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JURISPRUDENCE ON PARADE

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JURISPRUDENCE is part of the pageant that makes history. This is a truism that, it may be added, obtains irrespective of the view held as to the significance of general legal theory. To some, the constructs of jurisprudence may seem but laggard symbols of more vital facts and trends. The degree of the lag exhibited by the more celebrated of such constructs may suggest to an anthropologically-minded observer, such as Thurman Arnold, that the apparent function of jurisprudence in the present social climate is neither to represent reality nor to control the administration of justice, but rather by the magic of ritual to lend to the pageant the promise of paradise human beings still desire of the law that they may be reconciled to the uncertainty, confusion, injustice, and frustration of actual life. On the other hand, those of idealistic bent will, with Holmes, conceive theory as the significant part of law; for these, ideas set the tunes to which the pageant marches. Some of these, perhaps a Kelsen or a Morris R. Cohen, will insist the tunes derive from astral postulates of a metahistorical order, postulates beyond the contingencies of time and space and mysteriously therefore of ultimate significance to the physical world to which law applies. Even on this esoteric view, it is apparent that the categories of jurisprudence are part of their times.

Of this relation, the recent progress of juristic theories in the United States affords interesting illustration. In the glamorous Twenties, for example, American jurisprudence imbibed animated assurance from the current optimism. The jural air was rife with seminal ideas. Sociological jurisprudence pervaded the legal world, a gospel that promised constructive, if measured, progress and bestowed its contagious benediction upon a veritable ferment of reform. "Law in action," functional, pragmatic, institutional, and behavioristic approaches to the problems of law, the discovery of scientific method, cooperation with other social sciences, and corresponding emphasis upon legal research—such aspirations formed the heady brew that then served to enliven the sphere of legal discourse and to enlarge its traditional horizons. Under the stimulus, novel methods of legal instruction were envisioned, graduate training in law was extended to new

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areas, and even the long-established undergraduate curriculum, which in 1920 appeared as impermeable to innovation as once did the mediaeval *trivium*, was earnestly analyzed and in significant quarters succumbed to incipient reform. In the melioristic enthusiasm, subjects somewhat apart from the main streams of interest also profited: there was a modest revival of legal history and comparative law, as well as of legal theory, while a select cult of legal analysis concerned itself with such matters as Hohfeld's scheme of fundamental legal conceptions. Meanwhile, there was organized effort to improve the practical administration of justice. The Cleveland Crime Survey inaugurated an epidemic of corresponding factualistic studies, culminating in the National Commission on Law Observance and Enforcement, that promised to reveal the causes of crime as well as the defects in the judicial system. To streamline this system, admittedly antiquated, judicial councils were organized in a majority of the jurisdictions in the country. An imposing organization of the leadership of the bar and legal scholarship, the American Law Institute, was established to prepare a code greater than that of Justinian, the Restatement of the Law, designed, through authoritative formulation of the existing principles of the Common Law, to clarify the confusion and to relieve the burden of the enormous system of precedents, under which the bar had intermittently groaned for more than a century. To foster the new directions of legal inquiry and reform, new schools and institutes were founded, and notable benefactions to existing institutions were made to augment, house, and supply the expanding needs of legal education and research. These monuments celebrated and sought to perpetuate the hopes of the renaissance of jurisprudence in the Twenties.

Came the dolorous Thirties, and what had for a time seemed a temporary recession in business conditions deepened into the great depression. Promising projects were deferred, and enterprises of some hope in legal education and reform had to be reduced in scope or abandoned. Moreover, it became apparent that, in certain respects, the optimistic anticipations of the Twenties were, if not vain, at least difficult of achievement. It could be observed that the chief product of intensive effort to reform the legal curriculum was a new series of casebooks that but modestly represented the expanded area of legal science; that, despite extensive surveys of law administration and enforcement, the judicial system still creaked along under an accumulating burden of litigation, under conditions relatively unmodified; that the most monumental accomplishment of the new legal science, the Restatement of the Law, though still in process, gave little evidence

that it could clarify or stem the muddy multiplicity of the laws. If such interruptions and disillusionments were calculated to lend a cautious accent in the evolution of legal ideas, their pessimistic impact was relatively insignificant as contrasted with that of the social problems, rendered acute and conscious by the depression, that sprang from the soil from every quarter and in every land—problems epitomized in the United States in the New Deal philosophy that substituted the thesis of emergency for the myth of "normalcy" to launch with urgent courage a vast variety of social and administrative experimentation. Meanwhile, in the world at large, analogous pressures generated political movements and attitudes that degraded international relations in the name of reasons of state, and a tragic trend to resolve the pressures by ultimate recourse to war became progressively evident.

Such conditions necessarily had a profound, if impalpable, effect upon jurisprudence. Inevitably, its progress became less eager, more hesitant, as the rosy promise of the Twenties merged into the shadows of the valley of the depression, where hopes and fears, moral purpose and cynical activism, were embattled in confused melée, and as energy that might have gone into the development of legal science under normal conditions was diverted into the maelstrom of necessitous reform and administrative office. In the juristic world as such, two characteristic reactions to the situation appeared, which may be described, respectively, as a relapse to realism and a recession from reality. The first reaction, not without its antecedents, was definitely indicated in 1930 by two publications that have been commonly taken as inaugurating American legal realism, as the movement is somewhat ineptly termed. The first was a brilliant article in which Llewellyn proclaimed a realistic jurisprudence as the next step[1] and the second, Frank's *Law and the Modern Mind*, a work that must be deemed, in view of the attention it received, one of the significant contributions to American legal thinking during the past decade. The critical attack upon rationalistic traditionalism, the subordination of legal doctrine to social reality, the emphasis upon the relativity and uncertainty of law as actually administered, the call to a more sophisticated and experimental attitude to legal problems, announced in these and succeeding contributions to the realistic movement, challenged the complacency with which conventional jurisprudence had been conducting its vocation.

The challenge precipitated the second reaction to which reference

[1] "A Realistic Jurisprudence—The Next Step," 30 COL. L. REV. 431 (1930).

has been made above, the recession from reality. Appropriately and in short order, a counterattack emanated from the headquarters of the recognized schools of legal philosophy. None has juster cause to be jealous of a pretender than the king who sits upon the throne. The acknowledged leader of sociological jurisprudence, Roscoe Pound, recognizing the advent of a new juristic school, launched a most subtle argument to envelop its positions; recalling that various legal philosophies had failed to rationalize law in terms of an absolute reality or significance, he proposed that the new emphasis (in which indeed there was nothing new) was but one of the points of view to be taken into account in an adequate theory of law. To substantiate this argument, it was of course necessary to accentuate the traditional and idealistic aspects of law that realism was proposing to deëmphasize, to stress "Received ideals, conceptions, the quest for certainty and uniformity, an authoritative technique of using authoritative legal materials, settled legal doctrines and modes of thought, and a traditional mode of legal reasoning,"[2] as actual and therefore significant phenomena of the legal order. Simultaneously, Morris R. Cohen, a philosopher distinguished as the leading exponent of scientific and logical methods in law, more directly charged the new movement with the alleged sins of nominalism and suppression of the basic normative constitution of law.[3] If the first of these counts, however true, may seem quite irrelevant to any but professional epistemologists, the second reinforced Pound's insistence upon the significance of the ideal postulates of juristic theory. It is not necessary to consider the merits of these arguments to discern that both made toleration the basis of attack; "But in the house of jurisprudence there are many mansions," said Pound, while, not without a certain pathos, Cohen responded, "My own program may be a puny one but it has a right to live."[4] Under the conditions on which issue was joined, this effort to maintain the status quo in the house of jurisprudence involved a recession from reality in the direction of Platonism. This trend, it may be added, apparently inspired a neo-scholastic development at the University of Chicago, devoted to the exposition and study of "the principles and rules which constitute the law."

[2] Pound, "The Call for a Realist Jurisprudence," 44 HARV. L. REV. 697 at 699 (1931).

[3] M. R. Cohen, "Justice Holmes and the Nature of Law," 31 COL. L. REV. 352 (1931).

[4] Pound, "The Call for a Realist Jurisprudence," 44 HARV. L. REV. 697 at 711 (1931); M. R. Cohen, "Philosophy and Legal Science," 32 COL. L. REV. 1103 at 1118 (1932).

Though it is not pertinent to this occasion to review the further evolution of this interesting discussion, reference should be made to a third and highly original reaction to the realist program, formulated by Thurman Arnold in two acute, if somewhat discursive, works, *The Symbols of Government* and *The Folklore of Capitalism*, published respectively in 1935 and 1937. Discarding the effort of the realists to reconcile the legal and economic theories upon which society thinks it operates with its practices, the anthropological analysis projected in these works assumes that such theories form an integral part of the phenomena to be studied by social science. In effect, the argument presented is that, while fundamental principles are essential to the maintenance of human institutions in an environment that needs rational symbolisms to justify what is, such principles to serve the purpose must admit of the dramatization of so many conflicting ideals—the "little pictures" that society interposes between itself and the real world—that "no systematic set of doctrines can ever be used as either explanations or predictions concerning the habits of an institution."[5] Accordingly, jurisprudence was characterized as a species of folklore or ceremonial ritual. Curiously enough, the conclusion was, without intent, corroborated by its critics; among other things, they suggested that, by reducing indiscriminatingly all social theories to folklore, the analysis placed itself in that category and therefore taxed Arnold for failure to set forth a persuasive theory of social objectives. This substantiated the major premise that at present the social need in law and economics is for folklore rather than scientific observation.

These incomplete preliminary observations may serve to set the stage for a necessarily cursory review of certain recent contributions to the American pageant of jurisprudence. These include three series of lectures, two studies of the philosophy of legal realism, a popular representation of an intriguing Swedish theory of law, a projected sociology of law, and an instructive analysis of the theory of legal science.

I. *The Polemic Against Legal Realism*

It is appropriate first to consider the contribution of the first American jurist, the recent series of lectures on contemporary juristic theory by Roscoe Pound.[6] As contrasted with the magistral and eminently judicious survey of American juristic thinking in the twentieth century

[5] ARNOLD, THE SYMBOLS OF GOVERNMENT 10 (1935).

[6] CONTEMPORARY JURISTIC THEORY. By *Roscoe Pound*. Claremont Colleges. 1940.

published but a few months before by the same eminent scholar,[7] the present lectures can only be described as a macabre joust with the philosophy of legal realism in an atmosphere of consummate tragedy. Here is one, appalled at the spread of political absolutism, who attributes the portentous wave of increased regimentation by discretionary administrative processes to give-it-up philosophies of legal realism that deny the essential "oughtness" of law, who fully perceives the psychological, logical, and historical justification of these philosophies and reluctantly admits that idealistic legal philosophy has begged the question as to what ought to be, who is constrained to confess that the successive doctrines as to the ends of law give not so much a measure for resolving the essential problem of law, the valuing of interests, as a starting point for reasoning and the application of standards, and who therefore is driven to found his inexpugnable hope of an ideal philosophy in the experience to which the realists themselves appeal and its content in the traditional practices of the legal profession. To the amazement of the reader, the argument concludes with the admission that the ideals, the authoritative pictures of the social order, in accordance with which justice is now being administered do not comport with the present needs of society, or, in the words of the concluding paragraph, that

> "It is bad social engineering to administer justice to a blue print of a society of the past as a means of maintaining the jural postulates of civilization in a different society of the present."[8]

It is as if King Canute, even while defying the waves of the sea to approach the royal throne, should suddenly realize that his feet are getting wet. For the concluding admission destroys the validity of the last sanctuary in the argument to preserve the authority of law on some rational ground other than brute force.

It would be presumptuous and not without peril of misstatement to summarize the rich allusion and suggestive analogy with which the theme that a constructive legal philosophy is needed to avert the wave of absolutism is embroidered. It may, however, be useful to refer to certain points in the argument that do not carry complete conviction, if only to refer them to the judgment of the interested reader. The first

[7] "American Juristic Thinking in the Twentieth Century," A CENTURY OF SOCIAL THOUGHT 143 (1939).

[8] POUND, CONTEMPORARY JURISTIC THEORY 83 (1940).

refers to the thesis developed in these lectures that legal realism is the intellectual twin of political absolutism, a supposition which appears open to question on several counts. In the first place, the character attributed to realism is a caricature; we read for example:

> "The juristic absolutism, which is so widespread today as a reinforcement of administrative absolutism, assumes, it presupposes, that in the nature of things it is psychologically impossible for the judicial process to operate objectively and impartially. Hence, the apparatus of principles and rules... by which for centuries men have sought to constrain the process to operate uniformly and predictably and objectively is futile. Its supposed achievement of that purpose is a delusion. Our faith in it is superstition. Behind the supposed principles and rules and conceptions, the true moving forces of decision are operating independently. It is not scientific to take account of more than the individual decision itself. Thus it follows that what is done in the course of judicial decision is law because it is done, not done because it is law. The attempt to hold down the individual judge to legally prescribed paths of action is futile. Legislator, administrative official and judge may as well be left free in theory to pursue their own paths to the general good each in his own way, since in practice they will do so in any event. If we think in this fashion, the way out does seem to be a postulated all-wise leader with no limits to his power."[9]

Now, despite such loose language as may occasionally have been vented in the literature of legal realism, one who has stood somewhat outside the realist position may note that, in this construction of its philosophy, there are at least two vital assumptions that no realist need admit. The first is that for realism there can be no classification of judicial determinations; that each case is in all respects unique. This resurrects the exploded supposition that, certain realists having adopted a nominalistic vocabulary, realism necessarily excludes the possibility and usefulness of general conceptions denoting classes. Whether such conceptions be regarded as mental constructs, as the nominalists may suppose, or as Platonic essences, as the transcendentalists may urge, is not significant in this connection. What the realists have pertinently pointed out, however, is that frequently a legal situation may be classified under several such general conceptions, thus rendering it necessary

[9] Id. 10-11.

to look beyond the preconceived conceptual scheme for a basis of determination.[10]

The second exaggeration in the character attributed to legal realism is that it assumes principles and rules to be without significance. Which is in effect to say that, unless one agrees that principles and rules themselves disclose their automatic effect in the judicial process, he denies that they have any effect. If the realists really believed that legal concepts have no significance, it would be difficult to understand why they have been so concerned about their real significance. The fact is that the realists, not unjustifiably supposing that *general* concepts may have little consequence apart from their specific connotations and perceiving the eminent possibility that certain of the rules and concepts may serve purposes other than appear on their surface, have been particularly concerned to ascertain the function and effects of the conceptual apparatus in relation to other factors affecting the legal order. That this inquiry has led them to deny to the conceptual apparatus sole or even primary significance in certain crucial types of cases, to suggest that particular conventional legal formulations do not adequately represent what is doing in the judicial process, is perhaps the occasion for objection on the part of those who attribute unique significance to the traditional, authoritative concepts. But the objection is not supported by its mere assertion.

A second point to which attention may be directed is that the argument linking the advance of political absolutism to the prevalence of pragmatic thinking in law glosses over a serious problem of historical causation. Naturally, governmental organizations will generate or adopt philosophies to justify their procedures. And, in an age when, as the author persuasively indicates, philosophic realism is in the air, such philosophies will probably be realistic. But to suppose that the realistic hen is necessarily the cause of the political egg takes no account of the possibility that philosophy and institutional practice may not only react upon each other but more especially may have common relations to a far more intricate nexus of circumstances than the argument remotely suggests. Moreover, it is pertinent to recall that, in at least two epochs when political absolutism was waxing big, namely, the classical period of Roman law and the early part of the seventeenth century, natural law philosophies, philosophies that the significant law is what ought-to-be, were in vogue. Indeed, the most thorough-going

[10] For a classic discussion of this problem, see Oliphant, "A Return to Stare Decisis," 14 A. B. A. J. 71, 159 (1928).

projection of political absolutism in the English language was predicated by Thomas Hobbes upon the basis of natural law. This may suggest not merely that the relation between realistic philosophy and political absolutism is by no means necessary, but even that realism may be ultimately less hospitable to despotism than a romantic idealism. For realism inevitably points to the effects of governmental action that idealism is satisfied to deplore.

The second lecture is devoted to the "give-it-up" philosophies, which the author deprecates on the ground that they tend to eliminate from law its vital element, the Ought. In an extremely instructive synthesis, the intellectual currents which have contributed to such philosophies are indicated—the growth of the idea of contingency in natural science, the emphasis upon observational techniques in social science, the influence of Marxian economic determinism, the undermining of the basis of Kantian metaphysics by modern psychology, and the appearance of Neo-Kantian logical relativism. In the face of the admission that the Neo-Hegelian and other idealist philosophic systems apparently postulate as given that which is to be proved as the end to direct the processes of social control, it is difficult to appreciate why the realistic position should therefore be impugned by the author. And it is still more difficult to appreciate why such views should be prejudicially tagged as "give-it-up" philosophies, in the face of the further fact stressed by the author that the systematic process of social control by politically organized society proceeds without as well as with philosophical direction. It would thus seem that the realists have given up merely the effort to rationalize the process in terms of an abstract, absolute *petitio principii;* there is no evidence that this abstention has incapacitated them to participate in reform—if anything, the contrary. The underlying difficulty in the argument at this point is the assumption that realism really eliminates the ought from social and legal science, a matter that may be conveniently discussed below.

The final lecture is addressed to the central problem of judicial valuation, conceived as a process of social engineering which is to be analyzed in terms of the inventory, classification, recognition, delimitation, and effectuation of interests. Here too the author finds the measure in historical legal experience:

> "What then," he asks, "is the practical measure of values which the law has been using where theories have failed it? Put simply it has been and is to secure as much as possible of the scheme of interests as a whole as may be with the least friction and waste;

> to secure as much of the whole inventory of interests as may be with the least impairment of the inventory as a whole. No matter what theories of the end of law have prevailed, this is what the legal order has been doing, and as we look back we see has been doing remarkably well."[11]

This analysis of the judicial process as social engineering basically effected by compromise, be it noted, approximates realism in the author's sense. In accepting Ihering's concept of interests and in assuming as the basic measure of valuation the maximal protection of the whole inventory of interests, the inherent significance and validity of asserted claims and pressures is recognized essentially on the ground of "is" instead of "ought." An observer, I believe it was Max Lerner, once remarked the radical antinomy between this conception of law as social engineering and the author's efforts to idealize law as an autonomous system of postulates. We too may wage a doubt whether even his redoubtable competence to reconcile disparate ideas and, as Mr. Dooley might say, to "unscrew the inscrutable," will suffice to resolve the antinomy. The fact is that no one has more suggestively or effectively contributed than the author to the fund of ideas that inspired the recent realist movement in American jurisprudence. From this point of view, his gradual recession from that commanding position, by virtue of increasing insistence upon authoritative traditional principles and techniques as the primarily significant criteria of justice in a changing world, bears a tragic aspect of schizologic aberration.

In the wake of this personage, we may note in the pageant of jurisprudence another champion, less like King Canute than Don Quixote, namely Professor Fuller, who also bears a lance against the realist trend in a series of lectures entitled *The Law in Quest of Itself*.[12] As these lectures have been more than adequately reviewed elsewhere,[13]

[11] POUND, CONTEMPORARY JURISTIC THEORY 75-76 (1940).

[12] THE LAW IN QUEST OF ITSELF; Being a series of three lectures provided by the Julius Rosenthal Foundation for General Law, and delivered at the Law School of Northwestern University at Chicago in April, 1940. By *Lon L. Fuller*. The Foundation Press, Inc. 1940.

[13] In addition to Professor McDougal's vigorous refutation in "Fuller v. The American Legal Realists: An Intervention," 50 YALE L. J. 827 (1941), the Iowa Law Review has published two successive reviews of Professor Fuller's lectures, 26 IOWA L. REV. 173 (by B. F. Brown) and 166 (by E. W. Patterson) (1940). Further reviews have appeared in the Boston University, Harvard, Louisiana, St. John's, Texas, University of Pennsylvania, and Virginia law reviews, as well as in the American Bar Association Journal, the American Political Science Review, and the Canadian Bar Review.

brief comment will suffice. After a survey of various systems of legal positivism, defined as "that direction of legal thought which insists on drawing a sharp distinction between the law *that is* and the law *that ought to be*,"[14] and among which American legal realism is included, the lectures are chiefly concerned to demonstrate that such theories, emphasizing the formal and logistic aspects of law, exercise an inhibitive effect "upon the development of a spontaneous ordering of human relations, in [their] denial of the force which ideas have without reference to their human sponsorship."[15] On this negative ground, supplemented by somewhat dire apprehensions as to the fate of society if legal realism is to continue to hold sway, the argument concludes with a plea for a "natural law" approach to legal problems, tolerating a confusion of the *is* and the *ought*.

The realism to which this assault seems to be directed is a straw figure, a fictitious realism. In the first place, as the reviewer had occasion to note some time since with reference to a similar assertion of Morris R. Cohen,[16] the classification of American legal realism in the category of positivism along with Austin, Kelsen, etc., is so superficial as to border on the perverse. As the author truly states, the typical interest of a genuine legal positivist is in logic and form, while the interest of the legal realists in these aspects of law is in a degree incidental to their interest in the function, operation, and consequences or, in other words, the substance, of law.

In the second place, the supposition shared by the author with Pound and Cohen, that the distinction between the "is" and the "ought" as proposed by certain realists tends to eliminate the normative essence of law and to inhibit the progressive development of legal doctrine, rests, it is suggested, upon a misunderstanding as to the significance and function of jurisprudence. The criticism assumes the term to designate a quasi-judicial activity in which the jurisprudent is envisaged as engaged in the determination of legal problems and the statement of doctrine with that end in view. The prevalence of this more or less unconsciously accepted construction is entirely natural, in view of the facts that it fits the normal and necessary attitude of the judge or practitioner engaged in the governmental activity of administering law, and that, under present theories of legal education, the law schools

[14] FULLER, THE LAW IN QUEST OF ITSELF 5 (1940).

[15] Id. 110.

[16] Yntema, "The Rational Basis of Legal Science," 31 COL. L. REV. 925 at 946, note 62 (1931).

are customarily presumed to train lawyers for such activity. On the other hand, a scientific, or anthropological, examination of the several factors in the process of government by law, including specifically the behavior of lawyers and judges, without imagining such inquiry to be an immediate form of government, is both possible and desirable. This sense of the term "jurisprudence" is not inappropriate to the realist point of view. If so understood, the realist distinction between the "is" and the "ought" becomes a laudable effort to distinguish the attitude of scientific inquiry from governmental activity and reformist urge. It neither eliminates the normative essence of law nor precludes investigation of the relations between legal doctrine and social needs. As the reviewer has stated elsewhere, a simpler solution of this question, which cannot be more fully dealt with here, is to deny the supposed fundamental significance in legal science of the distinction between *sein* and *sollen*, to regard it as a matter of degree, attitude, or formal statement.[17] After all, if the "ought" is significant, it "is" and as such is meat for the realist. But it does not follow that jurisprudence should always be defined as an "oughty" science, replete with half-cocked platitudes. Or that legal realism divides "is" and "ought" in the sense supposed by its critics. They do.

II. *A Restatement of Legal Realism*

One of the complaints sometimes made about legal realism is that it has a supposed anti-rational tendency. It may therefore provide the realists with some ground for amused relief that Professor Fuller has discovered their egregious difficulty to consist in a positivistic hyper-conceptualism, which inhibits an unabashed "spontaneous" (which is to say, irresponsible) projection of ideas about law. If, however, this charge be insufficient to lay the innuendo of anti-rationalism, a complete disposition of the matter may be found in the stimulating consideration of *Law as Logic and Experience* by Professor Radin, which is the third series of lectures to be noted.[18] As contrasted with the somewhat dismal, if not desperate, atmosphere of the two works just noted, attributing to the current realistic philosophies an almost grotesque and sinister political influence, the account given in these lectures of the parts played by logic and experience in the life of law breathes an air of vital humanity and harmonious proportion. It is at once sane, urbane,

[17] Id. 953-955.

[18] LAW AS LOGIC AND EXPERIENCE. (The Storrs Lectures on Jurisprudence, Yale School of Law.) By *Max Radin*. Yale University Press, 1940.

judiciously judicentric (to appropriate Patterson's expression), irritatingly discursive, here and there pedantically incorrigible, more often incorrigibly pedantic in historic allusion, and withal delightful. Along its wandering course are a variety of fruitful and, in some respects, original conceits. The best that a reviewer can do is to isolate a few of these for the reader's attention.

Having noted that law as logic is necessarily tautological and that the illusion of movement in the process of legal logic has been shown by Cardozo to be backwards from conclusion to major premise, the first lecture emphasizes the significant, because obvious, point that the experience which is the life of law is "not the experience of lawyers but of nonlawyers and has of itself no legal content or coloring or function."[19] Thus, it becomes legal fact so soon, and only so long, as it is dealt with professionally by lawyers. Legal experience is nonlegal experience set in motion by lawyers. This penetrating observation leads to certain further suggestions of considerable interest respecting the scope and function of law.

First, the law deals typically with marginal situations, recognized as abnormal, not by the law, but by society itself. The vastly greater part of human experience is nonlegal, untouched by lawyers. Second, law has accordingly no exclusive jurisdiction over experience, as the historic conception of law as commanding what is to be done and prohibiting what is to be left undone suggests. So the author remarks:

> "That, one might imagine, is a large order. To do what we ought to do and leave undone what we ought not to do is nearly the whole duty of man. If law does all this, what is the function of ethics, of religion, of morals, of education?"[20]

Third, if the conception of law as command thus errs on the one hand in exaggerating the sphere of law, it fails on the other hand to account for a part of that sphere, originally of primary and still of major, importance, the definition of liberty. Remarking that "the relation of 'ought' and 'ought not'—the duty-right relation—is somewhat less important than the relation expressed by 'may,'" the author continues:

> "That is to say, a description of law, which derives from the notion that law 'regulates' our conduct, errs not only by excess but almost equally by defect. For purposes of legal discourse, the part of human experience which the law declines to direct, or to

[19] Id. 17.
[20] Id. 18.

attempt to direct, is nonetheless very much its affair. The life of the law includes as one of its notable elements the sense of being free from legal direction."[21]

Finally, in view of the limited area covered by law, it is futile to look to law as a significant means to cure the fundamental evils of society or to advance civilization. If we may transpose the author's remarks:

"The law is not right reason, nor the means of the good life, nor the framework of society, nor the foundation of the world, nor the harmony of the spheres. ... So far as those are concerned who think of law in its relation to other social forces, the only active participation they can have in the process of advancing civilization is to insist consciously on the opportunities that just men may find in the technique of legal judgment and neither to belittle the opportunity nor to impose upon it a moral obligation that will render it futile."[22]

It is not necessary to labor the pertinence of this analysis to the current controversies concerning legal realism. A second theme is of scarcely less interest. It is that, the judicial process being for the most part *post mortem*, its object is typically to reconstruct experience as the basis for decision; that the experience brought before the court is necessarily an experience, dead and gone forever, that cannot be resurrected and can be only imperfectly guessed at; at that the futility of the attempt to recall the past is obscured in highly artificial logical rules of evidence, which are really directed to the trial drama; that, in fine, in the author's words:

"The task of the court, therefore, to do the impossible thing, to reconstruct the past, has been performed in the way in which fallible human beings much addicted to self-deception would be likely to perform it. We go on pretending that that is what we should like to do and then proceed to spend our energies in doing something else, that is, in constructing a wholly imaginary picture out of what is said and done before our eyes, in which picture every element is a generalization of one of the elements actually present."[23]

This argument of the inability of the judicial process to reproduce

[21] Id. 20.
[22] Id. 163.
[23] Id. 62.

accurately the facts which it has to judge, added to the impossibility of reducing law in its sporadic contacts with life to a system of Euclidean mathematics, leads to a very practical discussion of the role of compromise in the legal process, or, in other words, of the possibility and desirability of basing judicial determinations not upon attempted reconstructions of the past but upon anticipations of what may be advantageous in the future. In this connection, the author adverts to the use of arbitration and forcefully argues that in various types of cases the issues of right and wrong are so obscurely balanced or so incalculable as to render it neither feasible nor expedient to judge in terms of strict justice. His plea for wider recognition and extension in the administration of justice of the principle of prevention instead of retribution, except where the moral issue is clear, is most persuasive.

Of similar interest and significance is the argument advanced by the author that, while lawyers are not as a rule equipped to determine the punishment to be meted out to criminal offenders, this being a matter for which special training in penology is requisite, they do have an important duty to perform in the administration of the criminal law, a duty with which they may be appropriately entrusted, namely, the task of preventing the punishment of unpunishable persons.

We may leave this interesting and significant contribution to contemporary jurisprudence with two observations. The first is that, as is largely true of American juristic literature, the preoccupation is with the judicial process and the determination by that process of private claims. This limitation appears specifically in the emphasis upon the law's concern with individual human beings rather than groups and in the consideration of litigation affecting classes in the community rather than individuals. Convinced and not without justice that the judicial process is ill-adapted to deal with such cases, the author somewhat cavalierly dismisses them to the spheres of politics or administration. By such exclusion from law, the broad fields of public law, including the relations between official and citizen, are measurably left out of consideration, despite the fact that the lawyer has increasingly to participate in the solution of problems lying in those fields. A second fringe in the account given of law appears in the final lecture in which a place in the judicial process, restricted perhaps but nonetheless essential, is asserted for equity, understood as a sense of justice beyond logic or experience. If this be not a reference to the transcendental as an element of judicial valuation, it at least admits into the sphere of law an irrational if appealing moment of intuition. The necessity for this

admission, stressed by the author, lies in his basic hypotheses, namely, that logic cannot move forward and that experience is nonreproducible.

III. *Realistic Theories of Justice*

If the element of justice, realistically considered, is thus made to appear by Professor Radin as a basic but undefined *X* in the legal process, two recent contributions to the literature of legal realism, which it is now pertinent to note, profess to ascertain its theoretical nature and content. The first of these is a monograph, especially useful in that it includes the most complete bibliography of American legal realism now available, *Legal Realism and Justice* by E. N. Garlan.[24] This study has a primarily philosophical orientation, and its purpose, as explained by the preface, is to formulate a theory of justice that will be adequate to modern insights and activities. The theory presented is constructed upon "the methodological basis provided by a realistic approach to law,"[25] since, as the author states, legal realism is not a mere juristic sect but most nearly expresses modern attitudes.

Justice, in this theory, is the "entelechy" of law. Its concepts are pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative. In other words, justice is the perennial quest for improvement in law, functioning as a symbol to represent the need of constant criticism and constant adaptation of law to the changing society that it articulates. It expresses the eternal motive of legal reform, "the insistence that law is the means to ends, making achievement, realization, preservation, and constant criticism always relevant to judgment."[26] In sum, justice is defined less by the ideals that may be sought than by the search for better law.

This thesis, which supposes that a philosophical theory of justice is in essence a methodology intent on the constant adjustment of law to the varying patterns of changing society, an assertion of the teleology of law, is predicated upon extensive examination of various concepts, ends, or standards by reference to which it has been attempted to define justice. After a brief resumé of the tenets of legal realism and an instructive discussion of the inherently problematic nature of the legal process, indicating that the determination of what the law is necessarily requires a selection, out of the multiplicity of possible solutions, of that

[24] LEGAL REALISM AND JUSTICE. By *E. N. Garlan.* Columbia University Press. 1941.

[25] Id. xi.

[26] Id. 131.

which is desirable, and that such selection requires a valuation of competing concrete claims, a succession of formulae, usually deemed primary in the definition of justice, are reviewed—the appeal to reason, public policy, due process, impartiality, equality, the sense of justice, peace, decency, reasonable satisfaction, benevolence, the ethical sense, natural law. The details of this review, albeit interesting in various respects, may be left for the reader's perusal of the volume. In general, it suggests the incompleteness, taken individually, and the lack of unity, taken together, of the concepts analyzed and remarks that, in varying degree, their indeterminateness and elasticity serve to enlarge the considerations taken into account in adjudication and to justify the adaptation of law to new needs.

In this analysis, so far as appears, the concern is exclusively with the judicial process, and the possible bearings of the thesis on the processes of legislation or administration are not canvassed. It also suggests a question as to the function of a theory of justice. In this connection, the author's observations upon Arnold's position with respect to theories of government,[27] noted above, are of interest. The chief objection apparently is that Arnold seems to turn every theoretician in social science into a priest, important only as a producer of emotive symbols, and to draw "an almost vicious dichotomy"[28] between the projection of ideals and scientific observation. Although, in this connection, a distinction between hieratic and scientific approaches is admitted and, at a subsequent point in the discussion, it is stated that an investigation into normative problems need not itself be normative, it does not clearly appear whether or not the author opines that scitific observers should also be priests. And ostensibly the theory advanced is intended to provide a "theoretical underpinning for realistic evaluation and reform."[28a] The ambiguity may be taken to reflect the basis for Arnold's criticism of the realist position.

Another effort to construct a theory of law adapted to the cultural pattern of modern times, but from a sociological rather than solely a philosophical point of view, is of special interest as suggesting a possible bridge between law and other social sciences. It is outlined in an essay, *The Significance of Function in Legal Theory*,[29] which is to form

[27] Id. 15 ff.
[28] Id. 15.
[28a] Id.
[29] 18 N. Y. UNIV. L. Q. REV. 1 (1940), also published as Series 2, Number 2 (1941) in Contemporary Law Pamphlets, New York University School of Law. [Since this review was written, the treatise LAW WITHOUT FORCE has been published by Princeton University.—*Ed.*]

a part of a projected publication on *Law Without Force* by the author, Gerhart Niemeyer. On the grounds that neither scientific positivism nor normative idealism resolve the essential problem in law, the relation between the "real" and the "ideal," and that external standards of morality have proved impotent in modern times as a compulsive criterion for value judgments, the author proposes an immanent standard of legal valuation. Such a standard, corresponding to the dynamic realism of modern times, it is stated, is to be found in a functional analysis of social institutions, in the study of human conduct which is socially relevant, since it has "an inherent functional destination."[30] It is pointed out that prior efforts to derive criteria of value from social reality have failed, since they were predicated upon individualistic or atomistic conceptions of society; therefore, function or the social end of relationships between individuals is definitely distinguished from private purposes having no necessary social significance. The thesis thus reached is that such functions, constituting elements of social structure organized by transpersonal ends as exhibited in the experience and actual conduct of individuals, determine the immanent standards of value of a given social order. This conception, reflecting the views of Hermann Heller,[31] is obviously more congruous with recent sociological theory than the comparable "balancing of interests" doctrine, originated by Ihering in an epoch of individualistic thinking, and at the same time suggests that the theory of valuation is to be controlled by examination of specific social relationships. Since it regards the meaning of factual social experience as determinant of the social order, it renders transcendental theories of valuation unnecessary. This is something, but it scarcely goes beyond establishing a perspective.

IV. *Law as Fact*

The lectures and essays thus far reviewed (with the partial exception of Professor Radin's lectures) are concerned distinctively with theories of judicial valuation or with theories about such theories. In contrast to this emphasis, a Swedish school of juristic thought, developed during the past generation by Hägerström and Lundstedt, subordinates the questions of judicial valuation in a more comprehensive and indeed ultra-realistic analysis of the legal process. Of this point of view, a brief, simple and most effective summary is now avail-

[30] Id. 13.

[31] HELLER, STAATSLEHRE (1934) (edited by Gerhart Niemeyer).

able in English in the recent work by Karl Olivecrona, *Law as Fact.*[32] As the title may serve to indicate, the purpose of the author is to provide an account of the operation of the legal system in which facts are treated as facts.

The inquiry in this volume (whose course can be but sketched in this review) commences with the question, Why is law binding? The obligatory force of law, it is pointed out, does not signify the fact that disagreeable consequences follow nonobservance, nor the feeling that law is binding (since it remains binding in the absence of any such feeling), nor any other observable fact; therefore, it is concluded, the obligation of law is an imaginary idea in human minds to which nothing in the external world corresponds. And accordingly, it is indicated that the notions that law has inherent authority as a normative system, or as natural law, or as the will of the state, are not scientifically tenable. What then is law? Law, according to this analysis, consists of independent imperatives setting up patterns of behavior for those whom the legislators wish to influence. As such, its rules are defined as "ideas of imaginary actions by people (e.g., judges) in imaginary situations."[33] The rules are cast in imperative form in order to obtain the desired effect, but they are independent imperatives, it is asserted, not commands, for the simple reason that nobody commands them, nor are they created by the state, for the equally simple reason that the state as a being existing apart from law is an illusion. How then are rules of law established? This, it is explained, is no mystical matter, but a pure question of cause and effect on the psychological level; thus, it is stated:

> "Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as 'binding' and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains. The general attitude towards the constitution places them in key-positions, enabling them to put pressure on their fellow-citizens and generally to direct their actions in some respects."[34]

The establishment of rules of law is therefore determined by the appropriate act of the person or body of persons in whom the power of legislation is vested by the received constitution. It is always a pure

[32] LAW AS FACT. By *Karl Olivecrona.* Oxford University Press. 1939.
[33] Id. 29.
[34] Id. 53.

formality, accepted by the community as designating the patterns of conduct that it assumes to be obligatory.

From this picture of law start corollaries of some interest for legal analysis. In the first place, legal duties are imaginary; what really exist are certain feelings of obligation with which the idea of an imaginary bond is associated, a bond which Hägerström has plausibly argued originally derived from primitive magic.[35] Similarly, legal rights must also be characterized as imaginary, not objective, entities; to demonstrate the conclusion, an incisive analysis is presented to show that the concept of legal right corresponds to no external facts. It is emphasized, however, that the *ideas* of right and duty are not therefore without significance; on the contrary, the circumstance that such ideas are believed in greatly simplifies the establishment of patterns of conduct by law. The common belief of the people that they are in duty bound by the rules of law assures obedience, while the accepted ideas of rights or imaginary powers avoid the necessity of complicated and cumbrous reference to the infinite variety of possible situations intended to be covered by legislation. As Ihering once brilliantly pointed out, these concepts are the alphabet of law, perhaps the most significant contribution of the Roman genius in jurisprudence. The argument of course has a nominalistic direction, but to dislodge the conclusion it will be necessary to show what objective reality other than imaginary ideas legal rights and duties represent.

In certain respects, an even more fundamental corollary of the analysis is the relation established thereby between law and force. It is pointed out that, in the name of law, force is constantly being applied by state officials in every community and that its presence is indispensable to the maintenance of society—without it there would be no safety of life or limb, no security for the existing economic order. It is also pointed out that the most significant effects of this organized application of force are indirect and latent: the more effective such application is, the less resort there is to actual violence and terrorism; its "unbending pressure on millions and millions of people, keeping their actions within certain boundaries, is of infinitely greater importance for the community than the immediate effect of the sanctions applied"[36] in some thousands of instances. In this connection, the psychological basis of obedience to law is explained primarily by the fear of sanctions, very

[35] HÄGERSTRÖM, DER RÖMISCHE OBLIGATIONSBEGRIFF IM LICHTE DER ALLGEMEINE RÖMISCHEN RECHTSANSCHUUNG (1937). See especially pages 35 ff.

[36] OLIVECRONA, LAW AS FACT 142 (1939).

largely suppressed in the subconscious, and emphasis is laid upon the important role of law in the formation of moral standards, suggesting that the persistent application of force pursuant to law is more significant in the development of morals than vice versa. Finally, since force cannot be dissociated from law, it is concluded that the practical question can be only how force can best be utilized for common ends; it is like fire, indispensable but dangerous when not controlled. Two basic conditions for the desirable organization of force are postulated: first, force must be monopolized by an organization; second, its use by the organization must be controlled by rules. The "reign of law" signifies that these conditions have been appropriately satisfied.

The argument finds tragic illustration in the field of international law. In this field, it is suggested, sheer necessity has developed a system of rules, not without restraining effect, but the system of sanctions is so ineffectual and the rights recognized by the rules themselves are so loosely defined as to constitute an incitement to war. It need scarcely be added that events since this work was penned have abundantly exemplified the penetrating validity of the thesis that the life of law depends upon the monopolization and harnessing of force by the ruling organization. When these conditions disappear, the existing legal order is in peril.

V. *Sociology of Law*

This review of the pageant of current American jurisprudence must conclude with an all too brief reference to two distinctive and thoughtful inquiries concerning the possibility of developing a social science of law. The first of these by N. S. Timasheff[37] proposes to stake out a pioneer field for scientific investigation, described as the sociology of law, and offers a substantial exposition of its proposed subject matter, which is of special value, among other things, on account of the extensive bibliography included and the formidable array of references appended to each chapter. This new science, proposed as a branch of sociology, is characterized as a nomographic science; it seeks to discover causal-functional uniformities in socio-legal phenomena. In respect of its object, the projected field is defined pursuant to the analysis of the forms of social coördination adopted, an analysis resulting from the crossing of two distinctions, on the one hand, between ethical and

[37] AN INTRODUCTION TO THE SOCIOLOGY OF LAW. (Harvard Sociological Studies, Vol. III.) By *N. S. Timasheff*. Harvard University Committee on Research in the Social Sciences. 1941.

nonethical coördination and, on the other hand, between imperative and nonimperative coördination. There are thus three possible and practically significant forms of social coördination, (a) the ethical but nonimperative, as exemplified by custom and morals, (b) the imperative but nonethical, as in the case of despotic government, and (c) the ethico-imperative or legal form of social coördination. The subject matter of the sociology of law is accordingly defined as the determination and coördination of human behavior by the existence of legal norms. This analysis fixes the structure of the treatise; it divides into four parts, the first an introductory discussion of the place of law in sociology, the place of the sociology of law, and the prior history of the proposed discipline, and the remaining three parts devoted to the exposition of the three forms of coördination, the ethical, the imperative, and the legal, considered as equilibria and with respect to their differentiation and change. In addition, in the part relating to law, consideration is given to the integration of law in culture, the phenomena of legal disequilibrium and disintegration, and the vindication of law, the last topic being a refutation of various utopian schemes of thought proposing the abolition of law.

As may be apparent from the foregoing, a wide sweep of particular problems is involved in the subject matter, too wide in fact to be given appropriate detailed consideration in this connection. This omission, the more regrettable on account of the comprehensive and lucid organization of the contents, will perhaps seem tolerable in a review of current jurisprudence, since the work falls specifically into the realm of sociology rather than law, as indeed the author is at some pains to justify in the initial discussion of the place of the sociology of law. Moreover, it does not appear that the legal materials, certainly not the materials of Anglo-American law, have been intensively covered, so as to offer significant discoveries of detail of interest to jurisprudence. From this point of view, the chief interest of the work is as an exploration of the possibility of a sociological formulation of external legal data. As such, it adopts a criterion of law, which, in company with recent trends in political theory and the Swedish school of legal thought epitomized by Olivecrona, stresses in the sphere of law the element of force or power. At the same time, it limits the sphere to such social exercise of force as is associated with an ethical group-conviction. This general thesis, which has the distinctive merit of raising basic issues as to the ground for a sociological study of law, however, involves certain questions that it is permissible to note without descending to detail.

The first question is as to the propriety of thus limiting the field of law for the purposes of sociological investigation. The limitation, to be sure, is put forward as an hypothesis, and the existence of peripheral cases is recognized. It is stated:

> "It is highly probable that the treatment of law as ethico-imperative coördination covers the cases of which most people think when speaking of law; legal order is constituted by patterns of conduct enforced by agents of centralized power (tribunals and administration) and simultaneously supported by a group-conviction that the corresponding conduct 'ought to be.' There are peripheral cases: the highest rules of constitutional law and the rules of international law seem to lack the support of centralized power; on the other hand, such rules as, for instance, those regulating traffic on the highways or customary regulations seem to lack any relation to group conviction."[38]

The question raised by this view turns on the significance of the matter thus excluded from law. In addition to the large body of legal rules, such as the traffic or customary regulations noted in the passage cited, which involve considerations of expediency or efficiency rather than ethics, there is the even more important area to which Professor Radin has pointed and in which the legal system is concerned not to vindicate rights but to declare liberties. In short, the question is whether the omission of items so substantial from the sphere of law does not bias the proposed definition. In connection with this observation, a second question is suggested by the thesis as exemplified in its application to the subject matter. Ostensibly, the purpose is to segregate the field of ethico-imperative coördination for sociological investigation. However, in the execution of this purpose, it apparently seemed essential to consider, equivalently with the legal, the ethical and imperative forms of coördination, on the ground that the legal form is a subspecies of each of these generic categories. Thus, the author's project to isolate a specific field for the sociology of law is defeated in its execution, since it involves examination of all the significant forms of social control envisaged.

The third and in some respects the most serious question is whether the enterprize as conceived is not now abortive. It purports to develop a causal-functional theory of legal phenomena, to construct a postulational analysis of equilibrium, differentiation, and change in law, not

[38] Id. 16–17.

immediately related to investigation of the specific phenomena and at a point in the development of the comparative legal inquiries basic for such a theory, that can only be described as primitive. It is of course entirely possible that, even under these conditions, the projection of theory may stimulate further and more specific studies, and therefore such efforts need not be too much discouraged. But there is also the eminent possibility, under such conditions, that theories so projected may be quite superficial or irrelevant, even as theories, merely on account of their inadequate basis. It is of course not pertinent here to consider the analogous issue from the viewpoint of sociology, though it may be of interest to remark in passing that, from that viewpoint, the thesis has been criticized on corresponding grounds as a belated effort to create a sociological philosophy of law or theory of values.[39] In this connection, the distinction proposed between the sociology of law and jurisprudence on the ground of their methodological differences is also in issue. This distinction is predicated upon a more general distinction between nomographic and idiographic science, between general theory and the study of particulars, which, however, appears equally artificial for reasons corresponding to those indicated. Nevertheless, if the distinction be regarded as not of kind but only as relating to the degree of reference to specific data, it is not inadmissible. So conceived, the sociology of law may appropriately be regarded as one of the possible and more theoretical aspects of legal science.

VI. *Jurisprudence as Social Science*

In contrast to this proposal to isolate a field for the sociological study of law, distinct from jurisprudence, is the analysis of the theory of legal science just published by Huntington Cairns,[40] in which the integration of jurisprudence with social science is in effect advocated. It offers an exact, careful, and challenging exposé of the methodology of jurisprudence conceived as a social science, concisely brilliant in detail, comprehensive in perspective, which reflects the author's wide acquaintance with the literature of social science and scientific method. Its thesis conceives of jurisprudence "as the study of human behavior as a function of disorder." The methodological ideal, the subject matter,

[39] Gurvitch, "Major Problems of the Sociology of Law," 6 J. Soc. PHIL. 197 at 199 (1941).

[40] THE THEORY OF LEGAL SCIENCE. By *Huntington Cairns*. University of North Carolina Press. 1941.

and the objective of a jurisprudence so conceived may be most adequately suggested in the author's persuasive summary:

> "Thus," he states, "the theory of jurisprudence as a social science marks off a field of inquiry which differs radically from that explored by the major present-day American schools. It differs first in its ideal, which is the ideal of the other social sciences, namely, the formulation of statements asserting invariant, or almost invariant, relationships among the facts in its specific field and, in its special case, the organization of such principles into a coherent system in conjunction with a rational theory of ethics. Secondly, it is concerned with a different subject matter. Its point of departure is not law as such, but human behavior as influenced by, or in relation to, the social factor of disorder. If the attempt is successful to create a jurisprudence which is in actuality a social science, it requires little reflection to grasp the importance of that result. We are living today in a human world which is under reconstruction. The focal point of human action is shifting; new claims, new demands, are calling for recognition. Our theory of law as we know it now is founded upon a view of a society which is in a rapid state of transformation. It is obvious that the law itself must be modified to meet the forces of the new society. . . . A social science jurisprudence aims at revealing to us the consequences of the various courses of action open to us. It aims to tell us in advance the perils which attend our various programs; to tell us which is the rational and which the irrational course."[41]

To portray the presuppositions and possibilities of jurisprudence thus regarded as a social science, concise consideration is given to a series of related topics, including the meaning of social order particularly as revealed in the appearance of custom, the influence of invention, communication, and social heredity in the formation of law, the current theories as to disorder and the nature of the inventive process, the application of scientific method in the study of human behavior, the problems involved in the analysis, classification, and alteration of human behavior, the theories of causality, functional dependence, and equilibrium, available for relating legal phenomena, and finally the question whether a normative valuation of values in jurisprudence is desirable at the present time.

The argument throughout is stimulating but far too compact and comprehensive to be briefly summarized; the most that can be here essayed is for the reviewer to note certain issues implicit in its course,

[41] Id. 9, 10.

for the rest recommending the volume to the reader's more exhaustive examination. For example, in justifying the principle of disorder as a vital factor in legal thought to provide "a point of departure for a systematic interconnection of legal facts,"[42] the assertion that social thought must start from concepts antithetical to the basic ideas of physical science,[43] suggests a subordinate difficulty. It seems inherently inconsistent with the position defined in the quotation reproduced in the preceding paragraph, as more particularly explained in the chapter on "The Method of Legal Science."[44] And it also is more or less refuted by the frequent and effective reference in the course of the argument on other topics to concepts evolved in the physical sciences.

The burden of the initial chapter, deprecating the current emphasis in legal research upon improvement of the administration of justice and leading to the conclusion summarized in the passage quoted above, involves a second query, also of subordinate significance. It would seem, curiously enough, that the motive for the conception of jurisprudence advocated, namely, the need to reform the legal system to meet new needs, which is also the motive of the trend in legal research deprecated, is the basis of the objection thereto. As the reviewer is signalized in the discussion as an apologist for the viewpoint criticized,[45] it should perhaps be noted that there is no disagreement respecting the importance of taking a liberal rather than a narrow view of the scope of legal research nor on the undesirability of confusing scientific method with its motive. Moreover and on the other hand, it is by no means obvious that a practical objective necessarily prejudices scientific method; indeed the recent development of research in medicine and physical science indicates that the almost inevitable relations between the direction of scientific investigations and the currently supposed practical ends are far from disadvantageous, even for the stimulation of highly theoretical inquiries. The truth of the matter is that it is relatively impertinent whether the motive of scientific endeavor be "pure" or sordid; the relevance of the subject matter to the inquiry in hand and the exact comprehension with which the data are examined, are what count.

In passing, mere reference can be made to a third source of query, the extremely subtle argument in the final chapter tending to the con-

[42] Id. 56.
[43] Id. 52.
[44] Id. 70 ff.
[45] Id. 7.

clusion that, at least for the time being, it is undesirable in the objective science of law envisaged to include ethics, or, in other words, the evaluation of legal values. Briefly and without entering at large upon this highly involved topic, to which allusion has been made previously in this paper, three remarks may be ventured: first, that, in the existing jurisprudential climate, the problem of evaluation is too central to be satisfactorily obviated; second, that a study of human behavior as affected by legal regulation will inevitably involve in some sense an evaluation of the values embodied in the system of regulation; and third, assuming that both law and ethics have a "normative" subject matter, the possibility of a descriptive-postulational science so cogently advanced for jurisprudence is equally plausible for the sphere of ethics.

Finally, the principal issue raised by the proposed conception of jurisprudence as a social science is its contemplated scope. Be it remarked, as the above-quoted passage will indicate, that the proposed delimitation of jurisprudence is in terms, not of law as such, but of human behavior as a function of social disorder. The area thus marked out is more specifically defined in terms of six elements or constant legal structures universally appearing within the various socially homogeneous parts of the earth, namely, the regulation of behavior with respect to individuals, associations subject to legal regulation, the community, property, promises, and administration or government.[46] Even so defined, this looks much like a claim on behalf of jurisprudence to a roving commission covering the social sciences generally. For it is not made clear whether the scope of jurisprudence is thereby described by reference to the regulated human behavior as such or to human behavior as regulated by law. The first of these constructions obviously does not afford a feasible basis for delimiting jurisprudence from other social sciences, since they may all with equal justice be so described (assuming the definition of disorder taken in the discussion). So much is in fact conceded with respect to political science, but the same situation obtains on this construction as respects the other social sciences. Now it is not meant to assert that the ancient boundaries of the social sciences should necessarily be observed. Indeed, there is much force in the consideration, which perhaps may have influenced the position urged, that these boundaries are unnecessarily artificial and, as Lynd has recently pointed out,[47] tend to discourage most-needed types of social science research. Moreover, it is undeniable that legal science

[46] Id. 93 ff.
[47] LYND, KNOWLEDGE FOR WHAT? 13 ff. (1939).

has been disproportionately preoccupied with immediate professional needs and has inadequately responded to prospective social requirements. But acceptance of this viewpoint directly involves the problem of establishing more advantageous bases for the necessary division of labor in social science. This is a crucial question of strategy in the effective disposition of research energies, which the alternative under consideration would but serve to complicate. On the other hand, the second alternative, which may perhaps be in mind, requires further elucidation of the distinctive criterion of law, whether as found in the employment of organized force, in the official agencies involved, in the specific techniques of social control resorted to, in the application of preformulated rules, in the normative character of the precepts applied, or in some combination of these or other supposedly characteristic features of law. This second alternative, which suggests that from certain points of view jurisprudence may be helpfully regarded as an applied science, by no means precludes coöperation with related disciplines, the utilization of all pertinent data and theories, or a liberal conception of scientific method in law. It is the great merit of this study to have laid emphasis on the high importance of these possibilities. The more modest conception of the sphere of jurisprudence in no sense discounts the desirability of what the author wisely advocates. It proposes merely that the desired objective is common to the whole university of social science.