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TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH

I. THE HEAVEN OF LEGAL CONCEPTS

Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, *laches*, and rights *in rem*. Here were all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems. Here one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.¹

Von Jhering's dream has been retold, in recent years, in the chapels of sociological, functional, institutional, scientific, experimental, realistic, and neo-realistic jurisprudence. The question is raised, "How much of contemporary legal thought moves in the pure ether of Von Jhering's heaven of legal concepts?" One turns to our leading legal textbooks and to the opinions of our courts for answer. May the Shade of Von Jhering be our guide.

1. *Where Is a Corporation?*

Let us begin our survey by observing an exceptionally able court as it deals with a typical problem in legal procedure. In the case of *Tauza v. Susquehanna Coal Company*,² a corporation which had been

¹ VON JHERING, IM JURISTISCHEN BEGRIFFSHIMMEL, IN SCHERZ UND ERNST IN DER JURISPRUDENZ (11th ed. 1912) 245.

² 220 N. Y. 259, 115 N. E. 915 (1917).

chartered by the State of Pennsylvania was sued in New York. Summons and complaint were served upon an officer of the corporation in New York in the manner prescribed by New York law. The corporation raised the objection that it *could not* be sued in New York. The New York Court of Appeals disagreed with this contention and held that the corporation could be sued in that State. What is of interest for our purposes is not the particular decision of the court but the mode of reasoning by which this decision was reached.

The problem which the Court of Appeals faced was a thoroughly practical one. If a competent legislature had considered the problem of when a corporation incorporated in another State should be subject to suit, it would probably have made some factual inquiry into the practice of modern corporations in choosing their sovereigns³ and into the actual significance of the relationship between a corporation and the state of its incorporation. It might have considered the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation. It might have balanced, against such difficulties, the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants. On the basis of *facts* revealed by such an inquiry, and on the basis of certain political or ethical *value judgments* as to the propriety of putting financial burdens upon corporations, a competent legislature would have attempted to formulate some rule as to when a foreign corporation should be subject to suit.

The Court of Appeals reached its decision without avowedly considering any of these matters. It does not appear that scientific evidence on any of these issues was offered to the court. Instead of addressing itself to such economic, sociological, political, or ethical questions as a competent legislature might have faced, the court addressed itself to the question, "Where is a corporation?" Was this corporation *really* in Pennsylvania or in New York, or could it be in two places at once?

Clearly the question of *where a corporation is*, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, "How many angels can stand on the point of a needle?" Now it is extremely doubtful whether any of the scholastics ever actually discussed this question.⁴ Yet the ques-

³ See Berle, *Investors and the Revised Delaware Corporation Act* (1929) 29 COLUMBIA LAW REV. 563; RIPLEY, *MAIN STREET AND WALL STREET* (1927).

⁴ Several students of scholastic philosophy inform me that they have never found any evidence of such discussion more reliable than the hearsay testimony of Rabelais.

tion has become, for us, a symbol of an age in which thought without roots in reality was an object of high esteem.

Will future historians deal more charitably with such legal questions as "Where is a corporation?" Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.). But this does not give us the right to hypostatize, to "thingify," the corporation, and to assume that it travels about from State to State as mortal men travel. Surely we are qualifying as inmates of Von Jhering's heaven of legal concepts when we approach a legal problem in these essentially supernatural terms.

Yet it is exactly in these terms of transcendental nonsense that the Court of Appeals approached the question of whether the Susquehanna Coal Company could be sued in New York State. "The essential thing," said Judge Cardozo, writing for a unanimous court, "is that the corporation shall have come into the State."⁵ Why this journey is *essential*, or how it is *possible*, we are not informed. The opinion notes that the corporation has an office in the State, with eight salesmen and eleven desks, and concludes that the corporation is really "in" New York State. From this inference it easily follows that since a person who is in New York can be sued here, and since a corporation is a person, the Susquehanna Coal Company is subject to suit in a New York court.

The same manner of reasoning can be used by the same court to show that the Dodge Bros. Motor Corporation "cannot" be sued in New York because the corporation (as distinguished from its corps of New York employees and dealers) is not "in" New York.⁶

Strange as this manner of argument will seem to laymen, lawyers trained by long practice in believing what is impossible,⁷ will accept this reasoning as relevant, material, and competent. Indeed, even the great protagonist of sociological jurisprudence, Mr. Justice Brandeis, has invoked this supernatural approach to the problem of actions against foreign corporations, without betraying any doubt as to the factual reference of the question, "Where is a corporation?" Thus, in the leading case of *Bank of America v. Whitney Central National Bank*,⁸ the

⁵ See 220 N. Y. at 268, 115 N. E. at 918.

⁶ *Holzer v. Dodge Bros. Motor Corp.*, 233 N. Y. 216, 135 N. E. 268 (1922).

⁷ "I can't believe that!" said Alice.

"Can't you?" the Queen said, in a pitying tone. "Try again: draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said; "one can't believe impossible things."

"I dare say you haven't had much practice," said the Queen. "When I was your age I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast." (Lewis Carroll, *Through the Looking Glass*, c. 5.)

⁸ 261 U. S. 171 (1923).

United States Supreme Court faced the question of whether a banking corporation incorporated in Louisiana could be sued in New York, where it carried on numerous financial transactions and where its president had been served, but where it did not own any desks. The Supreme Court held that although the defendant "had what would popularly be called a large New York business," the action could not be maintained, and offered, per Brandeis, J., the following justification of this curious conclusion:⁹

"The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and, hence, was not found within the district, is clear."

Of course, it would be captious to criticize courts for delivering their opinions in the language of transcendental nonsense. Logicians sometimes talk as if the only function of language were to convey ideas. But anthropologists know better and assure us that "language is primarily a pre-rational function."¹⁰ Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience. The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.

Valuable as is the language of transcendental nonsense for many practical legal purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena. And although judges and lawyers need not be legal scientists, it is of some practical importance that they should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged. Thus it is that the most intelligent judges in America can deal with a concrete practical problem of procedural law and corporate responsibility without any appreciation of the economic, social, and ethical issues which it involves.

⁹ *Id.*, at 173.

¹⁰ SAPIR, LANGUAGE (1921) 14.

2. *When is a Corporation?*

The field of corporation law offers many illuminating examples of the traditional supernatural approach to practical legal problems. In the famous *Coronado* case,¹¹ the question was presented to the United States Supreme Court, whether employers whose business had been injured in the course of a strike could recover a judgment against a labor union which had "encouraged" the strike, or whether suit could be brought only against particular individuals charged with committing or inducing the injury. So far as appears from the printed record, counsel for the union defendants did not attempt to show that labor unions would be seriously handicapped by the imposition of financial responsibility for damage done in strikes, that it would be impossible for labor unions to control *agents provocateurs*, and that labor unions served a very important function in modern industrial society which would be seriously endangered by the type of liability in question. Instead of offering any such argument to support the claim of the labor union to legal immunity for the torts of its members, counsel for the union advanced the metaphysical argument that a labor union, being an unincorporated association, is not a person and, therefore, cannot be subject to tort liability. This is a very ancient and respectable argument in procedural law. Pope Innocent IV used it in the middle of the Thirteenth Century to prove that the treasuries of religious bodies could not be subject to tort liability.¹² Unfortunately, the argument that a labor union is not a person is one of those arguments that remain true only so long as they are believed.¹³ When the court rejected the argument and held the union liable, the union became a person—to the extent of being suable as a legal entity—and the argument ceased to be true.

The Supreme Court argued, "A labor union can be sued because it is, in essential aspects, a person, a quasi-corporation." The realist will say, "A labor union is a person or quasi-corporation because it can be sued; to call something a person in law, is merely to state, in metaphorical language, that it can be sued."

¹¹ *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922). The British prototype of this case, *Taff-Vale Ry. Co. v. Amalg. Soc. of Railway Servants*, [1901] A.C. 426, reached a similar decision, professedly upon similar transcendental grounds, but this was soon upset by special legislation. See WEBB, *HISTORY OF TRADE UNIONISM* (Rev. ed. 1920) 600 ff.

¹² Cf. DEWEY, "Corporate Personality" in *PHILOSOPHY AND CIVILIZATION* (1931), 154; and see 3 GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* 279-285; cf. 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1923) 470-474.

¹³ Compare the case of Wild Modesty, a flower found on certain islands of the South Seas, which is really white but turns red when any one looks at it (reported in Traprock's "The Cruise of the Kawa" [1921] 10).

There is a significant difference between these two ways of describing the situation. If we say that a court acts in a certain way "because a labor union is a person," we *appear to justify the court's action*, and to justify that action, moreover, in transcendental terms, by asserting something that sounds like a proposition but which *can not be confirmed or refuted by positive evidence or by ethical argument*. If, on the other hand, we say that a labor union is a person "because the courts allow it to be sued," we recognize that the action of the courts has not been justified at all, and that the question of whether the action of the courts is justifiable calls for an answer in non-legal terms. To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle.¹⁴

3. *What's in a Trade Name?*

The divorce of legal reasoning from questions of social fact and ethical value is not a product of crusty legal fictions inherited from darker ages. Even in the most modern realms of legal development one finds the thought of courts and of legal scholars trapezing around in cycles and epicycles without coming to rest on the floor of verifiable fact. Modern developments in the law of unfair competition offer many examples of such circular reasoning.

There was once a theory that the law of trade marks and trade-names was an attempt to protect the consumer against the "passing off" of inferior goods under misleading labels.¹⁵ Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices.¹⁶ In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field.¹⁷ Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization. But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar de-

¹⁴ Cf. ROGUIN, *LA REGLE DU DROIT* (1889): "Nothing is more fallacious than to believe that one may give an account of the law by means of the law itself."

¹⁵ See NIMS, *UNFAIR COMPETITION AND TRADE-MARKS* (3d ed. 1929) § 8, and cases cited.

¹⁶ See *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 285 (C. C. A. 6th, 1900).

¹⁷ NIMS, *op. cit. supra* note 15, § 9a; Handler and Pickett, *Trade-Marks and Trade Names—An Analysis and Synthesis* (1930) 30 COLUMBIA LAW REV. 168, 759; Schechter, *The Rational Basis of Trade-Mark Protection* (1927) 40 HARV. L. REV. 813.

vices. For if they advanced any such argument, it might seem that they were taking sides upon controversial issues of politics and economics. Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal argument runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property.¹⁸ This argument may be embellished, in particular cases, with animadversions upon the selfish motives of the infringing defendant, a summary of the plaintiff's evidence (naturally uncontradicted) as to the amount of money he has spent in advertising, and insinuations (seldom factually supported) as to the inferiority of the infringing defendant's product.

The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word "Palmolive" is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued. In other words, the fact that courts did not protect the word would make the word valueless, and the fact that it was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of that word should be protected.

The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of *property*. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*. It is by virtue of the property right which the plaintiff has acquired in the word that he is entitled to an injunction or an award of damages. According to the recognized authorities on the law of unfair competition, courts are not *creating* property, but are merely *recognizing* a pre-existent Something.

¹⁸ Cf. *American Agricultural Chemical Co. v. Moore*, 17 F.(2d) 196 (M. D. Ala. 1927) in which an interesting implication of the current theory is carried to its logical conclusion. A fertilizer company is granted an injunction against state officials seeking to prevent the use of a misleading trade name. The argument is: The plaintiff expected to do a large business under this trade name; such expectations are property, and must be protected against governmental interference.

The theory that judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made by mortal men.¹⁹ The effect of this theory, in the law of unfair competition as elsewhere, is to dull lay understanding and criticism of what courts do in fact.

What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality.²⁰ If courts, for instance, should prevent a man from breathing any air which had been breathed by another (within, say, a reasonable statute of limitations), those individuals who breathed most vigorously and were quickest and wisest in selecting desirable locations in which to breathe (or made the most advantageous contracts with such individuals) would, by virtue of their property right in certain volumes of air, come to exercise and enjoy a peculiar economic advantage, which might, through various modes of economic exchange, be turned into other forms of economic advantage, e.g. the ownership of newspapers or fine clothing. So, if courts prevent a man from exploiting certain forms of language which another has already begun to exploit, the second user will be at the economic disadvantage of having to pay the first user for the privilege of using similar language or else of having to use less appealing language (generally) in presenting his commodities to the public.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition,²¹ that in creating

¹⁹ See M. R. COHEN, *The Process of Judicial Legislation*, in *LAW AND THE SOCIAL ORDER* (1933) 112, also printed in (1914) 48 AM. L. REV. 161.

²⁰ See M. R. COHEN, *Property and Sovereignty*, in *LAW AND THE SOCIAL ORDER* (1933) 41; R. L. HALE, *Coercion and Distribution in a Supposedly Non-Coercive State* (1923) 38 POL. SCI. Q. 470; R. L. HALE, *Rate Making and the Revision of the Property Concept* (1922) 22 COLUMBIA LAW REV. 209.

²¹ "Composition is the passage from a statement about each or every member of a collection, taken severally, in one of the premises, to a statement about the collection as a whole in the conclusion." EATON, *GENERAL LOGIC* (1931) 340. An instance of the commission of this fallacy, in the present context, would be the statement that the court is adding to the wealth of society because it is adding to the wealth of the particular individuals whose control over the sales device it protects.

new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered. Is there, for practical purposes, an unlimited supply of equally attractive words under which any commodity can be sold, so that the second seller of the commodity is at no commercial disadvantage if he is forced to avoid the word or words chosen by the first seller? If this is not the case, i.e. if peculiar emotional contexts give one word more sales appeal than any other word suitable for the same product, should the peculiar appeal of that word be granted by the state, without payment, to the first occupier? Is this homestead law for the English language necessary in order to induce the first occupier to use the most attractive word in selling his product? If, on the other hand, all words are originally alike in commercial potentiality, but become differentiated by advertising and other forms of commercial exploitation, is this type of business pressure a good thing, and should it be encouraged by offering legal rewards for the private exploitation of popular linguistic habits and prejudices? To what extent is differentiation of commodities by trade names a help to the consumer in buying wisely? To what extent is the exclusive power to exploit an attractive word, and to alter the quality of the things to which the word is attached, a means of deceiving consumers into purchasing inferior goods?

Without a frank facing of these and similar questions,²³ legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interests of business²³ and identifies the interests of business with the interests of society, will not be critically examined by courts and legal scholars until it is recognized and formulated. It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.

4. *How High Is Fair Value?*

Perhaps the most notorious example of circular reasoning in contemporary jurisprudence is that involved in judicial determination of the returns to which public utilities are entitled "under the Constitution."²⁴

²³ An example of realistic analysis of consequences in this field is Legis., The Vestal Bill for the Copyright Registration of Designs (1931) 31 COLUMBIA LAW REV. 477.

²⁴ See Schechter, *supra* note 17, at 831.

²⁵ The circularity of judicial reasoning in this field is discussed in R. L. Hale, *Value and Vested Rights* (1927) 27 COLUMBIA LAW REV. 523; D. R. Richberg, *Value by Judicial Fiat* (1927) 40 HARV. L. REV. 567; J. C. Bonbright, *The Problem of Judicial Valuation* (1927) 27 COLUMBIA LAW REV. 493.

What courts purport to do in rate cases is to ascertain the "value" of the utility's property and then to fix a price to the consumer which assures the utility a fair rate of return upon that value. This would be an understandable procedure if the courts meant by "value" either actual cost or replacement cost. For almost forty years, however, since the famous case of *Smyth v. Ames*,²⁵ the courts have insisted that it may be "unconstitutional" to allow a utility merely a fair return on the actual cost or replacement cost of its property; it must be allowed a fair return on the "actual value" of the property.

What is the actual value of a utility's property? Obviously it is the capitalization at current market rates of the allowed and expected profit. In a six per cent money market, an enterprise which is allowed to take six million dollars profit per annum will be valued at one hundred million dollars, one that is allowed three millions per annum, at fifty million dollars. *The actual value of a utility's property, then, is a function of the court's decision*, and the court's decision cannot be based in fact upon the actual value of the property. That value is created by the court; prior to the court's decision and aside from information or belief as to what the court will decide, it is not an economic fact. Nor is it avowedly an ethical fact based upon a determination of the amount which a given utility ought, in the light of social facts and social policies, to be allowed to charge its patrons. Judicial reasoning in this field is thus entirely mythical, and the actual motivation of courts in reaching given decisions is effectively concealed, from all true believers in the orthodox legal theology.

5. *When Is Legal Process "Due"?*

Legal reasoning carries a peculiar freight of human hopes and human suffering in that realm where the phrase "due process of law" serves as a text for judicial review of social legislation. Here, at least, one might hope that a "decent respect to the opinions of mankind" would lead courts to formulate with some clarity their own conception of what it is that they are doing. Yet in no realm does logomachy offer more stubborn resistance to realistic analysis.

What is due process of law?

One might have supposed from the language of certain cases²⁶ that "due process of law" meant such law as was familiar to the Founding Fathers of the Constitution. Thus conceived, the phrase would denote a fairly definite concept, and the function of the courts in applying that concept to legislation would be that of objective scholarly inquiry into

²⁵ 169 U. S. 466 (1898).

²⁶ See *Murray v. Hoboken Land and Improvement Co.*, 18 How. 272, 280 (U. S. 1855); *Robertson v. Baldwin*, 165 U. S. 275 (1897), and cases cited.

legal history. It is clear, however, that the modern judicial use of the due process clauses is not based upon any such historical inquiry. Regulation of wages and prices, against which these clauses have been directed with particular severity, finds ample historical precedent in early colonial and English legislation.²⁷

Recent judicial utterances suggest a second conception of due process: Legislation falls within the "due process" clauses when it is such as rational men may approve. Taken seriously, this conception makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren. Some such conception served as the major premise for the famous brief of Mr. Brandeis in the case of *Muller v. Oregon*,²⁸ which marshaled the favorable opinions entertained by individuals of undisputed sanity towards legislation restricting the hours of industrial labor for women. But subsequent applications of this technique have found less favor in the eyes of the courts, and when Mr. Frankfurter presented to the Supreme Court a similar anthology of opinions in favor of minimum wage legislation for women, the reply of the Supreme Court was that one might also make an impressive compilation of unfavorable opinions.²⁹ The fact, then, that reasonable men approve of specific legislation does not prevent it from being a violation of "due process of law."

The phrase "due process of law," then, denotes neither an historical nor a psychiatric fact. Does it, perhaps, denote a moral ideal? Whether legislation is due or undue or overdue may seem to laymen to be a question of social ethics or morality. But such a conception has been vigorously repudiated by the courts. Thus Mr. Frankfurter's analysis of the social evils which minimum wage legislation might eliminate was characterized by the United States Supreme Court as "interesting but only mildly persuasive," and the Court went on to say:

"These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide."³⁰

"Due process of law," then, can no more be defined in social ethical terms than in terms of legal history or abnormal psychology.

²⁷ See, for instance, the New York act of April 3, 1778, "An act to regulate the wages of mechanicks and labourers, the prices of goods and commodities, and the charges of inn holders within this State, and for other purposes therein mentioned," and other statutes cited in Handler, *Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COLUMBIA LAW REV. 708, 712 n. 14; see also 2 BOUDIN, GOVERNMENT BY JUDICIARY (1932) 401, 447.

²⁸ 208 U. S. 412 (1908).

²⁹ *Adkins v. Children's Hospital*, 261 U. S. 525, 559 (1923).

³⁰ *Ibid.*

In practice, the Supreme Court professes to consider, in a "due process" case, primarily its own former adjudications on the subject, apparently believing, with the Bellman,³¹ that what it says three times must be true. But this process of self-fertilization will scarcely account for actual decisions. And one may suspect that a court would not consistently hide behind a barrage of transcendental nonsense if the grounds of its decisions were such as could be presented without shame to the public.

6. *The Nature of Legal Nonsense*

It would be tedious to prolong our survey; in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in "legal problems" which can always be answered by manipulating legal concepts in certain approved ways. In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. *Corporate entity, property rights, fair value, and due process* are such concepts. So too are *title, contract, conspiracy, malice, proximate cause*, and all the rest of the magic "solving words" of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.

Now the proposition that opium puts men to sleep *because* it contains a dormitive principle is scientifically useful if "dormitive principle" is defined physically or chemically. Otherwise it serves only to obstruct the path of understanding with the pretense of knowledge. So, too, the proposition that a law is unconstitutional *because* it deprives persons of property without due process of law would be scientifically useful if "property" and "due process" were defined in non-legal terms; otherwise such a statement simply obstructs study of the relevant facts.

If the foregoing instances of legal reasoning are typical, we may

³¹ "Just the place for a Snark!" the Bellman cried,
As he landed his crew with care;

Supporting each man on the top of the tide
By a finger entwined in his hair.

"Just the place for a Snark! I have said it twice:
That alone should encourage the crew.

"Just the place for a Snark! I have said it thrice:
What I tell you three times is true."

Lewis Carroll, *The Hunting of the Snark*, "Fit the First.

summarize the basic assumptions of traditional legal theory in the following terms:

Legal concepts (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law*, which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. *Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.

II. THE FUNCTIONAL METHOD

That something is radically wrong with our traditional legal thought-ways has long been recognized. Holmes, Gray, Pound, Brooks Adams, M. R. Cohen, T. R. Powell, Cook, Oliphant, Moore, Radin, Llewellyn, Yntema, Frank, and other leaders of modern legal thought in America, are in fundamental agreement in their disrespect for "mechanical jurisprudence," for legal magic and word-jugglery.³² But mutual agreement is less apparent when we come to the question of what to do: How are we going to get out of this tangle? How are we going to substitute a realistic, rational, scientific account of legal happenings for the classical theological jurisprudence of concepts?

Attempts to answer this question have made persistent use of the phrase "functional approach." Unfortunately, this phrase has often been used with as little meaning as any of the magical legal concepts against which it is directed. Many who use the term "functional" intend no more than the vague connotation which the word "practical"

³² See HOLMES, "The Path of the Law" (1897) 10 HARV. L. REV. 457, COLLECTED LEGAL PAPERS (1920) 167; GRAY, NATURE AND SOURCES OF THE LAW (1909) c. 4-5; POUND, *Law in Books and Law in Action* (1910) 44 AM. L. REV. 12; POUND, MECHANICAL JURISPRUDENCE (1908) 8 COLUMBIA LAW REV. 605; BROOKS ADAMS, *Law under Inequality: Monopoly*, in CENTRALIZATION AND THE LAW (1906) Lecture 2; M. R. COHEN, *The Process of Judicial Legislation* (1914) 48 AM. L. REV. 161, LAW AND THE SOCIAL ORDER (1933) 112; T. R. POWELL, *The Judicilarity of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545; COOK, *Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; OLIPHANT, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215; U. MOORE, *Rational Basis of Legal Institutions* (1923) 23 COLUMBIA LAW REV. 609; M. RADIN, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika* (1933) 33 COLUMBIA LAW REV. 199; LLEWELLYN, *A Realistic Jurisprudence—The Next Step* (1930) 30 COLUMBIA LAW REV. 431; LLEWELLYN, *Some Realism about Realism: Responding to Dean Pound* (1931) 44 HARV. L. REV. 1222; YNTEMA, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468; FRANK, LAW AND THE MODERN MIND (1930).

conveys to the "practical" man. Again, the term "functional approach" is sometimes used to designate a modern form of animism, according to which every social institution or biological organ has a "purpose" in life, and is to be judged good or bad as it achieves or fails to achieve this "purpose." I shall not attempt to be faithful to these vague usages in using the term "functional." I shall use the term rather to designate certain principles or tendencies which appear most clearly in modern physical and mathematical science and in modern philosophy. For it is well to note that the problem of eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities is not a problem peculiar to law. It is a problem which has been faced in the last two or three centuries, and more especially in the last four or five decades, by philosophy, mathematics, and physics, as well as by psychology, economics, anthropology, and doubtless other sciences as well. Functionalism, operationalism, pragmatism, logical positivism, all these and many other terms have been used in diverse fields, with differing overtones of meaning and emphasis, to designate a certain common approach to this general task of redefining traditional concepts and traditional problems.

It may perhaps clarify the significance of the functional approach in law to trace some of the basic contributions which the functional method has made in modern science and philosophy.

1. *The Eradication of Meaningless Concepts*

On its negative side (naturally of special prominence in a protestant movement), functionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience.

In physics, the functional or operational method is an assault upon such supernatural concepts as absolute space and absolute time; in mathematics, upon supernatural concepts of real and imaginary, rational and irrational, positive and negative numbers. In psychology, William James inaugurates the functional method (of which behaviorism is an extreme form) by asking the naive question: "Does consciousness exist?"³³ Modern "functional grammar" is an assault upon grammatical theories and distinctions which, as applied to the English language, simply have no verifiable significance—such empty concepts, for instance, as that of noun syntax, with its unverifiable distinction between a nominative, an objective, and a possessive case.³⁴ And passing to the field

³³ *ESSAYS IN RADICAL EMPIRICISM* (1912) 1. Answering this question, James asserts, "There is . . . no aboriginal stuff or quality of being, contrasted with that of which material objects are made, out of which our thoughts of them are made; but there is a function in experience which thoughts perform . . ." (pp. 3-4).

³⁴ See H. N. RIVLIN, *FUNCTIONAL GRAMMAR* (1930); and cf. L. BLOOMFIELD, *LANGUAGE* (1933), p. 266 *et. passim*.

of art, we find that functional architecture is likewise a repudiation of outworn symbols and functionless forms that have no meaning,—hollow marble pillars that do not support, fake buttresses, and false fronts.³⁵

So, too, in law. Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow. Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it. Llewellyn has filed an involuntary petition in bankruptcy against the concept Title,³⁶ Oliphant against the concept Contract,³⁷ Haines, Brown, T. R. Powell, Finkelstein, and Cushman against Due Process, Police Power, and similar word-charms of constitutional law,³⁸ Hale, Richberg, Bonbright, and others against the concept of Fair Value in rate regulation,³⁹ Cook and Yntema against the concept of Vested Rights in the conflict of laws.⁴⁰ Each of these men has tried to expose the confusions of current legal thinking engendered by these concepts and to reformulate the problems in his field in terms which show the concrete relevance of legal decisions to social facts.

2. *The Abatement of Meaningless Questions*

It is a consequence of the functional attack upon unverifiable concepts that many of the traditional problems of science, law, and philosophy are revealed as pseudo-problems devoid of meaning. As the protagonist of logical positivism, Wittgenstein, says of the traditional problems of philosophy:

"Most propositions and questions, that have been written about philosophical matters, are not false, but senseless. We cannot, therefore, answer questions of this kind at all, but only state their senselessness. Most questions and propositions of the philosophers result from the fact that we do not understand the logic of our language. (They are of the same kind as the question whether

³⁵ See F. L. WRIGHT, *MODERN ARCHITECTURE* (1931).

³⁶ LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930).

³⁷ Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law* (1925) 25 COLUMBIA LAW REV. 705; (1928) 28 COLUMBIA LAW REV. 997.

³⁸ C. G. Haines, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges* (1922) 17 ILL. L. REV. 96; R. A. Brown, *Police Power—Legislation for Health and Personal Safety* (1929) 42 HARV. L. REV. 866; T. R. Powell, *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545; M. Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338; R. E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737.

³⁹ See note 24, *supra*.

⁴⁰ Cook, *Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468.

the Good is more or less identical than the Beautiful.) And so it is not to be wondered at that the deepest problems are really no problems."⁴²

The same thing may be said of the problems of traditional jurisprudence. As commonly formulated, such "problems" as, "What is the holding or *ratio decidendi* of a case?"⁴³ or "Which came first,—the law or the state?"⁴³ or "What is the essential distinction between a crime and a tort?"⁴⁴ or "Where is a corporation?" are in fact meaningless, and can serve only as invitations to equally meaningless displays of conceptual acrobatics.

Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Unless a legal "problem" can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.⁴⁵

3. The Redefinition of Concepts

Although the negative aspect of the functional method is apt to assume peculiar prominence in polemic controversy, the value of the method depends, in the last analysis, upon its positive contributions to the advancement of knowledge. Judged from this standpoint, I think it is fair to say that the functional method has justified itself in every scientific field to which it has been actually applied, and that functional redefinition of scientific concepts has been the keynote of most significant theoretical advances in the sciences during the last half century.

The tremendous advance made in our understanding of the foundations of pure mathematics, achieved through the work of such men as Frege, Peano, Whitehead, and Russell,⁴⁶ offers an illuminating example of the functional method in action.

⁴² WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922) prop. 4.003. And cf. JAMES, *PRAGMATISM* (1908): "The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. . . . The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. . . . If no practical differences whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. . . . It is astonishing to see how many philosophical disputes collapse into insignificance the moment you subject them to this simple test of tracing a practical consequence." (pp. 45-49.)

⁴³ See Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 *YALE L. J.* 161; and cf. LEWELLYN, *BRAMBLE BUSH* (1930) 47.

⁴⁴ Fortunately there is very little literature in the English language on this problem. German jurists, however, are inordinately fond of it.

⁴⁵ See C. K. ALLEN, *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* (1931) 226. And cf. W. W. Cook, Book Review (1932) 42 *YALE L. J.* 299.

⁴⁶ Cf. F. S. Cohen, *What Is a Question?* (1929) 39 *MONIST* 350.

⁴⁷ See RUSSELL, *PRINCIPLES OF MATHEMATICS* (1903); *INTRODUCTION TO MATHEMATICAL PHILOSOPHY* (1919); RUSSELL AND WHITEHEAD, *PRINCIPIA MATHEMATICA* (1910); FREGE, *DIE GRUNDLAGEN DER ARITHMETIK* (1824).

Mathematics, fifty years ago, contained as many unanalyzed "fictions," supernatural concepts, unreal questions, and unjustified operations as classical jurisprudence. High school students are still taught to subtract the integer seven from the integer two, which is logically impossible. An integer is the number of a class, and obviously a class of seven members cannot be contained in, or subtracted from, a class of two members. The student who refuses to believe in such supernatural subtraction is entirely justified, although he must expect scant mercy from ignorant teachers and examiners (as must the law student who refuses to answer senseless questions of law and merely points out their senselessness). Nevertheless, the mathematical fiction, like the legal fiction (*e.g.* the spatial location of a corporation), represents a confused perception of a significant fact, and it is the province of functional analysis to untangle the confusion and find the fact. It is a fact that if you move seven units in one direction—in the direction of bankruptcy, say, or in the direction of lowered temperature—and call that direction "minus"—and then move two units in the opposite direction—"plus"—you have in effect moved five units in the first—the "minus"—direction. Undoubtedly, it is useful to invent or define mathematical terms which will describe these two *motions* or *operations* and the relation between them (as it is useful to invent legal terms to describe the corporate activities of human beings). But such mathematical terms, it is important to recognize, are not numbers, as "number" is ordinarily defined (*i.e.* they are not integers). What, then, are these novel entities? Classical mathematics conceived of these entities as integers acting, under a special dispensation, in supernatural ways. Modern mathematics shows that these entities, known as "sign numbers," are not integers at all, but rather *constructs* or *functions* of integers. The number " -7 " is the operation of moving from any integer to its immediate predecessor in the series of integers, repeated seven times. The number " $+7$ " is the converse operation, *i.e.*, the operation of moving from any integer to its immediate successor, repeated seven times. The number " $+7$ " is therefore something quite different from the integer "7." It is, however, a logical function or construct of the integer seven, since the integer seven appears in the definition of " $+7$ " as an operation repeated "seven" times.

Similarly, modern advances in mathematics have made it clear that rational and irrational, real and imaginary, numbers are not numbers at all, in the original sense of the term, but are functions of such numbers.⁴⁷ The so-called arithmetization of mathematics, and the definition of the concepts of mathematics by Whitehead and Russell, as con-

⁴⁷ See RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY (1919) c. 7.

structs of certain simple logical terms, have stripped mathematical terms of their supernatural significations, illumined and eliminated hidden inconsistencies, and clarified the relationships of mathematical concepts not only to each other but to the material world.

A similar use of the functional method has characterized the most significant advances of modern philosophy. The attack upon transcendental conceptions of God, matter, the Absolute, essence and accident, substance and attribute, has been vigorously pressed by C. S. Peirce, James, Dewey, Russell, Whitehead, C. I. Lewis, C. D. Broad, and most recently by the Viennese School, primarily by Wittgenstein and Carnap.⁴⁸ These men fall into various schools,—pragmatism, pragmaticism (which is the word Peirce shifted to when he saw what his followers were doing to the word "pragmatism"), neo-realism, critical realism, functional realism, and logical positivism. It would be unfair to minimize the real differences between some of these schools, but in one fundamental respect they assume an identical position. This is currently expressed in the sentence, "A thing is what it does." More precise is the language of Peirce: "In order to ascertain the meaning of an intellectual conception one should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception."⁴⁹ The methodological implications of this maxim are summed up by Russell in these words:

"The supreme maxim in scientific philosophising is this: *Wherever possible, logical constructions are to be substituted for inferred entities.*"⁵⁰

In other words, instead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless.

⁴⁸ See C. S. PEIRCE, CHANCE, LOVE AND LOGIC (1923); COLLECTED PAPERS (1931-1934), especially vol. 5; JAMES, PRAGMATISM (1908); ESSAYS IN RADICAL EMPIRICISM (1912); DEWEY, *Appearing and Appearance*, in PHILOSOPHY AND CIVILIZATION (1931) 51; RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD AS A FIELD FOR SCIENTIFIC METHOD IN PHILOSOPHY (1914); MYSTICISM AND LOGIC (1918); WHITEHEAD, THE PRINCIPLES OF NATURAL KNOWLEDGE (1919); THE CONCEPT OF NATURE (1920); C. I. LEWIS, MIND AND THE WORLD-ORDER (1929); C. D. BROAD, SCIENTIFIC THOUGHT (1923); WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922); Carnap, *Ueberwindung der Metaphysik durch logische Analyse der Sprache* (1932) 2 ERKENNTNIS no. 4; J. E. BOODIN, *Functional Realism* (1934) 43 PHILOSOPHICAL REVIEW 147.

⁴⁹ C. S. PEIRCE, COLLECTED PAPERS 6.

⁵⁰ RUSSELL, MYSTICISM AND LOGIC (1918) 155.

The task of modern philosophy is the salvaging of whatever significance attaches to the traditional concepts of metaphysics, through the redefinition of these concepts as functions of actual experience. Whatever differences may exist among modern philosophers in the choice of experiential terms which are to serve as the basic terms of functional analysis—"events," "sensa," and "atomic facts" are but a few of these basic terms—few would disagree with the point of view expressed by William James when he says that in our investigation of any abstract concept the central question must be: "What is its cash value in terms of particular experience? and what special differences would come into the world if it were true or false?"⁵¹

A similar use of the functional method characterizes recent advances in physics. Instead of conceiving of space as something into which physical things fit, but which somehow exists, unverifiably, apart from the things that fill it (as the Common Law is supposed to exist apart from and prior to actual decisions), and then assuming that there is an ether that fills space when it is empty, modern physicists conceive space as a manifold of relations between physical objects or events. The theory of relativity begins with the recognition that relations between physical objects or events involve a temporal as well as a spatial aspect. Thus it becomes convenient for certain purposes to substitute the notion of space-time for that of space, or even to substitute a notion which includes mass as well as space and time.

The parallel between the functional method of modern physics and the program of realistic jurisprudence is so well sketched by a distinguished Chinese jurist that I can only offer a quotation without comment:⁵²

"Professor Eddington, in a recent book on 'The Nature of the Physical World,' observes: 'A thing must be defined according to the way in which it is in practice recognized and not according to some ulterior significance that we suppose it to possess.' So Professor Bridgman, in 'The Logic of Modern Physics':

"Hitherto many of the concepts of physics have been defined in terms of their properties." But now, "in general, we mean by any concept nothing more than a set of operations; *the concept is synonymous with the corresponding set of operations*. If the concept is physical, as of length, the operations are actual physical operations, namely, those by which length is measured; or if the concept is mental, as of mathematical continuity, the operations are mental operations, namely those by which we determine whether a given aggregate of magnitudes is continuous."

Now, this way of dealing with concepts was precisely what Holmes introduced into the science of law early in the '80's. Before discussing the significance

⁵¹ James, *The Pragmatic Method* (1904) 1 JOUR. OF PHILOSOPHY 673.

⁵² John C. H. Wu, *Realistic Analysis of Legal Concepts: A Study in the Legal Method of Mr. Justice Holmes* (1932) 5 CHINA L. REV. 1, 2.

and possibilities of the new method, let me list here some of his definitions of things juridic:

Law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

* * * *

"But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance *supporting* the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space."

Duty: "A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right."

* * * *

Contract: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."

"It may be conceded at the outset that all these definitions are capable of being further developed or improved upon: The important point to note is the complete departure from the way the old Classical Jurisprudence defined things. Hostile as he was to the traditional logic, Holmes touched the springs of the neo-realistic logic in his analysis of legal concepts. He departed entirely from the subject-predicate form of logic, and employed a logic of relations. He did not try to show how a legal entity possesses certain inherent properties. What he was trying everywhere to bring out is: If a certain group of facts is true of a person, then the person will receive a certain group of consequences attached by the law to that group of facts. Instead of treating a legal concept as a substance which in its nature necessarily contains certain inherent properties, we have here a logic which regards it as a mere signpost of a real relation subsisting between an antecedent and a consequent, and, as one of the New Realists so aptly puts it, all signposts must be kept up to date, with their inscriptions legible and their pointing true. In short, by turning the juristic logic from a subject-predicate form to an antecedent-consequent form, Holmes virtually created an inductive science of law. For both the antecedent and the consequent are to be proved and ascertained empirically."

In brief, Holmes and, one should add, Hohfeld⁵³ have offered a logical basis for the redefinition of every legal concept in empirical terms, i.e. in terms of judicial decisions. The ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or

⁵³ See HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919).

worse and is therefore subject to moral criticism. Of the functional method in legal science, one may say, as Russell has said of the method in contemporary philosophy, "Our procedure here is precisely analogous to that which has swept away from the philosophy of mathematics the useless menagerie of metaphysical monsters with which it used to be infested."⁵⁴

4. *The Redirection of Research*

It is often easier to distinguish a school of thought by asking not, "What basic theory does it defend?" but rather, "What basic question does it propound?"

A failure to recognize that the law is a vast field, in which different students are interested in diverse problems, has the unfortunate effect of making every school of legal thought an *ex officio* antagonist of every other school. Dean Pound's classification of jurists into mutually exclusive "analytical," "historical," "philosophical," and "sociological" schools, with sub-species too numerous to mention,⁵⁵ has given a good deal of prestige to the idea that a new school of jurisprudence must offer a revolutionary threat to all existing schools. It would be unfortunate to regard "functionalism" in law as a substitute for all other "isms." Rather, we must regard functionalism, in law as in anthropology, economics, and other fields, as a call for the study of problems which have been neglected by other scientific methods of investigation.

In general, when one comes upon a strange fact and seeks to understand it, there are four inquiries he can pursue.

In the first place, our investigator can *classify* the fact—either by putting an arbitrary label upon it or by discerning in the fact to be explained the significant similarities and differences which relate it to other facts.

Again, one may seek to discover the *genesis* of the fact in question, to trace its historical antecedents.

In the third place, one may inquire into the *nature* of the fact presented, endeavoring by logical analysis to resolve it into simpler elements.

A fourth possible approach seeks to discover the *significance* of the fact through a determination of its implications or consequences in a given mathematical, physical or social context.

It is this last approach to which the term "functional" has been applied. Obviously, it is not the *only* way of gathering useful information, and obviously, it is largely dependent upon the results of classificatory or taxonomic investigation, genetic or historical research, and

⁵⁴ RUSSELL, *loc. cit.* *supra* note 50.

⁵⁵ See POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* (4th ed. 1928) c. 1.

analytical inquiries. Finally, it must be remarked that the functional method is not a recent invention. Plato's attempt to define "justice" by assessing the activities of a just state,⁵⁶ and Aristotle's conception of the soul as the way a living body behaves⁵⁷ are illustrious examples of functional analysis. So, too, Hume's analysis of causation in terms of uniformity of succession, and Berkeley's analysis of matter in terms of its appearances, are significant attempts to redefine supernatural concepts in natural terms,⁵⁸ to wash ideas in cynical acid (borrowing Holmes' suggestive phrase).⁵⁹

If functional analysis seems novel in the law, this is perhaps traceable to the general backwardness of legal science, which is the product of social factors that cannot be exorcised by new slogans.

With these caveats against the notion that the functional approach is a new intellectual invention which will solve all the problems of law (or of anthropology, economics, or any other science), we may turn to the significant question: "What are the new directions which the functional method will give to our scientific research?"

In attempting to answer this question for the field of law we may find suggestive precedents in other social sciences.

Applied to the study of religion, for instance, the functional approach has meant a shift of emphasis away from the attempt to systematize and compare religious beliefs, away from concern with the genesis and evolution of religions, and towards a study of the consequences of various religious beliefs in terms of human motivation and social structure. Outstanding examples of this focus are Weber's and Tawney's studies of the influence of Protestantism in the development of modern capitalism,⁶⁰ and James' essays on the psychological significance for the individual of various religious beliefs.⁶¹ The functional approach asks of every religious dogma or ritual: How does it work? How does it serve to mould men's lives, to deter from certain avenues of conduct and expression, to sanction accepted patterns of behavior, to produce or alleviate certain emotional stresses, to induce social solidarity, to

⁵⁶ PLATO, *REPUBLIC*.

⁵⁷ ARISTOTLE, *DE ANIMA*, I, 1; II, 1.

⁵⁸ Cf. JAMES, *PRAGMATISM* (1908): "There is absolutely nothing new in the pragmatic method. Socrates was an adept at it. Aristotle used it methodically. Locke, Berkeley, and Hume made momentous contributions to truth by its means" (at p. 50). See, also, James, *The Pragmatic Method* (1904) 1 *JOUR. OF PHILOSOPHY* 673.

⁵⁹ "... the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." Holmes, *"The Path of the Law"* (1897) 10 *HARV. L. REV.* 457, 462.

⁶⁰ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (tr. by Parsons, 1930); R. H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (1926).

⁶¹ JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

lay a basis for culture accumulation by giving life after death to the visions, thoughts and achievements of mortal men.⁶² The significance of a religious dogma is found not in a system of theological propositions but in a mode of human conduct. The functional approach demands objective description of this conduct, in which the empirical significance of the religious belief is embodied. Just so, the functional approach in physics captures the significance of a physical concept in the actual processes and operations of the physicist, rather than in the theological or metaphysical interpretations which physicists put upon their own activities. It is an application of this same approach that discovers the significance of a legal principle in the actual behavior of judges, sheriffs and litigants rather than in conventional accounts of the principles that judges, sheriffs and litigants are "supposed" to follow.

In anthropology, the functional method represents a movement away from two types of study: the naive reporting and classification of striking human peculiarities; and the more sophisticated attempt to trace the historical origin, evolution and diffusion of "complexes." Those who have embraced the functional approach (not all of whom have invoked the word "functional"), have been primarily concerned to trace the social consequences, of diverse customs, beliefs, rituals, social arrangements, and patterns of human conduct. This approach has led to fertile fields that most earlier investigators missed. In the study of primitive art, the new focus has brought into the foreground the question of the craftsman's motivations and purposes, the significance of art as an individualizing or socializing force, the whole problem of interplay between materials, techniques, and social needs.⁶³ The study of primitive social organization comes increasingly to deal with the functional significance of family, clan, and tribal groupings as social determinants in the production, distribution, and use of property, as well as in the non-economic human relationships of education, religion, play, sex, and companionship.⁶⁴ In the study of primitive law, the functional approach raises to the fore the problem of incentives to obedience and the efficacy of these incentives, the techniques of law.

⁶² Cf. KAPLAN, *JUDAISM AS A CIVILIZATION* (1934), c. 26 (*Functional Method of Interpretation*); ELWANG, *THE SOCIAL FUNCTION OF RELIGIOUS BELIEF* (UNIV. OF MO. STUDIES, SOCIAL SCIENCE SERIES, vol. 2, no. 1, 1908); FOSTER, *THE FUNCTION OF RELIGION IN MAN'S STRUGGLE FOR EXISTENCE* (1909).

⁶³ See BOAS, *PRIMITIVE ART* (1927).

⁶⁴ See Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians* (1895) REPORT OF U. S. NAT. MUSEUM, at 315; MALINOWSKI, *THE FAMILY AMONG THE AUSTRALIAN ABORIGINES* (1913); LOWIE, *PRIMITIVE SOCIETY* (1920); GOLDENWEISER, *HISTORY, PSYCHOLOGY AND CULTURE* (1933) Part III (*Totemism*); W. C. MCKERN, *Functional Families of the Patwin* (UNIV. OF CALIF. PUB. IN AMER. ARCHAEOLOGY AND ETHNOLOGY, vol. 13, no. 7).

enforcement, and the relations of rivalry or supplementation between legal sanctions and other social forces.⁶⁵

A similar use of the functional approach is characteristic of modern political science, in which revolt against the classical supernatural conception of sovereignty is a point of agreement uniting the most diverse schools of contemporary thought. Typical is the following statement:

"By institutions we merely mean collective behavior patterns, the ways in which a community carries on the innumerable activities of social life. . . . Society achieves certain results through collective political actions. The means that it uses are the behavior patterns which we call courts, legislative bodies, commissions, electorates, administration. We idealize these institutions collectively and personify them in the State. But this idealization is pure fancy. The State as a juristic or ideal person is the veriest fiction. It is real only as a collective name for governmental institutions."⁶⁶

Under the influence of the functional approach political theory ceases to be a science of pure forms, and comes increasingly to grips with the psychological motives and the technological forces that function through political instruments.

In economics we have witnessed a similar shift of research from the taxonomic or systematic analysis of economic "norms" to the study of the actual economic behavior of men and nations. Veblen's indictment of classical economic theory may be applied word for word to classical jurisprudence, if we merely substitute for the terms "economic" and "economist" the terms "legal" and "jurist":

"The standpoint of the classical *economists*, in their higher or definitive syntheses and generalizations, may not inaptly be called the standpoint of ceremonial adequacy. . . . In effect, this preconception imputes to things a tendency to work out what the instructed common sense of the time accepts as the adequate or worthy end of human effort. . . . This ideal of conduct is made to serve as a canon of truth . . ."

"The metaphors are effective, both in their homiletical use and as a labor-saving device,—more effective than their user designs them, to be. By their use the theorist is enabled serenely to enjoin himself from following out an elusive train of causal sequence. . . . The scheme so arrived at is spiritually binding on the behavior of the phenomena contemplated. . . . Features of the

* See MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926); HOGGIN, *LAW AND ORDER IN POLYNESIA* (1934). In his introduction to the latter volume, Malinowski writes: "Modern anthropology concentrates, above all, on what is now usually called the function of a custom, belief or institution. By function we mean the part which is played by any one factor of a culture within the general scheme."

* W. J. Shepard, *Democracy in Transition* (1935) 29 AM. POL. SCI. REV. 1; cf. H. J. LASKI, *GRAMMAR OF POLITICS* (2d ed. 1929); W. Y. ELLIOTT, *THE PRAGMATIC REVOLT IN POLITICS* (1928).

process that do not lend themselves to interpretation in terms of the formula are abnormal cases and are due to disturbing causes. In all this the agencies or forces causally at work in the *economic* life process are neatly avoided. The outcome of the method, at its best, is a body of logically consistent propositions concerning the normal relations of things—a system of *economic* taxonomy."⁶⁷

The same "standpoint of ceremonial adequacy" has to some extent characterized the works of our classical jurists,—such masters of the law as Beale, Williston, and even Wigmore. For them, as for the classical economists, it was easy to avoid "an elusive train of causal sequence." Principles, conceived as "spiritually binding on the behavior of the phenomena contemplated," diverted their attention from the hard facts of the legal world,—the human motivations and social prejudices of judges, the stretching or shrinking of precedents in every washing, the calculations of juries, and the fact of legislation,—and at the same time diverted attention from the task of legal criticism.⁶⁸

The age of the classical jurists is over, I think. The "Restatement of the Law" by the American Law Institute is the last long-drawn-out gasp of a dying tradition.⁶⁹ The more intelligent of our younger law teachers and students are not interested in "restating" the dogmas of legal theology. There will, of course, be imitators and followers of the classical jurists, in the years ahead. But I think that the really creative legal thinkers of the future will not devote themselves, in the manner of Williston, Wigmore, and their fellow masters, to the taxonomy of legal concepts and to the systematic explication of principles of "justice" and "reason," buttressed by "correct" cases. Creative legal thought will more and more look behind the pretty array of "correct" cases to the actual facts of judicial behavior, will make increasing use of statistical methods in the scientific description and prediction of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench. And on the critical side, I think that creative legal thought will more and more look behind the traditionally accepted principles of "justice" and "reason" to appraise in ethical terms the social values at stake in any choice between two precedents.

⁶⁷ VERLEN, *Why Is Economics Not an Evolutionary Science?* in *THE PLACE OF SCIENCE IN MODERN CIVILIZATION* (1919) 56, 65-67.

⁶⁸ To say this is not to deny that such legal scholars have performed yeoman service in clarifying the logical implications and inconsistencies of judicial doctrines. Such analysis is useful, but it is not the sum and substance of legal science. Cf. F. S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 235-237.

⁶⁹ See M. Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification* (1934) 47 *HARV. L. REV.* 1367; and cf. Patterson, *The Restatement of the Law of Contracts* (1933) 33 *COLUMBIA LAW REV.* 397; E. S. Robinson, *Law—An Unscientific Science* (1935) 44 *YALE L. J.* 235, 261.

"Social policy" will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent, whether it be in constitutional law, in the law of trade-marks, or in the most technical details of legal procedure.

There is implied in this shifting of the paths of legal research a change in the equipment needs of the student of law. Familiarity with the words of past judicial opinions and skill in the manipulation of legal concepts are not enough for the student who seeks to understand the social forces that control judicial behavior, nor for the lawyer who seeks to use these forces.⁷⁰

The vested interests of our law schools in an "independent" science of law are undermined by every advance in our knowledge of the social antecedents and consequences of judicial decision. It becomes the part of discretion, in law schools aware of such advances, to admit that legal science necessarily involves us in psychology, economics, and political theory. Courses in our more progressive law schools are beginning to treat, most gingerly, of the psychological doctrines embedded in our rules of evidence, the sociological theories assumed in our criminal law, the economic assumptions embalmed in our doctrines of constitutional law, and the psychological, sociological, and economic *facts* which give force and significance to rules and decisions in these and other fields of law. The first steps taken are clumsy and evoke smiles of sympathy or roars of laughter from critics of diverse temperaments. The will to walk persists.

For the lawyer, no less than for the legal scholar, handling of materials hitherto considered "non-legal" assumes increasing importance. And courts that shut their doors to such non-legal materials, laying the taboos of evidence law upon facts and arguments that reveal the functional social significance of a legal claim or a legal precedent, will eventually learn that society has other organs—legislatures and legislative committees and administrative commissions of many sorts—that are willing to handle, in straightforward fashion, the materials, statistical and descriptive, that a too finicky judiciary disdains.

III. THE USES OF THE FUNCTIONAL METHOD IN LAW

The significance of the functional method in the field of law is clarified if we consider the bearings of this method upon four traditional legal problems: (1) The definition of law; (2) The nature of legal rules and concepts; (3) The theory of legal decisions; and (4) The role of legal criticism.

⁷⁰ The implications of the functional method for legal education are carefully traced in Keyserling, *Social Objectives in Legal Education* (1933) 33 COLUMBIA LAW REV. 437.

1. *The Definition of Law*

The starting point of functional analysis in American jurisprudence is found in Justice Holmes' definition of law as "prophecies of what the courts will do in fact." It is in "The Path of the Law,"⁷¹ that this realistic conception of law is first clearly formulated:

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

A good deal of fruitless controversy has arisen out of attempts to show that this definition of law as the way courts actually decide cases is either true or false.⁷² A definition of law is *useful* or *useless*. It is not *true* or *false*, any more than a New Year's resolution or an insur-

⁷¹ HOLMES, *Path of the Law* (1897) 10 HARV. L. REV. 457; 459-461; COLLECTED LEGAL PAPERS (1921) p. 167, 171-173. A more precise definition, following Holmes, is given in C. J. Keyser, *On the Study of Legal Science* (1929) 38 YALE L. J. 413.

⁷² For examples of such argument see Dickinson, *Legal Rules: Their Function in the Process of Decision* (1931) 79 U. OF PA. LAW REV. 833; H. Kantorowicz, *Some Rationalism about Realism* (1934) 43 YALE L. J. 1240; FRANK, *LAW AND THE MODERN MIND* (1930) 127-128. The vicious circle in Dickinson's attempted refutation of the realistic definition of law I have elsewhere analyzed. See F. S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 12, n. 16. Kantorowicz repeats the same argument, emphasizing the charge that a definition of law in terms of court decisions "puts the cart before the horse" and is as ridiculous as a definition of medicine in terms of the behavior of doctors. The parallel, though witty, is inapt: The correct analogy to a definition of the science of law as description of the behavior of judges would be a definition of the science of medicine as a description of the behavior of certain parasites, etc. Kantorowicz accepts uncritically the metaphysical assumption that definition is a one-way passage from the more general to the less general. But modern logic has demonstrated the hollowness of this assumption. It is useful for certain purposes to define points as functions of lines. For other purposes it is useful to define lines as functions of points. It is just as logical to define law in terms of courts as the other way about. The choice is a matter of convenience, not of logic or truth.

The same metaphysical fallacy vitiates the opposite argument of Frank, namely, that "primary" reality is particular and concrete, so that a definition of law must necessarily be in terms of actual decisions. To the eyes of modern logic, the world contains things *and* relations, neither of which can claim a superior grade of reality. One can start a fight or a scientific inquiry *either* with a concrete fact *or* with a general principle.

ance policy. A definition is in fact a type of insurance against certain risks of confusion. It cannot, any more than can a commercial insurance policy, eliminate all risks. Absolute certainty is as foreign to language as to life. There is no final insurance against an insurer's insolvency. And the words of a definition always carry their own aura of ambiguity. But a definition is useful if it insures against risks of confusion more serious than any that the definition itself contains.

"What courts do" is not entirely devoid of ambiguity. There is room for disagreement as to what a *court* is, whether, for instance, the Interstate Commerce Commission or the Hague Tribunal or the Council of Tesuque Pueblo is a court, and whether a judge acting in excess of those powers which the executive arm of the government will recognize acts as a court. There may even be disagreement as to the line of distinction between what courts *do* and what courts *say*, in view of the fact that most judicial behavior is verbal. But these sources of ambiguity in Holmes' definition of law are peripheral rather than central, and easily remedied. They are, therefore, far less dangerous sources of confusion than the basic ambiguity inherent in classical definitions of law which involve a confusion between what is and what ought to be.

The classical confusion against which realistic jurisprudence is a protest is exemplified in Blackstone's classical definition of law as "a rule of civil conduct, prescribed by the supreme power in a State, commanding what is right, and prohibiting what is wrong."⁷³

In this definition we have an attempt to unite two incompatible ideas which, in the tradition of English jurisprudence, are most closely associated with the names of Hobbes and Coke, respectively.

Hobbes, the grandfather of realistic jurisprudence, saw in law the commands of a body to whom private individuals have surrendered their force. In a state of nature there is war of all against all. In order to achieve peace and security, each individual gives up something of his freedom, something of his power, and the commands of the collective power, that is the state, constitute law.

Hobbes' theory of law has been very unpopular with respectable citizens, but I venture to think that most of the criticism directed against it, in the last two and a half centuries, has been based upon a misconception of what Hobbes meant by a state of nature. So far as I know, Hobbes never refers to the state of nature as an actual historical era, at the end of which men came together and signed a social contract. The state of nature is a stage in analysis rather than a stage of history. It exists today and has always existed, to a greater or lesser degree, in

⁷³ BL. COMM.* 44.

various realms of human affairs. To the extent that any social relationship is exempt from governmental control it presents what Hobbes calls a state of nature.

In international relations today, at least to the extent that nations have not effectively surrendered their power through compacts establishing such rudimentary agencies of international government as the League of Nations or the Universal Postal Union, there is in fact a state of nature and a war of all against all. This war, as Hobbes insists, is present potentially before actual hostilities break out. Not only in international relations, but in industrial relations today do we find war of all against all, in regions to which governmental control has not been extended, or from which it has been withdrawn—if it existed.

Mutual concessions and delegations of power involved in an arbitration contract, an international treaty, an industrial "code," a corporate merger, or a collective labor agreement, are steps in the creation of government, and call into operation new rules of law and new agencies of law enforcement. Governments do not arise once and for all. Government is arising today in many regions of social existence, and it arises wherever individuals find the conflicts inherent in a state of nature unendurable. The process by which government is created and its commands formulated is a process of human bargaining, based upon mutual consent but weighted by the relative power of conflicting individuals or groups.

In all this conception of law, there is no appeal to reason or goodness. Law commands obedience not because of its goodness, or its justice, or its rationality, but because of the power behind it. While this power does rest to a real extent upon popular beliefs about the value of certain legal ideals, it remains true today, as Hobbes says in his *Dialogue on the Common Law*, "In matter of government, when nothing else is turned up, clubs are trump."⁷⁴

Quite different from this realistic conception of law is the theory made famous by Coke that law is only the perfection of reason.⁷⁵ This is a notion which has had considerable force in American constitutional history, having served first as a basis for popular revolution against tyrannical violations of "natural law" and the "natural rights" of Englishmen, and serving more recently as a judicial ground for denying legality to statutes that judges consider "unreasonable." It would be absurd to deny the importance of this concept of natural law or justice as a standard by which to judge the acts of rulers, legislative, executive or judicial. It is clear, however, that the validity of this concept of law

⁷⁴ HOBBS, *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (1681), *Of Punishments*.

⁷⁵ CO. LITT.* 976.

lies in a realm of values, which is not identical with the realm of social actualities.

The confusion and ambiguity which infest the classical conception of law, as formulated by Blackstone and implicitly accepted by most modern legal writers, arise from the attempt to throw together two inconsistent ideas. Blackstone attempts in effect to superimpose the picture of law drawn by the tender-minded hypocrite, Coke, upon the picture executed by the tough-minded cynic, Hobbes, and to give us a composite photograph. Law, says Blackstone, is "a rule of civil conduct prescribed by the supreme power in a State (Hobbes speaking) commanding what is right and prohibiting what is wrong (Coke speaking)"⁷⁶ Putting these two ideas together, we have a fertile source of confusion, which many important legal scholars since Blackstone have found about as useful in legal polemics as the ink with which a cuttlefish befuddles his enemies.

Those theorists who adhere to the Blackstonian definition of law are able to spin legal theories to the heart's content without fear of refutation. If legislatures or courts disagree with a given theory, it is a simple matter to show that this disagreement is unjust, unreasonable, monstrous and, therefore, not "sound law." On the other hand, the intruding moralist who objects to a legal doctrine on the ground that it is unjust or undesirable can be told to go back to the realm of morality he came from, since the law is the command of the sovereign and not a matter of moral theory. Perhaps the chief usefulness of the Blackstonian theory is the gag it places upon legal criticism. Obviously, if the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or badness of any law, and any definition that deters people from criticism of the law is very useful to legal apologists for the existing order of society. As a modern authority on legal reasoning declares, "Thus all things made legal are at the same time legally ethical because it is law, and the law must be deemed ethical or the system itself must perish."⁷⁷

2. *The Nature of Legal Rules and Concepts*

If the functionalists are correct, the meaning of a definition is found in its consequences. The definition of a general term like "law" is significant only because it affects all our definitions of specific legal concepts.

⁷⁶ That "right" and "wrong" are used in this definition as ethical, rather than strictly legal, terms is made clear in Blackstone's own exegesis upon his definition. COMM.* 54-55.

⁷⁷ BRUMBAUGH, *LEGAL REASONING AND BRIEFING* (1917), 7.

The consequence of defining law as a function of concrete judicial decisions is that we may proceed to define such concepts as "contract," "property," "title," "corporate personality," "right," and "duty," similarly as functions of concrete judicial decisions.

The consequence of defining law as a hodge-podge of political force and ethical value ambiguously amalgamated, is that every legal concept, rule or question will present a similar ambiguity.

Consider the elementary legal question: "Is there a contract?"

When the realist asks this question, he is concerned with the actual behavior of courts. For the realist, the contractual relationship, like law in general, is a function of legal decisions. The question of what courts *ought* to do is irrelevant here. Where there is a promise that will be legally enforced there is a contract. So conceived, any answer to the question "Is there a contract" must be in the nature of a prophecy, based, like other prophecies, upon past and present facts. So conceived, the question "Is there a contract?" or for that matter any other legal question, may be broken up into a number of subordinate questions, each of which refers to the actual behavior of courts: (1) What courts are likely to pass upon a given transaction and its consequences? (2) What elements in this transaction will be viewed as relevant and important by these courts? (3) How have these courts dealt with transactions in the past which are *similar* to the given transaction, that is, *identical in those respects which the court will regard as important*? (4) What forces will tend to compel judicial conformity to the precedents that appear to be in point (*e.g.* inertia, conservatism, knowledge of the past, or intelligence sufficient to acquire such knowledge, respect for predecessors, superiors or brothers on the bench, a habit of deference to the established expectations of the bar or the public) and how strong are these forces? (5) What factors will tend to evoke new judicial treatment for the transaction in question (*e.g.* changing public opinion, judicial idiosyncrasies and prejudices, newly accepted theories of law, society or economics, or the changing social context of the case) and how powerful are these factors?

These are the questions which a successful practical lawyer faces and answers in any case. The law, as the realistic lawyer uses the term, is the body of answers to such questions. The task of prediction involves, in itself, no judgment of ethical value. Of course, even the most cynical practitioner will recognize that the positively existing ethical beliefs of judges are material facts in any case because they determine what facts the judge will view as important and what past rules he will regard as reasonable or unreasonable and worthy of being extended or restricted. But judicial beliefs about the values of life and the ideals of society are *facts*, just as the religious beliefs of the Anda-

man Islanders are facts, and the truth or falsity of such moral beliefs is a matter of complete unconcern to the practical lawyer, as to the scientific observer.

Washed in cynical acid, every legal problem can thus be interpreted as a question concerning the positive behavior of judges.

There is a second and radically different meaning which can be given to our type question, "Is there a contract?" When a judge puts this question, in the course of writing his opinion, he is not attempting to predict his own behavior. He is in effect raising the question, in an obscure way, of whether or not liability *should* be attached to certain acts. This is inescapably an ethical question. What a judge ought to do in a given case is quite as much a moral issue as any of the traditional problems of Sunday School morality.⁷⁸

It is difficult for those who still conceive of morality in other-worldly terms to recognize that every case presents a moral question to the court. But this notion has no terrors for those who think of morality in earthly terms. Morality, so conceived, is vitally concerned with such facts as human expectations based upon past decisions, the stability of economic transactions, and even the maintenance of order and simplicity in our legal system. If ethical values are inherent in all realms of human conduct, the ethical appraisal of a legal situation is not to be found in the spontaneous outpourings of a sensitive conscience unfamiliar with the social context, the background of precedent, and the practices and expectations, legal and extra-legal, which have grown up around a given type of transaction.

It is the great disservice of the classical conception of law that it hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy.

The Blackstonian conception of law as half-mortal and half-divine gives us a mythical conception of contract. When a master of classical jurisprudence like Williston asks the question "Is there a contract?", he has in mind neither the question of scientific prediction which the practical lawyer faces, nor the question of values which the conscientious judge faces. If he had in mind the former question, his studies would no doubt reveal the extent to which courts actually enforce various types of contractual obligation.⁷⁹ His conclusions would be in terms of prob-

⁷⁸ Cf. F. S. Cohen, *Modern Ethics and the Law* (1934) 4 BROOKLYN L. REV. 33, on the conception of "Sunday School morality."

⁷⁹ So hallowed is the juristic tradition of ignoring the actual facts of cases that a distinguished jurist, Professor Goodhart, can argue in all seriousness that the practice adopted by some American law libraries of putting the records of cases on file is very dangerous. Students might be distracted from the official *ratio decidendi* of the case, and might try to discover what the actual facts of the case were, which would be a death-blow to traditional jurisprudence. See Goodhart, *Determining Ratio Decidendi of a Case* (1930) 40 YALE L. J. 161, 172.

ability and statistics. On the other hand, if Professor Williston were interested in the ethical aspects of contractual liability, he would undoubtedly offer a significant account of the human values and social costs involved in different types of agreements and in the means of their enforcement. In fact, however, the discussions of a Williston will oscillate between a theory of what courts actually do and a theory of what courts ought to do, without coming to rest either on the plane of social actualities or on the plane of values long enough to come to grips with significant problems. This confused wandering between the world of fact and the world of justice vitiates every argument and every analysis.

Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought* to exist. Clarity on two fronts is the result. Description of legal facts becomes more objective, and legal criticism becomes more critical.

The realistic lawyer, when he attempts to discover how courts are actually dealing with certain situations, will seek to rise above his own moral bias and to discount the moral bias of the legal author whose treatise he consults.

The realistic author of textbooks will not muddy his descriptions of judicial behavior with wishful thinking; if he dislikes a decision or line of decisions, he will refrain from saying, "This cannot be the law because it is contrary to sound principle," and say instead, "This is the law, but I don't like it," or more usefully, "This rule leads to the following results, which are socially undesirable for the following reasons * * *."

The realistic advocate, if he continues to use ritual language in addressing an unrealistic court, will at least not be fooled by his own words: he will use his "patter" to induce favorable judicial attitudes and at the same time to distract judicial attention from precedents and facts that look the wrong way (as the professional magician uses his "patter" to distract the attention of his audience from certain facts). Recognizing the circularity of conceptual argument, the realistic advocate will contrive to bring before the court the human values that favor his cause, and since the rules of evidence often stand in the way, he will perforce bring his materials to judicial attention by sleight-of-

hand—through the appeal of a “sociological brief” to “judicial notice,” through discussion of the background and consequences of past cases cited as precedents, through elaboration and exegesis upon admissible evidence, or even through a political speech or a lecture on economics in the summation of his case or argument.

The realistic judge, finally, will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of corporations, conspiracies, property rights, titles, contracts, proximate causes, or other legal derivatives of the judicial decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment, and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of the conceptual acrobat.

3. *The Theory of Legal Decisions*

The uses of the functional approach are not exhausted by “realistic jurisprudence.” “Realistic jurisprudence,” as that term is currently used,⁸⁰ is a theory of the nature of law, and therefore a theory of the nature of legal rules, legal concepts, and legal questions. Its essence is the definition of law as a function of judicial decisions. This definition is of tremendous value in the development of legal science, since it enables us to dispel the supernatural mists that envelop the legal order and to deal with the elements of the legal order in objective, scientific terms. But this process of definition and clarification is only a preliminary stage in the life of legal science. When we have analyzed legal rules and concepts as patterns of decisions, it becomes relevant to ask, “What are judicial decisions made of?”

If we conceive of legal rules and concepts as functions of judicial decisions, it is convenient, for purposes of this analysis, to think of these decisions as hard and simple facts. Just as every physical object may be analyzed as a complex of positive and negative electrons, so every legal institution, every legal rule or concept may be analyzed as a complex of plaintiff decisions and defendant decisions. But simplicity is relative to the level of analysis. For the chemist, the atom is the lowest term of analysis. But the physicist cannot stop the process of analysis with the atom or even the electron. It would be heresy to the faith of science to endow either with final simplicity and perpet-

⁸⁰ See K. N. LLEWELLYN, *A Realistic Jurisprudence—The Next Step* (1930) 30 COLUMBIA LAW REV. 431; Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697; Llewellyn, *Some Realism about Realism: Responding to Dean Pound* (1931) 44 HARV. L. REV. 1222.

ual immunity from further analysis. Unfortunately, certain advocates of realistic jurisprudence, after using the functional method to break down rules and concepts into atomic decisions, refuse to go any further with the analytic process. They are willing to look upon decisions as simple unanalyzable products of judicial hunches or indigestion.

The "hunch" theory of law,²¹ by magnifying the personal and accidental factors in judicial behavior, implicitly denies the relevance of significant, predictable, social determinants that govern the course of judicial decision. Those who have advanced this viewpoint have performed a real service in indicating the large realm of uncertainty in the actual law. But actual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls. Their acts are "judicial" only within a system which provides for appeals, rehearings, impeachments, and legislation. The decision that is "peculiar" suffers erosion—unless it represents the first salient manifestation of a new social force, in which case it soon ceases to be peculiar. It is more useful to analyze a judicial "hunch" in terms of the continued impact of a judge's study of precedents, his conversations with associates, his reading of newspapers, and his recollections of college courses, than in strictly physiological terms.

A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event. Like the enactment of a Federal statute, or the equipping of police cars with radios, a judicial decision is an intersection of social forces. Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself. The distinction between "holding" and "dictum" in any decision is not to be discovered

²¹ See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions* (1929) 14 CORN. L. Q. 274; Hutcheson, *Lawyer's Law and the Little, Small Dice* (1932) 7 TULANE L. REV. 1; FRANK, *LAW AND THE MODERN MIND* (1930) c. 12-13; T. Schroeder, *The Psychologic Study of Judicial Opinions* (1918) 1 CALIF. L. REV. 89.

by logical inspection of the opinion or by historical inquiry into the actual facts of the case.⁸² That distinction involves us in a prediction, a prophecy of the weight that courts will give to future citations of the decision rendered. This is a question not of pure logic but of human psychology, economics and politics.

What is the meaning of a judicial decision, summed up in the words, "Judgment for the plaintiff"? Obviously, the significance of the decision, even for the parties directly involved in the case, depends upon certain predictable uniformities of official behavior, *e.g.* that a sheriff or marshall will enforce the decision, in one way or another, over a period of time, that the given decision will be respected or followed in the same court or other courts if the question at issue is relitigated, and that certain procedures will be followed in the event of an appeal, etc. When we go beyond the merely private significance of an actual decision, we are involved in a new set of predictions concerning the extent to which other cases, similar in certain respects, are likely to receive the same treatment in the same courts or in other courts within a given jurisdiction. Except in the context of such predictions the announcement of a judicial decision is only a noise. If reasonably certain predictions of this sort could never be made, as Jerome Frank at times seems to say,⁸³ then all legal decisions would be simply noises, and no better grist for science than the magical phrases of transcendental jurisprudence.

If the understanding of any decision involves us necessarily in prophecy (and thus in history), then the notion of law as something that exists completely and systematically at any given moment in time is false.⁸⁴ Law is a social process, a complex of human activities, and an adequate legal science must deal with human activity, with cause and effect, with the past and the future. Legal science, as traditionally conceived, attempts to give an instantaneous snapshot of an existing and completed system of rights and duties. Within that system there are no temporal processes, no cause and no effect, no past and no future. A legal decision is thus conceived as a logical deduction from fixed principles. Its meaning is expressed only in terms of its logical consequences. A legal system, thus viewed, is as far removed from temporal activity as a

⁸² Compare the orthodox wild goose chase of Goodhart after a formula which will determine the "real" *ratio decidendi* of a case (Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 YALE L. J. 161) with the sane description by Llewellyn of the way in which cases come to stand for propositions of narrow or wide scope. THE BRAMBLE BUSH (1930) 47, 61-66. Cf. also Oliphant, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215, 217-218; F. S. Cohen, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 33-37.

⁸³ See FRANK, *LAW AND THE MODERN MIND* (1930), 7, 53, 104-111, 132-134.

⁸⁴ In this, law is no different from other social institutions or physical objects. Cf. C. I. LEWIS, *op. cit. supra* note 48, c. 5.

system of pure geometry. In fact, jurisprudence is as much a part of pure mathematics as is algebra, unless it be conceived as a study of human behavior.—human behavior as it molds and is molded by judicial decisions. Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior.⁸⁵

Such a view of legal science reveals gaps in our legal knowledge to which, I think, legal research will give increasing attention.

We are still in the stage of guesswork and accidentally collected information, when it comes to formulating the social forces which mold the course of judicial decision. We know, in a general way, that dominant economic forces play a part in judicial decision, that judges usually reflect the attitudes of their own income class on social questions, that their views on law are molded to a certain extent by their past legal experience as counsel for special interests, and that the impact of counsel's skill and eloquence is a cumulative force which slowly hammers the law into forms desired by those who can best afford to hire legal skill and eloquence; but nobody has ever charted, in scientific fashion, the extent of such economic influences.⁸⁶ We know, too, that judges are craftsmen, with aesthetic ideals,⁸⁷ concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying, actions and theories; but again we have no specific information on the extent of this aesthetic bias in the various branches of the law. We know that courts are, at least in this country, a generally conservative social force, and more like a brake than a motor in the social mechanism, but we have no scientific factual comparison of judicial, legislative, and executive organs of government, from the standpoint of social engineering. Concretely and specifically, we know that Judge So-and-so, a former attorney for a non-union shop, has very definite ideas about labor injunctions, that another judge, who has had an unfortunate sex life, is parsimonious in the fixing of alimony; that another judge

⁸⁵ "To say that a legal institution,—private property, the federal government of the United States, Columbia University,—exists is to say that a group of persons is doing something, is acting in some way. It is to point to a particular aspect of human behavior. . . . But a legal institution is something more than the way men act on a single occasion. . . . A legal institution is the happening over and over again of the same kind of behavior." U. Moore, *loc. cit. supra* note 32.

⁸⁶ Promising first steps towards such a study have been taken in: Brooks Adams, *op. cit. supra* note 32; GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT* (1912); Boudin, *op. cit. supra* note 27 (1932); Walter Nelles, *Commonwealth v. Hunt* (1932) 32 COLUMBIA LAW REV. 1128; Nelles, *The First American Labor Case* (1931) 41 YALE L. J. 165; Max Lerner, *The Supreme Court and American Capitalism* (1933) 42 YALE L. J. 668; W. Hamilton, *Judicial Tolerance of Farmers' Cooperatives* (1929) 38 YALE L. J. 936; articles of Haines, Brown, and Cushman cited *supra* note 38.

⁸⁷ Cf. F. S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 56-61; *Modern Ethics and the Law* (1934) 4 BROOKLYN L. REV. 33, 48-50.

can be "fixed" by a certain political "boss"; that a series of notorious kidnappings will bring about a wave of maximum sentences in kidnapping cases. All this knowledge is useful to the practicing lawyer, to the public official, to the social reformer, and to the disinterested student of society. But it is most meager, and what little of it we have, individually, is not collectively available. There is at present no publication showing the political, economic, and professional background and activities of our various judges. Such a reference work would be exceedingly valuable, not only to the practical lawyer who wants to bring a motion or try a case before a sympathetic court, but also to the disinterested student of the law. Such a Judicial Index is not published, however, because it would be disrespectful.⁸⁸ According to the classical theory, these things have nothing to do with the way courts decide cases. A witty critic of the functional approach regards it as a *reductio ad absurdum* of this approach that law schools of the future may investigate judicial psychology, teach the art of bribery, and produce graduate detectives.⁸⁹ This is far from a *reductio ad absurdum*. Our understanding of the law will be greatly enriched when we learn more about how judges think, about the exact extent of judicial corruption, and about the techniques for investigating legally relevant facts. Of course, this knowledge may be used for improper purposes, but cannot the same be said of the knowledge which traditional legal education distributes?

If we know little today of the motivating forces which mold legal decisions, we know even less of the human consequences of these decisions. We do not even know how far the appellate cases, with which legal treatises are almost exclusively concerned, are actually followed in the trial courts.⁹⁰ Here, again, the experienced practitioner is likely to have accumulated a good deal of empirical information, but the young law clerk, just out of a first-rate law school, is not even aware that such a problem exists. Likewise, the problem of the actual enforcement of judgments has received almost no critical study. Discussion of the extent to which various statutes are actually enforced regularly moves in

⁸⁸ Frank reports (LAW AND THE MODERN MIND, 112-115) the discontinuance of a statistical study of the decisions of various New York magistrates which revealed startling differences in the treatment of certain offenses.

⁸⁹ Kantorowicz, *Some Rationalism about Realism* (1934) 43 YALE L. J. 1240.

⁹⁰ The Institute of Law of Johns Hopkins broke the ice in the modern study of trial court decisions. See STUDY OF CIVIL JUSTICE IN NEW YORK (1931). See also MARSHALL, *STUDY OF JUDICIAL SYSTEM OF MARYLAND* (1932); C. E. Clark, *Fact Research in Law Administration* (1928) 2 CONN. BAR J. 211; B. L. Shientag and F. S. Cohen, *Summary Judgments in the Supreme Court of New York* (1932) 32 COLUMBIA LAW REV. 825, and works cited therein, notes 6 and 7; Saxe, *Summary Judgments in New York—A Statistical Study* (1934) 19 CORN. L. Q. 237; B. L. Shientag, *Summary Judgment* (1935) 4 FORDHAM L. REV. 186.

the thin air of polemic theory. It is usually practically impossible to find out whether a given statute has ever been enforced unless its enforcement has raised a legal tangle for appellate courts.

When we advance beyond the realm of official conduct and seek to discover the social consequences of particular statutes or decisions, we find a few promising programs of research⁹¹ but almost no factual studies.⁹² Today the inclusion of factual annotations in a code, showing the extent and effects of law enforcement, would strike most lawyers as almost obscene. But notions of obscenity change, and every significant intellectual revolution raises to prominence facts once obscure and disrespectable. It is reasonable to expect that some day even the impudencies of Holmes and Llewellyn will appear sage and respectable.

4. Legal Criticism

It is perhaps the chief service of the functional approach that in cleansing legal rules, concepts, and institutions of the compulsive flavors of legal logic or metaphysics, room is made for conscious ethical criticism of law. In traditional jurisprudence, criticism, where it exists, is found masked in the protective camouflage of transcendental nonsense: "The law *must* (or *cannot*) be thus and so, because the *nature* of contracts, corporations or contingent remainders so requires." The functional approach permits ethics to come out of hiding. When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.

The importance for legal criticism of clear, objective description of judicial behavior, its causes and its consequences, is coming to be

⁹¹ See, for example, Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911-1912) 24 HARV. L. REV. 591, 25 *id.* 140, 489; F. K. Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 HARV. L. REV. 169, 191-194.

⁹² Notable exceptions are: McCracken, *Strike Injunctions in the New South* (1931); Brissenden and Swayzee, *The Use of the Labor Injunction in the New York Needle Trades* (1929) 44 POL. SCI. Q. 548, (1930) 45 *id.* 87. In addition to these direct studies of the effects of legal rules or decisions, there is a growing literature on the social materials with which law is concerned. Examples of such work are: Pound and Frankfurter, *Criminal Justice in Cleveland* (1922); R. R. Powell and Looker, *Decedents' Estates: Illumination from Probate and Tax Records* (1930) 30 COLUMBIA LAW REV. 919; Smith, Lilly and Dowling, *Compensation for Automobile Accidents: A Symposium* (1932) 32 COLUMBIA LAW REV. 785; S. and E. T. Glueck, *Predictability in the Administration of Criminal Justice* (1929) 42 HARV. L. REV. 297.

generally recognized. What is not so easily recognized is the importance for objective legal science of legal criticism.

Since the brilliant achievements of Bentham, descriptive legal science has made almost no progress in determining the consequences of legal rules.⁹³ This failure of scholarship, in the light of the encouraging progress of modern research into the antecedents and social context of judicial decision, calls for explanation.

Possibly this gap is to be explained in terms of an inherited assumption that statutes and decisions are self-executing, that the consequences of a law or a judgment are, therefore, clearly indicated by the language of the statute or decision itself, and that factual research is therefore a work of supererogation. Possibly this failure of research is to be explained in terms of the dominance of the private lawyer in our legal education. The private attorney is interested in the *causes* of judicial decisions, but his interest in consequences is likely to stop with the payment of a fee. I am inclined to think, however, that the failure of our legal scholarship in this direction may be attributed to a more fundamental difficulty. The prospect of determining the consequences of a given rule of law appears to be an infinite task, and is indeed an infinite task unless we approach it with some discriminating criterion of what consequences are *important*. Now a criterion of *importance* presupposes a criterion of values, which is precisely what modern thinkers of the "sociological" and "realistic" schools of jurisprudence have never had. Dean Pound has talked for many years of the "balancing" of interests, but without ever indicating which interests are more important than others or how a standard of weight or fineness can be constructed for the appraisal of "interests."⁹⁴ Contemporary "realists" have, in general, either denied absolutely that absolute standards of importance can exist,⁹⁵ or else insisted that we must thoroughly understand the facts as they are before we begin to evaluate them. Such a postponement of the problem of values is equivalent to its repudiation. We never shall thoroughly understand the facts as they are, and we are

⁹³ The following spiritual exercise is recommended by Professor Kantorowicz. Let the unconverted lawyer or law student read a code of laws in the following way: "Let him ask himself with respect to each statement . . . what harms would social life undergo if instead of this statement the opposite were enacted. And then let him turn to all textbooks, commentaries, monographs and reports of decisions and see how many questions of this sort he will find answered and how many he will find even put." RECHTSWISSENSCHAFT UND SOCIOLOGIE (1911) 8, quoted in Pound, *supra* note 91, 25 HARV. L. REV. 489, 513.

⁹⁴ Cf. W. L. Grossman, *The Legal Philosophy of Roscoe Pound* (1935) 44 YALE L. J. 605, 608-611; John C. H. Wu, *The Juristic Philosophy of Roscoe Pound* (1924) 18 ILL. LAW REV. 285, 294-304.

⁹⁵ See U. Moore, *Rational Basis of Legal Institutions* (1923) 23 COLUMBIA LAW REV. 609, 612; W. Nelles, Book Review (1933) 33 COLUMBIA LAW REV. 763, 765-768.

not likely to make much progress towards such understanding unless we at the same time bring into play a critical theory of values. In terms of such a theory, particular human desires and habits are important, and the task of research into legal consequences passes from the realm of vague curiosity to the problem form: How do these rules of law strengthen or change these important habits and satisfy or impede these important desires?

The positive task of descriptive legal science cannot, therefore, be entirely separated from the task of legal criticism. The collection of social facts without a selective criterion of human values produces horrid wilderness of useless statistics.⁹⁶ The relation between positive legal science and legal criticism is not a relation of temporal priority, but of mutual dependence.⁹⁷ Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched. It is loyalty to this union of distinct disciplines that will mark whatever is of lasting importance in contemporary legal science and legal philosophy.

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⁹⁶ See Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697, 701.

⁹⁷ I have attempted to trace these relations in some detail in *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) and again, more briefly and in words of one and two syllables, in *Modern Ethics and the Law* (1934) 4 BROOKLYN L. REV. 33.