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PRINCIPLES OR FACTS?

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A DECADE ago it would have been necessary to begin this paper with an apologetic preface and a bit of "sales-talk" designed to arouse the interest of the reader and to convince him that the subject matter had some practical value. But no longer. Times have changed and with the changing times has come a resurgence of discussion about the nature of the judicial process, the value of precedents and principles contrasted with the importance of facts and functions in the shaping of the law. Justice Cardozo, who is entitled to speak with considerable authority concerning matters philosophic, sets down the remarkable change which has come about in very recent years:

"I marvel when I observe the change that has come over us in so short a span of years. One of the most significant signs of the time is the ferment of the present-day interest in problems that are bound up with the nature and origin of law, problems of judicial method, problems of judicial teleology, problems of legal philosophy, if the word be not anathema."¹

The reasons for this sudden leaning towards jurisprudence may be briefly noted. Legal philosophy has descended to earth, deigns to walk with common man and to grovel in the dirt of actualities. Legal scholars are beginning to deal with vital problems of the day and to discuss the bread and butter cases which pass over the lawyer's desk. If proof were needed that jurisprudence has changed its aristocratic dress, it would be found in the terse and somewhat startling phrase from an English pen: "Jurisprudence cuts ice."² More expressive than pages of labored proof is this homely colloquialism connoting the harnessing of legal learning and scholarship in the interest of judge and lawyer rather than merely delighting the cloistered scholar.

Is judge or lawyer, law student or law professor, interested in the real stuff that makes for law? Are they alive to the raging controversies about the value of precedents, rules and principles balanced against the weight of facts and unconscious forces swaying the judicial mind? Have the terms "realism," "hunch process," "fact approach" and

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2. Cardozo, Address before New York State Bar Association, 55 REPORT OF NEW YORK STATE BAR ASS'N (1932) 264.

3. Amos, Roscoe Pound, Modern Theories of Law (1933) 86, 90.
“experimental jurisprudence” any importance if the coiners of these strange terms offer them to us with the assurance that the formulas underlying them spell out the real manner in which judges decide cases and mould the law? Certain it is that such questions which take issue with much of traditional doctrine and theory cannot be dismissed as “immaterial and irrelevant.” These problems of method and approach rub close to the very fabric and fibre of law and law making. They demand and are receiving interest and attention.*

One more preliminary note may be ventured: a plea to the complacent lawyer who still believes that the search for law consists alone in the thumbing of the pages of the reports and statutes and that all else may be curtly dismissed as “extra-legal,” interesting perhaps to broaden the cultural side of the lawyer’s activities, but of no avail in the work-a-day professional life. Law has its leaders, moulders of thought and action, no less than Church and State. By general consensus of professional and popular opinion, Holmes, Cardozo, Pound and Crane would rank very high in any contemporary reckoning of able and scholarly jurists. While preeminence of judicial pronouncements accounts in substantial degree for their high juristic standing, it may be pertinent to recall that these great jurists have all contributed extra-judicial writings expressive of their views on philosophy of law.5 They have realized full well the changing times, the mobility of law and the pressure of economic and political factors upon the legal order.

Today more than ever before this “extra-legal” outlook is imperative. Revaluation and experiment, readjustment and change, are dominant characteristics of our day and place (and, indeed, of the world about). Abroad and at home there is prevalent a violent and persistent attack upon institutions and customs, and a skeptical reexamination of traditional teaching. Government, industry and society are under the fire of adverse criticism. Strange it would be if these cataclysms

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4. One can hardly turn the pages of current law reviews without meeting with articles bearing upon some subject jurisprudential in scope and content. See infra notes 5 and 9.

5. For bibliography of articles by Justice Oliver Holmes, see Bent, Justice Oliver Wendell Holmes (1932) 357-360. See also (1931) 44 Harv. L. Rev. 797-798.

Cardozo: Nature of the Judicial Process (1921); The Growth of the Law (1924); Paradoxes of Legal Science (1928); Law and Literature (1931).


Crane (present Chief Judge of the New York Court of Appeals): Magic of the Private Seal (1915) 15 Col. L. Rev. 24; Judge and Jury (1929) A. B. A. J. 201; Taking Stock (1930) 55 Report of New York State Bar Ass’n (1930); Part Played by Tradition in Work of Judiciary (1931) 36 Com. L. J. 148; Liberal or Conservative (1932) 2 Brooklyn L. Rev. 7 (partial list).
and percussions in governmental, industrial and societal relations failed to jar the settled citadels of the law. Law is too closely interlocked with life to pass unscathed through these upsets which so violently affect the state, shop and home. A glance about reveals that skepticism and experimentalism—dominant moods and fancies of the hour—are beginning to seep into the law. And so we read that "ferment is abroad in the law" and that

"The waters of the law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy."

Whether this agitation of law is figuratively expressed in terms of "ferment," "wind," or "water"—one fact stands forth: There is action, change and flux in the law and it seems timely to catch this temper of the times and to attempt the evaluation of the merits and demerits of the proposed reforms.

A Bit of Realism

At the present time the most interesting and provocative movement in the law passes current under the title, "realism." Realism has been gaining force and confidence with the passing years. In matters of sheer enthusiasm and of productive legal writing, it stands forth as our most active school of jurisprudence. Peculiarly American in its origin and personnel it has aroused intense interest because of its radical departure from the tenets of the old order. "Here is an important movement in the science of law and it behooves us to understand it and to be

8. "The most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists and content with nothing less than revision to its very roots of the method of judicial decision which is part of the classical tradition." Cardozo, supra note 2, at 267.
9. See extensive bibliography of articles by writers of the realistic school in Llewellyn, supra note 6, at 1257. See also Goodrich, Our Black Ink Balance (1932) 7 Am. L. School Rev. 385, 393.
As a preliminary to the consideration of the substance of realistic teaching (and not wholly without importance in the understanding of its program) it is in order to note that it bears the stamp of youth. Realism is expressive "of the philosophy and psychology of today." It has attracted to its banners the younger generation of law teachers and lawyers; age has been relegated to the role of sympathetic observer. If not young in years, at least realists claim to be young in spirit. Confidence and courage, characteristic of youth, mark the utterances of the proponents of realism. Theirs is a "fighting faith." Pride in the products of its school gleams forth. "It spreads. It is no mere talk. It shows results, results enough through the past decade to demonstrate its value." The dare of formative years, the itch for action, the unrest of childhood—all these are paralleled in their juristic writings. "Life's very insecurity" has an appeal, is "a most inviting aspect." Stability is not a haven of refuge; it is a barrier to progress.

With some reason, realism may be labelled the revolt of youth belatedly appearing in the legal order, an offensive against the existence of "fundamental underlying principles," a plea for experiment and change; an urge to cut loose from traditional doctrine. This flare and verve of youth which permeate the realistic movement are not set down by way of criticism, but rather as a warning to realist and critic of realism. Its youth is indeed a vitalizing force which

12. Ibid.
15. "We may at least admire the courage of a school [realism] which sweeps aside in so categorically a manner the practice and learning of six centuries." Goodhart, supra note 10, at 15.
16. Llewellyn, supra note 6, at 1235.
17. Id. at 1223.
Rather oddly, Frank, who endorses the thrill and "enthusiastic bliss" of "insecurity" (p. 17) and argues for a removal of a "guarantee" against this insecurity of earthly affairs, is counsel of the AAA, which is endeavoring to remove the "enthusiastic bliss of insecurity" from the farmer's life.

Cf. Secretary of Labor Perkins: "In our study (of the New Deal), we shall not lose sight of the important fact that the primary objective of everything that is done must be recovery and the development of a more stable economic order." N. Y. Times, Aug. 14, 1934, at 3.
"Especially do they [realists] repudiate fixed beliefs as to the eternal validity of means for the accomplishment of a desired end." Frank, Realism in Jurisprudence (1934) 7 Am. L. School Rev. 1063.
has carried the fight forward in formidable fashion. It behooves the older generation, in the analysis of this presentment of the younger generation, to heed the words of Chief Judge Crane: “Too often the opinion of an older man represents the trend of a time which has passed, whereas youth is ever at the threshold of the future.”

But it is also permissible to suggest that youth has its shortcomings as well as its excellencies. In realism, as in any other new cult, the novelty of the proposals and the push of the proponents may impel them to overstate the case. Here at least the anchor of age and tradition may be of some utility if only to stabilize progress of youth. In this “moving-picture” era of the law with its rapidity of change and motion, a bit of “still photography” reminiscent of tin-type times, may not be out of place. If we are “on our way” let us at least try to find out where we are going.

What is realism? One thing is certain. Realism is not one thing, but many. “If one thing, it is twenty things in one.” Realists divide on the very label to be stamped upon their product. Frank prefers the term “experimental jurisprudence.” Cook calls the approach, “scientific;” Oliphant talks of “objective method.” “Fact-research” and “functional approach” are also used. Not merely in title but in substance there is no school of realists. They are united only in their skepticism.

They differ widely one from another.

In this situation of doubt and uncertainty necessarily incident to formulation of a new philosophy of law, it is difficult to avoid debates about content and substance, and more difficult and dangerous for

21. While the realists deplore the emptiness of words, credit must be given to them for peddling their juristic wares in attractive packages. There is a “punch” in their writings and a zest which adds much to the reader-interest. This is particularly marked in the contributions of Llewellyn, Frank and Hutcheson.

See Cardozo, Law and Literature (1931) 3-40.
23. Llewellyn, supra note 6, at 1223.
24. “Parenthetically let me say that realistic jurisprudence was an unfortunate label since the word ‘realism’ has too many conflicting meanings. In the light of congeniality with experimental economics I suggest that realistic jurisprudence should be renamed experimental jurisprudence and that those who lean in that direction be called experimentalists.” Frank, supra note 19, at 1053.

In Frank’s insistence upon the renaming of “realism” it may be that he is falling a victim to the failings of the conceptualists by doing a bit of “wishful thinking” in an effort to tie up law and experimental economics in the belief that thereby scientific words may produce scientific results. The ardent enthusiasm of the realists for scientific methods will be later developed in this paper.

25. Llewellyn, supra note 6, at 1234.
26. Ibid.
27. Frank, loc. cit. supra note 19.
the critic to generalize regarding the convictions of individual advocates of the realistic approach. The modest purpose of the present paper is to select a single thread that runs through the skein of entangled doctrines and to consider its present-day value.

Some Facts About Facts

One of the permeating factors which realists are agreed upon is the importance of facts and fact-finding in the evaluation of law. In this narrowed field it is submitted that realists have fallen victims to some of the very unrealities which they detect in their principle-blinded brothers of the law; that they oversell facts and undersell principles. In this realm of fact-research the charge is made that realism is not real enough to fit the facts as they actually exist.

In a recent address President Nicholas Murray Butler sets forth a warning note which may be pertinently developed in the discussion of fact-finding in the legal order.

"... an idea which delights the Frenchman or the Italian and which perplexes the Englishman\(^2\) is apt first to irritate and then to anger the American. He insists upon preferring what he calls facts to ideas quite unmindful that a fact is only the mark which an idea makes on the shifting sands of human experience."\(^3\)

This tendency of the American mind to run to facts instead of to ideas is particularly noteworthy in realistic jurisprudence.

Realism smacks of the res; it looks for grim reality; it abhors the "make believe;" it argues that we should view the law "as is," not as it "ought to be." The "thing" is the thing to search for in the discovery of the law, rather than the vaporous abstraction of principle or rule. Thus may the law be divorced from the vice of metaphysical catchwords and airy ideas. The facts are to be captured and brought forth with a Jack-Horner air of triumph to plague the "Jovian lawyer"\(^1\) dwelling on Olympus.

Borrowing this mythological touch of Frank, the main issue of this paper may be given a classical setting: Olympus of Principle or Elysium of Fact?

Llewellyn states the case for fact-finding in the following words:

"They [the realists] want law to deal, they themselves want to deal, with things, with people, with tangibles, with definite tangibles and observable relations between definite tangibles—not with words alone; when law deals with words, they want words to represent tangibles which can be got at beneath

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29. Tomlin, supra note 10, at 599.
31. Frank, supra note 19, at 1065.
words and observable relations between these tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts.\textsuperscript{32}

It is suggested that Llewellyn's comment upon the driving force of facts and their importance as the real objective of law research contains some rather definite implications that are of debatable texture even when gauged by the tests of the realists themselves. It will be noted that Llewellyn presses down upon “things” and “people” and “tangibles” which are “definite” and “observable.” Why this emphasis upon people and things and tangibles? Because, it would seem, facts are made of real stuff as contrasted with the “empty but mouth-filling”\textsuperscript{33} concepts of the “Absolutists” in the legal order.

If this definiteness and tangibility of facts are real, why not use facts to “check ideas” and to rid the law of the indefiniteness which unfortunately pervades it? Why not? There is a certain appeal in this emphasis upon “observables” and “tangibles” which one can walk around and touch and see; there is a certain ruggedness that is lacking in a principle or rule of law. Fact-finding seemingly offers advantages which are lacking in preconceived ideas and ideals.

Recalling the mandate of the realist that we must be able to determine whether we are “hearing thoughts, or merely words,”\textsuperscript{34} it is not inapt to point out that there are many problems in the law which do not produce “observable” and “tangible” facts visible to the eye and responsive to the touch. Labelling them “observable” or “tangible” does not make them so. Facts are, or may be, just as elusive and nimble as principles and rules. For example, the long struggle to give a situs to intangible choses in action for purposes of garnishment\textsuperscript{35} or taxa-

\textsuperscript{32} Llewellyn, \textit{supra} note 6, at 1223. “There is nothing upon which the new realist is so insistent as on giving over all preconception and beginning with an objectively scientific gathering of facts.” Pound, \textit{supra} note 9, at 700.

\textsuperscript{33} Frank, \textit{op. cit. supra} note 18, at 61.

Frank wields a trenchant pen against the verbalists addicted to “verbomania.” But one may be pardoned for refusing to become too excited about his attacks upon the “profound terminology” (p. 62) of the Absolutist.

He himself does fairly well in the matter of word-coinage: “Veusing” (p. 57), “Realism” (pp. 48-56), “nihilistic skepticism” (p. 63), “psychopathology” (p. 323), “Platonizing” (p. 94), and “chancelessness” (p. 75).

Having in mind the entry of a new vocabulary into the law by reason of the present-day scientific approach, the realists should be more lenient with the “mouth-filling” concepts of the old order. See \textit{infra} note 52.

The remarks of Goodrich are in point: “But we have not solved any problems in the law by simply shifting the vocabulary from discussion in technical legal terms, which we at least know how to pronounce, to the language of another field where we know neither the content nor pronunciation.” \textit{Supra} note 9, at 395.

\textsuperscript{34} Hutcheson, \textit{supra} note 14, at 1069, 1071.

\textsuperscript{35} Beale, \textit{Jurisdiction in Rem to Compel Payment of a Debt} (1913) 27 Harv. L. Rev. 107; Carpenter, \textit{Jurisdiction over Debts} (1918) 31 Harv. L. Rev. 905.
tion is not solved by stamping these airy relations tangible and observable. Calling an “intangible” a “tangible,” even by legislative fiat, may end in disaster.

Justice Holmes has been given high rating as a realist; with some reason he has been said to be the founder of realism. Yet Holmes, condemning the undue expansion of words by the formalist, uttered an admonition that with propriety may be brought forth against the oversimplification of fact-finding and the sprinkling of words which do not fit the facts. “Delusive exactness is a source of fallacy throughout the law. By calling a business ‘property’ you make it seem like land. . . . But you cannot give it definiteness of contour by calling it a thing.” Not inappropriate are a few words from Chesterton: “Many a modern man still vaguely feels there would be something vulgar about believing in ghosts, if they are called ghosts. For him was invented the word ‘ectoplasm’ because it sounds like ‘protoplasm,’ which sounds quite scientific and so it must be true.” The point about facts which the realists should remember is that, like ghosts, facts do not become more observable by calling them tangible. “Delusive exactness” is a human failing which tempts realist and conceptualist alike. The use of the fact-finding process does not prove that you have found the facts any more than the use of the syllogism guarantees the truth of the premises selected by the logician.

“When we attempt to fix the situs of a debt we leave the realms of reality and deal with fictions. A debt is a chose in action, not a chose in possession. Confining our analysis to an intangible debt, we do not search out its situs; we frankly confess that we are obliged to create one.” Kennedy, Garnishment of Intangible Debts in New York (1926) 35 YALE L. J. 689, 690.


38. “One wise leader pointing the way we have had with us many years. The judicial opinions and other writings of Mr. Justice Holmes—practitioner, teacher, historian, philosopher, judge—are a treasury of adult counsels, of balanced judgments as to the relation of the law to other social relations. There you will find a vast knowledge of legal history divorced from slavish veneration for the past, a keen sensitiveness to the needs of today with no irritational revolt against the conceptions of yesterday, a profound respect for the utility of syllogistic reasoning linked with an insistence upon recurrent revisions of premises based on patient studies of new facts and new desires.” FRANK, op. cit. supra note 18, at 253.


Llewellyn makes the same point in his inimitable style:

“Men limp along for years or decades with an outworn, performance-baffling framework of their thought, until some child, inadequately taught to ‘see,’ cries out that the king in question has no clothes.” The Constitution as an Institution (1934) 34 Co. L. REV. 1.

41. Chesterton, Ghosts, N. Y. American, Nov. 23, 1934; at “March of Events” page.
True it is that there are many cases wherein the facts are tangible to
the naked eye or through a hundred inch telescope. In this limited
area of visible facts, the fact-finding advocate may argue that the
approach to the legal solution is best made by keeping ideas “close to
facts” and thereby stripping the controversy of the doubts and uncer-
tainties of logic and syllogistic reasoning. Cook makes the point about
the slippery “minor premise” of the syllogism and the ease with which
the court may accept or reject the proposed rule of law. But alas,
the pursuer of facts, however tangible they be, does not escape the per-
sonal equation, the human element of research. Facts may be crystal-
clear, to you and to me, but it does not follow that our “minor premises”
or “conclusions” of facts will click in unison. Holmes, who penned the
aphorism that the life of the law has not been logic, but experience,
wisely warns that “one’s experience makes certain preferences dog-
matic.” Psychologists also reduce the reliability of fact-valuations
by the recognition that our “experience” may be colored no less than our
reasoning or judgment.

The fact-finder must be reminded that the eye and the ear may err no
less than the mind; the spectacles of realism do not guarantee against
legal astigmatism; a hundred inch telescope may distort the vision of
man. Science has its accomplishments, wondrous and amazing, to the
unscientific lawyer. But the realists, who talk about the duds and un-
fortunate number of misses of the tradition-loving abstractionist and
point in contrast to the sure-fire hits of science and the unvarying will-
ingness of scientists to change conceptions to fit the facts, should
recall that science has its competing theories which are real even in the

42. Llewellyn, supra note 20, at 986, 989 (describing Kelsen’s philosophy of Law).
44. Quotation from Frank, op. cit. supra note 18, at 257.
45. Swift, Psychology and the Day’s Work (1918) 14, 15.
46. For an interesting account of the dangers of “distortion” in photography. See
Scott, Legal Photography (1934) 3 KANSAS CITY L. REV. 8.
47. “And action which is intellectually purblind, even when it is informed by consid-
erable intuition, registers an unfortunate number of misses on occasions when bulls’ eyes
are needed.” Llewellyn, supra note 40, at 3.
48. “When they learn facts which cannot be reconciled with established conceptions of
the physical universe, scientists reject the conceptions not the facts.” Nelles, Towards
Legal Understanding (1934) 34 COL. L. REV. 862.
Cf. Frank, op. cit. supra note 18, at 135-136, for instances where scientists have been
unwilling to “reject conceptions,” which did not fit the facts. The scientist as well as the
abstractionist may be a victim of the “system-maker’s vanity.” Evans, New Reality
and Old Reality (1928) 14. The constant tribute of the realists to the “scientific approach”
recalls the words of Emerson: “Man thinking must not be subdued by his instruments.”
The American Scholar (1909) 5 HARVARD CLASSICS 10.
face of very simple facts. We find for instance the dentists at this late day divided as to the cause of tooth decay. The fact of tooth decay is at times (sad to say) very "definite" and "tangible." Yet the dentists are gravely debating whether the cause is external or internal. There are more "schools" of medical theory today than ever before. The facts of human ailments are often "observable," but the curative approach is along many highways and the travellers are not always on friendly terms. There is a striking acceptance by the realists of the infallibility of scientific methods and this science-worship has played no small part in the present-day emphasis upon fact-finding and the fundamental approach in the legal order. But science, no less than law, has its lunatic fringe and the "delusive exactness" of science is just as dangerous as the "delusive exactness" of precedent.

But if the facts, pure and simple, are before us, uncolored by personal feeling, bias or prejudice, is the end of our juristic journey at hand? Does the legal answer pop forth out of these facts, thus ticketed and labelled? We are witnessing a sudden enthusiasm for descriptive-word indexes and law books fashioned out of facts in mute tribute to the functional approach. That these mechanical arrangements of cases according to the fact-words are of aid to the busy lawyer is not denied. However, the fact-approach is an approach to the law; it is not the law. There is visible a dangerous tendency to overemphasize

49. N. Y. Times, March 28, 1934 at 20. The scene was a dental convention attended by 1,500 eminent dentists, doctors, chemists and nutrition experts. One group contended that cleaning teeth is a "pleasant exercise" but that it does not prevent tooth decay; decay being traceable to improper diet. The other group argued that "dental caries, or decay, starts on the outside of the tooth, and not on the inside."

The discussion was in the form of a debate. No formal decision was made. The presiding officer said: "both sides presented a very vexing and confusing question with high honor, and any decision would be a toss-up."

Even when the facts are clear, science has its competing theories which may be a "toss-up." Surely the law cannot be asked to accept one of these competing theories as true when the disputants are still at one another's throats. Yet the realists ask acceptance of the new philosophy and psychology of the day for the same reason that is present to the mind of the purchaser of a tooth brush—that it has never been used before.

50. EDUCATION LAW OF N. Y. (1909) §§ 1250, 1262.

51. For example, the conflict between the medical practitioners and the chiropractors. N. Y. Times, Dec. 21, 1933, at 12; Dec. 22, 1933, at 29.

52. Goodhart, supra note 10, at 12; see note 48, supra.

"Let us not forget that some of the social sciences are very young, and are as yet in large part only vocabularies of generous aspiration. Scientific sobriety certainly demands a more critical attitude to the results of current social psychology than some recent writers have shown. One trained in the law should have a better sense for what constitutes real evidence." Cohen, Justice Holmes and the Nature of Law (1931) 31 Col. L. Rev. 352, 365.

fact-analysis which threatens disaster. Again reverting to Holmes to illustrate the point:

"There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."54

The present fact-fetish in its most virulent form is very apt to approach the naïveté of the Vermont justice unless curbed and controlled.55 After ridding the law of a mechanical jurisprudence of concepts pushed to a "dryly logical extreme,"57 beware of the danger of erecting an equally mechanistic jurisprudence dependent principally upon the cataloging of facts to produce the legal solution.

Cardozo warns against the "tyranny of tags and tackets,"58 Holmes admonishes against the "tiresome repetition of inadequate catchwords."59 These criticisms, penned against the devotee of principle, are now returning to plague the fact-finder, who contends that "facts" and "functions" are the open sesame to the law. Let us indeed search for the facts, and make our search relentless, but let us also realize that a catchword—whether it be "fact-finding," "scientific approach" or "experimental jurisprudence,"—is subject to the same inadequacies as the beloved abstractions of the traditionalist. Having found the facts, some weighing machine, some norm or standard must be applied to these facts, however neatly piled. Try as hard as he will, the systematizing and ordering of the collected facts brings the realist bounding back into the region of fundamental principles.60 So argues Hutchins:

"Empirical operations do not make a science. Facts do not organize themselves. Let me emphasize as strongly as I can that we must accumulate cases, facts and data. I simply insist that we must have a scheme into which to fit them."61

54. The Path of the Law, Collected Legal Papers (1921) 196.
56. Pound, Mechanical Jurisprudence (1908) 8 Col. L. Rev. 605.
59. Bent, op. cit. supra note 5, at 197-203.
60. Scott, supra note 55, at 25: "Some students fail to see that concepts are not evils in themselves. All human activities are based upon concepts; all rationalizing of the principles of law governing such activities are concepts. Concepts are ideas, and to think without ideas is impossible; to talk without ideas is indeed common, but hardly commendable." See note 30, supra.
And what is this “scheme” by which to test out the facts? Hutchins replies:

“I suggest that the law is a body of principles and rules developed in the light of the rational sciences of Ethics and Politics. The aim of Ethics and Politics is the good life. The aim of the Law is the same. . . . The duty of the legal scholar, therefore, is to develop the principles and rules which constitute the law.”

The force of Hutchins’ critique of fact-research is not minimized when we recall that as Dean of Yale Law School he was partly responsible for inaugurating the system of “focussing on the facts” and for introducing into the faculty of law, economists, anthropologists, psychiatrists, psychologists and sociologists to aid the wearied law teachers in trapping these all-important facts.

Time marches on. Five years later Dean (now President) Hutchins recounts the result of the “experiments” in “focussing on the facts” and in introducing social scientists, psychologists and economists into faculties of law schools. The results were negligible and the innovations “added little or nothing” to the improvement of law except that the “social contacts . . . were very pleasant.” True to the tenets of the realists, who “are ready at all times to admit their own mistakes,” Hutchins frankly admits the failure of the “experiments” of fact-finding and the scientific approach and argues for a return to fundamental principles.

Conclusion

It is too early to predict the doom and downfall of realism insofar as it stresses the central value of facts and functions contrasted against rules and principles. Suffice it to say that Hutchins’ estimate of the weaknesses of this fact-school does not stand alone. Harding struggling with the vexatious problem of double taxation turned to economists for aid and found that they “had little to offer in substance.” Scott working in the field of trusts tried “to get help from economists” without much success. Michael and Adler studying crime point to the dangers of accumulations of facts without an accurate “measuring instrument” and further, the inadequacy of “particular sampling” without interpre-

62. Id. at 1055.
63. Hutchins, Address before Ass’n of the Am. Law Schools, HANDBOOK OF ASS’N OF AM. LAW SCHOOLS (1928) 33.
64. Frank, loc. cit. supra note 19.
65. Hutchins, supra note 61, at 1052-1053.
66. HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933) Introd. 6.
tation of the results of single cases. Somewhat startling to the advocate of "scientific" methods in the law must be the conclusion of these scholars that "criminological research has not yet achieved a single definite conclusion and that its utter lack of significance is due to defects either in the planning or the execution of the researches." Taft, the lawyer, rejects the "facts" unearthed by Münsterberg, the psychologist, and following a rather devastating analysis of Münsterberg's experiments with witnesses, concludes that the term, "New Psychology," offers scant hope of its being used with any profit in the improvement of judicial procedure.

It may be that scientific fact-finding of the future will shelve principles and rules into the background. But not yet. The difficulty at the moment is that facts cornered by scientist (or lawyer) are prone to elude the pursuer; they are not always the "tangible" things we yearn for. While scientists quarrel over facts and theories, the law must go lumbering on, deciding cases with the material at hand. In this estimate of the present-day status of experimentalism and fact-finding, the conceptualist finds himself at odds with the realist. Frank tells us that "The experimentalist attitude may have been fostered, in its inception, at Columbia and Yale but today it is an attitude which has spread everywhere. It is part of the spirit of the times." The statement may be promissory of the future; it clearly is not an accurate picture of the present status of experimentalism. Its exuberance of dimension is more typical of the spirit of youth than "of the times"; it covers too much territory. Realism and the fact-approach have not yet captured the citadels of Cambridge. President Hutchins of Chicago—a "foster" father of realism—is outside the fold. Law schools patterned after golf schools are yet in the making.

68. CRIME, LAW AND SOCIAL SCIENCE (1933) 101-102.
69. Id. at 105.
70. WITNESSES IN COURT (1934) 35-40.
71. "Facts cannot always be found. Neither the laboratory nor the court finds all the facts; and even in courts controversies must end. We act upon facts if we can, but without them if we must." STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933) 102. See Pound, supra note 9, at 706.
72. supra note 19, at 1066.
73. See Scott, loc. cit. supra note 55; Pound, supra note 9.
74. In the bibliography of realistic writers prepared by Llewellyn, it seems that T. R. Powell is the sole representative of the faculty of the Harvard Law School. Supra note 6, at 1257. Frank is particularly hostile to the "Langdell-Harvard system." WHAT CONSTITUTES A GOOD LEGAL EDUCATION (1933) 7 AM. L. SCHOOL. REV. 894; he also denounces "Realism," a term coined by him to signify conceptualism in the law. Op. cit. supra note 18, at 48-56. Evidence of realistic jurisprudence is scant in HARVARD LEGAL ESSAYS (1934), a volume dedicated to Professors Beale and Williston.
74. The proposals of Frank would materially change the law school from its present
The query before posited returns: Olympus of Principle or Elysium of Fact?

The conceptualist does not argue for an abandonment of fact-finding or the functional approach. Not at all. Rather he asks the realist to look beyond the single tree to the forest, made up though it be, of particular trees. He also asks that the realist deign to glance at the heights of Olympus and to hitch his wagon to the stars. True it is that a wagon “functions” best in the dirt and that both “wagon” and “dirt” are “tangibles.” But it was man thinking and reflecting that first gave shape and being to wagons. And further reflection and study sent the wagon Olympus-ward in the form of the airplane. If the vision thus unfolded by skyward glance is vast and limitless, so is life.

NOTE

After the above article was completed the present writer read the interesting paper of Professor Beutel appearing in the Harvard Law Review under the title, “Some Implications of Experimental Jurisprudence.”

Professor Beutel’s learned contribution cuts across the subject matter covered in the above article, Principles or Facts. It sets forth in a frank and realistic manner the unfolding program of experimental jurisprudence, the term coined by Jerome Frank. Because of its prominent place in one of our leading law reviews and because of the thorough manner in which Professor Beutel presents the case for scientific methods in the law, and finally, because it takes issue squarely with many of the conclusions of the present writer, a hasty review of some of his unusual proposals is appended.

form to a law office with emphasis upon the practice of law as distinguished from the study of legal principles. Frank, Why Not a Clinical Lawyer-School? (1933) 81 U. or PA. L. REV. 907. See criticisms of Frank’s proposals in Gardner, Why Not a Clinical Lawyer-School—Some Reflections (1934) 82 U. of P. L. REV. 907; Ferrari, The Function of a Law School (1934) 4 JOHN MARSHALL L. J. 31. True it is that the rounded experience of the lawyer is obtained in the battles of the court-room, but to attempt to fuse this experience into the law school curriculum is an impossible task.

75. “To the young mind, everything is individual, stands by itself. By and by it finds how to join two things, and see in them one nature; then three, then three thousand; and so tyrannized over by its own unifying instinct, it goes on tying things together, diminishing anomalies, discovering roots running under ground, whereby contrary and remote things cohere and flower out from one stem. It presently learns that since the dawn of history there has been a constant accumulation and classifying of facts.” Emerson, The American Scholar (1909) § HARVARD CLASSICS 7.

76. (Dec. 1934) 48 HARV. L. REV. 169. Italics have been inserted by present writer.

77. See note 24, supra.
His thesis is the formulation of a scientific program to save the law. Beutel states "that the fundamental postulates and methods which underlie experimental physical science are capable of application in the field of juristic science." His objective is to prove that the reactions of individuals or social groups can be predetermined, catalogued and charted by scientific methods somewhat akin to the experiments of the scientists with microscope or test tube. While conceding that individual action cannot be "as easily discerned as the microscopic shadows of physical matter on a sensitive photographic plate," he argues that the various crime surveys "indicate that social reactions to legal phenomena can be observed." Continuing he says "that the lines of the reports [on crime] may not be so fine as are those of the physicist or chemist, but the gross results are clear enough to be capable of scientific observation."

Just what Professor Beutel means by "gross results" is difficult to determine, but if he means to intimate that the crime surveys heretofore developed approximate the fixed findings of the physicist or chemist it is respectfully submitted that such a statement is not in accord with the "scientific facts."

What are the scientific methods by which Professor Beutel proposes to search into the recesses of the human mind and to predetermine the probable regularities of human action, individually or in groups? He suggests the use of "laboratory apparatus" which, however, he concedes is "still to be developed." He instances the "lie detector" and similar

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78. Beutel, supra note 76, at 172.

The present writer has suggested that Frank's insistence upon the term "experimental jurisprudence" might indicate an attempt on the part of the realists to hide behind the accomplishments of science. Supra note 24. The full sweep and force of Professor Beutel's argument seemingly justifies the aforesaid assumption. Indeed, as will later appear, if Beutel's program is carried into effect science will not merely reform the law; science will be the law.

79. Beutel, supra note 76, at 173.

It may be in order to direct attention to the fact that "microscopic shadows" on "a sensitive photographic plate" may be distorted. Supra note 46. One cannot refrain from the suggestion that the analogy between the alleged regularity of human reactions and the recordation of a sensitive photographic plate is, to say the least, rather far fetched; and Beutel's qualification that human reactions "are not as easily discerned" does not satisfy the conservative conceptualist.

80. Michael and Adler, Crime Law and Social Science (1933). See, for example, their estimate of the researches of S. Glueck and E. T. Glueck, 148-149. Following a review of criminological researches these writers conclude that these researches have not "achieved a single definite conclusion." The amazing faith of the realists in "findings of fact" contrasted with their extreme skepticism in the matter of rules and principles is aptly illustrated throughout Professor Beutel's paper.
instruments of scientific crime detection but willingly concedes that this "science" is still in its infancy. Evidently the "lie detector" is a "sample" which has made a deep impression on Professor Beutel's mind as a symbol of the possibilities of scientific method. This sample does not offer very convincing proof of the possibilities of the scientific approach. The use of the lie detector has been rejected by the courts\(^1\) and criticized by text writers.\(^2\) Certainly there is nothing more than promise and prediction in the present state of laboratory apparatus "still to be developed" or instruments of "scientific crime detection" which are still in the making.

Passing from the suggestion that the instruments of science are available to predict the uniformity of human action, Professor Beutel swings along in rather rapid fashion. While frankly conceding that the reactions of a body politic to law are exceedingly complex, he nevertheless concludes that science can accomplish this formidable task of assaying the operations of human beings. In proof of the power of science to hurdle lofty barriers he says that "complication of factors has not stopped the scientist from cleaning up such pest holes of the world as the Isthmus of Panama."\(^3\)

One of the striking passages of Professor


\(^2\) There are four tests offered by the psychologists promising some scientific means of detecting conscious deception:

(1) The galvanometer test measures the electrical body currents which vary greatly according to the various emotions of the subject. The accuracy of the test has been generally discredited because it registers emotions in general as well as emotions caused by deception. Marston, *Psychological Possibilities in the Deception Tests* (1921) 11 J. Crim. L. 551.

(2) Münterberg popularized the association reaction-time test which is premised upon the theory that a subject will react to "crucial" words which would have, to a guilty party, some meaning connected with the crime. Münterberg, *On the Witness Stand* (1908). For criticisms of Münterberg's theory, see Marston, *supra* at 551-552; Wigmore, *Professor Münterberg and the Psychology of Testimony* (1909) 3 Ill. L. Rev. 399; Taft, *supra* note 70, at 35-40.

(3) Inspiration-respiration test. This method posits a correlation between respiratory changes and conscious deception. Comment (1924) 31 Yale L. J. 771. For criticism, see Marston, *supra* at 552.

(4) Systolic blood-pressure test. This test has been said by Marston to have advantages over all other deception tests. *Supra*, at 553. Cf. Larson, *Modification of the Marston Deception Test* (1922) 12 J. Crim. L. 390.

In partial justification for the "fear-complex" of the law as to the finality of science, see the contentions of Cummins and Lee that finger-prints may be counterfeited. Cummins, *Counterfeit Finger-Prints* (1934) 25 J. Crim. L. 666; Lee, *Finger-Prints can be Forged*, id. at 673.

\(^3\) It may be asked what the relation is between the cleaning up of "pest holes in the Isthmus of Panama" and the forming of scientific laws governing the mental and social activities of mankind. To say that science is capable of cleaning up a given pest-ridden
Beutel's article follows. He states that the doctrine of free will, which appears throughout "literature, religion, philosophy and legal dogma," has very little experimental support. He continues:

"The recent development of child psychology and the work of the behaviorists have given the devotees of free will some rude shocks, and today there are many scientists of standing who will support the proposition that by controlling the individual's environment you can control his character and predict his future actions."

Some realists have developed the behavioristic slant but Beutel goes far in the direction of endorsing the psychology of Watson and of accepting the astounding proposition that "by controlling the individual's environment you can control his character and predict his future actions." It is submitted that more evidence is necessary than the theory of Watson (which rejects free will and consciousness) to convince the legal profession that such theories can be transplanted into the legal order and can bring about accurate predictions of human activities. No objection can be reasonably made to the part of Beutel's article dealing with the future possibilities of science, except to say that, while harmless, it is hardly "scientific." But before accepting the biologists' territory is one thing, but to argue therefrom that the same processes of science may be diverted into the channels of human activities with like success is quite another matter.

84. Beutel, supra note 76, at 175.
86. Beutel, supra note 76, at 175.
87. Watson, Behaviorism (1925) 3-5.

In view of the fact that Watson is now offered as a psychologist to be followed, it is in order to set forth some of his views on psychology: "Possibly the easiest way to bring out the contrast between the old psychology and the new is to say that all schools of psychology except that of behaviorism claim that consciousness is the subject matter of psychology. Behaviorism, on the contrary, holds that the subject matter of human psychology is the behavior or activities of the human being. Behaviorism claims that 'consciousness' is neither a definable or a usable concept; that it is merely another word for the 'soul' of more ancient times. The old psychology is thus dominated by a kind of subtle religious philosophy." Id. at 3.

Again Watson says: "One example of such a concept is that there is a fearsome God and that every individual has a soul which is separate and distinct from the body. This soul is really a part of the supreme being. This concept has led to the philosophical platform called 'dualism.' All psychology except behaviorism is dualistic. That is to say we have both a mind (soul) and a body. This dogma has been present in human psychology from earliest antiquity. No one has ever touched a soul, or has seen one in a test tube, or has in any way come into relationship with it as he has with the other objects of his daily experience." Id. at 4.
statement that "there is evidence that free will of the individual is on shaky ground" the inquisitive lawyer is likely to ask: "What is the evidence?" This rejection of free will is indeed a "rude shock" but it is believed that a scientific approach involving the introduction of muscular jurisprudence derived out of Watson has a long way to travel before it will be seriously considered by the law.

Exit the Law

The present writer has suggested above that the realists in the law are addicted to science-worship. The program proposed by Beutel indicates that he not only advocates the directive influence of science in the reformation of law but the "implications" arising out of his proposals virtually amount to an ouster of the law and a complete substitution of scientific methods in its place. Beutel says:

"Since he is engaged almost entirely in enlarging precedents from the past, and habitually opposes progress in the form of new legislation, the lawyer is a poor vehicle for experimental growth of the law. In fact, it is interesting to note the manner in which a number of legal reforms are being instituted through the medium of removing the lawyer as far as possible from the picture. If this tendency continues, the major problems of adjusting interests may slip out of the hands of the legal profession because their technique is unable to render substantial service or to take account of social reality. It is not surprising that in the eyes of many scientists the art of the legal profession today rises little higher than that of the osteopath, the astrologer, the hypnotist, or phrenologist, and that the wise business man stays as far as possible from the judicial process."

It thus appears that the time is rapidly approaching when the lawyer may be asked to abdicate in favor of the scientist because of the failure of the lawyer to respond to the trend of the times. Before "abdication" the stubborn lawyer meekly suggests that the "art" of science which offers "lie detectors" and the elimination of "free will" and "consciousness" as its contributions to the betterment of law will hardly arouse any great degree of enthusiasm in the "wise business man."

One concluding point may be noted which is a true picture of the sweep and extent of Beutel's proposals. His program calls for "the cooperation of squads, battalions, and even armies of research workers organized into mobile units directed toward great social research problems which may take years, even centuries for solution." This staggering program deserves at least a few queries. After the organization

88. Beutel, supra note 76, at 175.
89. Supra notes 48, 52.
90. Beutel, supra note 76, at 187.
91. Id. at 194.
of "armies" of research workers, organized down the centuries for the betterment of mankind, dedicated to the "study" of social statistics, moving forward in "purposeful research" after pertinent facts, how are these armies to function? With, or without, the "goose step" of behaviorism?

Accepting the face value of Beutel's previous argument that man's activities or reactions are motivated by his environment and heredity and that he is without freedom of will, tenacity of purpose or powers of detached judgment, why talk about a "brain truster in charge of a great social experiment" if "brain" is merely a slot machine registering external "stimuli"? What does Beutel mean by "intelligently directed purpose" if intelligence is merely a piece of muscular activity that can be weighed on the scales of science? Why point to "the challenge of the thinkers wrestling with the practical problems of government" if the thinkers are throttled by environment and held down by heredity?

Beutel suggests that the task of creating such an experimental science as he outlines is "stupendous." The task is stupendous; it is also visionary. Again quoting the words of Beutel: "Throughout the entire process there would be accumulated a body of scientific knowledge of human reaction to government which would surpass anything yet conceived by the mind of man." We suspect that Beutel is right. His one fatal defect in launching this scientific Utopia is that it calls for "man" to execute it, man possessed of courage, will and mind—three elements which have been read out of man's nature by Watson and his associates.

92. Id. at 175.
93. Id. at 196n.
94. Id. at 197n.
95. Id. at 197.
96. Id. at 196.
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