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LAW AS A SCIENCE*

GEORGE W. GOBLE**

I. THE LEGAL PARADOX

It would seem socially desirable, from one point of view, to have a system of law so certain and rigid that it could be applied to any conceivable situation with mathematical precision and accuracy. Then the legal consequences of particular conduct could always be known in advance. This would seem desirable so that people in the usual and comparatively simple situations may know what to expect of others, how to conduct themselves toward others and how to manage their business affairs without getting into legal difficulties. In more complicated situations under such a system, if laymen should become nonplussed, lawyers would be able to advise them as to the proper course to pursue, and would be able to predict with accuracy the outcome of litigation.

Any person who comes upon my land without permission and cuts down my trees is liable to me in damages. That rule is fairly certain. It applies equally to all people. The rule is known and, therefore, most people do not do such things. If it is not known generally, lawyers can advise as to the consequences of such an act. One of the techniques of our legal system for assuring this certainty and uniformity in legal rule is that known as stare decisis or the requirement that courts follow precedent. This principle puts a certain compulsion upon a judge to decide a particular case in the same way that similar cases have been decided before. It is more likely to assure certainty and uniformity than is a rule of action which permits each judge to decide for himself what should be done in the particular case. Different courts, in different localities and at different times having different ideas as to justice would in all probability reach different results on the same set of facts.

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To the extent therefore that legal rules are certain, impartiality and uniformity are promoted.

Suppose after a long line of decisions holding that removing another's trees without permission is unlawful, a judge with communistic leanings, influenced by the unequal division of wealth and impressed with the dire need of the particular trespasser for fire-wood for his freezing family, should exonerate the trespasser, what happens to the certainty of the rule? Can one now predict that under the circumstances of a particular case the old rule will stand? If one change in circumstances will break down the rule, who can say when another will not? Will not those who desire the trees of another be encouraged to help themselves? Will not increased litigation result from the increased number of such offenses, and from the lack of sureness as to what the outcome will be? Will not socialistically minded judges, with the disintegration of the rule begun, be encouraged to break down the rule further, perhaps for less justification? At any rate is it not probable that all the advantages of having a certain invariable rule on this point will now be lost? Assuredly lawyers can not now safely advise one as to his rights in such matters. Litigation will be much more of a hazard.

Laymen are wont to complain of the law when lawyers are unable to advise them definitely as to their legal rights, and yet they are extremely impatient of the doctrine which requires the following of precedent. They say that each case ought to be decided on its own merits, or that the judge ought not to let precedent force an unjust result. Yet what could be more destructive of certainty of a rule than the failure or refusal of a court to follow a rule previously established by a long line of decisions? It is too frequently not realized that to the extent that there is a departure from precedent there is a sacrifice of certainty.

Much can therefore be said for certainty of legal rule and as one might expect there is a school of thought which advocates certainty as the most essential element in a legal system. The advocates of this theory might be called rationalists, since they believe all legal phenomena can be rationalized or systematized. By some of this school it is even thought that there is something of the divine in the arrangement of the legal firmament, and therefore a particular decision can be said to be sound or unsound, depending upon its conformity or non-conformity to
the divine plan. They think to the extent that there exists doubts, differences of opinion or inconsistencies that are due to the judges’ inability to discover or apply the law. The rules are there as an omnipresence in the sky, wanting but an intelligence adequate to recognize and apply them. The judge has but to cast about for the correct rule, bring it down and fit it to the case at hand and justice springs forth, pure and undefiled. Most laymen follow this philosophy. They look upon law as consisting of a set of precise and definite rules sufficiently comprehensive to cover almost any conceivable situation that might arise, and think that all a lawyer need do when asked a question is to open a book and run his finger down the page until it falls upon the rule covering the situation at hand. By then reading the rule he is able to tell his client exactly what his rights are, or what would be the outcome if action were brought.

But alas, do we have, or is it possible or desirable to have a legal system so certain, so rigid? Is it not simply an illusion? If our legal system is certain, rigid, unbending, how is it to grow or adapt itself to changing conditions? Obviously, there must be a limit to its rigidity. Must not rules bend when by a newer conception of morality they work repeated injustice? Must they not yield to a changing economic and social order? When looked at from this point of view it seems obvious that a legal system should be elastic, that is, rules should not be held to be unerring implements to be rigorously and relentlessly applied in all cases regardless of consequences. New circumstances, changing social or economic conditions may require a new or modified rule. But elasticity of rule is inconsistent with certainty of rule. Advantages both of certainty and of elasticity of legal rule can be shown. One makes for stability, the other for progress, but how can a rule be both rigid and elastic? Here is the great paradox of legal science. Most of the difficulties of the law, most differences of opinion about principles revolve about this paradox. If a rule results in injustice in a particular case, when should it yield to the exigencies of the occasion and a decision based upon the merits rendered?

II. LEGAL REALISM

Of late the traditional conception of law as consisting of a body of fixed invariable rules has been losing ground. During the last decade legal philosophy has been in a ferment. I think
the cause is traceable directly to the revolution that has taken place in the physical and mathematical sciences.\(^1\) The development of non-Euclidean geometry, Einstein's theory of relativity, the research of Heisenberg and Schrödinger on the structure of the atom, Fitzgerald's theory of contraction, Compton's work with electrons, protons and photons, I understand have modified if not demolished orthodox conceptions and principles in physics and astronomy. I am not informed that the physics of Newton has become completely obsolete, but his law that every body continues in its state of rest, or of uniform motion in a straight line, can be readily seen to have lost much of its vitality when we are told that no body is at rest, and that there is no such thing as a straight line.

As bearing upon the significance of recent scientific developments, Professor A. S. Eddington says: "The frank realization that physical science is concerned with a world of shadows is one of the most significant of recent advances.\(^2\) . . . The modern scientific theories have broken away from the common standpoint which identifies the real with the concrete. I think we might go so far as to say that time is more typical of physical reality than matter."\(^3\) And Bertrand Russell suggests that, "The main point for the philosopher in the modern theory is the disappearance of matter as a 'thing.' It has been replaced by emanations from a locality—the sort of influences that characterize haunted rooms in ghost stories. . . . All sorts of events happen in the physical world, but tables and chairs, the sun and moon and even our daily bread, have become pale abstractions, mere laws exhibited in the succession of events which radiate from certain regions."\(^4\) "In a word 'matter'  

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1 Dean Pound, it is true, had previously pointed out the importance of sociological and economic factors in the decisional process, but at the same time he had recognized the necessity and validity of a body of precepts and had insisted upon the importance of the element of certainty. But Dean Pound's work, though not in accord with the new legal realism, has probably been influential to some extent in bringing it about. See Pound's "Scope and Purpose of Sociological Jurisprudence," 24 Harv. L. Rev. 591 (1911), 25 Harv. L. Rev. 140 (1911), 25 Harv. L. Rev. 489 (1912), his "Introduction to Philosophy of Law" (1922) and "Law and Morals" (1924). Bingham's influence also is apparent. See his "What is Law," 11 Mich. L. Rev. 1, 109 (1912).


3 Ibid., p. 275.

4 "Philosophy" (1927), p. 106.
has become no more than a convenient shorthand for stating certain causal laws concerning events."

The point we are interested in is that physical laws once thought to be universal or immutable have been found to be limited in scope, transitory in nature or based upon erroneous assumptions. If principles of the physical world are unstable and transitory things, how much more are principles of the social world, where we deal to a greater extent with human conduct, will, motive, instincts and emotions. Can there then be a science of law?

This tearing down of long-standing physical laws has made many doubt whether laws, physical or social, have any place at all in nature. Perhaps they are mere devices of the mind to make the world about us comprehensible. Perhaps but for the mind of man there would be no laws of nature. One is reminded of the old question—Is there sound if there is no ear to hear?

A group of legal scholars began to fall under the influence of such philosophers and scientists as Eddington, Russell, Dewey, Whitehead and others, and the idea occurred to them that if long-established principles of physics and astronomy have gone to pot, maybe some of the moss-backed legal principles were not as stable as supposed. As a result there came forth a new philosophy of law known as legal realism, which has all but relegated to the scrap heap the entire collection of legal rules found in the books. Although most of its sponsors are to be found among members of law school faculties, its most untim---

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5 Ibid., p. 280.
pered exponent is Jerome Frank, a New York practising lawyer, whose book, "The Law and the Modern Mind," has created widespread interest and comment among the laity as well as the profession. If the so-called immutable laws of physics proved vulnerable to the attacks of Einstein and the modern physicists, how much more vulnerable were the tenuous and comparatively insecure principles of law to the attacks of the new realists! Under their inexorable logic, venerable rules toppled over like tenpins.

This new school of realism attacks the validity and utility of systematic arrangement of legal phenomena in the form of legal principles. They deny that such an arrangement appreciably aids in predicting legal decisions. In formulating their creed they draw not only upon the science of Einstein, the philosophy of Dewey, but also upon the modern psychologists. As I understand it there are two phases of their thesis:

First, they deny that objective facts which have to do with legal controversy can be definitely ascertained or set forth and therefore can not be the basis for the application of set rules, assuming there to be rules.

Second, that as to any group of facts which a judge or jury conceives to exist, there is no inevitably applicable rule of law. In other words, the judge has such a choice of so-called principles or formulae of words that he can first reach any result he desires and afterwards find an applicable formula. It is impossible, therefore, to predict a result in any particular case by consideration of the facts and by a study of so-called principles of law, because the facts are objectively unascertainable, and a rule of law can be found to suit any purpose or reach any result the judge desires. The decision is really determined, say the realists, by extra-legal factors, such as the judge's education, race, religion, economic status and bias, psychological inhibitions, or repressions, political considerations, etc., etc.

Suppose we now give a more careful consideration to these two angles of the realists' philosophy.

(1) Impossibility of the Ascertainment of the Facts

Ascertainment of facts, whether physical or social, involves the phenomena observed (i.e., the objective) and the observer (i.e., the subjective). The first is the origin of a stimulus and the second conveys and mentally records it. The result
depends as much upon one as upon the other. Modern scientists recognize the importance of keeping in mind these two elements in fact finding. One of the reasons for the inaccuracy of old principals of physics was that facts differ with different observers, as well as with different objective phenomena. The theory of relativity, I am informed, involves the view that things do not just happen, but that they happen as they are observed to happen.

Suppose an automobile accident or some other event has occurred which gives rise to a dispute between two or more persons. There are a half-dozen witnesses. A controversy develops as to fault and as to a basis of settlement. X, one of the participants, consults his lawyer, and states the facts as he conceives them. But is X's impression or understanding of the facts an accurate picture of what actually happened? The facts can be made known to the lawyer only after passing through the senses of X and other witnesses whom the lawyer might call, and the various impressions of these witnesses may be entirely different. Experiments have shown that rarely do two or more witnesses see things alike. They will observe things that did not happen, or fail to observe things that did happen.

The variation in the mental picture of the several witnesses may be due to such things as:

(1) Keenness in sight or acuteness in hearing.

(2) The emotional state of the witness, and this in turn may have been determined by what the witness had for breakfast, how late he was out the night before, or even the amount of secretion of the various glands of his body.

(3) The witness's private or subjective sense of value and his ethical and moral views. His mind will draw colored inferences from the facts in spite of himself.

(4) The witness's own race differing from the race of others involved. He may have a strong prejudice against the colored race or the Jewish race.

(5) The extent and character of his education (for example, if he is an engineer he would see things others would not see), social class, economic and political background, affection or animosity towards particular individuals or groups they represent (e. g., plumbers, labor unions, auto mechanics).
(6) If the controversy involves domestic relations, or matters of sex, the witness’s attitude may be colored by his own experience in such matters. His own past may have created abnormal reactions to women or blonde women or men with Van Dykes or Southerners, Italians, ministers, college professors, Democrats.

(7) Childhood inhibitions or conditions, e.g., a certain nasal twang in speech or cough may recall painful or pleasant memories.

(8) His power of recollection may be feeble or may be influenced by others to whom he has talked after the event. A story grows with repetition.

(9) Desire to state what his lawyer wants may have its influence and some lawyers have a way of letting a client know what facts are most favorable to his case.

(10) A witness, too, is bound to make inferences, deductions, and fill in the gaps of his memory.

(11) Then there is sometimes the very potent influence of bribery or other inducements to dishonesty or perjury.

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that in the mind of the lawyer. Furthermore, who can predict
the effect of the judge’s likes or dislikes as to the lawyers or
parties in the case, his economic bias, racial or religious preju-
dice or other leanings or antipathies. Some contend that his
decision may even depend upon what he has eaten for breakfalt;
hence the term gastronomical jurisprudence, which has been
given to this school of thought. Are not all the diverting factors
that warp a witness’s impressions of the facts likely also to
warp the judge’s? If the dispute is between capital and labor,
who can say how much his opinion will be determined by his
bias for or against labor? If the question relates to domestic is-
sues, how much will his decision be controlled by his personal
feeling about marriage and divorce, sex conduct, etc.? How much
weight will such as the following factors have—that one of
the parties is a Jew, is a Catholic, is a Republican, a communist,
is wealthy, wears a diamond stud, was born on a farm, is
uneducated? It must be remembered that every case involves
the making of innumerable inferences and deductions first by
the witness himself, then by the lawyer in the case, and then
by the judge and jury. The factors enumerated are especially
influential in these inferences. The judge, although not a wit-
ness of the facts giving rise to the dispute, is a witness of what
transpires in the court room. He is a witness of what the wit-
tesses say and how they say it. All the limitations of a witness
and many more limit the judge, because many wills, emotions,
prejudices lie between him and the first-hand facts. If the case
is tried by a jury, their biases, racial feelings, economic status,
likes and dislikes, etc., all influence their compromise verdict
and complicate the situation manifold.

As Jerome Frank has put it:

“The ‘facts,’ as we have seen, may be crucial when, as is
often the case, a question of ‘fact’ is injected into litigation
involving a fee-simple. And those facts are, inter alia, a func-
tion of the attention of the judge. Certain kinds of witnesses
may arouse his attention more than others. Or may arouse
his antipathies or win his sympathy. The ‘facts,’ it must never
be overlooked, are not objective. They are what the judge
thinks they are. And what he thinks they are depends on what
he hears and sees as the witnesses testify—which may not be—
often is not—what another judge would hear and see. Assume
(‘fictionally’) the most complete rigidity of the rules relating
to commercial transactions; assume (‘fictionally’) that decisions are products of fixed rules applied to the facts. Still, since those ‘facts’ are only what the judge thinks they are, the decision will vary with the judge’s apprehension of the facts.”7

Without at this time giving any consideration to the law at all (which according to this school of thought can be applied in such a way as to reach any result desired) is it not practically impossible for a lawyer with a distorted impression of the facts to predict what sort of a warped impression of the facts will be made upon a judge’s mind by a group of witnesses with a great variety of distorted and inaccurate impressions? And if a judge’s decision is hard to predict, how much more hazardous is the verdict of a jury of twelve men?

But the gauntlet of the lawyer’s guess has not yet been run. His prediction is not merely based upon what a trial court will do. After all, the appellate court is the ultimate arbiter and the body that lays down the law upon which predictions are based. What further transformation and distortion will the case go through before it reaches this ultimate tribunal? This court does not even see the witnesses or hear their voices. They examine only the printed page. How inadequately it speaks. How remote it seems from the real facts. More than ever, inferences must be drawn to fill out the picture. But these judges have other leanings, biases, prejudices. To what extent do these color the interpretation of the facts, not to mention the application of the law to the facts? Does the ultimate picture in the mind of this court even remotely resemble the true facts as they actually occurred? After all, can the lawyer’s advice as to the rights of the parties be any more than a guess?

(2) Difficulty of the Application of Principles of Law

If witness, lawyer, trial judge or jury, and appellate judge have different conceptions as to the facts in a case, how can there be any agreement as to applicable legal principle, assuming there to be such? Principle can have no existence apart from facts. It has meaning only if tied up with concrete phenomena. But if people have different mental pictures as to the external phenomena correspondingly will the meaning of a principle vary from person to person? But a principle is a principle

only in so far as it is to some extent general and compelling as it is carried from one group of facts to another, and used by one person and then another, thereby creating uniformity in application. There can be no uniformity and therefore no principle where mental pictures differ as to the facts to which the principle is to apply.

For this reason principles, if they may be called such, overlap and conflict. They are not mutually exclusive. Where there is overlapping or where two conflicting principles seem equally applicable, what is to be the result? The supposed traditional method of a court's reasoning is that the judge first discovers a general principle which covers the case in hand. Then, using this as a major premise and the particular case as a minor premise, the decision is deduced. But that this is not really what a court does may be illustrated as follows: It is a principle of law that in the absence of fraud or coercion persons of full age and of sound mind are free to contract and manage their business in their own way. Another principle is that unfair competition is unlawful. Suppose X, a manufacturer, sells his commodities (say radios) to B and other retailers throughout the country and requires each of them to agree (i.e., contract) not to handle the radios of Y, or any other of X's competitors. Y complains that X's conduct is harmful to Y's business. Now if a judge wants to reach one result he may state his syllogism in this way:

"In the absence of fraud or coercion people of full age and of sound mind are free to contract and manage their own business in their own way."

"This transaction was free of fraud and coercion and X and B were of full age and sound mind."

"Therefore, X and B should be permitted to contract that B shall not use any of Y's radios, and their contract is valid."

Or if he wants to reach the other result he may say:

"Unfair competition is unlawful. For X to require B to agree not to handle the commodities of Y is unfair competition as against Y."

"Therefore, the contract between X and B is unlawful and invalid."

Each of these principles seems equally applicable to the facts. Why should one be used rather than the other? The question
after all is what influences operate on the judge's mind in causing him to select one major premise rather than the other. Would it not be his economic beliefs on the advantages of competition as compared to communism, or some other economic system, or upon his belief as to governmental paternalism as compared with a doctrine of laissez-faire? Since the factors which would influence a judge to select one or the other principle as his major premise can not be told in advance, his decision can not be predicted. If principle, so called, can be selected, narrowed or broadened to suit the judge's desires or purposes, or if the statement of principle is simply a rationalization of a conclusion previously reached by intuition, or by "hunch" or by other extra-legal process, can principle be any basis for predicting a particular judicial result? It should be noted here that after the judge has reached his conclusion by some intuitive or "feeling" process, he proceeds to write an opinion wherein he makes it appear that his conclusion was deduced from legal principles. He frequently does not tell why he selected the particular major premise in his syllogism, which after all is the real key to his decision. The assigned reasons are not the real reasons. Should the assigned, but unreal postulates be regarded as of any value as principles for future decisions?

A further objection to deductive logic as a legal technique is, according to the newer thought, that it is impotent as a device of discovery. Nothing that was unknown before can be revealed by a syllogism. Herman Oliphant in his introduction to Rueff's "From the Physical to the Social Sciences" puts it thus: "If the major premise does not include the case to be decided, it is powerless to produce and determine a decision of it." But, on the other hand if the major premise "is taken to include the case to be decided it assumes the very thing that is supposed to be up for decision."8 In either case the principle or major premise solves nothing. The syllogism, therefore, is sterile as a judicial technique.

So even if facts could be definitely and certainly ascertained (which they can not be) inevitable and exclusive principle could not be applied so as to compel or force a predictable result. Law, therefore, can not be schematized or set forth by systematic arrangement of rules. To attempt it is simply to bring an illusion of certainty. Courts "feel," "sense" or by

8 Rueff, "From the Physical to the Social Sciences", p. xix (1929).
some process of intuition or imagination reach their conclusions. They then rationalize, classify and fit into their conception of the legal system that result. The point is that the rationalization does not produce the result, but the result produces the rationalization.

III. APPRAISAL OF REALISM

So much for the new realism. Is it to be accepted in whole or in part? Is it nearer the truth than the old rationalistic point of view, which, as has been shown, would make law a comparatively rigid system?

It is my belief that the realists have performed a genuine service in knocking the props from beneath what might be called "rule hero worship." There can be little doubt that lawyers as a class have had and still have too much blind faith in legal rules. If they can but realize that rules are simply arbitrary, tentative artificial legal devices created by the imperfect mind of man in his attempt to comprehend legal facts, and do not constitute a universal, inevitable, perfect or infallible system to be inexorably applied, the legal atmosphere would be clarified and law would likely become a surer instrument of justice.

I have a feeling, however, that although what the realists say is true, they have erred in emphasis on one side, just as the older school erred in emphasis on the other side. Their error lies in not realizing or at any rate not pointing out the relative weight in the whole legal scheme of things, of the matters about which they talk. This overemphasis is no doubt pardonable during the pioneering period but becomes misleading in philosophic summations or appraisals.

It is believed that a more accurate and helpful view lies somewhere between the two extreme positions that have been stated. It is submitted that there is a large part of the law that is fairly definite and certain, and that it should be; that in that part, rules, imperfect as they are, do control, direct and inform lawyers and laymen as to how to conduct themselves; that by reason of the existence of rules many disputes are settled without the necessity of litigation. Legal rules serve as guides to business men, property owners and professional men in their relations with each other. And, perhaps by reason of rules, the great bulk of legal business of the country never gets into
It is only the doubtful or border-line cases that cause fights. But even in the doubtful cases legal rules serve as sign posts; they point the way to solution by narrowing the issue involved and by bringing to bear upon the question the pertinent considerations. It can not be denied that there are many extra-legal influences in the decisional process, but it is believed that in this process previous legal pronouncement and schematic formulation also weigh heavily with most judges. In spite of the insistence of the realists, rules of one kind or another will and should continue to play a most important part in legal thought and action.

Are there not cases where the preservation of the integrity of a rule, despite a particular result which on its merits may seem unjust, is worth more than a presently just result purchased at the price of integrity of the rule? Suppose the officers of the law involved in the Lindbergh baby case had agreed not to prosecute the kidnapers in order to assure the safe return of the baby—a desirable end in itself. Would not such conduct have made other babies less safe from kidnapers? Would it not have given to kidnapers generally such encouragement that they would have extended their kidnaping activities? Suppose a poor man negligently injures a rich man to the extent of $1,000. The rule of law is that the injured party may recover his damages from the negligent party. But in this particular case it is a greater hardship for the poor man to be compelled to pay the rich man $1,000 than it would be for the rich man to fail to get the $1,000. Yet is that sufficient reason for denying the application of the usual rule? Suppose A and B make a contract by which A is to pay B $1,000 six months from date for a lot. Before the six months elapse, A loses all his money in a bank failure, the mortgage on his house is foreclosed, and he is let out of his job. It is probably more of a hardship on A to require him to perform his contract than it would be on B to deprive him of the advantages of his bargain. Yet is the justification here sufficient to warrant breaking down the rule that a man should perform his contractual promises? If an offer to contract is sent by post, an acceptance by post is effectual when posted even though delayed or lost. Suppose a letter containing an acceptance of an offer to sell goods is delayed and the offerer, believing his offer to have been declined, sells the goods to another before he receives the acceptance, and upon receipt of the acceptance he immediately sends notice of
his action to the offeree, who in the meantime has done nothing in reliance on his acceptance. The equities here weigh pretty heavily in favor of the offerer. But can not a strong case be made out for holding the offerer to his offer? It is socially convenient to know that a letter of acceptance of an offer by post is effectual when posted. Business men can conduct themselves in accordance with this view if they know it is settled. Lawyers can advise against litigation questioning its soundness. The rule will thus promote the settlement of controversies out of court. Despite the injustice in this particular case, it can still be said that when a letter of acceptance is mailed there is a great probability that it will arrive in due course. Only one letter in many thousands goes astray. Rules of law should be made to fit the probable situation, and they should not be weakened by being disregarded in the rare case when some one is inconvenienced. This line of argument seems reinforced by the further consideration that as to what is justice in a particular case is frequently hard to determine. It is frequently a matter upon which reasonable minds would differ. If what is just—what is a proper balancing of equities—is a matter to be left to the court, should it apply its own conception of justice, attempt to determine what is the general opinion of the community, or the opinion of a majority of the judges who have given consideration to similar problems before? If it adopts the latter, it comes very near simply following the rule dictated by precedent. If the judge chooses to part company with the rule, he would probably do so upon the basis of his own opinion as to the justice of the case. Is that result, or the one followed by many other judges most likely to be just? Suppose in the case under consideration a court were to decide for the offerer, would that be a good decision? It would make room for the view in the future that an acceptance is valid when posted even though delayed, if that seems the most equitable result, or unless the offerer has changed his position. As a result other kinds of cases would be brought, raising the question as to whether the equities favor the offerer. But is the possibility of a different result in a few cases worth the increased litigation necessarily involved?

The idea of the desirability of the certainty of legal rules may be illustrated by a football game. Imagine such a game played without definite rules determined upon in advance. The players would not know where or how to line up, whether to
kick the ball or in what direction to run. The referee would be at a loss as to how to decide disputes. Suppose a referee should decide that no penalty should be inflicted for off-side play when the play resulted in no advantage to the opposing team or when the offender was provoked to get off-side by the violent language of his opponent. Such a decision would introduce a great deal of uncertainty and confusion into the play. When was the opponent’s language sufficient to provoke? Did the opponent use offensive language? Were not the words really spoken by another than the opponent, etc.? How many touchdowns have been recalled because a ball carrier’s teammate was off-side on the play? And yet in many cases it was obvious that the being off-side did not in any way contribute to the making of the touchdown. Still who would argue for a change in the rule because of the unjust result in the particular case? Certainty, uniformity and facility in refereeing and the ease of adjustment to the rule by all players argue for its retention.

Suppose courts did not decide cases by rule. One can imagine that the reformists would then be clamoring for rules so as to expedite the business of the courts. The first thing thought of by a newly organized committee or council which has a great many decisions to render is a body of rules by which it may classify its cases and reduce many of its decisions to rule-of-thumb procedure.

A formulation of a set of legal principles is simply a method of organizing the legal phenomena found in judicial decisions. This is not only desirable; it is indispensable. This is not to say that a particular formulation is sound or true, all others being unsound. No doubt other formulations could be contrived which would produce very similar results, though the differing systems may appear in certain respects conflicting and inconsistent. The test of soundness is simply convenience and utility. To the extent that a system works, it is sound.

I have no doubt that an entomologist could classify all insects upon an entirely different basis from that now generally adopted. He could draw his line of cleavage between classes at a different place or in different directions, and such new classification could probably be made as helpful for studying and understanding the insect world as the one now in use. Surely an astronomer could classify the stars in the heavens according to some other plan that the one now used, but how chaotic the heavens would seem without any plan. It must not be overlooked that in both
the physical and the social world things do not naturally arrange themselves in classes or in accordance with principle. Such arrangements are simply the devices of the mind which make the external world intelligible and comprehensive. The arrangements are tentative, transitory, imperfect and incomplete. They leave gaps and overlap. Yet if they help to clarify phenomena and make them rational they serve an indispensable purpose. Any one who criticizes systematic arrangements, because of inconsistency and incompleteness, must necessarily construct another system in his own mind, whether he outwardly admits it or not. And how long will his new creation remain invulnerable to attack? The self-satisfied air of the critic who pricks only the balloons of others is amusing until the critic's own balloon crumples and falls to earth. Then one is moved to pity. The objection raised here is not of the altogether commendable occupation of balloon bursting but of the satisfied air of the burster.

It is also well to remember that as to many questions presented to courts there can not be given a satisfactory or proved economic reason for deciding one way or the other. That is, the economic considerations may balance each other, economic opinion may be divided, or, what is more frequently true, economic data on the problem are not available and can never be made available. Certainty then becomes the controlling economic consideration and this can be attained only by adhering to the rule.

It seems to me that the extreme realistic position is vulnerable at certain points. To the cry of the realists that facts and not principles determine decisions and that deductive logic is sterile, Morris Cohen in his "Reason and Nature" asks, "What facts?"9 A mass of unclassified, unrelated facts reveals nothing, means nothing. They must be organized upon some hypothesis or theory. Deduction, says he, is a necessary tool in determining the relevancy of facts to the hypothesis or theory. Cohen would, therefore, object to the realists' attempt to relegate the

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syllogism to the scrap heap as a futile tool. Even Dewey recognizes the desirability of schematizing the law for the purpose of explanation and as a guide to conduct. He says, "There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd, because impossible, proposition that every decision should flow with formal logical necessity from antecedently known premises."10 . . . "It is most important that rules of law should form as coherent generalized logical systems as possible."11

To the realist's argument that facts, around which legal problems revolve, cannot be ascertained, it may be replied that, though it be admitted that the law's method of collecting facts is unscientific and antiquated, it is probable that the interpretation of factual phenomena by judges and juries is as accurate as the normal person's appraisal of the facts of daily life, and many of these he must interpret correctly at his peril. He risks his life daily in the faith that his senses have not deceived him in ascertaining the movements and locations of things about him. The accident mortality rate does not indicate that his personal defense mechanism is completely impotent. Different senses of the same person and the same sense of different persons have a way of checking each other. In the fields of science, history, economics and sociology, the same implements (the human senses), fallible though they may be, are relied upon for gathering the facts. Fact finding in law then is limited in the same way, but only in the same way that fact finding in other fields of learning is limited.

As I have already stated, recent developments in physics and astronomy do not give much encouragement to legal philoso-

10 10 Corn. L. Q. 25 (1914).
11 Ibid., p. 19. Cohen also points out that "Law without concepts or rational ideas, law that is not logical, is like pre-scientific medicine—a hodgepodge of sense and superstition, as has indeed been most of the world's common sense as distinguished from science. To urge that judges, for instance, should rely on their experience or intuition in disregard of logically formulated principles is to urge sentimental anarchy. Men will generalize in spite of themselves. If they do it consciously in accordance with logical principles, they will do it more carefully and will be liberally tolerant to other possible generalizations. But those who distrust all logic think that they deal with facts when they are occupied with the product of their own grotesque theories."—“Law and the Social Order”, p. 195.
phers in developing a system of law that will aid in predicting the legal consequences of a particular course of conduct. If laws dealing with physical things can not be formulated, how much more difficult is it to formulate a system of law dealing with human beings who have wills, emotions and instincts. But it should be noted that the revolution in physics has been wrought in the very large affairs of interstellar spaces and the very small affairs of the atom, which according to Eddington is as porous as the solar system and whose next quantum jump can not be predicted. Things lying between these extremes are least affected; e. g., rules still enable us to predict results in such moderately sized things as our own solar system. On August 11, 1999, it is predicted that there will be a total eclipse of the sun visible at Cornwall, England. This event will involve the relative positions of but three bodies—the sun, moon and earth. I do not know, but would venture a guess that Lloyds would refuse to issue a policy of insurance against the happening of this event. It is possible but so extremely improbable that some kind of solar cataclysm will prevent, advance or delay this solar affair that the mathematical chances of its coming off within seconds of the scheduled time are probably several thousands to one. Other safe predictions can be made as to what will happen on that day in August, 1999. The chances are almost so great as to amount to a certainty that the Mississippi River will not be dry, that 212 degrees F. will still be the boiling point of water under normal conditions, and that steam engines, electric lights and radios will still work. These accurate predictions are made possible by the so-called classical laws of the physical sciences. Perhaps, then, there is a range in the legal field within which prediction of results can be made with probabilities weighing most heavily in favor of its accuracy.

It is the wise judge who can divine where rigidity should end and elasticity begin. But no one has more clearly set forth the relative force of these two opposing magnets than Mr. Justice Cardozo, the most recent appointee to the United States Supreme Court. He says:

"The law has its formulas, and its methods of judging, appropriate to conservation, and its methods and formulas appropriate to change. If we figure stability and progress as opposite poles, then at one pole we have the maxim of stare decisis and the method of decision by the tool of a deductive logic; at the other we have the method which subordinates origins to ends."
The one emphasizes considerations of uniformity and symmetry, and follows fundamental conceptions to ultimate conclusions. The other gives freer play to considerations of equity and justice, and the value to society of the interests affected.¹²

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherted instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting.¹³

"My analysis of the judicial process comes then to this, and little more; logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression. The social interests served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey. If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.¹⁴

¹² "Paradoxes of Legal Science", p. 8 (1928).
¹⁴ Ibid., p. 112.
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