A Realistic Jurisprudence – The Next Step
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The Problem of Defining Law; Focus versus Confines

The difficulty in framing any concept of “law” is that there are so many things to be included, and the things to be included are so unbelievably different from each other. Perhaps it is possible to get them all under one verbal roof. But I do not see what you have accomplished if you do. For a concept, as I understand it, is built for a purpose. It is a thinking tool. It is to make your data more manageable in doing something, in getting somewhere with them. And I have not yet met the job, or heard of it, to which all the data that associate themselves with this loosest of suggestive symbols, “law,” are relevant at once. We do and have too many disparate things and thinkings to which we like to attach that name. For instance, legislators pass “a law,” by which we mean that they officially put a new form of words on the statute books. That calls up associations with regard to attorneys and judges, and to suits being brought “under the statute.” But it also calls up associations with regard to those sets of practices and expectations and people which we call political parties and machines and lobbies. The former we should want, in some way, to include under the head “law,” I suspect. If we did not, we ought to stop defining and think a little further. The latter—the parties and lobbies—we might have more doubt about, even if we did stop and think. Again, it seems fairly clear that there has been something we could not well dissociate from our symbol “law” in places and times when there was no legislature and even no state—indeed when there was no organization we can call “political” that was distinct from any other organization. You cannot study the simpler forms of society nor “the law” of such forms without looking into the mechanisms of organized control at such times and places; but today you will be likely to distinguish such types of control as non-legal. Of course, you would not disregard them, if you wanted to know anything about “law” that was worth knowing. But you would regard them as background, or foreground, or underground, to your center of interest. They would be something that you would compare and contrast with “law,” I suspect, in the present order of society. And yet I also suspect you would have your hands full if you set about to draw the line between “the two.” Or again, there are gentlemen who spend a good deal of time discussing “the ends of law,” or “what law ought to be.” Are they talking about “law”? Certainly their postulates and conclusions, in gross and in detail, have no need to look like anything any judge ever did; and at times some of these gentlemen seem to avail themselves of that freedom; but it would be a case-hardened person who denied that what they are dealing with is closely connected with this same loose suggestive symbol. What interests me about that is when a judge is working in a “well-settled field” he is likely to pay no attention to what such gentlemen say, and to call it irrelevant.
speculation; whereas when he is working in an “unsettled field” he seems to pay a lot of attention to their ideas, or to ideas of much the same order. This I take to mean that for some purposes they are talking something very close to “law,” under any definition; and for other purposes, they are talking something whose connection with “law” as just used is fairly remote. And this problem of the word calling up wide-scattered and disparate references, according to the circumstance, seems to me vital.

So that I am not going to attempt a definition of law. Not anybody’s definition; much less my own. A definition both excludes and includes. It marks out a field. It makes some matters fall inside the field; it makes some fall outside. And the exclusion is almost always rather arbitrary. I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining. I say again, therefore, that I shall not attempt a definition. I shall not describe a periphery, a stopping place, a barrier. I shall instead devote my attention to the focus of matters legal. I shall try to discuss a point of reference; a point of reference to which I believe all matters legal can most usefully be referred, if they are to be seen with intelligence and with appreciation of their bearings. A focus, a core, a center — with the bearings and boundaries outward unlimited.

Pardon my saying it so often, but I find it very hard to make people understand that I am not talking about putting or pushing anything out of the field or concept of law. People are so much used to definitions — although definitions have not always been of so much use to people. I am, therefore, going to talk about substituting a somewhat unfamiliar, but more exciting and more useful focus, for the focus that most thinking about law in the past has had.

Two references to the course that thought has taken will help to set the perspective: one, to the tenets of the nineteenth century schools of jurisprudence; one, to the development of the concepts of rights and of interests.

For the nineteenth century schools I am content to accept one of Pound’s summaries.1 It fits with what reading in the field I have done; it is based upon vastly more reading in the field than I shall ever do. With regard to the analytical jurists, Pound stresses their interest in a body of established precepts whereby a definite legal result is supposed to be fitted to a definite set of facts; he stresses the centering of their definition upon the “aggregate of authoritative legal precepts applied by tribunals as such in a given time and place,” and their presupposition of a state to make precepts and tribunals authoritative. The historical jurists, on the other hand, find making little distinction between law and other forms of social control; with them customary precepts, irrespective of whether they originate in the organs of politically organized societies, come in for heavy attention; central in their picture of law are the traditional techniques of decision and the traditional or customary notions of rightness. (All this, it may be added, without any too close analysis as to what is meant by “custom.”) For the philosophical jurists, finally, Pound finds that “philosophical, political and ethical ideas as to the end of law and as to what legal precepts should be in view thereof” occupy the center of the stage.

I have no wish to put the tenets of these schools to the test, nor to pursue them further. Their value here is limited, but great within its limits: taken together, they hammer home the complexity of law. Each school was reaching for a single definition of all that was significant about law. Each school wound up with a definition which stressed some phases and either overlooked or greatly understressed others. Each had a definition with which, for its purposes, and especially in the hands of its creative thinkers, it made striking headway. But too close attention to any one of the definitions — in its exclusion aspects — for too long, would have meant ultimate barrenness. And I gather that one lesson Pound has drawn from his study of these and other schools has been to insist rather on what goes into the idea of law than on what is to be kept out of it.

Precepts as the Heart and Core of Most Thinking About Law

Moreover, you will have noted running through his summary of their views the word
"precepts." This is traditional. When men talk or think about law, they talk and think about rules. "Precepts" as used by Pound, for instance, I take to be roughly synonymous with rules and principles, the principles being wider in scope and proportionately vaguer in connotation, with a tendency toward idealization of some portion of the status quo at any given time. And I think you will find as you read Pound that the precepts are central to his thinking about law. Along with rules and principles — along with precepts proper, may I say? — he stresses for instance “standards” as a part of the subject matter of law. These standards seem to be those vague but useful pictures with which one approaches a wide and varied field of conduct to measure the rights of a particular situation: a conception of what a reasonable man would do in the circumstances, or of what good faith requires, and similar pictures. They differ from rules, though not from principles, partly in their vagueness; they differ from both in being not propositions in themselves, but normative approaches to working out the application of some one term in a major proposition. The principle, let us say, would read: a man must answer for what good faith requires. But a standard (like a concept; like any class-term, loose or sharp) functions chiefly or exclusively as part of a precept. Consequently, it belongs in much the same world. It, too, centers on precepts. But Pound mentions more as law than precepts and standards. Along with the standards he stresses also ideals as to “the end” of law. These I take to be in substance standards on a peculiarly vague and majestic scale; standards, perhaps, to be applied to rules rather than to individual transactions. Finally, he stresses — and we meet here a very different order of phenomena — “the traditional techniques of developing and applying” precepts. Only a man gifted with insight would have added to the verbal formulae and verbalized (though vague) conceptual pictures thus far catalogued, such an element of practices, of habits and techniques of action, of behavior. But only a man partially caught in the traditional precept-thinking of an age that is passing would have focussed that behavior on, have given it a major reference to, have belittled its importance by dealing with it as a phase of, those merely verbal formulae: precepts. I have no wish to argue the point. It will appeal, or it will not, and argument will be of little service. But not only this particular bit of phrasing (which might be accidental), but the use made in Pound’s writings of the idea, brings out vigorously the limitations of rules, of precepts, of words, when made the focus, the center of reference, in thinking about law.

Remedies, Rights and Interests: A Developing Insight

Indeed, those limitations appear throughout the current analysis of law in terms of interests, rights and remedies. The growth of that analysis requires a short digression, but one that I believe worth making. It has to do with the subject matter of the rules and precepts of which men regarded the legal system as made up. Both with us and in the Roman system that subject matter has in the course of time undergone striking changes.

In the earlier stages the rules were thought of almost exclusively as rules of remedies. Remedies were few and specific. There were a few certain ways to lug a man into court and a few certain things that you or the court could do with him when you got him there. We are concerned here not with why that was (why “can” a court of law give no injunctive relief today?) but only with that it was. The question for the man of that day took this shape: on what facts could one man make use of any specific one of the specific ways of making the court bother another man? And the rules of law were rules about that. They clustered around each remedy. In those terms people thought. They thought about what they could see and do. Their crude minds dealt only with what they could observe. What they observed, they described.

To later writers this seemed primitive. The later thinkers find a different kind of order in the field of law. Remedies seem to them to have a purpose, to be protections of something else. They could imagine these somethings and give them a name: rights, substantive rights. Thus the important, the substantial rules of law become rules defining rights. Remedies are relegated to the periphery of attention. They are “adjective
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law" merely—devices mere or less imperfect for giving effect to the important things, the substantive rights which make up the substance of the law. The relation of rights to rules is fairly clear: the two are aspects of the same thing. When a rule runs in favor of a person, he has a right, as measured by the rule. Or, if he has a right, that can be phrased by setting out a rule ascribing to him and persons in like situation with him the benefits connoted by the rights. Rights are thus precise counterparts of rules, when the rights are ascribed generally to all persons in a class in given circumstances; and this is the typical postmortemizer's line of discourse. Or rights, when ascribed to particular individuals in specific circumstances, are deductions which presuppose the rule; the major premise is the general rule on rights; the minor is the proposition hooking up this individual and these circumstances with that general rule. Rights and rules are therefore for present purposes pretty much interchangeable; the right is a shorthand symbol for the rule.6

Substantive rights and rules are spoken of as prevailing between people, laymen: one has, e.g., a right to the performance of a contract. It is a heresy when Coke or Holmes speaks of a man having liberty under the law to perform his contract, or pay damages, at his option. It would likewise be a heresy to argue that the vital real evidence of this supposed "right" lies in an action for damages, and that the right could rather more accurately be phrased somewhat as follows: if the other party does not perform as agreed, you can sue, and if you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, and you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will probably get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay. To argue thus would be to confuse the remedy (which you can see) with the substantive right (which you cannot see, but which you know is there—somewhere; people tell you so). The substantive right in this body of thought has a shape and scope inde-

The Ambiguities in the Concepts of Rules and Rights

But that should not obscure the price that was paid for the advance. A price first, as already described, of moving discussion away from the checkup of fact. To a legal reformer in his campaigning, in his getting of new views across, this may have value, if "the fact" in question be existing positive law. He may move more comfortably if he can keep people from observing that his moves mean change. To a scientist, observing, or to a reformer engaged not in selling his reform, in propagandizing, in putting ideas over, but in inquiring what is before him, where he wants to get, and how to get
there, this obfuscation of the facts is another matter.

Secondly, a price was paid, of ambiguity — indeed of multiplicity. “Rules” is a term sufficiently ambiguous. A rule may be prescriptive: “this is what ought to be; what the judges ought to do in such cases.” Or it may be descriptive: “this is what is; what the judges actually do in such cases.” Or it may be both at once: “this is both what they do and what they ought to do.” And when theorists discuss, they will move from one of these meanings into another without notice, and with all and any gradations of connotations. In the particular case of rules “of law” a further ambiguity affects the word “rule”: whether descriptive or prescriptive, there is little effort to make out whose action and what action is prescribed or described. The statement “this is the rule” typically means: “I find this formula of words in authoritative books.” Does this constitute: “Courts are actually proceeding according to this formula?” or “Courts always rehearse this formula in this connection?” Does it connote: “People are conducting themselves in the light of this formula”; or even “People are conducting themselves as this formula suggests that they ought to.” The theorist will rarely trouble to tell you how many (if any) of these connotations are implicit in his statement: “this is the rule.” But he will reason, on the next page, from some one of such implications. Which means: confusion, profuse and inevitable.

The confusion is stirred blacker with the concept “right” poured in. “Right” adds nothing to descriptive power. But it gives a specious appearance of substance to prescriptive rules. They seem to be about some thing. So that to clothe one’s statement about what rules of law are in terms of rights, is to double the tendency to disregard the limitations actually put on rules or rights by practice and by remedies. At the vital core of thought about law, at the very place where one thought imposes on another, or where one part of law imposes on another, one sees the imponderable in terms of idealized somethings which may not, which mostly do not, reflect men’s actions. In terms of words, and not in terms of conduct, in terms of what apparently is understandable without checking up in life. So that one makes the assumption — without the urge to inquiry — that one is dealing with reality when he talks of rights, and proceeds to use these unchecked words for further building.

There is another confusion, found in dealing with rules, and strengthened by the associated ideas of rights, within the field of doctrine itself. Having come to regard words as sound bases for further thinking, the tendency is well nigh inevitable to simplify the formulations more and more: to rub out of the formulations even the discrepancies in paper doctrine which any growing system of law contains in heaping measure; doubly so because the word “rights” introduces sub rosa at this point the additional notion of “rightness” (in the sense of what ought to be) — before which unwanted discrepancies must fall. I am speaking here of the effects of the idea of rightness on the rejection of some of the existent purely doctrinal materials in favor of other equally doctrinal materials, the case of conflicts in and within legal doctrine — a matter of vast concern to a lawyer, though perhaps of no great moment to a political scientist.

But the same tendency carries over quite as well into the confusion of legal with non-legal materials, where it concerns political scientist and lawyer in common; and here the idea of “rights” seems to be the heavy tool of confusion, with no help at all from the idea of “rules.” “Right” eternally suggests its connotation of inherent “rightness” — social, political, economic, and especially moral. It takes more careful self-analysis than most have been interested in giving to keep the non-legal “right” (which was a reason for claiming or striving toward or awarding a legal right) distinguished from the “legal right” which was conceived, I take it, as something not quite a mere description of an available remedy, but at least an official recognition that some kind of remedy could be had. The threat of ambiguous middle is obvious. The natural rights theorists did little to make it less.

**Interests**

This third confusion (but, be it noted, neither the second nor the first) was cleared up by the...
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countroversy that centered about lbering. Since
that controversy we take some care to limit our
term “rights” to legal rights (“substantive,” if
nothing more be said), and are thereby aided in
keeping the legal separate from the social factors
at work in a situation. The term interests, on
the other hand, comes in to focus attention
on the presence of social factors, and to urge
that substantive rights themselves, like reme-
dies, exist only for a purpose. Their purpose
is now perceived to be the protection of the
interests. To be sure, we do not know what
interests are. Hence, behind substantive rights
(which we need not check against anything
courts do) we now have interests (which we
need not check against anything at all, and
about whose presence, extent, nature and im-
portance, whether the interests be taken abso-
lutely or taken relatively one to another, no two
of us seem to be able to agree). The scientific
advance should again be obvious. Complete
subjectivity has been achieved.

At this stage of the development, then, one
arrives at a double chain of purposes. One starts
with the interest. That is a social fact or factor
of some kind, existing independent of the law. And
it has value independent of the law.
Indeed, its protection is the purpose of substanc-
tive legal rights, of legal rules, of precepts of
substantive law. “Security of transactions” is
such an interest. The rules and rights of con-
tract law exist to protect and effectuate it. The
rules and rights are not ends, but means. But
they are means which in another aspect (like
most means) themselves become ends: remedies
exist as means to effectuate the substantive
rights, to realize the substantive rules. Obvi-
ously the means may be inadequate, badly
chosen, wasteful, even self-defeating, at either
stage. They may be so, cumulatively, at both
stages. The rule that consideration is necessary
to make an offer irrevocable for three days, even
when the offer is fully intended, business like,
signed, in writing, and expressed to be irrevo-
cable for three days, may be thought not adapted
to further security of transactions. The rule that
certain oral and essential terms of an agreement
are without force, if the balance of the agreement
has been committed to writing, and looks on its
face to be complete, raises considerable doubts as
to its furtherance of security of transactions—
sufficiently so as to have made our rules on the
subject rather intricate and uncertain, and our
judicial practices at times highly uncertain. The
rules standardizing the remedies in contracts for
the sale of goods, limiting the remedy to a suit
before a jury, and for damages, and measuring
the damages in the great body of cases by arbi-
trary standards which presuppose a frictionless
market, may be thought to give inadequate
remedies, even if the basis of supposed substanc-
tive rules and rights be thought wholly adequate
to its purposes. The means, I say, may be inad-
quate; but the analysis invites discovery of the
inadequacy. Hence, whatever one thinks of the
sufficiency in the large of the analysis in the
three-fold terms of interests, substantive rights
and rules, and remedies, one can but pay homage
to the sureness with which it forces law on the
attention as something man-made, something
capable of criticism, of change, of reform — and
capable of criticism, change, and reform not only
according to standards found inside law itself
(inner harmony, logical consistence of rules,
parts and tendencies, elegantia juris) but also
according to standards vastly more vital found
outside law itself, in the society law purports both
to govern and to serve.

On the other hand, the set-up in these terms
has carried over its full measure of confusion, as
I have tried to indicate above. And the confu-
sion thus carried over is not — like the virtues
of the analysis — familiar, well understood, and
regularly taken account of. Which brings me
again to the suggestion made above, that the
use of precepts, or rules, or of rights which are
logical counterparts of rules — of words, in a
word — as the center of reference in thinking
about law, is a block to clear thinking about
matters legal. I want again to make sure that I
am not misunderstood. (1) I am not arguing that
“rules of substantive law” are without import-
ance. (2) I am not arguing that it is not humanly
possible to use the interests-rights and rules-
remedies analysis and still think clearly and
usefully about law. (3) Least of all, am I at-
ttempting to urge the exclusion of substantive
rights and rules from the field of “law.” Instead
of these things, I am arguing (1) that rules of
substantive law are of far less importance than
most legal theorists have assumed in most of their thinking and writing, and that they are not the most useful center of reference for discussion of law; (2) that the presence of the term “rights and rules” in the interest set-up (a) has persistent tendency to misfocus attention on that term; (b) that the avoidance of that tendency is a great gain in clarity; and (c) that to both attempt such avoidance and retain the term is to cumber all discussion with embarrassing and quite unnecessary baggage; (3) that substantive rights and rules should be removed from their present position at the focal point of legal discussion, in favor of the area of contact between judicial (or official) behavior and the behavior of laymen; that the substantive rights and rules should be studied not as self-existent, nor as a major point of reference, but themselves with constant reference to that area of behavior-contacts. Let me take up the second and third of these positions together, and turn then to the first.

The Interests-Rights-Remedies Analysis: Words v. Practice

I see no value to be gained from the interests-rights and rules-remedies set up except to bring out, to underscore, that law is not all, nor yet the major part of, society; and to force attention to the relations and interactions of law and the rest of society; and as a matter of method, to provide words which keep legal and non-legal aspects of the situation and the interactions distinct. And it would seem to go without demonstration that the most significant (I do not say the only significant) aspects of the relations of law and society lie in the field of behavior, and that words take on importance either because and insofar as they are behavior, or because and insofar as they demonstrably reflect or influence other behavior. This statement seems not worth making. Its truth is abundantly apparent. For all that, it reverses, it upsets, the whole traditional approach to law. It turns accepted theory on its head. The traditional approach is in terms of words; it centers on words; it has the utmost difficulty in getting beyond words. If nothing be said about behavior, the tacit assumption is that the words do reflect behavior, and if they be the words of rules of law, do influence behavior, even influence behavior effectively and precisely to conform completely to those words. Here lies the key to the muddle. The “rules” are laid down; in the typicase they are “ought” rules, prescriptive rules: the writer’s prescriptions, the writer’s oughts, individually proclaimed oughts – the true rule is that judges should give judgment for the plaintiff on these facts. From this we jump without necessary notice into equivalent oughts as accepted in the legal system under discussion: prevailing oughts – the authorities agree that judges should give judgment for the plaintiff on these facts. Here, again without notice and without inquiry, we assume that practice of the judges conforms to the accepted oughts on the books; that the verbal formulations of oughts describe precisely the is-es of practice; that they do give such judgment on such facts. A toothed bird of a situation, in law or any other walk of life. Where is men’s ideology about their doing, about what is good practice – where is that ideology or has it ever been an adequate description of their working practice?

This is the first tacit imputation of factuality to the rules of ought. A second such imputation follows forthwith – again without explicitness, again without inquiry, again (save in odd instances) without challenge or suggestion or doubt. The paper rule of ought which has now been assumed to describe the judges’ working rule of ought (i.e., to correspond with the judges’ practice of decision) is now further assumed to control the practice of the interested laymen, to govern people’s conduct. Pray for the storm-tossed mariner on a night like this! What hope is there for clarity of reasoning with such a waste of building to build on?

Do I suggest that (to cut in at one crucial point) the “accepted rules,” the rules the judges say that they apply, are without influence upon their actual behavior? I do not. I do not even say that, sometimes, these “accepted rules” may not be a very accurate description of the judges’ actual behavior. What I say is that such accuracy of description is rare. The question is how, and how much, and in what direction, do the accepted rule and the practice of decision
diverge? More: how, and how much, in each case? You cannot generalize on this, without investigation. Your guesses may be worth something, in the large. They are worth nothing at all, in the particular. The one thing we know now for certain is, that different rules have totally different relations to the behavior of judges, of other officials, and of the particular persons "governed" (optimistic word!) by those different rules. The approach here argued for admits, then, out of hand, some relation between any accepted rule and judicial behavior; and then proceeds to deny that that admission involves anything but a problem for investigation in the case in hand; and to argue that the significance of the particular rule will appear only after the investigation of the vital, focal, phenomenon: the behavior. And if an empirical science of law is to have any realistic basis, any responsibility to the facts, I see no escape from moving to this position. Thus, and only thus, is the real gain sought by the interests-rights and rules-remedies analysis to be made tangible. I do not deny, be it noted, that those who have cast their thinking in that set-up are from time to time aware of the importance of what is here urged. "Law-in-books and law-in-action." Indeed, whenever challenged on the point, any one of them will proceed to remodel his emphasis ad hoc; he will, for a moment, fix his stress on the remedy, even on the effects of the remedy, as used, in life. But it is an ad hoc remodelling. It is forgotten when the immediate issue is passed. It is no part of the standard equipment of investigation, discussion, synthesis; it is a part only of the equipment of defense. When used apart from combat, as a result of a worker's own curiosity or of some sudden fact-stimulus from outside, it flares like a shooting star, and disappears. Always the night of words will close again in beauty over the wild, streaked disturbance.

**Interests: What Are They?**

This emphasis on behavior, on the observable, on attempts at objective cross-check on the data under discussion, on attempts to find words which describe and do not misdescribe those data, ought to bear fruit in the discussion of interests, as well. The attribution of "interest" quality to anything of necessity involves a value-judgment over and above those value-judgments inherent in any scientific inquiry. At that point the behavior approach ceases to promise objective agreement, except in this - that isolation of the value-judgment, in presentation, from the observed phenomena on which it in part rests, would clarify much discussion. Above all, such an approach to interests would move in terms of demonstrating the existence of groupings of behavior claimed to be significant, as the part of scientific decency when any "interest" is set up for discussion. The present approach tends instead to set up the broadest of formulae about interests, and to attribute them to situations in magisterial unconcern for the specific facts. I have paid my respects briefly above to some aspects of "security of transactions." I would not be understood thereby to deny that those three words are highly useful, or that they refer to very significant aspects of our life. But I am very eager to be understood as questioning how much is accomplished, for any given specific problem, by resting merely on the magic of those words. I think my friend Patterson has wisely described the interest-concept, in its present stage of development, as merely a red flag to challenge investigation in certain general directions - as leaving in any concrete situation most of the fact gathering and most of the fact weighing still to be done. "Security of transactions," in the contract cases I have put above would, to him, mean the most useful raising of a query: what kind of transactions is involved? Better, what kinds of transactions are involved? How many? What results, at present? What disappointments? What effects would any proposed change have? What possible undesired effects, in the hands of interested parties? And so on. "Security of transactions" would settle nothing. It would, as facts become clear, suggest one line of policy which has come in many phases of the law to be regarded as important; but it would leave the importance of that line of policy in any case to be illumined by the facts relevant to the situation in that instant case. No elimination of the subjective value-judgment, then; but an illumination by objective data of the basis and bearings of a subjective value-
judgment. Insofar, a comparison of facts with facts, and not of words with words. Not a comparison of a mere formula of words about an interest with a formula of words said to be a “rule of law,” a precept with no man knows what unexamined meaning in life. Nay, rather the objective data, the specific data, claimed to represent an interest, compared with the actual doings of the judges and the actual effects of their doings on the data claimed to represent an interest. If the judges’ sayings have demonstrable effects, add those to the comparison. What else is relevant? Better: is anything else anything like so relevant?

I have said above that this can be done under the more cumbersome three-fold analytical set-up. I have said that it semi-occasionally has been done. I have said that it is rarely done, and that the definite tendency of the set-up is to block off the doing of it. I venture to predict that without the shift of emphasis, of focus, to behavior, that tendency will continue cheerfully in evidence.

Meaning of Rules and Rights Under the Behavior Analysis

What now, is the place of rules and rights, under such an approach? To attempt their excision from the field of law would be to fly in the face of fact. I should like to begin by distinguishing real “rules” and rights from paper rules and rights. The former are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, except insofar as there may occasionally be implied that courts ought to continue in their practices. “Real rules,” then, if I had my way with words, would by legal scientists be called the practices of the courts, and not “rules” at all. And statements of “rights” would be statements of likelihood that in a given situation a certain type of court action loomed in the offing. Factual terms. No more. This use of “rights,” at least, has already considerable standing among the followers of Hohfeld. This concept of “real rule” has been gaining favor since it was first put into clarity by Holmes. “Paper rules” are what have been treated, traditionally, as rules of law: the accepted doctrine of the time and place — what the books there say “the law” is. The “real rules” and rights — “what the courts will do in a given case, and nothing more pretentious” — are then predictions. They are, I repeat, on the level of isness and not of oughtness; they seek earnestly to go no whit in their suggestion, beyond the remedy actually available. Like all shorthand symbols, they are dangerous in connotation, when applied to situations which are not all quite alike. But their intent and effort is to describe. And one can borrow for them Max Weber’s magnificent formulation in terms of probability: a right (or practice, or “real rule”) exists to the extent that a likelihood exists that A can induce a court to squeeze, out of B, A’s damages: more to the extent that the likely collections will cover A’s damage. In this aspect substantive rights and “rules,” as distinct from adjective, simply disappear — on the descriptive level. The measure of a “rule,” the measure of a right, becomes what can be done about the situation. Accurate statement of a “real rule” or of a right includes all procedural limitations on what can be done about the situation. What are left, in the realm of description, are at the one end the facts, the groupings of conduct (and demonstrable expectations) which may be claimed to constitute an interest; and on the other the practices of courts in their effects upon the conduct and expectations of the laymen in question. Facts, in the world of isness, to be compared directly with other facts, also in the world of isness.

A reversion, do you say, to the crude and outmoded thinking of rules in terms of remedies only, to confusing legal thinking to the vagaries of tradition-bound procedure? Not quite. It is a reversion to the realism of that primitive point of view. But a sophisticated reversion to a sophisticated realism. Gove is the ancient assumption that law is because law is; there has come since, and remains, the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means. Here value-judgments reenter the picture, and should. Observing particular, concrete facts of conduct and of expectation which suggest the presence of an interest, one arrives at his value conclusion that something in
those facts calls for protection at the hands of state officials. What protection is called for, and called for in terms of what action of the state officials? Again a matter of judgment — but a matter of judgment which at least rests on reality and comes to results in terms of action. With that hypothetical action, the actual conduct of those officials can be directly compared. Room for error, in plenty, in diagnosing interests, and in imagining the forms of official conduct suited to their protection. But realism at each end of the comparison; a narrowing as far as the present state of knowledge will permit, of the field for obstructing eyes with words that masquerade as things without a check-up.

The Place and Treatment of Paper Rules

Are “rules of law” in the accepted sense eliminated in such a course of thought? Somewhat obviously not. Whether they be pure paper rules, or are the accepted pattern of the law officials, they remain present, and their presence remains an actuality — an actuality of importance, but an actuality whose precise importance, whose bearing and influence become clear. First of all they appear as what they are: rules of authoritative ought, addressed to officials, telling officials what the officials ought to do. To which telling the officials either pay no heed at all (the pure paper rule; the dead-letter statute; the obsolete case) or listen partly (the rule “construed” out of recognition; the rule to which lip-service only is paid, while practice runs another course) or listen with all care (the rule with which the official practice pretty accurately coincides). I think that every such official precept-on-the-books (statute, doctrine laid down in the decision of a court, administrative regulation) tacitly contains an element of pseudo-description along with its statement of what officials ought to do; a tacit statement that officials do act according to the tenor of the rule; a tacit prediction that officials will act according to its tenor. Neither statement nor prediction is often true in toto. And the first point of the approach here made is skepticism as to the truth of either in the case in hand. Yet it is an accepted convention to act and talk as if this statement and prediction were most solemn truth; a tradition marked peculiarly among the legal profession when engaged officially. It is indeed of first importance to remember that such a tradition contains a tendency to verify itself. But no more so than to remember that such a tendency is no more powerful than its opposite: that other tendency to move quietly into falsifying the prediction in fact, while laying on an ointment of conventional words to soothe such as wish to believe the prediction has worked out.

Thus the problem of official formulations of rules and rights becomes complex. First, as to formulations already present, already existent: the accepted doctrine. There, I repeat, one lifts an eye caynny and skeptical as to whether judicial behavior is in fact what the paper rule purports (implicitly) to state. One seeks the real practice on the subject, by study of how the cases do in fact eventuate. One seeks to determine how far the paper rule is real, how far merely paper. One seeks an understanding of actual judicial behavior, in that comparison of rule with practice; one follows also the use made of the paper rule in argument by judges and by counsel, and the apparent influence of its official presence on decisions. One seeks to determine when it is stated, but ignored; when it is stated and followed; when and why it is expressly narrowed or extended or modified, so that a new paper rule is created. One observes the level of silent application or modification or escape, in the “interpretation” of the facts of a case, in contrast to that other and quite distinct level of express wrestling with the language of the paper rule. One observes how strongly ingrained is the tradition of requiring a good paper justification, in terms of officially accepted paper rules, before any decision, however appealing on the facts, can be regarded as likely of acceptance. And by the same token, one observes the importance of the official formulae as tools of argument and persuasion; one observes both the stimuli to be derived from, and the limitations set by, their language. Very rapidly, too, one perceives that neither are all official formulae alike in these regards, nor are all courts, nor are all times and circumstances for
the same formula in the same court. The handling of the official formulas to influence court behavior then comes to appear as an art capable only to a limited extent of routinization or (to date) of accurate and satisfying description. And the discrepancy, great or small, between the official formula and what actually results, obtains the limelight attention it deserves.

Paper Rules and New Control

I am tempted, however, to regard the new formulation of official rules as even more vitally affected by the approach here suggested than is the dealing with existing formulations. For such new formulation is always with a purpose. The effectuation of this purpose (one recalls "the protection of an interest," supra) must be sought by means of verbal formulation. In part the need is based on our legal tradition: our officials move to a great extent on the stimulus of and in the light of verbally formulated rules. In part, moreover, verbal formulations, and especially those in regard to new, planned change in action, are an inherently essential tool of communication in a complex society; they are peculiarly important in a society which depends in good part upon written records to maintain continuity of practice between successive incumbents of an office, and between successive generations. But since the ultimate effectuation of a purpose is in terms of action, of behavior, the verbal formulation, to be an efficient tool, must be such as will produce the behavior desired.

This turns on the relevant prevailing practices and attitudes of the relevant persons. In one familiar doctrinal illustration, language used in a statute "will be read" in the light both of the existing common law, and of prior judicial construction of that language. But that is a matter of the top, the most superficial, level. Below that are the more vital practices prevalent as to handling official rules, described roughly above; practices, i.e., of courts and of lawyers.

But in regard to the new (and especially the statutory) formulation, the behavior problem goes much deeper than such practices of the legal elect. The ways of appellate courts in handling existing official rules presuppose the cracking of the toughest nut the statutory draftsman has to crack: the case is already in court; someone is already making an appeal to the official formula. Whereas one of the statutory draftsman's major problems is to look into existent behavior beforehand, to make sure that his formula, when it becomes an official rule, will not merely bask in the sun upon the books. He must so shape it as to induce its application (with all the discrepancies that may entail) or else (for any purpose save that of pacifying cunorous constituents content with words) his blow is spent in air.

Only as a second job does he have to wrestle with making his formula so impinge upon judicial tradition that the results in action will be those desired if a case gets into court. Again there is little to be gained by laboring the point. It seems patent that only a gain in realism and effectiveness of thinking can come from consistently (not occasionally) regarding the official formulation as a tool, not as a thing of value in itself; as a means without meaning save in terms of its workings, and of meaning in its workings only when these last are compared with the results desired. In the terms used above: as prima facie pure paper until the contrary is demonstrated; and as at best a new piece of an established but moving environment, one single element in a complex of practices, ideas and institutions without whose study the one element means nothing. Hence: not the elimination of rules, but the setting of words and paper in perspective.

The Place and Treatment of Concepts

Like rules, concepts are not to be eliminated; it cannot be done. Behavior is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement. Nor can thought go on without categories.

A realistic approach would, however, put forward two suggestions on the making of such categories. The first of them rests primarily upon the knowledge that to classify is to dis-
turb. It is to build emphases, to create stresses, which obscure some of the data under observation and give fictitious value to others—a process which can be excused only insofar as it is necessary to the accomplishing of a purpose. The data to be singled out in reference to that purpose are obviously those which appear most relevant. But true relevance can be determined only as the inquiry advances. For this reason a realistic approach to any new problem would begin by skepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution of the new problem. It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely. The suggestion then comes to this: that with the new purpose in mind one approach the data afresh, taking them in as raw a condition as possible, and discovering how far and how well the available traditional categories really cover the most relevant of the raw data. And that before proceeding one undertake such modifications in the categories as may be necessary or look promising. In view of the tendency toward overgeneralization in the past this is likely to mean the making of smaller categories—which may be either sub-groupings inside the received categories, or may cut across them.

The other suggestion of a realistic approach rests on the observation that categories and concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories. This has been discussed above in its application to rules; it holds true, however, of any concept. It is peculiarly troublesome in regard to legal concepts, because of the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition. A simple but striking instance is the resistance opposed by the "master—servant" concept to each readjustment along the lines of a new industrial labor situation. The counsel of the realistic approach here, then, would be the constant back-checking of the category against the data, to see whether the data are still present in the form suggested by the category-name. This slows up thinking. But it makes for results which means something when one gets them.

Background of the Behavior Approach

All this is nothing new in social science. It is of a piece with the work of the modern ethnographer. He substitutes painstaking objective description of practice, for local report of what the practice is, or for (what is worse) a report either of local practice or of local ideology pleasantly distorted by the observer's own home-grown conventions. It is of a piece with the development of objective method in psychology. It fits into the pragmatic and instrumental developments in logic. It seeks to capitalize the methodological worries that have been working through in these latter years to new approaches in sociology, economics, political science. The only novel feature is the application to that most conventionalized and fiction-ridden of disciplines, the law. In essence the historical school of jurists from the one side, and Bentham and later Ihering from the other, were approaching the lines of theorizing here put forth. Holmes' mind had travelled most of the road two generations back. What has been done in the last decades that has some touch of novelty, is for theorists to go beyond theorizing, to move, along such lines as these, into the gathering and interpretation of facts about legal behavior: Ehrlich, Nussbaum, Hedemann, Brandeis, Frankfurter, Moore, Clark, Douglas, Moley, Yntema, Klaus, Handler, Lambert—12 I name only enough to show that neither a single country nor a single school is involved, and to make clear that the point of view has moved beyond the stage of chatter and has proved itself in operation. That out of the way, I should like to glance at a few further implications of the approach.
Administrative Action as Law

Three of them appear together. First, to focus on the area of contact between judicial behavior and the behavior of the "governed" is to stress interactions. Second, central are the judges' actions in disputed cases, there is a vast body of other officials whose actions are of no less importance; quantitatively their actions are of vastly greater importance, though it may well be that the judge's position gives him a leverage of peculiar power. In what has preceded I have somewhat lightly argued as if judge and court were the be-all and end-all of the legal focus. It is time to reformulate, to grow at once more accurate and more inclusive. The actions of these other officials touch the interested layman more often than do those of the judge; increasingly so, and apparently increasing at a rising rate of increase as the administrative machine gains in force and function. More often than not, administrative action is, to the layman affected, the last expression of the law on the case. In such a situation, I think it highly useful to regard it as the law of the case. I see no gain whatever, and much loss, from setting up a fictitious unity in the law, when some officials do one thing, some another, and the courts now and again a third. Realistically, the law is then not one, but at least three, and by no means three-in-one. If what the courts do ultimately prevails and is translated into administrative practice, that is that. If such an event is predictable in advance, I find it vastly more useful to think of that event as the emerging unity of the law, which until it happens may be an ought, and is already an opportunity (at a price) for him with gumption and money to reach for it, but is not yet the probable law for the ordinary case. What — more than one law, on a single point, in a single jurisdiction, according to the whim or practice of an official, or according to the funds or temperament or political complexion of the layman affected? Just that. What else expresses the facts? Why blink and squint because the paper tradition is annoyed? As long as there are words to describe the court rule which will ultimately prevail (in a case where it will!), and to describe the situation differently before and after the victory, what is gained in a science of observation by using the same words to describe both conditions — except a sure confusion?

Hence I argue that the focus, the center of law, is not merely what the judge does, in the impact of that doing on the interested layman, but what any state official does, officially. Lawyers are curious. As to a court of first instance, though it be a justice's court, they would have no difficulty seeing this. They could even see that a wrong decision below, appealed from and reversed, would be part of the troubles of a litigant, would reduce his effective rights — how often do they jockey the case to bring about a settlement, by trading on just such friction-factors? But to say that the decision of the eighteen hundred dollar clerk in Bureau B that certain expenses are not deductible from my income tax return is the law in my case, gives a lawyer's ideology the same shock that it gives to a political scientist to urge that for purposes of that decision, that official is the State. One needs again to wash the matter down with Holmes' "cynical acid" and see what is left. In the same manner, if the official's decision is adverse and erroneous, I should include as a subtraction from my effective rights, if I proceeded to get a reversal, the ill-will and subsequent trouble I might incur at the hands of that official; as a part of the law, if I won; and its predictability as a determining part of the law, if I decided not to fight.

Laymen's Behavior as a Part of Law

Interactions between official behavior and laymen's behavior, first and second, the recognition of official behavior as part of the core of law. Third, and an immediate part of both, the recognition of what Nicholas Spykman so strongly and properly stresses: that the word "official" tacitly presupposes, connotes, reaches out to include, all those patterns of action (ordering, initiative) and obedience (including passivity) on the part both of the official and of all laymen affected which make up the official's position and authority as such. Something of this sort is the idea underlying "consent
of the governed," "ultimate dependence upon public opinion," and the like; but these older phrasings have no neatness of outline; they do not even suggest the need of sharp-edged drawing, which I take to be the reason why they act as a soporific, while the Strykman formulation acts as a stimulant to the curiosity and imagination. In a passing it is well to note that here, too, Max Weber's method of formulation becomes classic: the official exists as such precisely\textit{ insofar as such} patterns of action and obedience prevail.\textsuperscript{20} I agree whole-heartedly that these patterns are an essential part of any phenomena we call law. The more whole-heartedly because Strykman's formulation brings out with fresh emphasis the difference between paper rules and resultant behavior, and the extent to which the behavior which results (if any) from the official formulation of a rule depends on the patterns of thought and action of the persons whose behavior is in question.

The Need for Narrower, More Concrete Study

How far these patterns can be presupposed, how far they require specific examination, depends on the individual case. Here as throughout we run into the need for reexamining the majestic categories of the romantic period of jurisprudence. The old categories are imposing in their purple, but they are all too big to handle. They hold too many heterogeneous items to be of any use. What is true of some law simply will not hold of other law. What is true of some persons as to some law will not hold of other persons, even as to the same or similar law.\textsuperscript{27} I care not how reclassification be made, so long as it is in terms of observation and of organizing the data usably, and with back-check to the facts. But reclassification is called for. From another angle, what we need is patience to look and see what is there; and to do that we must become less ambitious as to how much we are going to look at all at once.

An illustration may make the point clearer. Some "rules" are aimed at controlling and affecting the behavior of persons whose whole set and interest is opposed to making the adjust-

ment desired; others are aimed at affecting behavior of persons who are not only willing to adjust, but have an existing effective machinery for accomplishing the adjustment. A type of the first is almost any phase of professional crime; a type of the second, perhaps, would be some change in the law affecting city real estate transactions which happens to be desired by the dealers. Most cases are compounded of both elements. If city real estate alone is involved, much might be said at first blush for law reform being peculiarly easy and quick, because the practice is firmly entrenched of never entering a real estate deal without consulting a lawyer. But other practices are also entrenched, such as relying upon first mortgage finance from a particular type of concern which in turn insists upon a title policy which in turn is under control of companies whose interest runs counter to certain types of law reform. The troubles of Torrens titles in New York City are an instance. They are substantially unmarketable; no mortgage company will loan on them because no title company will insure them.\textsuperscript{28} That is, however, an instance of attempted "helpful-device" legal innovation. It is a different problem from the "ordering-and-forbidding" legal innovation. Barring questions of constitutionality, and barring the political question of how far legislation running counter to the desires of a well-organized and powerful group can be achieved at all, it is obvious that enforcement of a new prescribed style of doing business upon New York City title companies would be \textit{prima facie} a promising problem of legal engineering, precisely because their business is localized, well organized, and run by relatively few business units. Unlike the professional criminal, they could not dive underground and survive. The problem of detection would therefore be one of detecting not persons, but infractions by known units; and their deals could almost certainly be forced into the open. The major policing problem would therefore in all likelihood become one of anticipating and barring out in advance "evasions" undertaken by changing the methods of business under advice of counsel: \textit{i.e.}, a problem of initially or subsequently so framing the official formulae of ordering and forbidding that transactions could not be
accomplished (at a profit, after deducting fines, etc.) except along lines of the general purposes of the legislation. True, unless the engineering were so successful that a somewhat comparably profitable new turn to the business developed, the legislator would have to reckon not only with initial, but with persistent and highly skilled resistance — which might even take the line it once did with the railroads, of seeking to capture the governmental machine. And it is of course this type of resistance which would in fact (contrary to our hypothesis) keep the constitutional issue in the forefront of the fight. The parallels and the divergencies from regulation or prohibition of liquor traffic would be instructive. As one moves to bank robberies or jewelry thefts the parallels begin to fade out and the divergencies to sharpen. I have purposely chosen an illustration from a field in which I am blankly ignorant, in order to bring out the lines of thought and inquiry which open, under the approach, even before the gathering of data is begun. It is obvious that the set or attitude of those affected or sought to be affected by any piece of "law" is at the heart of the problem of control; it should be equally obvious that the style of organization of those persons, their group ways of action — whether among themselves or with regard to society at large — is equally vital. Behavior effects depend upon present behavior conditions.

The Narrow Application of Most Rules — and Its Implications

This leads directly into the next point: most pieces of law affect only a relatively small number of persons ever or at all, with any directness — or are intended to. Where that is the case, the organization, attitude, present and probable behavior of the persons sought to be affected is what needs major consideration, from the angle of getting results (or of understanding results). Indeed, the very identification of those persons may be a precondition calling for much study. Which is a somewhat absurdly roundabout way of saying that unless those matters are studied, the rules drawn, and the administrative behavior adapted to the persons in question, results will be an accident. "To the persons in question," and, indeed, "to those persons under the conditions in question." It cannot be too strongly insisted that our attitude toward "rules" of law, treating them as universal in application, involves a persistent twisting of observation. "Rules" in the realm of action mean what rules do, "rules" in the realm of action are what they do. The possible application and applicability are not without importance, but the actual application and applicability are of controlling importance. To think of rules as universals — especially, to think of them as being applicable to "all persons who bring themselves within their terms" — is to muzzle one's eyes in a constitutional fiction before beginning a survey of the scene. To be sure, constitutions purport to require rules of law to be "equal and general." But most rules, however general as to the few they cover, are highly special, when viewed from the angle of how many citizens there are. And most rules "applying" to "all who come within their terms" (all those who set up barber shops, or are tempted to commit murder, or to bribe officials, or to embezzle from banks or certify checks without the drawer having funds, or to adopt a child, or to run a manufacturing establishment employing five or more persons) do not and will not, realistically considered, ever be "applicable" in any meaningful sense of the term, to most people in the community. Such rules are indeed open. Persons do move in and out of the sphere of their applicability. But that sphere is much more clearly seen, when viewed as compared with the community) as narrow, as special, as peculiar. Obviously even more special is the sphere of real application: of official behavior with reference to application. (And is it not clear that this most special sphere is the one of greatest consequence to the persons on whose behavior any results depend: the objects of the "regulation").

I know of no consequence of the approach here contended for — the approach in terms of organized behavior interacting with organized behavior — no consequence more illuminating than this immediate opening up for study of the sub-group and institutional structure both of "governor" and of "governed." It opens up for study as a first essential to any understanding at all, as making the study of law a
study in first instance of particularized situations and what happens in or can be done about them.\[^{31}\]

**Realism as to “Society”**

“What can be done,” and by whom? I have spoken of law as a means; whose means, to whose end? Discussions of law, like discussions of “social control,” tend a little lightly to assume “a society” and to assume the antecedent discovery of “social” objectives. Either is hard to find in any sense which corresponds with the facts of control. Where is the unity, the single coherent group? Where is the demonstrable objective which is social, and not opposed by groups well nigh as important as those which support it? And law in particular presents over most, if not all of its bulk, the phenomenon of clashing interests; of antagonistic persons or groups, with officials stepping in to favor some as against some others. Either to fine up the dissector in the interests of his own group; that is one broad phase. Or to regulate the relations between two groups, or to alter the terms of the struggle (competitive or other) between them. Hence the eternal flight for the control of the machinery of law, and of law making, whereby the highly interested As can hope partially to force their will upon the equally but adversely interested Bs, and to put behind that control the passive approval and support of the great body of Cs— who happen to be disinterested, or, what is equally to the point, uninterested. To the truth of this observation it makes little difference whether the ends of the As are material or idealistic whether wholly selfish, or dedicated most altruistically to some concept of the welfare of the whole. And while this welter with regard to change in law may, if you will, be thought of as political, the presence of the welter raises problems in defining “interests.” One must also recur to the fact that it is on the same welter that official behavior is expected to be brought to bear when the new “rule” has been proclaimed.\[^{32}\] Thus raising all the problems raised above, with this addition: the possibility, not there mentioned, of a group of laymen pushing to help the official program through.

One matter does need mention here, however: the eternal dilemma of the law, indeed of society; and of the law because the law purports peculiarly among our institutions to “represent” the whole. There is, amid the welter of self-serving groups, clamoring and struggling over this machine that will give power over others, the recurrent emergence of some wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good. To affirm this is to confess no Hegelian mysticism of the State. It leaves quite open any question of the existence of some “life principle” in a society. It merely notes that, lacking such a self-salvation in terms of the whole, the whole would not indefinitely continue as a whole. And to deny that would be folly. It would be to carry emancipation from the idle ideology of “representation of the whole” into blindness to the half-truth around which that once-precious ideology was built. But to deny the emancipation, to worship the half-truth without dire and specific concern for the details of the welter, would be a folly quite as great.\[^{33}\]

**What Law is Thought to Be: Folk-Law**

In all the emphasis placed upon behavior I may have created the impression that a “realistic” approach would make itself unrealistic by disregarding what people think law is. Not so. But a realistic approach would cut at once into analysis and subdivision of the terms “people,” “think,” and “law” in such a phrase. For the great mass of persons not particularly concerned, I suspect that “law” in this aspect, so far as it concerns themselves, means “what I ought to do” and is not much distinguished from those selective slight idealizations of current practice we think of as morals. At times the issue certainly gets closer: “I want this contract to stick” — and doubtless I will then think of putting it in writing, and will meditate on reciting a formula I saw somewhere (in a deed, was it?): “for one dollar and other good and valuable considerations”; I may get a witness to the signing, too. In the field of private law we know singularly
little of this folk-law-in-action. In that of
criminal law we can suspect a very rough coinci-
dence of folk-law-in-action with folk-morality-
in-action, except that here and there the
thought of cop and jail will work concurrently
when plain external and internal non-official
social sanctions might not wholly click; we can
suspect further that over considerable fields
criminal law is too new and too specialized to
have much background or counterpart in folk-
morality; and, finally, that some fairly wide
bodies of non-moral (or not yet moral) criminal
law aspects will have percolated into folk-law: I
think of traffic law (as known to the traffickers)
as distinctly in advance in most places of traffic
morality, and of similar discrepancies in regard
to liquor, gambling, and sex matters, as to some
portions of a population with variant morals.
Now clearly what people think law to be, as
regards themselves, has some effect at times
upon their action. My guess is, however, the
effect on the side of forbidding is much slighter
than the lawyer is likely to imagine, whenever
any important pressure of self-interest is
present, except for a relatively small minority, or
over relatively small areas of action for any par-
ticular person. On the other hand, my guess is
that in the field in which law provides "helpful
devices" – the attempt to use which presupposes
concurrent self-interest – folk-law has very con-
siderable influence in shaping conduct. The
problem calls for exploration, from the realist’s
angle, by cautious study of detail. Even more
important, I suspect, is the problem of what
law is supposed to be with regard to others than
the supposer. But important in accounting less
for action than for inaction. For it seems likely
that in this aspect law is mainly conceived simply
as being all right, without concern for detail; and
that this aspect of folk-law is close to the heart of
the grand-scale passive cooperation of the un-
terested which makes control of the political
machinery a prize.

Ideals as to What Law Ought to Be

No less important than what people think law
is, is what people conceive that law should be.
Any change in law is in good part a reflection of
someone’s desire to produce a difference. And
just as attitudes and expectations must be taken
into account along with overt behavior, so must
purposes and the ideal pictures toward which
purposes drive. Thus far, even from the angle of
a purely descriptive science.

Into another aspect of ideals as to what law
ought to be this paper does not attempt to go. I
make no effort here to indicate either the proper
rule, or the proper action on any legal subject. I
do, however, argue, and with some vigor, that as
soon as one turns from the formulation of ideals
to their realization, the approach here indicated
is vital to his making headway. It is only in
terms of a sound descriptive science of law (or
of what is roughly equivalent, a soundly built
working art, which takes equal account of con-
ditions) that ideals move beyond the stage of
dreams. Moreover, as has so often been pointed
out, both the feasibility of accomplishing a
policy and the cost of its accomplishment arc
in a world of limited possibilities vital elements
in arriving at a judgment of the worthwhileness
of the policy itself.

Conclusion

In conclusion, then, may I repeat that I have
been concerned not at all with marking a per-
iphery of law, with defining “it,” with excluding
anything at all from its field. I have argued that
the trend of the most fruitful thinking about law
has run steadily toward regarding law as an
engine (a heterogenous multitude of engines)
having purposes, not values in itself, and that
the clearer visualization of the problems in-
volved moves toward ever-decreasing emphasis
on words, and ever-increasing emphasis on ob-
servable behavior (in which any demonstrably
probable attitudes and thought-patterns should
be included). Indeed that the focus of study, the
point of reference for all things legal has been
shifting, and should now be consciously shifted
to the area of contact, of interaction, between
official regulatory behavior and the behavior of
those affecting or affected by official regulatory
behavior; and that the rules and precepts and
principles which have hitherto tended to keep the
limelight should be displaced, and treated
with severe reference to their bearing upon that area of contact—in order that paper rules may be revealed for what they are, and rules with real behavior correspondences come into due importance. The complex phenomena which are lumped under the term "law" have been too broadly treated in the past, and that a realistic understanding, possible only in terms of observable behavior, is again possible only in terms of study of the way in which persons and institutions are organized in our society, and of the cross-bearings of any particular part of law and of any particular part of the social organization.

Included in the field of law under such an approach is everything currently included, and a vast deal more. At the very heart, I suspect, is the behavior of judges, peculiarly, that part of their behavior which marks them as judges—those practices which establish the continuity of their office with their predecessors and successors, and which make their official contacts with other persons; but that suspicion on my part may be a relic of the case law tradition in which we American lawyers have been raised. Close around it on the one hand lies the behavior of other government officials. On the other, the sets of accepted formulae which judges recite, seek right from, try to follow. Distinguishing here the formulae with close behavior-correspondences from others; those of frequent application from those of infrequent. Close around these again, lie various persons' ideas of what the law is; and especially their views of what it or some part of it ought to accomplish. At first hand contact with officials' behavior, from another angle, lies the social set-up where the official's acts impinge directly on it; and behind that the social set-up which resists or further reflects the impairment of his acts. Fath her from the center lies legal and social philosophy—approaching that center more directly in proportion as the materials with which it deals are taken directly from the center. Part of law, in many aspects, is all of society, and all of man in society. But that is a question of periphery and not of center, of the reach of a specific problem in hand, not of a general discussion. As to the overlapping of the field as thus sketched with that of other social sciences, I should be sorry if no overlapping were observable. The social sciences are not staked out like real estate. Even in law the sanctions for harmless trespass are not heavy.

Notes

1. LAW AND MORALS (1924), 25 et seq.

2. Not only ideals, but standards, not only standards, but concepts, not only concepts, but rules, involve of course generalized mental pictures which play a part in shaping both rules and the actions of courts. But as traditionally dealt with, this ideal element, even where observed, is promptly related in the first instance to rules.

3. Pound's work in this aspect is as striking in its values as in its limitations. It is a feat of magnificent insight. It is to Pound we owe the suggestion of "the limits of effective legal action" (worked out in terms of court decisions). It is to Pound we owe the contrast of law-in-books and law-in-action (the latter limited again, in his working out of it, to what courts do, though in other places he insists upon administrative organs as the present center of legal growth). It is to Pound we owe the formulation "individualization of treatment of an offender," and the reference to the proceedings of the Conference on Charities and Corrections to see what the criminal law is really doing. And so it goes. I am not concerned here with whether prior writers may have contributed to, or anticipated, some or all of these ideas. Pound saw them, he formulated them, he drove them home. But these brilliant buildings have in the main not come to fruition. No one thinks them through in their relation either to each other or to the bulk of received jurisprudence.

"Balancing of interests" remains with no indication of how to tell an interest when you see one, much less with any study of how they are or should be balanced. "Sociological jurisprudence" remains bare of most that is significant in sociology. "Law-in-action" is left as a suggestion, while further discussion of "the law" centers on "percept." The limits of effective legal action—a formulation that fairly shrieks for study of the habit and control set-up of society (that complex, industrialized, [partially] urban, indirect-cooperation society he has given us words for)—is left without study of the society to which law is supposed to have relation. The more one learns, the more one studies, the more light and stimulus Pound's writings give. But always peculiarly on
a fring of insight which fails to penetrate at all to the more systematic set-up of the material. One is tempted to see in the thinking of the one man and of the American school of sociological jurisprudence a parallel to the development of case law as a whole: accepting in the main what has been handed down; systematizing compartment-wise; innovating where need shows, powerfully and surely—but ad hoc only, with little drive toward or interest in incorporating the innovation into or aligning it with the mass of the material as received.

Critical reading of Pound's work, it may be noted in passing, and especially the phrasing of any concrete criticism, are embarrassed by the constant indeterminacy of the level of his discourse. At times the work purports clearly to travel on the level of considered and buttressed scholarly discussion; at times on the level of bedtime stories for the tired boy; at times on an intermediate level, that of the thoughtful but unproved essay. Most often, it is impossible to tell the intended level of any chapter or passage, and the writing seems to pass without notice from one to another. Now it is obvious that three successive, mutually inconsistent generalizations, though no one of them sustainable as the deliberate propositions of a scholar, may all be illuminating and indeed all true at once—and on the level of the after-dinner speech, or even of the thought-provoking essay. All of which gives the critic at the same time that it perhaps stimulates his critical faculties. There is value in this. There is value, even, in the legal bedtime story. But there is greater value to be had. What would one not give for the actual appearance of the long-awaited Sociological Jurisprudence, if its author would integrate it in terms of those pioneering thoughts of his which thus far have been waiting to be called together in a Constituent Assembly?

I am presupposing the presence of "rules of law," i.e., at least assuming law as a semi-specialized activity of control distinguished from other mechanisms of control; and also presupposing generalization to have set in. Just how far this first assumption reaches I am sure I do not know; I should be inclined to regard any special assembly held for the purpose of adjusting disputes, by say village elders otherwise without official position or authority (cf. Gutman, Das Recht der Dschagga, Der Sprichwesen), as one instance of its presence. The second assumption presupposes that prior decision has begun to be dealt with as precedent; that Themis is not merely an oracle, but marks a norm. But I am insisting that it be a norm of law. Vinogradoff cogently points out that Maine's Themis is not a pure creation of the judgment maker; before the Themis was a societal life in which norms were both explicit and implicit. I hesitate, however, to call the implicit norms either "rules" or "legal," and see nothing but confusion to be had from so doing. I see only practices, more or less definite, more or less conscious, plus a generalized attitude that whatever is practice is right, and whatever varies widely enough is wrong. Certainly the process of making the implicit norm express calls for difficult creative work (two pieces of gold as the reward, on the shield of Achilles) though any man can recognize the result once arrived at as right, if it is right (the crowd will award the gold). Certainly also the "explicit making" permits a twisting. Finally, once the judgment is made, it is both clearer to see, firmer in outline, more rigid, and perhaps more authoritative than it was before. If authoritative at all because of who made it, or the circumstances of its making, moreover, it has certainly begun the differentiation out of the general social matrix into the specific character of legality. (Malinowski's analysis in Crime and Custom in Savage Society (1926) is somewhat similar; but it moves in terms of dominant authoritativeness of the norm, not of the functionary. If, when appended to, a norm will prevail over an inconsistent norm of common practice, he thinks of it as legal. An illuminating discrimination.)

Here and in the following I am talking about the thinking of my friend T. R. Powell, and the "postmortemizers," those who hash over events that are past, and write books about them, or build taught law. Such persons typically show a wider range of thought than the practical man of similar ability, but a greater naiveté. The practical man seems to think in two water-tight compartments. One half of his mind grinds out the ideology of the day, as gospel, over pippins and cheese or from the rostrum; that half belongs to the postmortemizers. The other half deals cannily with existing institutions, of whatever holiness, to shape (at times it verges on twisting) them to the needs of the practical man or of his client. This side of the practical man's mind must have been at work in every legal system from the days of the most formal rigidity. (Compare the whole preparation and sequence of the lawsuit in Dase's Njads-Saga.) And some persons—con-
relation of interest and remedy since there has been law. (Compare the protection of the Church in the old English law.) But the tone and ideas of the postmortemizers have changed from age to age, and while not altering the basic attitudes of the practical man, have changed his words and his stock of ideas, his tools, seemingly with powerful effects on his results.

6 For present purposes the dubious distinction taken by the German thinkers: "objective Recht" (rather "law" than "right") and "subjective Recht" (close to our pre-Hohfeldian "right") can be disregarded. It fits the discussion in that the subjective Recht is viewed first of all as a deduction from the rule of law, and then as an independent something.

7 Neither would I be understood to deny practical consequences to this mode of thinking, in our case results, in constitutional law, limitation of actions, etc., or to urge that describing the remedy describes the whole situation, today. It does describe the most important, and a much neglected aspect of the situation.

8a Put another way, prescriptive rules are rules for doing something; descriptive rules are so-called rules of doing something - statements of observed regularity. But "rules of" in common speech includes both aspects at once, and "rules for" as often as not connotes the presence of a corresponding practice. I shall limit my term "rules" to "rules for," and shall not employ any such connotation.

8 I omit from discussion here one other troublesome confusion: whenever rules are discussed in their prescriptive aspect, it is frequently difficult to tell whether a writer is giving his own view of what ought to be, or, on the other hand, a view sanctioned by authority - the prevailingly accepted prescriptive rules. In this last case the preceence of a given prescriptive rule is a fact capable of description (or misdescription); but it always remains to be noted whether that prevailing prescriptive rule has any counterpart in practice, or remains in the paper or lip-service stage.

8 Refinement of terms goes some distance to avoid this confusion. "Rule" is well confined to the prescriptive sphere. "Paper rule" is a fair name for a rule to which no counterpart in practice is attached. "Working rule" indicates a rule with counterpart in practice, or else a practice consciously normalized. Cf. supra note 4. "Practice" indicates an observable course of action, with no necessary ascription of conscious normalizing above it. In an earlier paper (15 AM. Ec. REV.

671) I failed to make this last distinction; it seems obvious, however, that it refines one's descriptive and reasoning technique in an important detail. Consider, e.g., the double value Ehrlich's work would have had, if his stock of terms had served to keep such distinctions clear, and to let his magnificent thinking work itself out free of confusion.

9a Wherever the plaintiff has a [legal] right to recover, he can recover at law. This plaintiff has a [social, moral, economic] right to recover. Therefore this plaintiff can recover in this action at law. This may improve the law. It has. It is not, for that, any the better thinking for a scientist to use.

9b This is an overstatement. Past law may have contributed much to the present existence of an interest, and to its shape and extent.

10 How joyously sharp, under this addressing of the rule to the judge becomes the distinction between a rule telling him what to do, himself, and one telling him how to instirct a jury! As, e.g., that it is worth while finding out; that it is worth while checking conclusions in a particular case; and striving to state conclusions which stand within the observed facts; probably also that it is worth while to publish such conclusions for discussion irrespective of what preconditions they may affect, or what accepted values they may disturb.

12 Throughout this paper I am speaking primarily from the viewpoint of the postmortemizer, the observer, the theorizer, the scientist. But in passing let me pay my respects to four other lines of legal thinking in which the utility of the suggested approach seems equally striking. (3) That of the practicing lawyer. In his moments of action, in his actual handling of a case or situation, the measure of his success is the measure in which he actually uses this approach. (The question of how far he uses it consciously, how far intuitively, is immaterial.) His job is either to guide a specific client through the difficulties of action in a concrete situation, or to bring the personnel of a specific tribunal to a specific result. The desired results, and not formulae, are his focus, and he uses formulae as he uses his knowledge of both judicial tradition and individual peculiarity: as tools to reach his desired result. He can be more effective, as any other practical man or artist can, if his technique be consciously studied. This is not to say that all that goes to make up his technique can be laid down or be consciously imparted. Still less is it
to urge that he is himself a trustworthy reporter of his own technique.

(b) That of the legislator. Here is a man who wants results. How can one doubt the added utility to be derived from his wrestling with the observable facts of official action and lay action as those facts exist? Indeed, the successful practitioner and the successful politician are precisely the men whose grasp of the realities of law puts the word-clouded theorist to shame.

(c) That of the philosopher of law — on the side of the "ends of law" and social values. He takes his data for philosophizing from somewhere. The worthwhileness of his philosophy is to a considerable degree conditioned on those data. If they be data of life, his problems become more real, his check-up easier, his basis of thinking more actual. This means at least, when he comes to the application of his chosen values to the criticism of "positive law," that he would bridge to the law-in-action of his day, not merely to the book. If he be a pure mystic, this may be immaterial; otherwise the gain seems inevitable.

For the devotee of formal logic in the law the picture is somewhat different. He will be concerned with words, with propositions. Probably almost wholly with propositions which move within the realm of what — of doctrine — presumably the accepted doctrine of the system. Once he has his propositions, he runs free of the approach here discussed. He meets that approach in two places: the first, when he puts concrete content into his symbols, to start with. He will be no more accurate a logician, but a more useful one, if he reaches into observed fact, not merely into paper words, for that life-content. And again, when the logical process is over, and he wishes to compare his results with something, to see whether he would not prefer another line of systematizing, he can use the behavior-area effectively for his comparison.

But what I have said of the logician suggests the making express of a matter implicit throughout the paper. To say that the area of behavior contact is the most useful point of reference for all matters legal is not to say that a specialist may not do the most useful of work, conceivably, without ever reaching to that point of reference. A careful study of the formal logic of judicial opinions would be a useful study. But I would urge that even its usefulness would be hugely increased by an equally careful study of the instrumentalist, the pragmatic and socio-psychological decision elements in the same cases. And that an equally geometric increase in illumination would follow a further careful study of the effective causes of the society concerned of the same cases. Under the present "words" and "rules" approach, all the tendency would be to stop with, or slightly modify, the first of these hypothetical studies. Under the behavior-contact approach each would be welcome, but the insistent drive would be toward completing the last before the significance of the others would be thought even momentarily understood.

(d) That of the judge. His approach as one member of a bench to his colleagues does not seem to me to differ significantly for the present purpose from that of the practicing lawyer. His approach for himself involves (as does the approach of the philosopher) his forming a value-judgment on the case in hand, in addition to observation and prediction. How his value-judgment can fail of higher utility if he sees his problem not as the mere making of an abstract paper formula, but as the devising of a way of working in court which will in due course effect people is hard for me to see. The latter approach will certainly force him toward using all facilities he has available to visualize in advance the effects of the decision. Such visualization has been thought — and, I conceive, rightly — to be the essence of case-law wisdom-in-action. The approach described should make this wisdom-in-action a reality in a higher percentage of cases. I have developed elsewhere that whereas the net effect is undeniably an expansion of the traditional field of discretion and judicial law-making, yet this should give even a conservative no cause for alarm: first, because even when expanded, that field remains amazingly narrow; taken in relation to law as a whole, or to the movement of law — only cumulative changes over decades being in the main of much more; second, because it involves the introduction of no technique of change not already hallowed by conservative tradition, but only a reorganization, for conscious utilization, of techniques accepted for centuries as good; third (this an article of faith, not a matter capable as yet of proof) because the type of change produced under these circumstances is change which moves official action more into keeping with current needs; and another type of change, now constantly occurring, though hidden, tends to be eliminated: change by way of over-simplification of verbal formulae and over "application" of such formulae to cases they never had before been applied.

13 Eliminating such an implication would to my mind be pure gain. The question of desirability of continuing a given practice, when it comes up for discussion at all, is better made express.

14 This I think holds true of all official ought-rules, irrespective of their form. I speak of their effects, not of their purposes. And the rights of laymen result though the screen of the official’s practice, by a kind of social reflex. Ehrlich described the phenomenon cogently, so far as concerned the rules governing the set-up of the state governmental machine. A legal philosopher or a normatizer, with his mind fixed on the purpose of rules to ultimately affect the conduct of the “governed,” will quarrel with this. A sociologist is content to see and describe what happens — and compare that with what is purpose.

15 Ehrlich, again, brings this out beautifully.

16 And on moving into the further fields of contact between judicial or official behavior and lay behavior, one goes into much deeper water: how does the paper rule work out (i.e., have a reflection or a counterpart in behavior) in lower court cases, unappealed? How often does it have any influence? What influence on administrative officials? On transactions between laymen which never reach any officials? All signs point to this being vastly more important than the set-up of doctrine, or even the actual practices of higher courts. What is documented takes on a spurious appearance of value, as against the unexplored.

17 This hopelessly over-simplifies. There may be as many divergent purposes as there are participants. Almost regularly the formulator’s purpose and the purpose he publicly assigns are in part disparate.

18 This factor has by no means the exclusive importance the devotees of paper rules tend to attribute to it. The keener observers constantly stress this: what other meaning has the emphasis on the traditional techniques “for developing and applying precepts”; the practice of the office, or of the Constitution, which shift emphases, and often create or abrogate whole institutions; the “interpreting away” of a rule; the importance of experience in the office, of the “trained” incumbent. And so forth.

On the other hand the factor of verbally formulated rules has enough importance to explain why they have so long been considered the core of even the substance of law. They are not the sole machinery for producing regularity. Habit, practice, unverbalized experience and tradition, are vital to regularity. But they are a factor in producing it — to the extent that officials react to words, and read words, alike. They are, moreover, the main device for shocking regularity, for letting outsiders get an idea that officials are staying within the due limits of discretion. And they are, as indicated, a most vital element in introducing change in regularity. Where official behavior occurs without regularity, the older views tend to deny it the character of law (the assumed irregularity or caprice of cadiz justice, and the like). On this I differ. I should of course stress as the more perfect illustration of the concept regular official behavior; but I regard the behavior as more vital than the regularity, and the mere paper expression of desired regularity — save so far as it expresses an ideal — well, as paper.

19 I have not attempted in this paper to define conduct, action, behavior. I have no desire to exclude such things as the arousing and disappointment of expectations, the creation of hopes and fears, etc. The approach advocated would, however, go vigorously to inquiring into the grounds for claiming the arousing or disappointment of expectations in any given case — as also to inquiring into what expectations, and whose. So, too, for example, with the thought processes of judges, the influence of ideology on judges and laymen, etc. Cf. 15 Am. Ec. Rev. 670, n. 17, 675, n. 32.

20 Other aspects are developed in Proceedings of Conference of Social Work (1928), at 129 et seq.

21 Mortimer Adler suggests to me that the operational approach to modern physics is a classic analogue and precursor.

22 The work of the different men moves in somewhat different fields, and is uneven in value. The same holds often of different work of the same man. And an exhaustive bibliography of all that has been done along the lines discussed would be long. Probably most titles would fall in the useful but less advanced field of discovering the appellate courts’ real practice as distinct from the paper pattern of courts or writers. The names listed were chosen with reference to work at the next stage beyond: facts as to lower court operations, and the beginnings of inquiry into the contact area between official and layman’s conduct.
If we were dealing with a society which lacked political organization, this obviously would be a bad terminology. But another of the faculties of overgeneralization in the law has been the attempt to find one set of terms to cover the institutions of disparate societies. Before political organization we find control, and often specialized or semi-specialized control institutions. But in describing a politically organized society it is exceedingly convenient to limit the term to the official Big Stick. A convenient term for the closely similar "law" of the subgroup in such a society is "bi-law." Sociologically the two are often more similar than dissimilar. Cf. Max Weber, *Wirtschaft u. Gesellschaft*, 15, 17, 27 et seq.; and 15 Am. Ec. Rev. 672 et seq.

In the same way (borrowing Spelman again) "in the extent that the official's behavior plays into these interlocking patterns of action it becomes "official" rather than personal behavior, and so of direct interest here. "Purely" personal behavior of an official approaches inconceivability; but substantially personal behavior may take up a great bulk of a given official's time.


Thus one Torrens title to one lot is a block makes the block unavailable for large scale improvement. R. R. B. Powel tells me that Torrens titles have even on occasion been de-registered, in order to gain access to mortgage money.

In practice this costs no: "equalize in the choice of the very limited class to be affected." Equality of rule is impossible in a specialized society. It is true that some few of the lines of discrimination which are under our system excluded from consideration, are suggested by the word "equality." But it is not particularly significant, save historically.

I have stressed elsewhere that the vital problem in such cases is that of creating in the conduct of the relevant persons new practices (folkways) which conform to the purposes sought via the new legal rules. Proc. Conf. Soc. Work (1928), at 132 et seq. And that the effectiveness of legal rules, old or new, is not to be measured simply by how often officials act in accordance with them. Ibid., and 15 Am. Ec. Rev. 682.

Indeed the ideal effectiveness is not achieved unless officials do not have to act at all. But if
the rules are of the kind which coincide roughly with ancient, established law practice (more) it becomes a serious problem how far we have in such cases effectiveness of the legal rule, or of the occasional official behavior with reference to the rule. Contrast the extreme opposite case, an entire organized line of activity all units of which are prepared to move or not to move along lines newly prescribed, according to the outcome in court of a deliberately chosen test case. It is behavior of officials alone, but behavior of officials in its interaction with that of the relevant laymen.

31 What is wanted in the way of generalization must come from a synthesis of such particularized studies, when we have them. Meantime, we have our common sense and tradition-given understanding of some of the regularities of official behavior, and sufficient traditional skills in predicting, influencing, managing official or other behavior to get on after a fashion, in practice, while we learn more.

32 Not quite the same. The fight and victory may have somewhat changed the picture. And the enactment of a new formula has some consequences in itself; among others, that the formula chosen imposes temporary (though sometimes wide) limits upon what the officials can do, whereas the prior struggle is typically in terms of policies, not measures.

33 It is along the same line that I feel strongly the unwisdom, when turning the spotlight on behavior, of throwing overboard emphasis on rules, concepts, ideology, and ideological stereotypes or patterns. These last are, by themselves, confusing, misleading, inadequate to describe or explain. But a jurisprudence which was practically workable could not have been built in teens of them, if they had not contained a goodly core of truth and sense. To be sure, it was not the precept-ideology of jurisprudence, but the practice that jurisprudence only partly mirrored, which actually worked. But one thing sociological study ought to do for the advance of science is to coach the advocates of new insight no longer to jock wholesale the old insight against which they are rebelling. The rebelling indicates inadequacy in the old. It does not indicate that the old did not have much solid basis. The bare fact that the old exists, could come into existence and persist, evidences that it had. If we can examine it for what it has, and carry that with us into a new alignment, we shall do much to reduce the well-known pendulum swing from exaggeration to exaggeration. This is of less moment in the early stages of a new movement. The innovator carries over willy-nilly the virtues of the same training against which he is in intellectual revolt. But those newly trained in the new school will be half-trained unsound exaggerators, if the original innovators fail to incorporate in their doctrine as in their practice the life-power of the older school, even while attacking the latter's false emphases and implications.

34 May I insist again at this point that "folk morality" really means at least as many important varieties in specific details as there are subgroups within the main group.