

## LEGAL EDUCATION AND PUBLIC POLICY: PROFESSIONAL TRAINING IN THE PUBLIC INTEREST

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A RECURRENT problem for all who are interested in implementing policy, the reform of legal education must become ever more urgent in a revolutionary world of cumulative crises and increasing violence. Despite the fact that for six or seven decades responsibility for training new members of the "public profession" of the law has in this country been an almost exclusive monopoly of a new subsidized intellectual élite, professional teachers of law, and despite much recent ferment and agitation among such teachers, little has actually been achieved in refashioning ancient educational practices to serve insistent contemporary needs. No critics have been more articulate in lamenting this failure than the professional law teachers themselves.<sup>1</sup> What they think they have done to

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1. Still the best call to arms is HOFELD, *A VITAL SCHOOL OF JURISPRUDENCE AND LAW, FUNDAMENTAL LEGAL CONCEPTIONS* (Cook ed. 1923) 332. The most useful systematic survey is FACULTY OF LAW, COLUMBIA UNIVERSITY, *SUMMARY OF STUDIES IN LEGAL EDUCATION* (Oliphant ed. 1928). Among other articles which we have found helpful are Keyserling, *Social Objectives in Legal Education* (1933) 33 COL. L. REV. 437 (excellent criticism which has not yet received the attention it deserves); Steffen, *Changing Objectives in Legal Education* (1931) 40 YALE L. J. 576 (useful for both criticism and constructive proposals); Riesman, *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration* (1941) 50 YALE L. J. 636 (incisive criticism and clear orientation toward policy); Clark, *The Function of Law in a Democratic Society* (1942) 9 U. OF CHI. L. REV. 393; Gelhorn, *The Law School's Responsibility for Training Public Servants* (1942) 9 U. OF CHI. L. REV. 469; Harno, *Disciplines in the Training of a Lawyer* (1942) 22 B. U. L. REV. 254; Cavers, *New Fields for the Legal Periodical* (1936) 23 VA. L. REV. 1; Douglas, *Education for the Law* (mimeographed address given before The American Association of Collegiate Schools of Business, April 23, 1936); Bordwell, *Experimentation and Continuity in Legal Education* (1938) 23 IOWA L. REV. 297; Mechem, *The Proposed Four-Year Law Curriculum*

legal instruction may be recapitulated as a transition from lectures, to the analysis of appellate opinions, to confusion. Not atypical of the common indictment are the words of one eminent self-critic: "blind, inept, factory-ridden, wasteful, defective, and empty."<sup>2</sup>

The major contours of our contemporary confusion have long been plainly visible. Heroic, but random, efforts to integrate "law" and "the other social sciences" fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes*.<sup>3</sup> Lip-service is paid to the proposition that legal concepts, institutions, and practices are *instrumental* only; but the main organizing foci for determining both "fields" and "courses," and arrangement within fields and courses, of a "swollen and shapeless" curriculum are still time-worn, over-lapping, legal concepts of highest level abstraction.<sup>4</sup> Any relation between the factual problems that incidentally creep into particular fields or courses, in a curriculum so "organized," and the important problems of contemporary society is purely coincidental; and all attempts to relate such fields or courses to each other are frustrated by lack of clear social goals and inadequate criteria of importance. The relevance of "non-legal" materials to effective "law" teaching is recognized but efficient techniques for the investigation, collection and presentation of such materials are not devised. From lack of proper orientation, what appear to be promising ventures into "fact

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—*A Dissenting Opinion* (1940) 38 MICH. L. REV. 945; Frankfurter, *The Conditions for and the Aims and Methods of Legal Research* (1930) 6 AM. L. SCHOOL REV. 663; Frey, *Some Thoughts on Law Teaching and the Social Sciences* (1934) 82 U. OF PA. L. REV. 463; Frank, *Why Not a Clinical Lawyer-School* (1933) 81 U. OF PA. L. REV. 907; Gardner, *Why Not a Clinical Lawyer-School?—Some Reflections* (1934) 82 U. OF PA. L. REV. 785; Gardner, *Specialization in the Law School Curriculum* (1933) 81 U. OF PA. L. REV. 684; Harsch, *The Four-Year Law Course in American Universities* (1939) 17 N. C. L. REV. 242.

2. See Llewellyn, *On What is Wrong with So-Called Legal Education* (1935) 35 COL. L. REV. 651, 653. Contrast the resurgent optimism of the same author in *On the Problem of Teaching 'Private' Law* (1941) 54 HARV. L. REV. 775, an article in praise of STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (1939).

3. Katz, *A Four-Year Program for Legal Education* (1937) 4 U. OF CHI. L. REV. 527 writes with an intellectual modesty that borders on diffidence at 531: "We propose to consider a little more consciously whether anything worth while can be said as to the ends which law should serve." The shifting of courses in "moral and social philosophy" from the college to the law school is not likely to give new direction to legal education. A bolder attitude is taken and a more promising course on Law and Economic Organization is described in Katz, *What Changes are Practical in Legal Education* (1941) 27 A. B. A. J. 759.

4. Its framework is still largely that designed for the training of small-town practitioners of nearly a century ago. Some changes have, however, been effected. Not long ago a Connecticut judge complained that in the Yale Law School his son had learned how to reorganize a railroad but had not learned how to replevy a dog. Ironically the son's first job was to assist in the reorganization of a railroad. The records do not reveal that he has yet had opportunity to replevy a dog.

research" produce relatively isolated and trivial results. Professing to include, even as they transcend, purely vocational aims, most schools, by ignoring skills in negotiation, personnel management, and public relations—equally essential today to caretakers of private clients and public leaders—fail even to do a sound job of vocational training. Great emphasis is put upon "historical" studies, but too often these studies degenerate into an aimless, literary eclecticism that fails to come to grips with causes or conditions.<sup>5</sup> Despite all the talk of "teleological jurisprudence" and of the necessity of evaluating legal structures, doctrines, and procedures in terms of basic policy, there is little conscious, systematic effort to relate them clearly and consistently to the major problems of a society struggling to achieve democratic values.<sup>6</sup> Some slight integration of legal materials with conventional business practice too frequently passes for evaluation in terms of long-run policy. Indeed, occasional voices still insist that law schools should have no concern whatsoever with policies, goals, or values—that the only proper concern of law schools is method, *science* disinfected of all preference.<sup>7</sup> Finally, even a majority of those who subscribe to a conception of law as "continuously more efficacious social engineering," are so obsessed by myopic concern with one institution of social control, the court, that they fail to focus upon newer and, in many instances, more effective forms of organization, or to urge the creative consideration of alternative methods of formulating and implementing public policy.<sup>8</sup>

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5. Compare Boorstin, *Tradition and Method in Legal History* (1941) 54 HARV. L. REV. 424; Holdsworth, *Gibbon, Blackstone and Bentham* (1936) 52 L. Q. REV. 46.

6. Thus HOEFELD, *op. cit. supra* note 1, at 351 writes: "I mean to include under critical, or teleological, jurisprudence proper the *systematic* testing or critique of our principles and rules of law according to considerations *extrinsic* or *external* to the principles and rules as such, that is, according to the psychological, ethical, political, social, and economic bases of the various doctrines and the respective purposes or ends sought to be achieved thereby." What we stress is that not only a "testing" of such rules and principles is required but also a conscious pursuit of explicitly defined ends and systematic consideration of alternative doctrines, procedures and structures as means to such ends.

7. One distinguished authority on Bills and Notes insists that a teacher who expresses a social preference in the classroom should be fired. His preference is for law schools that concern themselves with "law" only as a means to *any* policies, goals or values and not with evaluation or deliberate choice of policies, goals or values. He justifies devoting most of his classroom time to the exposition of the legal literature on the grounds (1) that that literature discloses some of the rules established in the culture for the discourse of lawyers, and (2) that some of the propositions in the literature are part of the pattern of cues or signs to which non-verbal responses have been learned by judges and people generally.

8. It might be noted that not all experts on legal education in other countries are flattering in their references to American legal education. See Deal, *French Legal Education and Some Reflections on Legal Education in the U. S.* [1939] WIS. L. REV. 473; Rheinstein, *Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany* [1938] WIS. L. REV. 5; Riesenfeld, *A Comparison of Continental and American Legal Education* (1937) 36 MICH. L. REV. 31.

Proposals for escape from all of this confusion and inadequacy have, of course, been legion. Too often, however, such proposals have tended—by technologizing or gadgetizing the discussion at an early stage—to get lost in minutiae, in what one commentator has irreverently called the reverent modification of small particulars.<sup>9</sup> Lecture versus case; large class versus small class; seminars versus courses; group work versus individual work; specialization versus “well-rounded” training; vocational training versus cultural training; Bills and Notes (substitute any course) in the second year versus Bills and Notes in the third year; prescribed pre-legal training versus eclecticism; three-year curriculum versus four-year curriculum—these and many similar questions have been raised like quills on a startled porcupine. No thorough examination of educational problems can ignore such issues. But they are not basic.<sup>10</sup> To leap quickly into the fray on one side or the other, without clarifying more fundamental issues, is to satisfy lust for controversy at the expense of enlightenment.

A first indispensable step toward the effective reform of legal education is to clarify ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.

This end is not proposed as something utterly new or exotic. Indeed most of the recent developments in legal education—from “sociological

9. See Riesman, *supra* note 1, at 637.

10. Simpson, *The New Curriculum of the Harvard Law School* (1938) 51 HARV. L. REV. 965, 973 thus announces some revision of the rites of the Langdell shrine:

“The revised curriculum of the Harvard Law School attempts to harmonize three different but by no means inconsistent principles. These are:

“First: That everyone on the Faculty should be helped and encouraged to develop the best thought that is in him and to put it at the disposal of students to the fullest possible extent;

“Second: That every student should receive a solid foundation of conceptions and methods in each of the great basic legal subjects—such as litigation, crime, tort, property, contract, association, and government—with opportunity as he progresses to pursue the fields of his special interest in greater detail;

“Third: That the courses and their contents should be arranged, so far as practicable, so that the student will proceed to the complex from the simple, and that each course will throw the greatest possible light upon the rest.”

Note the lack of emphasis in Principle 1 on student self-education, the emphasis in Principle 2 on “legal technicality” as a basis for curricular organization, and the banality of Principle 3. Contrast the broader vision of the same author in *The Function of the University Law School* (1936) 49 HARV. L. REV. 1068 when he faces no necessity of appeasing colleagues.

jurisprudence" to neo-Thomism<sup>11</sup>—have tended, with varying degrees of explicitness, to move in this direction. None who deal with law, however defined, can escape *policy* when policy is defined as the making of important decisions which affect the distribution of values. Even those who still insist that policy is no proper concern of a law school tacitly advocate a policy, unconsciously assuming that the ultimate function of law is to maintain *existing* social institutions in a sort of timeless *statu quo*; what they ask is that their policy be smuggled in, without insight or responsibility. But neither a vague and amorphous emphasis on social "forces," "mores," and "purposes," nor a functionalism that dissolves legal absolutism for the benefit of random and poorly defined ends, nor a mystical invocation of the transcendental virtues of an unspecified "good life," can effect the fundamental changes in the traditional law school that are now required to fit lawyers for their contemporary responsibilities. Their direction is toward policy but their directives are at too high a level of abstraction to give helpful guidance. What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility.

It should need no re-emphasis here that these democratic values have been on the wane in recent years. The dominant trends of world politics have been away from the symbols and practices of a free society and toward the slogans, doctrines and structures of despotism. The outburst of racialism in Germany is but one of several profound recessions from the ideal of deference for the dignity and worth of the individual. Wherever democratic attitudes have declined, institutions connected with democracy have weakened or vanished. In post-Weimar Germany, as in post-parliamentary Italy and certain other countries, elections have ceased to be free and have become ceremonial plebiscites,—rituals of tribal union. Balanced public discussion has given way to discussion directed by a monopoly of government and party. The multiple-party system has yielded to something called a "party," though in fact an "order," a privileged monopolist of policy-making. In place of dynamic executive and judicial balance, there has arisen extreme executive concentration. Where institutions named parliaments yet survive, they are mummified into assemblies for the performance of rites of ceremonial ratification of executive decisions. Where there was a balance between centralized and local authority and control, there has arisen extreme centralization. The balance between governmental and private organization is unhinged as the tide moves toward the governmentalization of all organized life. With the sweep of regimentation, the balance is lost between private zones of

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11. See Kennedy, *Portrait of a Realist, New Style* (1941) 10 *FORDHAM L. REV.* 196.

living and the zones appropriate to official direction. The entire structure of open and competitive markets has been actively threatened by an economic structure of closed and monopolistic markets. Processes of production and distribution that were once carried on by bargaining and pricing depend on negotiation and rationing.

These sweeping transformations in the institutional structure of world politics may be summarized by saying that the balanced skill state has been yielding to the bureaucratic state. This is a reversal of nineteenth century trends. Despite local deviations, the over-all development of the world was toward the spread of free markets and free governments, and the resulting rise in influence of the specialist on bargaining, the businessman. He shared power with other skill groups—the propagandist, whose skill is the manipulation of symbols of mass appeal; the party boss, whose skill is the negotiation of favors; the civil official, whose skill is administration; the military men, whose skill is the management of violence. With the eclipse of the balanced skill state, the bureaucratic state has grown to behemoth dimensions. The line of development can be summarized by saying that the business state, with its balance of skill, gives way to the monopolist state, the propagandist state, or the party state; and that, if militarization continues, the garrison state will come out on top.<sup>12</sup>

Looking at the plight of freedom in the world today, can we fail to ask how the policy-makers of a free society have come to experience such catastrophic rebuffs? Through what deficiencies of skill or character have they failed to keep the trend of world development in line with their basic objective? Such chronic failure suggests that the policy-makers of recent times have arrived at their decisions without a firm grasp on reality, and that they have allowed their focus of attention to be absorbed with trivial non-essentials. Long before the present storm, clouds of difficulty were plainly visible. Yet decision-makers in business, government, and in all branches of public life were either oblivious to these portents or remained sterile and ineffective.

The question may be asked whether the lawyer can be held responsible in any significant degree for the plight in which we find ourselves. For a moralist, the question is whether the lawyer can be "blamed;" for a scientist, whether he is an important causal variable; for a reformer, whether he can be acted upon to produce change. The answer to all of these questions is: most assuredly, yes. It should need no emphasis that the lawyer is today, even when not himself a "maker" of policy, the one indispensable adviser of every responsible policy-maker of our society—whether we speak of the head of a government department or agency, of the execu-

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12. On the changing structure of world politics, see LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935); MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* (1940); Lasswell, *The Garrison State* (1941) 46 *AM. J. SOC.* 455.

tive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man.<sup>13</sup> As such an adviser the lawyer, when informing his policy-maker of what he can or cannot *legally* do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy. It is a familiar story, too, of how frequently lawyers who begin as advisers on policy are transformed into makers of policy; "the law" is one of the few remaining avenues to "success" open to impecunious talent. Successful practitioners of law often receive sufficiently large incomes, from advice and investment, to become powers in their own right and hence gravitate into positions of influence in industry. How frequently lawyers turn up in government—whether as legislators, executives, or administrators, or as judges (where they have a virtual monopoly)—is again a matter of common knowledge. Nor can the policy-making power of lawyers as executors, trust administrators, administrators in insolvency, and so on, be ignored. Certainly it would be difficult to exaggerate either the direct or indirect influence that members of the legal profession exert on the public life of this nation. For better or worse our decision-makers and our lawyers are bound together in a relation of dependence or of identity.

One of the best indicators of the policy-making power of lawyers would, of course, be a complete "job analysis" of the profession. Unfortunately, such an analysis has never been made.<sup>14</sup> In its absence a listing of professional activities which, though it is designed to emphasize the opportunities of lawyers to affect policy, is neither exhaustive nor of consistent level of abstraction, must suffice:

- Drafting, promoting, interpreting, and amending constitutions.
- Drafting, promoting, and interpreting executive orders, administrative rulings, municipal charters, and so on, and attacking or sustaining their constitutionality.
- Drafting and interpreting corporate and private association charters, agreements, dispositive instruments, and so on, and attacking or sustaining their validity.
- Deciding or otherwise resolving causes or controversies, and making other decisions which affect the distribution of values, as judges, executives, administrators, arbitrators, referees, trial examiners, and so on.

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13. See RUTHERFORD, *INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* (1937), for a chronicling of some of the more organized aspects of the influence of the bar on policy. CHEATHAM, *CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION* (1938) is suggestive of the range of the lawyer's activities.

14. For the beginnings see AMERICAN BAR ASSOCIATION, *THE ECONOMICS OF THE LEGAL PROFESSION* (Garrison ed. 1938) 28, 70; Bradway, *A National Bar Survey* (1936) 16 B. U. L. REV. 662; Clark and Corstvet, *The Lawyer and the Public: An A. A. L. S. Survey* (1938) 47 YALE L. J. 1272; Llewellyn, *The Problem of Undone Legal Service* (1940) 26 A. B. A. J. 38.

- Bringing to, or obscuring from, the attention of decision-makers the facts and policies on which judgment should rest.
- Advising clients on how to avoid litigation and controversies and on how to make the best possible use of legal doctrines, institutions, and practices for the promotion of their private purposes and long-term interest. (Clarifying, *inter alia*, intentions as to property disposition, business transactions, and family relations).
- Consulting and negotiating with clients, businessmen, opposing counsel, and decision-makers of all kinds.
- Reading, digesting, and reinterpreting the decisions and reasoning of past decision-makers of all kinds.
- Guiding, conducting, and preparing for investigations and hearings (criminal, regulatory, legislative, social-scientific, administrative).
- Preparing arguments, legal forms, witnesses (ordinary, expert), trial briefs, and so on.
- Selecting courts, juries, arbitrators, negotiators, and other decision-makers.
- Selecting clients.
- Selecting clerks, associates and successors.
- Preparing or supervising press conferences. issuing news releases, preparing radio material, or newsreel material.
- Developing influence through participation in civic and other public activities (organizing and directing pressure groups, lobbying propaganda, and other control procedures) and private sociability.
- Participating in professional organizations (organizations engaged in selection, exclusion and training of members, and with the maintenance of standards of varying degrees of ambiguity).
- Contributing by investigation, writing and lecturing to legal and social science (publishing facts and analyses of the relationship between legal rules and human relations; reformulation of legal rules).

It should be remembered, furthermore, in computing the sum of the lawyer's influence, that its true measure is not to be found in the more dramatic occasions, such as constitution-making or legislation-drafting, when such influence is exercised, but rather in the cumulative effect of multiple thousands of routine, day-to-day, presentations of fact and deliverances of opinion.

Yet, even if it be granted that lawyers are among the most influential of the policy-makers of our society, one question still persists. Is the lawyer not made of the same flesh, blood, eyes, and errors as other men? Can lawyers be "blamed" for sharing—or be made to share less—the compulsions and obsessions, the false hopes and egregious illusions, which have been, and are largely still, common to his clients and the other



policy-makers of our society? The answer is that the lawyer does bear a peculiar responsibility. The lawyer, it must be recalled, is a member of a learned profession—of a skill group which has the temerity to make a profession of tendering advice to others. It is his responsibility to acquaint himself not only with what the learned have thought, and with the historical trends of his time, but also with the long-term interests of all whom he serves and the appropriate means of securing such interests. For nurturing him in the necessary skills and information society offers him a peculiarly long period of training and incubation; and, if that period is filled with the proper experiences, he can—our whole educational system is based on the premise—be trained for responsible leadership. To no one else can clients and members of the public reasonably be expected to look for that enlargement and correction of perspective, that critical and inclusive view of reality, that is based on the disciplined exercise of skills which the layman is not given the opportunity to acquire.

Few would contest that during this pivotal era in our history lawyers have flouted both their opportunities and their obligations.<sup>15</sup> The blind have been leading the blind. It is self-congratulatory falsehood to say that recent catastrophes have come upon us like bolts from the blue, unforeseen by the eye of mortal man; unheeded prophets have foretold for years what was coming unless appropriate moves were made in time.<sup>16</sup>

The war period is a propitious moment to retool our system of legal education. America's huge plants for the fabrication of lawyers are practically closed for the duration; yet if the end of the present war in any way resembles the termination of World War I, their doors will swing wide to admit a dammed-up stream of returning soldiers who want legal training. In the rush of conversion from war to peace the archaic conventions and confusions of the past may win out over the vital needs of our civilization and the doors may open to admit the unwary members of an entire generation into a reguiled vacuum. War is the time to retool our educational processes in the hope of making them fit instruments for their future job.

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15. Compare Stone, *The Public Influence of the Bar* (1934) 48 HARV. L. REV. 1; Douglas, *The Lawyer and the Public Service* (1940) 26 A. B. A. J. 633; Jackson, *The Product of the Present Day Law School* (1939) 27 CALIF. L. REV. 635; Clark, *Legal Education in Modern Society* (1935) 10 TULANE L. REV. 1; Berle, *Modern Legal Profession* (1933) 9 ENCYC. SOC. SCIENCES 340; Shea, *Overcrowded?—The Price of Certain Remedies* (1939) 39 COL. L. REV. 191.

16. Cyclical conceptions of history with many pessimistic applications to the present are summarized in 4 SOROKIN, *SOCIAL AND CULTURAL DYNAMICS* (1941). For a century Marxists have predicted the coming crises of capitalism. Influential modern works are: LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM* (1933); GROSSMANN, *DAS AKKUMULATIONS UND ZUSAMMENBRUCHSGESETZ DES KAPITALISTISCHEN SYSTEMS* (1929); LUXEMBURG, *DIE AKKUMULATION DES KAPITALS* (1913); HILFERDING, *DAS FINANZKAPITAL* (1910). Non-Marxist pessimism is found in SPENGLER, *DECLINE OF THE WEST* (1926-28).

What, then, are the essentials of adequate training for policy? Effective policy-making (planning and implementation) depends on clear conception of goal, accurate calculation of probabilities, and adept application of knowledge of ways and means. We submit that adequate training must therefore include experiences that aid the developing lawyer to acquire certain skills of thought: goal-thinking, trend-thinking, and scientific-thinking. The student needs to clarify his moral values (preferred events, social goals); he needs to orient himself in past trends and future probabilities; finally, he needs to acquire the scientific knowledge and skills necessary to implement objectives within the context of contemporary trends.

Goal-thinking requires the clarification of values. In a democratic society it should not, of course, be an aim of legal education to *impose* a single standard of morals upon every student. But a legitimate aim of education is to seek to promote the major values of a democratic society and to reduce the number of moral mavericks who do not share democratic preferences. The student may be allowed to reject the morals of democracy and embrace those of despotism; but his education should be such that, if he does so, he does it by deliberate choice, with awareness of the consequences for himself and others, and not by sluggish self-deception.

How can incipient lawyers be trained in the clarification of values? Whatever the difficulties of communication, any statement of values must begin with words of high level abstraction, of ambiguous reference. No brief definition can convey to anyone else much of what the definer means. Too many persons jump to conclusions about the meaning of terms, regardless of the rules of interpretation intended by the speaker. At the risk of misconstruction, we offer our brief statement of democratic morals. The supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference—a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture, or class. It is a society in which such specific values as power, respect, and knowledge are widely shared and are not concentrated in the hands of a single group, class, or institution—the state—among the many institutions of society. This formula is not new. On the contrary, it states the implicit or explicit assumptions of most of the traditional moralists of democracy. But such a statement of democratic values—and this is the point of our present emphasis—cannot be understood, or implemented, unless it is amplified by rules of interpretation, of varying degrees of generality, that show how observers of specific situations can validly use the terms in describing concrete reality and promoting the occurrence of relatively specific events in harmony with the definition. This task of spelling out values in terms of consistent propositions of varying degrees

of generality or of relating general propositions to operational principles, is a long and arduous process. But it is indispensable to clarity and, hence, to the education of policy-makers.

Clarification of values, by relating general propositions to operational principles in representative and specific contexts, must for effective training be distinguished from the traditional, logical, *derivation* of values by philosophers. Such derivation—that is, exercises by which specialists on ethical philosophy and metaphysics take sentences that define moral standards and deduce them from more inclusive propositions or vice versa—is a notorious blind alley. Divorced from operational rules, it quickly becomes a futile quest for a meaningless *why*, perpetually culminating in “some inevitably circular and infinitely regressive logical justification” for ambiguous preferences.<sup>17</sup> From any relatively specific statements of social goal (necessarily described in a statement of low-level abstraction) can be elaborated an infinite series of normative propositions of ever increasing generality; conversely, normative statements of high-level abstraction can be manipulated to support any specific social goal. Prospective lawyers should be exposed, by way of warning and sophistication, to the work of representative specialists in derivation; relatively little time should be required, however, to teach them how to handle, and how to achieve emotional freedom from, the ancient exercises.

Implementation of values requires, first, trend-thinking. This considers the shape of things to come regardless of preference.<sup>18</sup> His goals clarified, a policy-maker must orient himself correctly in contemporary trends and future probabilities. Concerned with specific features of the future that are ever emerging from the past, he needs to be especially sensitive to time, and to forecast with reasonable accuracy passage from one configuration of events to the next. For this purpose he must have at his disposal a vast array of facts properly organized and instantly accessible. No one, much less a policy-maker, can do without expectations about the future—expectations about the probability of a short or a long-drawn-out war, of mounting or diminishing taxes, of rising or falling standards of living. To think developmentally is to be explicit about these anticipations of the shape of things to come. Every policy proposal and decision, including our recommendations about legal training, turns in part upon a picture of significant changes in the recent past, and expectations about significant changes in the emerging future. The nature of our picture of recent trends, together with our interpretation of the principal cross-currents of the near future, have been briefly indicated in our de-

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17. See McDougal, *Fuller v. The American Legal Realists* (1941) 50 YALE L. J. 827, 835.

18. Thus one of the writers has tried to suggest the kinds of trends which “property” lawyers should study. See McDougal in HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS (1941) 268, 273.

scription of the wane of democratic values and of the unrealistic orientation of contemporary policy-makers. The results of trend-thinking must continually be evaluated by the policy-maker in the light of his goals; the task is to think creatively about how to alter, deter, or accelerate probable trends in order to shape the future closer to his desire.

Implementation of values requires, next, scientific-thinking. While trend information is indispensable, it is not sufficient to enable us to mould the future. Trends have a way of changing direction; and often we can contribute to these changes by the skillful management of factors that condition them. A trend is not a cause of social change; it is a register of the relative strength of the variables that produce it. We do not learn about causal factors by passively observing trend; we must compare many examples of trend before we can build up a body of scientific knowledge. The laws and propositions of science state invariant interrelations. We do not have scientific knowledge when we know, for example, that there was a trend toward world war in 1939; it is only when we can, by comparing war periods, relate war to conditioning factors that we have science. When we look toward the future our aim is not to draw a fatalistic series of trend curves in the direction they have been moving in the past. To extrapolate in this way is necessary, but it is a prelude to the use of creative imagination and of available scientific knowledge in deciding how to influence the future. The very act of taking thought and of acting on the basis of thought are among the factors that determine the future trend of events. In a democratic society a policy-maker must determine which adjustments of human relationships are in fact compatible with the realization of democratic ideals. Which procedures actually aid or hamper the realization of human dignity? How can the institutions of legislation, adjudication, administration, production, and distribution be adjusted to democratic survival? What are the slogans and doctrines—in which contexts of experience—that create acceptance of democratic ideals and inspire effort to put them into practice? In short, the policy-maker needs to guide his judgment by what is scientifically known and knowable about the causal variables that condition the democratic variables.

Effective training in scientific thinking requires that students become familiar with the procedures by which facts are established by planned observation. Most of our sources of information about human experience are not deliberately created records. For the most part we must rely upon whatever inferences can be drawn from "accidental" residues of the past. In recent decades, and especially with the rapid expansion of the social and psychological sciences, the observing of human conduct has become progressively more technical and exhaustive. It is not too much to say that the great contribution of modern specialists on the human sciences is less in the realm of general theory than in the perfecting of method by which ancient speculations can be confirmed, modified or rejected. From

the laboratory of the psychologist, the field expedition of the ethnologist and the clinic of the physician have come illuminating bodies of data; and the procedures of observation invented in these special situations have stimulated the development of ways of studying men and women under normal circumstances in our own civilization. The effect of many kinds of human environment—in family, factory, school, army, prison, market—have been subjected to careful scrutiny. The results are continually applied and retested in the selecting of personnel in business, government, army and other social structures. Systems of incentive (the granting of indulgence or the inflicting of deprivation) are explored for their efficacy in raising production and reducing disciplinary problems. Modes of phrasing are pretested to evaluate their effectiveness as modifiers of buying, giving, voting. Throughout the length and breadth of modern society decisions are modified on the basis of what is revealed by means of intensive or extensive observation of human life, the procedures varying all the way from the prolonged interviews of a psychoanalytic psychiatrist to the brief questions of the maker of an opinion poll.<sup>19</sup>

Acquaintance with various methods of observation not only furnishes a sound basis for policy planning; it contributes directly to skill in the practical management of human affairs. Another glance at the job analysis of the modern lawyer set forth above indicates something of the range of management problems with which he must grapple. Success calls for skill in direct personal contact with client, partner, clerk, opposing counsel, investigator, witness, jurymen, judge (to name some conspicuous examples); likewise, there is need of skill in public relations (in the handling of grand jury investigations, conducting trials, conducting legislative hearings).

From all the emphasis which we have placed upon certain ways of thinking, observing and managing, it should not be inferred that we propose to discard or neglect the traditional skills and knowledge of the lawyer. It is the lawyer's mastery over constitutions, statutes, appellate opinions and textbooks of peculiar idiom, and his skill in operating the mechanics (procedure) of both governmental institutions (courts, legislatures, administrative boards, executive offices) and private associations (corporations, partnerships, trade associations, labor unions, consumers' cooperatives), that set him apart from, and give him a certain advantage over, such other skill groups in our society as diplomats, economists, social psychologists, social historians and biologists. But much of what currently passes for instruction in law schools is a waste of time because it consists of the reiteration of a limited list of ambiguous terms cut asunder from any institutional context that would set a limit to their ambiguities. Thus, a student may learn that if discussion begins with "contract," it

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19. Further details are given later in this article.

must then proceed by rearrangement of certain meanings to be assigned to a small list of well-known words, such as "offer and acceptance," "consideration," "mistake," "performance," "condition," and so on; but he knows very little unless he has also learned to complete the meaning of these terms by reference to representative institutional contexts and important social values. What we propose is that training in the distinctive core of the lawyer's repertory of skills and information be given a new sense of purpose and new criteria of relevance. It is a fundamental truth of practical and scientific psychology that purpose increases ease of learning; students can be expected to acquire more rather than less mastery of legal technicality when the comparatively small repertory of key legal terms is considered in relation to the goals and the vital problems and processes of democracy, rather than in a formalistic framework, un-oriented toward policy. The lawyer's traditional storehouse of learning is already too tightly stuffed with legacies from the past to be thoroughly mastered by anyone in a lifetime of devoted scholarship; a student must, if he is not to choke on triviality, have extrinsic criteria of relevance. There comes a time, as Mr. Justice Holmes long ago remarked, when energy can be more profitably spent than in the reading of cases. Given a new sense of purpose and trained in the skills and information which should be common to all policy-makers, the lawyer cannot escape becoming a better lawyer. Schools which prepare themselves to emphasize such purposes and to offer such training may succeed in becoming more truly vocational even as they grow more genuinely professional.

For a quick review of the skills appropriate to lawyers who participate in policy, the following brief table is appended. Later in the article it will be explained in some detail.

#### SKILL TABLE

1. Skills of thought.
  - a. Goal-thinking.

The basic values of democracy: how derived, how related operationally to concrete events.
  - b. Trend-thinking.

Past trends and future probabilities appraised according to the degree of the realization and the distribution of the basic values.
  - c. Scientific-thinking.

The variables that condition the democratic value-variables.
  - d. Legal technicality (the distinctive skill of the lawyer).

The command of the vocabulary, citations and procedures that courts and other authoritative agencies expect from counsel.

## 2. Skills of observation.

## a. Intensive procedures.

Observer devotes himself for a long time to a particular person or situation and uses complex methods (detailed personality studies; detailed studies of historical or current situations).

## b. Extensive procedures.

Observer devotes himself briefly to a particular person or situation and uses a simple method (brief opinion poll interview; cursory report on a situation).

## 3. Skills of management.

## a. Primary relations.

Persons with whom one deals individually.

## b. Public relations.

Persons with whom one deals as members of a large group.

So much by way of broad outline. It is now incumbent upon us to spell out in more detail what we understand to be the values of a free society, the variables that condition their appearance, and the ways in which lawyers can be trained in the skills necessary to manage them with a reasonable probability of success.

## DEMOCRATIC VALUES AND CONDITIONING VARIABLES

The cardinal value of democracy we have already specified as the realization of human dignity in a commonwealth of mutual deference. Let us now specify in more detail what we mean by a society where the dignity of man is proclaimed and practiced. What pattern of value distribution is characteristic of a free society? By a value we mean an object of human desire. In our civilization, at least, representative values are power, respect, knowledge, income, and safety (including health).

Three values may be named whose proper relationship determines whether we are justified in calling any group democratic. These values are power, respect, and knowledge. Where the dignity of man is fully taken into account, power is shared, respect is shared, knowledge is shared. A society in which such values are widely shared is a free society. A free society is by no means restricted to these values; it must, however, make certain that other goal values are not incompatible with them. Within the framework of shared power, respect and knowledge, many other values may be sought, such as a high material standard of living.

We know that the degree of attainment of each cardinal value reacts favorably upon the others. Wherever power is shared it is easier to maintain a sharing of respect and knowledge. Where respect is shared it is

easier to share power and knowledge. Where knowledge is shared the sharing of power and respect is simpler. In the same way that they interact with one another, these democratic variables are conditioned by other social factors. One of these variables is balance, in the sense of a balanced distribution of income. One of the earliest discoveries of civilized man was the necessity of avoiding extremes of riches and poverty if human dignity is to be realized and maintained through the years in the life of any community. Still another conditioning variable is regularity in the tempo of social development. When the tempo of social change is erratic, human beings have great difficulty in adjusting smoothly to their environment; they store up resentments that may discharge destructively against themselves and one another. A third variable is realism, by which is meant access to a stream of fact and comment that provides one with needed clues to sound policy. No matter how well-intentioned the individual may be or how thoroughly equipped with intellectual skill and information, he is dependent upon the reports that reach him through private and public channels of communication in making up his mind on policy questions. A fourth important and very pervasive variable is character. A democratic society is most possible where democratic character prevails; that is to say, where personalities develop with a minimum of distortion. From our studies of personality development we know that great reservoirs of inhibited rage distort human beings and diminish the probability of congenial and productive interpersonal relationships.

The foregoing list of conditioning variables does not exhaust the factors that may aid or retard the attainment of shared power, respect and knowledge, but the list does deal with a cluster of the most important. If we conceive of interpersonal relations as a continuing stream of events through days, weeks, years and generations, we can think of our policy problem as that of maintaining a proper equilibrium among component parts of this perpetual flow. Such a value as power is shared in government, business, church, in varying degree, fluctuating with the passage of time. The magnitude of this variable, indexed by whatever criteria are taken to be most appropriate, increases or diminishes in relation to the other variables we have specified.

The policy task of a free society is to put its own distinctive value-variables into practice and to control the factors that condition their attainment. In addition, other value-variables can be selected to enrich the life of the community.<sup>20</sup> In choosing the following goals of democratic policy we have been influenced by all of these considerations, combining the distinctive values of a free society with conditioning factors and with values that may be sought regardless of the form of society.

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20. Compare the comprehensive statement made in NAT. RESOURCES PLANNING BOARD REPORT, NATIONAL RESOURCES DEVELOPMENT (1942).



*Distinctive Goal Variables*

*Shared Power.* By "power" we mean participation in or the ability to participate in the making of important decisions. When such participation or ability is general, there is democracy, in so far as the power variable is concerned. The term "power," as we use it, is equivalent to "the function of government," which is not to be confused with the "institutions called government." The power function—the function of government—may be exercised not only by agencies called "government" by the local population, but by private pressure organizations, business enterprises, churches and others. Moreover, we must be on guard against accepting all simple choices as true decisions. It is convenient to reserve the word "decision" for choices potentially or actually sanctioned by coercion. When statutes lapse into desuetude, they have ceased to be decisions in our sense of the word. Coercive sanctions are the "proper sphere" of the state, traditionally conceived as an independent community organized for making and enforcing policy.<sup>21</sup> We do not reject this definition, though we warn against confusing the institutions named government with the agencies that perform the power function; the identity of the institutions that exert power can only be determined by proper investigation, and must not be taken for granted through verbal coincidence.<sup>22</sup>

In reviewing the indexes that may be selected to determine the distribution of power in a given community, we may proceed from the institutions locally named "the government" to whatever private pressure associations are in existence. In the United States, we begin with federal, state and local government, and pass on to private pressure organizations that are recruited from, or speak in the name of, the principal groups into which the population is divided. From pressure organizations we pass to businesses, distinguished according to degree of market control (monopoly, competition) and economic function (mining, agriculture, etc.). Private associations may carry on economic functions though not organized as government or business; an example is the consumers' cooperative. From the economic functions in private hands, we go on to consider all the widely ramifying forms of cultural activity—religious, fraternal, scientific, educational.

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21. The traditional distinctions are in BURGESS, *POLITICAL SCIENCE AND CONSTITUTIONAL LAW* (1891); WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924).

22. Still another distinction may be made in passing: when we refer to "authority" we mean forms; by "control" we mean facts. The authoritative rules of the code books may be belied by the facts of life. MORGANTHAU, *LA REALITÉ DES NORMES* (1934) distinguishes the "validity" of a rule from its "efficacy." Some serviceable categories of "power" are in TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* (1939), especially c. 11. See CATLIN, *THE SCIENCE AND METHOD OF POLITICS* (1927); MERRIAM, *POLITICAL POWER* (1934); RUSSELL, *POWER* (1938).

When organizations are scrutinized it is first necessary to examine their formal set-up. Beginning with the state, we may declare it to be democratically organized if authority to change the constitution is vested in the people, who may be authorized to act directly by referendum or indirectly through delegates and representatives.<sup>23</sup> The same standard is applicable to government, that is the institutions locally called government, through which the state finds expression; government is democratic when the majority can change officials or act directly on legislation. We are not satisfied to take the formal rules laid down in constitutions and statutes at their face value; we need to assemble indexes of the degree of popular control in fact as well as in name. Election statistics provide pertinent information.<sup>24</sup> The prevalence of what are called "elections" in despotisms reminds us that high percentages of electoral participation do not necessarily signify majority rule; we must look beyond the figures to ascertain the degree of coercion, and this calls for properly trained observers. Election returns may reveal a very high degree of non-voting, and while this may signify indifference or hopelessness about influencing important decisions, it may be attributable to other causes. The vital point is to discover whether voters (or non-voters) possess a genuine sense of participation, whether they take it for granted that whenever they feel like it they can make a difference in the decision-making process by utilizing procedures legally available to them.<sup>25</sup>

Another body of participation indexes describes the affiliation of government agencies with the constituent groups of society.<sup>26</sup> To what extent are high, middle and low income groups found in the agencies of government? <sup>27</sup> What is the relation of officeholders to the distribution of population by sex, age, race, religion, nationality of origin, or occupational skill? <sup>28</sup> Does the agency receive financial or other aid from special groups,

23. For the constitutional structure of the world on the eve of world depression and world war, see DELPECH AND LAFERRIÈRE, *LES CONSTITUTIONS MODERNES* (1928-34).

24. Data and analyses are in GOSNELL, *WHY EUROPE VOTES* (1930) and TINGSTEN, *POLITICAL BEHAVIOR* (1937).

25. For attitudes associated with non-participation in elections, the material found in a pioneer study of the subject is still unexcelled: MERRIAM AND GOSNELL, *NON-VOTING, CAUSES AND METHODS OF CONTROL* (1924).

26. A classic of this type is, of course, BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913; with a new introduction, 1939).

27. See HOLCOMBE, *THE POLITICAL PARTIES OF TODAY* (1925), *THE NEW PARTY POLITICS* (1933), and *THE MIDDLE CLASSES IN AMERICAN POLITICS* (1940).

28. Specimen inquiries: EWING, *THE JUDGES OF THE SUPREME COURT, 1789-1937* (1938); HERRING, *FEDERAL COMMISSIONERS* (1936); LASKI, *STUDIES IN LAW AND POLITICS* (1932); UMBREIT, *OUR ELEVEN CHIEF JUSTICES* (1938); Cole, *Italy's Fascist Bureaucracy* (1938) 32 *AM. POL. SCI. REV.* 1143; Gerth, *The Nazi Party: Its Leadership and Composition* (1940) 45 *AM. J. SOC.* 517; Heinberg, *The Personnel of French Cabinets 1871-1930* (1931) 25 *AM. POL. SCI. REV.* 389; Hyneman, *Who Makes Our Laws?* (1940) 55 *POL. SCI. Q.* 556; Lasswell and Sereno, *Governmental and Party Leaders in Fascist Italy* (1937) 31 *AM. POL. SCI. REV.* 914.

such as foreign governments or business groups?<sup>29</sup> If there is little participation in office-holding by any specific group, do we find that mobility is fairly high, in the sense that persons who start life in the low income group, for example, often climb to the office-holding level?<sup>30</sup>

In considering private pressure organizations<sup>31</sup> we must raise the same questions that we have posed for government, since we are interested in both the forms of authority and the facts of control. Pressure organizations are private associations, such as parties, trade associations, and trade unions, whose primary object is to influence community decisions. These organizations may be distinguished from one another according to the groups in whose name they speak, from whose ranks they recruit, or from whom they draw financial support. We need to determine which organization is connected with the chief economic divisions of society. As said above, economic divisions can be described according to economic function performed and according to the degree of market control. Another closely related classification separates the skill groups.<sup>32</sup> Chemists and engineers are among the professional groups whose skill consists in the manipulation of symbols of things, and of procedures in dealing with things. Lawyers and social scientists are also professional skill groups; but their skill is the manipulation of symbols of interpersonal relations, and of procedures for dealing with people. In our inventory of private pressure organizations, we do not stop with economic and skill divisions; each organization radiates into all the sex, age, race and other identities recognized in society. As with government, we want the facts about internal forms of authority; and we want to investigate the intensity of participation in control processes on the part of affiliated elements to discover the extent to which the organization puts democracy into practice.<sup>33</sup> The foregoing questions apply to organizations in all the remaining fields of private life, when we pass from pressure organizations to private economic organizations, and from them to all remaining cultural organizations.<sup>34</sup>

In our discussion so far we have referred to the task of assessing the degree of democracy in the internal affairs of any significant governmen-

29. A succinct introduction is Senturia and Odegard, *Corruption, Political* in 4 ENCYC. SOC. SCIENCES (1931) 448.

30. See SOROKIN, *SOCIAL MOBILITY* (1927).

31. For recent information see BLAISDELL, *TNEC REP., ECONOMIC POWER AND POLITICAL PRESSURES*, Monograph 26 (1941); PEARCE, *TNEC REP., TRADE ASSOCIATION SURVEY*, Monograph 18 (1941).

32. Consult LASSWELL, *POLITICS; WHO GETS WHAT, WHEN, HOW* (1936) c. 6; CARR-SAUNDERS AND WILSON, *THE PROFESSIONS* (1933). See TAUSSIG AND JOSLYN, *AMERICAN BUSINESS LEADERS* (1932); Schwarz, *Heads of Russian Factories—A Sociological Study* (1942) 9 SOCIAL RESEARCH 315.

33. A recent study, representative of the best, is GARCEAU, *THE POLITICAL LIFE OF THE AMERICAN MEDICAL ASSOCIATION* (1941).

34. An enterprising attempt to appraise the state of democracy in an entire commu-

tal or non-governmental organization. But that does not exhaust the problem. We must take external relations into account. With respect to any one area of activity, every degree of organizational control may be found, extending from exclusive control by a single organization to rivalry among many. In world politics the relations among states are deeply conditioned by the expectation of violence, the expectation that whether we like it or not, adjustments will probably be made by acts of coercion ranging all the way from light pressure to all-out war. There is no organized world state; and the typical pattern of world politics has been incessant rivalry among all powers, but particularly among a small number of great powers.<sup>35</sup> Freedom is found when there is one world state which is democratically organized, or when every existing state is democratically organized, or to the degree that democratic states are able to prevent interference by despotic powers.

The pattern of great power politics applies to many areas of economic activity. It is obvious that single economic organizations do not typically dominate one particular product or service throughout the world, although this state of affairs is closely approximated in peace times in nickel and certain other commodities. The market for grain is structured internationally on a different pattern from the market for oil; and inside each region, country and locality an enormous variety of set-ups prevails. Many commodities are dominated by a small number of economic great powers, whose rivalries may vary all the way from total conflict to total sham.<sup>36</sup> In determining the degree of democracy, indexes of the following kinds are in point: degree of monopoly control; degree of internal democracy. To the extent to which any participant in a market can impose scarcity, he is a monopolist who has broken down a genuinely competitive market structure. He has politicized the market; scarcity power is among the sovereign powers.

Viewing the world as a whole, it is evident that among the world's most powerful organizations are cartels and trusts that strive for world control of various markets.<sup>37</sup> Some private trusts and cartels add to the manipulation of scarcity by peaceful means the imposition of scarcity by violence, sometimes privately through their police, sometimes indirectly through the armed forces of the governments which they domin-

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ity (Akron, Ohio) is JONES, LIFE, LIBERTY AND PROPERTY (1941).

35. A standard text outlining categories for the study of world politics is SCHUMAN, INTERNATIONAL POLITICS (1933). A remarkable attempt to formulate interstate relations on a scientific basis is Richardson, *Generalized Foreign Politics*, BRIT. J. OF PSYCH., Monograph Supplement 23 (1939).

36. Consult LAWLEY, THE GROWTH OF COLLECTIVE ECONOMY (1938); PLUMMER, INTERNATIONAL COMBINES IN MODERN INDUSTRY (1938).

37. See the vigorous articles by Brady, *Policies of National Manufacturing Spitzenverbände* (1941) 56 POL. SCI. Q. 199, 379, 515; also BORKIN AND WELSH, GERMANY'S MASTER PLAN (1943).

ate, or which dominate them as instruments of total state policy. In periods of total war, the network of interests that cuts across boundary lines exhibits a comparatively simple pattern; two groups of powers, each seeking to encircle the other, strive to establish totally independent zones of authority and control. So far as shared power is concerned, the general principle is to preserve competition or democratize dominance. In practice difficulties arise from the reluctance of policymakers to clarify and enforce rules of market control in the areas under their jurisdiction. With respect to markets, notably internal markets, it may be possible to settle on workable rules of balance, to win support for the slogans that incorporate these rules, and to organize the vested and sentimental interests necessary to put them into operation.<sup>38</sup>

*Shared Respect.* Beyond the voting and arguing relations involved in the making of policy lie many other zones of human contact in which the dignity of the individual is involved. Human beings are respected, in our present sense of the word, when they are taken into consideration by all with whom they come in contact in spheres of life beyond the making of collective decisions.

Respect is shown in ways that may be called negative and positive. The negative side is absence of interference with individual choice, the preservation of large zones of self-determination for the private person. On the positive side respect means equality of access to opportunity for maturing latent capacity into socially valued expression.

We know that communities that share power do not always respect the individual in the sense of reserving for him large areas in which he can go his own way free from compulsion and prohibition. It is notorious that small, tightly-organized and tradition-bound neighborhoods may hedge the zone of individual expression within narrow limits. This is true of some of the "peasant democracies" and of certain primitive societies that have been reported by ethnologists.<sup>39</sup> The history of sumptuary legislation shows that democracies may even excel despotisms in the austerity of the regime they prescribe for their citizens.<sup>40</sup> Our own principle is that the presumption is against any proposal to pour the individual into a

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38. On rules of balance see LASSWELL, *DEMOCRACY THROUGH PUBLIC OPINION* (1941) c. 10.

39. Perhaps a word of caution should be given against putting too much credence in the picture of the savage caked with custom who was so movingly described in the earlier ethnological reports. As our investigators have become more familiar with primitive culture they have been less impressed by its uniformities and more struck by personal manifestations. Contrast the point of view of W. G. Sumner and associates in *THE SCIENCE OF SOCIETY* (1927) with that of Edward Sapir's students in *LANGUAGE, CULTURE AND PERSONALITY* (Spier, Hallowell, and Newman ed. 1941). None the less, the degree of individualization appears to be lower than in our own highly variegated civilization.

40. For guidance to the history, see the articles on *Blue Laws*, *Prohibition*, *Sumptuary Legislation* in *ENCYC. SOC. SCIENCES*.

mould; the justification must be immediate and overwhelming necessity of the community or clear evidence that men are affected destructively by the prevailing degree of self-direction.

In describing the degree of respect, in the negative sense, that prevails in a given community, certain indexes are pertinent, notably all that has to do with prohibitions, restrictions and compulsions upon the way the individual spends his time. The most extreme degree of disrespect for autonomy is prescribing every move that is permissible by the hour, day and week. In emergency situations, we must acquiesce in such stringent rationing of human resources. But in less critical periods, the zone of personal responsibility can be enormously extended without inflicting damage on others.

Provision for equal opportunity often involves positive measures by the community as a whole. This is notably true with regard to those persons who suffer a temporary or permanent handicap and who cannot realize their full potentialities unless special measures are taken in their behalf. Special exemptions or facilities can be made available to the immature; to the crippled, injured, and ill; to the unemployed and the recipients of low incomes; to those who have received unfortunate early training.<sup>41</sup> Equality of sacrifice is not equality of burden; the same burden weighs far more heavily on the weak than on the strong. We must make at least a partial application of the maxim, "from each according to his capacity, and to each according to his need."

As indexes of mutual respect we must examine the extent to which groups participate equally in contact with one another in the non-power spheres of human relations. Scientific field workers know how to make exhaustive inventories of the state of mutual respect among persons divided according to age, sex, race, religion, skill, income, nationality of origin, length of residence (and similar characteristics). Rates of inter-marriage, access to economic activity, areas of residence, the giving and receiving of social invitations, membership in clubs and cliques, the use of courtesy forms (as in salutation)—these are among the facts of human life open to systematic investigation.<sup>42</sup> Besides the degree of equal participation at any given cross-section, it is pertinent to know the facts about

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41. For guidance to the history see the articles on *Allowances, Charity, Child, Dependency, Disaster Relief, Family, Humanitarianism, Institutions, Public, Labor Legislation and Law, Maternity Welfare, Old Age, Pensions, Poor Laws, Public Welfare, Rehabilitation, Social Work* in ENCYC. SOC. SCIENCES.

42. For an exhaustive report on the division of a community into "classes" (respect groups, in our terminology) see the six-volume Yankee City Series in course of publication by the Yale University Press, summarizing the work of W. Lloyd Warner and associates. Also: DAVIS, GARDNER AND GARDNER, *DEEP SOUTH* (1941); DAVIS AND DOLLARD, *CHILDREN OF BONDAGE* (1940); DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1937); POWDERMAKER, *AFTER FREEDOM* (1939).

social mobility. To what extent are those who begin life in a low respect position able to rise to more respected positions?

*Shared Knowledge.* One of the basic manifestations of deference to human beings is to give full weight to the fact that they have minds. People need to be equipped with the knowledge of how democratic doctrines can be justified. They can not be expected to remain loyal to democratic ideals through all the disappointments and disillusionments of life without a deep and enduring factual knowledge of the potentialities of human beings for congenial and productive interpersonal relations. As a means of maintaining a clear and realistic appraisal of human nature, there must be deeply based recognition of the factors governing the formation of human character. No democracy is even approximately genuine until men realize that men *can* be free; and that the laborious work of modern science has provided a non-sentimental foundation for the intuitive confidence with which the poets and prophets of human brotherhood have regarded mankind. Buttressing the aspirations of these sensitive spirits stands the modern arsenal of facts about the benevolent potentialities of human nature, and a secure knowledge of methods by which distorted personality growth can be prevented or cured. Through the further application of methods that have already achieved partial success, we can provide instruments capable of putting into practice admonitions of the moralists and visions of the dreamers. Without this knowledge, the intuitions of genius are helpless; armed with this knowledge, including knowledge of the means of further knowledge, moral intention becomes steadily more capable of fulfilling itself in reality. There is no rational room for pessimism about the *possibility* of putting morals into practice on the basis of what we know, and know we can know, about the development of human personality.<sup>43</sup> Any form of crippling predestinationism, based on myths about "heredity," whether of an individual or a race, can be brushed aside.<sup>44</sup>

If democratic forms of power are to be full-blooded with reality, the overwhelming mass of mankind must be provided with enough intellectual skill to make a proper evaluation of policy goals and alternatives. These skills include observation and analysis; and analysis implies intellectual tools for the understanding of human relationships. Our basic knowledge must be ever-expanding; this makes necessary an organization of scientific work capable of providing more of what we need to know about the factors that mould man and society. At present only crude indexes are available to show the state of knowledge of our people. To some

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43. In particular see FROMM, *ESCAPE FROM FREEDOM* (1941) and Sullivan, *Conceptions of Modern Psychiatry* (1940) 3 *PSYCHIATRY: J. OF BIO. AND PATH. OF INTERPERSONAL RELATIONS* 1.

44. See BENEDICT, *RACE: SCIENCE AND POLITICS* (1940) for an authoritative summary of the difference between the science of "race" and the ideology of "racism."

extent we can rely on figures of literacy and of years in school;<sup>45</sup> more subtle items are not yet described in convenient terms.

### *The Instrumental or Conditioning Variables*

From the goal variables of shared power, shared respect, shared knowledge we now pass to other factors that determine the degree to which deference can be realized. Social processes are explicable as interacting variables; social life is an ever-moving equilibrium. This applies to the interrelationships of the key variables. They are all in a relationship of ends and means to each other. Distribution of respect affects the distribution of power and knowledge; in turn the distribution of knowledge affects the distribution of respect and power. More than that, we take it for granted that these key variables are affected by the magnitudes of certain other variables. In such a potential list we propose to select a few. They are chosen because they are believed to be particularly important for the development of policies capable of achieving and maintaining that inter-relationship among the key variables that we call democratic. Among the conditioning variables we have chosen the following: balance; regularity; realism; character.

*Balance.* When we speak of balance we refer to the distribution of income in any given community. By income we mean both monetary and real—the flow of money and claims of all kinds, and of food, housing, medical care, clothing, recreation, and so on. The distribution is relatively balanced when there is a comparatively small number of rich and poor. From the earliest days of systematic political speculation the importance of balanced income for democracy has been explicitly recognized.<sup>46</sup> Throughout the history of Greek and Roman political thought there were continual reiterations of the danger to democracy of an unbalanced distribution of property.<sup>47</sup> The classics of American political thought take second place to no literature in the amount of emphasis placed upon this theme.<sup>48</sup> Few political thinkers have been more acutely aware of the intimate dependence of government and economics than the men whose active hands shaped our basic institutions.

Despite the recognition given to the principle of balanced income, there has been an extraordinary failure on the part of policy-makers and their advisers to translate the principle of balance into operating rules applicable

45. See 1 PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS, SOCIAL TRENDS (1933) c. 7 and Judd, *Education* (1942) 47 AM. J. SOC. 876.

46. Even before Plato, Euripides stated the point with great clarity in 1 THE SUPPLIANTS (Way's trans.) 238.

47. This recurring theme in political thought can be conveniently followed in Sabine's compact and discriminating A HISTORY OF POLITICAL THEORY (1937).

48. No. 10 of THE FEDERALIST is always in point. See Pargellis, *The Tradition of Liberty in England and America* (1941) 65 THE PA. MAG. 393.



to given situations. In the United States, for example, there is practically no literature that undertakes to stipulate the balances that are compatible with or promote the expansion of production (and hence creation of new income) and the preservation of democratic processes of government. But it is a commonplace of politics that unless general ideas can be translated into operating slogans and principles their effect on social life is greatly weakened. There is little exaggeration in declaring that one of the most flagrant instances of intellectual failure is the existing ambiguity with which the problem is discussed.

It should be noted that discussions of balance often proceed in contrasting "mechanical uniformity" or "dead-level equality" with some other pattern of income distribution. The idea seems to be that since formal equality is ridiculous, there is nothing more to be said about alternative patterns. We do not pretend to have formulated in our own minds a final judgment about income distributions in the United States, especially since existing reports evaluate income only in dollar terms that are by no means the same as "real income." But certain suggestions with respect to extremes can be formulated. At one extreme there is the possibility of an income maximum, or of rigorous removal by inheritance taxation of power based on accidental family connection. At the other, there is the urgent need of a minimum annual income for every family, to be maintained by special payments through the Government, if necessary. There is also the possibility of free public education until early adulthood, with payments being made to each student during these probationary years.<sup>49</sup>

*Regularity.* By "regularity" is meant absence of erratic changes in social development. Today men are only too aware of the enormous crises of insecurity that have been accentuated by the failure of our processes of production to expand at a fairly regular tempo. Instead, modern states have undergone vast periods of prosperity, promptly followed by devastating collapse.<sup>50</sup> During the swings between prosperity and depression, states have sought to escape from internal difficulties by increasing their impact upon the outside world. This clash of expanding and internally unstable states has bred crises of war and catastrophe, threatening

49. In arriving at proximate goals not too far removed from recent facts, it is necessary to consider the data, relations and procedures set forth in such investigations by the National Bureau of Economic Research as: BARGER, *OUTLAY AND INCOME IN THE UNITED STATES, 1921-1938* (1942); KUZNETS, *NATIONAL INCOME AND ITS COMPOSITION, 1919-1938* (1941). On the crucial significance of every form of balance for freedom, see MOSCA, *THE RULING CLASS* (Livingston ed. 1939).

50. On the facts about irregularity and the losses resulting from them, see THORP AND MITCHELL, *BUSINESS ANNALS* (1926) and NATIONAL RESOURCES COMMITTEE, *THE STRUCTURE OF THE AMERICAN ECONOMY* (1939) Pt. 1. On the relation of acts called "criminal" to economic fluctuations, see BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (1916). A particularly elaborate inquiry into crimes against property in Germany is SCHWARZ, *Kriminalität u. Konjunktur* (1938) 3 *INTERN. REV. OF SOC. HIST.* 335.

the peaceful development and even the survival of forms of civilization consonant with our ideals.<sup>51</sup> Human beings find it difficult to adjust without destructiveness to such rapidly changing environments.

It must not be lost sight of that the internal structure of modern business states has put a premium on policies that promote irregularity. The economy of the United States, like that of Great Britain, has been an export surplus economy. Such an economic order produces industrial commodities in excess of the amount absorbed by the internal market. The internal market is the area under direct political control, the home market. The investors and merchants of relatively industrialized states have continually extended the scope of their activities beyond the home zone. These groups have, in recent times, curbed the admission of industrial imports in the home area while they continue to operate abroad with surpluses obtained in the internal market.

The possibility of receiving capital returns and repayment from foreign areas depends either upon the preservation of peace and the willingness to receive imports or the winning of a war of conquest that brings the capital equipment—such as mine machinery, public utilities and manufacturing plants—into an enlarged home zone. To the degree that home peoples share in more values—more income, safety and deference—than they would receive from alternative uses at home, they gain from foreign investment. To the degree that such investment causes the home population to lose income, compromise safety or endanger their power or respect or other deference values, they suffer; the surpluses that they send abroad are “gifts” and they may be said to operate a “gift economy.” The fact of gift may be somewhat veiled by the terminology of “investment;” there may be comparatively little emphasis upon the fact that full repayment is not received—it is neither expected nor indeed permitted.<sup>52</sup> Steady inflation of the world price level, together with periodic revaluation of monetary units, are among the factors that contribute to transforming into gifts the exports that were once listed as foreign sales accounts receivable, or as investments abroad. The consequences of this outflow of industrial products are hardly as benign as the term “gift” would imply. Zones of foreign trade and investment affect more than the structure of world markets—they quietly alter the balance of power, perpetually tilting the scale of fighting effectiveness on the side of Great

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51. On state expansion and conflict see WRIGHT, *A STUDY OF WAR* (1942). For analyses of fundamental economic sources of maladaptation, consult CLARK, *THE CONDITIONS OF ECONOMIC PROGRESS* (1940); MEADE, *AN INTRODUCTION TO ECONOMIC ANALYSIS AND POLICY* (1938); MOULTON, *INCOME AND ECONOMIC PROGRESS* (1935); ROBINSON, *ESSAYS IN THE THEORY OF EMPLOYMENT* (1937); WRIGHT, *ECONOMIC ADAPTATION TO A CHANGING WORLD MARKET* (1939).

52. Resistance to imports is revealed by protective tariffs and similar restrictive measures. Note especially the resistance of industrial states against receiving indemnities.

Britain, or the United States, or Germany, or Russia, or Japan, or of any combination of powers.

Within the structure of world business economies there are focal points of intense pressure on behalf of ever more foreign trade and investment. Banking houses gain underwriting profits from the flotation of foreign loans and great manufacturing industries find it easier to expand the market of established products than to diversify their offerings on the internal market. Whenever an economy passes into the hands of a monopolistic or militaristic ruling class that tries to keep the masses of the population adjusted to a low standard of living as a means of reducing labor costs of production, and of fostering the manufacture of military and commercial export goods, the aggressive-expansionistic tendencies of an economy are at a maximum. The outstanding recent examples, of course, are Japan, Germany and Italy.

With one exception the industrialized or industrializing economies have not solved the problem of operating a modern system of machine production at a regular tempo. These problems have been postponed to an unspecified future in which it was assumed that the world would be one big market; and it was implied that some automatic and benevolent process would introduce into the closed world market an internal balance that had never been achieved or thought out for any "closed," "continental" or "empire" market. The only great state, with an independent as distinct from an export surplus economy, is Russia; and it may be some cause for foreboding that independence was achieved by means of internal despotism (even though ideological aspirations remained humanistic). Does this mean that one world market will evolve one world boss? Or are there means of fusing the technical controls appropriate to an independent economy with controls consistent with freedom? It is probable that within any closed economy regular production can be attained by proper monetary policy. So far, however, the focal points of initiative in our business economies have not put the needed energy behind such monetary measures.

*Realism.* By "realism" is meant access to a body of fact and comment on the basis of which decisions can be made to implement effectively democratic values. This is not only a matter of skill in thought and observation, for people of great intellectual competence are dependent upon the information that actually comes to their notice when they are trying to make up their minds on policy questions. One guarantee of realism is the provision of proper balance between those who generally emphasize one or another kind of alternative.<sup>53</sup> What appears in the mass media,

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53. Valuable for the analysis of public opinion remain ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE 19TH CENTURY* (1905); LIPPMAN, *PUBLIC OPINION* (1932); WALLAS, *HUMAN NATURE IN POLITICS* (1909) and *THE GREAT SOCIETY* (1914).

such as press, radio and film, must provide most of the facts and comments in the light of which sound public judgments can be made. But the problem of realism goes far beyond the content of channels of mass communication. It includes the quality of material made available to decision-makers at every level. Legislators, judges and juries, administrative commissions, boards of directors, executive committees, must all make their determinations on the basis of what comes to their notice.<sup>54</sup>

The fact that so many unrealistic decisions have been made in the past suggests the importance of providing for a proper balance of fact and interpretation in the future. There is no royal road to truth, but there is reasonable probability of reaching truth when channels are open to the free play of news and opinion, and not closed according to the special prejudices of a few. The vitality of democratic processes, however, cannot be assured by simple acquiescence in the idea that freedom to talk will result in decisions consistent with the preservation of the democratic system. We have seen too many republics make suicidal decisions to believe that passivity is enough. Obviously there was not enough affirmative effort in Weimar Germany to clarify the values and conditions adequate to the perpetuation of the Republic. To the ideal of toleration there must be joined energetic determination to find and disseminate truth over falsehood, the better opinion over the worse opinion. Otherwise democracy can perish by default.

It is technically possible to survey the media of communication to find out whether those who have access to them obtained a balanced "diet" of fact and opinion, or whether the members of some publics are condemned to one-sided reporting and comment.<sup>55</sup> We can safely say that democracy is endangered wherever the sources are one-sided, and men are allowed to freeze their convictions free from the hot discipline of exposure to contradiction. Science and common sense are at one in emphasizing the importance of certain factors that influence the quality of debate and final judgment. Disclosure of source is important,<sup>56</sup> since one who is notified of source is better able to evaluate probable freedom from bias and probable competence. The quality of decision is imperilled when non-relevant matters are allowed to absorb and distract attention from realistic consid-

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54. On the intelligence function see Lasswell, *The Relation of Ideological Intelligence to Public Policy* (1942) 53 ETHICS 25. A penetrating study of the foundations of military decision-making in France is Possony, *Organized Intelligence; The Problem of the French General Staff* (1941) 8 SOCIAL RESEARCH 213.

55. Scientific procedures will be described later. On problems of policy see Catlin, *Propaganda as a Function of Democratic Government*, in PROPAGANDA AND DICTATORSHIP (Childs ed. 1936).

56. See CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); Riesman, *Civil Liberties in a Period of Transition* (1942) PUB. POLICY 33 and *Democracy and Defamation: Fair Game and Fair Comment II* (1942) 42 COL. L. REV. 1282; Smith, *Democratic Control of Propaganda through Registration and Disclosure I* (1942) 6 PUB. OPINION Q. 27.

erations. It is sound policy to protect the integrity of thought by excluding or nullifying the non-relevant. Some procedures of thought and discussion aid in clarifying goals and alternatives.<sup>57</sup>

*Character.* Character refers to the degree of integration achieved by individual personalities. The democratic character is distinguished by capacity to respect the self and others. It has been pointed out by modern psychiatrists that self-love is not to be confused with selfishness; indeed that selfishness, or domineering arrogance, are evidence of some lack of self-esteem.<sup>58</sup> Within the last two generations the patient, objective study of development during infancy, childhood and adolescence has enormously extended our knowledge of factors affecting the growth and deformation of human personality.<sup>59</sup> Whatever damages the child's respect for himself gives rise to a chain of adjustments that may result in a character dangerous to the individual and to his neighbors.<sup>60</sup> Such secondary attitudes as the acceptance of democratic doctrine may be incorporated in personalities whose basic structure is incompatible with the ideals of mutual respect. Yet very well-integrated characters may live in societies where caste differentiations are taken for granted and these personalities may express secondary attitudes grossly incompatible with democratic ideals. In short, there is no one-to-one correspondence between the total structure of personality and expression in any single sector, such as in the sphere of secondary political attitudes. We know, however, that under stress the underlying character formation exercises profound influence over the conduct of the individual.

A very interesting and important pioneer investigation undertook to probe the relationship between socialist attitudes and character formation in pre-Nazi Germany.<sup>61</sup> The study revealed a very large discrepancy between the characters of many who called themselves socialist and the political attitudes that they professed. This was a basic weakness of the parties that sustained the Republic in Germany. In view of these considerations it is only wise foresight for any society that aspires toward democracy to use every means within its power to make sure that the persons who come to adulthood possess characters whose basic structure is compatible with democratic values.

57. See Smith, *Propaganda Analysis and the Science of Democracy* (1941) 5 PUB. OPINION Q. 250.

58. See Fromm, *Selfishness and Self-Love* (1939) 2 PSYCHIATRY: J. OF BIO. AND PATH. OF INTERPERSONAL RELATIONS 507.

59. For the early years modern knowledge is authoritatively summarized for general use in GESELL AND ILG, *INFANT AND CHILD IN THE CULTURE OF TODAY* (1942). For later epochs, COLE, *THE PSYCHOLOGY OF ADOLESCENCE* (1936).

60. See, for example, GLUECK AND GLUECK, *ONE THOUSAND JUVENILE DELINQUENTS* (1934); HEALY AND BRONNER, *NEW LIGHT ON DELINQUENCY AND ITS TREATMENT* (1936).

61. See Fromm, a manuscript report to be published.

*Non-distinctive Goal Variables*

In addition to its distinctive values of shared power, respect and knowledge, any democratic society can rightfully aspire to the achievement of other values. The list that follows suggests with even briefer treatment than was given the distinctive and conditioning variables, a few such non-distinctive values.

*Safety and Health.* Among the variables non-distinctive of democracy but almost universally sought can be placed safety and health. We might include them as subdivisions of the respect category, in the sense that respect for individuality requires provision of safe, healthy environments. The present plan, however, gives this basic value some of the prominence that it deserves and aids in keeping the category of respect within manageable limits. We know that health and safety are not equally distributed throughout the community but are often directly correlated with income. Sickness is a poor man's burden, partly through exposure to hazardous occupations, partly through inadequate hygienic training, and partly through incapacity to command the best preventive and therapeutic help.<sup>62</sup> Because of the varying incidence of war, various parts of the world differ greatly in safety and the hand of mortality presses with special weight on some elements of the community.<sup>63</sup>

*Comfort, Convenience, Taste.* Without seeking to expand the discussion we may at least add comfort, convenience and taste as a reminder that they need not be foresworn by democratic societies. As the general material standard of living improves, it presumably affords members of any community wider opportunities for gratifying themselves in new and refined ways.

#### EXISTING CURRICULUM NOT ORIENTED TOWARD ACHIEVEMENT OF DEMOCRATIC VALUES

It should be obvious that our existing law school curriculum is not adequately oriented toward achieving the distinctive values and conditioning variables of a free society. For the most part the organizing principle still appears to be legal technicality; problems are defined and classified in terms of overlapping legal concepts of high level abstraction rather than in reference to social objectives. Concerned largely with the traditional, conventional syntax of appellate opinions, the curriculum offers little explicit consideration of alternative social objectives, general or specific, or of justifications for preference or preference priorities. Legal concepts and doctrines, which in theory are *instrumental* only, are too often pre-

62. For guidance to available information see articles on *Morbidity and Mortality* in 11 ENCYC. SOC. SCIENCES (1933) 3, 22.

63. On war see 3 SOROKIN, *loc. cit. supra* note 16; WRIGHT, *A STUDY OF WAR* (1942).

sented as if they embodied the prime democratic values of society, and specific decisions are too often appraised or justified, not according to the degree to which they implement these values, but exclusively in terms of their supposed logical derivation from ambiguous definitions and doctrines. Little orientation is given in the historical and contemporary trends that are most helpful in determining what problems are most important and what objectives are most practicable, and in supplying the background necessary to the formation of realistic judgments about such important problems as do find their way—more often by accident than design—into the present curriculum. Scientific study of the factors that condition the use of old, or the creation of new, social controls (doctrines, slogans and structures) is almost non-existent. Finally, by reason of exaggerated, even obsessional, emphasis upon legal technicality, the methods of social control brought to the notice of the student are too much restricted to a single institution—an institution whose role in the total process of modern life is of steadily diminishing relative importance—the appellate court and the norms it announces.

Comprehensive and detailed documentation of the above criticisms is no doubt superfluous. It is a matter of common knowledge that the main organizing foci of our existing curriculum are "contract," "property," "tort," "crime," and the "police power" of government—all much-favored instruments of the laissez-faire society that is today so desperately navigating the troubled waters of a hostile epoch. From these master concepts, about which are organized our extensive introductory exercises in the conventional legal syntax, stem a plethora of repetitive secondary courses—such as Sales, Insurance, Credit Transactions, Bills and Notes—which, though they may grope after social values and institutional contexts, seldom have the temerity to throw away the blinders of their organizing principle of legal technicality. Cutting across the same factual problems with which these introductory and secondary courses so inadequately deal are certain other courses, such as "equity" or "trusts," which offer exercises in parallel syntaxes inherited from a court system that no longer exists, or such as "wills" or "conveyances," which take their name and topical organization from certain common legal instruments and their contents. Add a few courses on the rules that are supposed to govern the allocation of power among courts and the rules of fair combat before courts, with, perhaps, a course or two on "administrative procedure" or "legislation," plus a few faint allusions to "international law," and the contemporary law student's feast of reason is complete. Small wonder that a distinguished faculty not long ago concluded that it makes little difference in what order the feast is served to the student or the student is served to the feast.<sup>64</sup>

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64. See FACULTY OF LAW, COLUMBIA UNIVERSITY, *op. cit. supra* note 1, at 53.

The assumption back of a curricular organization in terms of legal technicality—an assumption long since explicitly repudiated by most law teachers—is, of course, that the body of conventional legal doctrine at once provides comprehensive and well-ordered coverage of the important problems of our society and embodies our preferred values for the handling of such problems. Thus, if a student thoroughly masters such concepts as “offer and acceptance,” “consideration,” “conditions,” “mistake,” “fraud,” “duress,” “impossibility,” and “legality,” he will know, it is assumed, what agreements are important in our society, how they affect the distribution of values, and to what extent they will be enforced under what conditions and how. Whether, while mastering these concepts, he focuses his attention on agreements to climb flagpoles or on international cartels is largely immaterial—institutional contexts and modes of adjustment or control other than agreement within such contexts are irrelevant. So also if a student masters the syntactic mysteries of “liability,” “anatomy of fault,” “negligence,” “contributory negligence,” “absolute liability,” “nuisance,” “trespass,” “proximate cause,” “intent,” “motive,” and “malice,” the assumption runs that he will be able to handle the redistribution of “unintended losses” in our society in a way that will promote democratic values irrespective of whether the damage is caused by animals, automobiles, blasting, defective sidewalks, rotten housing, defective consumers’ goods, or industrial accident; institutional contexts are once again largely irrelevant and problems of prevention must be left to the tillers of other syntax. Similarly, the organizing focii of the “property” courses are such concepts as “easement,” “profit,” “license,” “covenant,” “servitude” or “land contract,” “deed,” “delivery,” “covenant of title” or “reversion,” “possibility of reverter,” “right of entry,” “remainder,” and “executory interest,” and not such goals as the provision of healthful housing, in well-planned communities, for all citizens at prices that they can afford to pay or the promotion of the cheap, secure, and speedy transfer of land, without adventitious restraints having no basis in policy, or the appraisal of doctrines and practices about the transmission of wealth from generation to generation in terms of their effect on a balanced distribution of claims in society. Even the so-called public law courses are still organized with too much deference to “separation of powers,” “jurisdiction,” “due process,” “equal protection,” “interstate commerce,” “police power,” “tax power,” “spending power,” “war power,” “public purpose,” and “public use.” Struggles between governmental units and private groups are isolated from their institutional contexts, and academic investigations into the “public control of business” seldom sweep through all the important businesses and relevant controls or are explicitly oriented toward a full and optimal use of resources.

The traditional language of lawyers and the conventions of judicial etiquette indeed lend spurious plausibility to the assumption that underlies



most of our existing curriculum. The accredited language contains a series of symbols of identification that are available for use in referring to parties who invoke hierarchies of normative statements purporting to specify which relations *ought* to obtain among such parties when certain factual statements can be assumed to be true and can be subsumed under certain other legal definitions and doctrines. What is commonly called "the law" can, thus, be defined as a syntactic system of propositions composed of terms that are supposedly defined, plus some admittedly indefinable terms, whose modes of combination are governed by certain postulates and rules. In venerable fiction this system, like that of a science or a theology, is internally consistent and complete in its reference; from its central terms, definitions, and rules, all possible relations can be deduced. If *X* is a specified entity, *X* then bears a certain relationship to another entity, *Y*, or, in more sophisticated form, there is a whole series of interrelationships governed by prescribed rules. If *Y* performs a specified act, he becomes another entity, *Y'*, and his relations to *X* are defined by still other rules. Such is the pattern. Courts are confronted by parties who make use of this traditional terminology in describing themselves and the happenings on which they base their claims. Such parties declare that they are "sureties," or "guarantors of collection," or "accommodation indorsers," or "residuary legatees," or "remaindermen," and that such and such a defense is "personal" or that such and such an interest is a "contingent remainder" and hence "destructible." They ask the courts to apply other identifying terms to the remaining parties to the controversy, and, hence to adopt the rule that is laid down in the authoritative books for governing the interrelations of "entities" so defined. Politely responding to the losers in their own terms, courts allow or disallow the claims advanced by the various parties and justify—and perhaps partly guide—their decisions by invoking the traditional language. Allowing the claims of certain parties, it labels them according to the appropriate identification terminology and declares that its decision is consistent with certain authoritative statements governing such entity relationships. It need occasion no surprise that text-writers, digest-compilers, and curriculum-makers largely work within this framework.

That "the law" consists of a closed, automatic, syntactical system is, as has been suggested above, an assumption too obviously belied by the facts for many to give it conscious credence today.<sup>65</sup> Most of the key terms and propositions of the legal syntax are, admittedly, *tautological* in the sense that they take whatever meaning they have from relations between sign and sign;<sup>66</sup> they cannot be given meaning in terms of empirical

65. For an excellent statement of the traditional view, see the Introduction in BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

66. For an explanation of the distinctions here made see Morris, *Foundations of the Theory of Signs* in 1 *INTERNAT. ENCYC. OF UNIFIED SCIENCE* (1938) No. 2.

events of behavior (relations between signs and objects) except by reference to the very judicial responses which they are supposed to predict or justify.<sup>67</sup> But here all resemblance to a true syntactical system ends. The terms and propositions of the legal syntax are neither internally consistent nor comprehensive in their reference. They are, on the contrary, inconsistent, ambiguous, and full of omissions. It was Mr. Justice Cardozo who aptly remarked that legal principles have, unfortunately, the habit of travelling in pairs of opposites.<sup>68</sup> A judge who must choose between such principles can only offer as justification for his choice a proliferation of other such principles in infinite regress or else arbitrarily take a stand and state his preference; and what he prefers or what he regards as "authoritative" is likely to be a product of his whole biography. Should a judge, so beset by antinomy, decry "high priori" solution by existing principle and seek the help of more humble induction from previous cases, he does not escape his dilemma. Consciously or unconsciously, if he keeps within the legal syntax, he must beg the very question that he has to decide. The point has been well made by Oliphant and Hewitt:<sup>69</sup>

If the principle . . . 'induced' is no broader than the sum of the previous cases which it summarizes, it obviously does not and cannot include the case to be decided, which, by hypothesis, is a new and an undecided case, and, hence, can form no part of the generalization made from previous cases only. If it does not include the case to be decided, it is powerless to produce and determine a decision of it. If it is taken to include the case to be decided, it assumes the very thing that is supposed to be up for decision."

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67. What empirical observations can be made to determine whether a mortgagee has "title", or whether a defense claimed by a surety is "personal" or "real", or whether a partnership is an "entity", or whether a right of way is a "license" or an "easement", or whether a covenant "touches and concerns", or whether a remainder is "vested", or whether a group of donees is a "class" or whether "title" under a power of appointment comes from the donee or the donor? Does the mortgagee get possession because he has title or does he have title because he gets possession? Is the surety denied a defense because it is personal or is the defense personal because the surety is denied it? Is the partner an agent because he is a partner or vice versa? Is the promise of a "right-of-way" revocable because it is a license or is it a license because it is revocable? Does the covenant run because it touches and concerns or does it touch and concern because it runs? Is the remainder alienable because it is vested or is it vested because it is alienable? And so on. What, furthermore, is the clear and consistent reference of words like "title," "personal," "vested," and so forth, to either major democratic values or any sub-values? What place have such symbols in a system of policy norms? As Cook has pointed out in *Scientific Method and the Law* (1927) 13 A. B. A. J. 303, at 305, we may say that "all gostaks are doshes" and that "all doshes are galloons" and conclude with strictest logic that "all gostaks are galloons" and still not know what we are talking about.

68. For documentation see CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) and Oliphant and Hewitt's Introduction to RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929).

69. *Id.* at xix.

Facts in controversy do not neatly subsume themselves under legal concepts. A judge or other arbiter must create his minor as well as his major premise; in putting similarities and taking differences, in eliminating the irrelevant and emphasizing the relevant, he must make policy choices. Legal syntax alone—it is no news—does not and cannot dictate decision.<sup>70</sup>

Contemporary legal scholarship has, therefore, largely abandoned the once prestigious effort to reduce the vast corruscation of traditional legal learning to beautifully terraced unified statements, geometrically laid out with no overlapping, erosion or gaps. In the main modern scholarship works in one of two directions. Certain iconoclasts content themselves with rather fruitless exposés of existing imperfection and present "the law" as a chaotic mass of confused and more or less meaningless statements. Other and more ambitious investigators set themselves the task of attempting to determine what courts and other decision-making bodies *do*, as opposed to what they *say* they do. Their aim is the legitimate scientific goal of prediction. After making precise summaries of what courts have done in the past they look into the future and forecast what courts will do when confronted with certain affirmations of facts and various patterns of legal language. Such studies enlarge the scope of legal training and bring it in closer relation to the living reality of the judicial process. They escape the stereotype of law as a body of completed rules about entities and the almost equally naive and sterile iconoclasm of imagining that words have no significance whatsoever in forecasting judicial conduct. In the name of prediction they have often gone far enough to provide courts with more concise formulae for reconciling past inconsistencies than the courts have been able to create themselves and hence, much as business forecasters affect the stock market, predictors have shepherded judges toward the fulfillment of prophecy. Yet this recent emphasis on prediction, however laudable it may be, cannot be said to have brought about important changes in the classification or presentation of legal materials in textbook or casebook. Organizing focii remain all too often in the frame of legal technicality; prevailing methods of investigation continue at the level of loose impressionism; and, least heartening of all, the scope of permissible inquiry does not necessarily include the most significant variables affecting judicial response.

Seriously undertaken, the goal of forecasting judicial behavior poses formidable problems to the legal scholar. The less he is preoccupied with the symmetry of legal syntax and the more with prediction, the less he continues in the role of logician to the state and the more he must become a man of science. As scientist, it is his task to account for the occurrence

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70. See Dewey, *Logical Method and Law* (1924) 10 CORN. L. Q. 17. Compare Fuller, *Williston on Contracts* (1939) 18 N. C. L. REV. 1 and Patterson, *Logic in the Law* (1942) 90 U. OF PA. L. REV. 875.

of a selected category of events—to wit: judicial conduct. To account for such conduct he must take into consideration all variables that may significantly determine it. Every resourceful practitioner knows that judicial conduct is affected, not by rival phraseology alone, but by such factors as the nature of the value in controversy, the position of litigant and judge in the structure of society, the personality characteristics of judges, parties, counsel, witnesses and juries, and the method of conducting cases. The legal scholar who would predict the future course of decision must equip himself with skills appropriate to the task of evaluating variables, and this means that to his traditional knowledge of legal technicality it is imperative to add naturalistic skills of observation and analysis. As scientist, the legal scholar will conceive that the response of any court is affected by two sets of factors: environmental and predispositional. By environmental factors is meant what goes on when cases are tried; predisposing factors are how matters stand before the case is opened. Briefs, oral arguments, testimony and exhibits are typical environmental factors ( $E$ ). The biases of the judge against the very rich or the very poor, the white or the black, the commerce clause or the opinions of Mr. Justice Brandeis, are all part of the predispositions ( $P$ ) with which the judge approaches the trial, and, in conjunction with  $E$  factors, determine his response ( $R$ ). The final response of the judge is “yes” or “no” to a value claim; hence he indulges or deprives the parties to a litigation. If we had scientific laws of judicial decision they would relate given classes of  $R$  to  $E$  and  $P$ . More strictly, such scientific propositions would state the probability of  $R'$  (a specified type of decision) to  $R''$  (another type of decision). Truly scientific propositions of this nature can only rest on data of observation. Scientific prediction is based on the expectancy that past relations among variables will continue, and that when a given list of variables occurs in the future, their interrelations can be foretold on the basis of proper analysis of observations made on them in the past. The ordinary forecast is a vaguely qualified assertion, or prophecy, that a given concrete event will in fact take place; that is, that a certain judge will decide a specific case for the defendant or the plaintiff. Strictly speaking, such a forecast is not a scientific prediction, even though it may be arrived at partly as the basis of scientific knowledge. Propositions that formulate scientific predictions are statements of the probability that if  $E$  and  $P$  are so and so,  $R'$ , not  $R''$ , will occur.<sup>71</sup>

Despite the verbal support given to the idea of prediction, existing investigations have not moved very far along the path of science. Even with the vigorous and outspoken encouragement of a few pioneers (like Walter Wheeler Cook and Underhill Moore), scientific habits of thought are still

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71. On the theory of science, see COHEN, REASON AND NATURE (1931); REICHENBACH, EXPERIENCE AND PREDICTION (1938); Nagel, *Principles of the Theory of Probability* in INTERN. ENCYC. OF UNIFIED SCIENCE (1939) No. 6.

largely alien to the training of legal scholars. Little has been done either to make clear the nature of the assumptions involved in any prediction or forecast of judicial response, or to construct the theories and develop the techniques of fact-finding necessary to discover and to interrelate the more significant variables in the environment and predisposition of courts. Some inkling of the true complexity of the task of framing predictive rules, or of making concrete forecasts, may be gained from the following outline, which is no more than a rough, preliminary categorization of some of the principal variables which may affect the response of a court or other authoritative agency to a controversy.<sup>72</sup>

*Claims Presented.* The competing claims presented by the parties to the court (or other agency): *who* they are, *what* they demand, from *whom*, and why they think they are entitled to their demands.

*Objective Facts.* The facts which give rise to the controversy as an objective, non-participant observer who utilizes all available sources may determine them. The observational standpoint here must be kept clear. It is not that of the parties; their view appears as "claims presented." It is not that of the court; the judge's view of the "facts" is part of the response to be explained on the basis of the total context of environment and predisposition. The perspective here is that of the disinterested, scientific observer trying to predict human behavior.

In deciding what to accept as "objective facts" about the original dispute, two sets of sources are available; namely, allegations made during the trial, and information from other places. It should be noted that the prediction studies may be made on the basis of one or both sets of data. The observer may limit himself to making a critical comparison of every-

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72. This outline is in part a condensation of one previously used in a criticism of Volume III of the Restatement of Property. McDougal, *Future Interests Restated: Tradition versus Clarification and Reform* (1942) 55 HARV. L. REV. 1077. Many of the sentences should be in quotation.

Whatever the potentialities of the table for predictive, scientific purposes, it has some advantages for expository purposes over the usual dichotomy between "legal concepts" and "operative facts." The word "operative," as indicated in the text, conceals three different observational standpoints, that of the parties, that of the court, and that of an objective observer; in deciding what facts are "operative" a court must smuggle in its own response to the facts as an objective observer would report them. The addition of "policy norms" focuses attention, furthermore, upon the variable which is presumably most significant in contemporary society.

One of the writers has found the table most helpful in exploding the theoretical differences between such concepts as "license," "easement," "profit," and "estate," and between "legal" and "equitable" interests and in discussion of such complicated topics as "delivery" of deeds. Its usefulness in clarifying the illusory character of the traditional distinctions between the various categories of future interests was sought to be demonstrated in the article above cited in this note. For further citations on the method of multiple-variable analysis see that article at 1080, n. 7, and HICKS, *MATERIALS AND METHODS OF LEGAL RESEARCH* (3d ed. 1942) 35.

thing that was offered in court; obviously, he may arrive at a picture that differs from the one accepted by the judge, which is included in the *R* of the court. If the observer has access to other information about the original dispute, he may accept a picture of reality that diverges even more from the view of the facts assumed by the judge.

Two distinct, though related, scientific problems may be studied—one concerned with the response of the parties, and the other with the judge. We have already made it clear that we are interested in how the court responds to "claims presented" and to the "objective facts." We may also explore what kinds of disagreement are taken before courts, rather than other tribunals, which calls for data about the predispositions of persons at the time they became involved in disputes. Our knowledge of causal connections is much greater if we can follow the entire sequence that begins with the occurrence of a disagreement. Thus we can hope to predict the *probable* response of courts and other agencies to *probable* kinds of objective situations.

*Legal Norms.* These are the conventional justifications of decisions which judges have become conditioned to give to losing counsel and higher courts,<sup>73</sup> and are the syntactical propositions that appear in legal textbooks and appellate opinions. Most often they are in words found in the peculiar and distinctive vocabulary of lawyers, like "vested," "contingent," "executory interest," "title," "delivery," "touch and concern," "privity," "relation back," "personal defense," "due process," "equal protection," and so on. Typically they point to no identifiable social goals; they are, as indicated above, tautological in the sense that they can be given meaning only by circular reference to the very behavior which they are usually supposed to justify and predict.

Legal norms enter into scientifically conducted precision studies at several places. The *R* of the court is partly describable by taking note of the legal norms that are invoked or rejected in support of the decision. Legal norms also enter in the *P* of the judges; it can be shown that courts in different jurisdictions are predisposed during a certain period to rely upon different doctrines. Forecasts need continual revision as judicial predispositions change; every *R* of the court immediately becomes part of the *P* of its future response.

There is yet another way in which legal norms are involved in the predictive studies; they enter into the *E* of the judges when they are invoked as part of the justification of the "claims presented." If the spokesmen of the litigants invoke doctrines against which the court is unfavorably disposed in support of a claim, no doubt the court will reject the claim, or at least the probability of such a response is greater than if the claimant's counsel made use of discourse toward which dispositions were favorable.

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73. See Moore and Sussman, *The Lawyer's Law* (1932) 41 YALE L. J. 566.

In forecasting the outcome of specific litigation we may ask which claimant is likely to be best represented by counsel who are informed about the *P* of the court on doctrinal points. This problem, like the question whether a given disagreement will be carried before a court at all, is separable from the narrow task of studying the response of judges, since it calls for an explanation of the response of the claimant. In assembling data about legal norms for use in prediction studies, therefore, we must carefully indicate whose norms they are supposed to be, whether of the judge before or during trial, or of the claimant before or during trial. Besides those who participate directly in the proceedings, many others—ranging from the general public to specific elements within it—may take a hand in invoking legal norms; and what they say becomes part of the environment, whenever it is brought openly or privately to the notice of anyone connected with what goes on in court.

*Policy Norms.* These are propositions about how values ought to be distributed, including those to which we have given special mention, like power, respect, knowledge, safety and health, comfort and convenience. Sometimes the norms are invoked or rejected in propositions of high level abstraction; often they are condensed into slogans; and frequently they are implied by the specific endorsement of concrete measures. As with many legal norms, statements of policy concern prediction studies when they are made by judges or claimants before or during proceedings. Furthermore, they may impinge upon the environment of all participants when they are invoked by the public at large or by specific sectors of it.

*Other Norms and Statements.* In addition to legal and policy norms, statements are often made, supported or rejected, that appeal to such supplementary norms as authority, reason (or logic), evidence, nature (and science), faith, tradition or administrative convenience.

*Personality and Value Position.* What judges and juries do is "human" in the sense that it is affected to some extent by the impact of personalities upon one another. There are many patterns of personality and the interaction of an aggressive claimant, counsel or witness upon judge and jury may produce different results than when submissive types are involved. Besides the factor of personality we must take into account the constellation of factors that link participants to the value structure of society. Powerful and respected people interact upon one another and upon weak and disreputable persons very differently than the poor react to the poor or the middle class groups respond to one another and to those above and below them in value position.

*Judicial or Administrative Structure and Procedure.* The result of litigation is affected in varying degree by the set-up of courts and related structures and by the procedures actually used.

*Skill.* We now come to one of the most subtle variables that determines "law in action"; namely, skill. This is a matter of taking advantage of

the opportunities afforded in any situation for the achievement of ends by the most economical means. Not only do counsel invoke legal, policy and other norms and statements in influencing the court; these factors are presented in a certain pattern of interrelationship. Personality and social types may be brought to the notice of the court in ways that strengthen the total impact made on the judge.

Properly adapted, this scheme may be used to include all data required to lay a scientific foundation for prediction. At present, however, the actual content of law school instruction has been relatively little influenced either by the urge to foretell or the skill to predict scientifically. It may be noted that when scientific search for rules of prediction gains the upper hand, legal syntax ceases to occupy the center of attention. Legal norms furnish only part of the data necessary for the formulation of prediction rules. A law school curriculum, organized around scientific prediction, would be compelled to re-evaluate the significance given to legal technicality. Does this imply, however, that prediction should be accepted as a sound principle of curricular reconstruction? It is true that in the search for predictive rules, values are given some consideration when policy norms are noted; but the search does not begin with clarifying value goals. The point of departure is a controversy, and the most prominent initial variable is "claims presented." When attention is directed to other variables, value objectives are de-emphasized; hence goal considerations are subordinated in prediction studies. Too much stress on prediction inhibits creative approaches by the student to policy questions; scientific formalism can be as sterile, in so far as the implementation of democratic values goes, as legal technicality, especially if scientific inquiry is chiefly directed toward the forecasting of judicial behavior. In predicting decisions, as in explaining any response, there is no end to the number of factors that may be taken into account, or the degree of technical refinement to which the gathering and processing of data may be carried. A vast amount of work on the courts may result in comparatively meagre contributions to policy, since it may be doubted whether the opportunity of courts to redistribute values is currently as great as that of legislatures, or of their administrative and corporate creatures. The student who would affect the distribution of values and hence make an influential impact on society must not only bear in mind his policy values, but must try to evaluate and command every control necessary to reach his goal. Imagination should not be too quickly turned toward winning arguments in court or passively forecasting the outcome of litigation, before the previous question has been raised—whether avenues of action other than those provided by the court may not serve the long-term policy needs of a client. Effective policy-thinking must be manipulative, originative, evocative, creative. It cannot substitute the calculation of an endless fan of possibilities for disciplined and imaginative attention to actualizing the most favored possi-



bility. Unlike logical or scientific thinking, policy-thinking is not primarily contemplative and passive; it is goal-thinking and provides criteria for the selection of arguments as well as for the control of other pertinent factors. It is developmental, unifying preference and probability.

In the light of the foregoing considerations, we must unequivocally reject both the principles of legal technicality and of scientific prediction as criteria for reconstructing a curriculum for training lawyers to put democratic values into policy.

#### NEW PRINCIPLES OF CURRICULAR ORGANIZATION DIRECTED TOWARD POLICY

At the outset of our positive statement of principles and recommendations, let us make it perfectly clear that we have no hesitation in accepting the traditional assumption that it is imperative for the student to acquaint himself with the established legal syntax. For many generations to come it will be indispensable to persuasive communication. There is, furthermore, no royal road to its mastery. Just how many cases, read for how many hours, discussed for how many hours, described in how many examinations, can turn out a student adequately equipped for the successful manipulation of legal doctrine and procedure? Certainly no one can successfully demonstrate an exact answer to this question. Nevertheless, we are not entirely in the dark. It is possible to find out how many cases are usually discussed in the various years of a student's work in modern law schools of good standing. The contents of the casebooks provide a clue. Suppose we agree that during his period in law school a student must gain the command over legal technicality that comes from having read and discussed with varying degrees of intensiveness X thousands of cases. The question then becomes by what principles should law teachers select and organize these cases.

Life, like "the law," is, of course, a "seamless web." For any event the causal factors are so many and so interdependent that, strictly speaking, it is impossible to tear any one episode from the web of human experience in which it is embedded and treat it in strict isolation from the configuration of which it is a part. Yet classify we must if we are to cope with the "big, booming, buzzing confusion" about us and direct it toward our purposes. Our present major purpose is to promote the adaptation of legal education to the policy needs of a free society. Therefore, our first principle is that all legal structures, definitions, and doctrines must be taught, evaluated, and recreated in terms of the basic democratic values. Not only the legal syntax but also all legal structures and procedures must be related to the larger institutional contexts, the factual settings, that give them operational significance.<sup>74</sup>

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74. For a systematic analysis of the larger context, see Malinowski, *Culture in 4 ENCYC. SOC. SCIENCES* (1931) 621 and *The Group and the Individual in Functional Analy-*

We are not so foolhardy as to assume that we can *uno ictu* make the study of the whole social process which is prerequisite to locating every activity in its appropriate context. Nor do we assume that we can get complete consensus upon the values we have stated as the basis of democratic values, or that these or any other values can be neatly segregated for teaching purposes into water-tight curricular departments. What we do affirm is that it is possible to map our seamless web of activities into teachable contexts for the better understanding and eventual promotion of our preferred events (values) and that the events which we teachers prefer should be made as explicit as language can make them. The particular abstract symbols which we have chosen to state our preferences (a "commonwealth of mutual deference") are not indispensable; the important point is that we have not been content—nor do we propose to advocate being contented—with either the neglect of goal statements or the failure to lay down definitions and exemplifications by means of which terms whose initial meaning is ambiguous can be brought into referential relation to reality. We have already undertaken to specify, at least in a preliminary way, how our key terms are to be understood. They have been given relatively explicit meaning in terms of their relation to people, and so defined they express representative values of our culture. In the light of further experience we may wish to reconsider or re-define these symbols or values. But—and here we take our stand—unless some such values are chosen, carefully defined, explicitly made the organizing focii of the law school curriculum, and kept so constantly at the student's focus of attention that he automatically applies them to every conceivable practical and theoretical situation, all talk of integrating "law" and "social science," or of making law a more effective instrument of social control, is twaddling futility. Law cannot, like golf or surgery, be taught only as technique; its ends are not so fixed and certain. What

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*sis* (1939) 44 AM. J. Soc. 938. Compare Hamilton, *Institution* in 8 ENCYC. SOC. SCIENCES (1932) 84; Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1. Malinowski's broadest generalization is, perhaps, that an "institution" is always comprised of a group of people working on a material base, with definite traditions, and organized with reference to a task or purpose which satisfies certain basic or derived needs. His primary concepts are charter (unifying and validating norms), rules (administrative detail), personnel, material equipment, activities, function and needs (basic and derived); all these he defines with great precision and in great detail.

Some have suggested that students can be taught legal analysis in one course or year, how to apply this analysis to "vital" problems in still another course or year, and how to synthesize social perspectives in still a third dose. The curriculum of one influential law school is in fact being reorganized along these lines. It would appear doubtful, however, whether the process of evaluation can be so segregated. To give legal syntax operational significance it must, as we have seen, be related to institutional contexts and values. See MARSHALL AND GOETZ, *CURRICULUM—MAKING IN THE SOCIAL STUDIES* (1936); Green, *Relational Interests* (1934) 29 ILL. L. REV. 460, 1041, (1935) 30 *id.* at 314 and (1936) 31 *id.* at 35.

law "is," and hence what should be taught as "law," depends primarily, as we have seen, upon the ends preferred. It is not necessary, of course, to have a functional organization of materials for a teacher to disseminate a functional *attitude*; many teachers today achieve some good results by ridiculing the materials or casebooks with which they work. Truly effective education for policy-making must, however, strive for more than the cultivation of attitude. Its curriculum must offer *skill*, including informational background and appropriate drill as well.<sup>75</sup>

Several new principles of curricular organization have already been sufficiently tested in American law schools to suggest great promise. The first may be described as organization in terms of the needs of selected, influential *policy-makers*, such as business managers, government officials, and labor leaders; existing courses on business units, public control of business, and labor law reflect this principle with varying degrees of consistency. A second principle—still only slightly used—is explicit organization in terms of specified social *values* or clusters of values; Michael and Wechsler's casebook on criminal law is perhaps the most successful example of this principle put into practice.<sup>76</sup> Still a third principle, traditional to the American law school curriculum and probably indispensable to any reconstruction, is organization in terms of emphasis on particular *skills*; procedure courses, designed to supply the information and drill necessary to operate judicial machinery, are in one sense classic applications of this principle and indicators of its effectiveness. It is not inconceivable that a curriculum thoroughly integrated in terms of these three principles—*influence, values, and skills*—could lay a basis for effective training in policy-making. Designed to achieve values, through influence and by skills, it offers at least a beginning formula. Let us now explore in more, though necessarily impressionistic, detail what is involved in the full utilization of each principle.

### *Influence Principle*

First, consider organization in terms of the needs of influential policy-makers. Two principles are useful in this connection: selection according to maximum influence and selection according to representative influence. In our society the most influential policy-makers include some government officials, party leaders, business owners and executives. Courses

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75. Compare the emphasis of an outstanding contemporary professional educator in KILPATRICK, *REMAKING THE CURRICULUM* (1936).

76. See MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES* (1940); Reviewed by Riesman, *loc. cit. supra* note 1. Other books which might be mentioned, without our purporting to offer a definitive list, as tending strongly in this direction are: GREEN, *CASES ON TORTS* (2d ed. 1939); HAVIGHURST, *CASES ON CONTRACTS* (1934); JACOBS, *CASES ON DOMESTIC RELATIONS* (2d ed. 1939); POWELL, *CASES ON TRUSTS AND ESTATES* (1932).

can be arranged according to the problems that confront them, problems connected with maintaining and extending their special values and of integrating their special skills with the general values in which they participate as members of a free society. Policy questions also confront the individual whose position in the value structure of society as a whole is quite modest. Most humble individuals are small property holders, spouses and the like, and legal courses, such as Family Law, can be construed to deal with the range of questions that confront them.

Policy selections need to be made in the light of facts about the structure of society. By the structure of society is meant basic practices in creating and distributing values. In the examination of any society, a list of values for purposes of analysis may be chosen. We have mentioned among others power, respect, knowledge, income, safety. This list is not designed to reflect a general theory of human motivation; we do not assume that everybody wants the same values with equal intensity all the time or that many people from time to time do not want values different from the ones named in the list. These values were selected only because they are widely sought by persons brought up in our civilization and there is widespread interest in their amount and in how they are shared.

Power, as we have indicated, means participation in the making of important decisions. If we examine American society as a whole from the standpoint of shared power, we find that it is convenient to divide the country into six broad social divisions according to their degree of participation. At the top of the power series stand the policy-makers of monopolistic and basic businesses. Next in the series, and during war time of particular importance, stand public officials. Farther down the line are the competitive businessmen. Lower yet stand the bulk of the professionals and skilled labor groups that find employment in industry and commerce. The lowest tier is composed of farmers and unskilled laborers. Even in a rough over-all sketch of the distribution of power in society it is important to subdivide according to the type of skill by virtue of which the leaders at any level retain their positions of privilege and leadership; namely, the skill in propaganda, skill in violence, and skill in the management of goods and services. All leaders possess one or more of these skills in high degree. In civilian societies particular prominence is given to those who are masterful in symbol manipulation and in the management of goods and services (the managers include bargainers, party administrators, government administrators). Even in peace times, however, the prevalent expectation of external and internal violence allows for a substantial participation in leadership by some who are recruited from, or remain anchored in, army, navy, air and police services.<sup>77</sup> In the light

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77. Professor Bruce L. Smith, with the aid of Dr. Rudolph Modley, has set forth the broad social divisions in the United States in a chart published in the *Public Opinion Quarterly*, June, 1941.

of this perspective on the distribution of power in our society, we may suggest a series of law courses devoted to the needs of influential and representative persons in each of the major divisions and skills.

It is not difficult for a law student to identify himself in imagination with the problems of a definite policy group. He easily conceives of himself as a legal adviser to a huge corporation or to one of the most important departments or agencies of government. He can readily project himself into some of the recurring situations in the lives of persons of modest status. The business units, public control of business, and labor law courses in our existing curriculum only faintly reflect the possibilities of this principle of organization.

There are, however, certain disadvantages in the organization of courses from the perspectives of particular policy-makers. Students may tend to stereotype their assumptions about the continuity of the social structure with which they become acquainted. Concerned with promoting the aims of particular groups, they may lose sight of the long-term general interest. Emphasis needs to be put upon training students how to persuade the policy-makers of specific interests to formulate a line of policy consistent with the long-term general interest. The important decisions of our society are, furthermore, often compromises between conflicting influential groups (such as government and business) and not the dictates of one group only. It is the direction taken by these compromises that so profoundly affects the general interest. Hence it is advantageous to shift the focus of student attention from the angle of specific groups of influential policy-makers to the consideration of how specific value goals can be achieved by society as a whole. In this way the mind of the student is kept free to assess the adequacy of existing ideas and practices for the attainment of significant policy results.

### *Value Principle*

Let us, therefore, turn to the principle of curricular organization in terms of specified social values or clusters of values. Here there are several possibilities. Courses could be organized more or less haphazardly about certain important contemporary problems of relatively low level abstraction—such as civil liberties, social security, full employment, democratization of business, democratization of government, healthful housing, conservation and full utilization of resources, farm security, more medical care, food and clothing to more people, protection of consumers, protection of investors, more realistic channels of communication, cheaper and better administration of justice, free education to the extent of ability, and so on<sup>78</sup>—without any attempt to run through such problem courses any consistent generalizations of high level abstraction based on

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78. See McDougal, *loc. cit. supra* note 17.

some explicit theory of social dynamics, or to harmonize specific values with a general theory of democratic values. Were enough problems taken, it would be possible to achieve a fairly complete, though repetitious, coverage of social processes and legal syntax. Such an organization would have much to commend it over the present principle of legal technicality. In our view, however, the ultimate aim of those who seek better preparation for policy-making should be an attempt to achieve a curriculum organized on the basis of a realistic and comprehensive picture of the structure and functions of society, joined with the best knowledge now attainable of the dynamics of social process, and oriented toward the implementing of a consistent and explicit set of democratic values.

### *Non-systematic Application*

To illustrate further the potentialities of even the haphazard aiming of legal doctrines, procedures and structures at specific social goals, let us refer briefly to what is now called the "field of property."<sup>79</sup> Take the customary introductory course. Such organizing foci as "nuisance," "covenants," "easements," and "equitable restrictions" (and their functional equivalents allowed to go by default to other "fields") could be replaced by the specific goal of implementing the definite, intelligible, and generally accepted norms of community planning experts for building stable and livable urban communities. In such an organization the "nuisance" cases would serve only to demonstrate the interdependence of all land uses, the utter anarchy of modern cities, and the ineffectiveness of any judicial handling of the problem. Covenant, easement, and equitable restriction cases could be used to show both the inadequacies of private agreement to serve the public interest and its continuing indispensability, under existing public controls, to individual security. But with these legal technicalities the course would just begin. For achievement of its set goal, it would have to sweep many newer and more effective social controls. Some indication of the scope it would require may be gathered from a brief outline, which begins at the level of local administration:<sup>80</sup>

- A. Techniques for expanding planning area. Contemporary functional activities have completely burst the arbitrary bounds of existing governmental subdivisions. Means must be devised to

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79. See McDougal, *Summary and Criticism of Answers to Question 8 of the Property Questionnaire* in HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS (1941) 268. In the discussion that follows we draw heavily upon this statement, though a number of new suggestions are added.

80. Any serious effort to implement the kind of post-war planning now being urged by a host of public and private agencies must require major changes in our existing legal and administrative structures, procedures and doctrines. Yet little or no work is presently being done by universities, government agencies, or private interests to prepare recommendations for such changes.

make integrated planning, and governmental control, coextensive with geographically, socially, and economically integrated areas.

1. Extension of old boundaries (automatic on achievement of certain conditions; legislative vote; extraterritorial powers, . . .).
  2. Consolidation of old units.
  3. Interstate compacts.
  4. Public authorities or public-private redevelopment corporations, crossing state lines, etc.
- B. Techniques for establishing and maintaining *physical design* and *permissible uses* of area. Past controls have failed not only because of unrealistic planning but also because of a lack of integrated administration of available controls and of a failure to exercise such controls to their constitutional limits.
1. Zoning. How can this device be made more effective both for controlling new development and for reconstructing areas already built up?
  2. "Planning laws." Can affirmative measures be worked out to supplement the negative measures of police power regulation?
  3. Subdivision control. What new controls can be devised for both quality and quantity?
  4. Private covenants. Can administrative machinery be designed to make these more efficient and secure instruments in both the private and public interest?
  5. Future street reservations, parks, etc.
  6. Community purchase of land. How can this method of control, used so successfully in Scandinavia, be adapted to this country?
  7. Institutional structure. How can all the powers developed above best be integrated for administration? How can long-term planning best be introduced into a short-term political structure? How devise a Special Land Court to determine all land-use controversies?
- C. Techniques for promoting public improvements.
1. Capital budget.
  2. Special assessments.
  3. Revenue bonds.
  4. Public authorities.
  5. Municipal ownership.

Should we add, in the course now under consideration, to the goal of livable communities, the further goal of providing healthful and cheap housing—in lieu of the traditional landlord and tenant antiquities of "rent," "caveat lessee," "implied covenants," "independent covenants,"

“constructive eviction,” and so on—the scope of our course becomes even more extensive. A beginning should, of course, be made in the landlord and tenant syntax to demonstrate once again the inadequacies of legal doctrine and judicial control alone to serve the desired social end. With this emancipating exercise completed, attention could be turned again to newer and more effective controls. The following outline, still at the level of local administration, may suggest some of the possibilities.<sup>81</sup>

- A. Techniques to provide adequate housing.
  - 1. Public authorities. How high up the income-scale will “public purpose” permit such authorities to build?
  - 2. Urban redevelopment corporations—privately owned but publicly regulated. Which of the many schemes being proposed by various interests offers the most promise? How can sufficient inducement be offered to such corporations? What of the host of resulting legal problems?
  - 3. Stimulation of private building. Tax and credit controls, rationalization of construction industry, lowering cost of land, etc.
- B. Controls of condition of premises.
  - 1. Compulsory repair, vacation, demolition.
  - 2. Revision of building codes.
  - 3. Consolidation of municipal departments (building inspection, health, fire, etc.).
- C. Controls of the price of shelter.
  - 1. Rationalization of building industry.
  - 2. Taxing for policy purposes.
  - 3. Credit controls.
  - 4. Rent regulation.
  - 5. Yard-stick competition.
  - 6. Tenants’ unions.
- D. Ancillary improvements.
  - 1. Improved recording system.
  - 2. Uniform condemnation procedure.
  - 3. Improved mortgage and tax foreclosure, etc.

The vision of such a course should, however, extend much beyond the level of local administration. To implement an effective national program—or indeed even an effective local program—it will be necessary to focus the students’ attention upon inquiries at state, regional, and federal levels as well. Thus:

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81. For elaboration see McDougal, Book Review (1941) 54 HARV. L. REV. 526 and outline of legal questions in CONFERENCE ON URBANISM, HARVARD UNIVERSITY (Greer ed.), THE PROBLEM OF THE CITIES AND TOWNS (1942) 42.



- A. At the State Level. What changes must be made in state institutions and laws to enable local communities to exercise all the powers recommended above? How can the planning function best be located in the structure of state government? How allocate powers between state and local planners and administrators?
- B. At the Regional Level. How can institutional machinery for making important decisions at the regional level best be set up? By interstate compacts? By public authorities like the T. V. A.? By governors' conferences? By federal administrative agencies? And so on.
- C. At the Federal Level. What federal institutions and laws are required to promote an effective and consistent national policy and yet preserve local enterprise? What in detail should be the conditions of the grant of federal funds? How resolve all the attendant legal (constitutional and otherwise) problems?

Indeed, since use of land and other resources for housing purposes is a part of our "whole economy" and affects and is affected by all other economic activities, such as rates of saving and investment and extent of employment, it is possible that certain other general controls for expanding our whole economy—such as, government spending and subsidies of all kinds, lowering of interest rates, rationalization of tax policies, removing tariffs and other trade barriers, freeing technology of patent restrictions, enforcing anti-trust laws, international organization to reduce expectation of violence, and so on—may be even more important for securing cheap and healthful housing than many of the more specific controls outlined above. Though a course which included all of these controls would quite obviously exceed the bounds of management, there is no reason why students should not be kept sharply aware of their relevance.

Suppose—to vary our illustration from the introductory property course—we substitute for the traditional organizing foci of "streams," "surface waters," and "underground waters" or "natural flow" and "reasonable user," the goal of the best use and conservation of our water resources in the interest of the consumer. Appellate opinions might be used to demonstrate that the physical, engineering, and utilization unities of a drainage basin (every use affects every other use) are such as to make imperative the unified development of its water resources for all uses, including flood control, soil conservation, power production, city supply, industrial use, irrigation, navigation, and recreation. In the course of this demonstration it would also become evident that no distillation or purification of property or tort or any other doctrines can give courts designed to settle a wide variety of individualistic disputes by broad social norms, the necessary staff training, experience, and powers to carry out the affirmative, multi-purpose programs which both public and private inter-

ests require. The scope of the course would, accordingly, have to be expanded to include such other controls as state and federal flood control measures, the New England mill acts, the Western water boards, the state pollution control boards, the Federal Power Commission, interstate compacts, the federal-state soil conservation districts, regional authorities like the T. V. A., federal developments like that in the Columbia River basin, rural zoning, and rural public works of all kinds.<sup>82</sup>

Take, again, the orthodox second year course in property. Sometimes called Conveyancing and sometimes Vendor and Purchaser, it is built about the instruments of "contract" and "deed" (or only one of these!) and the doctrines that courts have sprayed about them. Suppose an inquiring student were to ask himself what it is that the courts and legislatures are trying to do in these cases. He might answer: to promote the cheap, secure, and speedy transfer of land. Why are they interested in cheap, secure, and speedy transfer of land? To promote, of course, the maximum and most efficient utilization of one of our most valuable resources. Why are they interested in such utilization? To promote, of course, industrial production, more healthful housing, better planned communities, more farm production for the benefit of both farmers and consumers, and so on. Having thus obtained a set of policy norms, of varying degrees of abstraction, to appraise the judicial and legislative practices he is studying, he might then ask a very fundamental question. Why do we need two pieces of paper, both a "contract" and a "deed," to transfer a parcel of land? Ships, automobiles, and shares of stock require no such double-barrelled ceremony. If he is told that there must be a period of time between "agreement" and "transfer" during which the vendee can make certain that the vendor has what he is promising, he may wonder why there should be so much uncertainty or insecurity about what a purporting vendor of land has. By the time he discovers that this is because we recognize very old interests in land, because some of these interests are not even required to be recorded in public books, and because the public books are kept by the accounting system of the country storekeeper of a hundred and fifty years ago, he will, of course, be deeply enmeshed in the whole institutional context of that exclusive group of monopolistic, dilatory, and costly specialists, which includes brokers, appraisers, recorders, title lawyers, and insurance company executives. It might even occur to him that the transfer of land is not actually becoming more speedy, secure, and cheap, but rather more dilatory, complicated, and expensive, and that these complications serve no social purpose to which he cares to subscribe. Though he might not prefer liquidity of land as a value in itself, he certainly would not subscribe to non-liquidity that was not directed toward some specific public purpose. Such an inquiring student might wonder, further, why a

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82. See McDougal and Runyon, Book Review (1940) 49 YALE L. J. 1502.

course on the transfer of land should be confined to our most "individualistic" transfers only. He might think that, if he is to be adequately prepared for all the functions he is to perform in a society whose collective features are ever more prominent, he should have some drill in the modes of acquisition practiced by public utilities, governmental units, and public authorities of all kinds.

Take, for a final example from Property, the way Possessory Estates, Future Interests, Wills, and Trusts are commonly taught. The completely complementary possessory estates and future interests are often divorced for separate courses. "Legal" interests and "equitable" interests are treated in contamination-proof compartments as if they had no relation to each other. The formalities for the creation of these interests are taught in one course and the social limitations on their creation in another. Legal technicalities are the organizing foci throughout. Suppose our inquiring student asks what this is all about. He will discover that the courts are here concerned largely with the instruments by which one generation transmits economic power to the next, sometimes through "future interests" reserving a certain amount of dead-hand control, and sometimes escaping a little taxation or avoiding a few creditors' claims. By what norms should he appraise the practices of courts in handling these instruments and toward what ends should his own activities be directed? The answer is difficult because the requisite scientific studies have not been made. It is probable that the practices for transmitting power from generation to generation which we presently tolerate do contribute to our growing inequalities or over-concentration of wealth. Such over-concentration is, of course, inconsistent with our basic democratic values and it impedes the proper functioning of our economic structure. But an exact determination of what we should do about it would require considerable study of how inheritance claims are distributed in our society and have been distributed in other societies and how such distributions have been correlated with the distribution of such major values as power, respect, and knowledge. It is possible that we would conclude that a certain amount of inheritance should be tolerated for individual security; how much may depend upon the availability of other functional equivalents such as insurance or governmental "social security." For the present, in any event, the student must assume that society will tolerate, perhaps even encourage, the private transfer of substantial amounts of wealth from generation to generation. One norm he can set up, however, for appraising the doctrines, procedures and structures by which this transfer is to be effected is that the transfer should be at the least possible social cost and should result in the least possible adventitious disappointment of the reasonable expectations of presumptive beneficiaries. From such a perspective he will see that most of the traditional syntax of this "field" are not only superfluous but positively harmful. He can demonstrate that

the classic categories, now hopelessly ambiguous, of future interests are disappearing under gradual judicial attrition and should be made to disappear even faster. He can point out that practically the only difference between "legal" interests and "equitable" interests today is in the anachronistic verbiage; they are functional equivalents. The practical problems are the same, the variations in the donor's language are inconsequential, the donor can make the same reference to beneficiary, time, and condition; no policy reason can be advanced for invoking a difference in result merely by utterance of a different symbol, and the responses of the courts are in fact largely the same. The chief function of the surviving language, that of categorizing the various interests and of dichotomizing them into legal or equitable, is to mislead unwary or unsophisticated courts into harsh decisions. He might even suggest that the venerable Rule against Remoteness now serves little more than this same function of confusion and that what small limitation it does impose on family dynasties might be better achieved by taxation.

Similar reorientations of other traditional "fields" could undoubtedly be suggested by those who are versed in their mysteries. It would be presumptuous for us to make the attempt. We may, however, in an effort at further exemplification suggest some of the initial questions which should be asked about various representative courses. The following are selected almost at random:

*Contracts.* What are the important agreements of our society? How can we put these agreements in institutional settings that will enable us to assess the effect of the enforcement or non-enforcement or other policing of these agreements on the distribution of major democratic values? What is the effect on such values of our present modes of handling such agreements? What are the methods of adjustment other than agreement among various component parts of society, and how are they interrelated with agreements?

*Torts.* What are the important injuries, intended or unintended, recurring in our society? In what institutional contexts do they occur? How does our present handling of these injuries promote or retard major democratic values? How could the prevention of injury and the lessening of loss to society as a whole be realized as a goal in addition to the goal of readjusting the redistribution of loss among specific individuals? What controls, other than judicially administered tort doctrines, can be devised for handling; for example, automobile accidents or injuries from defective residential structures? How can "libel and slander" be handled in a way that will promote respect for civil liberties and realistic reporting and comment in the channels of public communication?

*Business Units.* What is the effect on the tempo and balance of society of providing the present variety of methods by which persons who wish to engage in speculative activities can limit their possible loss and slough

it off on the unsuspecting or the timorous? If it is socially desirable to so encourage entrepreneurs, should not the loss be socialized directly through government provision of capital by means of taxation according to ability to pay, rather than indirectly and haphazardly by present methods? How can business managers be made more responsible to investors, labor, consumers, and the public interest? What are the relative advantages and disadvantages in terms of technological efficiency of aggregates of business capital of varying size in various industries? How can these aggregates be brought to and kept at their most efficient size? Of all the businesses of our society, which are the most important? What are their power structures? How is this power used to affect the distribution of values? What controls are available, and what can be invented, to democratize this power?

*Equity.* What useful purpose is served by putting this rag-bag of stuff between two covers?

*Conflicts.* How does this illusory syntax actually distribute power among the courts of different states? Does it allocate power to the courts most competent, in different kinds of controversies, to promote democratic values? Can less costly and litigious allocations be devised?

*Insurance.* Why link "fire" and "life" insurance? What is the function of each? What is the effect of the existing system of "distributing" loss upon the value position of various groups in the nation? Are these results "rational" in terms of democratic values? If the most general function of insurance is to make certain by present relinquishments a future flow of stable and adequate income, should not the function be performed by government, since its taxing power can base the required relinquishments on ability to pay? What are the interrelations of "private" insurance and "social security" in a democratic system?

*Taxation.* Can the social and economic effects of taxation be appraised and taught in a "general" course on taxation, or must the effect of tax controls be meaningfully considered as an incident of elaborate factual inquiries into the processes of society? Should the tax course be conducted simply as a "skill" course in ways and means of collecting money (or of avoiding its collection) and the policy implications of tax manipulation relegated to richer contexts?

*International Law.* How can we build international organizations as effective for promoting democratic values everywhere as we have built for strategy, munitions, and shipping? How, in detail, can we build such organizations for the promotion, on an international scale, of full employment, full utilization of resources, technological development, rational fiscal procedures, trade, democratization of business power, and related purposes? In the place of international cartels that restrict production, how can we substitute international-development organizations that increase production for the benefit of consumers everywhere? How can we imple-

ment our relinquishment of war as an instrument of national policy and form an international institution authorized to determine aggressors? What are the modes of constituting a world state?

Enough by way of illustrating the kinds of preliminary inquiries required by a more or less haphazard aiming of legal institutions, practices and doctrines at explicit social goals.

### *Systematic Application of the Value Principle*

Let us now turn to a brief examination of curricular organization in terms of a more systematic statement of values and a more explicit theory of social dynamics. This problem we have anticipated by our formulation above of the values of a free society and of the principal variables upon which the attainment of such values depend. It is far from fantastic to assume that effective courses may be explicitly organized about these major democratic values and variables. Consider the following basic courses (no great importance is attached to the order in which they are listed) :

1. Law and control.
2. Law and intelligence.
3. Law and distribution.
4. Law and production.
5. Law and character.
6. Law and community development.

1. *Law and Control.* The scope of this course is the study of power, the investigation of how power is distributed, and of how legal syntax, procedures, and structures affect, or can be made to affect, this distribution. Its purpose is to offer a realistic survey of the people or agencies who are actually making the important decisions of our society and of the controls available to keep their power responsible, hence shared. It is convenient to examine the facts of power in reference to the institutional groups found in society; hence the course begins with what is commonly called government; from government, the transition is made to private pressure organizations, and to business and non-business private associations.

Concerned as it is with government, much of the traditional content of courses on constitutional law finds place here. Included are cases that bear on the determination of "the meaning of the Constitution" with respect to the apportionment of authority between federal and state governments, and among all the agencies of government at each level. So far as the sharing of power is concerned, many special problems deserve special attention, such as the legal devices available to the Federal Government in seeking to correct tendencies toward autocracy and despotism in the franchises of individual states.

In addition to problems from the general domain of constitutional law are parts of courses in municipal corporations where the problem is to determine lines of authority between state and local agencies. Here, in particular, it is important to consider the legal doctrines available to readjust governmental areas. With changes in population, with increasing distinctions between work place and residence place, problems of adapting the many kinds of governmental districts to one another are among the most pressing technical problems of government. These issues greatly affect the balance of power among different regions of the country, and among various kinds of economic and other cultural groups.

This course includes some of the topics found in public international law, particularly the concepts relating to the role of "sovereign" and "half-sovereign" states, and doctrines of government intervention. Under the rubric of control will come cases that clarify doctrines governing the internal distribution of power in private pressure associations. The problem of access to membership in an association is peculiarly acute whenever the association exercises dominance over the distribution of values, as do certain business cartels, trade unions, and trade associations. The issue is particularly important when groups are able to entrench themselves in private organizations by various methods of coercion. In recent times this problem has been put in the foreground as a result of the efforts of Nazi-controlled and Communist-controlled factions to dominate fraternal, benevolent and other organizations nominally set up for cultural ends.

This course will include the structure of formal authority and of effective control within corporations, partnerships and personal profit-seeking enterprises. Degrees of control over personnel and policy by various classes of shareholders are in point here. This involves part of the material found in courses on corporation law or "business units." After examining private pressure and business organizations, attention will be given to the control problems that arise in non-profit economic associations and in other private groupings for non-economic purpose.

2. *Law and Intelligence.* The problem here is how more people can be given access to, and skill in interpreting, the facts necessary to decisions that will promote democratic values. The realism of the decisions made by the officers or members of any organization depend in no small measure on the quality of the intelligence that reaches them, and the degree of skill with which they are equipped to think. This raises the whole question of the control and the freedom of channels of communication.

When we examine the question we find that legal devices have already been used in order to improve the factual basis of judgment. One requirement for an adequate stream of intelligence is disclosure of source, the disclosure of all who have anything to do with directing the flow of communication. The practices of registration and labelling have been partially adapted to the problem, so that statements of ownership and circulation

must be made available from time to time, and advertising matter must be plainly labelled as such.

Besides the disclosure of source, positive means of obtaining access to the media of communication are essential, if public opinion is to be influenced by minority statements of fact and purpose. Several legal devices have been partly adapted to this problem. In some instances the government has itself assumed the cost of circulating controversial statements. This is the effect of the Congressional mailing privilege, and of the dissemination at public expense in certain states of party electoral platforms. Since freedom of speech involves freedom of access to public attention, topics connected with the use of public property for political meetings and demonstrations are relevant here.

Still a third aspect of the intelligence function is access to facts that interested parties try to conceal (in addition to their identity). Although legislative bodies may have relatively unlimited powers of subpoena, the scope of their investigations are blocked by several legal considerations, notably by a narrow interpretation of the words used to describe the purpose of the inquiry. It falls within the scope of this course to explore the arsenal of legal attack and defense available to governmental agencies in the exercise of their investigative functions. Also in point are the alternatives available to courts of various jurisdictions to obtain information, including the barriers involved in confidential communication.

Another requirement of proper intelligence is competent decision-makers. It has long been notorious that some courts and administrative agencies are so poorly equipped and poorly skilled by experience and training that it is ridiculous to expect them to exert effective control over private utility companies. In setting up a judicial and administrative system, one of the positive tasks is to locate jurisdiction at a point where adequate facilities can be brought to bear on problems.

In the conduct of debate and of hearings, certain procedures enhance the probability of a realistic outcome. From this standpoint it is relevant to scrutinize the means by which the attention of the group is protected by the exclusion of the irrelevant (as in the application of many evidence rules), or, if total exclusion is impossible, how protection is found by the nullification of the non-relevant. That all parties to a litigation should have the benefit of counsel is a tacit application of the rule that the effect of mere professional skill on decisions should be nullified by being equalized on all sides. A more positive aspect of procedure is the clarifying of goals and alternatives; still another is provision for the discovery of new truth. The latter problem carries us over to the study of the set-ups most favorable to enlarging the stock of scientific knowledge available to society. When we consider private pressure organizations, the same questions must be systematically canvassed as for government. Already many legal devices have been invoked for such purposes as forcing disclosure of



records to members. Private business organizations are affected by legal means affecting the stream of intelligence at the disposal of prospective investors, and of the shareholders of going concerns. Parallel problems can be taken up for the remaining types of cultural organization.

3. *Law and Distribution.* We have laid down as one of our major policy objectives the achievement and protection of balanced income. The purpose of this course is to examine the effect of legal syntax, procedures, and structures upon property distribution and to consider their potentialities for the attainment of varying states of balanced distribution. The course begins with a study of the present distribution of income, of the correlations between this distribution and the distribution of other values, and generally of the factors affecting distribution. Consideration will then be given to alternative distributions, their probable consequences, and the compatibility of these consequences with major democratic values. Once preferred distributions are designated or assumed, the course can begin to consider the great variety of controls relevant to redistribution, such as taxation, government spending, credit manipulation, tariff policies, control of corporate device, patent revision, changing rules of descent and inheritance, price controls, abolition of restraints on employment, criminal penalties for too obvious shearing of sheep, changes in bankruptcy laws, anti-monopoly activities, and so on.

The authority to tax, for example, is peculiarly relevant here, since it is theoretically possible to mold the pattern of income distribution by the appropriate use of the tax power. At any given time, however, we are confronted by many devices by which exercise of the tax power in the interest of balanced distribution are nullified in practice. For this reason it is necessary to devote patient attention to the fate of various tax provisions of federal, state and local units of government. In point here is the thorny problem of double taxation, not only among the several jurisdictions within a given nation but by several states of the world. We find a continual struggle between the specialists hired by tax reducers and specialists hired by tax enforcers, and one function of this course will be to get abreast of the current state of this perpetual tug-of-war. In recent times, for instance, we have seen legal syntax connected with the trust made use of extensively in tax evasion.

4. *Law and Production.* The problems centering around production concern regularity and volume. It is apparent that this is one of the continuing and crucial problems of a machine economy. However, regularity is not the only consideration pertinent to the process of production. It is evident that we are also interested in the volume of various types of products. Although the word "production" is made use of to describe man-hours and materials expended, the term covers many diverse operations. There are great differences in the attitude of workers and management when they are engaged in producing instruments of war

than when they are at peace. Attitudes differ when heavy machinery or luxury goods are being made. Some processes of production are deeply respected by those who participate in them, while others have no emotional satisfactions whatever. To cover all of these diversified situations by the term "production" is a very preliminary use of the word; sub-specification is immediately needed.

In this course we pay particular attention to the role of money in relation to the technical processes of production. Modern analysis of the monetary (including the credit) system has disclosed the enormous cumulative effect of seemingly isolated transactions upon the ebb and flow of economic activity. When an invested dollar is backed by a saved dollar there can be steady expansion of total production. However, there are many technical devices whose effect is to destroy any constant relationship between dollars saved and dollars invested and to create a pyramiding of money that rests upon no foundation of saving. This process can give rise to enormous booms, but such booms cannot be sustained indefinitely and end in crash. The fabrication of dollars is often obscured by the technical operations involved, the most striking example of which has been a system of financing business through commercial banks. When a bank receives a deposit it assumes a liability to return the money. If it did no more than "warehouse" the depositor's dollars, retaining them as a 100% reserve until called for, it would make only the money charged the depositor for the performance of this custodial service. When the bank loans out dollars that it has received to businesses, savings are transformed into investment and the income of the bank is increased by the interest charged on the loan. Commercial banks, however, have been permitted to enlarge their profit-making opportunities by the use of procedures enabling them to create dollars. This is what happens when a loan is granted in the form of a deposit, since the bank is now able to loan out some of the deposit that it has just created; and the pyramiding may go on until an enormous discrepancy prevails between the saved dollars and the number of "invested" dollars circulating. It has been proposed that the warehouse function and the investing function should be clearly segregated in different types of institutions and made subject to rules that keep the flow of dollars invested in stable relationship to the dollars saved in the economic system as a whole. This is but a single example of the complex technical processes of modern institutional life with which we are especially concerned. In this context it will be necessary to appraise not only the consequences of the banking system but of securities markets, exchanges, government budgets, currency regulations, import and export of capital, and the like.<sup>83</sup>

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83. Professor Eugene Rostow has developed courses on (a) The Control of Competition, given three or four times in various forms at Yale, and (b) The Control of Industrial Fluctuations, given in part in Chicago in 1941, and listed for Yale in the Spring of

5. *Law and Character.* The plan of this series of materials is to consider factors affecting the distribution of respect in society. In studying the relation of legal syntax to respect we will evaluate it from the point of view of increasing or diminishing the zone of individual self-determination. Included here are many of the limitations on the procedure of public officers designed to protect the individual from arbitrary acts. In so far as the traditional remedies for many torts are designed to diminish the amount of interference by persons or groups with one another, they will be relevant in this course. When we use the word "interference" we refer to actions affecting an individual that are regarded by him (and accepted by the courts) as limitations upon his freedom of choice.

A more positive side of respect is equality of opportunity, and many legal doctrines are designed to facilitate, or can be used to expedite, the realization of equality. Laws against discrimination on grounds of age, sex, race, religion, provenience in obtaining access to education or jobs, fall in this category. One positive facet of respect is the exempting of persons from burdens that they are less qualified to bear than some others in the community, and the placing of special burdens on those capable of carrying them. (Equality of sacrifice, it may be said again, does not mean equality of burden. In the interest of equality many legal arrangements grant exemptions to children, women, sick, crippled, or defective people).

As a means of aiding character formation, special provisions are often made to affect the rearing of children. The aim of many of these provisions is to protect the growing child from the character distortions that result when the personality is treated disrespectfully (such as rules to protect offspring from the stigma attached to illegitimacy).

6. *Law and Community Development.* This is a course which cuts across all our major values and variables. Its frame of reference is the relation of legal syntax, procedures, and structures to the utilization of resources in communities of varying size. The areas range from neighborhoods to village and urban nuclei, to regions, to the broader geographical areas of the world. In modern times the problem of providing some degree of direction for the use of land and other resources for population groups has become increasingly urgent. The need is most acute in relation

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1942. The first course was an effort to study the economic literature on the subject of competition and to use it in analyzing a complex mass of data, given in cases, statutes, administrative reports, etc., concerning specific markets for coal, oil, milk, steel and other commodities. The second course was designed on the same pattern to analyze the chief legal institutions of use or potential use in controlling general fluctuations in employment: the banking system, the securities markets, currency laws, international exchanges, as well as more general economic arrangements for controlling wages, prices, etc. Some experimental materials of this kind were published in Chicago in 1941. The two courses together were designed both to cover aspects of the problem of economic policy as a whole, and to present an integrated conception of a positive economic program for democracy.

to community and regional planning. Whenever a problem of community development is in the foreground, the fundamental point is to be clear about the pattern of life that it is proposed to facilitate. Given our preference for a democratically functioning society, by what legal devices can we give direction to the growth of communities along lines consistent with these ideals?

It is evident that community planning brings into the focus of attention all of the ends and means that we have considered. Certainly the layout of homes and work places exerts a profound effect upon the degree to which democratic character is achieved by the rising generation and the extent to which democratic ideas are put into practice by the older generation. One of the major sectors of this problem concerns the use of legal doctrines and new institutions as means to the achievement of ever-expanding standards of individual health and safety, of individual comfort, convenience and taste. In this context is found most of the traditional content of courses in property, but the syntax of property is given significance in relation to the problems here set forth and much new material is covered. Some indication of the possible scope of such a course has been offered in the discussion of community planning and housing above.

In all the foregoing courses a continuing theme is the relation of the problem at hand to the stage of crisis or inter-crisis prevailing in the nation as a whole. In the crisis of war, every problem must be seen in a somewhat distinctive framework. There are the enormous adaptations involved in conversion from peacetime to wartime production; and at the end, there are the special problems of "conversion back." Hence one of the considerations governing the choice of cases throughout will be to exhibit problems that arise in crises of varying degrees of intensity and duration.

### *Skill Principle*

It remains to discuss the third principle of reorganizing the curriculum, the skill principle. The second, or value, principle is the one we have emphasized most, although the first, or influence, principle deserves a larger place than it now has. The immediate problem is to what extent we shall take skill into consideration.

In a sense all courses in the law school exemplify the skill principle, since they provide the student with command of legal technicality. Though we proceed on the assumption that the skill principle in this sense must be applied in whatever curricular changes are introduced, we have asserted that the choice and arrangement of legal technicality should be made from the standpoint of influential groups or key values. There are, however, certain clusters of legal syntax that should be considered separately if we are to avoid tiresome and wasteful repetition. The traditional courses in pro-

cedure have already been instanced as the classical application of the skill principle, in this more limited meaning. Their function is to train the incipient lawyer how to choose a court for settling his dispute and how to operate a court once chosen to get the result he wants. Obviously both the "jurisdiction" and the "mechanics" of courts affect the distribution of each of the values in which we are interested, especially power, and are bound to come in for a certain amount of attention in our specific analysis of values. But the details of court procedure and structure are worthy of special courses. The operating lawyer sees his alternatives of action in this way: Who has authority to settle my dispute? Who of this group is most likely to be predisposed in my favor? How can I operate on him to get the results I want? By what verbal incantations and the like do I get in and out of the scope of his authority?

It is common knowledge, however, that a lawyer who wishes to operate successfully on his environment does not confine himself to the courts. Influential decisions are not restricted to judges. Skill training that stops short with the traditional procedure courses leaves the potential policy-maker hopelessly inadequate for modern conditions. For he must be prepared to work with—and on—legislators, executives, administrators, arbitrators, negotiators, and other responsible persons. It is incumbent upon law teachers to make plain to the student not only that there are different ways of settling disputes but many ways of getting results other than by disputation.<sup>84</sup> As a lawyer moves away from acts

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84. Compare Assistant Solicitor General Cox, *Wartime Interpretation of Legislative Orders*, mimeographed address to Society for the Advancement of Management, August, 1942:

"We lawyers are frequently—and many times justly—accused of having negative minds. Too often we are disposed to search out and magnify the reasons why something necessary can *not* be done rather than to seek the means whereby it *can* be done. The counsel's office is the bottleneck of progress in many a government agency faced with the urgent job of putting a new policy into effect or carrying out a directive from Congress.

"The responsibility of the government lawyer in time of war is, above everything else, the affirmative one of finding ways and means by which the decisions of the policy-makers can be most promptly and effectively fulfilled . . . .

". . . Our lawyers must be sufficiently bold and imaginative to explore this new realm of freedom—to discover what the law can *do* as well as what it can prohibit."

For further indication of what is required here see FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930); GALLOWAY AND ASSOCIATES, *PLANNING FOR AMERICA* (1941); LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); NAT. RESOURCES COMMITTEE, *THE STRUCTURE OF THE AMERICAN ECONOMY* (1939) Pt. 1; Gray, *The Passing of the Public Utility Concept* (1940) 16 J. OF LAND AND P. U. ECON. 8; Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government* (1941) 54 HARV. L. REV. 545; Rostow, Book Review (1941) 8 U. OF CHI. L. REV. 169; Tugwell, *The Superpolitical* (1940) 5 J. SOC. PHILOSOPHY 97.

that impinge directly on a court, his distinctive skill in handling legal technicality loses application and he is compelled to rely more fully upon general policy skills. If the lawyer is to operate on a par with others he cannot afford to forego these skills. The years spent in going to law school impose handicaps no less than advantages if they insulate the student from opportunity to acquire or perfect the exercise of the modes of thinking, observing and managing that we call general policy skills.

To a limited extent the existing curriculum looks beyond the doctrines, procedures and structures of the court system and calls the attention of students to other processes by which controls are made operative in modern civilization. Most of these ancillary courses, however, go but a little way toward providing a unified factual picture of the process of dispute-settling and result-getting in our society. Entirely too much concerned with the syntax of "interpretation," and over-cautious in abjuring "policy,"<sup>85</sup> courses on legislation rarely come to grips with the fundamental problem of how to get statutes enacted for achieving specified purposes. In control over funds, in power to create new structures and procedures, and in authority to prescribe policy norms of the broadest scope by utilizing words that refer to identifiable social goals, the legislature ranks among our most strategic agencies; its comparative neglect by the law schools can hardly be justified in a democracy. Surprisingly enough, courses on the executive are conspicuously non-existent. Whatever attention is bestowed upon the modern executive is imbedded in the interstices of constitutional law. The potency of the executive for waging war suggests that equal potency might be achieved with adequate safeguards for the waging of peace. Still over-apologetic about the growth of the administrative function and excessively worried about the "nature" of that function, established courses on "administrative law" seldom succeed in having a sufficiently sustained orientation toward important factual contexts to make the syntax with which they deal meaningful; moreover, they seldom give explicit and creative attention to how "administration" can be adapted or even further extended for the better promotion of democratic values. Only an occasional catalog carries an occasional seminar on arbitration, despite the enormous potentiality of this procedure for reducing wasteful litigation. The "public authority" or "public corporation," fast emerging as one of the most significant agencies of our time, probably with a great international career ahead of it, receives scant notice.

Most of the material describing power processes in our civilization can be furnished to the student in the proposed course on "law and control." But every agency engaged in preventing and settling disputes evolves detailed doctrines and procedures; hence skill courses on the existing operation and possible improvement of each structure should be offered. In all such courses the minutiae ought to be mastered first, followed by criti-

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85. See Hurst, *Content of Courses in Legislation* (1941) 8 U. OF CHI. L. REV. 280.

cal thought about how the detailed modalities of the structure—whether court, legislature, executive, administrative agency, or public corporation—may be molded into more perfect instruments of democracy. The latter frame of reference follows the value rather than the skill principle; but there is nothing that forbids compatible principles from being applied in the same course. The influence, value and skill principles are not mutually exclusive; properly understood they supplement one another. Although we rely upon the value principle to provide the broad frame within which an improved curriculum can emerge, we are not estopped from exploring every fruitful combination with other principles.

In the foregoing discussion of principles the main emphasis has been upon mastering the legal technicality needed for the professional practice of law; at the same time, the objective has been to relate this distinctive skill to the goals and the general skills appropriate to the maker of policy in a society that affirms its devotion to the dignity of man. We assume that “courses” will continue to be the pedagogical framework in which most of the law school instruction will be carried on. We are not opposed to supplementary means of reconditioning the law school environment into a more efficient instrument of pedagogy—indeed, we shall presently make some proposals looking in this direction—but we regard the pattern of classroom instruction as too firmly rooted in our culture to give way in the immediate future. Moreover, it is entirely possible to work within this frame in transmitting policy attitudes and techniques. Individual law professors can reset the modest parcel of legal technicality over which they have catalog control in such a way that it contributes directly to the aims we have been stating. Adventurous law faculties can revamp the traditional compartments in accord with the principles of value, influence and skill here made articulate; but the heart of the matter is not the rechristening of courses but the changing of aim and emphasis.

The resetting of legal technicality in a policy-potent framework is an enormous task for any law professor who has the temerity to consider the gaps in his own equipment, and the skills most appropriate to the relating of legal syntax to the larger factual context with which it unceasingly interacts. During the years of transition toward a policy-training law school, it will be advisable to provide special guides to aid the student in orienting himself. We have already provided a brief synopsis of the skills to be commended for inclusion in the training program of the future law school. In the skill table we set out, besides legal technicality, other skills of thought, observation and management to which we may now give more extended attention.

### *Skills of Thought*

The mastery of habits of thought and talk can be facilitated by insight into the nature of the tools themselves. Insight is something more than

the enrichment that comes from learning and relearning the terms, doctrines and citations of any established field of law. Insight means awareness, not puppet learning; and one means of enabling the student to objectify his thinking about thought and language is to provide him with knowledge of the rapidly expanding sciences that deal with these two indispensable processes. We understand legal technicality better when we know wherein it resembles or diverges from other forms of expression. These distinctions are all the more pertinent, since in his professional career the lawyer cannot confine himself to the "Yea, Yea," and the "Nay, Nay," of the legal idiom. Whether he addresses client or juror, the language of legal technicality gains clarity and impact in the framework of other forms of communication.

In recent years our knowledge of the process of thought and communication has advanced by leaps and bounds, and new insights, properly correlated and kept up to date, should be made accessible to the student.<sup>86</sup> Several frames of reference are often unwittingly invoked by those who purport to state the "law"; and until these differences are explored, confusion is compounded.

Consider, for a moment, the following statement uttered by a law teacher who is expounding a case, a legal adviser who is arguing with a client, or an advocate who is addressing the court: "This is the law (followed by a statement of a 'doctrine')." This statement may be treated as a summary of past statements made by sources who are treated as qualified spokesmen (authorities). It may also be taken to refer to future events, predicting what certain authorities will say (even though there is doubt about what they have said in the past);<sup>87</sup> or it may be construed as a declaration of preference by the professor, adviser, advocate—a statement of what the speaker thinks the law should be even though the authorities (before or after) dissent.<sup>88</sup> If this last construction is put upon the words, the speaker may affirm that he is misunderstood, since he did not use words that categorically convey preference; nevertheless, the listener may believe that the speaker lays himself open because so many talkers do in practice say "the law is so and so" when what they mean—in the sense of what they say if challenged—is a preference for the law to be so and so. Under some circumstances the statement goes beyond a simple preference and becomes a volition to do whatever is feasible to get the "should" accepted as an "is."

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86. Consult OGDEN AND RICHARDS, *THE MEANING OF MEANING* (4th ed. 1936), with Supplementary Essays by Malinowski and Crookshank; also Sapir, *Language* in 9 *ENCYC. SOC. SCI.* (1933) 155, *Communication* in 4 *id.* (1931) at 78, and *Symbolism* in 14 *id.* (1934) at 492.

87. Obviously the aim of those who accept the "prediction theory of law" is to arrive at future reference statements that will be confirmed by the event.

88. The "normative conception of law" arrives at such statements, if the speaker takes responsibility for the norms invoked by him.



Hence if we take the statement of the "law" at face value we may find it ambiguous; and we can call it *normative-ambiguous*, because the word "law" is used, and "law" is a word that refers to norms, even though it is unclear whether the norm in question pertains exclusively to the speaker, whether it is shared by the speaker with others, or whether, though a norm of others, it is not the norm of the speaker at all. Common sense experience emphasizes the enormous role of such normative-ambiguous statements in the discourse that purports to expound "law" or "ethics" or "Divine Will." "That is right (morally)" is a sentence open to all the doubts raised about the "this is the law" sentence; and "this is God's Will" is no whit less ambiguous. By evoking such word sequences a speaker may conceal his own preference or volition on contentious matters and increase the attention paid to what he says by enunciating norms whose sponsor appears to transcend the speaker.<sup>89</sup>

If we seek to gain objectivity toward our flow of thought—and everybody's flow of language—it is helpful to practice using technical categories for classifying the phenomena in question. We have already suggested that some statements may be described as normative-ambiguous; and there are other useful distinctions to be drawn according to whose norms are understood to be involved. Thus, "I think the law should be so and so" plainly involves the maker of the statement; it is a *normative-demand* statement. "The judges of that period held that the rule was so and so" is a remark about the norms of others; it is *naturalistic-normative*. The "fact" statements in litigation are *naturalistic*.

Many normative statements refer to internal relations among a group of propositions. Assertions that purport to formulate a legal doctrine may be examined in connection with the entire family of statements that are taken to be the "law of contract," or the "law as a whole," in a given period or jurisdiction. The internal relations among these statements are consistency, economy and degree of generality (universality-particularity); statements about these relations are *syntactical*. A well-developed syntactical system is composed of propositions utilizing a limited list of key terms combined according to postulates and rules. The law is but one of the well-developed syntactical systems in our civilization; every theology is such a system.<sup>90</sup> Where the meaning involves not the internal rela-

89. The "illusion of universality" is cultivated by ambiguity. For this and similar distinctions see ALLPORT, *SOCIAL PSYCHOLOGY* (1924).

90. A valuable contribution to our understanding of the likenesses and differences of modern and ancient logics is KAPP, *GREEK FOUNDATIONS OF TRADITIONAL LOGIC* (1942). Note particularly the treatment of the syllogism in Chapter 4. For a succinct statement of syllogistic logic: Treusch, *The Syllogism*, in HALL, *READINGS IN JURISPRUDENCE* (1938) c. 12. For modern "postulationalist" logics: CARNAP, *INTRODUCTION TO SEMANTICS* (1942); KORZYBSKI, *SCIENCE AND SANITY* (1933); TARSKI, *INTRODUCTION TO LOGIC* (1941); USHENKO, *THE PROBLEMS OF LOGIC* (1941) (a criticism). A "psychologistic" logic is DEWEY, *LOGIC, THE THEORY OF INQUIRY* (1938).

tions of a body of propositions, but the external references of a statement, we are dealing with the *semantic* dimension of thought and language. The statement that Judge So-and-So made such and such remarks is a semantic proposition; the statement that certain of his remarks contradicted one another is syntactic.

We are now in a better position to detect the many frames of reference that may be more or less wittingly invoked by those who purport to state a legal doctrine. To the degree that a given statement affirms that something was said in the past, or will be said in the future, it is semantic. To the degree that it characterizes the interrelations of past or future statements according to consistency, generality and economy, the statement is syntactic. It may be that the formulation of the legal rule is accomplished by declarations of approval or disapproval on the part of the statement-maker or of determination to block the recognition of the rule; these are normative-demand, not naturalistic-normative.

All of the distinctions made thus far have to do with the *content* of statements rather than their *causes or consequences*. If we assert that the court accepts a certain rule out of deference to a cited authority, our remark purports to explain the judge's conduct. In this instance the explanation offered is to impute to the judge a conscious or unconscious bias.<sup>91</sup> Other types of explanation may, however, be invoked, as when we say that Judge So-and-So favors the corporations because he comes from an upper income family.<sup>92</sup> In this case we are connecting conduct with position in the social structure. The foregoing statements have been causal; and statements about consequence may also refer to personality or social context. We may forecast that a ruling will annoy a certain justice on the bench of a higher court, or predict that the ruling made by the court will hasten the concentration of wealth. When we undertake to relate what is said to its causes or consequences, we are indulging in *pragmatics*, as distinguished from *semologics* (which is content). All pragmatic statements are naturalistic.

Most of the "fact statements" offered in court belong to the realm of semantic discourse. The counsel, however, has latitude in selecting and presenting this material on the basis of his estimate of the pragmatic probability of acceptance by judge and jury. Statements put forward as "fact" are continually scrutinized syntactically in order to expose or cover up lurking inconsistency.

On examination it appears that most of the language used in presenting claims to the court is syntactic in nature, since it applies a system of closed categories of identification to all parties involved in the controversy,

91. A general bias toward absolutism was asserted in FRANK, *LAW AND THE MODERN MIND* (1930).

92. Such interpretations are stressed in Marxist literature. See BOUDIN, *GOVERNMENT BY JUDICIARY* (1932).

and invokes normative standards in justifying specific demands. The norms of claimants often run through a wide gamut of legal, policy and other standards; but at every step of the proceedings the counsel governs his choice of syntactical propositions by his forecast of their pragmatic effect on the trial and appeal court. The heavy freight of citation that appears in every brief is semantic (naturalistic-normative) to the degree that it asserts the fact that authorities have enunciated norms; assertions about the interrelations of doctrines are syntactic. We know that a parade of citations is often designed to gain the pragmatic end of acceptance by bulk.

For the most part opinions written by appellate judges flow within the established banks of legal syntactics, though they are not infrequently characterized, if not distinguished, by forthright declarations of preference, sustained by norms of policy or theology. In some jurisdictions it appears that a seat of authority promotes the flow of normatively ambiguous discourse.

What we have been referring to as "legal syntax" is a short way of talking about language that purports to state the "law"; on closer examination an example of legal syntax may turn out to be normative-ambiguous, normative-demand, or naturalistic-normative. Following some current usage, the entire science of statement analysis may be called *semiotic*; statements about content are *semologic*; statements about cause and effect are pragmatic. *Semologic* falls into syntactics and semantics.<sup>93</sup>

In our proposals to recast the curriculum we do not recommend specific courses on thought and language, but rather the preparation of materials that can be kept readily available to the law student during all the years of his training. The incentive to master the tools of thought and language should be continually reinforced by a word-consciousness cultivated by teachers in the classroom. As a guide and companion to many of the skills valuable to the law student, it is advisable to prepare and keep up to date through constant revision a collection of materials that may be called "The Skill Book." Such a volume would contain reprints, original articles by experts, and unpublished research; it would give "who's who" information on authors.<sup>94</sup>

The categories just developed can be explicitly related to the forms of thinking mentioned above as goal, trend, and scientific. The statement of a goal that is endorsed by the statement-maker is normative-demand; so,

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93. "Semiotic," "pragmatic," "syntactic," and "semantic" are used in approximately the senses here indicated by Morris, *loc. cit. supra* note 66. Morris does not suggest a convenient term for "content;" hence we have used "semologic" to round out the system.

94. In the "who's who" of the science of thought and communication, America's great pioneer, Charles S. Peirce, will be outstanding. Other significant figures will be Carnap in Austria, Tarski in Poland, Couturat in France, Whitehead and Russell in England.

too, are explicit acceptances of more inclusive norms under which it is subsumed, or particular applications that are deduced from it. Assertions that a given statement of goal is consistent with a certain norm are not necessarily normative-demand; the speaker may not himself prefer the norm in question. Normative-demand statements may fall into the preference or volition type ("I accept democratic values"; "I will work to clarify and execute democratic policy").

What we have previously called skill in derivation is proficiency in syntactics with special reference to arranging propositions in which affirmations of the democratic values occupy a place. It is the same type of skill involved in legal technicality, save that the lawyer operates with norms imputed to an authority that is assumed to be binding on certain courts, while the authority for moral and other norms may be indeterminate. In connection with derivation, it should be noted, furthermore, that proficiency has little bearing on which values are accepted by the statement-maker. After all, the values of a given individual are acquired in the interaction of original nature and the cultural environment in which he grows up. What may be accomplished by a sophisticated process of derivation is insight; and by means of insight our actions may be more efficiently integrated toward realizing values. When we "take our values for granted" we may not only make mistakes, but find ourselves at a disadvantage in the articulate defense of our values when we meet anyone who doubts or rejects them. Part of the lawyer's training should be familiarity with the thought and speech of those who are currently invoked as authorities in controversies over value. Hence a place will need to be found in the Skill Book in which are described prevalent modes of legitimizing democratic or anti-democratic values.<sup>95</sup>

Trend thinking, in contradistinction to goal thinking, is conspicuously naturalistic in form, characterizing as it does the structure of past and future events. Affirmations of approval or of determination to do everything possible in order to increase the probable occurrence of future events are not trend but goal statements. The thinker or speaker may assign varying

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95. See, *e.g.*, DUCASSE, *PHILOSOPHY AS A SCIENCE, ITS MATTER AND METHOD* (1941); FRANK, *BETWEEN PHYSICS AND PHILOSOPHY* (1941); PERRY, *GENERAL THEORY OF VALUE* (1926); Dewey, *Theory of Valuation* in 2 INT. ENCYC. OF UNIFIED SCIENCE (1939) No. 4. On the democratic values see ANSHEN (ed.), *FREEDOM* (1941); DEWEY, *THE ETHICS OF DEMOCRACY* (1888); FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS* (1937); JEFFERSON, *DEMOCRACY* (Padover ed. 1939); KALLEN (ed.), *FREEDOM IN THE MODERN WORLD* (1928); LASKI, *DEMOCRACY IN CRISIS* (1933); LINDSEY, *THE ESSENTIALS OF DEMOCRACY* (1929); MERRIAM, *THE NEW DEMOCRACY AND THE NEW DESPOTISM* (1939); MILL, *ON LIBERTY* (1854); TAWNEY, *EQUALITY* (1931). Convenient guides to democratic theory are COKER, *RECENT POLITICAL THOUGHT* (1934); MERRIAM AND BARNES, *A HISTORY OF POLITICAL THEORIES, RECENT TIMES* (1924). See also CARGILL, *INTELLECTUAL AMERICA* (1941); GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* (1940); PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT (1927-1930)*.

degrees of probability to the occurrence of the events referred to; indeed he must arrive at such estimates if he is to think and act on the basis of the alternatives that the future seems to hold in store. When the speaker's estimate of probability is left vague, the statement is naturalistic-ambiguous. When probability is assigned by the speaker the degree may be high or low; or it may be wholly uncertain: "America's balance of government and business will outlive totalitarian forms of state and society"; "Private enterprise is doomed"; "I have no opinion as yet about the future of private enterprise."

Scientific thinking, too, is naturalistic in the sense that all propositions are looked upon as confirmed or confirmable by data. The language of science, however, includes both direct statements about events and statements about these statements. The first are the sentences embodying data and the second are concepts, definitions, rules, laws and hypotheses. Propositions that state interrelations among variables are hypotheses; they are laws when they receive a sufficiently high degree of confirmation by data. In accounting for the behavior of courts we have specified a number of variables whose interrelationship is a potential object of scientific investigation. Claims presented, objective facts, legal norms and all the other factors enumerated can be connected with the description of reality by specifying the indices that a given observer is authorized to accept as evidence of the variable's presence, direction and magnitude. It is apparent, therefore, that while the generalizations of science are confirmed or confirmable by data, and therefore rest upon a body of semantic propositions, the semantic statements are composed of units whose definitions and rules of combination are part of a syntactic system.<sup>96</sup>

Certain distinctions cut across goal, trend and scientific thinking; all statements may be given contemplative or manipulative form. A goal may be phrased in passive, contemplative form when one says, "Let us assume for the moment that we want to increase by 10% the segment of the population called middle class." Goals may also be phrased manipulatively, actively: "We want a healthy middle class, and that means expanding the middle class sector of the population 10% in the immediate future." A trend is formulated in a contemplative manner when we say,

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96. Scientific relations may be formulated in terms of factor X and factor Y, or systemically. Variables compose a system where changes in any one of them regularly bring about changes in the others that maintain the characteristic pattern of the variables as a whole. Biological processes have been fruitfully considered from this standpoint; the physico-chemical components of the blood stream, for example, constitute a system. If one of them alters in magnitude, the others change enough to maintain the integrity of the whole. This approach to social processes is advocated in MAYO, *HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933). For sociological theory, the "one factor-one result" pattern of thought is stated in DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1938 tr.). An example of its application is RANULF, *JEALOUSY OF THE GODS AND CRIMINAL LAW AT ATHENS* (1933-34).

"We will now consider the possibility that free private enterprise is rapidly moving toward extinction." A more affirmative, manipulative mode of referring to trend is: "The extinction of free private enterprise is probable in the immediate future." Scientific propositions may be couched in contemplative, inactive style, when we say, "X varies as a function of Y and Z." The same relations may be stated as principles, not as laws, when we say, "To increase the amount of X, diminish the quantity of Y and increase the quantity of Z." It is plain that most of the sentences that phrase responsible decisions are likely to be phrased manipulatively; on the contrary, initial, tentative and speculative attitudes will be in more contemplative form. For various pragmatic reasons even the statements embodying fixed determination may sometimes receive contemplative expression.

This carries us to the need of distinguishing the method from the form of thought. By method of thinking we mean an operation that is carried on with insight for the express purpose of problem-solving. Manifestly, it is not appropriate to speak of a method of thinking when the process is dominated by unanalyzed and unexplored hunch. The sequence in which different patterns of thought are taken up by the problem-solver may affect the probability that he will arrive at realistic solutions. Many problem-solving operations go wrong through failure to clarify goal, or to evaluate trend and scientific data. The deliberate use of each pattern of thinking for the purpose of facilitating the total process is the configurative method of thought.<sup>97</sup> Practical classroom teaching in the law school will be at its best when it stimulates versatile modes of attack upon any problem; and supplementary guides to the study of specific techniques of thinking will be valuable if they contribute to insight.

### *Skills of Observation*

Insight into the process of thought are not sufficient to provide the law student with the orientation needed for policy-thinking. No matter how well-equipped the individual is for goal, trend and scientific analysis, his elaborate machinery must work on relevant factual material. As classroom instruction is progressively revised, the student will be exposed to

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97. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935) c. 1 and *Person, Personality, Group, Culture* (1939) 2 *PSYCHIATRY: J. OF BIO. AND PATH. OF INTERPERSONAL RELATIONS* 533. To think or talk in "equilibrium" terms is to use "variables," whether in a one-to-one or a systemic pattern. Thinking or talking may also be "developmental," in the sense that terms are employed that refer concretely to events. If, following CAIRNS, *THE THEORY OF LEGAL SCIENCE* (1941), we choose the term "order" to indicate the frame of reference for legal studies, and consider the variables that affect it, our mode of thought fits the equilibrium mould. If we consider the post-war prospects of war in Germany, our starting-point is developmental. In the same way we may begin with, or stress, syntactic or semantic statements.

more facts about the world. However, it will be necessary for the classroom to maintain a high degree of concentration upon drill in the handling of legal technicality. When, in connection with specific cases, the facts are in the foreground, the outline of the social system as a whole may remain too far in the background. As a corrective of the many distortions of perspective that come from specialization, it will be wise to make available to the law student a guide to social trends, a body of materials to be continuously consulted in the course of his educational and subsequent professional experience. We have already outlined the justification of factual knowledge of trend, since we have put a great deal of emphasis upon the rational choice of goal, and the disciplined choice of method, on the basis of insight into the structure of the situation in which it is necessary to operate.

As a means of making the point more explicit, we include a provisional outline of a possible "Trend Book."<sup>98</sup> To some extent the outline has grown out of trial and error in teaching and policy advising relationships. The book, it will be noted, is divided into five major divisions, of which the first, having to do with population, provides basic information about the density, distribution and biological characteristics of the people of America and of the world. The second division is taken up with trends in the utilization of resources. It brings together information about how people spend their time in production and about the volume and efficiency of output, the level of consumption, the degrees of depletion of potential resources, and the intensity of inventiveness in relation to the exploitation of natural advantages. The plan is to describe each trend, first in terms of such technical measures as "man hours," or "per capita physical units," and then in monetary terms, such as "dollar value of output" or "dollars received." Summaries are made of the fluctuation of price levels and of general economic activity.

The third part deals with the distribution of values among various groups in society. The main breakdown is according to deference, income and safety. Deference is the general term for the distinctive values of power, respect, knowledge. The fourth division of the "Trend Book" summarizes information about changing methods of getting social results. Here the lines of division are according to the main instruments by which the human environment can be modified. To some extent results are obtainable by the manipulation of symbols, as when counsel argues before the court, which reach the public through news releases and interpretative comment. Besides the manipulation of symbols, results can be achieved by the skillful handling of goods and services. In this connection we keep track of boycotts, barter and other arrangements for using economic means for policy ends. Violence, of course, stands out as a method of overwhelming

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98. See Appendix to this Article.

importance today. By diplomacy we mean the use of official offer and counter-offer, agreement and non-agreement, as a means of getting results. In this connection we review the practices of mediation, arbitration, conciliation, adjudication, legislation and similar procedures, whose relative significance fluctuates from time to time and place to place. In connection with the treatment of each of these methods it is convenient to give attention to the structural characteristics of the specialized agencies most concerned with them. Here is where details will be found about the structure and operating procedures of courts.

The fifth and last division gathers together trends relating to the value position and methods of groups whose members are rarely if ever gathered in an all-inclusive organization. In the fifth division such topics are considered as the changing place of class, skill, personality and attitude groups. Much of the pertinent information can be cited by cross-references made to the preceding parts of the "Trend Book." However, there are or can be summaries of the change in the total situation of various components of society, and these will be assembled in the fifth division.

In general, our view is that the material brought together for the use of law students ought to provide them with a concise, inclusive, reliable answer to such fundamental questions as these: How are population characteristics changing? What are the trends in the use of basic resources? What trends are exhibiting themselves in the distribution of each significant value in society? What are the changes in the degree to which different methods of influence are relied upon? What are the trends affecting the value, position and methods of each of the important groups of which society is composed?<sup>99</sup>

Valuable as the trend data are for the education of lawyers and policy-makers, they by no means exhaust the helpful material. The student needs a guide to the best sources of information and analysis about the major fields of national policy. At the present time there is a growing agreement on the convenience of dividing total policy into the fields

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99. In the outline we have referred under each main topic to one or two sample charts or tables. These are intended to give a greater sense of reality about each of the sub-categories and to underline the advantages that come from making our knowledge of social trends available in the compact or graphical forms that have been carried to such a high state of perfection in recent times. This is the "age of visualization." There is no more effective method of conveying relative magnitudes than by means of charts, graphs and maps.

One result of preparing a "Trend Book" is to disclose gaps in knowledge of significant relations. Our world is still poorly informed about itself, and a continuing inventory of basic trends will reveal the spots where investigation is needed. The questions raised by alert law students will, in many instances, lead to the making of special requests to the census bureau and to other fact-gathering agencies.



of strategy, diplomacy, economy and ideology. In the reconstruction of the law school curriculum according to influence, value and skill principles, special emphasis upon value patterns must necessarily lead to familiarizing the student with the considerations involved in total policy.<sup>100</sup>

In order to give a more unified view of policy, it is advisable for the student—at some point in his training—to concentrate upon well-rounded assessment of national policy from the ideological, diplomatic, economic and strategical standpoints. For this purpose it may be wise to arrange for a series of seminars, available to students in their last year, on each of the four fronts of policy. This idea may be made somewhat more definite by sketching the possible scope of such seminars.

*Seminar on Ideology.* One function of this seminar will be to give special consideration to the state of democratic ideology in relation to challenging ideologies at home and abroad. Part of the work will be to consider the syntactical structure of major ideological systems, a procedure that has already been discussed in connection with goal thinking. At the same time, however, it will be necessary to describe the actual facts about the ideological state of the world and of the chief trends that have been manifesting themselves in it, together with the possible lines of future development. The well-qualified student will want to have first-hand acquaintance with the most authoritative expositions of major ideologies, prepared by scholars or by persons whose power position in the world entitles what they say to particular consideration.<sup>101</sup> Within recent years there have been important advances in the scientific methods of studying ideological systems.<sup>102</sup> In particular there has been avid study of the effect

100. Policy thinking, as remarked above, is more manipulative than contemplative; it is pointed toward possible action in the emerging future. For a masterly exposition see MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* (1940) Pt. 4; see also LYND, *KNOWLEDGE FOR WHAT? THE PLACE OF SOCIAL SCIENCE IN AMERICAN CULTURE* (1939).

A general science of "order" can be developed along the lines proposed by Cairns; it would call for the "laws" of order and the "principles" of preserving order. Our present concern is with part of the proposed field; we want to develop the laws, principles, and practices of "democratic order." Another way to formulate our standpoint is to say that we are concerned with a special field within the general science of values. The general science may be christened "general political science" if desired; then the name of the special science becomes "the science of democracy" (distinct, for example, from the science of despotism or anarchy).

101. Besides the pro-democratic statements referred to above, the student will want to familiarize himself with the positions taken by Stalin, Hitler, Mussolini—and equivalents—together with their intellectual progenitors, expositors, and amplifiers.

102. Notably PARETO, *THE MIND AND SOCIETY* (tr. 1935); MANNHEIM, *IDEOLOGY AND UTOPIA* (tr. 1936). On the backgrounds of modern thought consult CARLYLE, *POLITICAL LIBERTY, A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES* (1941); CURTIS, *CIVITAS DEI* (1934-37); McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932).

of organized propagandas upon the spread and restriction of rival systems.<sup>103</sup>

*Seminar on Diplomacy.* The function of diplomacy is to protect and expand values by means of negotiation. In recent times the term "diplomacy" has been limited for the most part to the conduct of external relations of states; but there is also internal diplomacy, the process by which the individuals and group spokesmen of society come to terms with one another by various forms of negotiation.

Successful diplomacy is possible only where there is awareness of the changing power position of persons and groups at home and abroad. Hence the seminar on diplomacy must examine trends in the power of modern states and of the significant groups within them.<sup>104</sup> By examining historical instances of diplomatic negotiation, it is possible to evaluate the degree to which the technique of negotiation can itself become a significant factor in achieving the policies appropriate to democratic goals.<sup>105</sup> To some extent books are available to interpret recent and prospective lines of world development.<sup>106</sup> Indispensable data about the internal structure of American and of other societies have been assembled by many scholars.<sup>107</sup> Specialists have concentrated upon specific factors or groups of factors that interplay in the total power process.<sup>108</sup>

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103. Examine for instance, ASHTON, *THE FASCIST, HIS STATE AND HIS MIND* (1937); BORKENAU, *WORLD COMMUNISM* (1939); HEIDEN, *HISTORY OF NATIONAL SOCIALISM* (1935); LASSWELL AND BLUMENSTOCK, *WORLD REVOLUTIONARY PROPAGANDA* (1939); ROSENBERG, *HISTORY OF BOLSHEVISM* (1934). General guides to the literature of propaganda are FARAGO AND GITTLER, *GERMAN PSYCHOLOGICAL WARFARE* (1941) (annotated bibliography); LASSWELL, CASEY AND SMITH, *PROPAGANDA AND PROMOTIONAL ACTIVITIES, AN ANNOTATED BIBLIOGRAPHY* (1935).

104. For the diplomatic picture see BEMIS, *DIPLOMATIC HISTORY OF THE UNITED STATES* (1936); LANGER, *EUROPEAN ALLIANCES AND ALIGNMENTS, 1871-1890* (1931) and *DIPLOMACY OF IMPERIALISM, 1890-1902* (1935); STEIGER, *A HISTORY OF THE FAR EAST* (1936). On transformations in the social structure of the great powers, consult FORD (ed.), *DICTATORSHIP IN THE MODERN WORLD* (1939); MICHELS, *UMSCHICHTUNGEN IN DEN HERRSCHENDEN KLASSEN NACH DEM KRIEGE* (1934); NEUMANN, *PERMANENT REVOLUTION* (1942).

105. See such detailed studies as FAY, *ORIGINS OF THE WORLD WAR* (2d ed. 1930); SCHMITT, *THE COMING OF THE WAR* (1930).

106. See BURNHAM, *MANAGERIAL REVOLUTION* (1941); LEDERER, *STATE OF THE MASSES* (1940); NOMAD, *REBELS AND RENEGADES* (1932).

107. On Germany see NEUMANN, *BEHEMOTH, THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM* (1942); on France, FERRE, *LES CLASSES SOCIALES DANS LA FRANCE COTEMPORAINE* (1934); on England, CARR-SAUNDERS AND JONES, *SURVEY OF THE SOCIAL STRUCTURE OF ENGLAND AND WALES* (1927); on China, WITTVOGEL, *NEW LIGHT ON CHINESE SOCIETY* (1938); on Japan, LEDERER AND LEDERER-SEIDLER, *JAPAN IN TRANSITION* (1938); in general, WEBER, *WIRTSCHAFT U. GESELLSCHAFT* (1924) 122, 603.

108. On geographical factors, for example, see WHITTLESEY, *THE EARTH AND THE STATE* (1939); also an appraisal of Geopolitik by WHITTLESEY, COLBY AND HARTSHORNE, *GERMAN STRATEGY OF WORLD CONQUEST* (1942).

*Seminar on Economy.* The task of this seminar is to evaluate the possible contribution to total politics of the skillful handling of goods and prices. Basic data, of course, will concern trends of economic development in America and throughout the world.<sup>109</sup> At the same time it will be necessary to become familiar with the systems of economic thought that are exerting significant influence on the assumptions and actions of influential groups throughout the world.<sup>110</sup>

*Seminar on Strategy.* Strategy is concerned with the use of armies, navies, air force and police as instruments for the attainment of selected policy goals. The purpose of the seminar is not to turn out future generals or admirals but to prepare policy-moulders for realistic evaluation of the testimony of whatever experts must be relied upon in the calculation of when, and how most effectively to use violence in defending and advancing the basic aims of policy. Such a seminar will concern itself with trends of fighting potential, with changes in the doctrine of war, with innovations in the organization of the armed forces as well as the technology of fighting.<sup>111</sup>

In connection with the work of each seminar it will be expedient to provide for the continuous criticism of current writing and speaking on the subject of America's policy. In this way the student will become more intimately acquainted with "who's who" in the private and public dis-

Since we have used the term diplomacy to include all processes of agreement, the inner front of diplomacy includes the structures and procedures by which offers are made and accepted. In point, therefore, are studies of the courts in action, like CLARK AND SHULMAN, *A STUDY OF LAW ADMINISTRATION IN CONNECTICUT* (1937); also, investigations of mediation, conciliation, arbitration, collective bargaining, and administrative determination. See, for example, MILLIS, *HOW COLLECTIVE BARGAINING WORKS* (1942).

109. See BEARD, *A HISTORY OF THE BUSINESS MAN* (1938); BRUCK, *SOCIAL AND ECONOMIC HISTORY OF GERMANY* (1938); DAY, *ECONOMIC DEVELOPMENT IN EUROPE* (1942); EMENY, *STRATEGY OF RAW MATERIALS* (1934); GILFILLAN, *SOCIOLOGY OF INVENTION* (1935); GRAS, *HISTORY OF AGRICULTURE IN EUROPE AND AMERICA* (2d ed. 1940); HAYNES, *THIS CHEMICAL AGE* (1942); LIEFMANN, *CARTELS, CONCERNS, AND TRUSTS* (1932); NAT. RESOURCES COMMITTEE, *TECHNOLOGICAL TRENDS AND NATIONAL POLICY* (1937); PIGOU, *THE POLITICAL ECONOMY OF WAR* (rev. ed. 1940); SWEETZ, *STRUCTURE OF NAZI ECONOMY* (1941); VON WALTERSHAUSEN, *DIE ENSTEHUNG DER WELTWIRTSCHAFT* (1931). See also HANSEN, *FISCAL POLICY AND BUSINESS CYCLES* (1941); KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936).

110. Consult BUCK, *THE POLITICS OF MERCANTILISM* (1942); DICKINSON, *ECONOMICS OF SOCIALISM* (1939); SWEETZ, *THE THEORY OF CAPITALIST DEVELOPMENT* (1942).

111. See BRODIE, *SEA POWER IN THE MACHINE AGE* (1941); MITCHELL, *OUTLINES OF THE WORLD'S MILITARY HISTORY* (1931); ROWAN, *TERROR IN OUR TIME* (1941); SLOUTZKI, *THE WORLD ARMAMENT RACE, 1919-1939* (1941); SPAULDING, NICKERSON AND WRIGHT, *WARFARE* (1925); SPYKMAN, *AMERICA'S STRATEGY IN WORLD POLITICS* (1942); VAGTS, *HISTORY OF MILITARISM* (1937); WERNER, *BATTLE FOR THE WORLD* (1941).

cussions in the course of which policy-makers arrive at the proposals they endorse.<sup>112</sup>

It is evident that the frame of reference of the policy seminars is primarily manipulative, in the sense that the minds of all participants are pointed toward the deliberate pursuit of goals that are persistently being clarified. As indicated before, the chief advantage of shifting the focus of attention from classroom preoccupation with legal technicality is that students can gain by shifting their frame of reference back and forth from details to context and from one mode of thought to another—and supplementary—one. With a knowledge of legal technicality well advanced, it will be possible for the student toward the end of his career in the law school to canvass the larger outlines of the situation in which he must presently find a more active and responsible place.

Whether the student is confronted by data purporting to deal with goal or trend, he is continually faced with the task of evaluating every statement in the light of its probable relationship to reality. Insight into the structure of reality is a never-ending process and every detail of the educational experience of the student can be justified only insofar as it contributes to this all-encompassing need. Yet there are certain forms of special experience that enhance the capacity of anyone to evaluate the truth-value of what is told him. Throughout his professional life the law student will deal with a continuing stream of experts on nearly any conceivable topic. As a policy-maker, he will be particularly concerned with what the specialists have to say about the processes of society and about the formation of human personality. Policy considerations, as we cannot too often reiterate, are "human" considerations the moment we put at the apex of our value hierarchy the celebration and realization of the dignity of the individual.

To some extent it will be possible to furnish law students with guides to the procedures by which qualified specialists obtain their data, together with the conceptual and technical processes by which they rearrange their observations. One part of the Skill Book may, for instance, include handy descriptions of the techniques used in collecting social data. Sometimes a procedure calls for prolonged contact between the observer and the individual or the situation under survey. The scholar who writes the professional or private life of Blackstone, or makes a study of

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112. The field of total policy can be considered as a whole, not only in reference to ideology, diplomacy, economy and strategy. The larger structures involved in all of these processes can be examined. This is the place at which the general laws and principles of governmental organization are relevant (the analysis of legislation, the executive, administration, adjudication and control). In recent times the strategy and tactics of administration have received special attention; see, for example, METCALF AND URWICK, (eds.), *DYNAMIC ADMINISTRATION* (1942); ROETHLISBERGER, *MANAGEMENT AND MORALE* (1941).

some living personality with whom he is in prolonged contact, stands at one end of a series of data-gatherers; at the other end are interviewers who ask a brief list of questions of persons whom they have never met before and never expect to see again. Obviously the biographers are making use of far more intensive procedures than the poll-taker. Differentiations in intensiveness, however, do not turn exclusively upon the length of time that the observer devotes his attention to any one individual or situation. Intensiveness is a function of the complexity or simplicity of the method utilized in recording and processing data. The writer who is equipped to examine personality from the standpoint of modern psychology, psychiatry and sociology is making use of a much more complex method for deciding what details are data than the man who operates within a framework of "common sense."<sup>113</sup> The contact of the poll-taker with an individual subject is very brief, yet it may be part of a division of labor in which elaborate mechanical and statistical considerations have been involved in constructing a satisfactory sample of the population; and the individual interview results may be processed in connection with hundreds or even thousands of other interviews taken concurrently or during several preceding years.<sup>114</sup>

It is not only convenient to distinguish observational standpoints according to their degree of intensiveness-extensiveness, but we need to take account of the degree to which the scientific observer modifies the situation that he undertakes to describe. What happened to Blackstone during his lifetime cannot be changed by anybody who writes about him in the twentieth century; but the picture gained of a living figure by a man who sees him every day may be modified by the characteristics of the two personalities. We may call the observers who have no direct contact with the persons or situations that they describe *collectors*,<sup>115</sup> distinguishing them from all who are in direct contact with the phenomena they investigate. Even those who are in direct contact do not necessarily exert the slightest degree of influence over the phenomena; a *spectator*<sup>116</sup> who is buried in the grandstand does not modify the spectacle if he behaves like everyone else. *Interviewers*,<sup>117</sup> on the other hand, make people conscious

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113. A book like ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1931), is especially full of insight into deeper personality structure.

114. See GALLUP AND RAE, *THE PULSE OF DEMOCRACY* (1940); ROBINSON, *STRAW VOTES* (1932).

115. Observational standpoints are summarized with reference to political science in Lasswell, *The Developing Science of Democracy* in *THE FUTURE OF GOVERNMENT IN THE UNITED STATES* (White ed. 1942) c. 2.

116. Child behavior is often studied by observers who are not seen by the children. Some technical procedures developed in these researches are summarized in Arrington, *Time-Sampling Studies of Child Behavior* (1939) 51 *PSYCHOLOGICAL MONOGRAPHS*, No. 2.

117. See BINGHAM AND MOORE, *HOW TO INTERVIEW* (2d ed. 1931); ROETHLISBERGER, DICKSON AND WRIGHT, *MANAGEMENT AND THE WORKER* (1939) c. 13. See also MORENO.

that they are being studied, although false inferences may be made about particular purposes. *Participant-observers*<sup>118</sup> are those who give no clue that they are studying anybody for any purpose whatsoever, although they are bound to influence to some extent the persons with whom they live.

### *Skills in Management*

We will now consider some of the more active skills of dealing with people, whether individually or as members of groups, that the lawyer needs. There are limits on what the law school can provide in this direction, and most of what can be done must be outside the classroom. To some extent it is useful to acquaint the student with methods of observing people, since it is impossible to improve proficiency in understanding others without picking up pointers about the self. One function of the body of materials we have called the Skill Book can be to impart some of the observational skills that directly affect managerial efficiency.

Consider random movements. Everyone is sensitive to blushing, perspiring, fidgeting, and doodling, usually without insight. We act on the vague inference that the other person is trustworthy, shifty, poised or flustered. Are these "hunches" valid? And can we learn to see even more in random movements than the ordinary man in the street sees in them?

When one stops to think about it, the truth comes forcibly home that much of our success and failure in life depends on "reading human nature," on making correct inferences about the character and even the ability of others on the basis of what we see in ordinary life situations. There is the task of "sizing up" a witness and settling on a line of examination that will improve, or break down, the impression that he is trustworthy. In selecting law clerks, partners and clients, we often have many sources of information to supplement our unaided guesses. Nevertheless we learn to depend on our judgment, and our success and usefulness is at stake on our "disciplined intuition." If we judge incorrectly, we may select, and unknowingly instigate, a partner who commits suicide at a critical time in our affairs. On the basis of a "hunch," we may defy the appraisals of others, and entrust a law clerk with great responsibilities; possibly the

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WHO SHALL SURVIVE? A NEW APPROACH TO THE PROBLEM OF HUMAN INTERRELATIONS (1934); THOMAS AND ZNANIECKI, THE POLISH PEASANT IN EUROPE AND AMERICA (1927); WEBB AND WEBB, METHODS OF SOCIAL STUDY (1932).

118. See LINDEMAN, SOCIAL DISCOVERY (1924); MADGE AND HARRISON (eds.), BRITAIN BY MASS OBSERVATION (1939); Kluckhohn, *The Participant Observer Technique in Small Communities* (1940) 46 AM. J. SOC. 331; Mead, *More Comprehensive Field Methods* (1933) 35 AM. ANTHROP. 1. On various methods of self-observation consult ALLPORT, THE USE OF PERSONAL DOCUMENTS IN PSYCHOLOGICAL SCIENCE (1942); HORNEY, SELF-ANALYSIS (1942); LASSWELL, A NEW TECHNIQUE OF THINKING (1930) c. 3.

outcome will vindicate us. There is the question of how far to trust newspaper correspondents with "inside stories"; a mutually helpful relationship with columnists and commentators may spell the difference between public support of one's side and public hostility. No experienced person banks too much on his "knowledge of human nature," especially when he has had wide enough experience to find out how complex it often is. Even those whom we know "like a brother" may turn out to be serious misfits; a promising and charming young person may suddenly disintegrate into a compulsive thief. The trusted clerk proves to be a falsifier of accounts; the conscientious partner has a "nervous breakdown," or becomes suspicious, embittered, uncooperative.

What can be done to improve our "judgment of men?" There is no royal road, no X-ray eye, no teachable hocus-pocus that gives infallible results. Two things, however, can be done. The student can be made explicitly aware of what he sees, and the inferences that he draws; and he can learn to interpret the possible significance of what specialists are able to report. Law students do not have time to become experimental psychologists, or mental and aptitude test experts, or clinically competent interviewers.<sup>119</sup> But they can learn how to apply some of the products of scientific research to the daily process of judging men. Actual experience in recording the random movements of others is excellent self-discipline. If we meet a new person and talk to him for a while, we may decide that he is "untrustworthy." Very well; we may practice noting (in an unobtrusive way) some of his specific acts. Where does he focus his gaze? Does he look the other person in the eye, or does his gaze wander up and down and around the room? There is popular prejudice against the "shifty eyed," and physicians have found shiftiness a useful clue, taken along with others, of neurotic instability. We must keep in mind the "over-compensatory" reaction of keeping the eyes riveted on the other person; this is often found in slick, bold imposter types. What is significant in behavior is deviation, which may be toward exaggerating a tendency, or toward extreme adjustment in the opposite direction.

Random movements may make "physiological sense," even though at first glance they lack rhyme or reason. Certain levels of fear are often manifested by an inhibiting effect on some secretions. There is the famous "dry mouth" of stage-fright, connected with reduced salivation, a symptom upon which the Chinese have traditionally depended in detecting false testimony. After all, there is a physiological basis for testing truthfulness according to capacity to chew a mouthful of rice husks.<sup>120</sup> Persons may also indicate anxiety by fingering or picking the nose; the inner lining often gets dry and irritated under stress. Feelings of helplessness can be betrayed by what appears to be excessive activity of the tear ducts. Some

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119. For guidance to the literature consult ALLPORT, *PERSONALITY* (1937); MURPHY, AND NEWCOMB, *EXPERIMENTAL SOCIAL PSYCHOLOGY* (1937).

120. See LARSON, *LYING AND ITS DETECTION* (1932).

movements can be better understood in the light of the clinical caricature of the tendency that finds only limited expression under ordinary conditions. The uptilting of the chin, with its hint of condescension, is present in many haughty "paranoid" types.<sup>121</sup> A quick, stereotyped smile may be understood in relation to extreme cases in which excessive fear of being assaulted by others leads to the propitiatory peace-offering of a quick, ingratiating smile.

Lawyers and other members of learned professions often overestimate the creative ability of compulsive and obsessive people.<sup>122</sup> The trained intellectual may have obsessive strains in his own personality; in any case, seeming sincerity, gravity, orderliness and industry make a favorable impression, where all these qualities are of obvious value. However, when these characteristics are not blended with detachment, revealed in a touch of humor, there is danger that the person in question is too rigid, unadaptable, and lacking in improvisation to mature into an individual who can face new and important responsibility. Often we get disappointing results from conscientious people when we promote them into better jobs; they need definite instructions and a set system, and when they have many alternatives to choose among, the strain is more than they can bear. Suddenly the dependable assistant becomes inefficient, irritable with himself and everyone else, and wholly incapable of smooth adaptation. From the "clinical caricature" of types who have "nervous breakdowns," we can learn much about the structure of such characters, noting in particular how greatly they depend on routine operations to hold in check their hostile, destructive impulses. From this group of rigid characters are often recruited stern, self-righteous types who have no insight whatever into the deep, veiled gratifications that they receive from the discomfiture of others. Here are the judges who gain secret joy from cruelty; in this category, too, we find petty clerks and officials who annoy, where they do not more seriously damage, those who depend upon their application of a rule.<sup>123</sup>

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121. For a view of current psychiatric conceptions see BROWN AND MENNINGER, *THE PSYCHODYNAMICS OF ABNORMAL BEHAVIOR* (1940); MASLOW AND MITTELMANN, *PRINCIPLES OF ABNORMAL PSYCHOLOGY* (1941); SULLIVAN, *loc. cit. supra* note 43.

122. The distinction between obsessive and hysteric types is succinctly given in MAYO, *HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933) 107, based on the work of Pierre Janet.

123. In addition to random movements, the flow of words may provide helpful clues to the mood of the person with whom one has to deal. It is convenient to classify statements according to reference. "Self" references allude to the statement-maker; "other" references to other persons. Plus references put the referent of the statement in a favorable light ("I am a great man"); minus references do the opposite ("I am a flop"). Furthermore, the standard may be specified; plus or minus may be in terms of "strength-weakness" or "morality-immorality", for example. See Lasswell, *A Provisional Classification of Symbol Data* (1938) 1 *PSYCHIATRY: J. OF BIO. AND PATH. OF INTERPERSONAL RELATIONS* 197.



For lack of basic information about human personality, many lawyers have become fruitlessly entangled with ill and even dangerous persons. To choose a notorious example, there is a type well known to psychiatrists called a "litigious paranoid," who is continually starting lawsuits, owing to an exaggerated tendency to feel discriminated against, coupled with the ability to tell a plausible story. Unhappily, such individuals do not impress the untutored as ill, and they may go on for years fomenting trouble. Some other paranoid types are more destructive. They are homicidally inclined; yet often they arouse no suspicion in the layman's mind. But the lawyer can be given enough familiarity with the picture to keep his guard up.

By closely observing the interplay among those who participate in courts, committees and other recurrent situations, we may discover many valuable facts. Some judges are intimidated by vigorous, bold, outspoken personalities who challenge opposing counsel constantly and go as far as possible in challenging the court itself. Usually, of course, judges are amenable to more flattering modes of allusion, if not to opposing counsel, at least to the bench. In watching witnesses it is often possible to learn to forecast accurately the "breaking point" of the liars and even to distinguish it from the often clumsy fumbling of an honest man with poor poise. The observer of court proceedings can actually make a record of the frequency with which given participants refer to themselves and others in various ways, and provide not only self-training in the study of behavior but contribute to a body of records valuable for deeper understanding of what happens in litigation.<sup>124</sup>

What is seen and heard can be fitted into the perspective of social structure as well as personality type. By accent and manner the upper, middle and lower class person—in terms of "respect" position—may be discerned. The "upper class" manner may be found to include an air of gracious detachment that is difficult for the middle or lower class individual to acquire. The clue to a genuinely aristocratic attitude, as has often been pointed out, is that the aristocrat has no compulsion to allow himself to be

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124. Administrators who came in direct contact with clients were directly observed by Lasswell and Almond, *Twisting Relief Rules* (1935) 13 PERSONNEL J. 338. The officials were supposed to apply a definite body of rules, but showed great differences in practice, some discriminating in favor of the client, and some against him. By careful study, it is possible to distinguish between patterns common to a culture and those pertaining to a personality. See EFRON, *GESTURE AND ENVIRONMENT* (1941), a tentative study of some of the spatio-temporal and "linguistic" aspects of the gestural behavior of Eastern Jews and Southern Italians in New York City, living under different environmental conditions. Correlations between physical type and other characteristics are reported in SHELDON, *THE VARIETIES OF HUMAN PHYSIQUE* (1940) and *THE VARIETIES OF TEMPERAMENT* (1942). See also MURRAY (ed.), *EXPLORATIONS IN PERSONALITY* (1938), and HORST, *THE PREDICTION OF PERSONAL ADJUSTMENT* (1942). The scientific approach to the entire legal process was advocated and exemplified in the pioneer book of ROBINSON, *LAW AND THE LAWYERS* (1935).

measured in terms of proficiency in any particular skill.<sup>125</sup> He aristocratically demands respect, not on the basis of sacrificially-gained attainments, but solely for "being"; he expects to be deferred to just because he exists, not because he is "good for something." Part of the code is to maintain an air of imperviousness to the trials and tribulations of the moment; the ego must appear to remain unruffled and uncontaminated by momentary acts of fate. Even enemies may be treated with ceremoniousness. All this, where it is found, contrasts with the sharp "self" and "other" evaluations that are so often on the tongue of the middle class person, and especially of the more rivalrous "climbers." It may be found that in negotiation, as well as before some of the higher courts, the near-aristocratic benignity may be a more powerful instrument than the "huffing and puffing" of the "over-zealous," or at least over-transparent, middle class derivative. When tribunals are made up of middle class personnel, however, certain accents and demeanors may be resented, especially if the person in question is suspected of being "really" middle class. One of the major points to watch is which participants assume lower class submissiveness, and which ones react against an inner tendency to submit. "Class points" and "personality points" are continually becoming entangled with one another, sometimes limiting and sometimes reinforcing each other. Middle class rivalrousness leads to a high frequency level of aspersive remarks; but from this level may appear conspicuous deviates in the direction of extreme "objectivity," "sweetness and light," or "super-cynicism." The focalizing of stress within our civilization at the middle layers leads to great variety in the forms of solution found by middle class youth.<sup>126</sup>

In the name of better training for students in these matters it may be possible for law professors to learn more and more of these facts of life and to diminish their own danger to students. All of us have seen promising students fail drastically at some point in their professional training; often they were gifted intellectually, but suffered from some distortion of personality that might have been rectified had their needs been identified in time and assistance tactfully given by professors who were interested in them. Industrial plants often assume some measure of responsibility in providing modern medical and psychiatric facilities for the executive staff and the working force. Up to the present, however, many professors in our professional schools apparently feel themselves free to damage human personalities at will through unnecessary ignorance and arrogant self-dramatization.<sup>127</sup>

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125. Compare Hobhouse, *Aristocracy* in 2 ENCYC. SOC. SCIENCES (1930) 183.

126. See especially Warner and Dollard, *loc. cit. supra* note 42. On one of the neglected layers of the middle class, Spier, *The Salaried Employee in Modern Society* (1934) 1 SOCIAL RESEARCH 111. For historical perspective, PALM, *THE MIDDLE CLASS THEN AND NOW* (1936).

127. A sketch of modern medical and psychiatric services in various institutions is in the ENCYC. SOC. SCIENCES under such titles as *Psychiatry, Industrial Hygiene, Medicine*.

Many of the problems of management involve large groups of people rather than specific individuals and hence are problems of public relations. This is the field which was called ideological policy in the four-fold analysis of policy above. Other synonyms or closely related characterizations are information or propaganda policy. In any case, the problem is to modify response by controlling the symbols that come to the focus of general attention. In operations that concern far-flung governmental, business and other private activities, the time has long since passed when public relations policies are run entirely by hunch. The modern moulding of the human environment proceeds on a factual basis, quite as much as economic, military or diplomatic policy.<sup>128</sup> Many procedures have been developed for describing the distribution of attitudes on which the future survival of various enterprises depends, and these several procedures may be relied upon to furnish a factual basis for estimating trends and evaluating future probabilities on the basis of scientific knowledge of causal interrelationships. In the field of military policy it has long been a commonplace that command depends upon adequate intelligence; that is to say, information about the disposition of enemy forces, the germinating plans of the enemy, and the ways that the enemy would probably respond to various counter-measures. The providing of similar facts is what is involved in establishing a solid intelligence basis for public relations policy.

A quick over-all view of significant responses may often be gained by the use of existing methods of polling opinion. By means of a sample that reflects the structure of a large population in correct proportion, it is possible to obtain a reliable picture of what great numbers of people think by interviewing a small fraction of the persons concerned. The results of such polling operations are most easy to interpret when the issue before the public is one in which there is very active public interest and with respect to which a few leading alternatives of action are universally known. Scientific polling operations conducted in the midst of election campaigns can provide trend data on the basis of which a high batting average can be scored in forecasting elections. In an election there is public interest, and alternatives are few; the electorate can vote for or against the party in power. But we cannot be so sure about the relevance of polling results when public interest is at a low ebb and when a very limited number of alternatives have not been crystallized. When people are questioned about the structure of a post-war world long before the nature of the leading alternatives is clear, very little can be said about how people will actually respond in future situations. Under such conditions

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128. On propaganda and allied activities of various groups see CULP, *THE AMERICAN LEGION* (1942); McCAMY, *GOVERNMENT PUBLICITY* (1939); MCKEAN, *PRESSURES ON THE LEGISLATURE OF NEW JERSEY* (1938); SELLE, *THE ORGANIZATION AND ACTIVITIES OF THE NATIONAL EDUCATION ASSOCIATION* (1932); STRONG, *ORGANIZED ANTI-SEMITISM IN AMERICA* (1941); WALKER AND SKLAR, *BUSINESS FINDS ITS VOICE* (1938).

the brief polling interview tends to become a method of discovering which words are "plus" words and which words are "minus" words. If the word "planning," for example, is a "plus" word in the vocabulary of a given sector of the population, the word may be invoked to justify almost any of the alternatives eventually presented in the opinion-forming process.<sup>129</sup>

Deeper knowledge of the way people are disposed to respond can be obtained by the use of other methods of collecting facts. We may, for example, conduct prolonged interviews with selected persons.<sup>130</sup> In this way we may discover that people who profess interest in post-war plans will at the same time evince such active distrust of Britain or Russia that the idea of placing the control of certain basic raw materials jointly in the hands of an international agency has little appeal. On the other hand, it may happen that deep-lying skepticism is encountered about the possibility of providing jobs for all unless there is some form of world economic authority charged with the stimulation and regularization of production in different regions of the world. There may be great loyalty to certain leaders who may at some future time take serious initiatives on behalf of world planning. Skilled workers, unskilled workers, small businessmen, professional people, government and party employees, owners and top executives of big businesses may reveal at any given time a tangled pattern of inconsistent and contradictory aspirations, expectations and identifications. By means of prolonged interviewing we may get some of the facts for forecasting the "priority attitudes" that prevail among the major social divisions.

The most valuable insight into the structure of collective attitudes may be obtained not by brief or prolonged interviews of the type just described but by the comparative study of the historical background out of which contemporary attitudes have arisen. In this way it will be possible to rediscover many past experiences that have dropped out of the minds of most of the members of the contemporary generation but which would take on a new birth of vitality under certain future conditions. By examining the statements and counter-statements made in public and private circles during the struggle of the United States over the ratification of the League of Nations, we may arrive at a more realistic sense of the priority of different factors that may affect adjustment to the post-war environment. Such fact-gathering operations can be disciplined not only by the knowledge of historians but by the scientific findings of social scientists and psychologists.<sup>131</sup> In the light of the relationships thus explored and

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129. See Gosnell and de Grazia, *A Critique of Polling Methods* (1942) 6 PUB. OPINION Q. 378.

130. On the use of longer interviews to evaluate attitudes see CANTRIL, *THE INVASION FROM MARS* (1940); LAZARSFELD, *RADIO AND THE PRINTED PAGE* (1940).

131. The convergence of personality and cultural standpoints is creating "social psychology." See BROWN, *PSYCHOLOGY AND THE SOCIAL ORDER* (1936); HORNEY, *THE*

revealed, it would be possible to devise experimental methods both for probing the structure of current attitudes and pre-testing the pragmatic effect of alternative lines of propaganda.

In studying predisposition and response it is important to describe what appears in the media of communication that reaches the focus of attention of different groups and thus operates causally in moulding response. The procedures by which it is possible to describe what is said in speeches, what is sent over the wires of press associations, or what is depicted in newsreels, fall within the general field of "content analysis."<sup>132</sup> Public relations policy, as we have pointed out, consists in managing the stream of communication, and if this process is to be understood it is necessary to evaluate three groups of factors: content, effect, predisposition. In studying the predispositions we must give special attention to those who exercise special control over the channels through which news and comment gets to the attention of others. In particular this calls for knowledge of the attitudes of owners, regulators and contributors to press, radio, motion picture and all other mass media. One revealing body of data locates the controllers of communication in the social structure and then shows the value position of those whom they reach through the network at their command. In view of the high concentration of governmental or private ownership control of most of the great modern networks of mass communication, it is apparent that communication flows chiefly from those who occupy high positions in the social pyramids to the rest of the community. Systematic data about the affiliations of those who own, control or contribute to the mass media are peculiarly important in evaluating the function that these media may be expected to perform in future crises.<sup>133</sup> Whether we have to do with a special Hughes or Seabury investigation, or the conduct of significant and protracted litigation, or with the hearings before Congressional committees, or with debates on the floor of legislative bodies, or proceedings before chief executives, departments and agencies, or with presentations to the executive committees and the boards of directors of private pressure groups, business, or pri-

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NEUROTIC PERSONALITY OF OUR TIME (1937); KARDINER, *THE INDIVIDUAL AND HIS SOCIETY* (1939); KLINEBERG, *SOCIAL PSYCHOLOGY* (1940); SHERIF, *PSYCHOLOGY OF SOCIAL NORMS* (1936); MILLER AND DOLLARD, *SOCIAL LEARNING AND Imitation* (1941); LINTON, *THE STUDY OF MAN* (1936).

132. CHILDS AND WITTON (eds.), *PROPAGANDA BY SHORT WAVE* (1942); WAPLES (ed.), *PRINT, RADIO, AND FILM IN A DEMOCRACY* (1942); WAPLES, BERELSON AND BRADSHAW, *WHAT READING DOES TO PEOPLE* (1940); WOODWARD, *FOREIGN NEWS IN AMERICAN MORNING NEWSPAPERS* (1930); JONES, *Quantitative Analysis of Motion Picture Content* (1942) 6 *PUB. OPINION Q.* 411; LASSWELL, *The Politically Significant Content of the Press: Coding Procedures* (1942) 19 *JOURNALISM Q.* 12.

133. Representative studies of contributors to media are ROSTEN, *THE WASHINGTON CORRESPONDENTS* (1937) and *HOLLYWOOD* (1941). An exemplary study of control is PEP, *REPORT ON THE BRITISH PRESS* (1938).

vate cultural organizations—we are engaging in processes that interact with the entire structure of value distribution and condition the fulfillment of democratic goals.<sup>134</sup>

Information about control, content and consequence of communication is necessary to the development of sound strategical and tactical policies. Although democracies and despotisms alike make use of propaganda, the line taken by democratic societies in meeting emergencies is most effective when it adheres to certain differences that distinguish it from despotism. For one thing, the control of communication is not completely subordinated to detailed dictation. Democracies that adhere to their own ideals tolerate self-criticism during crises not as a necessary concession to weakness but as a means of mobilizing their natural strength. However, there are conspicuous dangers in permitting unfavorable presentations of democratic leaders, institutions and policies unless these are promptly counterbalanced by favorable material. The basic policy of democracy is neither intolerance nor passive acquiescence in its own destruction; rather it is vigorous, positive self-defense and counter-attack.

The psychic potential of democracy is far higher than that of despotism, since people are at their best when their total energies are released in respected lines of activity. The technique of despotism is to divide and rule; the masses are divided into echelons that are ordered according to the arrogant self-interest of those in each echelon. At every tier individuals are encouraged to believe that they will gain special privileges by submitting to the echelon just above. The principal advantage consists in permission to impose one's will upon those beneath. Democracies, on the other hand, can maintain a conception of power as a shared pursuit of a common goal to which everyone contributes according to capacity. In their propaganda democracies must rule by insight and not by reiteration and imposition, although they must be alert and vigorous in the reaffirmation of their basic principles and in preserving confidence in ultimate success. They can safely allow far more dissent on ways and means than is compatible with the structure of despotism. One tacit admission of the power of democracy is the spurious simulation of a democratic order by despotic states. This simulation shows itself in the use of democratic symbols, but it betrays itself by mystical and ambiguous, hence fraudulent, application. While despotisms offer verbal deference to the masses, they do so on the express understanding that the masses shall not be trusted to have a voice in the selection of leaders or in the determination of policy. In short, the

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134. On general theory see BARTLETT, *POLITICAL PROPAGANDA* (1940); BLAU, *PROPAGANDA ALS WAFFE* (1937); CHAKOTIN, *THE RAPE OF THE MASSES* (1940); CHILDS AND WITTON (eds.) *loc. cit. supra* note 132; DOOB, *PROPAGANDA* (1935); MERRIAM, *THE MAKING OF CITIZENS* (1931); PINTSCHOVUS, *DIE SEELISCHE WIDERSTANDSKRAFT IM MODERNEN KRIEG* (1936); TAYLOR, *STRATEGY OF TERROR* (1940). See also BRADWAY, *THE BAR AND PUBLIC RELATIONS* (1934).

masses are to be flattered without being trusted. It is of vital importance for those who participate in the making of democratic policy to make full use of the enormous potentialities of the fundamental ideological doctrine of a free society, which is deference for the dignity and worth of the individual.

#### BEYOND THE CLASSROOM

In the foregoing discussion we have taken it for granted that the classroom will remain the most conspicuous pedagogical device in the environment of the students of the future law school. Hence it will be incumbent upon the professors to make of the classroom a more powerful instrument for transmitting not only the skills in legal technicality that constitute the indispensable core of the lawyer's professional equipment but the additional skills that promise to mould the policy-makers capable of fulfilling the aims and realizing the opportunities of the years ahead. We have, however, recognized from time to time in these suggestions about curricular reconstruction that other parts of the law school environment can be deliberately remodelled into more effective instruments for supplementing the classroom.

Among these supplementary instruments we give special emphasis to the seminar. By the seminar we mean a comparatively small group of professors and students engaged in creative analysis and research on problems. Now there is nothing new about the seminar any more than there is about the classroom—the problem is to refill it with content appropriate to the professed objectives of our curricular reconstruction. The special advantages of the seminar are well known. In the intensive work that goes forward skills may be perfected in the organization and presentation of material. In particular the seminar lends itself to the discovery of new problems and to the patient exploration of new sources and even new skills marginal to the central apparatus of legal technicality with which the student becomes familiarized in connection with the classroom. In the law school of the future there should be ample opportunity for seminar work, since it seems very plausible to the writers, as to many reformers of law school education, that sufficient grounding in legal syntax and procedure can be gained by a full year of classroom instruction. Additional work directly looking toward the mastery of legal doctrine and procedure, as well as in the acquisition of general policy skills, can be more productively carried on in seminars.<sup>135</sup>

Without concerning ourselves too greatly with revising the seminar formula itself, we may nevertheless urge the advantages of seminars in

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135. There is merit in Hall's suggestion that legal technicality precede intensive work in the social sciences. However, the courses in legal technicality should not be relegated to the status of drill hours in syntactics devoid of semantic content. Hall, *A 2-2-2 Plan for College-Law Education* (1942) 56 HARV. L. REV. 245.

which several men of established professional competence take an active hand. Too often the seminar is exploited by a single dominating personality as an instrument for riding his special hobby. This tendency can be held in check by colleagues. The idea here is not to turn seminars into little bullpens, where men of incompatible view and temperament are supposed to conduct interminable jousts with one another. On the contrary, the idea is to create seminars among people who share not only quite general values but specific concern with the achievement of rather restricted objectives.

It is particularly advantageous if seminars can grow into productive centers of continuing research from year to year. In many ways there are advantages if the seminar becomes, even in name, an institute. In addition to the professors in the law school and in other departments of universities, such seminar-institute staffs can be recruited from research fellows who devote most of their time for a period of years to work in a special field. These fellows should be recruited from the regular teaching staff of law schools; from men who can spend a year or more away from their regular teaching duties whipping into shape some fruitful contribution to the literature of law and policy. To a certain extent, moreover, fellowships may become available to law school graduates who have but a limited interest in teaching but who have great aptitude for fundamental inquiry. Men of this type often have difficulty in making their most distinctive and useful contributions to society, since often they mature into effective classroom teachers late in life when they have the poise that comes from confident mastery of a special field. One of the purposes of the institute-seminar system can be to adapt the whole institutional structure of legal research, teaching and practice to various patterns of individual skill and aptitude. It is difficult to overemphasize the practical importance of making adequate provision for the encouragement of research along margins of the traditional field of accepted technicality. Only too often in the past brave new worlds of integrated law and social science have been proposed; but a short time afterwards it has been painfully apparent that the high aspirations of the founding fathers had come to little because of the practical difficulties of providing adequate financial and honorific inducements to enable people to "take the long chance" of cultivating marginal problems and skills.<sup>136</sup>

One principle of professional training is to project the student into situations that resemble as closely as possible the circumstances of his future career. One well-established pattern of this type can, in the re-

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136. A seminar is a convenient pivot around which can revolve the work of preparing and revising such materials as we have referred to as skill book or trend book. The collaboration of many specialists on different varieties of economic, governmental, psychological and allied forms of data is required for the successful execution of such a project.



formed law school, be turned into a more productive instrument of legal education. We refer to the moot court. It is common in some places to conduct various "autopsies" on the performance of students before these tribunals. What we propose is that the appraisal should be conducted not only in terms of legal technicality but for the purpose of revealing the total effectiveness of the participant in handling himself in the situation. By the use of modern recording devices it is feasible to record the speaker's voice and to enable the individual to achieve objectivity toward that all-important instrument. With the aid of motion picture equipment it becomes feasible to present the total demeanor of the individual to the subject himself. In connection with the law school, it is practicable to provide technical facilities of many kinds in order to enable the individual to overcome difficulties of trait and skill. Through proper testing facilities, unsuspected aptitudes may be revealed and the source of many inhibitions on effective expression may be exposed, understood and eliminated. In some cases it is wise to take advantage of special analytic procedures developed as an adjunct of modern clinical psychology. For many students intensive coaching in writing is quite as vital as in speaking.

Still another well-established institutional practice is to conduct investigations in the field. Very often it has been pointed out that the training of modern students deflects their attention from the factual contexts in which legal technicalities are made functional and that this cannot receive entirely satisfactory correction by providing more fact books. The recommendation is that opportunities be provided for direct contact with courts, administrative agencies and other parts of our social process. It is desirable that at least brief periods of field experience should occur at different times.<sup>137</sup>

So much for the possibilities of the influence, value and skill principles in reconstructing the law curriculum for systematic training for policy-making. In bringing these proposals to a close, we repeat that they are prepared from the point of view of the needs of a nation that professes deep regard for the dignity of man and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy. In our view the democratic values of our society can only be effectively fulfilled if all who have an opportunity to participate significantly in the forming of policy share certain ways of thinking, observing and managing. It has been our purpose to deal with some explicitness with those changes in the existing pattern of the law school that will increase the probability that the lawyers of the future will be

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137. Proposals for "clinical" law schools or "internships" have been increasingly prominent in recent years.

more effective instruments for the achievement of the public good than they have been in the past. We have chosen this moment, when the law schools are in a state of abeyance for the duration of the war and while crisis compels people to clarify their objectives, to outline these suggestions, not for the purpose of speculating about some unobtainable future but in the hope of guiding responsible discussion toward the choice of effective means of making the reopened law schools of the post-war world a place where people who have risked their lives can wisely risk their minds.

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#### APPENDIX

(The following citations are intended to illustrate what is meant by each main category of the social trend outline. Charts are given preference, since they are more concise than tables).

##### I. Population

###### A. Numbers

- x1. Momentum of world population growth, 1650-1930. SNYDER, *CAPITALISM THE CREATOR* (1940) 25, chart 2.
- x2. Population of the United States, 1850-1920, and estimates of population 1930-2000 A. D. BAKER, BORSODI, AND WILSON, *AGRICULTURE IN MODERN LIFE* (1939) 20, fig. 3.

###### B. Biological Traits (and Families)

- x3. Growth of population of the United States by age groups 1930-1980. ANDERSON, *TNEC REP., TAXATION, RECOVERY AND DEFENSE*, Monograph 20 (1941) 284, chart 5.
- x4. Estimated number of private families, U. S., 1920-1980. *Id.* at 287, chart 6.

###### C. Spatial distribution

See atlases.

##### II. Resource Utilization

###### A. Technical

###### 1. Degree

- x5. Employment and unemployment, 1920-1938. GILL, *WASTED MANPOWER* (1939) 21, chart 1.

###### 2. Output

- x6. Index numbers of world agricultural and industrial production, 1925-1933. Woytinsky, *Social Consequences of the Economic Depression*, in *STUDIES AND REPORTS*, Series C, No. 21, International Labor Office (1936) 21, diagram V.

###### 3. Units (for convenience combined with III, B, 1).

###### 4. Efficiency.

- x7. Travel time in days from Boston, 1790-1798. STALEY, *WORLD ECONOMY IN TRANSITION* (1939) 8, chart II.
- x8. World travel time in days from Boston, 1938. *Id.* facing p. 10, chart III.
- x9. Progress of efficiency in the consumption of fuel by large industrial consumers in the United States. LORWIN, *TNEC REP., TECHNOLOGY IN OUR ECONOMY*, Monograph 22 (1941) 104, chart VI.

## 5. Consumption and Depletion

x10. Average per capita consumption of principal agricultural products, 1920-37. MEYERS, TNEC REP., AGRICULTURE IN THE NATIONAL ECONOMY, Monograph 23 (1940) 3, table 1.

x11. Coal resources of the U. S. (showing original tonnage, amount produced, and estimated waste as of Jan., 1936). NAT. RESOURCES COMMITTEE, ENERGY RESOURCES AND NATIONAL POLICY (1939) 283, table 3.

## 6. Invention

x12. Number of British patents granted from 1449 to 1921. 2 SOROKIN, SOCIAL AND CULTURAL DYNAMICS (1941) 168, fig. 8.

## B. Monetary

## 1. Output

x13. Value of all construction, 1919-1939. STONE, TNEC REP., TOWARD MORE HOUSING, Monograph 8 (1940) 3, chart 1.

## 2. Price levels

x14. Long term movements of various price series. MACAULAY, SOME THEORETICAL PROBLEMS SUGGESTED BY MOVEMENTS OF INTEREST RATES, BOND YIELDS AND STOCK PRICES IN THE U. S. SINCE 1856 (1938) 230, chart 29.

## 3. Income and Outlay (expenditures for consumption, investment)

x15. Gross national product, capital formation, and consumers' outlay, 1919-1940. ALTMAN, TNEC REP., SAVINGS, INVESTMENTS AND NATIONAL INCOME, Monograph 37 (1941) 68, table 16.

x16. Governmental expenditures, federal, state and local, 1923-1938. ANDERSON, *op. cit. supra* x3, at 52-55, tables 20, 21, charts 3, 4.

## 4. Cost

x17. Indexes of output per man-hour, average hourly earnings and unit labor cost, United States, 1923-1939. LORWIN, *op. cit. supra* x9, at 153, chart XII.

## 5. Activity levels

x18. Percentage distribution of business cycles in various countries and various periods according to their approximate duration in years. THORP, BUSINESS ANNALS (1926) 56-59, chart IV.

## III. Values

## A. Total (Relation of an organized group to several values)

x19. Political control of the world's population and land surface by empires. CLARK, A PLACE IN THE SUN (1936) charts at 81.

## B. Deference

## 1. Power (units, activity, composition)

## a. Government

## (1) Interstate

x20. Membership of the League of Nations, 1920-1940. MIDDLEBUSH AND HILL, ELEMENTS OF INTERNATIONAL RELATIONS (1940) 204, chart II.

## (2) State

x21. Class, skill and attitude analysis of governmental and party leaders of Fascist Italy. Lasswell and Sereno, *Governmental and Party Leaders in Fascist Italy* (1937) 31 AM. POL. SCI. REV. 914, tables 1-3.

- x22. Age composition of the National Socialist Party in percentages of the total in the years 1931, 1932, and 1935, as compared with age composition of the Social Democratic party in 1931 and of the total population over eighteen years of age in 1933. Gerth, *The Nazi Party: Its Leadership and Composition* (1940) 45 *AM. J. OF SOC.* 530, table 2.
- (3) Intrastate
- x23. Number of local units of government in the United States. GROVES, *FINANCING GOVERNMENT* (1939) 636, table 42.
- x24. Distribution according to occupation of all members of thirteen lower chambers and twelve senates during 1925-1935. Hyneman, *Who Makes Our Law?* (1940) 55 *POL. SCI. Q.* 557, table 1.
- b. Private pressure associations
- x25. Table of meetings of private international organizations, 1840-1914. POTTER, *AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION* (4th ed. 1935) 48, n. 3.
- x26. List of national organizations with headquarters at Washington (modifying earlier list by Herring). BLAISDELL, *TNEC REP., ECONOMIC POWER AND POLITICAL PRESSURES*, Monograph 26 (1941) 197-201.
- c. Business
- x27. Indexes of U. S. business population, 1900-1938. Anderson, *op. cit. supra* x3, at 318, table 24 (appendix).
- x28. Intercorporate holdings of voting stock by the John D. Rockefeller and J. P. Morgan and connected interests in companies having substantial holdings in the natural gas and natural gas pipeline industries of the United States as of Jan. 1, 1939. FEDERAL TRADE COMMISSION, *TNEC REP., FEDERAL TRADE COMMISSION ON NATURAL GAS*, Monograph 36 (1940) exhibit 3, facing p. 89.
- x29. Growth in the average size of establishments in all manufacturing industries, 1914-37. THORP, *TNEC REP., STRUCTURE OF INDUSTRY*, Monograph 27 (1941) 4, table 2.
2. Respect
- x30. A measurement of the interconnectedness of the several classes in their associational relations. WARNER AND LUNT, *THE SOCIAL LIFE OF A MODERN COMMUNITY* (1941) 125, table 1.
3. Insight.
- x31. Regional variations in high school enrollment. ODUM AND MOORE, *AMERICAN REGIONALISM* (1938) 534.
- C. Income (distribution)
- x32. Shares of total individual income received by selected proportions of income recipients, 1918-37. GOLDENTHAL, *TNEC REP., CONCENTRATION AND COMPOSITION OF INDUSTRIAL INCOME, 1918-1937*, Monograph 4 (1940) 22, table 2.
- D. Safety
- x33. Percentage of casualties in four countries from the twelfth to the twentieth century. 3 SOROKIN, *op. cit. supra* x12, at 33, table 17.

## IV. Methods

## A. Symbols

x34. Volume of newspaper and periodical advertising revenue, per capita expenditures in these media, and ratio of expenditures to national income, selected years, 1865-1937. BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* (1942) 48, table I.

## B. Goods (and Services)

x35. Federal expenditures for grants-in-aid, 1910, 1918, 1928, 1936 (in thousands of dollars). BITTERMAN, *STATE AND FEDERAL GRANTS-IN-AID* (1938) 132 ff.

## C. Violence

x36. Relative indicators of war activities by century periods for nine European countries. 3 SOROKIN, *op. cit. supra* x12, at 341, table 18.

## D. Diplomacy (offer, counter-offer, acceptance, rejection by authorized group spokesmen)

x37. Work of the Permanent Court of International Justice, 1922 to June 15, 1939, showing chronologically the number of judgments, orders having the force of judgments, and advisory opinions of the Court. MIDDLEBUSH AND HILL, *op. cit. supra* x20, at 457, table VII.

## V. Groups (The value position and methods of groups that are not as a rule inclusively organized. Governments, private associations, and business organizations are, for convenience, described under II, B, 1).

## A. Class

(Cross reference here the table on "Class Analysis" in x21).

## B. Skill

(Cross reference here the table on "Skill Analysis" in x21).

## C. Personality

x38. Distribution of ideational, mixed, and sensate types among popes and kings. 1 SOROKIN, *op. cit. supra* x12, at 106, table 2.

## D. Attitude (data concerning the distribution of symbols at a given time is recorded here, and changes of distribution).

x39. Shifts in attitude patterns, May to September, 1940. Cantrill, Rugg and Williams, *America Faces the War: Shifts in Opinion* (1940) 4 *Pun. OF. Q.* 652, chart 1.