Some New Ideas About Law

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Our discussion of something new will begin with the year 1345. In a complicated litigation over church property, one of the lawyers argued to the judges, “I think you will do as others have done in the same case, or else we do not know what the law is.” “It is the will of the judges,” replied Judge Hilary, but Chief Justice Stonore broke in, “No, law is that which is right.” Thus these old lawyers and judges made clear-cut the issue which still vexes us. Do judges make law, or do they merely discover the rules of justice which already exist somewhere or other?

According to one view, the law is like a great continent which the judges are gradually mapping out by their decisions. A wrong decision is simply a mistaken line in the map which can be rubbed out and the right line substituted. According to the view that judges make law, we can think of legal doctrines as like the beams of a skyscraper which the judges are gradually putting in place. If they set a beam wrong, they can take it down and lay it differently, but while it is up that beam is part of the skyscraper.

Or I can compare the judge to a slot machine into which the legal rules (either statutes or rules declared by previous judges) are dropped and out comes the decision. According to this theory, the main occupation of the judges is to discover the pertinent rules. They may be contained in statutes, which makes this task easy. If they are only to be found in prior judicial decisions, it is a somewhat harder job. Yet it is believed that a trained man, by studying a judicial opinion, can state with certainty the principle which guided the judge. If the student of the opinion is himself a judge, he can apply this principle to the facts in a new case before him. Similarly, a lawyer can use the same principle to advise a client how he

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*Address by Zechariah Chafee, Jr., Professor of Law at Harvard Law School, delivered before the Indiana State Bar Association at Lake Wawasee, Indiana, July 10, 1936.*
should transact his affairs, because future judges will find the same principle in the old case and apply it if a dispute should arise. Thus we have a theory of certain rules existing outside the minds of individual judges and discoverable by judges and lawyers.

This comfortable theory has become rather shaky during the last few years. Let us begin by examining the assumption that a rule can be discovered with certainty in a prior decision. For example, take the important decision of the United States Supreme Court in 1918, *International News Service v. Associated Press*, 248 U. S. 215. The Associated Press was obtaining the latest news from the war front in France and delivering this news to its member newspapers. Hearst was on bad terms with France so that the correspondents of the Hearst newspapers were prevented from getting war news directly. The agents of the Hearst News Service adopted the ingenious practice of copying war news from the bulletin boards and early editions of the Associated Press newspapers and telegraphing these items to the Hearst papers. Because of the convenient revolution of the earth, these telegrams reached the Pacific Coast several hours before the time they were dispatched from the Atlantic Coast and California Hearst newspapers would often get this war news on the streets before the Associated Press newspapers appeared. The Associated Press sued to enjoin the Hearst Agency from continuing this practice. The news was not protected by copyright. There was no pertinent statute and no prior decision close to the facts. The Supreme Court granted the injunction with a long, serious opinion. What single sure principle can be drawn from this decision to guide a judge in deciding a later case, or a lawyer in advising a client? The more we study the opinions in this case the more we see that the actual litigation was like a stone thrown into the water and sending out a series of concentric circles. What the Court actually did was to hold the Hearst Service to be subject to disagreeable physical consequences if it persisted in its conduct. Yet the decision must mean more than that this particular defendant can be coerced by this particular plaintiff. Going outward from the stone, we reach
the first circle and can say that the decision means that one
news gathering agency cannot imitate the news gathered by a
rival agency while that news is fresh. Or we can go out to a
second circle and say that news while fresh is protected from
appropriation for gainful purposes by another person, whether
this other person is a rival news agency or something else, for
example, a radio broadcasting station. Or we can go out to a
third circle, and find abundant support in the opinion of Mr.
Justice Pitney for the principle that a person cannot reap
where he has not sown and cannot gather in the product of
another's labor at the very point where the profit is to be
harvested. This principle would apply whether the subject
matter misappropriated is news or something very different.
Indeed we can make an even wider sweep and find in the opin-
ion of Mr. Justice Pitney the principle that "when the rights
or privileges of one are liable to conflict with those of another,
each party is under a duty so to conduct its own business as not
unnecessarily or unfairly to injure that of the other." Which
of these four principles is the rule discovered by the Supreme
Court in the Associated Press case? Perhaps we shall be
helped in answering this question by observing some later
judges engaged in the process of discovery.

In a recent case in the United States court in New York
City, the facts were these. Cheney Brothers, the well known
silk manufacturers, got out each season new patterns of silks
for neckties, scarves, etc. These patterns were designed at
great expense. Some of them proved attractive to the public
and others did not. The Doris Silk Corporation, without
bothering about hiring designers of its own, was in the habit
of watching the Cheney patterns on the counters of stores and
after noticing which patterns sold well the Doris Company
would imitate these successful patterns in its neckties and
scarves. The Cheney Company sued for an injunction. Such
an injunction should clearly have issued if the rule declared by
the Associated Press case was that a person cannot reap where
he has not sown. However, Judge Learned Hand refused the
injunction and said that the Associated Press decision applied
only to news. What rule then does it declare for news? In two
recent cases a radio broadcasting station was picking up recent news items from the evening editions of Associated Press newspapers and sending them over the air to the listeners. The United States court in South Dakota stopped the broadcasting station, finding in the old case the rule that news could not be imitated for gain while it was fresh. Subsequently another United States court in Washington refused to enjoin another radio station, finding no rule in the old case that was applicable since the plaintiff sold its news and the broadcasting station distributed its news gratuitously, 44 Yale L. J. 879. Thus the judge in a later case appears to be free to choose the particular radiating ripple in the old case at which he will start.

Statutes enacted by a legislature might seem to leave no opportunity for a judge to make law. This is true so long as the particular case is exactly covered by the language of the statute. However, this does not always happen. A public land statute of Congress granted land to settlers, a quarter section (160 acres) to "a single man" and a half section (320 acres) to "a married man." A widow settled on some public land. Was she outside the generosity of the government or was she a "single man" or a "married man?" The Land Office refused to give her anything. The Supreme Court held that a widow was a "single man," saying that this was "the intent of the framers" of the statute. Silver v. Ladd (1868), 7 Wall. 219. They did not find this intention by consulting the men who had been in Congress when the statute was passed. The judges merely looked at the whole statute and found out for themselves what it fairly ought to mean. In large measure the intent was the intent of the judges.

Another federal statute, the Contract Labor Law, made it a crime to prepay the transportation of any foreigner into the United States under contract "to perform labor or services" in the United States. It was passed because railroads and other large corporations had been sending agents to Europe to hire gangs of laborers to come over and work at low wages. Trinity Church brought in an English clergyman as its rector and was prosecuted for bringing a foreigner in under contract
“to perform services.” Nevertheless, the church was held not to be within the statute. The Court said, “We cannot think Congress intended to denounce with penalties a transaction like that.” Although the Court went on to say expressly, “This is not the substitution of the will of the judge for that of the legislator,” the judges had no testimony about the intention of the legislators but simply drew their own inferences from the wording of the statute and the evil it was passed to meet. *Church of the Holy Trinity v. United States* (1892), 143 U. S. 457.

The White Slave Traffic Act was also aimed at a specific evil. It made it a crime to transport a woman in interstate commerce for prostitution or debauchery or any other immoral purpose. The defendant and a young woman went from California to Nevada to spend a week-end together. Although there was no commercialized vice involved, this was held to be within the statute. The Court said, “Congress had in view—Congress evidently thought,” without really knowing what members of Congress thought. Once more the judges expanded the statute by supplementary legislation of their own. This was not improper. They could do nothing else, although they need not have made the law they did. *Caminetti v. United States* (1917), 242 U. S. 470.

A personal experience illustrates the fictitious nature of the legislative intent. Some years ago the Rhode Island Bar Association submitted a bill to the legislature improving the way in which the property of a dead person should be divided if he left no will. As secretary of one of the bar association committees, I did most of the detailed work of drawing this bill. It was enacted by the General Assembly without substantial change. Afterwards litigation arose as to what provision of this statute covered a rather unusual kind of property. The statute said nothing expressly on the point. If the hole in the statute was to be filled up according to the intention of the men who drew the act, whose intention should it be? The members of the legislature had kindly accepted the recommendation of the bar association, and the members of the bar association had trustingly accepted my recommendation. If
anybody's mind was concerned it was my own. The truth was, of course, that neither the members of the legislature nor I had thought for a minute about this particular question. The lawyers in the case wrote to ask how I thought the point was covered by the statute and I gave them my view. The lawyers tried to read my letter to the court and the court very properly refused to pay any attention to it, although the decision in fact corresponded to my view. In reality the judges formed their own opinion of how the hole in the statute ought to be filled and did not care about the intention of the only person who had done any detailed thinking in the matter. Thus statutory rule was treated in the same way as judge-made rules. The court has a choice between various possibilities.

So in the interpretation of a constitution, the court does not merely declare the pre-existing will of the people, because the people probably never thought about the matter one way or the other when they voted for the constitution. "The process of adopting a constitution," Professor Morris Cohen, of the College of the City of New York, says "is frequently spoken of as if it were a magical or supernatural procedure. It is, however, subject to all the frailties of human nature." There is no sharp distinction between the capricious will of the people as shown in the election of legislators and the deliberate, solemn will of the people as embodied in constitutions. In fact, statistics show that the people take much less interest in constitutional provisions than in candidates. How many of those who vote for approval have taken the trouble or have the opportunity to consider carefully all the possible consequences of every provision. It is absurd to suppose that when the reconstruction Congresses forced through the Fourteenth Amendment at the point of the bayonet to protect negroes, the people actually intended that states could fix the rates of fire insurance companies but could not fix the amounts that New York theatre ticket agencies would add to the box-office prices. The Supreme Court made the law on those questions when they construed the general words "due process of law."

This does not mean that the judges are completely free to declare any rules of law they wish, though we shall find some
writers so suggesting. Judicial law-making is limited by the rules of the process and the nature of the material. It attempts to accomplish three purposes, namely: (1) To decide the dispute between the parties, (2) To bring the case within a general rule, logically related to some prior rule or rules (this is questioned) and (3) To have general rule adapted to future disputes.

But legislative law-making is also limited though less closely and by different factors. Careful studies of legislation like Dicey's Law and Public Opinion show that so far as it does change the substantive law it is not entirely arbitrary but does move somehow according to definite directions. The fate of the Volstead Act shows that legislation may fail when it goes too far. It is not correct to suppose that the work of the legislature is entirely independent of prior law and custom while the work of the courts is entirely predetermined. Both make law in ways conditioned by their methods and materials.

Rules as to rights are often not found in statutes or other pre-existing sources. The judge states a new rule to explain what he is doing in the particular case as if that rule had always existed. Along come Professor Llewellyn and his associates to suggest that this rule may be of little or no importance. These "Realists," as they call themselves, insist that we concentrate on what the judge and jury do, and not on what the judge says. "A Realistic Jurisprudence—The Next Step," 30 Col. L. Rev. 431 (1930).

We like to say, and the judges encourage us, that a person has "a right to the performance of a contract." What really happens, Llewellyn points out, is this.

"If the other party does not perform as agreed, you can sue, and if you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, and you give up four or five days of time and some ten to thirty per cent of the proceeds, and wait two to twenty months, you will probably get a judgment for a sum considerably less than what the performance would have been worth—which if the other party is solvent and has not secreted his assets, you can in further due course collect six per cent interest for delay."
Lawyers do not like to talk like this when they discuss the nature of law. Instead of the remedy, which you can see, they prefer to talk of the substantive right, which you cannot see but which you know is there, somewhere—people tell you so. It is pleasant to get into the ultimate concepts behind what courts do. You can think more clearly in this world of ideas. It is not so much obscured by inconsistency and confusing facts. "Right" gives a specious appearance of substance to rules; they seem to be about some thing.

Llewellyn wants to shift the focal point of legal discussion from abstract rights and rules to the area of contact between the behavior of judges and the behavior of laymen. The traditional approach is in terms of words. It tacitly assumes that words reflect acts and influence acts effectively to make them conform to the rule, e.g., the defendant is liable to perform such and such a contract. He admits the accepted rules do sometimes influence the actual behavior of judges, but sometimes the rules and the practice diverge. "How, and how much, in each case?" You cannot generalize on this, without investigation. He wants to learn the actual doings of judges and the actual effects of their doings, to compare facts with facts and not words with words. He wants to find how far the paper rule (what the judges say) is mere paper and how far real, that is, how far the judges do what the rule tells them to do.

Now we take a very significant step. Most legal discussion centers around the work of appellate courts, whose sayings about rules are readily accessible in official volumes. But if we want to know law-in-action, we must go beyond these upper courts and see how far the rules are followed by the acts of lower court judges. Any disobedience of the rules on their part will perhaps be corrected by the higher court if any appeal is taken, but in the mass of decisions by lower judges there is no appeal. Yet the acts of the judges in the Sixth District Court have far more effect on the lives of Providence citizens than those of the Supreme Court judges in the bigger court-house to the south. It often happens that these so-called "inferior" courts act as they desire regardless
of the paper rules issued from on high. Thus the Supreme Judicial Court of Massachusetts has repeatedly laid down the rule that injunctions are not granted unless some property right is to be protected. Newspaper clippings collected by me tell how one lower Massachusetts judge enjoined Mrs. Tillie Feldman from making any rude or improper faces at her neighbor, Mrs. Minnie Freedman, and how another lower judge enjoined all love affairs between William Beach, of Springfield, and a Mrs. Thompson, whom the judge ordered to go back with her husband to Indianapolis and forget all about Beach. These lower court judges are forbidding interference with the plaintiff's peace of mind though no money is at stake. Which is the law of Massachusetts? Llewellyn says not the paper rule but what the judges did to the maker of faces and the erring wife.

Then he goes still further. What influence do the rules have on other officials than judges—sheriffs, policemen, immigration inspectors? Laymen see much more of these officials than of judges. To many a man they are the law. The decision of the official might be set aside by a court, but it never gets to a court. The decision of the $1800 clerk in Bureau B that traveling expenses to attend a summer session are not deductible from my professor's salary is the law in my case, whatever judges have said to the contrary.

It may well be that the discrepancy is very great between what the statutory or judge-made rule tells an official to do and what the official actually does. Thus the constitution of Illinois says: "No person shall be compelled in any criminal case to give evidence against himself." The Illinois statutes make it a serious crime for two or more persons to commit an assault upon another for the purpose of obtaining a confession or revelation tending to incriminate the man assaulted or anybody else. The frequent behavior of the Chicago police, as described by judges of the State Supreme Court, is to question the arrested man for several hours without food or sleep and then take him to "see the goldfish" which involves being dragged around by the hair and beaten with a length of rubber hose. Which is the law of Illinois? Llewellyn says what the
policemen do. "What these officials do about disputes is, to my mind, the law itself."

The last discrepancy he would bring into the limelight is that between the rules and the behavior of laymen. How far do they do what the rules tell them? I think we lawyers assume too easily that laymen, even intelligent business men, guide their conduct according to judicial decisions, or at least statutes. For 250 years England and every state has had a statute making oral guarantees of another man's debt invalid, yet much money is lent and work done on the faith of unwritten guarantees without apparent knowledge of the statute. In some states if A buys land with money furnished by B under an oral agreement that A will give B a deed when B asks for it, B can enforce the promise; in other states these oral trusts are expressly forbidden by statutes. Yet people seem to go on making them just as freely, in the second region as in the first, if the mass of litigation is any test. Obviously, both legislatures and courts will make rules more wisely, the more they know about their probable effect on human conduct. For them law is not a collection of abstract rules but the totality of social behavior, or, at least, official behavior. The influence of a recent school of psychology is plain, but to some extent, this theory goes back to a remark by Mr. Justice Holmes in 1897: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Critics have pointed out that the context shows that Holmes was describing law from the viewpoint of the layman, and that his definition is of no help to the judge trying to decide a case. Similarly, the definition, "Medicine is what the doctor gives you," might satisfy a patient, but not a physician hesitating what drug to give him.

As Pound has pointed out, law like "droit" and "recht" is a very ambiguous word. Llewellyn uses it in one sense, to mean the judicial or official process and the outcome of that process. It can also mean a collection of rules, of grounds for or guides to judicial and administrative action. We do not have to stop saying the law forbids murder because some murderers are not arrested or convicted. Both subjects are worthy of
study, whether we call them by the same name or not. One is a body of "oughts" and the other a body of "ises." Llewellyn's main service is in insisting on the temporary divorce of "is" from "ought" for purposes of study and the immense need of realizing the discrepancies between the two.

Even if one does not agree with the Realists, the preceding discussion shows the importance of human beings in the formulation of legal rules. Just as Graham Wallas and Harold Laski have brought into political science consideration of the selection, training and thinking of government officials, so legal writers have given increased attention to the mental processes of judges. It is like the shift in philosophy from cosmology to epistemology.

The attitude of the advance guard to this problem of judicial thinking has been chiefly influenced by one school of psychology, behaviorism, the doctrines of which have been credited with the infallibility simultaneously denied by the Realists to rules of law. Perhaps you have been wondering that I have not said anything about an even more famous psychologist. In 1928, my colleague Austin W. Scott, after outlining some wild ideas about law, remarked:

"I thank God that the theories of Freud, which in many quarters were accepted as ultimate psychological truths, were propounded sufficiently long ago, so that their universal validity was generally denied before the teachers of law discovered them. I, for one, would be sorry to be compelled before determining how a question in the law of trust will be decided, to investigate the love life of the judges who are to make the decision. When Lord Eldon's house caught fire one night, he buried the great seal in his back yard, and Lord Campbell tells us that he became so much absorbed in watching the maids running about in their shifts that he completely forgot where he had buried it. But I doubt whether there is any close connection between this event and one of his important decisions."

Professor Scott's jubilation over the legal repression of Freud was premature. Within two years Mr. Jerome Frank published his *Law and the Modern Mind*, which explains the craving for certainty in law by the desire to regain the uninterrupted serenity we enjoyed in the womb. The child at
birth, he tells us, is literally forced from a small world of almost complete and effortless security into a new environment which at once sets up a series of demands. The baby finds himself in what William James called “a big, booming confusion.” He longs to find once more peace, comfort, protection from the dangers of the unknown. At first the child satisfies that craving through his confidence in his omnipotent, infallible father. Then repeated experiences erode this fictional over-estimate. There are many things his father doesn’t know and cannot do. Despite advancing years the childish fear of change remains and a growing man attempts to satisfy his longing for serenity through the rediscovery of father, through father substitutes.

The Law, a body of rules apparently devised for infallibly determining what is right and what is wrong takes the place of the omnipotent father. Grown men, when they strive to recapture the emotional satisfactions of the pre-natal or childish world, seek in their legal systems the authoritativeness, certainty, and predictability which they once believed they had found in the law laid down by their father. Hence arises the basic legal myth that law is, or can be, made unwavering, fixed, and settled.

On the basis of Piaget’s Studies in Child Psychology, Mr. Frank gives us other parallels between lawyers and children. Children are egocentric, wishful thinkers, and believe in word magic. The name is the thing, for lawyers as for Plato, who also had a childish mind.

In reality there is no certainty about law, the judges merely decide as they want. Why then all these volumes of law reports, full of long judicial opinions? If only what the judges do is important, why do they say anything? Merely because they are in a conspiracy to preserve the Freudian myth of certainty. A former president of the American Bar Association advised Mr. Frank at the beginning of his practice, “The way to win a case is to make the judge want to decide in your favor and then, and then only, cite precedents which will justify such a determination. You will find plenty of cases to cite in your favor.” Mr. Frank also quotes a
federal judge, Hutcheson, who has let the cat out of the bag in an article entitled, *The Function of the "Hunch" in Judicial Decisions*, 14 *Cornell Law Quarterly* 274. Judge Hutcheson says that the judge really decides by feeling and not by judgment, by hunching and not by reasoning, the ratiocination appearing only in the opinion. After the astute judge has made up his mind how he will decide on the basis of an intuitive sense of what is right or wrong in the case, he enlists his every faculty and belabors his laggard mind, not only to justify his intuition to himself, but to make it pass muster with his critics. In other words, the judge is just kidding himself and others by his opinion. The pretense of certainty is desirable to make men obey, just as Plato advocated that the rulers of his Republic would find considerable doses of falsehood and deceit necessary for the good of their subjects; but no certainty is really there, none is possible, none is even desirable, for it would prevent any change. Mr. Frank closes his book with the hope that lawyers and judges may, like Mr. Justice Holmes, acquire a completely adult mind and win free of the myth of fixed and authoritarian law. Skepticism has proved its worth in the physical sciences. It has yet to do so in the law.

Mr. Frank’s book has two aspects, his psychoanalysis and his doctrine of uncertainty. The psychoanalysis opens unsuspected chasms before us. He tells us that the judge in learning the facts that are the basis of his hunch is continually subject to minute and distinctly personal biases. “His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats . . . The peculiar traits, dispositions, biases and habits of the particular judge will, then, often determine what he decides to be the law.” So when I once went with Horace Kallen to hear Judge Webster Thayer decide a motion for a new trial for Sacco and Vanzetti on the ground that the jury had got the bullets mixed up, Kallan took one look at Judge Thayer as he sat down in the courtroom and remarked “That man has something in his past that he is ashamed of and wants to conceal.” I am not equipped to determine the
validity of Mr. Frank's psychoanalytic theory and must leave it to Professor Carmichael. Mr. Mortimer Adler turns the tables by suggesting that Mr. Frank and his Realist friends are themselves the victims of an inferiority complex. Although they make fun of the awe-struck voices with which lawyers mention Marshall, Kent, Story, and Shaw, they are continually citing impressive names like Freud, Piaget, Dewey, Vaihinger, Malinowski, and C. I. Lewis with implicit confidence. Instead of law they worship scientific method. Their myth is that empirical science portrays the real world.

As to Mr. Frank's other point, that there is no logic about judicial opinions and judges always decide as they want to, we have first-hand testimony from soberer judges than Hutcherson. Mr. Justice Cardozo, in his *Nature of the Judicial Process* (1922), frankly admits that a judge has a choice in developing rules of law, but refuses to deny the existence of genuine rules. He carefully analyzes the factors which have determined his past choices, naming four of these factors: Analogies along the line of logical progression, historical considerations, the customs of the community, such as business practices in a commercial case, and considerations of justice, morals, and social welfare, which he calls the method of sociology. Mr. Justice Cardozo's work lay largely in appellate courts, but the experience of a trial judge is ably described by Judge Ulman of Maryland in *A Judge Takes the Stand* (1923). He kept a diary of his trials, and whenever the jury went out to deliberate he put down what he himself would vote if he were on the jury. Against this he recorded the actual verdict of the jury in the case, and then if this verdict differed from his own view he wrote out what he believed to be the reasons for the divergence. On one occasion Judge Ulman, sitting without a jury, had to pass on the validity of an order of the Maryland Public Service Commission reducing the fares charged by the Baltimore street railways. The main issue involved the amount of a proper depreciation reserve. Since he was much influenced by the dissenting opinions of Mr. Justice Brandeis, he wanted to decide against the railway company and hold that the fares were properly lowered by the
Public Service Commission. Nevertheless, his study of the previous decisions of the United States Supreme Court made him feel obliged to decide in favor of the railroad and write an opinion to that effect. Judge Ulman's decision was sustained by the United States Supreme Court, with a dissenting opinion by Mr. Justice Brandeis.

These judges bring out the point that among the factors which determine what a judge does are his professional training and experience. His choice among the competing analogies offered by previous decisions and other sources is not completely arbitrary. Opposing legal principles do not fit the same set of facts with the same degree of appropriateness. Thorough consideration of both principles is likely to show a difference in their respective consequences to society or in their logical relations to the general body of law. Hard thinking of this sort affects the judge's final conclusion as much as his initial hunch.

Certainly it is better to examine analytical rules critically than to act only on intuitive hunches, which are often just a body of prejudices, illusions, and ancient metaphysics. In so far as trained and open-minded judges do have such hunches, we cannot assume that the so-called intuition is irrational even when its sources are unconscious. Into the hunch may go a great deal of previous thinking that is not specifically remembered. A fruitful illustration is furnished by The Road to Xanadu. Just as Coleridge unconsciously fused in the passage thoughts drawn from his reading of many different books, doubtless without specific recollections of his sources, so a judge's long experience in his law library and on the bench may unconsciously supply the elements which produce the rapid feeling that the plaintiff ought to recover or ought to lose.

Another outside influence upon law comes from the physical sciences. The effects are not entirely harmonious. Mr. Frank uses them to support his theory of legal uncertainty. "The physicists ... have just announced the Principle of Indeterminacy. If there can be nothing like complete definiteness in the natural sciences, it is surely absurd to realize even an
approximate certainty and predictability in law, dealing as it
does with the vagaries of complicated human adjustments."

On the other hand, Walter Wheeler Cook is fully aware
of the human tendency to uniformity of action, which Mr.
Frank ignores. Cook has taught mathematics for four years,
and really knows something about scientific method. Also he
is a legal scholar of the first rank. For him the physical
sciences are a guide for new approaches to law, and not a
solution of all our troubles. The laws of nature are no longer
assumed to be immutable truths, he says, in combating abso-
lutist legal conceptions. The laws of nature are reached by
collecting data, that is, by observing concrete phenomena, and
then forming by a process of trial and error generalizations
that are merely useful tools by means of which we describe in
mental shorthand as wide a range of facts as possible. We
choose that form of description which works most simply in
enabling us to describe past observations or to protect future
observations. He points to a similar development in the field
of social sciences. For instance, economics has shifted from
the conception of the acquisitive man to experimental collect-
ton of facts. He urges a similar change in law. For example,
in an article on the breakdown of a narrow-minded doctrine of
the law of contracts, he begins by telling how generalizations
in physics have been found to need revision or amendment as
more events are observed or events previously noticed are re-
examined with more delicate or powerful instruments.

The phenomena of legal science consist primarily of the
conduct of certain agents of society, judges, and similar offi-
cials. The records of their past conduct is found in law
reports. On the basis of these records and the scholar's
knowledge of the behavior patterns of the existing agents of
society—such as members of the Supreme Court of the United
States—and using a logical technique fundamentally similar
to that of other scientists, the legal scholar endeavors, Cook
says, to formulate general statements which will summarize
as accurately as possible these past phenomena and also serve
as an aid in forecasting future phenomena, that is, the future
decisions of whatever group of societal agents the scholar is
interested in at the time. General statements of this kind are
what lawyers call law, or the rules of the existing law. Under-
lying them is an assumption of the uniformities of conduct on
the part of officials—the behavior patterns of judges causing
reactions to certain classes of stimuli (precedents) in a definite
way (following precedents). A lawyer must also from time
to time reformulate these rules to bring them into accord with
the totality of his observation just as Whitehead shows that
the rules as to the earth revolving around the sun, or *vice
versa*, have been revised in the light of new facts observed by
Ptolemy, Kepler, Galileo, and Einstein.

As in the physical sciences, they say that the limit of advance
in the social sciences will be set by the fruitfulness of the
ranges of phenomena selected for observation and by the
exactness with which such phenomena can be observed. This
empirical method should test legal postulates, but these need
to have some current significance. Little of such significance
attaches, they say, to great masses of the present postulates of
the law, which originated in medieval scholasticism and have
been subjected to little testing since by observations or experi-
mentation.

Without committing myself to any attempted fusion of
physical and social sciences, I want to emphasize the increas-
ingly closer relation between law and the other social sciences.
The Encyclopaedia of the Social Sciences points out links
hitherto not generally realized, especially the introductory
first volume on the Development of Social Thought and In-
stitutions, notably the closing chapter on War and Reorienta-
tion. Recent legal developments are paralleled by many of
the developments listed in other social sciences—the general
suspicion of theories, the attention to non-rational elements as
in Wallas's *Human Nature in Politics*, relativity and the in-
terest in the individual or the single event as the term of
reference, the dissolution of a sense of personal responsibility
under the influence of psychoanalysis and behaviorism, the
tendency of anthropology to emphasize the uniqueness of
every concrete situation, regionalism in geography, etc., con-
centrating on all the social forces in a given area. The attack
on judicial reasoning recalls debunking biographies. The editors conclude that in law the genetic method shows an amazing and devious carry-over of old ideas to deal with new situations. No more fertile phase of intellectual history is to be found in any of the social sciences than in law. One of the oldest of organized studies is passing through a new, youthful stage.

From these general discussions I turn to some recent investigations of the actual operation of legal rules. The first is Alfred Bettman, *Analysis of Criminal Surveys* in his Report on Prosecution in the first volume of the bound reports of the Wickersham Commission. Here he explains the so-called mortality tables first devised and applied in the Cleveland survey in which Mr. Bettman was associated with Dean Pound and Professor Frankfurter. The purpose of such a table is to set up the statistics of the disposition of a large group of arrested persons in such a way as to give a picture of the number and percentage of cases which fall away or die at the various stages between arrest and conviction, and thereby throw some light on the relative responsibility of the various organs of justice for the failure of many offenders to receive adequate punishment. Before these tables were published, the attention of the bar and the bench was concentrated on the jury trial as supposedly the proper place for improvements in the disposition of criminals. Much was said about the vital need of selecting better juries, simplifying the rules of evidence, and eliminating long hypothetical questions to expert witnesses. In contrast to this attitude, look at one of Mr. Bettman's mortality tables. In Chicago, in 1926, 11,000 felonies (excluding liquor cases) were charged against that number of arrested persons. Out of this 11,000 cases, 6,000 or much more than fifty per cent, were eliminated without even going before the grand jury. Over 3,000 were released on the responsibility of the prosecuting officers, and over 2,000 were discharged by the committing magistrate because no sufficient evidence was presented against them. Out of 4,900 cases taken before the grand jury, 1,500 were eliminated chiefly because no indictment was found. Of the remainder
who entered the trial court, 1,600 more were released on the responsibility of the prosecution; 2,000 more pleaded guilty to the offense charged or a lesser offense and so never went before the jury. Out of the original 11,000, 490 were convicted after trial and 580 were acquitted. Thus fewer than 1,100 prisoners, or ten per cent of the original group, ever came before a jury. More were convicted by agreement with the district attorney than by a jury. The number acquitted was only a tenth of the number released on the responsibility of the district attorney, and only a quarter of the number released by the committing magistrate at the preliminary hearing. Obviously the proper points for improvement are the district attorney's office and the so-called inferior court to which the prisoner is brought immediately after arrest.

Professor Sheldon Glueck, of Harvard, in his 500 Criminal Careers, studied 510 men who left the Massachusetts Reformatory at Concord during the years 1911-22. He examines the methods used in the reformatory, but the most important part of his study comes after the men left its walls. Through energetic and prolonged investigation, Mr. and Mrs. Glueck ascertained what almost every one of these men did during five years after discharge and tried to learn what effect they showed and felt from the Reformatory. One striking fact was that over three-fourths of these men committed crimes during this five-year period. This is diametrically opposed to the estimates in annual reports of reformatories and prisons that eighty per cent of the inmates are "successes" after discharge. It looks as if reformatories do not reform. A similar investigation of 1,000 children passing through the Boston Juvenile Court under a judge of great wisdom reveals that within five years after the close of official treatment eighty-eight per cent committed crimes. This need not lead to hopelessness, but it proves that the problem is far more difficult than anybody realized. The Gluecks' latest book, Five Hundred Delinquent Women, indicates a higher success rate during the five-year period for the graduates of the Massachusetts Reformatory for Women. The strongest cause of reform
appeared to be a happy marriage and the responsibility of bringing up children.

Some years ago Everson studied the sentences in the various Magistrates Courts in New York City. Judge A found ninety-seven per cent of his drunkenness cases guilty and Judge B twenty-one per cent. Judge C discharged eighteen per cent in disorderly conduct cases and Judge D fifty-four per cent. Vagrancy discharges among the judges varied from five per cent to seventy-nine per cent. Some judges fined a large proportion of their cases while others ran freely to suspended sentences. The disclosures were "so startling and so disconcerting that it seemed advisable to discontinue the comparative table of the records of justices." 10 J. Crim. L. & Criminol. 90.

Civil remedies for automobile accidents were investigated by a large group of lawyers and law teachers under the auspices of the Columbia University Council for Research in the Social Sciences. Summary in 32 Col. L. Rev. 785 (1932). Nearly 9,000 cases of actual injury to life or person were studied, in cities of varying sizes and rural regions. Legal theories were laid aside in an effort to find what actually happens after an accident. It was shown that the existing policy, which contemplates adequate compensation based upon the defendant's fault, is not carried out. Where this policy would give compensation, recovery is often prevented by the expense, delays, and risks of trial and still more by difficulties of collection.

In conclusion, let me speak of my personal reactions to these new ideas. In the Wickersham investigation I did all the fact-finding I want to do in my life. At the same time I welcome the results of such work on the part of others who do enjoy it and hope to check my own "Platonic" ideas thereby. I admit that we have been too easily satisfied by the wording of rules without troubling to learn how they affect human lives. The discrepancies are too great to ignore. They loom up in Herbert's Holy Deadlock and his Misleading Cases, for instance, and the absurdity of treating slander more leniently than libel when the spoken word goes out over the radio. The
more they are studied the better. And in dealing with the universals, Frank's despised rules, I find myself far less mathematical than twenty years ago, more tentative, more worried about the imponderables. The unrational is all around me, and I see that reason plays less part than I hoped. "For the use of reason is to justify the obscure desires that moved our conduct, impulses, prejudices, and follies, and also our fear." Conrad, Victory.

Law has at least three meanings, (1) the behavior of judges and officials, (2) a collection of rules, (3) a body of ideals. Law is the will of the judges trying to do right within the accepted rules of their action.

Although I am too old to change my faith in the predominant value of legal rules, I see no reason for wasting time in bickerings with those whose ideas are different. "There is more than enough room for all of us and more than enough work." (Pound, The Call for a Realist Jurisprudence, 44 Harv. L. Rev. 697 (1931).