has taken place in four eastern universities. The functional approach of Columbia professors has profoundly influenced the study of law; the sociological investigations at Yale are of abiding value; the work of Pound at Harvard, though relatively more conventional, is a dominant force; and the program of the Institute of Law at Johns Hopkins is one of the most ambitious in all contemporary social research. A word about the Institute to give you a picture of what is actually going on. Four

45 Harv. L. Rev. at 618.
men were selected to organize it. They are Leon Marshall, former dean of the Commerce School at Chicago; W. W. Cook, a physicist and student of Planck, who turned lawyer; Oliphant and Yntema, legal scholars trained in the social sciences. The outstanding project of the Institute to date has been a study of litigation in Ohio, a research costing hundreds of thousands of dollars. Cook has described the Institute's plan as follows:

"In the belief that the application of methods similar to those which scientists in other fields have so fruitfully used will yield a rich harvest in the legal field, the members of the Faculty of the Institute have attempted to plan the work of the Institute for the immediate future. They have assumed that the fundamental purpose of the Institute is to study as scientifically as may be law in action; to seek to determine whether or not our legal system is accomplishing the purposes for which it exists, and to the extent that the conclusion is that it is not, to ascertain both what the reasons for the failure are and what may be done to remedy the resulting evils. Notice that a fundamental assumption is—and here recall Galileo's experiment—that the only way to find out what anything does is to observe it in action and not to read supposedly authoritative books about it or to attempt by reasoning to deduce it from fundamental principles assumed to be fixed and given."

And Marshall has thus summed up their objectives:

"1. To study the trends of litigation, and to ascertain its human causes and effects.

"2. To study the machinery and the functioning of the various agencies and offices which directly and indirectly have to do with the administration of law.

"3. To learn reasons for delays, expense and uncertainty in litigation.

"4. To institute a permanent system of judicial records and statistics which will provide automatically information now secured after great labor.

"5. To detect the points at which changes in substantive law would contribute markedly to social justice.

\* \* Ind. L. Jour. at 116.
\*7 Ind. L. Jour., pp. 122-123.
“6. To do all this in close co-operation with the practical worker in the field and to turn the results over to practical administrators for utilization.”

Current movements in jurisprudence are closely related to contemporary thought. Just as social scientists generally have been comparing their fields with the exact sciences, so legal scholars have been asking:—is or can law be scientific? The principal objections raised have been the enormous range and variability of the phenomena dealt with; and the lack of control or recurrence of identical phenomena, and the consequent limitations upon predictability. In dealing with these objections, in law as elsewhere, the emphasis in the discussions has been upon methodology, and techniques. Cook of Johns Hopkins and Patterson of Columbia have discussed this problem most significantly.28

A second movement, in which Cook and Oliphant 29 have been leaders, although Dewey 30 and Morris Cohen 31 have contributed, deals with legal analysis. The function of and limitations upon logic as a tool in legal decision have been pointed out with the result that a much more sophisticated interpretation of cases is made possible.

Another though related movement has to do with the nature of the judicial process. Justice Cardozo in a brilliant little book has discussed the use of logic, history, custom and sociology as methods of deciding cases.82

Growing out of the discussions on judicial process, and inspired in great part by a number of lawyers and judges, is the current school of realists. As might be expected of realists, the adherents of this school have challenged many accepted views, including some of Dean Pound’s. The present emphasis upon particular studies, concrete factual situations and scientific techniques have made the struggle an inevitable one. In a fashion the battle is the old one between idealist and realist, the former in-

29 See Oliphant’s Introduction to Rueff, supra note 9.
30 Logical Method and Law (1924), 10 Corn. L. Q. 17.
31 The Place of Logic in the Law (1916), 29 Harv. L. Rev. 622.
32 The Nature of the Judicial Process (1922), Yale Press.
sisting upon the place in law of ethics and values, the latter concerning himself with behavior. While I should not, without denying the realism of Holmes, classify him with the current school, it is clear that he has been their great inspiration. His thesis that "the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law" has made the behavior of judges (and others) the principal interest of the realists. As outlined by Llewellyn of Columbia, the realist is characterized by the following:

1. The temporary divorce of Is and Ought for purposes of study.
2. A distrust of the theory that traditional, prescriptive rule formulations are the heavily operative factor in producing court decisions.
3. An insistence on evaluation of any part of law in terms of its effects.

Judges, lawyers, litigants and juries are all human beings. Law deals with behavior of motivated, propelled, determined human beings. Be that as it may it is impossible to deny that values have become part and parcel of modern jurisprudence, and that the utility of immediate social purposes is granted.

If I have touched upon too many subjects, I can only plead in justification, what Holmes put so eloquently when he said:

"The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable. All that

See Pound, The Call for a Realist Jurisprudence, 45 Harv. L. Rev. 697-711.

See Llewellyn, Some Realism About Realism—Responding to Dean Pound, 45 Harv. L. Rev. 1222-1264. An excellent bibliography on the literature of contemporary realism in law is appended.

The Profession of the Law (1886), in Holmes, Collected Legal Papers, pp. 29-30.
life offers any man from which to start his thinking or his striving is a fact. And if this universe is one universe, if it is so far thinkable that you can pass in reason from one part of it to another, it does not matter very much what that fact is. For every fact leads to every other by the path of the air. Only men do not yet see how, always. And your business as thinkers is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe. If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all."

I have no doubt that it is not necessary for me to dwell, here, upon the immediate application of these thoughts to the practice of law. Lawyers were once the recognized intellectual leaders in their communities and should be anxious to regain that position. A keen feeling of moral responsibility is essential for this, and I am inclined to the view that it will result from an understanding of law as a social discipline rather than from the study merely of the canon of ethics.

But aside from obligations of any sort, there is a fascination in law as a social discipline. As Llewellyn puts it, "it is the land of high desire." One who has an understanding of law in this broader sense can appreciate the beautiful expression of Justice Holmes, who said, in speaking of the law 36:—

"And what a profession it is! No doubt everything is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—so share its passions, its battles, its despair, its triumphs, both as witness and actor?

"But that is not all. What a subject is this in which we are united—this abstraction called the Law, wherein as in a magic mirror, we see reflected, not only our own lives, but

36 The Law (1885), in Holmes, Collected Legal Papers at 26.
the lives of all men that have been! When I think on this majestic theme, my eyes dazzle.”

I leave it to your imagination to bound the limits of the work that needs to be done if law, the eternal guardian of life is to fulfill its mission. There is more than abiding interest and love of wisdom to encourage such culture. For it is out of these incursions into the thought of the ages that a higher and fuller measure of justice is achieved. It is by this contact with culture and chiefly with the social sciences that the jurist who none-the-less keeps his ear to the ground during his own days, and his finger on the pulse of his own times, creates a nobler and a wiser vision of justice. And in doing this, is he not fulfilling the highest hopes of humanity for whom justice will forever be the most distinctive, the most human and the most inspiring of human qualities?

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