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THE THEORY OF LEGAL "SCIENCE"**

K. N. LLEWELLYN*

Mr. Cairns has read more widely in the field of social science than any man of law of whom I know. His *Law and the Social Sciences* signaled that six years back, and the reading has continued. He has, as appears in the present volume, been working intensively, as well, in the philosophy of science. He has read with acumen, and has found time somehow to ponder on this vast reading. Most definitely, he is qualified to speak on "The Theory of Legal Science." What he says, cuts deep.

The volume in hand is short but formidable. Let it be said at once that it becomes less formidable on second reading; and that it rewards both a second reading and a third. But it is no book to enliven the evening of the tired lawyer seeking relaxation. It calls for effort. It it formidable because at least on first reading it is somewhat terrifically compact; because that compactness is achieved in fair portion by recourse to a vocabulary which law-men could find good use for if they had it, but which for the most part they do not have; because although there is no heavy display of learning, the presentation rests on and connotes the distillation of rich and varied learning; because Cairns is active in the life of the law and has tested much (though not enough) of his thinking against the going grind as well as against the theories of the other-than-law books; finally, however, because the level of thought is down among the roots, where the plain man finds breathing hard, and movement harder.

In dealing with the content of the book, therefore, I shall not at all attempt to reproduce. One might, with luck, summarize the volume in half or so of the space which it itself occupies; but the result would be only a more baffling compactness. The other choice is deliberate simplification and omission, with all the risks of distortion which that entails. It is the only available choice.*

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** This is a semi-review of THE THEORY OF LEGAL SCIENCE, by Huntington Cairns, Chapel Hill, University of North Carolina Press (1941), pp. viii, 155, together with personal discussion of some of the implications of the themes of that book. The essential argument is that an admirable book has overshot the mark. I have also endeavored to suggest the pattern, in this connection, which runs through some of my own prior publications, which have been misunderstood along the exact lines which threaten for Cairns. His book neither states nor suggests an effort to deal with the whole of Jurisprudence, nor with Law in all its aspects.

* The MS was submitted to Cairns, and I have tried to correct my mis-readings accordingly. But we still lack clear contact on the matter of "order" and "orders," in a society.

To begin with, then, Cairns is interested in proclaiming, and in justifying, and in exploring and furthering, "jurisprudence" *as the pursuit of knowledge* about law and the things of law—over the long haul, and without regard to the practical legal problems of the moment; and in the main without regard to the problem of ultimate objectives for the law.

So that the first and necessary road into understanding of his purpose and his work is to get clear that when Cairns says "jurisprudence," he does not mean what most people mean by "Jurisprudence"; and therefore nothing that he says is at odds with what other people may have said about "Jurisprudence." If, for instance, someone writes that the heart of "Jurisprudence" is, say, the quest for justice, or the accurate determination of what justice is, or the art of such determination "under the law," then he is writing about a different discipline, a different subject matter, from that which Cairns is writing of. If either writer by inadvertence should suggest that the other was off the track, either would be really saying: "*He* is not dealing with what *I* am interested in." And no more.

For the truth is plain to see, that "Jurisprudence"—shall I say "sober and deep study of things legal?"—is a catch-all label to cover what in another discipline would be divided into a whole series of subdisciplines. In our nearest neighbor-field, Government, men carefully distinguish Political Philosophy, a quest for right goals of the game, from Political Science, the descriptive study of how government goes round and what forms it assumes; and Merriam rightly hammered home almost twenty years ago that Political Prudence about the art or craft of governing was quite a different line of study from either;[1] while Practical Politics has long been known as a going craft-of-life, apart from any intellectual "discipline," but giving off material for the use of any of the "disciplines." If you lump all of these as "Government," without discrimination, you can produce as fine a donnybrook of needless and cross-purposed controversy as has afflicted "Jurisprudence." You can, meanwhile, even match within Government the quarrel between Analytical and Functional Jurisprudence, when you see one group of Political Scientists wrestling with governmental forms as their major basis of comparative analysis, while men like Bentley have insisted on studying "process"—people at work within forms, and on them.[2]

What Cairns is after, then, is that *branch* of the greater field of Jurisprudence which corresponds to Political Science of the functional type: What is it, what does it do, how does it go round, how did it

[1] MERRIAM, NEW ASPECTS OF POLITICS (2d ed. 1931).
[2] BENTLEY, THE PROCESS OF GOVERNMENT (1908).

come to be, how does it work out, what does it change, what changes it, how does this body of stuff tie in with other bodies of stuff? This is not the *whole* of the proper field of study of the things of law, nor can it ever be. It is, however, a very vital part of that study, and a most neglected part. It can be effectively furthered by isolating it for specialized development; otherwise, it does not *accumulate* its material or compare its results. It is, as Cairns insists, worth while just as any other finding-out is worth while. It is worth while also because each small step in advance, in such a line of study, yields fruit in offering a sounder and surer basis for better work in the practical arts of law. But above all, it is *different* from other branches of "Jurisprudence" because its objectives are different: it seeks only to find out what and how. And it is different because its subject matter is different: it deals only with what can be observed and known and tested objectively, by the coarser tools: that is, it deals only with behavior. To this particular branch of objective study, for instance, "ideals" are such ideals as actually are held by men, and the question is: what difference does the fact make that men hold them, or that men hold this one rather than that? The discipline is thus different, in that it seeks to become a "science" in the naturalistic sense—which is an objective for the next three centuries to come; and a needed one. The discipline, if viewed as an attempted *coverage* of Jurisprudence, is patently partial, and is therefore of course in so far utterly deficient, because it leaves out such problems as: What is the right goal of all law, or of law for this particular time, or for this particular occasion? But the discipline is also legitimate and valid. For jurisprudence of *any other kind,* lacking Cairns' discipline, will also be partial, and will also be deficient if viewed as an attempted *coverage* of Jurisprudence; because only Cairns' discipline provides the hard-headed underpinning of objective knowledge about what can be done, and how; what must (by natural necessity) be done, and why; what deflections are possible, and by what means, and at what cost—and the like—with which matters all other phases of Jurisprudence must reckon at their peril of disappointment, or of unwanted by-product, or of futility.

Thus far, I go entirely with Cairns.

When it comes to exploration and tentative development of the foundations and some of the content of what he calls jurisprudence as a true (naturalistic) science (which I should call the descriptive sociology of the institution of law),[3] I find myself differing even while I agree, and differing also at times without being able to agree at all.

[3] See Hamilton, *Institution,* 8 ENC. SOC. SCI. 84 (1932). On the "institution of law," see MY PHILOSOPHY OF LAW (1941) 181; Llewellyn, *On Reading and Using the Newer Jurisprudence* (1940) 40 COL. L. REV. 581, 604-609, on the way

Let me illustrate with two examples of the former situation. First: "The notion of equilibrium reduces itself merely to another example of the dangers attendant upon the introduction of ideas or words from other sciences. If jurisprudence is to become a true science it must minimize the risk of error by studying the facts which confront it from the position of its own hypotheses."[4]

There are here three ideas. One is that the borrowing of ideas or words from a discipline devoted to different subject matter or method is dangerous. Nothing could be truer. One such danger is the skewing of data by forcing them into categories made for other purposes: mis-observing, mis-recording, mis-reading. Another is the belief that solutions are at hand, when really the problems are only opening for study. "Mechanistic" economics and "evolutionary" ethnology can serve as reminders.

The second idea in the passage is that this danger lies in unconsidered outright borrowing of an idea tailored to the context and data of a different field. Such outright borrowing is rarely safe, without careful reexamination of the suggestion which may lie in ideas or words from other disciplines, accompanied by the required re-analysis, weeding out, lopping off, reshaping, careful testing. And that is also true.

The third idea suggested is that the way to avoid these dangers is to keep eye and mind on the data at home, and to keep them there exclusively. Cairns does not mean this, and it is unfortunate that he has seemed to say it. He cannot mean it, when the words appear in a book which ranges over and draws on neighboring disciplines of every kind. He cannot mean it when in building a theory of the rise of custom which he thinks "necessary as a foundation for an adequate social theory of law" (p. 21), he wisely turns to psychology for the idea

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in which the conception organizes the various lines of jurisprudential writing, with which compare Yntema's extremely interesting critique of recent books, *Jurisprudence on Parade* (1941) 39 MICH. L. REV. 1154. I find both Timasheff and Olivakrone less valuable than Yntema does; and I am much more hesitant than he in thinking that "scientific" inquiry promises the base-lines for determining values for juristic work.

[4] CAIRNS, THE THEORY OF LEGAL SCIENCE (1940) 128, just after a discussion of Timasheff on "equilibrium." I hold no brief at all for Timasheff on "equilibrium," and none for "equilibrium" as any sort of ideal condition. I do recognize the phenomenon of relatively balanced "drives" or "forces" within any organized whole, and I recognize a striking difference in behavior when there is such relative balance and when there is not. I recognize also a striking difference, even at times of balance, according to whether the "drives" or "forces"—whether in balance or not—are high-voltage or low-voltage. Compare LLEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941) chs. IX, XII; or, for an individual case, the note on Cardozo's judging, *On Reading and Using the Newer Jurisprudence* (1940) 40 COL. L. REV. 581, 585. On the use of such words as "drive" and "force," see *infra*, pp. ...., and Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method* (1940) 49 YALE L. J. 1355, 1356 n.

and word and experimental knowledge of "learning"[5] (p. 20), or when on p. 107 he makes the (utterly inadequate) current sociological analysis of societary "relationships" basic to his own development of the relationship idea. In the latter instance, he illustrates the danger of mere unconsidered borrowing; in the former, he illustrates the value of cautious, careful inquiry into the light our neighbors *may* have—either (for this once) ready at hand, or, much more frequently, in terms of ideas which are, for us, only loosely suggestive—yet *very* suggestive. Let me mention a pair of instances in point: the modern "scientific" sociologist's concept of "situational necessity" (with the closely related concept of "convergence" from cultural anthropology) is of patent value as a suggestion when one is dealing either with the devices developed to deal with recurrent or perennial legal problems (e.g. the decision of dispute; the keeping of the peace despite a dispute; the problem of making the disposition of a dispute become a final disposition) or when one is dealing with lines of probable institutional sequence (e.g. the tendency, *given* a successful administrative organ in a successful culture, for it to bud off first a semi-court, and then an independent court). Or again, the psychologist's concept of "configuration," together with the physicist's of "field of force," and the ethnologist's of "ethos" (this last foreshadowed in what the Historical Jurisprudes were groping toward with *Volksgeist*), and the medic's concept of "constitution"—these are all suggestive (and *none* of them is directly borrowable) when one finds legal institutions "resisting" development in one direction, but "giving" or "flowing" easily in another, under the impact of some stimulus which shows no sign in itself of favoring either line of change as against the other.

Of course any man must concur that the following of fads from across the border is nonsense; and must recognize that fads, in successive correction, have been the course of growth in every science;[6]

[5] On which compare the powerful opening of Moore's paper in MY PHILOSOPHY OF LAW (1941) 201.

Cairns writes me after reading the MS that he approves of borrowing from across the border knowledge and concepts of *general* validity; but that a "science" of jurisprudence must *formulate its questions* from the angle of its own interests and problems. This clarifies the passage quoted, and is wholly sound. But I have too much doubt about *general* validity to wish to see concepts from other disciplines *built on*, rather than used as *suggestions*.

[6] The study of signs and symbols has already, in the hands of its enthusiasts, outrun its solid values, as the conditioned reflex did twenty years ago. Compare vitamins in medicine, at the moment. This means progress, in the exploration of all imaginable possibilities. It means waste, in the building of so much (in over-hope) that will prove to need junking, and in the raising of successive generations, within any discipline, with no adequate training in critical search for balance. Compare, in Jurisprudence, the discovery that our present run of rules of law do not really decide doubtful cases, most of the time. If we had not been raised in faddish over-belief in the power of even poorly engineered rules of law, there would have been no over-reaction into disillusioned discovery; and we could have had fifteen years of work on the technique of more effective rule-

and "the most recent and only up-to-date" material, across the border, has a nine out of ten chance of being an exaggerated fad whose solid kernel will become clear only ten years hence. And any man must concur, as well, that half-mystical make-shift concepts from across the border (e.g. "constitution," still, in medicine,[6a] or "ethos" in ethnology) are doubly to be distrusted. I refer to such concepts here because, half-mystical or not, they still suggest that when available analysis of observable factors is completed, there remains, in a whole series of disciplines, a *net* something which seems probably at least as much a matter of position, organization, and going-ness as a "whole," as it is a result of a left-over body of factors as yet unidentified and unanalyzed. Such a probability gives a cautious lead for inquiry into legal institutions, as well. And it seems to prove a fruitful lead.[7]

Thus, even while agreeing with the passage quoted from Cairns, I repeat, I find myself in disagreement both with its seeming implication, and with parts of his own application of it.

A second illustration of this may be had in the key-idea and most significant single idea in his book. The true science of jurisprudence he sees as focussed on *"human behavior as a function of disorder"* (p. 93). There is here a profound idea which is sound from top to bottom, plus one which gallops in the enthusiasm of discovery far beyond where it has any business going.

The sound idea is that it is *behavior* which must be the subject matter of an observational science, of objective character, about things legal. Not rules of law, nor norms, nor yet imperatives, *save* as these flow from, or are reflected in, or operate upon, behavior, plus the checked urges, and the patterns of thought and of held ideal, which are properly included in that term. The particular branch or sub-discipline under discussion is a "social science" in the same sense in which descriptive economics is a social science, whereas "welfare economics" is half philosophy, and principles of "business administration" are the "prudence" of a craft of life.

Thus to make *behavior* the subject matter leads at once to two highly valuable results. First, it leads to *direct* contact (*via* this behavior) with the other behavior-disciplines (descriptive government, descriptive economics, etc.)—a thing impossible to the dogmatic

making instead of fifteen years of rather unprofitable squabble and disorganization. *Cf.*, Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, 462, n. 33.

[6a] Llewellyn, Book Review (1933) 42 YALE L. J. 805, 809 n.

[7] I have attempted exploration of one situation of this sort—also with an eye on the part played by the individual in key-position—in Llewellyn, *Horse-Trade and the Merchant's Market in Sales* (1939) reprint from 52 HARV. L. REV. 725, 873. For use of the results (which themselves had been reached along Cairns' line: inquiry "in order to find out"), see *Report, and Second Draft of a Revised Uniform Sales Act*, Commissioners on Uniform State Laws, 1941.

branch of law, which moves in a world of legal correctness all its own, with contact and comparability only with the worlds of ethical or religious correctness. It is not easy to exaggerate the importance of this, either to our discipline or to our neighbors. In the first place, as Cairns' prior book (by all odds the most careful study in the field) demonstrates, so long as "law" is treated as a body of rules, or of doctrines, or of imperatives, *alone,* so long its material simply will not merge on a comparative basis with the material of, say, descriptive sociology, or descriptive economics, or social psychology. Such disciplines feed in their material for use on the level of change in law (e.g., legislation) or of practical work in the crafts of law (e.g., litigation). But the legal doctrine of the moment, as such, remains closed to them, and apart. Nor can they use it. On the other hand, the behavior-side of matters legal is the *same* behavior which is susceptible of analysis also by a psychologist, an economist, or a sociologist. The results of such analyses complement and cross-fertilize one another. We can directly use much of the better sociological and ethnological work on the ways of institutions, and we can gain much suggestion from the study of the ways of men in groups and in relations. *Per contra,* both of these lines of study, across the border, have been crippled by non-recognition, and by misunderstanding where there was recognition, of the law-phases of institutions, of group-life, and of relationships.[7a] And the *behavior*-aspects of the law-side, once

[7a] There was an important swing toward illumination of legal behavior, and use thereof in sociology, in the first decade of the century. SUMNER, FOLKWAYS (1907); ROSS, SOCIAL CONTROL (1901); BENTLEY, PROCESS OF GOVERNMENT (1908). The men of law were doing their part. Wigmore's path breaking but almost utterly neglected work had come early. WIGMORE, NOTES ON LAND TENURE AND LOCAL INSTITUTIONS IN OLD JAPAN (1891); WIGMORE, MATERIALS FOR THE STUDY OF PRIVATE LAW IN OLD JAPAN (1892). What those studies can mean for Economics appears in TAKIZAWA, THE PENETRATION OF MONEY ECONOMY IN JAPAN (1927). What they can mean for Ethnology appears when one finds Rattray recapturing the essential method of description of local variants, locality by locality. RATTRAY, ASHANTI LAW AND CONSTITUTION (1929). The contrast is the Post and Kohler line of "investigation." Meantime, Pound's work of this era was extremely close to behavior-study, and much of it remained so, up through the CLEVELAND CRIME SURVEY (1919). But all of these lines of rapprochement slowed down, and fell off, on both sides. When such fine work as J. R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) or J. M. CLARK, SOCIAL CONTROL OF BUSINESS (1926) came to be done, the writers started essentially from scratch, and met their law essentially in its normative aspects, solely; skilfully, but because of the one-sided line of contact, much less fertilely than might have been. When MIDDLETOWN came to be surveyed (1929) and revisited (1937) by the Lynds, the legal aspects of behavior there did not seem worth canvass—or capable thereof. The BEARDS, RISE OF AMERICAN CIVILIZATION (1933) and AMERICA IN MID-PASSAGE (1939) deal with every aspect of our civilization except the one which holds it together. Such work of the best men typifies the gap in contact.

The new line of rapprochement moves, from across the border, chiefly out of Ethnology. BARTON, IFUGAO LAW (1919); MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926). Note, incidentally, the clarification achieved by each of these authors, as he came to focus more particularly (a) on the particular group

cast into manageable form, are directly accessible to the other social disciplines,[7b] as some psychologists have already discovered. But those psychologists have not fully understood the *context of tradition* in which such legal behavior as "deciding" occurs, and their analyses thus leave out a vital factor.[7c] A comparable analysis by a Cairns would not leave it out—and the divergent results would offer, for instance, to psychology, what is as yet a largely unexplored dimension of the effects of a *known* tradition, not guessed at, but documented, not loose, but moderately edged and fixed, on say, the psychology of "reaching a solution of a problem."

Secondly, as Cairns well brings out, to make behavior in the legal aspects of life the subject matter of a "science" is to overcome the obsession that *only the State* can have significance in this connection, and so to open up the closely comparable phenomena of primitive law in primitive society, and of sub-group "by-law" within our own society, for the revealing light they shed on legal phenomena in general. Gurvitch has in good part gone this same road, as had Ehrlich, and especially Max Weber.[8] It is a good road.

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and group-order involved in any instance; and (b) on the particular official personnel whose behavior was concerned. BARTON, THE HALF-WAY SUN (1930); Malinowski, *Introduction* to HOGBIN, LAW AND ORDER IN POLYNESIA (1934). Rattray's book belongs here, with Spieth on the Ewe, Gutmann on the Chagga, and Dundas' papers in 51 and 55 J. A. I.; also (with crisis-case study as the main method) HOEBEL, THE POLITICAL ORGANIZATION AND LAW-WAYS OF THE COMANCHE INDIANS (1940) 54 Mem. Am. Anth. Assn., and RICHARDSON, LAW AND STATUS AMONG THE KIOWA INDIANS (1940, Mon. Am. Ethn. Soc.).

From our side, the movement is, on the larger scale, by way of legal sociology. See *infra* note 8. On the even more important side of cumulation of small inquiries, it is too scattered for citation.

[7b] How badly such accessibility is needed, with awakening interest on the part of shrewd thinkers, is neatly brought out by the groping still evident in such admirable papers as Bain, *Freedom, Law, and Rational Social Control,* 4 J. SOC. PHIL. 220 (1939).

Interestingly enough, some of the philosophers have proved good bridge-builders into law. M. R. Cohen, LAW AND THE SOCIAL ORDER (1933); GARLAN, LEGAL REALISM AND JUSTICE (1941); Dewey, in MY PHILOSOPHY OF LAW (1941).

[7c] Compare Robinson's approach to judging, in LAW AND THE LAWYERS (1935) with Arnold's in SYMBOLS OF GOVERNMENT (1935), and Llewellyn in THE COMMON LAW TRADITION (forthcoming, Yale U. Press), esp. ch. IV. One of the most amusing and distressing phenomena of the current controversies in Jurisprudence has been the way in which Arnold's books, which rest utterly upon the effectiveness of a given, going, integrated ideology, and so upon the existence of one; and which plead for intelligent use of the ones we have; and then show the dangers of leaving badly built ideologies around, unreformed, for possible abuse—the way in which these books have been discussed as if they either denied the existence and importance of ideologies, legal or other, or the existence and importance of ideals to strive for. There are plenty of faults in both of Arnold's books; but it is queer irony that their very virtues should be treated by critics as absent. Citations on request. This is a non-polemic paper.

[8] Gurvitch's *Sociology of Law* (which the invaders caught and removed from circulation, save for odd copies) has now been translated; a summary of the ideas is available in *Main Problems of the Sociology of Law,* 6 J. SOC. PHIL. 197 (1941). See also his forthcoming paper in Columbia Law Review. He perceives and admirably develops the law-phases of subgroups, and is peculiarly

The other idea is also sound, in its *positive* aspect. *"Behavior as a function of disorder"* is a beautiful illumination, as Cairns finely develops, of a central aspect of things legal; it is rich with implication for the creative role of "invention" (in which Cairns includes the luck of the hits, in hit-or-miss procedure), and amusingly enough in this so ethically neutral book, it is rich with implication for the glory and the duty of order, and better order, to be *achieved,* not to be taken as given. On the other hand, the overemphasis upon the "function of disorder" leaves out of account that great body of behavior, of strictly relevant behavior, which is a direct function of *order;* and it also skews the meaning of the "function of disorder" itself. For what we really have, in this aspect, is human behavior as a function of disorder *within a going order.* And only with both phases in mind can the matter be either grasped or dealt with.

From this conditioning factor: "within a going order," there flow two conclusions in regard to method, one of which the present volume slights, and the other of which it misses. The one which is slighted is that the *particular* given going order is likely to condition the behavior-sequences so heavily that conclusions reaching beyond a single legal system are exceedingly unsafe at present writing. I have myself drawn a goodly number of such conclusions, based on intensive study, and have put many of them in print. I think them sound, highly prob-

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sensitive to the relation of tension and flux between formed law-stuff and dim-felt need or conscious drive in group and interest structures. His formulations are still a touch over-systematized, and the flux-situation has still only partly emerged from the half-mystical, in his treatment—chiefly because the role of the mediating personnel has not as yet been adequately drawn into his picture. But few living authors are further along.—Max Weber's great SOCIOLOGY OF LAW (MS. completed in 1909!) is approaching completion of translation at the University of Chicago. It is unique in the magnificent and sustained integration of the operations of a legal structure—seen as an institution—with economic conditions, the manner of governmental organization, and the prevailing ideology about the supernatural.—Ehrlich's book on the subject is available in English, has juice, and is worth study, despite certain confusions. It bears the relation to Weber's that a very fair high school course bears to a superb graduate course. It bears to Gurvitch's the relation which is proper, as between an exploratory inquiry of 1914 and thoughtful further work of 1940.—Timasheff's more recent book has some meat and suggestiveness, but has hit on an unfertile base-line, and suffers accordingly. Lines of effective development can lead out of any one of the first three mentioned. And Cairns' "function of disorder" is one such line. While Gurvitch's concept of "social law," for instance, is a line of thought which is peculiarly interesting when set against my concept of the "Net Drive" aspect of a legal system.

A neglected paper dealing very skilfully on the dogmatic side with the problem of flux out of life into formed law should be mentioned: Kantorowicz, *Legal Science—A Summary of its Methodology* (1928) 28 COL. L. REV. 679 (with useful notes by Patterson). It is a paper that some of the more vigorous anti-realists could study with profit. It demonstrates the essential urge of the leader of the "free law" movement not into *"free* law," but into "free *law."* A point which no American critic whom I have read has appeared to perceive, in regard either to the German "free law" movement or to American "realistic" writers.

able, and useful; but I should lament having anyone take any of them as claiming truly scientific status. They are emphatically in the realm of pre-science, because the possible deflecting factors, or assisting factors, which may have played into divergence or convergence of the sequences and results observed, are not known, and in many instances are not knowable. It takes intensive single-system studies to lay the foundation for generalized conclusions which reach beyond the stage of informed and partially tested artistic judgments. On the other hand such judgments can set the basis for sharpened hypothesis. The trouble is, then, that it takes not one further intensive job on a particular legal system and time-period, but a dozen such, to begin to put "scientific" validity under the hypothesis; because an adequate variety of "other" factors, in the cultures concerned, and in the people concerned (especially within the legal and governing staffs) require to be watched at play upon the hypothetical sequences of legal behavior.

The conclusion from "disorder *within a going* order" which the book misses, is that this "going order" aspect makes it possible to do very useful work, and at once, without having need for any preliminary theory of the *origin* of either "custom"[8a] or "law." The going phenomena can be effectively studied without necessity for that study to *rest* on any such theories. Personally, I go much further: I conceive more intensive study of the going phenomena (particularly in formative groups, such as new marriages and child groups and communities; and again, in new and groping governmental agencies) to be as illuminating on the matter of origin as is the study of primitive culture or of social and legal history. Cairns' recourse to the going phenomena on which the modern psychology of learning rests seems to me, for instance, utterly sound. Note, too, that these are the phenomena of concrete learning, by concrete going personalities, within a concrete going order, and neither in vacuo nor in the abstract.

Neither do I wish to be understood as suggesting that a solid theory of origins would not both sharpen and deepen study and understanding. For I have become convinced that almost the only way to get deeply under the skin of a pre-science about behavior in matters legal is by way of the detailed *processes* which lead to the larger phenomena—

[8a] I have elsewhere paid my disrespects to the concept of "custom" as a tool for inquiry into legal phenomena. It is vague, diffuse in reference, misleading as to content, and involves a peculiarly vicious indiscriminate fusion of "practice" and "accepted standard *for* practice." If one is interested in *process*, especially in a society at all mobile and non-homogeneous and with specialized bodies of ways (i.e. in almost any known society) then "custom" belongs, as a working tool, with the firelock smooth-bore: a good instrument, in its day, worth preservation in an intellectual museum. LLEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941) 275-276. Note the degree to which the clarity of Max Weber as against Ehrlich depends on Weber's differential use of the *elements* which are loosely lumped in the complex "custom" concept.

watching the men, within the institution, under the impact of fresh stimuli. And I have become further convinced that despite all the variant aspects which are produced by the conditioning of the variant general cultures and of the variant legal systems, there are "drives," "problems," and even some channels of response or "invention" which are relatively limited in number among our human kind, and which have something of the character of basic elements whose differential combination produces the weird variety of total-results. A right theory of origins seems to me therefore to have good possibility of being at the same time a right theory of the basic elements currently at work on the direct-action (e.g. judging this case) and the direct-contact sides (e.g. this negotiation, or the training of this law-cub) of modern legal phenomena; and I hold that the indirect-action and indirect-contact sides cannot be understood save in their joint impact with the direct phases. But when that has been said, the fact remains that to rest work upon the wholly speculative *and as yet untestable* is no sound procedure, unless there is no other way of working. And that the factor "within a going order" gives a wherewithal for an immediate, solid other way of working which does not rely upon any given theory of origin.

Let us recur now to Cairns' indication of the subject matter of that particular and specialized phase of jurisprudence which interests him in this book, to get at another aspect of its meaning. That subject matter focusses on "behavior *as a function* of disorder" [within a going order]. And the idea of "function" needs attention.

But when the author comes to define explicitly the sense in which he uses this word "function" (pp. 122-124), he does so in a context of avoiding any conception of "monistic causation" for his version of this "science" of jurisprudence. The example chosen is the relation between economic phenomena and legal. He goes with the causation-idea far enough to be interested in time-sequence phenomena, one set following on the other, rather than in the straight concomitant variation suggested by the mathematical idea of "function." Beyond that, he cautiously proposes inquiry merely in terms of what change in *b* follows a given change in *a*—noting that, if the events occur other end to, the result may be very different: a change in the economic scheme may be followed by very different variation in the legal scheme than if the change in the legal system had happened first.[8b]

[8b] *From here on, there is some cross-purposing* of words and issue between Cairns and me, which I have not yet fathomed. He seems (judged by the book and especially by his response to the MS hereof) to be thinking in terms of the interaction of various "orders"—as, *e.g.*, "the legal" and "the economic." My own thinking is much more pedestrian; it runs in terms of particular officials dealing with particular law-consumers on particular occasions in the light of particular desires of the litigants (typical or not), and of particular imperatives and/or

So much is harmless. It is also (for an indefinite period into the future) all but useless, as I hope to show in a moment. But about here, our author recalls that the very subject matter of his "science" has been defined in terms of the word "function": "behavior as a function of disorder." That recollection is a misfortune. For he promptly faces that problem squarely, and makes the wrong resolution of it. He actually suggests that he means "function" in the definition itself to have the sense just described. And: "Order is the element in which it is assumed *change must* occur for a change to take place in a legal *system.*" (My italics, p. 124.)

At this point I get impatient with my brother Cairns. The sentence quoted is not nonsense; but its relation to "*behavior* as a function of disorder" is hardly perceptible. And if *change* is per se to mean *dis*-order, then Cairns has plumped into a concept so close to the "equilibrium" which he castigates in the immediately following pages, that the splash would wet the book. What has happened, as I read it, is a temporary lapse on page 124. Throughout the volume, save for this one graceless page, Cairns writes as if "function" in his basic phrasing ("behavior as a function of disorder") had a double meaning. The one half of that double meaning is the semi-mathematical sense just described: roughly, "varying with." But equally and constantly, the other half of the double meaning is present. That is a semi-biological sense of "function": roughly, "dealing with, in order to survive and manage smoothly." If both of such meanings are not present, in tacit conjunction, the *book* does not make intelligible sense, nor do its passages build into any intelligible unity.[8c] Indeed, if both meanings are not present, the "science" proposed is at once so narrow and so ungraspable as to be hardly worth serious discussion.

I grow impatient, because a good man with a lovely idea, sweetly developed, has no business to be dragged off the track of the development by one mere word. I grow impatient, secondly, because the occasion for introducing "function" at all, on page 122, is no necessary occasion. There is no need to eliminate the good old common-sense idea of causation from a "science" that has fifty or a hundred years to go before it can hope to get beyond the stage of gradually more ordered and better tested *un*common sense. Eliminate *monistic* "causa-

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norms; and it runs in terms of whatever patterns or observable goals there may be, discoverable among the instances. I cannot follow the impact of "one order" on "another order," save as a possible conclusion from some two hundred specific impacts—especially not, when I see each "order" as in flux. What I *can* follow (as I think) is the specific impact of "disorder," *within* a specific phase of legal order, upon *that* phase of order.

[8c] The MS produced no challenge on this point. And if an older man may feel with a younger, the nonchallenge by Cairns was for a reason; and the reason is, that a chunk of nonbehavior "something-else" is simply there.

tion," yes; to do that is itself merely common sense. But the junking of the causation concept in the more metaphysical phases of modern physics represents a level of critique, a level of refinement of conceptual working apparatus, which is appropriate only to a discipline with three or four cumulative and highly successful centuries of tested, integrated, *truly* "true science" *behind* it. Such a super-refined conceptual apparatus, brought to bear with enthusiasm on Seventeenth or Eighteenth Century Physics, would so far as I can make out human nature, have taken the edge off precisely the work which was then needed; it would have had as its main effect a drive back into philosophical speculation, untested, and because of its scale untestable; a drive back toward feeling so strongly the urge to grasp the great Whole that no time would be left over to experiment on those little dirty details on whose slow, successive mastery the modern edifice rests.

Now, in this pre-pre-science of behavior relating to matters legal, we might as well recognize that we are today hardly as far along as were the physicists of the Seventeenth Century. From the standpoint of *determinate* co-variations, we know nothing that I have yet heard of. What we have spotted is a fair number of "trends" or "tendencies," or of seemingly limited possibilities of ways for doing this or that perennial legal job; we have even spotted many of the perennial legal jobs that need doing.[9] The best work has not gotten beyond this, save in particular monographic inquiry on narrow points of particular time, situation or single cultures.[10] True, if the books were combed for the wisdoms that are in them (which are mostly, though true, only partly true) and if those wisdoms were put then together, there would be a good deal of raw material for Cairns' "science" to start work on. But scattered, uncoordinated, untested, uncommunicated, inaccessible, hit-or-miss wisdoms are in that condition not even raw material for a pre-science. They do not lead to critical hypotheses. They are ore in the ground, still undug, the lodes not even yet located.

Is that a stage of a discipline which it is proper to torture and embarrass with the refinements of modern philosophy built for sciences that *are* sciences? It is like using seven-place logarithms to work out

[9] See LLEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941) cs. X, XI.

[10] For example, Pound's INTERPRETATIONS OF LEGAL HISTORY (1923) makes a rather persuasive prima facie case for the applicability of Pareto's hypothesis on origin and spread of "a philosophy" to philosophy of law: "One can consider theories in terms of who produces them, and of who accepts them," etc. (1 SOCIOLOGIE GÉNÉRALE (1917) 7). But Arnold's challenge opened up a wholly different aspect of the matter (philosophy of law as flight from the need for observation) which is plainly apt, *sometimes*. And now nobody knows anything, for sure, about the situations which Pound described without having had the "flight" possibility in mind. My own study has convinced me that the "flight" aspect has some real importance in the later nineteenth century, especially in the United States; but how *much*, and *how*, does not become at all clear as yet.

the rough carpentry of a building whose parts are being measured by thumb-joints—a different man's thumb-joint for each measurement.

I suggest that we can have a working attack which has no need for the delicate apparatus discussed so entertainingly by Cook, and so belligerently by Bentley's current papers: "The *man* at work in the *context* of the order, under the stimulus of the problem in hand, and working with and largely within the wherewithal provided by the tradition."

Do not mistake me. I am well aware that there are things for us to learn from the ways of natural science. Cairns nicely develops one of them, already mentioned: the utter need of the clear hypothesis. Add: insistent attempt at objective observation; sustained objective recording of the data observed; cumulation and *comparison, consistent* cumulation and *ordered* comparison of observations, *with attention concentrated on any seeming discrepancies.* That is what leads to sharper and more critical hypothesis. Add: patience. If it took our friends in Physics these few hundred years to get to where their original rather simple (simple-minded, if you will) working premises—"force," "causation," and the like—needed to be refined; and, indeed to get to where an ordered grasp of ultimate bases of the whole began to seem even in the possible offing—then maybe our not so simple material may take us more than a minute or two, to master. Or again: we can learn from natural science that Big Things in the pursuit of science are not commonly achieved by going after Big Things. They come, vastly more, out of sustained, insistent, cumulative digging after smaller bits of testable and tested knowledge about small things; and out of concentrated study —including speculation—on matters little enough to be studied *closely.*

And there is a final thing to learn, along with the value of the constantly sharpening hypothesis. That is, the additional need, from time to time, of some workers who just take a fresh look, and repose whole lines of work and interpretation.

The sweep with which my brother Cairns sees those "universals" which are the only true ultimate goal (e.g. page 89) will, I hope, appeal for the next generation to few others who may become interested. For it is hard for me to conceive a working program for the greater body of workers which would be more ill-designed to put salt on the tail of a universal than a direct general charge after one. It takes more than the conjunction of an apple and a head, even the best head, to produce a significant universal; it takes also the prior presence of massed, reliable, ordered, but puzzling data. What universals need, is to be forgotten *except from time to time,* while we try for reliable light on little matters, one by one. For instance: we know that a formula of words used to indicate a part of a transaction (official or other) can pass

slowly from the position of a vital and meaningful phrase into that of a formula merely. We know that this happens when the transaction has taken on the form of a recurrent pattern so well understood that it comes to be seen as a whole, rather than as a result of parts seen still as working parts. "Value received" in the promissory note, "against documents" in the C. I. F. contract, the recital of the prisoner's presence and opportunity to speak, before sentencing, the recital for the record of "a quorum being present," or of "on motion duly made and seconded" —and so on down. We know that at some stage of such a pattern's history the once-vital formula becomes so meaningless that its omission is no longer significant;[11] but that there is a stage before, in which its very standard character makes men see its omission as peculiarly significant.[12] I think these things are just about all we know on the matter. We know neither the more exact "whys," nor whether the process differs in different types of legal situation, nor how far law is peculiar in the matter, nor what factors (e.g. necessity of policing against abuses, at meetings) may give extra vitality to a formula; nor do we have any means of telling when a particular formula has become useless encumbrance, nor how far even such an encumbrance may yet have a ceremonial value apart from its original meaning. This is a very little matter, in one aspect. It happens to be one which I happen to consider as possibly opening considerable light on the ways of our law, and indeed of law at large, and on the relation of law-behavior to other phases of behavior. It is one on which we have enough accumulated horse sense to sharpen an inquiry, and enough material, both current, recent, and ancient, to probably reach rather usable results. It cuts into the great question of form, not at large, but with a focus on testable material. The same, as to two particular phases of form: ceremonial, and record. The same, as to that key-question, the use of words in law. I develop the matter at length because it is so pretty a type of the tiny patient inquiry of which there need to be the cumulated hundreds before some Cairns of 2041 will do a Newton on the Law of Form in Law. In 2141, perhaps another one will do an Einstein on the first one's Newton. Meanwhile such homely ideas as "force" and "causation" (not monistic), if we simply use them (instead of doing such philosophizing as the author scorns on p. 61, about whether they are *vis a tergo* or *vis a fronte*), will do our present work.

Again let me not be mistaken. For another thing that we can learn directly from the natural scientists is that there is no single road, and that there is huge profit in having different men at work, specializing

[11] NEGOTIABLE INSTRUMENTS LAW, §6(2).

[12] This was the point of the division of the court in Clemens Horst v. Biddell [1911] 1 K. B. 934 (C. A.). See LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 99.

on different phases of the same great game, even within such a single sub-branch as this hoped-for behavior-science of things legal. It happens to be my belief that solid, testable *knowledge* which reaches beyond careful *un*common sense is so hard to get, on matters legal, that a good part of the first crop is going to require to be confined to single cultures—such as our own—and that again a good part is wisely to be worked out by way of smaller groupings (a city, a district, a trade, a trade within a district, and the like) to somewhat reduce to manageability the range of the needed observation. But that does not mean that I do not feel, say, that comparative material from primitive cultures is a fruitful simultaneous study by some other workers. And it does not mean that I fail of appreciation of the value of having some men going at an attempted view of the whole—gathering, sorting, arranging, posing speculative hypotheses, as have Weber and Gurvitch. Nor does it mean that I fail to understand the virtue of Cairns' inquiries into philosophy of method, and his insistence on the ultimate goal: universals. What I am trying to say is, that broad synthesis (at the present stage), and the philosophy of method, are areas of limited possibility until we get more of reliable data, more reliably gathered, arranged in terms of meaningful hypotheses. A half dozen men on Cairns' work, and a dozen on Gurvitch's, will be adequate, for a while. But we need six hundred, and can use six hundred dozen, in intelligent labor on increase of the area of the significantly known, or indeed of the significantly better-than-merely-suspected. And I am trying to say also that in my belief, as in my observation and experience, good theory and both deeper and wider insight come both better and more reliably when a sharp hypothesis is being tested out on concrete material (always with an eye to the wider possible bearings of the inquiry) than they do by any other means available to most of us. Data fertilize theory even more, if possible, than theory fertilizes data. And nothing so sharpens thinking as the felt need for finding some means to see the data both accurately and significantly.

Much exceedingly valuable work of inquiry has already been done, and has appeared in print. The outstanding bodies of material are law review notes, government publications, and monographic work in legal history, ethnology, and the sociology of groups. The second outstanding body of material is the multitude of shrewd, though passing, observations on the ways of law with life, and the ways of life with law, made by writers interested in other things—such as the correct phrasing of some particular rule of law, or the life of some judge. The ore is there. The job needs doing. Cairns' assembly call is very welcome.

There has, however, been so much misunderstanding abroad in the

field of Jurisprudence these last twelve years that I beg leave once again to point up a vital aspect of this hoped-for "science." In that "science"—that one sub-branch of Jurisprudence—Cairns (and I) would be very glad to see the search for right goals for law eliminated, if that be possible, and to see eliminated also any discussion of the right answer, for judge or for legislator or for administrator, to any particular problem of present or of possible future law. In so far as a discipline aims to be a science, the basic values are the effective finding out and recording of how things *do* go round, and the effective arrangement and coordination of what has been found out. This means, to repeat, that the "science" projected is not, in one sense, one about Law at all, and that, in one sense, it cannot with seemliness claim to be Jurisprudence, because it does not deal with certain problems which are central to Law. That is one reason why it may be wiser to speak of an objective sociology of the institution of law; because any man can see that such an objective sociology does not purport, save by accident, to solve juristic problems or to show the right goals of a legal system or of any part of one.

Yet I am much concerned that those interested in right goals and sound juristic solutions for our own legal system should not get the idea that such effort to see and say the behavior which is there to see (whether the observer likes it or not—and this observer frequently does not at all like what he sees)—that they should not get the idea that such effort is without meaning or utility for those branches of Jurisprudence which are concerned with justice, or with better goals for society, or with sounder rules of law, or with sounder and more effective legal techniques. For I hold that in the seriously confused legal situation which faces us, only a reexamination of the essential given problems, and of the actual working of the given men, rules and other phases of the institution, and of the relation-in-result between existing techniques and the handling of the problems—I hold only such objective preliminary reexamination can free the mind or clarify the conditions for more effective juristic work. And I hold that the determination of right goals does no more than begin the job of *legal* philosophy, because the lawyer's job (and so that of his philosophy) is hardly begun until he finds and shapes a *measure* proper and effective to the desired end. Hence the effective pursuit of any branch of Jurisprudence except straight analytical dogmatics seems to me dependent on the advance of the behavior-branch of the discipline; and even analytical dogmatics can greatly profit by advance in the behavior-branch.[12a]

Cairns does not stress this. He has a reason. Observation of the degree to which straight seeing can be deflected by desire; observation

[12a] Compare THE COMMON LAW TRADITION, cited n. 7c.

of the degree to which this holds peculiarly in matters of law, in which not only the drive for justice is constantly at work, but also the advocate's conscious or unconscious skill in selecting and rearranging data to suit his cause—these instil into Cairns a lively skepticism as to the value, for objective science-directed study, of any hook-up with the current struggles of the law or in it. To stress the point stressed here is to invite pseudo-objective inquiries which then proceed to muddy the water by claims of "scientific" support for this cause or for that. Plainly, the advance toward a science would be more steady, if straight attempted-objectivity were the sole drive of the workers. But that presupposes an available body of workers with some such motivation. We have no such body, now or in prospect. What we have is odds and ends of scholars who are not either staggering under teaching loads or occupied in administration, school, bar, or governmental, plus a handful of legal historians, and a *rara avis* or three like Cairns who somehow manage to get time off for study and inquiry. The social disciplines can give us little direct help; their men do not understand legal contexts, and few of them want to. Either, then, behavior-study *as such* in matters legal becomes a focus of interest for men engaged in practical legal work (from instruction on through to judging) because its bearing on "straight" legal or juristic problems becomes obvious, or else the machine of inquiry goes unmanned, and so fails to go.

It seems to me, moreover, that Hogben makes a solid point about the fruitful influences of practical problems, through the ages, upon the growth and direction of scientific inquiry and theory[13]—one which has good promise of working out here as well. When, for instance, one meditates upon the unrecorded, shrewd behavior-observation of the practicing lawyer or practicing lobbyist or sitting judge, or listens in informal conversation to the results, one feels himself in the presence of a lake, deep, untapped and baffling as Tahoe.

The progress of one long-drawn investigation of my own, however sketchily presented, may serve as an illustration. Twelve or fifteen years back, it had become very clear to me that our rules of law, coupled with our established express techniques for dealing with them, were for the most part not in fact and in themselves capable of giving us reckonability of result sufficient to admit of intelligent counselling.[14] "Property" and "commercial law" were supposed to be peculiarly steady, in this aspect. As to "property," my own work in Mortgages, and Clark's essays,[15] raised doubts. As to commercial law, I knew that the

[13] HOGBEN, SCIENCE FOR THE CITIZEN (1938).

[14] LLEWELLYN, THE BRAMBLE BUSH (1930) c. IV; LLEWELLYN, PRÄJUDIZIENRECHT (1933)—the bulk of the work having been done 1928-1931.

[15] CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" (1929).

current rules did not, in the main, do the work. Yet it was no less clear that intelligent counselling was possible, with moderately reckonable results.[16]

My first recourse was to the hypothesis that economic conditions might be the additional factor that needed to be drawn into the reckoning. I tried to explore that,[17] and to have it explored;[18] I went on the trail of "little" conditions or patterns of practice,[19] as well as on the trail of large trends. This gave help, but there was something missing. I tried exploration by way of sequences of cases in single jurisdictions on single topics[20] and even in different courts within a single jurisdiction.[21] And it slowly became clear that "conditions" hit the case-law only by way of, first, the facts of the case, in whatever distortion those facts might show, and second, the reaction of the court to both those facts and the conditions. It developed, at least in the warranty cases, that the same conditions resulted in radically different results according to views of the court about the meaning of the conditions. Yet the *methods* of the courts, despite changing personnel, remained very similar; and the piece of method which was regularly added to the rules of law and the standard techniques was horse-sense directed toward wisdom in the situation. So, from about 1800-1850, in Pennsylvania, New York, Massachusetts; but the *results* of cases rolled around unpredictably because "horse-sense" seemed different to different judges. Whereas from 1870 to 1910 the New York cases showed a wholly different kind of confusion and unreckonability: that of muddled rules that befuddled half the judges.

This began to look as if it might lead somewhere. If you had both clear rules that made sense, and open use of the horse-sense element (such as you did have, largely, in the 1840's) you might come out with something pretty clear and steady. With that hypothesis I turned first to inquiry in a general but familiar field, that of Offer and Acceptance.[21a] Results promptly seemed too exciting to allow even of time for completion; I wanted, at once, to get into current opinions in

[16] Compare the annotations throughout LLEWELLYN, CASES AND MATERIALS ON SALES (1930).

[17] *Id.*, at c. III.

[18] Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts* (1935) 44 YALE L. J. 782; and a series of Col. L. Rev. Notes, and unpublished papers.

[19] E.g., C. I. F., LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 98 ff.; or division among broad types of transaction, *ibid.*, 3 f., or between types of bill of lading, *ibid.*, 77 ff. Compare also *Notes* (1929) 29 COL. L. REV. 960, 1123, 1131.

[20] See Notes cited *supra* note 19. LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 219 ff.; Llewellyn, *On Warranty of Quality and Society* (1936) 36 COL. L. REV. 699, (1937) 37 COL. L. REV. 341.

[21] LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 270 ff.

[21a] Llewellyn, *The Rule of Law in our Case-law of Contract* (1938) 48 YALE L. J. 1243; Llewellyn, *On Our Case-Law of Contracts: Offer and Acceptance* (1938, 1939) 49 YALE L. J. 1, 779.

general, as they appeared in the books, *outside* the single area of any initial specialized inquiry, outside the lines of any particular "legal" topic. The results appear elsewhere.[22] They seem to me to clarify certain perplexing current problems. But if they do, it is because for the whole period of inquiry the effort was to forego seeing what one wanted to see in the way of behavior, and instead to see as nearly as might be just what was there, and to figure out *how* it had happened, and *why* it had happened, irrespective of whether one liked its happening. That is the kind of thing I take this effort toward a science of behavior, *as* behavior, in matters legal, to mean; and that is also the kind of practical result I see as its proper and necessary consequence.[23]

There will indeed be few enough matters, for the next decade or two, in which we can hope to get beyond shrewd insight, *somewhat tested,* checked against other shrewd insight by some further semi-testing, and so refined and sharpened—*and then made readily accessible to all.* But I count that very much. It is more than law has ever had, on this behavior-side.

And it would be ungrateful to close on any other note than this: that not the least valuable depository of those shrewd observations which are high-grade ore is the little volume which has been under consideration. That volume deserves all three of the readings mentioned at the outset.

Yet there is another point to stress in closing: the value of Cairns' rigorous stand against debasement of the coinage and mint-mark of Science. We live in days when the terms Science and Scientific have

[22] LLEWELLYN, THE COMMON LAW TRADITION, Yale Univ. Press (forthcoming); *Second Draft of a Revised Uniform Sales Act,* Commissioners on Uniform Sales Laws, 1941, especially Alternative Material to Sec. 3.

[23] Let me again avoid being mistaken. What I see as both possible and desirable is materially more than the type of informed common sense and insight suggested by Fuller in THE LAW IN QUEST OF ITSELF (1939). What I have in mind *begins* with that type of informed common sense and insight, and goes on then to sustained cumulation, cross-check and refinement into at least highly *un*common sense and better-than-*mere*-insight. And again, I do not at all share the seeming scorn of statistics or of other quantitative method suggested by my brother Nussbaum, *Fact Research in Law* (1940) 40 COL. L. REV. 189. I put not my faith in figures, and certainly I hold no brief for waste in research. But, for instance, the work from the New York County Lawyers' Survey, on the one hand, and from Clark and Corstvet, *The Lawyer and the Public* (1938) 47 YALE L. J. 1272, on the other, on through to Garrison, *The Problem of Overcrowding* (1940) 16 TENN. L. REV. 658, gives a sureness of light on the economics of the profession and on the question of undone legal business which no common sense plus insight could have possibly achieved. Note what this contemporary material would mean in the context of a "science of behavior" in matters legal, as one body of data affecting such a question as: what happens, when the mediating personnel of law, in their organization and methods, become expensive, wasteful and inaccessible?

Quantitative material, rightly and economically gathered and handled, has its unique contribution to make. But of course (1) good progress can be made without it, and (2) a fetish of pseudo-quantativity is a curse.

become honorifics. They are sought after as are high titles and rare ribbons for the buttonhole. The appropriate cheap road is to debase the standards, and then to put out whatever wares one has, in bottles—or books—with the label Science pasted on. The alternative cheap road is to dress up one's wares, say in shoddy pseudo-quantitative form, with unmeasurable heterogeneities "measured" and counted as if they were in fact significant "units," which one proceeds to solemnly manipulate by mathematical procedures—producing a type of garbage which has peculiarly afflicted the third-rate run of work in sociology. The painstaking, cautious, lovely, quantitative work of W. F. Ogburn will serve to illustrate the standard which I am taking as *first*-rate, in this aspect.[24]

Now Cairns will have none of this mislabelling. His inquiries into the philosophy of science do indeed run in advance of present practical need in the particular field; but those same inquiries have another virtue. They are clean on the bull's eye, in this matter of making utterly unmistakable that objective Science about legal behavior does not come out of any grab-bag, and that the goal of the discipline is *objective* Science, and that the standards for objective Science are both clear and known, and tough to meet.

I wholly accept this clarity and this rigor. The minimum, as I see it, goes to the data being both objectively verifiable, without recourse to personal intuition or to revelation; and to those data being also verified; and to the range of the resulting inaccuracy being established with high probability, as a *part* of the "data"; and, finally, to verifiable relations being established in communicable and freshly testable form. And if that is the minimum for Science in the field, then I repeat that I see no prospect of having much of it in my life-time. But I think it necessary to keep down quackery, and the way to do that is Cairns' way: relentless insistence on rigorous standards.

But meantime it lies on my heart to negate a false conclusion from any acceptance of such standards for Science. Some years back, in reference to Criminology, Michael and Adler did a job not too dissimilar to this one of Cairns.[25] Their views of "rational science," as applied to any fields but mathematics and symbolic logic, I cannot accept; words are too tricky, for one thing; and I am loath to dignify by the term Science (of any kind) any discipline the aptness of whose premises is not objectively verifiable. But the standards set up by Michael and

[24] Exciting is Ogburn's recent return to interpretative work in *addition* to the quantitative. OGBURN AND NIMKOFF, SOCIOLOGY (1939). For comparison: where, in legal matters, is the body of pretty solid tested material with which Ogburn and Nimkoff in that book could test their interpretations, in reasonable part? "Sociology," in this book, develops without consideration of legal institutions.

[25] MICHAEL AND ADLER, CRIME, LAW, AND SOCIAL SCIENCE (1933).

Adler for empirical Science—which is what this behavior-discipline of matters legal is aimed toward—those standards are sound, they coincide in substance with those of Cairns, and they are in some ways deepened and sharpened by his contribution. But when Michael and Adler divided knowledge into two essential categories: "common sense" and "scientific knowledge," they overlooked (and Cairns does not sufficiently stress) that the matter does not thus cleave neatly into *two* significant areas, but that it stretches out or sprawls instead between two poles. At the one pole is ignorance and *pure* guess. At the other pole is solid and thoroughly systematized scientific knowledge. "Common sense" is, so to speak, in the South Temperate Zone. *Un*common sense, ordered, pondered on with care, and tested out once, and again, and yet again, in inconclusive but still illuminating corrective careful tests—that is, so to speak, in the North Temperate Zone. Knowledge does not have to be scientific, in order to be on the way toward Science. Neither does it have to be scientific in order to be extremely useful. It is time that social "scientists" should recognize this openly; it would save much confusion, and it would save more waste motion. What we need is knowledge moving carefully and cannily *toward* the scientific pole, accompanied by some rough indication of its present latitude. *That* is the scientific road *toward* Science. And progress on that road is valuable, step by step.

Knowledge, I repeat, does not have to be scientific, in order to be useful and important. And that holds also of knowledge in the field of what are good values, or are the right values, for our civilization, or for Man. What Michael and Adler see as "rational sciences" (for they, like the empirical workers whose products they so keenly dissected, felt the need to capture the pretty buttonhole decoration for their own work)—those "rational" *non*-sciences—notably Politics and Ethics—are full, in their best exponents, of non-verifiable knowledge of this extremely useful sort. So are the informed expert judgments of informed experts who have judgment. So are the inspired words of true prophets. So, indeed, are the largely unspoken wisdoms-of-work in the practical crafts of law—appellate judging, judging at trial, advocacy at trial, advocacy on appeal, counselling in its various aspects, policy-shaping administration, "administrative" administration, "quasi-judicial" administration, and the others. Let me not be misunderstood as belittling such indispensable knowledges. It is no belittling to point out, to insist, that they are not objective scientific knowledge, which is a quite peculiar kind of knowledge. When we have that peculiar kind of knowledge, then informed persons can tell a true prophecy from a false one with little need for faith (beyond faith in the recurrence of events and in the honesty of prior work) and without need to abide the event.

Of course, then, we have little "scientific" knowledge about anything. Of course, then, most daily work of most "scientists" has its copious admixture of expert judgment which is *not* full-blown science. But this is not only true; it is, as well, an excellent thing to realize. Most of what we currently dub "science" is only on the way. And what of that? So much of it is so much further along that way than we are in things legal that we are overdue to move in that direction. But of course I do not belittle the knowledges that we have—either their kind or their quantity. We have managed after a fashion to make out with them. And they are what we must continue to make out with, till we have more and better. But they are not yet gathered or organized, even such as they are. That is one thing that rather patently needs doing. Beyond that, I heartily join with Cairns in urging effort to move each piece of any of them another step, and yet another, into clear phrasing, for comparison, critique, *sharp hypothesis, test*—and so into semi-verification, and refinement, and sharper hypothesis, and cleaner test, and wider correlation—and so, still further.

Cairns puts his finger on a desperately needed truth. This neglected and least developed among the sub-branches of Jurisprudence, this attempted science of behavior in matters legal,[26] is the road which may offer the wherewithal to take Jurisprudence at large out of the squirrel-cage in which, while it has been content to rest on *mere* common sense and on *un*communicated, *un*compared, *un*tested individual wisdoms, it has been racing round now these some 2,300 years. For unless I badly mistake the nature of the material, the attempt to study recurring societal situations and behavior-sequences within such situations, has in it the wherewithal for giving altogether fresh light on whither it is good to strive by way of law and on how to strive with effect.[27]

[26] Behavior as a function of order, and of disorder within a going order.

[27] Adumbrated, LLEWELLYN and HOEBEL, THE CHEYENNE WAY (1941), cs. III, X-XII, especially the last; as also in my Chicago lecture on "The Good, in Law," and in THE COMMON LAW TRADITION. I had not, in 1930, conceived of behavior-study as offering, in itself, more than further understanding plus a road to surer techniques, as appears from Frankfurter, Llewellyn, and Sunderland, *The Conditions for and the Aims and Methods of Legal Research* (1930) 6 AM. LAW S. REV. 663, 671 n. 4; Llewellyn, *A Realistic Jurisprudence* (1930) 30 COL. L. REV. 431, 463; *Legal Tradition and Social Science Method*, BROOKINGS ESSAYS ON RESEARCH IN SOCIAL SCIENCE (1931) 89. And I have consistently rejected, and still reject, that line of hiding from the issue which insists on *both* seeing the discipline whole, *and* (though there is not enough tested knowledge available) at the same time treating the result as if it were objective science—a line best typified by those German categories *Moralwissenschaft* or *Geisteswissenschaft*. But as I get deeper into what (with all the deficiencies of present knowledge at large and of my own in particular) begins to look like a view of the whole, I begin to seem to find certain probable permanent values for Man emerging (not as guesses, nor as desires based on personal temperament, nor as local-culture conditionings, but as, conceivably, partly testable long-range objective values) out of the study of recurrent situations and the behavior-sequences within them. One fools oneself with peculiar unconscious skill on matters of this sort. Nonetheless, here is the interstitial report for what it is worth—if anything. *Cf.* my Chicago lectures on "The Beautiful," and on "The Good," in Law.