

1-1-1959

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Recommended Citation

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METHODOLOGY AND VALUES IN AMERICAN LEGAL EDUCATION: SOME INTERACTIONS AND RECIPROCAL INFLUENCES

Any study of dominant trends in philosophy of law in American law schools at the present day must take note of distinctive organizational and institutional features, peculiar to the American scene and distinct from those existing in other countries, which so largely shape and condition American lawyers and law professors' attitudes to questions of values in law. For the American law school, in contrast to law schools in other countries and even those in England and most of the Commonwealth countries,¹ is a professional school, in design and in emphasis.² It is, of course, a graduate school, though a graduate school without any specific correlation or liaison with the program in undergraduate schools or colleges, and without therefore any continuing common core curriculum requirement for its freshmen entrants.³ The fact that the law school is a graduate school has, however, been used as a successful argument that the law schools should purge themselves of all erstwhile liberal arts tendencies in their own curricula.⁴ Legal History⁵ and Roman Law in the law schools have been dead for years; Jurisprudence (Philosophy of Law) has dwindled away into a twilight option attended in the sophomore year or not at all;⁶ Constitutional History, Political Science, and similar courses seem not to have been taught in the law schools in three quarters of a century. Of course, the demise of these particular subjects in the law school was undoubtedly hastened by indifferent professorial teaching and research in them: they were usually as-

1. See generally Griswold, *English and American Legal Education*, 4 THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW (New Series) 131 (1958).

2. "In the United States, legal education is dominated by a new institutional type, the professional law school. [Footnote omitted] Originating in the initial era as a proprietary substitute for apprentice preparation for legal practice, it is of interest to observe how these institutions have acquired a recognized place in the universities so as to give academic prestige to what is basically training in the trade." Yntema, *Looking Out of the Cave — Some Remarks on Comparative Legal Research*, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 67 (Conard ed., 1955). This article by Yntema was reprinted in 54 MICHIGAN LAW REVIEW 899 (1956).

3. "... There has been no effective control over nonvocational prerequisites of admission to legal study. For a time, in fact, these were negligible, and the law schools actually competed with the colleges for students. Today, this has been partly remedied, and a modicum of cultural preparation is needed to enter law school or to qualify for the bar. But there is no agreement on what such preparation should be and no real disposition to look behind the high school or college diplomas to make sure that applicants are in fact qualified. The law schools automatically accept the more or less standardized products of the system of public or private instruction." *Id.* at 68-9.

4. "Reinforced by the concrete method of case study later introduced by Langdell, this vocational conception [in the American law school] *a fortiori* disclaimed responsibility either to instruct the layman in what he should know about government by law in a democracy or to consider law in the light of reason, justice, or science. Such matters were left to the colleges and universities, upon which also devolved the development of the social sciences generally." *Id.* at 68.

5. Murphy, *Legal History as a Course*, 10 JOURNAL OF LEGAL EDUCATION 79 (1957).

6. See generally Ehrenzweig, *The Teaching of Jurisprudence in the United States*, 4 JOURNAL OF LEGAL EDUCATION 117 (1951); and compare Graveson, *The Teaching of Jurisprudence in England and Wales*, 4 JOURNAL OF LEGAL EDUCATION 127 (1951).

signed to the most junior members of the faculty, who were but rarely interested in them, but this was, in itself, largely a product of the law school governors' disdain for the old pre-Langdell conception of legal practice as a liberal profession.

I do not want to yield too much to the current temptation to blame Langdell for the current "professionalism," as opposed to an erstwhile "liberalism," in the American law school, or to hold him personally responsible for "all that has gone wrong" in American legal education in recent years. He has, in this regard, even been assailed, and by one of the foremost among the American Legal Realists at that, with the charge of inculcating an ivory-tower approach, with producing an unwholesome divorcement of American legal education from the actualities of day-by-day practice.⁷ Taking any sort of historically deterministic approach to American legal education it was probably inevitable, Langdell or no, that with the demands of the new industrial entrepreneur after the Civil War and especially at the turn of the century for a more efficient legal approach to technical problems of corporate organization and practice, some more rigorous and scientific system of legal education should be developed in the law schools.⁸ The criticism — if criticism be warranted on the score that the law schools emphasize a narrow vocationalism — would be more fairly directed, not at Langdell, but at his latter-day disciples. In taking note of the jejune quality of American legal education at the time of, and immediately after, the Civil War — legal education, at Harvard, at the time, was, in Holmes' own words, "almost a disgrace"⁹ — Langdell may be pardoned perhaps for confusing its overall quality of humanism with the sloppiness and inefficiency with which it was conducted.¹⁰ I do not know, how-

7. "American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell. I call him a neurotic advisedly. He was a cloistered, bookish man, and bookish, too, in a narrow sense. . . .

"His pedagogic theory reflected the man. The experience of the lawyer in his office, with clients, and in the courtroom with judges and juries, were, to Langdell, improper material for the teacher and his student. They must, he insisted, shut their eyes to such data. They must devote themselves exclusively to what was discoverable in the library. . . . The neurotic escapist character of Langdell stamped itself on the educational programs of our leading law schools." Frank, *A Plea for Lawyer-Schools*, 56 *YALE LAW JOURNAL* 1303, 1303-4 (1947).

8. "Fundamental change in legal education went naturally with the drift of law business and of main currents of thought in the United States after 1870. Leadership fell to the Harvard Law School through the accidents of personality; if it had not come there, some other school must shortly have taken the lead under the driving force of the times. Events now demanded of the bar knowledge and skills not within the sonorous phrases of the 'constitutional lawyer' of mid-century or the black-letter learning of the conveyancer. . . . The new problems brought a pressure for more thorough and rigorous intellectual training in the law." HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 260-1 (1950).

9. See generally Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 *HARVARD LAW REVIEW* 401, 417-8 (1957).

10. The intellectually broadest and most varied period in American legal education seems, ironically enough, to have been the colonial period at the close of the eighteenth century — highlighted by the work of Chancellor Wythe and St. George Tucker at William and Mary, and by Kent at Columbia: "[Their work] was marked by a breadth of treatment which did not appear again in formal legal education until the 1920's. These men saw legal education as a proper part of a liberal education. Accordingly, they introduced their students and readers to a framework of general ideas in jurisprudence; and they gave them some picture of the law of nations and of constitutional law, not as a superficial adornment

ever, that Langdell's latter-day successors can be pardoned for perpetuating that error or for allowing it to be concretized further in special institutional and procedural devices that have since become the pattern for most of the law schools of the common law world. I mean here, among other things, the institution of the Law Journal with its attendant self-perpetuating skill-type, the law journal editor;¹¹ and I mean the case system of legal education. In a way the two are, in an American setting, inextricably intertwined. The case system, as practiced and developed in the major American law schools, is undoubtedly responsible for some of the cardinal and continuing characteristics of law journal policy and practice; just as, in its turn, the law journal system, by developing a "caste" tradition around its own numbers, has tended to produce an accepted hierarchical progression — law journal editorship, law clerkship, law professorship¹² — with a consequent reinforcement of attitudes and outlook already there.

The apogee of success in the American law school is undoubtedly election to the Law Journal board, and then subsequently election to one of the Cabinet posts (Editor-in-Chief, Articles Editor, Comment Editor, etc.) on the Journal. Some like Jerome Frank have campaigned against the Law Journal's exclusiveness;¹³ others have argued whether its very success may not pose a major psychological problem of providing necessary prestige symbols for those who are not fortunate enough to secure election to the board — a lesser or second-string law

of more bread-and-butter matters, but as necessary to a lawyer's proper grasp of his subject." HURST, *op. cit. supra*, note 8 at 258.

Some elements of this academic liberalism seem to have survived, together with an extraordinary element of student indiscipline and laxness, at the Harvard Law School in the era of Parker, Washburn, and Parsons, immediately preceding Langdell's appointment as Dean in 1870. Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 HARVARD LAW REVIEW 401 (1957); HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 176 *et. seq.* (1957). Langdell, however, "ruthlessly sheared off such faint beginnings as his predecessors had made in political and economic studies allied to law." HURST, *op. cit. supra*, note 8 at 263.

11. "[Law] is not kept esoteric vis-à-vis the student who, after a year, can become a law review editor, which involves sometimes editing his professors (even reviewing his case-books, the only 'books' the professor is apt to 'write') or taking issue with them in student notes and comments on recent decisions. There are some 150 law reviews, often subsidized by the school as part of its public-relations work or as due its image of itself, and of course often also guided by the faculty. But there is, so far as I know, nothing comparable to this development in the graduate school, despite the frequently lesser professionalization of the latter (or perhaps because of this). . . . Graduate students do not run the social science (or humanities) periodicals and lack the confident impetus this involves. Law-review and other law students more than compensate for the lacunae of their teachers by educating each other." Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, 9 STANFORD LAW REVIEW 643, 648 (1957).

12. "I know the power of the system, because I made a quixotic effort to overthrow it when I was a student at Harvard Law School: I sought to persuade Professor Felix Frankfurter and other faculty men to send to the various judgeships of which Harvard held the clerkship patronage, gifted students who were not law-review men. I got nowhere: if the students were good, they would be on the law review." *Id.* at 649.

13. Thus, as a visiting member of the Yale Law School faculty, Judge Frank used to inveigh against what he regarded as an excessive concentration of student energies on the Law Journal to the exclusion of the Legal Aid Society, Barristers' Union, and other activities less pre-occupied with (in Frank's own term) "appellate-court-itis." McWhinney [Book Review], 33 INDIANA LAW JOURNAL 111, 113 (1957).

journal (intramural law review)¹⁴ for those who do not make the first division. But none can deny the law journal's status. I do not want to enter into a debate on the wisdom of necessarily arbitrary classifications of this sort made in regard to young people scarcely out of their teens, when these same classifications are accepted as criteria influencing or determining subsequent professional advancement in later life. Perhaps such classifications do not pay enough regard to possible late maturing of individual talent. But they do, in a way, answer the deeply-felt American need for establishment of competitive standards in the professions to which all can aspire and which the most able can attain; in this sense, if the American legal profession must be élitist in its organization it will, at least, be a democratically-recruited élite. The able and ambitious, whatever their financial, or for that matter social or ethnic, background, can ascend to the top.¹⁵

What I do question in the law journal system are some of its long-range effects on legal education and on legal scholarship and thinking in the United States. The American law journals are models of concentrated research and scholarship, but it is an essentially low-level, problem-oriented research and scholarship.¹⁶ American legal education as a whole is problem-oriented too — here I hark back to the case system once more — but the law journals are even more so. The model of law journal research is the case-note or case-comment — masterpieces of exhaustion of detail but singularly lacking in broad principle or philosophy.¹⁷ Of course this condition is understandable, granted student editorship and a student editorship that changes, as to its key decision-making posts, each twelve months. Such philosophy as there is must normally be developed *ad hoc* or else carried on mechanically from year to year. What I doubt is whether this system, even with some of the veiled pressures and advice that come from the faculty (especially in the smaller schools), can provide that opportunity for long-range reflection and in particular for the continuing re-examination of ultimate goals and objectives and of the relationship of particular instruments for achieving particular ends to those ends themselves, that is necessary for any profession that hopes to keep alive and vital. Anyone reading the major American law journals at the present day must be struck by the absence of sustained policy-type discussion in their pages.¹⁸ An attempt to counter this

14. Such an Intramural Law Review was, in fact, introduced at the New York University School of Law several years ago, as an autonomous student-edited journal separate and distinct from the existing *New York University Law Review*. Riesman mentions, somewhat facetiously, that he himself attempted (quite abortively) to start "another law review with nonlaw-review men" at Harvard. Riesman, *op. cit. supra*, note 11 at 649.

15. "Naturally, the confidence that comes of believing this [that law school marks are infallible] — believing that one got one's start through ability and not looks or luck (confidence which in other versions has been part of the dynamism of the self-made man) — is purchased at the cost of others being robbed of confidence." *Ibid.*

16. See, especially, the pungent criticisms by Miller, *A Modest Proposal for Changing Law Review Formats*, 8 JOURNAL OF LEGAL EDUCATION 89 (1955).

17. There may, however, be a certain element of consumer (the practicing profession, at least) approval of present law journal policy as to internal organization. See the survey (on a somewhat different point) made by Mueller and Skolnick, *Bar Reactions to Legal Periodicals: The West Virginia Survey*, 11 JOURNAL OF LEGAL EDUCATION 197 (1958).

18. Thus, Dean Stason of the University of Michigan Law School has posed the question

omission is the mild Editorial — strictly an advance-prospectus — that has been appearing in the *Harvard Law Review* regularly in the last several years. And the law professors themselves, aware of the danger, have themselves provided some corrective with the professor-edited, general principle-oriented journals like the *Journal of Legal Education*,¹⁹ and *Law and Contemporary Problems*,²⁰ that can face up to problems of possible synthesis of competing ideas in law at the present day. But these journals are of relatively recent origin and as yet may lack the full prestige and influence of the older, student-edited journals of the “national” law schools.

I have mentioned already the developed pattern of hierarchical progression from law journal editor to law professor. This leads me to the plight of professorial scholarship in law, at the present day, in the United States. When I speak of “plight” I do not mean to imply that there is not an extraordinarily high standard of scholarship in American law, or that American professors do not work extremely hard — harder, certainly, than their counterparts in the Commonwealth countries. The competitive system for promotions, in operation in the major American law schools, would, I think, be enough by itself to ensure a constant and continuing literary output, at least until the last promotion hurdle is cleared, though most professors at the major schools seem to work without any such artificial incentives. But it is the *character* of the research that I want to direct attention to, not its quantity or its abstract quality. The prime research outlet in the American law school is the casebook: it is, as a perceptive American scholar has observed, the built-in prestige symbol of American legal scholarship.²¹ Now a casebook, as its name implies, is primarily a scissors-and-paste job — a collection of court decisions loosely stuck together with explanatory headnotes or footnotes.²² I am not denying that a form of interstitial scholarship may emerge from the casebooks — Dean Griswold points out that many scholarly notes are embedded in them.²³ But the point is that the scholarship

tellingly: “Are the law reviews and law journals, prolific as they are, diluting unduly our constructive and productive efforts? Are we in academic pursuits taking on numerous minuscule literary jobs, worthy in themselves, but serving to bar us from effective prosecution of large-scale research?” Stason, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 4-5 (Conard ed., 1955). And see also Miller, *op. cit. supra*, note 16 at 89.

19. Published by the Association of American Law Schools, the general body representing American law professors, and now (1958-59) in its eleventh volume. It is edited for the Association by members of the Faculty of Law at Duke University.

20. A quarterly, published by the Faculty of Law at Duke University.

21. “For a generation, the typical, almost the exclusive, book-size production of legal scholarship has been the casebook. A casebook in print is the symbol of professional contribution and status.” Hurst, *Research Responsibilities of University Law Schools*, 10 JOURNAL OF LEGAL EDUCATION 147, 158 (1957).

22. “This generation of legal scholars finds that the challenge to master a field of the law consists in showing that it can be reduced to teachable proportions. It is a commentary upon how little serious commitment to basic research there is in the law school world that casebook production should so long have enjoyed the prime claim on our creative energies.” *Ibid.*

23. “There have been a relatively few law teachers who have worked hard and effectively to broaden and diversify the contribution of the law schools to knowledge and to the application of knowledge to the improvement of the law. But law schools generally have not been notably successful in opening up new fields for research activities and new methods for their pursuit. In this, law teachers have lagged far behind their fellows working in the

in the casebooks is interstitial, the intellectual discussion being fragmented and dissipated and in no sense comprehensive and synthesizing.²⁴ And on the whole the patterns of casebook organization tend to be standardized or conventionalized throughout the country in regard to selection and organization of materials for discussion, with little opportunity, in consequence, for innovation or the breaking of new ground; and so much sheer physical energy goes into the checking for accuracy of case citation and other purely mechanical tasks associated with the preparation of the casebook, that little professorial energy seems to remain for professorial research and writing other than the conventional law review case-comment type article, the traditional "filler" material for casebooks.²⁵ It is a red-letter day in an American law school when someone publishes an independent monograph treatise, and then it is more than likely to be written by an advanced scholar — Harold Lasswell or Filmer Northrop, both now of the Yale Law School faculty, for example — who has strayed into the law school after making his name in another discipline.

fields of the natural sciences, including medicine, and well behind many of those working in other areas of the social sciences.

"... Law teachers turn naturally to the compilation of teaching materials (in which many scholarly notes are imbedded), and to the writing of articles on questions that come to the fore in the classroom. This leaves little opportunity for inquiries in other directions or for the development of basic studies which would involve investigations into the actual operation of legal processes and institutions." Griswold, *Harvard Law School, Dean's Report, 1957-1958* 11-12.

24. "The research that will make a good casebook need go no further than to turn up stimulating questions within a quite generalized frame of reference; the function of the casebook does not require its author to spend toil on answering the questions. Langdell's stripped-down contracts casebook met all the responsibilities of research directed at course construction. The extended commentaries of the current casebook edge toward quite a different responsibility but typically avoid its fulfillment, striking a balance on limited issues and disclaiming determinations on big ones. This is fitting enough for making useful casebooks; it does not go more than part way, however, toward meeting the university's obligation to advance knowledge of the legal order." Hurst, *op. cit. supra*, note 21 at 160.

25. Professorial preparation for the case method instruction, if that method is to adhere faithfully to its stylized format of a series of responsive questions addressed by the professor to the class, is also, it is to be noted, particularly time consuming. Griswold, *Harvard Law School, Dean's Report, 1957-1958*, p. 12. Among other explanations suggested for the marked lag in advanced research at the present day are the immense administrative adjuncts of education in the modern American law school. Stason, in *CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH* 5 (Conard ed., 1955). Dean Cavers speculates on whether the American law school may not now have to develop a specialist research cadre on the pattern successfully developed (through training in research for the Ph.D. degree) in the American graduate school. Cavers, *Manpower for Research*, *id.* at 91 *et seq.*

The imagination and flexibility of the University administration (the Dean of the Law Faculty, or even the University President) in actual utilization of existing intellectual resources on the Law Faculty, especially scarce research intelligence, may be crucial. Thus Llewellyn mentions that President Nicholas Murray Butler of Columbia succeeded in keeping Mr. Justice Cardozo's posthumous papers out of Llewellyn's hands. — Llewellyn, *id.* at 30-1. On the other hand, a more perceptive administrator, Charles E. Clark, then Dean of the Yale Law School, handled the brilliant but difficult Thurman Arnold with understanding and kindness, with immediate and outstanding results from the viewpoint of productive research: *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937) appeared in quick succession. — Clark, *id.* at 177. And as to the general problem of overall planning of research programs and handling of manpower for research, see McDougal, *The Policy-Science Approach to International Legal Studies*, in *LECTURES ON INTERNATIONAL LAW AND THE UNITED NATIONS* 61 (Bishop ed., 1957).

I have promised some examination of the case method of teaching in American law schools and I will not delay it longer. The case method seems to have started, in part, as a simple revolution in teaching *materials*.²⁶ Instead of the loose, sprawling authorities referred to as adjuncts to the old pre-Civil War lecture system of instruction, Langdell planned at Harvard a more concise, core set of materials — a group, so to speak, of ideal cases representing the best in the continuing common law tradition.²⁷ It was this emphasis on the ideal case, with the built-in implication of timelessness in law that caused Jerome Frank, I am sure, to advance his most devastating criticism of Langdell as encouraging an unwholesome isolation of legal education from legal practice.²⁸ But it is not the case method as practiced by Langdell that we are concerned with but the case method of this post-World War II era as developed and refined and extended under the influence of the American Realists and the sociological school of law. One should beware, of course, of assuming too easily that the case method must mean the very same thing to everyone who employs it — Dean Griswold reminds us that Ames and Williston could conduct a class of almost any size, with equanimity, with the case method;²⁹ but he concedes that there are no more Ames or Willistons around now (even at Harvard).³⁰ What is a vibrant exercise in the Socratic method with one teacher may, with a lesser man, be reduced to a conversational mumble punctuated at fitful intervals by irrelevant questions directed to the audience. But by and large the case method of teaching, as practiced today in the American law school, has these elements in common. It is interested in asking questions rather than in answering them;³¹ it is problem, rather than principle, oriented;³² it is, in the Realist vein, attuned

26. See generally HURST, *THE GROWTH OF AMERICAN LAW. THE LAW MAKERS* 260 *et seq.* (1950); REUSCHLEIN, *JURISPRUDENCE — ITS AMERICAN PROPHETS. A SURVEY OF TAUGHT JURISPRUDENCE* 78 (1951); *A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 140 *et seq.* (Goebel ed., 1955).

27. But note Morris Cohen's tempered criticism of Langdell's failure (due, in Morris Cohen's view, to Langdell's ignorance of Roman law, ancient or modern) to see that the common law was not a purely timeless logical system but merely a body of rules that grew up, historically, under definite social conditions, in England. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 151-6 (1954).

28. Frank, *A Plea for Lawyer-Schools*, 56 *YALE LAW JOURNAL* 1303 (1947). And compare also Morris Cohen's attack on Langdell's preoccupation with the late 18th century in his rather irrational acceptance of the English common law of that particular era as the "perfect embodiment of a completely rational legal system." COHEN, *op. cit. supra*, note 27 at 152.

29. "Looking over the past, it seems fairly clear to me that a class of almost any size conducted by Dean Ames or Professor Williston would provide better legal education than a small class under a lesser teacher." Griswold, *Harvard Law School, Dean's Report, 1957-1958*, p. 10.

30. *Id.* at 11.

31. Hurst, *op. cit. supra*, note 21 at 160.

32. "Today the most significant effect of [the Langdell school's] lack of any coherent philosophy is shown by its influence in the restatement of the law. The doctrine of *stare decisis* and the empiricist living from hand to mouth that is called 'deciding each case on its merits' (without any guide on how to evaluate these merits) have made our actual law a hopeless labyrinth. Clearly, there is no way out except by some process of selecting some rulings and rejecting those that conflict with them. This, however, requires conscious examination and evaluation of the policy of the law, for which there is no room in the tradition of the Langdell school. The law is viewed as a perfect system, even though in practice it cannot be so." COHEN, *op. cit. supra*, note 27 at 155.

to the solution of single cases rather than the synthesis of long lines of decisions; it is fact-conscious and emphasizes the *ad hoc* character of judicial decision making;³³ it aims at the identification of the competing interests (individual or group) involved in any problem-situation rather than at any deep-seated exploration of the psychological origins of those same interests or at an attempt at scientific evaluation of them.³⁴ The dilemma over recourse to values in the actual decision-making process — of preference for one competing interest rather than another — is solved in an impressionistic, almost unconscious way. For the governing values, on this particular type of approach, will be societal ones; the differing interests pressed in the particular problem-situation are valid, in true Jamesian fashion, simply because they are pressed;³⁵ the ideal solution is the one that least interferes with or disturbs the complex of interests being pressed in society as a whole.³⁶ What we have operating here, then, is philosophical relativism — American legal Pragmatism in the best sense of the word. Now there are very many who will see nothing wrong with Pragmatism as a general philosophy of law and I have, in fact, no quarrel with them on the general issue at this stage. The point is, simply, that what is really, in the ultimate, a problem of values and value-choice is concealed in the interstices of methodology. The crucial part of the decision-making process is, I believe, slurred over and all too frequently ignored altogether in the general technique-oriented law school approach.

It is, however, not until very recent years, and certainly until after World War II, that this all-exclusive preoccupation with method has begun to present any special problems for American law schools or American lawyers. I think this fact is largely due to the erstwhile substantial agreement on fundamentals

33. Thus Roscoe Pound himself assailed the American Legal Realists' "insistence on the unique single case rather than on the approximation to a uniform course of judicial behavior. . . . Radical neorealism seems to deny that there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, cannot be referred to them." Pound, *The Call for a Realist Jurisprudence*, 44 HARVARD LAW REVIEW 697, 707 (1931). However, Llewellyn, in replying to Pound, suggested that this Realist emphasis could be explained, more simply, as a distrust of traditional legal rules and concepts insofar as they purported to *describe* what either courts or people were actually doing; a distrust of the theory that traditional prescriptive rule-formulations were the *heavily* operative factor in producing court decisions; and a belief in the worthwhileness of grouping cases and legal situations into narrower categories than had been the practice in the past. Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARVARD LAW REVIEW 1222, 1237 (1931).

34. This proposition applies especially to Roscoe Pound's interest-oriented, sociological jurisprudence. See especially the discussion by Pound's student and authoritative interpreter, Julius Stone. STONE, *THE PROVINCE AND FUNCTION OF LAW* 355 *et seq.* (1946).

35. WILLIAM JAMES, *THE WILL TO BELIEVE* (1897); JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* (1907).

36. The association of James' thinking with Roscoe Pound's Sociological Jurisprudence and with contemporary American legal thought generally is both proximate and substantial. STONE, *op. cit. supra*, note 34 at 355-368; PATTERSON, *JURISPRUDENCE — MEN AND IDEAS OF THE LAW* 516 *et seq.* (1953); Jones, *Edwin Wilwhite Patterson: Man and Ideas*, 57 COLUMBIA LAW REVIEW 607, 610 (1957). For analogous influences on American legal thought, of the pragmatism of Charles Peirce, see Freund, *Thomas Reed Powell*, 69 HARVARD LAW REVIEW 800 (1956); of the pragmatism of Dewey, see Frank, *Modern and Ancient Legal Pragmatism — John Dewey and Co. vs. Aristotle*, 25 NOTRE DAME LAWYER 207 *et seq.* (1950).

among American lawyers once the New Deal-Welfare State ideals had become received majority opinion, and concomitantly while the Realist and sociological drives in American law were at their height. The problems have come with the great tension issues of the 1950's—problems of the necessary definition or redefinition of relationships between man and the State—especially in the internal security and race relations area. On these issues, clearly, there has been no substantial community consensus as yet, and the dilemma of value-choice of necessity could therefore no longer be smothered over or remain submerged. Unfortunately American lawyers and law teachers seem to have been caught largely unprepared because intellectually unequipped for its solution.

Now it would be wrong to suggest, in any crude, oversimplified way, that the villain of the piece is the man who first thought of abolishing the compulsory courses in Jurisprudence and Philosophy of Law or in Legal History in the American law school. A great deal of the blame undoubtedly rests with the professional jurists themselves. We are reminded that the American Realist drive brought with it, thirty years ago, many bold calls to action, but little concrete action,³⁷ even (or, perhaps, especially) on the part of the Realists themselves.³⁸ The Realists, on the whole, were a protest movement, and had no affirmative program for legal action to offer in place of the existing order that

37. "Taken alone, [the legal realist movement's] attitudes and methods are not adequate to the opportunities and obligations of our time." McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE LAW JOURNAL 1345 (1947).

"... We have had little treatise production and a thin and uncertain trickle of monograph publication about the law. Of course, we must reckon with the interruption of the war; perhaps, too, the very pace of change might naturally be expected to outdistance scholarly reflection upon it. But there was not a substantial research output in the decade before the war. The stir in legal philosophy over 'realism' from the mid 1920's on produced many calls to bold work—and little work. And the excuse of the war's disturbance begins to wear thin by 1957." Hurst, *op. cit. supra*, note 21 at 158.

Compare the blistering attack on the whole realist drive for integration of law and the social sciences that culminated in the short-lived Center at Johns Hopkins University in the late 1920's—an attack made, albeit partly with tongue in cheek, by an elder statesman of legal realism, Llewellyn: "Never in the long history of efforts toward social science had there been as ill-considered, badly prepared, and generally useless squandering of research money as in the Hopkins experiment If you want to know what kept the foundations from being interested in other than doctrinal legal research, the answer is the Hopkins experiment"

"[Underhill] Moore, for my money, put forward the absolute nadir of idiocy when he tested out whether law has mystical operations by an elaborate, sustained set of observations and meterings and statistics on the non-effect, on the parking practices of people in New Haven, of a change in the official traffic regulations in New Haven, which he had carefully arranged to keep anybody in New Haven from knowing had occurred. This is bottom. You'll never get below it, gentlemen. It's like the market at the bottom of 1932. It can only go up from there." Llewellyn, *Social Significance in Legal Problems*, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 10-11 (Conard ed., 1955).

38. But see the spirited reply by another realist, Judge Charles E. Clark (of the United States Court of Appeals for the Second Circuit, and formerly Dean of the Yale Law School): "... Whatever the mistakes we made, we were at least willing to make them. In other words, we got beyond the stage of talking to the stage of doing It seems to me as I look around that there's one thing that we're now missing, and that is the willingness to take a chance. Perhaps another way to put this is that we should have the courage to try even if we fail." Clark, *id.* at 175.

they were bent on overthrowing.³⁹ And there is something to the suggestion that sociological jurisprudence, as an essentially empiricist philosophy, is little calculated to produce reflection on ultimate values in law.

When I consider the standard outstanding products of the contemporary national law school in the United States — and I stress that I am considering, now, the Law Journal editor-type, hard-working, intelligent, and dedicated as he is — I think I see men who, in Isaiah Berlin's words, "pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle; [who] lead lives, perform acts, and entertain ideas that are centrifugal rather than centripetal."⁴⁰ The American law school has, I think, produced a generation of foxes — of low-level empiricists — at a time when the need for devising ordering principles in law was never greater. The complete atrophy at the present day of American thinking on Federalism (formerly so rich and vibrant a subject of study), on political pluralism and the territorial dispersal of power — has never been more apparent than in the confused and bitter doctrinal debate in the aftermath of the 1954 Supreme Court decision on school-segregation.⁴¹ The problems of definition and redefinition of the relationship of Man and State — the conventional area of political liberalism — in the continuing world condition of bipolarity of power has not been solved, *Jencks*⁴² *et alia* notwithstanding. The need for a value or policy-oriented jurisprudence (whether natural law or otherwise) has never been more apparent if we are to supply the judiciary and practicing profession with some more affirmative guides to decision-making in this crisis age.⁴³

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39. Note the shrewd assessment of the historical significance of the legal realist movement in American law, advanced by Thurman Arnold, himself one of the realist notables of a generation ago: "Realistic jurisprudence is a good medicine for a sick and troubled society. The America of the early 1930's was such a society. But realism, despite its liberating virtues, is not a sustaining food for a stable civilization." Arnold, *Jerome Frank*, 24 UNIVERSITY OF CHICAGO LAW REVIEW 633, 635 (1957).

40. BERLIN, *THE HEDGEHOG AND THE FOX. AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1 (1953). For a thoughtful assessment of the potential contribution of Berlin's philosophy of history in developing new philosophic perspectives for English law students, see the comment by Jerome Hall, 44 VIRGINIA LAW REVIEW 321 (1958).

41. *Brown v. Board of Education*, 347 U.S. 483 (1954).

42. I am referring, here, to the group of major decisions handed down by the United States Supreme Court in the Spring, 1957, court term. See especially *Jencks v. United States*, 353 U.S. 657 (1957).

43. See, for example, Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE LAW JOURNAL 203 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE LAW JOURNAL 1345 (1947).