

Jurisprudence and Legal Philosophy in Twentieth-Century America— Major Themes and Developments

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Jurisprudence and legal philosophy in twentieth-century America may be said to have begun around 1880 with the publication of Oliver Wendell Holmes's book *The Common Law*.¹ In this work, and in his widely read 1897 article "The Path of the Law,"² Holmes broaches, with varying degrees of emphasis, four themes that subsequently dominated American jurisprudence and legal philosophy: (1) the relation of law and morality, (2) the nature of legal rules and legal concepts, (3) the nature of judicial decision making, and (4) the relation of law to the social sciences.

In this lecture I propose to trace some of the main lines of development of these themes, through the work of leading and representative figures from Holmes to the late Lon L. Fuller. Given the time allotted me, important writers and much important material will have to be omitted from my account, and at various points the sketch will be drawn with a rather thick pencil.³ In order to get a handle on the subject matter, it may be helpful, though somewhat distorting, to think of American jurisprudence and legal philosophy (which I do not regard as two separate fields) as being roughly characterized by three perspectives or emphases in approach: (a) the historical, (b) the scientific, and (c) the ethical. It will not be possible to give equal time to how each perspective treats each of the four themes. The currents and cross-currents of influence and reaction are too complexly intertwined in any case.

There can be little doubt, however, that Holmes is the dominant figure in American jurisprudence. The American obsession with the nature of judicial decision making, for instance, is attributable to his writings. Much of the

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1. Oliver Wendell Holmes, *The Common Law*, ed. Mark DeW. Howe (Boston, 1963; first published 1881).
2. Oliver Wendell Holmes, *The Path of Law*, 10 *Harv. L. Rev.* 457 (1897).
3. There is a serious question as to who should be covered in this account and who should be excluded. I have excluded writers whose activity began after World War II, though I occasionally refer to a few of them for purposes of comparison. Post-World War II developments are excluded because many of their facets are represented in their own right at this Workshop. Hans Kelsen, to whom I also refer, resided in the United States from 1940 on. But his main work was done before then, and in any case he was not influenced by the American tradition. I should also add that although there is a large secondary literature (including some pieces by myself) on many of the figures I discuss here, I cite only primary source materials in this paper.

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later literature is an expansion of or a critical reaction to Holmesian ideas. To appreciate his accomplishment it is necessary to begin with a brief statement of the situation that prevailed in American legal thought before Holmes.

I. The Situation Before Holmes

Two features characterized this situation, a native (or perhaps better said, a naive) natural law tradition and what might be called "conceptualism." The former, which went back to the pre-Revolutionary period, appeared particularly in the guise of a natural rights doctrine, which was employed in numerous decisions of American courts. (See, e.g., *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190 (1904), an early right to privacy case.) When Holmes began writing, this tradition was understood very much in the form it took in Blackstone's *Commentaries on the Laws of England* (1765-17—). An examination of reports from 1787 to 1890 shows Blackstone to be the most cited writer in the various courts of the United States.

What we find in Blackstone is a set of ideas that, perhaps rather unfairly, have often been regarded as constituting an incoherent whole. In accordance with his medieval sources, Blackstone held that "no human laws should be suffered to contradict" the law of nature and the law of revelation.⁴ More important, though, was his definition of "municipal law" as a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."⁵ While Blackstone recognized that municipal law covered morally indifferent wrongs (*mala prohibita*), the hard core of law governed wrongs that are *mala in se* and natural rights; municipal law, however, added nothing to the force of these latter wrongs and rights. Personal security, personal liberty, and property were in fact called "absolute rights." Yet, Blackstone held, these rights can be limited, if permitted by law. Finally, and significantly for his numerous American readers, he held a declaratory theory of judicial decision: judges did not make the law, they merely declared it, so that "the decisions of courts of justice are the evidence of what is common law."⁶ Where a prior decision was evidently "contrary to reason" and therefore was rejected, the subsequent judge did not make a new law; it is not that the prior decision was bad law; rather, it never was the law.

The second feature of the prevailing situation I have called conceptualism. This position was represented by Christopher Columbus Langdell. There can be no doubt that Langdell was the object of Holmes's famous sentence—which is the most quoted sentence in all of American jurisprudence—in the famous opening paragraph of *The Common Law*: "The life of the law has not been logic: it has been experience."⁷ According to Langdell, as expressed in the preface of his 1871 casebook on contracts, the law consists of a limited

4. 1 W. Blackstone, *Commentaries* +42.

5. *Id.* at +44.

6. *Id.* at +71.

7. Holmes, *supra* note 1, at 5.

number of fundamental doctrines and principles, and “the cases which are useful for [tracing their growth] at the present day bear an exceedingly small proportion to all that have been reported.”⁸

Although Langdell was writing about the common law, his view is similar to what the Germans called *Begriffsjurisprudenz*. This is illustrated in his *Brief Survey of Equity Jurisprudence* (1905): “Absolute rights,” he said, “are either personal rights or rights of property. Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value.”⁹ Were it not for the interposition of the positive law, a debtor’s debts would be extinguished with his death, for, he wrote, “it is impossible that an obligation should continue to exist after the obligor had ceased to exist.”¹⁰ Basically, Langdell accepted the declaratory theory of judicial decision: the law preexists the case, and the principle of legal growth is that of logical development out of fundamental doctrines and concepts, which is the notion attacked in Holmes’s famous sentence. (Joseph H. Beale, a subject of attack in Jerome Frank’s *Law and the Modern Mind* [1930], held views similar to Langdell’s.) Langdell, Holmes wrote to Pollock in 1881, “represents the powers of darkness.”¹¹

II. Holmes and the Revolt Against Formalism

In his book *Social Thought in America* (1949), Morton White lists Holmes together with Thorstein Veblen and John Dewey as key figures in the “revolt against formalism” toward the end of the nineteenth century.¹² In Holmes’s case this was a revolt against the ideas just described, and it essentially involved the application of a historical perspective to the law. When viewed in this way, the law cannot possibly be seen as consisting of absolute rights and fixed doctrines out of which it grows by a process of logical development, by *elegantia juris*, the logical cohesion of part to part. The prime influence on Holmes was Sir Henry Sumner Maine’s *Ancient Law* (1861), which had used history to criticize certain views, which I cannot discuss here, about the origins and nature of Roman and primitive law. There were, of course, other influences: Bentham, J. S. Mill, Darwin, the “pragmatists” who circulated around Cambridge, and especially John Austin, who is frequently discussed in articles Holmes published between 1870 and 1880.

A. Law and Morality: External Standards of Criminal Liability

All these influences can probably be detected in *The Common Law* in the treatment of the relationship between law and morality, but its most distinctive aspect is Holmes’s historical argument for “external” or objective stand-

8. Christopher Columbus Langdell, *Cases on Contracts* vi (Boston, 1871).

9. Christopher Columbus Langdell, *Brief Survey of Equity Jurisprudence* 220 (Boston, 1905).

10. *Id.* at 126.

11. 1 Holmes-Pollock Letters, ed. Mark DeW. Howe 17, 2d ed. (Cambridge, Mass., 1961).

12. Morton White, *Social Thought in America* (New York, 1949).

ards of criminal liability. This argument was part of the larger reductionist project of “get[ting] rid of the whole moral phraseology which I think has tended to distort the law,” as he wrote to Pollock in 1927.¹³ According to Holmes, morality uses an “internal” standard to determine blameworthiness: it takes the mental state of the actor into account. A historical examination of the development of the law, he thought, shows a transition from subjective to objective standards of blame. Moreover, this development is as it should be when the law rids itself of such irrational dogmas as the equal right to life, liberty, and personal security, which are assumed by the Kantian retributivist theory of punishment. Most English-speaking lawyers, said Holmes, would adopt the (utilitarian) preventive theory “without hesitation.”¹⁴ The purpose of law is to induce external conformity to rule—“conditions of things manifest to the senses”—and therefore, Holmes (fallaciously) argued, it should employ external standards of liability. The true explanation of the rule that ignorance of the law is no excuse “is the same as that which accounts for the law’s indifference to a man’s particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good.”¹⁵

It is quite clear that the preceding argument employs a mixture of utilitarian, philosophical considerations and an appeal to history, as Holmes read it. Holmes sums up his position by saying that “while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, *by the very necessity of its nature*, is continually transmuting those standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.”¹⁶ The emphasized words bring out Holmes’s view that legal and moral concepts necessarily differ in content and meaning. But the statement as a whole is a clear echo of Henry Sumner Maine’s famous value-laden “historical” law: “the history of *progressive* societies has hitherto been a movement from Status to Contract.”¹⁷ What else is a progressive society but one that shows this movement?

B. The Theory of Legal Growth: Judicial Legislation and Policy

Although the influence of Maine’s *Ancient Law* betrays itself in the very chapter headings of *The Common Law*, it treats judicial legislation only briefly, and that in the discussion of legal fictions. But Maine was not dealing with the common law. Holmes was thus left room to develop his original and powerfully influential anti-Langdellian thesis that the principle of legal growth in the common law is the legislative, policy-based decisions of the courts—“experience” rather than “logic.” This is not to say that Holmes did not frequently engage in conceptual analysis of legal

13. 2 Holmes-Pollock Letters, ed. Mark DeW. Howe 200, 2d ed. (Cambridge, Mass., 1961).

14. *Supra* note 1, at 37.

15. *Id.* at 41.

16. *Id.* at 33; emphasis added.

17. Henry Sumner Maine, *Ancient Law* 100 (London, 1917); emphasis added.

doctrine, that he denigrated the importance of concepts and doctrines, or that he denied that judges generally are bound by rules. Yet the thesis is implicit on virtually every page of Holmes's book. His position is made quite clear in an 1879 article in which he defined "public policy" as "considerations of what is expedient for the community concerned." The important consequence of Holmes's historical study is that it shows we "are at liberty to consider the question of policy with a freedom that was not possible before."¹⁸

In addition to discussing in detail particular rules and doctrines in *The Common Law*, Holmes's "Path" article introduces an elegant argument in support of his thesis. Judges of course write their opinions in a form that makes it appear that the result in the case is the logical extension of prior law or doctrine. But in important litigations, where the law moves forward, these opinions in fact commit a "fallacy" of logical form, for actually the result will often depend on an unarticulated value premise, a judgment of what is expedient: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds."¹⁹

This account of judicial decision making suggests that Holmes held that there is an inextricable bond and necessary connection between law and morality, but we must be careful about the interpretation of this connection. He did hold that judges willy-nilly take sides on burning questions, that they have the duty of weighing considerations of social advantage, a duty that is "inevitable." He also thought that while the law of the present belonged to the black-letter man, the law of the future belonged to the man of statistics and economics. (It is to Holmes that we owe the pragmatic cast that American jurisprudence took on.) Yet Holmes never developed this idea. He remained a "naive instrumentalist."²⁰ But I think it is clear that, for Holmes, the connection between law and morality was never much more than the position just expounded—the inevitability of judicial value judgments. He remained a positivist to the last because it was his view, I believe, that these judgments are *extra-legal*. These judgments, and the decisions determined by them, fall within the realm of judges' discretion, since they, the judgments and the decisions, are not predetermined by the prior law—discretion in the strong sense, as Ronald Dworkin calls it.²¹ It is in these Holmesian ideas that we find the origins of the American obsession with the nature of the judicial process.

The thesis that judges have the duty of weighing considerations of social advantage in litigations that raise a serious question of law leads to what has been called the "enigma" of Holmes. For as a judge, rather than as a theorist, Holmes generally was loath to break new ground (with some exceptions), and he has been taken as the model of "judicial restraint." We cannot explore this issue here, however.

18. Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 Am. L. Rev. 660 (1879).

19. Holmes, *supra* note 2, at 466.

20. See Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, N.Y., 1982).

21. Ronald Dworkin, *Taking Rights Seriously* 32, rev. ed. (Cambridge, Mass., 1978).

C. Laws as Generalized Predictions

The project of reducing law and legal concepts to “hard fact” was continued in the “Path” article, where the famous “bad man” theory is expounded. From the perspective of the bad man, laws are no more than generalized predictions of the decisions of the courts. The predictive approach is also applied in the analysis of the concept of “rights.” As early as 1870 Holmes had suggested that the terminology of rights could be eliminated in favor of the concept of duties. In this article he went further and maintained that, just as the law can dispense with the idea of primary rights, so also can it dispense with the idea of primary duties. To say that A has a duty to B means no more than a *prediction* that if B can prove his claim to the satisfaction of the court, the court will grant B a remedy as against A. It is not difficult to see, I think, that the prediction theory of law and of rights and duties, as illuminating as it might be from the perspective of the litigant and his lawyer, is inadequate as a general theory of law (if Holmes meant it as such) or as an account of the judge’s perspective. Certainly, the judges of the highest court in a jurisdiction are not trying to predict their own decisions.

III. The Judge as Lawmaker: John Chipman Gray

Holmes’s notion of laws as generalized predictions of the decisions of judges nevertheless was instrumental in establishing the court-centered focus of much of American jurisprudence. His close friend John Chipman Gray contributed to this approach in his classic book *The Nature and Sources of the Law* (1909, 2d ed., 1912). “[I]n truth,” said Gray, “all the Law is judge-made law.”²² In contrast to Holmes, however, Gray defined “law” in terms of rules, rights, and duties: law consists of the general rules followed by courts in establishing legal rights and duties. Although Gray criticized John Austin on many points, he remained in the positivist tradition and rejected any idea of nonpositive or natural law.

A. Attacking the Declaratory Theory: Law and Its Sources

The main object of Gray’s attack, though, is the historical school of Savigny, which had begun to take root in the United States. This school saw the law as an expression of the “folk spirit” and it was the task of state law to capture the law that had been exhibited in the freely developed customs of the community. As a result of Gray’s devastating critique of the historical school, American jurisprudence lost hold of its fundamental insight that the tacit understandings and mutual accommodations of the members of the community are factors that typically underlie the efficacy of positive law. This insight was only recovered with the work of Lon Fuller.²³

In Gray’s view, however, the historical school was at best no more than a version of the declaratory theory, the idea that the task of the judge is to

22. John Chipman Gray, *The Nature and Sources of the Law* 125, 2d ed. (Boston, 1963; first published 1912).

23. See, e.g., *Human Interaction and the Law*, in Lon L. Fuller, *The Principles of Social Order*, ed. K. Winston, 211-46 (Durham, N.C., 1981).

discover pre-existent law. But in fact there are genuine gaps in the law, and judges make law retroactively. Gray presented many examples to show that courts confront many issues on which the “folk spirit” has no opinion whatsoever and that, moreover, courts in adjoining states might follow different rules, even though the two states are virtually identical in cultural terms. The basic error of the declaratory theory was its failure to recognize the capital distinction between law and the sources of law. These sources are hierarchically arranged: statutes, judicial precedents, opinions of experts, customs, and (last) principles of morality (which include public policy). The courts are organs of the state, which sets limits to the courts by requiring that acts of its legislative organ be binding on them. But since the interpretation of statutes is still a matter for the courts, statutes constitute a source of law rather than law itself. Where there is no governing statute, precedent, or custom, there will be a gap in the law that remains to be filled in by judicial law making.

Although Gray defines “law” in terms of rules, it is not difficult to see how his position could lead to the “rule skepticism” that was soon to become popular on the American scene. If, in truth, all law is judge-made (because judicial decision always involves some element of interpretation), the efficacy of rules and the predictability of decisions are thrown into question. (Gray himself was not an adherent of the prediction theory, and in his own specialty, real property law, he remained much of a conceptualist.) In any case, while the legal realists and their opponents heatedly debated the issue of rule and discretion, they all agreed that there can be gaps, which call forth judicial creativity.

B. Critique of Gray on Gaps in the Law

Criticism of Gray came much later, and then from a “foreign” quarter, Hans Kelsen, the most influential legal theorist outside the English-speaking world, who came to the United States as a refugee in 1940.²⁴ In his *General Theory of Law and State* (1945), Kelsen allowed that judges can create law, but he rejected the possibility of gaps.²⁵ His argument, which was presented in earlier German works without reference to Gray, rests on formal considerations: there can be no valid judicial decision without preexisting law, and the preexisting adjective law may authorize the judge to go beyond the given substantive law. More important, there can be “negative” applications of law, as when the plaintiff fails to carry the burden on the question of law that is before the court. A so-called gap is no more than the difference between the positive law and some putative law thought to be better or more just.

The existence of gaps has also been denied more recently by Ronald Dworkin, who maintains that there is (almost) always a “right answer” to questions of law in systems as rich as ours. The right answer is the one that is supported by a better argument than any alternative answer. He too claims

24. Kelsen came to have considerable indirect influence on Anglo-American thought, by way of H.L.A. Hart's *The Concept of Law* (Oxford, 1961).

25. Hans Kelsen, *General Theory of Law and States* 146 *et seq.* (Cambridge, Mass., 1945).

that there can be what Kelsen called negative applications of law, but he also presents very sophisticated positive arguments against the existence of gaps in the law.²⁶ Discussion of Kelsen and Dworkin would be out of place here. It is my impression that most Anglo-American legal theorists have not been convinced by them. Both Kelsen and Dworkin were arguing against a position that had been entrenched in American jurisprudence since the days of Holmes and Gray.²⁷

IV. A Quick Look Ahead

Before we proceed it might be helpful to take a quick look ahead. Out of the labors of Holmes and Gray there emerged two fundamental questions: Can there be a science of law? And, if so, what form would it take? As a result of the critical side of their work, it no longer seemed possible to have the kind of doctrinal science of the law that had been envisioned by Langdell. (This is not to say that Langdellianism did not survive in various forms or that there was no opposition to the trends initiated under the influence of Holmes and Gray.) The notion that it was the prime function of the jurist or law teacher to "cognize" the "valid" law—to use the terminology of continental legal theory—seemed to have been exploded. (With a few notable exceptions American writers showed little interest in "validity" as a theoretical problem until the publication of Hart's *Concept of Law*.) If there was to be a science of the law, it would have to be an empirical science,²⁸ a predictive, court-centered science. The issue of the roles of rules and policy in judicial decision would be crucial. Though the science would be value neutral, it would have significant implications for judicial policy making. The issue of policy could now be considered with a liberty that was not possible before, as Holmes had said.

In my opinion these heady prospects were never to be realized, although much empirical study of legal processes, of varying quality and employing a variety of methodologies, did follow. One of the initiators of this work was the erudite and prolific Roscoe Pound. He, however, remained skeptical as to the general inferences that could be drawn from it. (The legal realists first thought of Pound as an ally, but he came to be regarded as a traitor to the cause. Yet, as Karl Llewellyn was to concede, all of realism could be found in Pound, as well as much that was not in realism.)

V. Sociological Jurisprudence: Roscoe Pound

In 1908, one year before Gray published his book, Pound published his influential yet often misunderstood article "Mechanical Jurisprudence."²⁹

26. See the essays *Hard Cases and No Right Answer?*, in Dworkin, *supra* note 21.

27. It may be noted, though, that the Hohfeldian scheme occasionally was used by American writers to defend a no-gaps thesis. For a brief critical comment on this move, see Lon L. Fuller, *Legal Fictions* 112, n. 37 (Stanford, Calif., 1967). This book was originally published as three articles in 25 *Ill. L. Rev.* (1930-1931).

28. For a similar move in political science, see Arthur F. Bentley, *The Process of Government* (Chicago, 1905).

29. Roscoe Pound, *Mechanical Jurisprudence*, 8 *Colum. L. Rev.* 605 (1908).

Roscoe Pound was probably unique among turn-of-the-century American jurists in his assimilation of the writings of continental theorists. He had of course read the historical and philosophical works of Holmes, but he was influenced mainly by the German writers (particularly Rudolf von Jhering) who had criticized *Begriffsjurisprudenz* and those who had a neo-Hegelian, cultural approach to the law (particularly Josef Kohler). From these writers Pound developed his formulation of the ends of the law in terms of "interests." Subsequent American jurisprudence owes its talk of the "promotion," "balancing," and "weighing" of interests largely to him.

A. The Meaning of "Sociological Jurisprudence"

Another influence of equal importance was the American pragmatist philosopher William James, who had been a close friend of Holmes. In the article just noted Pound proclaimed "sociological" jurisprudence as "a movement for pragmatism as a philosophy of law."³⁰ And in 1909 Pound cited Holmes's dissent in *Lochner*³¹ as an instance of pragmatism in the law.³² The term "sociological jurisprudence" was unfortunate in two respects. It was, first of all, mistaken for socialism, but Pound never pushed for radical change; he was for reform of the law—for instance, procedural reform and the introduction of juvenile courts—to meet the needs of a changing society and a technological civilization.³³ Although he criticized the "economic interpretation" of *Priestley v. Fowler*,³⁴ which many took as illustrating how single decisions are shaped by class interest, he did not claim that the fellow-servant rule was "something that should have been preserved in the law under the conditions of today."³⁵

The term "sociological" was also misleading in that it suggested that Pound's primary interest was the empirical investigation of legal phenomena—the sort of science of law mentioned above. Pound had in fact been trained as a scientist; he received a Ph.D. in botany in 1897 (hence his penchant for classificatory schemes)³⁶ and never took a degree in law. But for Pound sociological jurisprudence was basically normative. If sociological jurisprudence was more concerned with the working of the legal order than

30. *Id.* at 605.

31. *Lochner v. New York*, 198 U.S. 45, 73 (1904).

32. Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454 (1909).

33. See Wigmore's account of the reception of Pound's 1906 address to the ABA, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in *Interpretations of Modern Legal Philosophies*, ed. Paul Sayre, 424-27 (New York, 1947). A rather strange attack by a judge on Pound's alleged radicalism—interesting now as a historical curiosity—appeared in 1913. See Robert Ludlow Fowler, *The Future of the Common Law*, 13 Colum. L. Rev. 595 (1913); see also Robert Ludlow Fowler, *The New Philosophies of Law*, 27 Harv. L. Rev. 718 (1913-1914), which is followed by a Note by Roscoe Pound, at 731. Pound was always a conservative by temperament.

34. 3 M. & W. (Ex. 1837).

35. Roscoe Pound, *The Economic Interpretation and the Law of Torts*, 53 Harv. L. Rev. 365, 383 (1940).

36. See Pound's five-volume *Jurisprudence passim* (St. Paul, Minn., 1959). This work is pieced together out of numerous publications; places and dates of original publication are not supplied.

with the abstract content of authoritative precepts, it was because it viewed the law as a social institution that could be improved by intelligent effort.

B. Pragmatism as a Philosophy of Law: Rules as Guides to Decision

Aside from its influence on Pound's interests-oriented jurisprudence, Jamesian pragmatism as a philosophy of law meant that legal rules and precedents should be thought of as *guides* to decision rather than rigid prescriptions governing fixed categories. The rejection of "mechanical jurisprudence," as Pound later on made clear, never meant that courts could dispense with the application of authoritative techniques and authoritative ideals to authoritative materials (rules, principles, conceptions, doctrines, and standards). He was often charged with being inconsistent here, for he denounced law without rules and yet insisted on the existence of an element of discretion in decision making. But what Pound was calling for was sensitivity to the *facts* in a case. Was it true, as judges readily assumed in "liberty of contract" cases, that the parties, employer and laborer, were equal in bargaining power (or—to put it in Hegelian terms—equal in positive freedom, which was the operative concept here)? The question was hardly raised. Pound's stress on sensitivity to facts had a great and often unacknowledged impact on the legal realists' treatment of precedent. It also lies behind what Llewellyn later called "situation sense." And Llewellyn's "steadying factors" are nothing other than Pound's authoritative techniques and materials.³⁷ The realists also owed to him the distinction between law in books and law in action (paper rules and real rules, as they called it).

C. Justice and Social Engineering: The Theory of Social Interests

Pound identified himself with a "social engineering" approach to the law. While this phrase may sound manipulative and potentially malevolent, it actually reflects a notion of justice as "such an adjustment of relations and ordering of conduct as will make the goods of existence . . . go around as far as possible with the least friction and waste."³⁸ The theory of social interests, which he began to develop as early as 1913, was designed to give coherence to the requisite policy judgments and the weighing and balancing that were entailed in them.³⁹ Social interests are individual interests (claims, demands, desires—the influence of William James, but also of Bentham, may be detected here) in their most general form, and they are distinguishable from public interests, interests asserted in title of organized society as a legal entity. Pound names six classes of social interests, under which fall

37. Karl N. Llewellyn, *The Common Law Tradition—Deciding Appeals *passim** (Boston, 1960).

38. The location of this quotation escapes me, but a very similar remark occurs in Roscoe Pound, *The Spirit of the Common Law* 195–96 (Boston, 1921). This conception of justice might be profitably compared with the idea of Pareto Optimality and the "efficiency" approach of the Chicago law and economics school.

39. For his latest statement, see Roscoe Pound, *A Survey of Social Interests*, 57 *Harv. L. Rev.* 1 (1943).

subclasses: general security, security of social institutions, general morals, conservation of social resources, general progress, and individual life.

The theory of social interests was the heart of Pound's sociological jurisprudence. His survey was meant to provide guidance to legislatures and courts, though courts were largely restricted to doing justice in accordance with law, a point that he came to stress in his later years, although he did not abandon the idea of rules as guides. Still, in addition to having the classificatory and substantive problems noted by critics,⁴⁰ the list clearly does not by itself provide a way of evaluating claims or adjudicating between conflicting interests.

This was a widespread criticism of Pound and it was reenforced by his view that there could be no absolute, timeless judgment as to how social wants should be satisfied. In a not altogether unsympathetic article, Walter B. Kennedy suggested that there are demands that it may not be good to satisfy. One should reject the "gracious [James-Pound] assumption that 'the essence of good is simply to satisfy demand.'" ⁴¹ While the pragmatic, social engineering view of law had its uses, Kennedy argued, it needed to be supplemented with permanent constitutional principles and a doctrine of natural rights, as a protection against the "hurricane" of social wants and demands. In his later years Pound seems to have veered toward this view. (Plainly, this issue is as alive today as it was 60 years ago.)

Meanwhile, Pound's "jural postulates of civilization," an idea he derived from Kohler, were meant to fill the gap.⁴² Briefly put, Pound maintained that in a civilized society men must be able to assume: that others will not commit intentional aggressions; that one may control for one's use one's own discoveries, the product of one's labor, and what is acquired under the existing social and economic order; that others will deal in good faith; that others will not expose them to unreasonable risk of injury; and that others will restrain things, harmless in themselves, but harmful when they cross boundaries. No doubt, a study of legal history, of which he was a master, lends support to Pound. Nevertheless, it must be conceded that he never adequately worked out how the jural postulates solve the problem of evaluating interests. It is ironic that the theory of jural postulates was originally presented as an address to a labor union school in 1919. A member of the audience may well have been puzzled by the postulate that one should be able to assume that one may control the creations of one's own labor and what one has acquired under the existing economic order.

All this merely skims the surface of Pound's work. I have, relatively speaking, spent so much space on Pound precisely because he is so much unread today—undeservedly. Llewellyn noted that all of legal realism could be found in him, and much else. Llewellyn may not have intended the remark as a complete compliment, but I would mean it that way. Pound made contributions to many parts of legal philosophy and jurisprudence,

40. For an elaborate discussion of the interests theory, see Julius Stone, *The Province and Function of Law* chaps. 15, 21–22 (Cambridge, Mass., 1950).

41. Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 *Marquette L. Rev.* 63, 75 (1925).

42. See Roscoe Pound, *Outlines of Jurisprudence*, 5th ed. (1943).

including its purely analytical side. His work merits comparison with that of recent writers: the jural postulates, for instance, compare very favorably with H.L.A. Hart's "minimum content of natural law"⁴³ and lend themselves to richer treatment. Finally, despite the difficulties in the theory of social interests, I think it has much to offer for the analysis, if not the final resolution, of legal problems and problems of public policy.

VI. Realism and a "Science of Law"

I noted earlier that the critical writings of Holmes and Gray seemed to have left the idea of a doctrinal science of the law in a shambles. If there was to be a science of law, then, the natural alternative would be the empirical investigation of legal phenomena. The individuals generally identified as legal realists⁴⁴ represent this latter approach, yet many of them did not engage in hard-nosed empirical research. For some, "realism" meant a new way of dealing with the traditional subject matter of legal study, upper court opinions, with prediction of decisions and their consequences as its aim, and perhaps it was the goal of prediction of the social *consequences* of decisions that most distinguished these writers from standard scholarship. (The consequent impact on legal education is beyond the scope of this article, e.g., the introduction of new courses such as legal method into the standard curriculum and the substitution of cases and materials for the casebooks.) The realists constituted a rather varied group, a movement rather than a school.⁴⁵

A. Realism and the Traditional Study of the Law

What united them was their "negation," as Llewellyn put it, of the traditional focus on rules, principles, and doctrines. This "negation," however, was held on a number of different grounds. On the basis of purely theoretical considerations it was argued that rules and principles have no existence; only individual judicial decisions exist. It was also argued that, despite what judges say, rules and principles do not determine judicial outcomes and hence are valueless for a science of law. And it was also maintained that since it was impossible to discover what the rules are that were actually being applied, they are valueless. Finally, it was held (by the most moderate realists or by the extreme realists in their moderate moments) that rules and principles do exist and exercise *some* influence on decisions, but that there are more interesting and important things to study about the law, for example, official behavior of any kind (Llewellyn). All these considerations can be found in the literature of realism, and some realists seem to have entertained all of them at once.

43. Hart, *supra* note 24, at 189-95.

44. See Edwin W. Patterson, *Jurisprudence* 538 (Brooklyn, N.Y., 1953), who lists some twenty people, including himself.

45. See Karl N. Llewellyn, *Some Realism about Realism*, 44 *Harv. L. Rev.* 1222 (1931), which was a reply to Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *Harv. L. Rev.* 697 (1931).

The realists did agree that intelligent reform of the law presupposed grounded knowledge of the operations of the legal system, how it works and what its social impact is, about which the traditional study of the law gave little or no information. (Thoughtful opponents of realism—e.g., Pound and Morris R. Cohen—of course also maintained that intelligent reform required this knowledge. Indeed, how can it be denied?) Just as Holmes's work took its inspiration from nineteenth-century advances in the field of historical study, the realists were inspired by developments in the sciences, especially the social sciences. But there was no single direction in which this inspiration manifested itself: some realists emphasized economics, others the use of statistics, and still others psychology. While the empirical science of law was assumed to have momentous implications for legal reform, with the exception of one writer (Felix S. Cohen, the youngest member of the movement), little systematic attention was given to formulation of standards for evaluating judicial decisions.⁴⁶ Realist writings smack of "scientism," with its assumption that scientific investigation alone can answer normative questions, though the realists often denied that this characterization was accurate. (A study of the impact of the Depression on the realists and of their involvement in the New Deal, which might show changes in their approach, remains a desideratum.)

B. Legal Science and Its "Field" of Study: Joseph W. Bingham

Because of the varied character of the group, it is impossible to take up the movement in its entirety here. I will focus on its epistemological and ontological assumptions, the "philosophy of science" held by at least many members of the group. What, in particular, was the nature of the objects cognized by their legal science, as they conceived it?

Although realism was a movement of the 1920s and 30s, its first expression, aside from obvious hints in Holmes and Gray, was Joseph W. Bingham's 1912 article "What Is the Law?" in which the author expounded, powerfully and with precision, the underlying theory of a realist legal science.⁴⁷ Bingham obviously was a highly original thinker, and I am not sure what the influences on him were. Lon Fuller describes a course in water law that he took from Bingham in 1925: "like everything he taught, [it] was less a course in its specific subject than it was in Walter Bingham."⁴⁸ It would be interesting to have more detail on how he taught the course, because he rejected as "fundamentally erroneous" the idea that the field of law consists of a system of rules and principles enforced by political authority.

Bingham's account of legal science is based upon a general theory of science. Every science studies sequences of concrete, "external" phenomena to determine their causes and effects, and (if the science is not purely histor-

46. See Felix S. Cohen, *Ethical Systems and Legal Ideals* (Ithaca, N.Y., 1959; first published 1933).

47. Joseph W. Bingham, *What Is the Law?*, 11 Mich. L. Rev. 1, 109 (1912).

48. Fuller, *supra* note 23, at 190.

ical) to predict similar future sequences. In the case of the science of law, the “field” that it investigates “consists of external governmental phenomena and their concrete causes and effects.”⁴⁹ By using the standard procedures of scientific inquiry, knowledge of these concrete phenomena may be generalized into rules and principles, and it is only when we have achieved an organized body of knowledge of this sort that we really have a science of law. But these rules and principles are only “mental tools” for the classification and communication of knowledge, similar to the generalizations of other sciences.⁵⁰ Briefly put, the (legal) generalizations do not denote any facts in the field of law because there are no general facts for them to denote; only “concrete” phenomena exist; rules, principles, and concepts exist only in the minds of individuals. Though Bingham did not supply examples, he undoubtedly would have held the same view about, for instance, the Boyle-Charles Gas Law ($pV = kT$): it, too, is a mental tool for classifying and communicating knowledge about the behavior of gases; nothing in nature, no general fact corresponds to it. Along the same lines, he maintained that nothing corresponds to such legal terms as “legal right.” While such terms can be useful, they are also a source of confusion, especially if it is assumed that such terms have a denotation.

It is in this viewpoint that we find the origins of the idea that only individual judicial decisions exist: it is not the case that there are rules that individual decisions enforce. Decisions are datable spatio-temporal occurrences, concrete phenomena, which rules are not. Rules are subjective ideas in the minds of those who think about law. It is not entirely clear how many realists actually subscribed to these notions, for most of them probably were not so self-conscious about their ontological commitments as Bingham. (I think that Llewellyn did not subscribe to these notions.) Still, we do find statements that suggest Bingham’s view—for example, Frank’s pronouncements that the law “consists of decisions” and that “rules are merely words” (yet Frank quixotically denied that this proposition entails the nonexistence of rules—but Frank frequently contradicted himself).⁵¹ As the philosopher Morris R. Cohen pointed out in a 1932 article, Bingham’s theory is a version of medieval nominalism (sometimes also called conceptualism) as applied to law. According to nominalism, such general terms as “human” have no referent other than all individual humans, for only particulars and no universals exist. Cohen found fault with Bingham’s nominalism and with

49. Bingham, *supra* note 47, at 9.

50. Bingham’s theory of science is highly “instrumentalist.” While such a theory was also held by pragmatists, I do not know whether Bingham had read any of them before (or even after) 1912. In his untitled contribution to the volume *My Philosophy of Law* (Boston, 1941), Bingham wrote (at 5): “Of course, it is unnecessary to say that there is nothing new in any of the ideas which I shall now present. Most of them appeared in my personal cosmos as a result of my experiences with men and affairs and the written reports of events which together made up the basic materials for my study of law. The iconoclastic element in my ideas developed naturally out of my peculiar methods of work and my insistence on independent analysis and logical arrangement of the facts inherent in the materials of my study.”

51. Jerome Frank, *Law and the Modern Mind* 138 and 141 (Garden City, N.Y., 1963; first published 1930).

the dualistic metaphysics of a mind and a world external to it, which his position assumed. Law, conceived as a conglomeration of decisions, however predictable, makes no sense, Cohen held.⁵² He and Hessel Yntema carried on a heated exchange over these issues.⁵³

The epistemological perspective of (realist) legal science is quite clear in Bingham: legal science studies the field of law (the sequences of concrete, external phenomena) from “without,” a position explicitly or implicitly held by all the realists. He thus distinguished the perspective of the legal scientist, the law teacher, and the law student from that of the judge, jury, and litigant (and his lawyer), who are participants in the law making process. It is hardly surprising that from this “external point of view,” to use H.L.A. Hart’s phrase, the law appears as sequences of behavior—and, Bingham would add, their causes and consequences—rather than a system of rules and principles. Now in a sense Bingham did not deny that there are rules and principles distinct from the generalizations that the external observer makes about the field. But the former, too, are merely “mental things” and are of interest solely insofar as they are *causally* significant in the flow of sequences.

Is the view from “without” adequate for cognizing the constituents of the field, for cognizing them as *legal*? Doesn’t the point of view of the observer, which admittedly is external, have to *take account* of the internal, participants’ perspective?⁵⁴ I cannot enter into this issue here, but it might be noted that there is a crucial word in Bingham’s definition of the field of law that has an important bearing on the topic, namely, the word “authoritative.” “The existence of law as we know it,” said Bingham, “is dependent on the existence of *authoritative* government. In a state of anarchy there is nothing closely analogous to the field of our profession because there is no continuing of authority and therefore no certainty concerning the governmental sequence of events.”⁵⁵ Now what did Bingham mean by “authoritative” and its cognate “authority”? How are we to distinguish between authoritative and nonauthoritative occurrences and sequences? Unfortunately, he did not say. And it is certainly arguable that the explication of these terms and distinctions requires reference to the internal point of view, the participants’ perspective. Bingham’s lapse on this matter is replicated in much other realist writing.

C. The Analysis and Prediction of Judicial Decisions: Herman Oliphant on Stare Decisis

I noted earlier that the realists’ displacement of rules and principles from the center of legal study was grounded on a variety of considerations. For

52. See Morris R. Cohen, *Justice Holmes and the Nature of Law*, in *Cohen’s Law and the Social Order* 198 (New Brunswick, N.J., 1982; first published 1933); Cohen argued that realists were mistaken in claiming Holmes as a supporter of the nonexistence of rules thesis.

53. See Hessel Yntema, *The Rational Basis of Legal Science*, 31 *Colum. L. Rev.* 925 (1931); Morris R. Cohen, *Philosophy and Legal Science*, in *supra* note 52, at 219.

54. Hart, *supra* note 24.

55. Bingham, *supra* note 47, at 9, n. 10; emphasis supplied.

some associates of the movement this "negation" meant a broadening of the area of research, such as Underhill Moore's banking-practices studies. This aspect of the movement, however, cannot be reviewed here, although interesting theoretical arguments were involved in it.⁵⁶ For other realists the negation meant a new way of approaching the analysis and prediction of judicial decisions. Among this group, a leading figure was Herman Oliphant, whose article "A Return to Stare Decisis" formed the basis of many treatments of the judicial process.⁵⁷

Oliphant's article was important because it provided an elaborate analysis and critique of the traditional Anglo-American doctrine of standing by the precedents. Oliphant wanted to turn legal study toward "how" judges actually decide cases and away from the reasons that judges give for their decisions—to stare decisis, not stare dictis. While he did seem to allow that there were cases governed by rules, he argued that such cases were very much rarer than traditionally thought. The traditional employment of the doctrine of stare decisis is that of extracting a rule from a prior decision for application to the facts of the instant case. But this approach, he maintained, is beset by the logical difficulty that any set of facts is classifiable in an indefinite number of ways. Moreover, a logical analysis of decision making shows that, where there is no clearly applicable statute or clear precedent, one can formulate a number of plausible competing general principles as major premises and get conflicting results.

The consequence of Oliphant's argument is the considerable enlargement of the sphere of novel cases and, correspondingly, a diminution of the stock of pre-existent governing rules and principles. To put it in current terminology, Oliphant appears to have held that the law is largely "indeterminate" ("rule skepticism," in older language). But if this is so, a number of questions arise: How do judges actually decide cases? How should they decide cases? And what effect does this indeterminacy have on the prospects of the empirical study of judicial decision making and the prediction of decisions?

The first and third questions are intimately related. Each precedent and each case, said Oliphant, "rests at the center of a vast and empty stadium. The angle and distance from which that case is to be viewed involves the choice of a seat."⁵⁸ The judge cannot escape the fact that he can and must choose; the decision is not a matter of "logical coercion." It nevertheless is possible to determine "what courts have done in response to the stimuli of the facts in concrete cases before them."⁵⁹ Careful attention to judges' responses to fact situations will reveal more clearly than a study of the vague and shifting "rationalizations" given in opinions the patterns of decision

56. See Underhill Moore, *Rational Basis of Legal Institutions*, 23 *Colum. L. Rev.* 609 (1923).

57. Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71 (1928); see also Herman Oliphant & Abram Hewitt, *Introduction to Jacques Rueff's From the Physical to the Social Sciences* (Baltimore, 1929).

58. Oliphant, *supra* note 57, at 73.

59. *Id.* at 159.

that make prediction possible. It is apparent that Oliphant's stimulus-response method for determining the case law comports with the behavioristic psychology that was popular in his day. Both were distrustful of introspection and the "vocal behavior" that purported to describe it, which in Oliphant's case would be the reasons that judges give for decisions.⁶⁰

As to the second question—how should judges decide cases?—Oliphant's answer manifests the inadequacy found in much of the realist literature. Since judges must make choices, they should squarely face up to that fact and adopt a "practical" approach. By this Oliphant meant that judges should decide "not on principle but on policy."⁶¹ Unfortunately, he does not tell us how the weighing of practical considerations is to be methodically done, to use his own word.

The stimulus-response method is also faulty. Oliphant's distinction between what judges "say" and what they "do" is misleading, for after all their decisions are also instances of verbal behavior. As Morris R. Cohen pointed out, Oliphant was led to underrate the importance of written opinions as a source of knowledge about the law; "pious platitudes" may determine actual decisions. More important, though, the method is beset by logical difficulties similar to those which Oliphant identified in the traditional employment of *stare decisis*. He assumed that the "battered experience of judges among brutal facts" supplies them with an intuitive apprehension of the facts relevant to the cases they must decide, and such facts are not always stated in the opinions. But even if this dubious assumption is allowed,⁶² the problem remains as to how the investigator is to identify and characterize those facts, which, as the theory holds, are the stimuli of a given decision. The facts in a case are not like the behaviorist's pinprick (stimulus) and a decision is not like the jerking of a finger (response). It is hard to see how the investigator is going to discover the stimulus-response patterns that will enable the prediction of future decisions.

If Oliphant's positive program for a science of law was seriously flawed, his critical analysis of *stare decisis* is still of value, in my opinion. It shows that single decisions, taken in isolation and independently of how facts are classified, do not logically determine future decisions. And though Oliphant, like other realists, failed to distinguish between the context of discovery and the context of justification, his analysis has significance for the theory of legal reasoning.

Oliphant's analysis served the cause of legal realism: it buttressed its "negation" of the traditional focus on rules and principles, at least insofar as these are taken to be found in judicial opinions. Yet if he and many other realists were sanguine about the prospects of a predictive science of law,

60. See the opening words of John B. Watson's manifesto, *Psychology as a Behaviorist Views It*, 20 *Psychological Rev.* 158 (1913): "Psychology as the behaviorist views it is a purely objective natural science. Its theoretical goal is the prediction and control of behavior. Introspection forms no essential part of its method nor is the scientific value of its data dependent on the readiness with which they lend themselves to interpretation in terms of consciousness."

61. Oliphant & Hewitt, *supra* note 57, at xxv.

62. Cf. Morris R. Cohen, *supra* note 52, at 217.

Jerome Frank, for one, was not.⁶³ Frank took Oliphant's analysis as exposing the "weakness" of the use of formal logic by judges ("The court can decide one way of the other and in either case can make its reasoning appear equally flawless. . . . The 'joker' is to be found in the selection of these premises"),⁶⁴ but he criticized Oliphant's efforts to apply "that veterinary's psychology [behaviorism] to matters legal."⁶⁵ Guesses, even educated guesses, perhaps; but "scientific" predictions, no.

VII. Skeptical Realism: Jerome Frank and the Indeterminateness of Law

Jerome Frank's views are not easy to expound. He wrote a great deal and he wrote to shock. He was a writer who complained of having been misinterpreted. The most contentious point is the question of rule skepticism. In the preface to the sixth printing of *Law and the Modern Mind*, which he wrote 18 years after the book's publication in 1930, Frank denied that he was ever a rule skeptic; he was, rather, a "fact skeptic." The book is an attack on the myth of legal certainty, which he also called Bealism (the reference is to Joseph Beale of the Harvard Law School, who held a position like that of Langdell's) and legal fundamentalism, and it offers an explanation of why this myth is accepted by most judges, lawyers, and the general public. Briefly, Frank maintained that the craving for absolute certainty is a consequence of a childish wish for father authority, which is transferred to the law. (In an addendum to the second printing he insisted that this interpretation had been intended as only a "partial" explanation.)

A. *The Myth of Legal Certainty and Rule Skepticism*

Despite Frank's qualifications in footnotes (which often flatly contradict the text) and his statements that he is concerned with the craving for excessive certainty, it is difficult to accept his disclaimer. True, Frank does discuss the distortions introduced into fact-finding by the ignorance, laziness, prejudices, and biases of judges and juries. But these discussions form a relatively small part of the book. The heart of the attack on the myth of legal certainty is his claim that law is primarily judge-made. He criticizes Gray for still maintaining that the law consists of "*rules laid down by judges*," for this stress on the generality of law is a remnant of the old myth. He castigates John Dickinson for seeking to determine the line between rule and discretion, because judges are not controlled by rules and principles, as he took Oliphant to have shown. He cites Bingham with approval, and says that it is "peculiarly unfortunate" that Dickinson paid no heed to Bingham's work.⁶⁶ "Viewed from any angle," Frank asserted, "the rules and principles do not constitute law."⁶⁷ The law "consists of *decisions*, not of rules."⁶⁸

63. See Jerome Frank, *Courts on Trial* chap. 14 (New York, 1963; first published 1949).

64. Frank, *supra* note 51, at 72.

65. *Id.* at xxv; from the 1948 Preface to the 6th printing.

66. *Id.* at 295.

67. *Id.* at 141.

68. *Id.* at 138; emphasis in original.

In light of the preceding statements I find it hard to believe that Frank was only a fact skeptic when he wrote *Law and the Modern Mind*.⁶⁹ The rejection of the myth of legal certainty implies that the law is unpredictable, and he explicitly declares that this unpredictability exists also in cases that turn solely on points of law and not only in those involving disputed questions of fact.⁷⁰ He does not limit the former unpredictability to the rare case.

B. Judicial Decisions and Judicial Rationalizations

How then are we to understand Frank's frequent qualificatory remarks that he does not deny the existence of rules? Here, I think we have to turn to his analysis of judicial decision making.

Frank was probably the popularizer of the idea that the process of judicial deliberation begins with a "hunch." Judge Hutcheson is cited approvingly as saying: "The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion."⁷¹ In other words, the process begins, as Frank put it, with the "dominance of the conclusion," a sense of what is right in the particular case.⁷² This is the reverse of the traditional description, which has it that the judge begins with rules and principles which are then applied to the facts to produce the decision. The opinion of the court, in which rules and principles appear, is then an effort of "rationalization."⁷³ Rules and principles do, of course, serve as "hunch producers." But they are not the only hunch producers, nor are they necessarily the most important ones. Their other chief use is "to enable the judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive."⁷⁴

This analysis of judicial decision is, I think, misleading. It fails to take adequate account of the distinction between the *context of discovery* and the *context of justification*, as philosophers of science have called it.⁷⁵ The first concerns the psychic (and even social) factors operative in the invention and formulation of hypotheses, and the second the criteria of evidence and argument necessary to the validation of hypotheses. How judges and scientists arrive at, discover, their decisions and hypotheses is an interesting question. But the question is irrelevant to whether they are able to produce adequate justifications for those decisions and hypotheses. And in the legal situation there is the special issue of what materials are *necessary* elements in these justifications. If rules and principles are necessary, it is incorrect to deny them the status of law. Frank is in fact aware that rules "help the judge to

69. For an early statement of fact skepticism, see Jerome Frank, *What Courts Do in Fact*, 26 Ill. L. Rev. 645 (1932).

70. See Frank, *supra* note 51, at 9.

71. Joseph C. Hutcheson, *The Judgement Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 Cornell L. Q. 274 (192829).

72. Frank, *supra* note 51, at 109.

73. See *id.*, chaps. 3, 12, and 13.

74. *Id.* at 140.

75. See Carl R. Kordig, *Discovery and Justification*, 45 Philosophy of Science 110 (1978).

check up on the propriety of the hunches.”⁷⁶ But I suspect he did not grasp the significance of this admission for the analysis because he also held that rules and principles are “window dressing.”⁷⁷

It is doubtful, though, that Frank would have changed his position on the status of rules, in any case. For in the end he argues that rules and principles are not “authoritative” and that no useful distinction can be drawn between rule and discretion.⁷⁸ So the law consists only of decisions, not rules. Here again he falls back on Bingham’s theory, on the idea that rules and generalizations are only “mental tools,” and on the idea that opinions do not always reveal the real reasons for decisions. But the more subtle, underlying argument is that judges simply are not controlled by rules. Here, I think, is where the rule skepticism and fact skepticism possibly link up. Not only do judges have to choose between rules and between lines of precedent—and, Frank would maintain, where there is choice there is no “control”—but the judge can avoid the demands of any given rule by manipulating the facts of the case or by giving more weight to some facts over others. Unfortunately, we cannot embark on a detailed examination of this argument. I think that the distinction between the contexts of discovery and justification would go a long way toward defeating it.

C. Fact Skepticism and the Upper Court Myth

In 1941 Frank became a judge of the U.S. Court of Appeals for the Second Circuit. It is not clear to me whether this factor occasioned any change in his skeptical views, though he seems much more friendly toward rules and principles in his 1949 book *Courts on Trial*.⁷⁹ This book continues the attack on the myth of legal certainty, but now Frank’s steady focus is the trial court. The canonical form of decision is “R (rules) x F (facts) = D (decision).” The difficulty in predicting decisions is not so much the R’s, but the F’s. There is a harmful myth, an “upper court” myth, which says that trial court outcomes are controlled by the rules laid down by appellate courts. This myth overlooks the fact that one cannot predict what facts will be contested and what facts will be found. Moreover, judges and juries are not trained fact finders. It is not true, Frank argued, that the adversary mode of trial (the “fight theory”) is a rational method of truth-finding.

That the real indeterminacy of the law is to be found at the trial court level is highly plausible. We cannot expound Frank’s detailed argument for this thesis here. Of the practical significance of the thesis there can be no question. What its wider significance is for legal philosophy and jurisprudence is perhaps more debatable. Frank’s fact skepticism may turn out to be a more lasting, if less exciting, contribution to legal theory than his earlier iconoclastic work.

76. Frank, *supra* note 51, at 113, n. 4; see also, 140.

77. *Id.* at 113, n. 4.

78. *Id.* at 298.

79. Frank, *supra* note 63, chap. 19 (Precedents and Stability); see also Frank’s concurring opinion in *Aero Spark Plug Co. v. B. G. Co.*, 130 F.2d 290, 294–99 (1942) (Stare decisis is important but too highly venerated; courts should be more concerned with doing justice in the particular case than with settling hypothetical future cases.).

VIII. Responding to the Skeptics: John Dickinson

Realism was the cutting edge of American jurisprudence and legal philosophy in the 1920s and 30s, and like any innovative movement it met with opposition from a variety of quarters. Some opponents were sympathetic critics (for instance, Cardozo and Morris R. Cohen—Holmes stood above the battle) in the sense that they were prepared to reject legal certainty as an absolute truth or as an attainable goal and to admit an area of judicial discretion. This message, however, had already been taught by Pound. One of the more interesting reactions came from John Dickinson, a student of Pound's who could stake his own claims to scholarliness and originality. Dickinson attacked the skeptics, as he called them, at two points: their denigration of the role of rules in judicial decision and their non-normative conception of rules.

A. Legal Rules as Normative Rules

As far as I am aware, Dickinson was the first American writer to indicate the distortion introduced into the analysis of law by the adoption of the "outside spectator's point of view." Even for the scientifically-minded realists who wanted a predictive science of law, such a perspective is misleading. "It is submitted," Dickinson wrote, "that the sound way to anticipate a future decision is to attempt to put oneself in the place of the judge or judges who will actually make the decision. The judge will find himself confronted with one or more legal rules applicable, or conceivably applicable, to the case before him. For him these rules cannot be conceived as mere rules of prediction."⁸⁰ Legal rules, then, are normative rules, and what judges in the past have done is important in prediction only to the extent that it is formulable as a rule that the judge now regards himself *bound* to follow. Distortion is introduced into the analysis of the decisional process by taking rules as descriptive generalizations, because the normative thinking of the judge is different from scientific experimentation.

B. Rules and Discretion

The skeptics were correct in arguing that rules do not always dictate decisions, but, Dickinson claimed, rules may have an influence and at times be controlling. The skeptics are disappointed absolutists; they in effect argue that because there is a difference in degree between rule and discretion, there is no difference at all. "It is no more a disparagement of the influence of legal rules to admit that they are 'forms of words' than to say that their formation and application involves acts of thought."⁸¹ Dickinson saw the problem of rule and discretion as one of drawing a line, of determining their appropriate and relative roles, of finding the "limits of legal order," as he titled a scholarly chapter of his book *Administrative Justice and the Supremacy of*

80. John Dickinson, Legal Rules: Their Function in the Process of Decision, 79 U. Pa. L. Rev. 833, 843 (1931).

81. *Id.* at 842.

Law.⁸² For him, the problem had both normative and conceptual aspects: What matters do we want to make subject to rule and what to discretion? And what matters can we feasibly subject to a regime of discretion-minimizing rules?

That there are areas of activity in which a relative uniformity of conduct is desirable Dickinson had no doubt. Nor did he doubt that rules could serve as discretion-minimizing factors. Following Pound, Dickinson identified four jurial instruments for bringing human relations into predictable order: rules, principles, concepts, and standards. The heart of law is its concepts; they make rules possible, although it may be impossible to construct concepts that ensure that mutually inconsistent results will never flow from their employment. The "technique of law" admittedly does not secure absolute justice or absolute certainty.⁸³ Still, it is because of rules that many issues are not litigated at all, and many litigated issues involve only disputed questions of fact.

It is at the appellate court level that the skeptics have their strongest case. At this level the issues are relatively more complex and usually involve a number of rules. Although the rules by themselves will not necessarily determine the result, Dickinson argued that rules still are discretion-minimizing insofar as they focus the issues and determine which ones remain to be decided. The skeptics fail to distinguish between the question of what rules are accepted as authoritative to the exclusion of other possible rules and the problem of whether authoritative rules determine decisions. They in effect deny "the value of all reasoning from rules."⁸⁴

Dickinson did concede that choice and balance may be involved in the application of existing rules, but this involvement does not undermine their discretion-minimizing character. Moreover, he conceded that where two rules capable of sustaining different results seem applicable to a fact situation "the opportunity arises for a *creative precedent*—for a decision, that is, which will make a new rule of law to cover a doubtful case."⁸⁵ It is probably because of this concession that many realists did not find Dickinson's argument for the discretion-minimizing nature of legal rules convincing. They thought that many cases were of this sort. (Frank said that Dickinson's articles would be first-rate contributions to realism if one-fourth of their contents were eliminated.) It seems to me that even so the rules would play a discretion-minimizing role. The controversy, of course, cannot be settled here without addressing the nature of judicial justification.

C. A Realist's Rejoinder to Dickinson: Felix S. Cohen

Dickinson's work evoked a response from Felix S. Cohen, the youngest member of the group that Patterson identified as realists. In the article cited Dickinson had written: "[A] legal rule, even though derived by generaliza-

82. John Dickinson, *Administrative Justice and the Supremacy of Law* (New York, 1955; first published 1927).

83. *Id.* at 141.

84. Dickinson, *supra* note 80, at 857.

85. *Id.* at 851; emphasis in original.

tion from what has been done, is not a rule of 'isness' because it either may or may not be applied to the next case, i.e., the case for which the rule is sought."⁸⁶ To put this in other words, a judge wants to know not what he is about to do, but what he *should* do according to the rules. Only because rules are norms is it possible to criticize the judge's behavior.

Cohen took this insistence on the normative character of legal rules as implying the impossibility of a descriptive science of law. Opposing this position, Cohen offered two replies. First, he asserted that "a description of judicial volition is a rule of *isness*. . . [Dickinson] has said nothing which reveals the impossibility or undesirability of a descriptive science of judicial conduct."⁸⁷ This last remark is correct, but it ignores the question of whether such a science can be complete if it does not also recognize that legal rules are normative for the judge. Cohen apparently assumed that statements made in a descriptive science cannot be statements about norms and that such statements therefore must be predictive statements about behavior.

Cohen's second reply is more interesting. Dickinson was assuming, said Cohen, that "a judge's duty is to *find* the law rather than to mould it, an assumption which no realist makes. . . . Unless one assumes that the law is above ethical criticism, there is no difficulty in criticising a judge for making or perpetuating bad law."⁸⁸ As we have seen, however, Dickinson did admit that judges mold the law. The problem that engaged him was how to draw the line between binding legal rule and judicial discretion: if all decisions belong to the judge's discretion, then they cannot be criticized as *legally* correct or incorrect. And this is precisely Cohen's position. He held that decisions can only be *ethically* criticized, criticized as good or bad, not legally right or wrong.

This does not mean, however, that Cohen abandoned the realists' doctrine, which they shared with positivism, of the distinction between the law that is and the law that ought to be. Nevertheless, more than any other realist perhaps, he was anxious that this divorce not repudiate in practice the question of what law ought to be. Cohen therefore developed a "functional" jurisprudence that was constructive, as well as critical of orthodox theory.⁸⁹ While his brother realists emphasized the necessity for policy judgments in judicial decision, few of them, in their complacency, undertook the task of articulating how these judgments should be made. It was left to Felix Cohen to devote systematic attention to the problem in *Ethical Systems and Legal Ideals* (1933) and many articles. Cohen tried to show how a kind of hedonistic utilitarianism could be applied to questions of legal policy. His treatment has whatever merits or demerits that that approach has.

86. *Id.* at 860, n. 51.

87. Felix S. Cohen, *supra* note 46, at 12, n. 16; emphasis in original.

88. *Id.*; emphasis in original.

89. See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935); for a contemporary criticism, see W. B. Kennedy, Functional Nonsense and the Transcendental Approach, 5 Fordham L. Rev. 272 (1936).

IX. Philosophers and Law: Morris R. Cohen

It can hardly have escaped notice that the people I have been discussing as contributors to American jurisprudence and legal philosophy have not included any professional philosophers. In a lecture given in 1912 to the American Philosophical Association, the philosopher Morris Cohen (father of Felix Cohen) lamented that “[t]he philosophy of law . . . is now with us fallen into utter neglect.”⁹⁰ And a long time would pass before American philosophers could claim more than a few significant contributions to the field aside from his own work, which was much admired by Holmes, Pound, and Cardozo. Cohen’s articles are scholarly, deep, and acute; they range over the entire field; and he was a masterful, if sometimes overly harsh, critic. In my opinion these articles are still worth reading. Only those aspects that bear on our previous discussion can be taken up here, however.⁹¹

A. Rules and Discretion

Morris Cohen was a critic of “absolutisms” in legal thinking, from the conservative, “legalistic” absolutisms of the bench and bar to the “nihilistic” absolutisms of the radical realists. In a 1914 article “The Process of Judicial Legislation,” he presented a detailed attack on the “phonograph theory,” the notion that judges only “find” the law, that they never “make” it.⁹² Allegedly self-evident legal principles and maxims (e.g., no one can acquire a right by committing a wrong, no liability without fault) also fall under his gun.⁹³ Such principles and maxims, he showed, often mask unanalyzed philosophical assumptions about economics and political order.

But while he attacked the phonograph theory, he was careful not to draw the opposite inference. “While judges do and must make law,” he wrote years before the heyday of legal realism, “it would be absurd to maintain that they are in no wise bound and can make any law they please.”⁹⁴ It was only natural, then, that he would later turn to criticize what he took to be the excesses of the realists. (I do not think that Morris could have been entirely happy with some of his son Felix’s views.) It particularly irked him that they claimed Holmes as an ally, for Holmes never denied the importance of certainty in the law and the roles that concepts and formal logic play in attaining it, as far as is feasible.⁹⁵ Legal problems are often cleared up by logical analysis, and classifications, however fuzzy at the edges, are indispensable. It is not deductive logic which is at fault in judicial decision, but the abuse of logic by the overhasty application of so-called self-evident principles and categories to complex materials. Of course even radical realists

90. Morris R. Cohen, *Jurisprudence as a Philosophic Discipline*, 10 *J. of Philosophy* 225 (1913).

91. Cohen’s principal papers on legal philosophy are collected in two books: *Law and the Social Order* (see *supra* note 52), and *Reason and Law* (New York, 1961, first published 1950).

92. Reprinted with revisions in Morris R. Cohen, *supra* note 52, at 112.

93. See *Absolutisms in Law and Morals*, in Morris R. Cohen, *Reason and Law*, chap. 3.

94. Morris R. Cohen, *supra* note 52, at 146.

95. See *Justice Holmes and the Nature of Law*, in Morris R. Cohen, *supra* note 52, at 198.

admitted as much in their more cautious moments, but they did not in consequence always feel called upon to modify their views.

Like Dickinson, Morris Cohen held that there is a meaningful distinction to be drawn between binding legal rules and discretion. And he was especially concerned to counter the denial of the reality of legal rules, which he held to be based on faulty definitions or analyses (e.g., of the "control" of decisions by rules), a flawed philosophy of science (positivism or fact worship), or bad metaphysics (nominalism). As noted earlier, the last point was directed against Bingham who, Cohen maintained, denied the reality of rules on a priori grounds. He in fact countered Bingham with an alternative metaphysics that refused to restrict reality to things and events in space and time. His leading idea was the principle of polarity. Certain concepts are polar opposites and involve each other in the sense that one cannot be understood without the other: immediacy and mediation, unity and plurality, fixity and flux, substance and function, actuality and possibility—and in law, rule and discretion. We can make sense of the idea of judicial choice and discretion only against a background of rules to which judges are subject. There is no good reason to restrict the field of law to individual decisions and their consequences, as the nominalist would have us do. "Rule or discretion" is a false dilemma; law involves both, and in social terms it needs both.⁹⁶ In his writings Cohen restructured at many levels the controversy between the "absolutists" at both extremes. Whether the metaphysical resolution is ultimately satisfactory is an open question that cannot be pursued here. (It at least represents an interesting approach to the ontology of law, which I think is beginning to reemerge as a topic in current jurisprudence.)

B. The Juristic Postulate of Lawfulness

Despite the differences that he noted between science and law (the former being descriptive, the latter normative), Cohen stressed similarities in their respective methodologies. Both strive for completeness and systematicity and both involve the use of assumptions and postulates. Science postulates that for every physical event there is a cause. The law has the "juristic postulate" of lawfulness, "that the judge should decide every case according to the law and not according to his own arbitrary will. It involves the juristic assumption that for every case which can possibly come before a court, the law has a completely determining governing principle."⁹⁷

The serious difficulty with this postulate is that new cases, cases of novel impression, are bound to appear. Cohen tried to deal with it by specifying more precisely what the postulate asserts and by broadening the conception of logic. The postulate does not assert the "historical" (pre)existence of a governing principle for a novel case, which would lead to the phonograph theory of the judicial function. "Properly understood," Cohen said, the postulate ascribes "only logical existence, i.e., validity or significance, to the

96. The dilemma is put by conservative legalists as well as by rule skeptics. See *Rule versus Discretion*, in Morris R. Cohen, *supra* note 52, at 259.

97. *Id.* at 230.

legal ground of the decision."⁹⁸ I am not at all sure what Cohen meant by this statement, but he went on to make some remarks that may help to clarify it. The juristic postulate, as he explained, asserts that the decision of every case is subsumable under general legal rules. Now, as essential as deductive logic is to judicial justification, if the scope of logic is expanded, as it should be according to Cohen, beyond formal deduction,⁹⁹ these rules can be tested, so to speak, by examining their implications for other decisions and by exploring lines of similarity with decisions taken as already justified or just. In the effort to formulate the law as a system of rules, Cohen saw a degree of likeness to science, viewed as a self-corrective system.

Cohen called the juristic postulate of lawfulness a tautology, but it is best to think of it as a methodological, procedural principle. As such, it could be rejected. But Cohen seems to have regarded it as a necessary presupposition of judicial technique and legal science. It is therefore unfortunate that he did not develop the workings of the postulate in more detail. At times his discussion seems to border on John Dewey's notion of instrumental logic (see below), at others it suggests the idea of principled decision, and at still others it gives a hint of Ronald Dworkin's Judge Hercules.¹⁰⁰

C. Normative Jurisprudence and Legal Positivism

It is clear in any event that employment of the postulate immediately engages one in normative, ethical issues. About this Cohen was adamant. He castigated the realists who thought that factual study was sufficient to constitute a science of law, as if the answers to policy questions would somehow pop out of the results of their investigations. (Here the influence of Morris on Felix is plain, except that the latter went a step further and held that how a judge should decide a case is never a purely legal question.) He would have regarded as fatally naive the suggestion of Hessel Yntema—with whom he vociferously disputed over the scope of legal science—that the mere study of comparative law, without a direct confrontation of ethical issues, could resolve matters of policy.¹⁰¹

Morris Cohen maintained that normative jurisprudence "ultimately depends on ethics and yet is relatively distinguishable from it."¹⁰² This seemingly paradoxical thesis is not easy to explain. Part of what he had in mind can perhaps be garnered from a chapter on "Natural Rights and Positive Law" in which he argued that juristic ideals, however indeterminate and subject to revision, are indispensable to the law.¹⁰³ Given this position, and his principle of polarity, Cohen's self-admittedly "perhaps unnecessarily severe" review of Lon Fuller's *The Law in Quest of Itself* (1940) is somewhat

98. *Id.* at 233.

99. See *id.* at 232.

100. See Dworkin, *supra* note 21, chap. 4.

101. See Hessel Yntema, *Roman Law as the Basis of Comparative Law*, in 2 *Law, A Century of Progress* 346 (New York, 1937).

102. Morris R. Cohen, *supra* note 52, at 245.

103. Morris R. Cohen, *Reason and Nature*, 2d ed. (New York, 1964; first published 1931).

surprising. (Fuller was stunned by it.) Fuller argued for natural law, "which denies the possibility of a rigid separation of the *is* and the *ought*, and which tolerates a confusion of them in legal discussion."¹⁰⁴ Cohen, however, insisted on maintaining a clear distinction here, namely, a distinction between distinguishing and separating law and ethics. For unless the distinction is kept, the ethical criticism of law would be impossible. In a significant sense, then, Cohen adhered to this tenet of legal positivism.¹⁰⁵

Some of Cohen's best writing consists of the analysis and ethical criticism of legal institutions.¹⁰⁶ For instance, he showed how property law distributes power and the social product, and therefore raises questions of justice. Much of the law, he held, is a result of ignorance, prejudice, and selfish class interest; Pound is criticized for underrating the economic interpretation of legal history. Morris Cohen had great respect for law as a human institution, but he had no romantic illusions about it, either.

X. Philosophers and the Law: John Dewey's Instrumental Logic

While Morris R. Cohen was the leading legal theorist among American professional philosophers in the 1910s and 20s, John Dewey (whom Cohen studiously avoided mentioning) can also be cited for a significant contribution, though on a smaller scale. Perhaps the most important American philosopher of the first half of the twentieth century, Dewey's production was massive but he wrote only a few pieces that deal directly with jurisprudence. Yet he long held a keen interest in the subject. As early as 1894, Dewey published an article on John Austin.¹⁰⁷ And for many years, he taught, jointly with Edwin W. Patterson, a seminar on jurisprudence at the Columbia Law School. "Corporate Personality," a paper written in the late 1920s, is still of value.¹⁰⁸ Here we shall briefly consider only one publication, "Logical Method and Law."¹⁰⁹

This article is important because it brings out the type of judicial logic that many critics of orthodox doctrine must have had in mind, when they were at their best, as the proper alternative to the deductive method. In matters legal, Dewey was influenced by Holmes and Pound, and he never associated himself with the realists. Attention to Dewey's approach would have saved the last from extreme and untenable statements that denigrate the role of logic in the law. He affirmed that "[i]t is most important that rules of law should form as coherent generalized logical systems as possible"¹¹⁰ And

104. Lon L. Fuller, *The Law in Quest of Itself* 5 (New York, 1964).

105. See *Should Legal Thought Abandon Clear Distinctions?*, in Morris R. Cohen, *Reason and Law*, chap. 8.

106. See the essays *Property and Sovereignty*, and *The Basis of Contract*, in Morris R. Cohen, *supra* note 52, at 41 and 69.

107. John Dewey, *Austin's Theory of Sovereignty*, 9 *Pol. Sci. Q.* 31 (1894).

108. See John Dewey, *Philosophy and Civilization* 141 (New York, 1963; first published 1931).

109. John Dewey, *Logical Method and Law*, 10 *Cornell L. Q.* 17 (1924); *reprinted in Philosophy and Civilization*, at 126.

110. Dewey, *supra* note 108, at 129.

it is here that formal logic, conceived as an affair of the relations and orders of relations between propositions, plays an indispensable role. But that role is not ultimate in judicial thinking, in how courts *reach* decisions. For the latter we need a “logic of search and discovery.”

Dewey’s account of that logic is continuous with his general analysis of thinking, which he gives in numerous places in his writings. All thinking begins when the individual finds himself in a problematic situation, in which the flow of behavior has been interrupted because of the failure of previously developed habits or previously employed rules of procedure to provide a ready resolution that restores the flow. Such might occur to a person who unexpectedly finds himself locked in a room, a craftsman working on an artifact, a mathematician trying to solve a problem—or a judge faced with a partially or wholly novel case. The problem here is not to draw a conclusion from previously given premises, but to “find statements of general principle and of particular fact, which are worthy to serve as premises.”¹¹¹ These premises, according to Dewey, emerge from a total analysis of the given situation, and they are tested by examining what the probable consequences of following them would be. In the judicial situation this means that general legal rules and principles are “working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations.”¹¹² The “revolutionary” implication of this approach is that judicial logic is a “logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties.”¹¹³

This logic of search and discovery, Dewey made clear, is different from the “logic of exposition” that is involved when judges state to others the justifying reasons for the conclusions they may have otherwise reached. Grounds are set forth so that the decision should not appear as an arbitrary dictum, and so that it will indicate a rule for use in similar cases in the future. The distinction that Dewey drew here is of great significance, and had it been attended to, much of the confusion in the debate between the realists and their opponents could have been avoided. The logic of exposition is primarily that of formal logic, and courts naturally will be tempted to write opinions that give the appearance of greater certainty than is actually present, which is a danger to be careful of. Still, a judge’s exposition of the decision need not be an exact rehearsal of the process of discovery; the intuitions and gut feelings that occurred in the process, the fits and starts, are not grounds that justify the decision to others, though they may suggest premises. The important point, however, is Dewey’s claim that reaching decisions can be an affair of applied intelligence, that it can have a logic. It is a logic, I would add, that is especially appropriate to a policy-oriented approach to appellate adjudication.

111. *Id.* at 134.

112. *Id.* at 139.

113. *Id.* at 138; emphasis in original.

It seems to me that Dewey's instrumental logic of search and discovery is a theoretical formulation of Pound's notion of "judicial empiricism" which was presented in *The Spirit of the Common Law*.¹¹⁴ (I have a copy of the book with Dewey's markings and annotations.) Dewey's formulation goes beyond Pound by placing judicial empiricism in a wider context, the nature of thinking, and relating it to the general issue of problem solving. But it is precisely here, I think, that it may show its weakness. It is not clear to me that there is a perfect analogy between a question of law as a "problematic situation" and other sorts of problematic situation, or that "solutions" to the former are like solutions to the latter, or that "testing" can mean the same thing in both. (I shall glance back at this topic in the discussion of Karl Llewellyn, whose ideas of function and beauty in judicial decision are essentially like Dewey's notion of resolving a problematic situation.) Even a partial treatment, however, is out of place here: it would take us into Dewey's theory of valuation and ethical decision making, according to which value judgments are empirical propositions.¹¹⁵ Despite my reservations about it, I think that Dewey's logic of search and discovery still has great importance, because it shows that intelligence can be applied in reaching judicial decisions as much as in expounding and justifying them.

XI. Broadening the Area of Empirical Research: Karl N. Llewellyn

The transition to Llewellyn may be facilitated by noting his reference to "the beauty of Dewey's exciting analysis" of decision making.¹¹⁶ Llewellyn also juxtaposed Dewey and Pound: "Pound has contributed, for my guess, more than any other individual (unless perhaps John Dewey) to making legal thought in this country, result-minded, cause-minded, and process-minded."¹¹⁷ But then: "Dewey's lines of thought just do not fit the Pound mind. The Dewey emphasis, indeed the Dewey necessity, was always to reach for effects, for function, for 'what it has been *doing*.'"¹¹⁸ Because of the volume and variety of Llewellyn's writings I shall take these remarks as the focus of a necessarily brief and incomplete exposition of his contribution to

114. See Roscoe Pound, *The Spirit of the Common Law*, chap. 8 (Boston, 1921).

115. See John Dewey, *Theory of Valuation* (Chicago, 1939), and *Logic: The Theory of Inquiry* (New York, 1938).

116. Karl N. Llewellyn, *Jurisprudence* 499, n. 14 (Chicago, 1962). This book is a collection of articles from 1930 to 1960.

117. *Id.* at 501.

118. *Id.* at 503; emphasis in original. These quotations are from a 1960 review of Pound's multi-volume *Jurisprudence*. It would be difficult, I think, to overemphasize the impact of Pound on Llewellyn. He is the most cited writer in Llewellyn's *Jurisprudence*. Llewellyn somewhere said (the reference escapes me) that save for "the rigorous temporary severance of Is and Ought," he would endorse Felix Cohen's remark that Pound can be cited for all the planks in the realist platform—and against many of them.

American legal thought.¹¹⁹ In my opinion Llewellyn's thought was the richest of any of the realists.¹²⁰

A. Dispute Settlement and the Behavior Approach

A good place to begin is with Llewellyn's famous 1930 statement, "What these officials [judges, sheriffs, clerks, jailers, lawyers] do about disputes is, to my mind, the law itself."¹²¹ Although Llewellyn was later prepared to repudiate this statement because critics took it as denigrating the importance of rules and the regularities of conduct that they facilitate, it expresses two constant orientations in his work: dispute settlement and official behavior.¹²² If there is to be a scientific study of law, an empirical, observational science, he held, it should center on the "somewhat regularized" interactions between the behavior of officials and laymen in the settling of disputes "that do not otherwise get settled."¹²³ Llewellyn saw these orientations as opposed to the traditional approach that was concerned with how to get disputes settled or with how disputes ought to be settled. It seems to me that the consequence of these (interrelated) orientations is the broadening of the area of empirical research in the law beyond the reaches that other realists took it to have, though of course there were exceptions (e.g., Underhill Moore).

But more important than the way the dispute-settlement orientation stakes out an area for empirical research is, I think, its implications for jurisprudence and legal philosophy. Llewellyn took brief note of this point in a 1940 paper entitled "A Required Course in Jurisprudence." "There is," he wrote, "a theory of legal institutions to be inquired into, quite as illuminating as any theory of law: What is a court? Why is a court? How much of what we know as 'court' is accidental, historically conditioned—how much is essential to the job?"¹²⁴ These are important *conceptual* questions, and they require an answer to what it is, after all, to "settle" a dispute. Moreover, Llewellyn's original orientation—resolution by officials of disputes that do not otherwise get settled—is in fact too narrow: a comparison is needed with modes of dispute settlement other than (official) courts. In other words, what is needed is a general study of the jurisprudence of dispute settlement, of its

119. I shall not deal, for instance, with the "temporary severance of Is and Ought." This theme was prominent in his early methodological writings but became less so as he later turned to normative questions of institutional design, to use Lon Fuller's term.

120. In his case I shall break my rule about not referring to any secondary literature. See William Twining, *Karl Llewellyn and the Realist Movement* (London, 1973).

121. Karl N. Llewellyn, *The Bramble Bush* 12 (New York, 1951; first published 1930); emphasis removed. Extension of the definition of "law" beyond Holmes's "prophecies of what courts will do in fact" had earlier been suggested by W. W. Cook: "The word 'courts' should include some other more or less similar officials." Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *Yale L.J.* 457 (1924).

122. Disputes and "trouble cases" are analyzed in Llewellyn's foray into legal anthropology. See Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* (Norman, Okla., 1941).

123. Llewellyn, *supra* note 116, at 78; from a 1931 paper. For contemporary criticism of Llewellyn's conception of legal science, see, e.g., Hermann Kantorowicz, *Some Rationalism about Realism*, 43 *Yale L.J.* 1240 (1934).

124. Llewellyn, *supra* note 116, at 374.

techniques and procedures. Nor can the normative aspects be disregarded: What counts as a fair procedure in these different modes and what are the ethical implications of adopting one or the other mode of settlement? I do not think that Llewellyn would have been averse to this further broadening of the field of inquiry, which would be empirical only in part, but it was left to Lon Fuller to pursue the subject.

One additional topic remains to be mentioned in this connection, the meaning of “official.” How is this notion to be analyzed? Here Llewellyn seems to have adopted an “institutional” approach, in terms of the “doings” of certain individuals, which deemphasizes rules. He relied especially on Max Weber: “the official exists as such precisely *insofar as* such patterns of action [ordering] and obedience prevail.”¹²⁵ One might question—but I will not here—whether this approach is adequate.

B. The Question of Rule Skepticism

Llewellyn’s deemphasis, or “negation,” of rules seems to put him in the camp of rule skepticism, but he insisted that he never denied the existence or influence of rules. Moreover, he took exception to Frank’s “exaggerated” claims, in *Law and the Modern Mind*, about uncertainty in the law.¹²⁶ In Llewellyn’s view, as presented through the 1930s, the traditional study of legal systems, to which Pound’s great contribution is acknowledged, has severe limitations because it makes *words*, particularly in the form of precepts, rules, and principles, the center of reference in thinking about law. Now, Llewellyn asked, what are rules about? In primitive systems they were rules of remedies, but sophisticated thinking held this notion to be insufficient and therefore introduced the ambiguous conceptions of substantive rights and interests, which the remedies purportedly protected. But these conceptions, he argued, only add confusion to the idea of rules, which is already ambiguous as between a descriptive and prescriptive formula. The “behavior approach” would translate these notions into purely *factual* terms, the practice of the courts for “rules” and the likelihood of a certain type of court action for “rights.” (The obvious impact of Holmes is recognized by Llewellyn.)

To what extent is Llewellyn’s position a kind of rule skepticism? In a sense he bypassed the question by reformulating the issue. He admitted that the rules the tradition talked about may exist, but they may be merely “paper rules.” It is one of the aims of the behavior approach to determine “how far the paper rule is real, how far *merely* paper.”¹²⁷ The distinction between real rules and paper rules turns on a functional or pragmatic theory of meaning. (See Llewellyn’s remarks about John Dewey, above). “‘Rules’ in the realm of action,” he said, “*mean* what rules *do*; ‘rules’ in the realm of action *are* what

125. *Id.* at 32; emphasis in original.

126. He also took exception to Frank’s “psychoanalytic” explanation of the “myth of legal certainty.” See his otherwise complimentary review, *id.* at 101.

127. *Id.* at 24; from Llewellyn’s important 1930 article A Realistic Jurisprudence—The Next Step; emphasis in original.

they do.”¹²⁸ To the objection that so-called paper rules exist insofar as they stand ready for possible application, he responded that “[t]he *possible* application and applicability are not without importance, but the *actual* application and applicability are of controlling importance. To think of rules as universals—especially to think of them as being applicable to ‘all persons who bring themselves within their terms’—is to muffle one’s eyes in a constitutional fiction before beginning a survey of the scene.” Most rules, he held, in fact have only a narrow applicability. What counts primarily is “the sphere of *real* application: of official *behavior* with reference to application.”¹²⁹

In sum, while the import of Llewellyn’s statements about rules, taken as a whole, may not be crystal clear (to me at least—I am often irritated by his stylistic cuteness), it would be difficult to put him in the camp of rule skepticism. I suspect, though, that Llewellyn became friendlier toward rules as time went on; the leading spirit behind the Uniform Commercial Code could hardly be a rule denier. His view of rules was in the end that which Pound had expressed in 1908 in “Mechanical Jurisprudence.” “Rules,” said Llewellyn, “are not to Control, but to Guide Decision.”¹³⁰

The “behavior approach,” as Llewellyn continued to develop it, blossomed into a theory of “law-government” and “law jobs.” Drawing on Max Weber, Llewellyn saw the legal order as serving six main functions, for there are needs that must be met if the group is to survive as a group: (1) Adjusting the “trouble case.” (2) Channeling conduct in advance of trouble. (3) Rechanneling conduct to adjust to change. (4) Allocating authority to make law or legal decisions. (5) Providing incentives within the group. (6) The job of juristic method.¹³¹ The concern with juristic method and judicial technique, whose improvement was conceived as one of the main offices of jurisprudence, was constantly with him, and culminated in *The Common Law Tradition* (1960), a study of appellate decision making.

C. The Common Law Tradition and the Tradition of American Jurisprudence and Legal Philosophy

It is impossible to summarize this difficult book here. In closing the discussion of Llewellyn, however, it is useful to briefly note its connections with earlier elements in the tradition of American jurisprudence. Llewellyn focused on “styles” of decision making, the formal style and the grand style, which he associated with different eras in our legal history. The first is one of rigid rules, *elegantia juris*, and the declaratory theory of law. By contrast, the grand style, which Llewellyn not only described but also advocated, is characterized by flexibility of rules, “situation sense,” appeal to policy considera-

128. *Id.* at 34; emphasis in original.

129. *Id.* at 35; emphasis in original.

130. Llewellyn, *supra* note 37, at 179.

131. Karl N. Llewellyn, *The Normative, the Legal, and the Law Jobs: The Job of Juristic Method*, 49 *Yale L.J.* 1355 (1940). (Here again a profitable comparison might be made with H.L.A. Hart’s minimum natural law and with Pound’s theory of social interests and jural postulates.)

tions, and functional "beauty." In broad terms it is clear that the major influence on *The Common Law Tradition* was Roscoe Pound, who devoted a good deal of writing to legal history and its periodization and forms of development. But the Poundian strains are also specific: flexibility of rules and situation sense are the parallels of the use of rules as guides and sensitivity to the facts of a case, including its social context, which Pound had stressed in 1908. Moreover, against people like Frank who had held the law to be uncertain, Llewellyn maintained that decisions of grand style appellate courts are "reasonably reckonable" because of "steadying" factors, which include what Pound called the known techniques of common-law judges. Emphasis on the use of policy considerations of course takes us back to Holmes.

"Functional beauty," which is closely connected with situation sense, is perhaps the most elusive of all these ideas. It contrasts with *elegantia juris*, the beauty of the logical coherence of the result with the legal system as a whole, a judicial technique that Holmes found to have severe limitations. The former involves a different aesthetic, the aesthetic of fitness for purpose, of what works in the given situation. One of Llewellyn's illustrations of functional beauty is Cardozo's opinion in *McPherson v. Buick*.¹³² Cardozo's decision, according to Llewellyn, was dominated by a sense of the "life situation" in which the case arose. As Cardozo wrote: "precedents drawn from the days of travel by stage coach do not fit the conditions of travel today"; the "needs of life in a developing civilization" required the introduction of a new tort rule. It seems to me that Llewellyn's account, however hard to grasp, brings us back full circle to "the beauty of Dewey's exciting analysis" of judicial decision.¹³³

XII. The Revival of Natural Law: Lon L. Fuller

The dominant innovation in American jurisprudence in the 1920s and 30s was, as we have seen thus far, the realist idea of an empirical science of law that would take the place of a conceptualist, rule-and-doctrine-centered orientation, which was subjected to a radical critique. There were, of course, many people who simply ignored the new trend, and hardy vestiges of the older approach still prospered. On the other hand, there were writers who were prepared to acknowledge points of value in that critique, but wished to save what they thought to be of value in the older orientation. It is difficult, however, to find in their writings any bold idea that would serve as a robust alternative to realist legal science. A near exception to this statement, perhaps, was Morris Cohen, who called for a revival of natural law. Cohen's own efforts in this direction, however, were thin in my opinion, and cannot be regarded as containing anything distinctively novel. The medieval, thomistic doctrine of natural law was also in the field as a possible alternative. But though it had some ardent and able proponents (e.g., Walter B. Kennedy, among the law teachers), it was largely a dead letter outside Roman Catholic institutions.

132. 217 N.Y. 382, 111 N.E. 1050 (1916). See Llewellyn's discussion, *supra* note 37, at 430-37.

133. Llewellyn, *supra* note 116, at 499, n. 14.

A. Secular Natural Law

The true exception was Lon Fuller, who, I believe, was one of the most original figures in American jurisprudence and legal philosophy. He was active from the early 1930s to the early 70s. Fuller took up the cudgels against both realism and legal positivism, which he held to have wrongly severed law from its roots in morality. In turn he developed a position that was uniquely his own, though he always recognized its affinity to some traditional natural law notions. Fuller endorsed natural law in its "most modest form." "Its fundamental tenet," as he put it in his last book, "is an affirmation of the role of human reason in the design and operation of legal institutions."¹³⁴ Fuller, however, rejected the idea, held by various natural law theorists from the seventeenth to the nineteenth century, that there is an "ideal" legal system that actual systems should strive to match; he also seems to have rejected their notion of natural rights.¹³⁵

Like Saint Thomas Aquinas, Fuller held that law making, of which he took a broader view than Aquinas, was a purposive endeavor, and can only be understood as such. (In fact, he held that problems arise for the legal order because law serves conflicting purposes.) In contrast to Aquinas's theory, Fuller's natural law theory was secular and had no theological grounding. Additionally, he was more concerned with how legal institutions and processes should be designed than with the traditional natural law issue of the justness of particular laws. The traditional doctrine judged laws by a substantive morality that was "external" to the legal system, he said, while he was interested in a morality that is procedural and "internal" to law.¹³⁶ His "legal morality" is not a criterion of "right law," except perhaps indirectly.

In 1934 Fuller published a detailed critical analysis of certain aspects of legal realism, especially of the work of Underhill Moore.¹³⁷ While he was not without appreciation for their service in enlarging the sphere of the "legally relevant," Fuller rejected the view, widely expressed by many realists, that legal institutions should be understood merely as "ways of behaving."¹³⁸ Aside from the important affirmative claim that the essence of institutions is to be found in the "mental attitudes" of the participants rather than in behavior, this rejection reflected a more deep-seated feeling: Fuller found "uncongenial" the attitude "which sees the salvation of the law in a pervasive application of the methods of natural science."¹³⁹ The law has pressing

134. Lon L. Fuller, *Anatomy of the Law* 181 (New York, 1969).

135. See Lon L. Fuller, *The Law in Quest of Itself* 110 (Boston, 1966; first published 1940).

136. Lon L. Fuller, *The Morality of Law* (New Haven, 1964; rev. ed. 1969).

137. Lon L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429 (1934).

138. In a supplementary reading for his class in jurisprudence (dated 1952-1953) Fuller said: "Men like Karl N. Llewellyn and Jerome Frank, though identified originally with the Realist movement, turned in their later writings to problems of the order-creating process and wrote much that is valuable to our inquiry." Fuller, *The Principles of Social Order* (see *supra* note 23, at 270). This book consists of selected essays.

139. Lon L. Fuller, in an untitled contribution to *My Philosophy of Law*; see *supra* note 135, at 118.

problems that cannot be solved by the methods of natural science—for instance, problems of distributive justice. (Fuller himself, however, made no direct contribution to solving the latter sort of problems either, as far as I can tell.)

B. The Battle with Legal Positivism and Realism: The Fusion of Is and Ought

Although the realists had claimed that their severance of the is and the ought was only temporary, as Llewellyn had put it, Fuller maintained that this view was just as misguided as the positivists' more permanent separation of the law that is from the law that ought to be.¹⁴⁰ Fuller felt impelled to argue in favor of a "fusion" of Is and Ought or Fact and Value.

Why do the positivists and realists insist on separating them? The case of Thomas Hobbes, the grandfather of legal positivism, is readily understandable: he held that the positive law, good or bad, provides a society with its common (and, hence, objective) standards of conduct, without which social peace would be impossible. While there are sometimes strains of this idea in later positivism, its quest for an "exclusive hegemony" for law, "where its existence can be free from the complications of ethics and philosophy,"¹⁴¹ is undertaken for scientific, descriptive purposes. The various versions of positivism and realism have therefore sought a "test" whereby the law that *is* definitely could be distinguished from the law that *ought to be*. Upon examination, Fuller argued, all these tests (the command of the sovereign, the basic norm, the behavior of judges, and so on) can be shown to suffer from serious difficulties.

Even if Fuller is correct on the last point, that point alone would not be sufficient to establish the principal thesis of *The Law in Quest of Itself* that a rigid separation between Is and Ought is impossible and that "a confusion of them" should be tolerated in legal discussion.¹⁴² For this thesis he offered, as far as I can see, three arguments. The first was the dubious metaphysical argument that in "the moving world of law," as in the moving world of fact, the is and the ought are "inseparably mixed."¹⁴³ The second argument claimed, quite rightly I think, that a litigant (even a so-called Holmesian "bad man") and his lawyer have to be concerned with the law that will be and the law that ought to be as much as with the law that is; but this claim can easily be accommodated by a positivist or realist.

The most interesting argument is the third. Apart from its adequacy for the Is-Ought question, it foreshadows ideas in Fuller's later work. "The bulk of human relations," said Fuller, "find their regulation outside the field of positive law, however that field may be defined. . . . In this field of autonomous order which surrounds the positive law there can be no sharp division between the rule that is and the rule that ought to be. The field,

140. See Fuller, *The Law in Quest of Itself*, which is devoted to the separation issue.

141. *Id.* at 17.

142. *Id.* at 5.

143. *Id.* at 64.

being unorganized and formless, permits of no such division.”¹⁴⁴ While the last sentence suggests a reversion to the first argument, Fuller’s general point can be separated from it. He was asserting, I think, that the positive legal order is continuous with and dependent for the meaning and scope of its rules upon the rules of the social order, and that the latter rules are often unexpressed or not fully formulated, so that the positive law contains rules that are “latent” as it were, rules that ought to be, but are not yet laid down.¹⁴⁵ No positivist “test,” therefore, can sharply isolate the sphere of the law that is from the law that ought to be.¹⁴⁶

It seems to me that Fuller’s points are correct, but it is far from clear that they upend the positivist. For the latter can respond that the Is-Ought distinction applies to the rules of the autonomous order as much as it applies to positive legal rules; of any given rule of any kind it may be asked: Is it a good or just rule? Ought it to be a rule? If the question can be asked, then there is a distinction, however difficult it is to draw. The underlying problem in Fuller’s argument with positivism is, I suspect, that the two parties are using the term *ought* in different senses. A similar problem infects Fuller’s heated exchange with the philosopher Ernest Nagel.¹⁴⁷ Fuller argued for the thesis that “in any interpretation of events which treats what is observed as purposive, fact and value merge.”¹⁴⁸ Much of this debate turned on the meaning of the terms *value* and *evaluation* and the sense in which the characterization of anything in “functional” terms necessarily requires value judgments.

My own sense of the matter is that Fuller’s dispute with the positivists was more complicated than either side sometimes let on, and frequently they spoke at cross-purposes. As just noted, the positivists insisted that it is always possible to ethically evaluate *individual* rules or laws. I do not think that Fuller ever denied this or, if he did, that he was required to do so by his insistence on a fusion of the law that is and the law that ought to be. What he did hold was that purpose is a fact and that certain ought-statements could be derived from certain fact-statements.¹⁴⁹ But Fuller apparently used such terms as *ought* and *value* in a less ethically heavy way than the positivists who affirmed a distinction between Is and Ought and Fact and Value. His fundamental claim was that no legal institution or practice can be fully understood without taking into account the general purpose that it is *suited*

144. *Id.* at 111, 112.

145. Fuller’s thesis on the continuity between “explicit,” already made law and custom or tacit understandings and conventions received a sophisticated and powerful statement in a 1969 article, *Human Interaction and the Law*, reprinted in *supra* note 23, at 211–46.

146. Compare Ronald Dworkin’s argument against a master-test for “valid law,” in *supra* note 21, chap. 2.

147. Lon L. Fuller, *Human Purpose and Natural Law*, 3 *Nat. L. Forum* 68 (1958); Ernest Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, *id.* at 77; Lon L. Fuller, *A Rejoinder to Professor Nagel*, *id.* at 83; Ernest Nagel, *Fact, Value, and Human Purpose*, 4 *Nat. L. Forum*, 26 (1959).

148. Fuller, *Human Purpose and Natural Law*, *id.* at 69.

149. See Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. Legal Educ.* 457 (1953–1954). This article is a review of Edwin W. Patterson’s *Jurisprudence*.

to serve, and this in turn involves seeing it in its social setting. It was his view, I think, that in the total institutional context *some* rules, existent or implicit, will have a kind of naturalness or rationality that is contingent on their promoting or expressing that general purpose. Contrary to what the realists seemed to have been saying, he held that we do not need to have a complete description of law in order to know, in a general way, what the various legal institutions are *good for* and consequently what some of their rules should be, given the proper background information.

It is in light of these claims that Fuller's use of *ought* and *value* must be interpreted. We cannot here examine the extent to which positivism and realism are committed to the denial or, perhaps, the nonassertion of these claims. Even the latter would be significant for his argument. In any case, I believe that it was unnecessary and only distracting for Fuller to have insisted on a "fusion" of is and ought or fact and value to carry his cause against the positivists. In his late writings this notion received less emphasis, although he of course never gave up the central idea of law as a "purposeful enterprise" or his dispute with positivism.

C. *The Internal Morality of Law*

Perhaps the best-known aspect of Fuller's work is his argument in favor of "procedural natural law" in his book *The Morality of Law* (1964; rev.ed. 1969, which contains "A Reply to Critics"). Fuller claimed, quite rightly I think, that the positivists are better at analyzing the contents and structure of an existing legal system than in explaining what is involved in creating and managing one. The creation of such a system clearly is an affair of purposeful effort and commitment which is not captured in any positive legal rules. What, then, are the conditions for the creation of a legal system, regardless of the content of its particular rules? What, in other words, are the conditions of "legality"?

These conditions were characterized by Fuller as the "morality that makes law possible" and the "internal morality" of law or, as he tended to call them in *Anatomy of the Law*, the "implicit laws" of law making. If law making is minimally defined as "the enterprise of subjecting human conduct to the governance of rules,"¹⁵⁰ the failure to adhere to this morality results in a failure to make law. Briefly, the canons of the internal morality are: (1) there must be general rules, (2) the rules must be promulgated, (3) the rules must typically be prospective, not retroactive, (4) the rules must be clear, (5) the rules must not require contradictory actions, (6) the rules must not require actions that are impossible to perform, (7) the rules must remain relatively constant over time, and (8) there must be a congruence between the rules as declared and the rules as administered. Fuller explained the workings of these canons, including problems in them (what is adequate promulgation? to whom must the rules be clear? and so on), by means of the figure of King Rex, a would-be lawmaker who had all the power of an Austinian absolute

150. Fuller, *supra* note 136 (rev. ed.), at 122.

sovereign. As good-willed as he was, Rex bungled the job because he violated the morality that makes law possible.¹⁵¹

A few points should be noted about these canons of "legal morality." First, they are procedural and say nothing about the contents of the legal system. They are conditions that have to be satisfied in order to be successful at the enterprise of law making, achieving a legal system. Second, these conditions can be satisfied in greater or lesser degree, so that the existence of a legal system is itself a matter of degree. And third, the canons do not negate the possibility that a legal system might contain *some* secret (unpromulgated) or retroactive or unclear rules. The internal morality of law is more a criterion of the "legality" of a system as a whole than it is a criterion of the "legality" of individual rules; it is not a test of the validity of a rule. Where there is a pervasive failure with respect to any one of the canons or a partial failure with respect to a few of them, a system fails to maintain its status as *law*—as occurred, according to Fuller, in Germany under the Nazi regime.¹⁵²

It seems to me that Fuller's argument is successful in showing that there are implicit, nonpositive laws of law making. "It will not be far off the mark," Fuller wrote, "to say of the legal positivist that he is an apostle of made law....he is one with a strong preference for the intellectual flavor of made law."¹⁵³ His argument deals a severe blow to legal positivism so conceived.¹⁵⁴

The question remains, however: What entitles Fuller to regard the eight conditions of success in the enterprise of subjecting human conduct to the governance of rules as a *morality*? As conditions for the successful performance of an activity (here, law making), they seem to be no more a morality than a batter's keeping his eyes on the ball is part of a morality of baseball. Fuller's position is complicated by a distinction he drew between a morality of duty and a morality of aspiration.¹⁵⁵ Most people would recognize only the former as a morality. A morality of aspiration, the idea of which goes back to Plato and Aristotle, obtains whenever there are standards for judging how well a certain activity (e.g., artistic activity) is being performed; Fuller put the internal morality of law into this category. We can note only briefly the gist of his response to this critical question.¹⁵⁶

151. *Id.* at chap. 2.

152. On this issue, see the Hart-Fuller exchange: H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *id.* at 630.

153. Fuller, *supra* note 134, at 175.

154. Note the slogan associated with Kelsen's positivism: "All law is positive law." Kelsen admitted that the "idea of a pure positive law . . . has its limitation," for the basic norm is not a made law. Hans Kelsen, *General Theory of Law and State* 401 (Cambridge, Mass., 1946). On Fuller's argument, the limitations of positivism are more far-reaching than this. In various places he also criticized Kelsen's refusal to go behind the Grundnorm and the omission of Austin and other positivists to explore the basis of the habit of obedience or the efficacy of laws.

155. See Fuller, *supra* note 136 (rev. ed.), chap. 1.

156. See *id.* at 200-23; Fuller, *supra* note 134, at 939.

Fuller argued in reply that the implicit laws of law making, which constitute limitations on government, are crucial to whether a regime of order is founded on law rather than arbitrariness. They bear therefore on the legitimacy of a regime and on the citizen's obligation to the enacted law; the citizen's fidelity to the law will depend in part on the fidelity of government to these implicit laws. "Legality" then is not merely a descriptive term. One can speak, as Fuller does, of the ideal of legality. (The proper analogy is not with an alleged morality of baseball but rather with the ideal of sportsmanship, the morality of sport.) The internal morality of law *is* a morality because it provides a standard, though not the exclusive standard, for evaluating the worth of a legal system and because of its direct bearing on crucial moral questions.

D. Problems of Institutional Design

Until now I have been considering Fuller as a critic of realism and (principally) positivism, but with many hints of the direction of his constructive work. He viewed law as an order-creating process, of which legislation is only one form. The implicit laws of law making, the constraints on the legislative process that we have been discussing, do not exhaust the subject of constraints on legal institutions. This point was brought out in a 1946 article in which Fuller examined the process of "arbitration."¹⁵⁷ He imagined a group of men shipwrecked on a desert island. Because disputes arise in the group, one of their number is appointed as an arbitrator. While the latter's decisions are bound to have a "fiat" or arbitrary element, it is clear that in order to perform his task successfully he must take into account the aims of the group and the fact that these decisions will be seen as precedents for future decisions. But, furthermore, he will have to attend to the constraints imposed by "the natural principles underlying group life." For the arbitrator is concerned with creating not only order but good order.

"The science, theory, or study of good order and workable social arrangements" was given the name "eunomics."¹⁵⁸ Though Fuller never produced a systematic treatise on eunomics, his writings amount to more than just a programmatic statement of the subject. These writings deal with a variety of legal institutions and the principles of social order that underlie them. Fuller saw the lawyer as someone who should be an expert in "social architecture."¹⁵⁹ And just as architecture has design principles that are invariant under different applications, so are there principles in the design of legal institutions that "do not change with every shift in the details of the design toward which they are directed."¹⁶⁰

157. Lon L. Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 376 (1946).

158. Fuller, *supra* note 149, at 447.

159. See, The Lawyer as an Architect of Social Structures, *in* Fuller, *supra* note 23, at 264-70.

160. Fuller, *supra* note 134, at 181. This thesis sounds a bit like Rudolf Stammler's idea of "natural law with variable content." See Rudolf Stammler, *The Theory of Justice*, trans. I. Husik (Boston, 1925; German ed. 1902). Fuller read widely in many languages and undoubtedly read Stammler. But a more likely influence is the sociologist-philosopher Georg Simmel, to whom he occasionally referred. See, e.g., Georg Simmel, *On Individuality and Social Forms* (Chicago, 1971).

It would be impossible to summarize here Fuller's treatments of the various institutions of law and order-generating processes. His earliest extended discussion occurs in *The Problems of Jurisprudence* (1949).¹⁶¹ Here and in later publications he considers such institutions and processes as legislation, adjudication, mediation, negotiation, majority vote, and managerial authority. Throughout, his treatments are inspired by the question, What kinds of human relations are best organized and regulated by one or the other of these mechanisms? Thus adjudicative law, he pointed out, is an inept instrument for designating crimes and managerial tasks, and the limitations on ordering by contract are developed in an illuminating way. Fuller was concerned with how the various institutions and processes can maintain their integrity and effectiveness. He asked, for instance, what procedural limitations are required if adjudication is to be effective in performing the particular kind of dispute settling to which it is suited while at the same time retaining the respect of the losing party? Like such positivists as Kelsen and H.L.A. Hart, Fuller emphasized the facilitative function of law, but only he seems to have been interested in the conditions that make this function effective.¹⁶²

The search for the principles of social order ties Fuller to the natural law tradition, but it is again important to stress that, for him, this was not a search for a so-called ideal legal system. The heart of Fuller's natural law approach is its concern with the problems of institutional design, as contrasted with the legal positivist's concern with "made" law. The significance of a legal theory, as he put it as early as his 1940 book *The Law in Quest of Itself*, was the direction it gave to legal research and reflection. To Fuller, the natural law approach reminded us that the "given" in law is in development, that positive law is only one aspect of the phenomenon of law, that the law faces permanent problems, and that human reason and effort are constantly on call in trying to solve these problems.

XIII. Concluding Remarks

I have now concluded this survey of major themes and developments in twentieth-century American jurisprudence and legal philosophy. Aside from the discussion of writers whose work began before the 1940s, I have said little except by occasional innuendo, about post-World War II developments: the legal process school, the reception in America of H.L.A. Hart's work, the "neutral principles" debate, the absorption of John Rawls's theory of distributive justice by law teachers, the rise of economic analysis, Ronald Dworkin's treatment of judicial decision making and rights, and the critical legal studies movement. Fortunately, some of these developments were well represented in their own right at the Jurisprudence Workshop. It is gratifying that scholarship in the field of American jurisprudence and legal philosophy remains so vigorous.

161. Lon L. Fuller, *The Problems of Jurisprudence* 693-743 (Brooklyn, 1949). Fuller considered this work to be a "temporary edition."

162. On the subjects mentioned in this paragraph, see the essays in *The Principles of Social Order*.