

## A PLEA FOR LAWYER-SCHOOLS\*

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EVERY few years, during the past fifteen, I have made a speech or written an article expressing my views about the deficiencies of American legal education.<sup>1</sup> No one has ever paid much attention to those views. Here I shall do little more than repeat what I've often said before, thinking wistfully that perhaps this time some of my audience will not dissent.<sup>2</sup>

American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell. I call him a neurotic advisedly. He was a cloistered, bookish man, and bookish, too, in a narrow sense. In his student days at Harvard Law School, he haunted the library, poring over the Year Books; he is said to have expressed regrets that he had not lived in the time of the Plantagenets. In his sixteen years of practice he led a secluded life, seeing little of clients, for the most part in the law library writing briefs and drafting pleadings for other lawyers. One of his biographers says of that period, "In the almost inaccessible retirement of his office, in the library of the Law Institute, he did the greater part of his work. He went little into company." Returned to Harvard as a law teacher, there soon to become Dean, he is said to have referred to "a comparatively recent case decided by Lord Hardwicke."

His pedagogic theory reflected the man. The experience of the lawyer

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\* This article is based upon an address delivered at the National Student Conference on Legal Education, New York City, July 12, 1947. The text of the original address has, however, been expanded to enlarge on suggestions which, because of time limits, could not be considered in detail at the Conference.

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1. Among my writings of which this paper is in part a restatement are the following: *IF MEN WERE ANGELS* *passim* (1942), and especially 105-8, 314-5; *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 252-60 (1931); *What Courts Do In Fact*, 26 ILL. L. REV. 761, 778-81 (1932); *Why Not A Clinical Lawyer-School?*, 81 U. OF PA. L. REV. 907 (1933); *What Constitutes A Good Legal Education*, 19 A. B. A. J. 723 (1933); *What's Wrong With The Law Schools*, an address delivered in Washington, D. C., September 15, 1938; *cf.* *LAW AND THE MODERN MIND* (1930) *passim*.

2. In some earlier writings, seeking to avoid a show of egotism, I used the impersonal approach, saying, "the writer," when I meant "I." I have come to believe that the first personal pronoun is less egotistic, for it abandons the impersonal disguise and frankly reveals the personal character of the statements.

in his office, with clients, and in the court-room with judges and juries, were, to Langdell, improper materials for the teacher and his student. They must, he insisted, shut their eyes to such data. They must devote themselves exclusively to what was discoverable in the library. The essence of his teaching philosophy he expressed thus: "First that law is a science; second, that all the available materials of that science are contained in printed books." This second proposition, it is said, was "intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice."<sup>3</sup>

Langdell declared that "the library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist. . . . The most essential feature of the [Harvard Law] School, that which distinguishes it most widely from all other schools of which I have any knowledge, is the library. . . . Without the library the School would lose its most important characteristics, and indeed its identity." In the same vein, the President of Harvard commented not long after, "The Corporation recognizes that the library is the very heart of the [Law] School." In *The Centennial History of Harvard Law School* (published in 1918) it was said, "If it be granted that law is to be taught as a science and in the scientific spirit, previous experience in practice becomes as unnecessary as is continuance in practice after teaching begins."<sup>4</sup>

This philosophy of legal education was that of a man who cherished "inaccessible retirement." Inaccessibility, a nostalgia for the forgotten past, devotion to the hush and quiet of a library, exclusion from consideration of the all-too-human clashes of personalities in law office and courtroom, the building of a pseudo-scientific system based solely upon book-materials—of these Langdell compounded the Langdell method.

The neurotic escapist character of Langdell stamped itself on the educational programs of our leading law schools. As a consequence, until a short time ago, most of the teachers in those schools either had little or no experience in active legal practice or, more important, if they had, yet when they withdrew from practice to teaching, they succumbed to an atmosphere in which the memories of practice became shadowy and unreal. The Langdell spirit choked legal education. It compelled the experienced practitioner, turned teacher, to belittle his experience at the bar. It forced him to place primary emphasis on the library, to regard a collection of books as the heart of the law school.

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3. CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 231 (1918). For more detailed descriptions of Harvard Law School under Langdell see Frank, *Why Not a Clinical Lawyer-School?*, 81 U. OF PA. L. REV. 907, 908 (1933); Frank, *What Constitutes a Good Legal Education*, 19 A.B.A.J. 723 (1933).

4. CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 72 (1918).

A school with a library as its heart is what one may well imagine. The men who teach there, however interested they may once have been in the actualities of the law office and the courtroom, must pay only a subordinate regard to those actualities. The books are the thing. The word, not the deed. Or only those deeds which are or become words. Verbal acts, so to say, are central, and all else peripheral.

In such a school, that which is not in books has become "unscientific"; it may perhaps have truth, but it is a lesser truth, relatively unreal; true reality is achieved by facts only when reported in books. To be sure, Dean Pound, many years ago, spoke of "law in action." That awakened hopes. But has Harvard been showing its students "law in action"? The students have had the opportunity to read in books and law review articles about some very limited phases of law in action. But that, at most, is law in action in the library.

At Harvard's law school the students are given courses in evidence, practice, and pleading. Close by, courts are in action, and especially trial courts, where one can observe evidence in action, practice in action, pleading in action, torts in action, property in action. Are the students urged to attend the courts frequently? Do they spend many days there? Are they accompanied there by their professors who comment thereafter on what has been observed? Are the students familiar with the development of cases in those courts? Are they asked to speculate on the next move to be made in a suit—at a time when the results of that move depend on foresight and skill, instead of hindsight? Are the procedural possibilities of a real lawsuit shown to the students by their professors, together with the so-called substantive law formulae—or are the two split up into separate courses? I mention Harvard. I could as well refer to almost any of the leading university law schools. Do they make any effort to watch, describe and interpret courts in action?

"Law in action" was a happy phrase. It contained, to be sure, that miserably ambiguous word "law." Yet it was a pointer or guidepost; it seemed to indicate a new direction. But what university law school has followed the pointer? The phrase "law in action" has remained a phrase; at any rate, so far as legal pedagogy is concerned, the function of the phrase, psychologically, has been to substitute a new verbal formula for revised conduct. The contents of the bottle remained much the same, the label was changed. One is reminded of the scene in the Gilbert and Sullivan opera where the policemen march around and around the stage promising the distracted father that they will rescue his daughters from the pirates who have abducted them. "We go, we go," shout the policemen as they continue to march in circles. "But they don't go," exclaims the father despairingly.

Litigation is the ultimate reference for the lawyer. By and large, in the last analysis, legal rights and duties, so-called, are nothing more

or less than actual or potential successes or failures in lawsuits.<sup>5</sup> A lawyer who has inadequate acquaintance with litigious processes is, relatively, an impotent lawyer. Indeed, the lawyer is differentiated from other men by the sole fact that he, more expertly than others, is supposed to know the ways of courts. (When I speak of courts, I include administrative agencies, which constitute a special sort of court.)

When you come to practice and, acting for your client, Mr. Shadrach, draw his will, or pass on a bond issue, or organize a corporation, or negotiate the settlement of a controversy, or draft a legislative bill, you will—or you should be—concerned with how the courts will act. If you are competent, you will, as best you can, try to answer this question: “What will happen if those specific documents or transactions hereafter become a part of the drama of a trial?” For the legal rights and duties of your client, Mr. Shadrach, under any given document, or in connection with any given transaction, may mean simply what some court, somewhere, some day in the future, will decide at the end of a trial in a future concrete lawsuit relating to Shadrach’s specific rights under that specific document or in connection with that specific transaction. In the last push, when your client gets into litigation, he has a legal right if he wins the law suit, a legal duty if he loses it.

You will note that I have emphasized trials and trial courts. In that respect, I differ from most law teachers. With a very few notable exceptions, the kind of so-called “law” taught by most professors in the schools consists of deductions from upper-court opinions. The schools, generally speaking, are upper-court law schools. But upper courts, courts of the sort in which I sit, are relatively unimportant for most clients. Why? Because the overwhelming majority of lawsuits are never appealed, and, in most of the small minority which are appealed, the appellate courts accept the facts as “found” by the trial court.

This brings me to the transcendent importance of the facts of cases. A legal rule, principle or standard, says merely this: “If the facts are thus and so, these are the legal consequences.” In a lawsuit, any particular rule, then, should be applied only if the facts invoking that rule’s application are found to exist. If you, as a lawyer, assert that a given rule should govern your client’s case, you will therefore fail, you will lose your suit, unless either the opposing lawyer concedes that those are the facts, (which he seldom does), or you persuade the trial court (a jury or a trial judge sitting without a jury) that those are the facts.

Now the actual facts in a suit do not walk into the courtroom. For they are past events, events which occurred before the suit began. The trial judge or jury, in most cases (*i. e.*, those in which the facts are disputed) can usually learn about those past facts in but one way—

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5. *Warning*: This statement is qualified in the discussion of out-of-court sanctions, *infra* p. 1329.

through the court-room narratives of witnesses. The witnesses, being human, may make mistakes in their original observation of the facts, in their memories of what they thus observed, or at the trial in their reports of their memories. Some witnesses deliberately lie. Many others are biased, and, because of bias, unconsciously distort their stories. The trial judge or juries, who are themselves merely fallible human witnesses of the witnesses, must guess which, if any, of the witnesses accurately testify about the actual past facts.

A guess it must be, since there exist no mechanical instruments for weighing evidence or for determining the honesty and accuracy of the respective witnesses.<sup>6</sup> We have not yet perfected a foolproof lie detector; we certainly now have no detector of the unconscious distortions of prejudiced but honest witnesses; and almost surely we will never have a contrivance for correcting a witness' original mistaken observation of the facts.

The facts, then, for decisional purposes are no more than what trial judges or juries guess—what they think the facts are (or, more accurately, what they publicly say or imply they think the facts are).<sup>7</sup> The "facts" consist, therefore, of the fallible subjective reactions of the trial judge or jury to the fallible reactions of the witness. Consequently, subjectivity, in two ways, inheres in trial-court fact-finding—in the subjective reactions of the witnesses, and in the subjective reactions to the witnesses of the jury or trial judge. Specific decisions frequently turn on such subjective reactions, culminating in such fallible findings of the facts. In court-houses, the legal rules are never self-operative, are always at the mercy of those findings, and often of that subjectivity.<sup>8</sup> I can perhaps most easily indicate the practical significance

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6. See FRANK, *IF MEN WERE ANGELS* 90-4 (1942).

7. The words in parenthesis are necessary because of the following: Most jury verdicts are general verdicts which give no clue to what the jury thinks the facts are. Many decisions of trial judges are unaccompanied either by published findings of fact or opinions by trial judges; we know only what the trial judges *report* as to their belief as to the facts, and when the testimony is conflicting, so that an issue of credibility arises, we usually have no means of knowing whether those reports accurately state those beliefs. See Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 761 (1932); FRANK, *IF MEN WERE ANGELS* c. VII, apps. III, V (1945); Frank, *Introduction to PAUL, STUDIES IN TAXATION* (1932). See my dissenting opinion in *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115, 123-4 (C.C.A.2d 1946), to this effect: Since, when a trial judge's decision turns on the credibility of witnesses, "his 'finding' of 'facts,' responsive to the testimony, is inherently subjective (*i.e.*, what he actually believes to be the facts is hidden from scrutiny by others), his concealed disregard of evidence is always a possibility. An upper court must accept that possibility, and must recognize, too, that such hidden misconduct by a trial judge lies beyond its control."

8. I have suggested that the conventional theory of the decisional process may be crudely symbolized as  $R \times F = D$ , where  $R$ , represents the rules,  $F$  the facts and  $D$  the decision. FRANK, *IF MEN WERE ANGELS* 77-8 (1942); *In re Fried*, 161 F.2d 453, 464 (C.C.A.2d 1947).

of that subjectivity by quoting what I have said elsewhere<sup>9</sup> with respect to the trial judge: "What we call the 'facts' of a case constitute, often, the most important ingredient of the trial judge's decision. But when the testimony is in conflict—as it is in thousands of cases—the 'facts' of a lawsuit consist of the judge's belief as to what those facts are. That belief results from the impact on the judge of the words, gestures, postures, and grimaces of the witnesses. His reaction—inherently and inescapably subjective—is a composite of the way in which his personal predilections and prejudices are stimulated by the sights and sounds emanating from the witnesses. Now these personal attitudes of the judge reflect the subtlest influences of his experience and of the manner in which he has moulded them into what we describe, loosely, as his 'personality'. Where he was born and educated, his parents, the persons he has met, his teachers and companions, the woman he married, the books and articles he has read—these and multitudinous other factors, undiscoverable for the most part by any outsider, affect his notion of the 'facts'.<sup>10</sup> All kinds of obscure, unarticulated community moral attitudes thus play their part in his fact-determination." As I recently said, on behalf of our court:<sup>11</sup> "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even in infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired 'slants', preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those

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If, now, the actual, objective, facts are called *OF*, and the subjective facts (*i.e.*, those "found" by the trial judge or jury) are called *SF*, then we should revise the decisional formula to read  $R \times SF = D$ .

Even that formula is too crude, for it neglects the interaction of *SF* and *R*. (See also note 7 *supra*.) As to a related subject, the *gestalt* aspect of the trial judge's or jury's decisional process, see *In re Fried*, *supra* at 463 n. 28; see also my dissenting opinion in *Old Colony Bondholders v. N. Y., N. H. & H. R. R.*, 161 F.2d 413, 449-50 (C.C.A.2d 1947).

9. FRANK, *A Sketch of an Influence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 235 (1947).

10. See more in detail, FRANK, LAW AND THE MODERN MIND 104-117, 268 n. 2 (1930). Attention is there called to the fact that most adherents of "sociological jurisprudence," in emphasizing the political, social and economic views of judges, largely disregarded the far less discernible factors affecting judicial reactions, and, having little interest in trial courts, paid virtually no heed to the effect of judicial attitudes on the findings of the facts in specific law suits.

11. *In re J. P. Linahan, Inc.*, 138 F.2d 650 (C.C.A.2d 1943).

pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields dispassionateness, for such dispassionateness signifies utter indifference. 'To live . . . is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and to have a point of view is to have a prejudice or bias . . .' An 'open mind', in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social preconceptions, the 'value judgments' which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed 'the valuation system of the law'. The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

"In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic 'leanings of the mind', uniquely personal prejudices . . . . He may be stimulated by unconscious sympathies for, or antipathies to, some of the witnesses, lawyers or parties in a case before him. As Josiah Royce observed, 'Oddities of feature or of complexion, slight physical variations from the customary, a strange dress, a scar, a too-steady look, a limp, a loud or deep voice, any of these peculiarities . . . may be, to one, an object of fascinated curiosity; to another . . . , an intense irritation, an object of violent antipathy.' In *Ex parte Chase* . . . Judge Peters said he had 'known a popular judicial officer grow quite angry with a suitor in his court, and threaten him with imprisonment, for no ostensible reason, save the fact, that he wore an overcoat made of wolfskins,' and spoke of 'prejudice, which may be swayed and controlled by the merest trifles—such as the toothache, the rheumatism, the gout, or a fit of indigestion . . . .' 'Trifles', he added, 'however ridiculous, cease to be trifles when they may interfere with a safe administration of the law. . . .' Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless

thinking machine." For obvious reasons the point becomes markedly sharper when cases are tried by juries.

Never forget that courts do business at retail, not wholesale. All decisions are specific decisions in specific suits. In advising a client of his rights and duties, a lawyer is attempting to predict, to guess, what decision will be rendered in a specific bit of litigation. Often that requires him, before any suit is begun or even threatened, to guess whether, should litigation arise, there will be a dispute about the facts, and, if so, whether conflicting testimony will be introduced at the trial, and what trial judge or jury will try the case, and what will be the reaction of that as yet unknown trial judge or jury to that as yet unknown testimony.

Prediction of specific decisions is hazardous, then, not primarily because of uncertainty about the legal rules but usually because of the obstacles to guessing what the trial courts will guess to be the facts. Due presumably to the difficulty of such guessing, Learned Hand, our greatest American judge, declared, after a long period on the trial bench, "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."<sup>12</sup> Sir William Eggleston, the present Australian Ambassador, an experienced trial lawyer, wrote this year, "With regard to the trial of pure questions of fact, I am of opinion that the results are . . . much a matter of chance."<sup>13</sup>

Because, fixing their attention on upper courts, they neglect that crucial aspect of court-house government, many leading law teachers do their maximum worst in gravely miseducating their students. Repeatedly they assert that clear and precise legal rules usually prevent litigation, and imply that the difficulty of predicting decisions stems largely from uncertainty in or about the rules. That amounts to saying that if all the legal rules were settled and precise, or if parties to controversies always could agree on the pertinent rules, there would be little or no litigation. That is pure, unadulterated tosh. In most suits, no disagreement arises about the rules, and the disputes relate solely to the facts. Decisions in such suits, says many a professor, quoting Cardozo, leave "jurisprudence . . . untouched."<sup>14</sup> That is true, provided you so conceive of "jurisprudence" that it stays aloof from the affairs of ordinary men. But such a decision often means death or imprisonment or poverty or a ruined life to some mere mortal who, in his benighted ignorance, has more regard for his own welfare than for the aesthetic delights of pure "jurisprudence."

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12. HAND, *The Deficiencies of Trials to Reach the Heart of the Matter* in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

13. Eggleston, *Legal Development In A Modern Community*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 167, 188 (1947).

14. See quotations from and discussions of certain of Cardozo's writings in FRANK, *IF MEN WERE ANGELS* 284-95 (1942).



Uncertainty about some of the legal rules exists; one comes upon it in the "marginal" (or "unprovided" or "new" cases). Cardozo correctly said that such uncertainty ought not to be exaggerated. However, the point he missed, because he was an upper-court lawyer or an upper-court judge during most of his career, is this: The major cause of legal uncertainty, which is vast in extent, inheres in the unknowability of the "facts" of cases.<sup>15</sup> For I repeat that few cases are appealed and that, even when a case is appealed, the upper court usually accepts the facts as found by the trial court. Appellate courts deal principally with the legal rules. For that reason upper courts are relatively unimportant. Trial courts—trial judges and juries—are the pivotal factor in the judicial process.

In 1937, when I was still a practicing lawyer, I spoke at Harvard Law School to some six hundred law students. I talked about government and "economics." One of the Harvard professors had previously objected, urging me, instead, to talk about my experiences in litigation. I told the students of that suggestion, but said I had refused to comply with it because, while what I might tell about litigation might be amusing to them, my remarks would be as remote from their knowledge as if I were to talk about head-hunting in the Solomon Islands. To test out the validity of that comment, I asked all those students who had ever been in a court-room to raise their hands. Ten of the six hundred did so. I then asked which of those ten had visited a trial since he had been in law school. Five raised their hands. I then asked how many had been urged by their professors to attend trials. Not a single student raised his hand. I made similar experiments last year at both Columbia and Yale, with substantially the same result.

If it were not for a tradition which blinds us, would we not consider it ridiculous that, with litigation laboratories just around the corner, law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject. The same holds for toe-dancing, swimming, automobile-driving, hair-cutting, or cooking wild ducks. Is legal practice more simple? Why should law teachers and their students be more hampered than golf teachers and their students? Who would learn golf from a golf instructor, contenting himself with sitting in the locker-room analyzing newspaper accounts of important golf-matches that had been played by someone else several years before? Why should law teachers be like Tomlinson? " 'This I have read in a book', he said,

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15. *Id.* at 284-94, 301-7.

'and this was told to me, and this I have thought that another man thought of a Prince in Muscovy.'"

Legal practice is an art, a fairly difficult one. Why make its teaching more indirect, more roundabout, more baffling and difficult than teaching golf? But that is what the Langdell method has done. Legal teaching would be no "cinch" at best. The Langdell method has increased the difficulties, has made the task of the teacher as complicated as possible. Even the teacher who is a genius cannot overcome the obstacles. When I was at law school I sat next to a Chinese student who had learned his English in Spain. As a consequence, when he took his notes on what the American professors said, he took them in Spanish. On inquiry, I ascertained that he actually thought them in Chinese. University law teaching today is involved in a process not unlike that. It is supposed to teach men what they are to do in court-rooms and law offices. What the student sees is a reflection in a badly-made mirror of a reflection in a badly-made mirror of what is going on in the work-a-day life of lawyers. Why not smash the mirrors? Why not have the students directly observe the subject-matter of their study, with the teachers acting as enlightened interpreters of what is thus observed?

As you will see in a moment, I am not advocating a plan for legal education which will produce mere legal technicians. It is imperative that lawyers be made who are considerably more than that. That "more" is alien to the Langdell spirit. That spirit, I grant you, is somewhat weakened. The undiluted Langdell principles are nowhere in good repute today. But they are still the basic ingredient of legal pedagogy, so that, whatever else is mixed with them, the dominant flavor is still Langdellian. Our leading law schools are still library-law schools, book-law schools. They are not, as they should be, *lawyer-schools*.

The history of American legal education commenced with the apprentice system: The prospective lawyer "read law" in the office of a practicing lawyer. Daily he saw for himself what courts and lawyers were doing. Before his eyes, legal theories received constant tests in legal practice. Even if he did not always articulate the discrepancies between theory and practice, he felt them. The first American law school, founded by Judge Reeves in the 1780's, was merely the apprentice system on a group basis. The students were still in intimate daily contact with the courts and law offices.

To shorten a long story, legal apprenticeship, à la Reeves or otherwise, all but disappeared in the universities under the impact of Langdellism, as school after school quarantined its students in the library. Some twenty-five years ago, however, the university law schools began to have a troubled conscience. Why, they asked, does what we teach as "law" so little resemble "law" as practiced? The question and the troubled conscience yielded something labelled "sociological jurisprudence." Its watch-word was that "law" is one of the "social sciences."

All, then, would be well if legal education meshed with sociology, history, ethics, economics and political science. That became the great new dispensation.

It was all to the good, as far as it went. But it did not bring the schools back on the track from which they had fatefully strayed under Langdell's neurotic wizardry. If you want to go from New York to San Francisco, you're not likely to get there soon by voyaging to Rio de Janeiro. Maybe you should go to Rio, even if your ultimate destination is 'Frisco; for, when you arrive in 'Frisco, you'll be a wiser citizen, thanks to the knowledge gained on that detour. But if your final goal is 'Frisco, then 'Frisco ought to be somewhere on your itinerary. On the itinerary of most university law schools you'll find no mention of a trip, not even of a side-trip, to the court-house or to real everyday lawyerdom. The student's travels consist almost entirely of detours.

The sole way for these law schools to get back on the main track is unequivocally to repudiate Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers. That simple, obvious step the university law schools have shunned as if courts and lawyers would infect students with intellectual bubonic plague. These schools have been devising the most complicated ways to avoid taking that step; instead of marching straight up to lawyerdom, they have walked all around it. They have been like a man who reaches with his right hand around behind his neck to scratch his left ear. As a result of present teaching methods, law students are like future horticulturists who restrict their studies to cut flowers. They are like prospective dog-breeders who never see anything but stuffed dogs. Perhaps there is a correlation between that kind of legal education and the overproduction of stuffed shirts in the legal profession.

I maintain that something of immense worth was lost when our leading law schools wholly abandoned the legal apprentice system. I do not for a moment suggest that we return to that old system in its old form. But is it not plain that, without giving up entirely the case-book method and without discarding the invaluable alliance with the so-called "social sciences," our law schools should once more bring themselves into close contact with what clients need and what courts and lawyers actually do? Should the schools not execute an about-face? Should they not now adopt Judge Reeves' 18th century apprentice-school method, modifying it in the light of the wisdom gained on the long detour?

Let me now be more specific. I present the following ideas for consideration:

*First:* A considerable proportion of teachers in any law school should be men with not less than five to ten years of varied experience in actual legal practice. They should have had work in trial courts, apprel-

late courts, before administrative agencies, in office-work, in dealing with clients, in negotiations, in arbitrations. Their practical experience should not have been confined chiefly to a short period of paper work in a law office. I do not mean that there are not some highly capable teachers with little or no such practical experience; some such teachers, who are brilliantly intuitive, partially make up for their deficiencies by imaginative insight. Nor do I say that mere experience in legal practice will make a man a good law teacher. By and large, teachers are born, not made.

There is room in any school for the mere book-teacher. Part of the job of the lawyers is to write briefs for appellate courts. Brief-writing in part does employ "library-law." The exclusively book-lawyer is perhaps at his best in teaching such "library-law." But the "library-law" teacher should cease to dominate the schools. More than that, some of the teaching of the art of "persuasive reasoning" in briefs might well be done by men who have written many real briefs for real courts.

Unfortunately, attempted reform of legal pedagogy is frequently in the hands of the "library-law" teacher. With the best will in the world, such a teacher often finds it almost impossible to warp over the old so-called case-system so as to adapt it to the needs of the future practicing lawyer. So long as teachers who know little or nothing except what they learned from books under that case-system control a law school, the actualities of the lawyer's life are there likely to be considered peripheral and as of secondary importance. A medical school dominated by teachers who had seldom seen a patient, or diagnosed the ailments of flesh-and-blood human beings, or actually performed surgical operations, would not be likely to turn out doctors equipped with a fourth part of what doctors ought to know. But our law schools are not doing for their students even the equivalent of that shoddy job. Many of those schools are so staffed that they are best fitted, not to train lawyers, but to graduate men able to become book-law teachers who can educate still other students to become book-law teachers—and so on ad infinitum, world without end. They are, in large part, excellent book-law-teacher schools. Because many law school professors have cut themselves off from the realities of a lawyer's life, because viewing these realities from too great a distance, they are class-room lawyers, one might say that they teach what they call law "through a class darkly."

As I have already intimated, the spirit of Langdell so dominates many a university law school that even the practitioner who becomes a teacher in such a school often succumbs to that spirit and forgets the difference between the theory he is teaching and the actual practice he has previously encountered. In some instances, to be sure, this forgetfulness stems from the character of the individual teacher; he may have found practice distasteful and lacking in that certainty which he

craved, so that he shifts with delight to a system in which far greater (but illusory) certainty seems to be a reality.

What I suggest, then, is not that all law professors should have had first-hand contacts with courts, lawyers and clients, but that a very large proportion of the professors should be men with such a past.

*Second:* The case-system, so far as it is retained, should be revised so that it will in truth and fact become a case-system and not a mere sham case-system. A few of the current type of so-called case-books should be retained to teach dialectic skill in brief-writing. But the study of cases which will lead to some small measure of real understanding of how suits are won, lost and decided, should be based to a very marked extent on reading and analysis of complete records of cases—beginning with the filing of the first papers, through the trial in the trial court and to and through the upper courts. A few months properly spent on one or two elaborate court records, including the briefs (and supplemented by reading of text-books as well as upper court opinions), will teach a student more than two years spent on going through twenty of the case-books now in use. In medical schools, “case histories” are used for instruction. But they are far more complete than the alleged case-books used in law schools. It is absurd that we should continue to call an upper court opinion a case. It is at most an adjunct to the final step in a case (*i. e.*, an essay published by an upper court in explanation of its decision).

*Third:* But even if legal case-books were true case-books and as complete as medical case-histories, they would be insufficient as tools for study. At best, dissection of court records would merely approximate the cadavers which first-year medical students learn to dissect. What would we think of a medical school in which students studied no more than what was to be found in printed case-histories, and were deprived of all clinical experience until after they received their M. D. degrees? Our law schools must learn from our medical schools. Law students should be given the opportunity to see legal operations. Their study of cases, at the veriest minimum, should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts. The cooperation of judges could easily be enlisted. (In the days of the Year Books the judges went out of their way, at times, to instruct law students who were present in the courtroom. If Lardell had but taken that hint when he was sighing for the days of the Plantagenets!)

The “up-stage” attitude of the bookish-trained teacher towards instruction in the actualities of trial-practice is prettily illustrated in the following excerpt from *The Centennial History of Harvard Law School*: “Efforts have been made from time to time to give students some experience in the trial of cases by substituting a trial of the facts before a jury for the argument of questions of law, whether in the law clubs

or in the . . . moot court. Interesting experiments have been made in acting out a legal injury and summoning the witnesses of the event to testify; and on the other hand in coaching witnesses on the points of actual testimony in their reported trial and having them reproduce the testimony in the Practice Court. Such experiments have been more successful in affording amusement than in substantial benefit to the participants. A fact trial now and then is well worth while, but only as a relief to the tedium of serious work."<sup>16</sup>

One cannot but agree, in part, with that writer. Such fake trials are poor substitutes for careful observation of actual trials. Would any medical school substitute pretend-surgical-operations for real operations as means for instructing students? Obviously such sham law school trials can do little more than "afford amusement" or serve "as a relief to tedium." They are not the equivalent of serious lawyer-work. It is interesting to note that Mr. Justice Douglas, formerly Professor Douglas, agrees with me on this score.

*Fourth:* Now I come to a point which I consider of first importance. I have stated that law schools could learn much from the medical schools. The parallel cannot be carried too far. But a brief scrutiny of medical education suggests the use of a device which may be employed as an adequate method of obtaining apprentice work for law students: Medical schools rely to a very large extent on the free medical clinics and dispensaries. There now exist legal clinics in the offices of the Legal Aid Society. Today, however, those offices are by no means the counterpart of the medical clinics and dispensaries. The ablest physicians devote a considerable portion of their time to medical clinics, while the Legal Aid Society is, on the whole, staffed by men who are not leaders of their profession. The Society, too, is limited in the kinds of cases it takes, and the law teachers have little, if any, direct contact with its efforts.

Suppose, however, that there were, in each law school, a legal clinic or dispensary. As before indicated, a considerable part of (but not necessarily all) the teaching staff of a law school should consist of lawyers who already have varied experience in practice. Some of these men could run the law school legal clinics assisted by the students. The work of these clinics would be done for little or no charge. The teacher-clinicians would devote their full time to their teaching, which would include such clinical work (although they would also teach other matters). The law school clinics, however, would not confine their activities to such as are now undertaken by the Legal Aid Society. They would take on important jobs, including trials, for governmental agencies, legislative committees, or other quasi-public bodies. Their professional work would thus comprise virtually every kind of service ren-

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16. CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 84-5 (1918).

dered by law offices. The teacher-clinicians would disclose to their student assistants, both in and out of "office hours," the generalized aspects of the specific doctrines pertinent to the specific cases with which they dealt. Theory and practice would thus constantly interlace. The students would learn to observe the true relation between the contents of upper-court opinions and the work of practicing lawyers and courts. The students would be made to see, among other things, the human side of the administration of justice, including the following:

(a) The hazards of a jury trial: How juries decide cases. The irrational factors that frequently count with juries. The slight effect which the judges' instructions concerning the legal rules often have on verdicts.

(b) How legal rights are affected by lost papers, missing witnesses, perjury and prejudice.

(c) The effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, biases and open-mindedness of judges. How legal rights may vary with the judge who tries the case and with that judge's varying and often unpredictable reactions to various kinds of cases and divers kinds of witnesses.

(d) The student would learn that, except fictionally, in trials there is no such thing, for instance, as the "law of torts" as distinguished from specific decisions; and that all legal rules, including the "substantive" rules, in a fundamental sense are procedural, since they are only some among the many implements lawyers use in the court-room fights we call "litigation."<sup>17</sup>

Participating in the preparation of briefs, both for trial courts and on appeals, the student, with the aid of his teachers, would learn legal rules and doctrines in the exciting context of live cases. The difference is indescribable between that way of learning and that to which students are now restricted in the schools. It is like the difference between kissing a girl and reading a treatise on osculation. Abstract theory divorced from concrete practical interests is usually dull. Montessori discovered that to teach half-witted children arithmetic became easy, if they were given practical activities, interesting to them, in which adding, subtracting and multiplying were necessary aids to the desired specific achievements. They learned by "doing." If that method is good for half-wits, why not for law students (who are presumably whole-wits)?

(e) Again, in a living context, the student in my sort of apprentice school would be instructed in the methods used in negotiating contracts and settlements of controversies.

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17. See FRANK, *IF MEN WERE ANGELS* 81-2, 100 (1942); cf. *In re Fried* 161 F.2d 453, 464 (C.C.A.2d 1947), and the brilliant paper by Miss Silving, *Law and Fact in the Light of the Pure Theory of Law*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 642 (1947).

(f) The nature of draftsmanship would become clearer. The student would understand how the lawyer tries to translate the wishes of a client (often inadequately expressed by the client) into wills, contracts or corporate instruments. The university law schools even now can, and some do, accomplish something in the way of teaching draftsmanship. That is, they can do something in the way of showing the students how to draft mortgages or wills or deposit agreements (or the like) which have a more or less stereotyped form. But "creative draftsmanship"—the use of novel fact-materials thrown at the lawyer by his client and sometimes worked out in negotiations with counsel representing the other party to the bargain—cannot be adequately taught in most university law schools as they are now conducted.

(g) In such a school, what I call the "enforcement approach" could soon dawn on the students. That is, they would perceive that in advising a client as to whether he should bring a suit, it may be well to begin with the projected end, to find out what the client wants, and then to ascertain whether by a law suit he can obtain it. For instance, if a man owes a client \$5,000, but the man is hopelessly insolvent or all his assets are judgment-proof, litigation will be fruitless.<sup>18</sup>

(h) Concern with the pressing practical affairs of clients would also induce close-up study of the legislative process in action. The student would be prodded into learning how legislation is made, would come to know the realities behind the "legislative intention" or the "purpose of the legislature."

I will be told—I have been told—that the law schools at most have but three short years to train lawyers, and that these years are already so crowded that there is no time to spend on the sort of first-hand material to which I have been referring. I am not at all impressed by such talk. For in most university law schools the major part of the three years is spent in teaching a relatively simple technique—that of analyzing upper court opinions, "distinguishing cases," constructing, modifying or criticizing legal doctrines. Three years is much too long for that job. Intelligent men can learn that dialectical technique in about six months. Teach them the dialectic devices as applied to one or two legal topics, and they will have no trouble applying them to other topics. But in the law schools, much of the three years is squandered, by bored students, in applying that technique over and over again—and never with reference to a live client or a real law suit—to a variety of subject-matters: torts, contracts, corporations, trusts, suretyship, negotiable instruments, evidence, pleading, and so on. Of course, it is impossible in three years, or indeed in thirty-three years, to give or take courses, in all the subjects into which what is compendiously called

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18. The student would thus better comprehend the practical significance of executions, supplementary proceedings, bankruptcy, reorganizations, etc.



"law" can be subdivided. If you measure the limited number of courses that can be covered in three years over against the totality of subject-matters which a lawyer, when engaged in general practice, will encounter, three years seem all too brief. But the point is that the able lawyer, if he has once mastered the dialectic technique in respect of one or two subject matters, can in short order become adept in coping with a great variety of subject-matters. Teach a man the use of *stare decisis* devices with respect to the so-called law of contracts or trusts, and he will have little trouble in applying those devices with respect to corporations, insurance, or what-not.

The myopic "case system" necessarily limits the student to study of a limited portion of a very few subjects. It seems absurd to me that students should not be required to read textbooks and legal encyclopedia articles, not only on those few subjects, but on several dozen others. By that means they will attain a general nodding acquaintance with the leading concepts and peculiar vocabularies of a variety of special topics. Thus they will, for example, overcome that silly dread, experienced by many a graduate, of legal problems concerning patents, copyrights, and admiralty.

Some sixteen years ago, Judge Crane of the New York Court of Appeals characterized the typical graduate of a university law school as follows: "With the practical working of the law he has little or no familiarity. He may come to the bar almost ignorant of how the law should be applied and is applied in daily life. It is, therefore, not unusual to find the brightest student the most helpless practitioner, and the most learned surpassed in the profession by one who does not know half as much. Strange as it may seem, there were some advantages in the older methods of preparation for the bar. As you know, the law school is relatively a matter of recent growth. Formerly, a student, working in the office of a practitioner, combined the study of law with its daily application to the troubles and business of clients. He had an opportunity of hearing the story at the beginning, of noticing how it was handled by his preceptor, of reading the papers prepared to obtain a remedy; he accompanied the lawyer to court and became acquainted with the manner of the presentation of the case to the judge or to the jury. . . . You know much more law after coming out of a university [law school] than these former students ever knew, but you know less about the method of its application, and how to handle and use it."<sup>19</sup>

Is that not a shocking state of affairs? Think of a medical school which would turn out graduates ignorant of how medicine "should be applied and is applied in daily life." In this connection it is important, to note that, according to Flexner, in the best-equipped medical schools,

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19. Quoted in Frank, *Why Not a Clinical Lawyer-School?*, 81 U. OF PA. L. REV. 907, 919 (1933).

the student "makes and sees made through physical examinations, painstaking records, varied and thoroughgoing laboratory tests, at every stage in the study of the patient; the literature of the subject is utilized; at one and the same time medicine is practiced and studied—teachers and students mingling freely and naturally in both activities." In this manner, said Flexner, there has been "effected the fusion of bedside and laboratory procedures alike in the care of patients, in teaching, and in research. . . . From the standpoint of training, fragmentariness, if stimulative and formative, is desirable rather than otherwise. . . . The student must . . . acquire a vivid sense of the existence of breaks, gaps, and problems. The clinics I am now discussing carry him from the patient in the bed to the point beyond which at the moment neither clinical observation nor laboratory investigation can carry him. There he is left, in possession, it is to be hoped, of an acute realization of the relatively narrow limits of human knowledge and human skill, and of the pressing enigmas yet to be solved by intelligence and patience."<sup>20</sup> Here is much that law schools should ponder carefully. The Langdell system is their albatross. They should cast it off.

The core of the law school I propose would be a sort of sublimated law office. Those who attended it would learn by "doing", not merely by reading and talking about doings. But such a school would not limit itself to instruction in legal techniques. It would consider "strictly legal problems" in the light supplied by the other social studies (mis-called "social sciences")—history, ethics, economics, politics, psychology and anthropology. Mere pre-legal courses in those fields, unconnected with the live material of human actions with which lawyers must cope, have proved a failure. The integration ought to be achieved inside the law schools. Some of the teachers who give those courses need not have been practicing lawyers, indeed need not be lawyers at all. Most of the synthesis, however, between the instruction in legal techniques and in those other wider perspectives should occur in the courses relating to legal subjects. Accordingly, all the teachers should be men who have themselves made that synthesis.

I may say that, more than twenty years ago, I was one of a group of alumni who pleaded with the University of Chicago Law School thus to widen its curriculum. Far, then, from rejecting the notion of teaching subjects not directly "legal," I would extend such teaching. I would, in addition, show (as I try to do in my own teaching) the connections between legal philosophy and other phases of philosophy. Noting that a trial judge or jury is a kind of historian, I would also show the resemblances and differences between the methods—the logics—of the natural scientists, the historians and the lawyers.<sup>21</sup> I would

20. A. FLEXNER, *MEDICAL EDUCATION* 269-70 (1925).

21. As to the judge as historian, see *In re Fried*, 161 F.2d 453, 462 (C.C.A.2d 1947).

give a first-rate course in logic and semantics.<sup>22</sup> For example, apropos of the distinction between so-called "substantive law" and "procedure," I would explore the concept of "substance" in philosophy and science. I would have students study the several varieties of psychology as related to the problems of lawyers and judges, including the psychology of judges, juries, witnesses and litigants.

If I had my own way I would point to the error of determinism, economic or otherwise;<sup>23</sup> I would indicate the lack of foundation for cyclical theories of history, such as Toynbee's and Spengler's;<sup>24</sup> I would show the intertwining of the legal notion of "natural law" and the notion of "laws of nature";<sup>25</sup> I would severely criticize "behaviorism";<sup>26</sup> I would get Max Radin to write an article on the relation of the history of the legal concept of "cause" to the idea of "causation" in physics.

An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad. Like M. Jourdain who was surprised to learn that all his life he'd been talking prose, so those "practical lawyers" who decry legal theory as frivolous are, despite themselves, legal theorists, legal philosophers. But their philosophies, their theories, are usually inarticulate, so that they delude themselves and surrender in practice to their own unexamined, uncriticized principles.<sup>27</sup>

#### SO-CALLED "REALISM" AND LEGAL EDUCATION

A lawyer's legal philosophy affects his attitudes toward legal education. It may therefore be asserted (1) that my educational proposals link up with the fact that I am a so-called "legal realist," from which it must follow (2) that my educational proposals suffer from the pernicious moral and intellectual maladies said to be common to all the "realists." For, despite the lack of homogeneity among that group of non-Euclidean legal thinkers unfortunately labelled "legal realists,"<sup>23</sup>

22. See, e.g., FRANK, *FATE AND FREEDOM* cc. 1, 2, 12, 14, and apps. 4 and 5 (1945).

23. *Id.*, *passim*.

24. *Id.* at 37-8.

25. *Id.* at 115-42. As to the problem posed to "natural law" advocates by the subjectivity of fact-finding, see Frank, *Sketch of an Influence*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 189, 234-7 (1947).

26. Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233 (1931).

27. See FRIEDMANN, *LEGAL THEORY* 250-1 (1944); McKeon, *The Philosophic Problem*, in *NEW PERSPECTIVES ON PEACE* 196 (1944); Frank, Book Review, 59 HARV. L. REV. 1004 (1946).

28. As to the unfortunate nature of that label, see FRANK, *IF MEN WERE ANGELS* 276-7 (1942); Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 258 and n. 69 (1931).

As to the lack of homogeneity of the "realist" group, see FRANK, *IF MEN WERE*

critics have repeatedly leveled blanket charges of moral obtuseness and intellectual stupidity against them all.<sup>29</sup> Those charges Northrop restated in 1946 as follows: The "realists" are narrow-visioned uneducated positivists who think "all theoretical principles are . . . myths," and who act on the "erroneous assumption that experimentation and an appeal to what happens in practice, without guiding theoretical principles, are alone what matters in science and life"; they deem "theory and principles irrelevant"; considering themselves "scientific," they nevertheless face social problems "without the knowledge or appreciation of the role of theory in realistic scientific method necessary" to understand and grapple intelligently with problems. As a result (so the indictment continues) they have no awareness of the distinction between "problems of value" and "problems of fact," and, in their incredible ignorance, confusing "the 'ought' of society with the 'is,'" they lack all interest in the importance of the quest for "normative social theory," and cannot intelligently pose or answer questions as to "how we can alter facts" in order to "produce a more ideal state of affairs." Thus (the indictment goes on) they believe that "ideological issues can be resolved and the principles defining what is good in legal and social action can be found merely by observing what is in fact the case with respect to the behavior of judges and people generally"; so it came about that, in the New Deal administration, when advising concerning governmental and economic affairs, they fooled themselves and their advisees by "allowing value judgments, smuggled surreptitiously into the empirical evidence, to determine their legal opinions and prescriptions. . . ." <sup>30</sup>

Now it happens that among the "realists" who played outstanding roles as New Deal advisers were William O. Douglas and Walton Hamilton. The palpable absurdity of the blanket charges, summarized above, could easily be demonstrated by citing the achievements and quoting from the writings of either of those men. Since, however, the "realist" with whom I am best acquainted is myself, I shall—not at all out of egotism but solely out of laziness—use myself as a guinea-pig. In 1932, replying to such charges, I wrote, "All those known as legal realists . . . are eager—perhaps altogether too eager—to improve the judicial system, to make it more efficient, more responsive to social needs, more 'just'. . . . They are unflagging idealists. . . . But where

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ANGELS 277-9, 284 (1942); Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 263-4 (1931); Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1233-56 (1931).

29. See, e.g., FULLER, *THE LAW IN QUEST OF ITSELF* 5-64 (1940); Fuller, *American Legal Realism*, 82 U. OF PA. L. REV. 429 (1934); Kennedy, *Realism What Next?*, 8 FORD. L. REV. 44, 75 n. 110 (1939); Pound, *Modern Administrative Law*, 51 VA. BAR ASS'N PROCEEDINGS 372, 384-5 (1939).

30. NORTHROP, *THE MEETING OF EAST AND WEST* 152, 187-8, 255, 258-9 (1946).

they differ from others who seek to change court-house ways is in this important respect: They insist that no program for change can be intelligent if it is uninformed, if it is not based on moderately accurate knowledge of what has happened and is happening, and on informed guesses as to what can be made to happen. They believe that the way to attain ideals is not by merely assuming that those ideals are now operative or easily attainable, but by painstaking study of what is now going on (thereby learning something of what can be made to go on thereafter)."<sup>31</sup> Previously I had written, "To decry, as we have done, the quest in law of the demonstrably unattainable does not mean that we advocate giving up 'ideals' in law. What the law ought to be constitutes, rightfully, no small part of the thinking of lawyers and judges. Such thinking should not be diminished, but augmented. . . . But there is a nice difference between ideals or ('oughts') and illusions. The approximately possible differs from vain hopes founded on unprofitable day-dreaming. Such day-dreaming, often, indeed, prevents the pursuit of the possible. . . ."<sup>32</sup> Wishes impossible of realization are frivolous. . . . And ethical attitudes towards law must conform to possibilities and feasibilities. 'Oughts' must be based on 'ises' and 'cans'."<sup>33</sup>

#### VALUES AND POLICIES

Entertaining such views, of course I thoroughly agree with those who, like Professors Lasswell and McDougal, urge that law schools should emphasize democratic values and ideals, and should stimulate future lawyers to think of themselves in the role of makers of policies which will implement such values.<sup>34</sup>

31. Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORN. L. Q.* 568, 586 (1932).

32. Attention is called to the invaluable "dreaming" phases of creative activities in FRANK, *LAW AND THE MODERN MIND* 169 (1930). See, *infra*, as to "thoughtful wishing;" see also, as to "wish postulates," FRANK, *IF MEN WERE ANGELS* 119, 364-5 (1942); Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORN. L. Q.* 568, 584-5 (1932); cf. FRANK, *FATE AND FREEDOM* 200-1 (1945).

33. FRANK, *LAW AND THE MODERN MIND* 168, 361-2 (1931). That book was written before I had learned to be cautious about using the word "law." For answers, by persons other than "realists," to criticism of the charge that "realists" are uninterested in and ignorant of "values" and "ideals," see Kessler, *Theoretic Bases of Law*, 9 *U. OF CHI. L. REV.* 98, 109 (1941); Kessler, *Natural Law, Justice and Democracy*, 19 *TULANE L. REV.* 32 (1944); McDougal, *Fuller v. the American Legal Realists*, 50 *YALE L. J.*, 827 (1941).

34. See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L. J.* 203 (1943). To cherish those values is to repudiate the notion, à la Plato, that university law students are to constitute an élite, versed in methods of "manipulating symbols," according to their appraisal of contemporary "mass psychology," for the public good. See Frank, Editorial, *Self-Guardianship and Democracy*, 16 *AMERICAN SCHOLAR* 265 (Summer, 1947). For a recent espousal of the "useful lie" as an indispensable instrument of social control, see BURNHAM, *THE MACHIAVELLIANS* 269 and *passim* (1943).

But such a program must honestly and courageously face these conditions: In a legal system, social values, ideals, policies, find their expression in legal rules, standards and principles (which, for convenience, I have collectively called "rules"). A legal rule, I repeat, says, "If the facts are thus and so, then the legal consequences are this and that." Now, whatever otherwise may be the effect of such rules on the community's mores, yet, *so far as the courts are concerned*, those policies and ideals become operative chiefly in one direct way—through specific decisions in specific law suits. A rule (enacted by a legislature or judge-made) receives judicial enforcement in most cases only if a trial court finds that the facts of a case are such as to invoke that rule. If a trial court mistakenly finds the facts—*i. e.*, finds facts markedly different from the actual facts of the case—and, on that basis, invokes and applies a given rule, then that rule is not really, but only seemingly, operative, and the ideal or value it expresses is frustrated.

Let me illustrate: The rule against murder represents a minimal ethical ideal. When a trial court—judge or jury—finds an innocent man guilty of murder and, as a result, he is hanged or jailed, patently the ideal embodied in the rule against murder has tragically miscarried. Less dramatic, but often equally tragic, is a non-criminal case in which, as a result of mistakes in trial-court fact-finding, a man loses his savings, his property, his job, his reputation. The moral is that, no matter how well-made the rule, no matter how significant the social policy it articulates, that rule and that policy are, in truth, not judicially effective unless, in specific cases, the rule is applied to the actual facts, not to erroneously conceived facts. Indeed, unless this happens, that rule and that policy miscarry and may yield deplorable injustice. Thus the efficacy of ideals and policies expressed in legal rules often depends on fallible guesses by trial courts in specific law suits about the actual past facts involved in those suits.<sup>35</sup>

All of which means—what? It means that if law schools are to do something more than to chatter about ideals and policies, if they aim at ideals and policies in action, they must, at a minimum, teach how those ideals and policies are being daily frustrated by defective trial-court techniques, and must indicate what can be done to reform those techniques.<sup>36</sup> For although lawyers who are good American citizens share with other citizens the obligation to see that all phases of our democratic government and economy work well, on the lawyers rests a special moral responsibility to see to it that the courts approach as near as is practically possible to justice and democracy in the trial of cases. That calls for an overhauling of the jury system and for drastic altera-

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35. See *In re Fried*, 161 F.2d 453, 462-5 (C.C.A. 2d 1947).

36. Compare Morgan, Book Review, 49 HARV. L. REV. 1387, 1389 (1936); FRANK, IF MEN WERE ANGELS 94 *et seq.*, 109 *et seq.* (1942); Frank, Book Review, 56 YALE L. J. 589, 593-4 (1947).

tions in the rules of evidence, since otherwise not only will the legal rules continue to go into the ash-can (through jury ignorance or worse), but evidentiary data indispensable for correct fact-finding will continue to be excluded.

But it calls for much more. We proudly declaim the democratic slogan of "equality before the law," yet too often that equality is lacking. Here is what I have in mind: since most decisions turn on the facts, and since the evidence presented at a trial presumably has some considerable effect on what facts are "found" by the court, preparation or lack of preparation, by way of ascertainment of the evidence *before trial*, will often spell victory or defeat. But frequently the procuring of the most important evidence before trial requires expensive investigation. It may necessitate hiring a detective, or an accountant, or an engineer, or an appraiser, or a hand-writing expert. Accordingly, the *prospective litigant who has not the money to pay for such an investigation is denied justice.*<sup>37</sup>

I haven't time here to explore that problem or to suggest possible solutions. Liberal "discovery" rules cannot do the trick. Nor can the Legal Aid Society or a law school "clinic," since neither of them will have the funds (often considerable) to pay for the necessary pre-trial investigations. The general line of advance is governmental assumption of a larger responsibility in ensuring that no available important evidence fails to be adduced, and a concomitant reduction of the present fierceness of our contentious procedure. That such a notion is not "radical" appears from the fact that such a proposal received the endorsement of President Taft in 1926.<sup>38</sup>

I earnestly suggest that a law school which really means business about democratic ideals should interest itself mightily in that problem—and in the related problem of the effect of corruption and political pull on trial judges. A law school should tell its students about judicial corruption, not of course in order that they may learn how to use bribes or political pull, but for these obvious reasons: (1) Lawyers should do what they can to help the public eliminate eradicable blights on the judicial process. If such factors as dishonesty and political "fixing" of cases are not included in the study of how courts function, what chance is there of an intelligent attack on the problem of diminishing the evil effect of such factors? (2) A lawyer should know which judges are corrupt, or susceptible to political influence, so that, when possible, he may keep his clients' cases from coming before those judges. I suspect that law students hear little from their teachers concerning those problems. They have doubtless, however, heard something of profes-

37. See Frank, *White Collar Justice*, SAT. EVE. POST, July 17, 1943, p. 22.

38. See WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 33, 59, 205 note, 207 (1929). See also FRANK, IF MEN WERE ANGELS 123-7 (1942); *In re Fried*, 161 F.2d 453, 464 (C.C.A. 2d 1947).

sional ethics. But that subject can be effectively taught only if the students, while discussing the canons of legal ethics, have available some first-hand observation of the ways in which lawyers' ethical problems arise and of the actual habits, the mores, of the bar.

Of course, the lawyer's interests should roam far beyond the courthouse aspect of government; but to say that is not to say that he should submerge his interest in that aspect. Without a doubt, the "full role of the lawyer in the community" compels recognition of "his impact on policy-advising and policy-making," and he should therefore give "imaginative consideration" to "the whole range of institutions . . . that can be created, improved, or rearranged for community values."<sup>39</sup> But, in our democracy, prominent among the vaunted community values is the right to a fair trial; and a legal education which does not vigorously stimulate the student's interest in that direction, while it may deserve high praise for its general educational worth, is not a democratic education for future lawyers. For, if lawyers do not cherish the values of which courts peculiarly should be the guardians, who will or can? It is tempting to say today that the formulation of sound policies in foreign affairs should wholly preoccupy all of us, lawyers and the rest, because, absent such policies, our civilization, and with it our entire domestic menage, will soon vanish.<sup>40</sup> Yet, just as we dare not abandon sewage disposal while we debate world problems, we cannot afford to put in parentheses our concern with the functioning of our domestic democracy; and that democracy will be sadly deficient unless our courts function well.

Last year, when many of my students told me of their interest in policy-making, I asked them just how they would go about that job. Not one of them gave me anything but the foggiest answer.<sup>41</sup> One answer would be to combine lawyers' know-how concerning the courts with economic and political wisdom (and well-thought-out surveys of the future) in the drafting of statutes or of workable administrative regulations likely to stand up in the courts.

Let me give you one concrete illustration of the way in which practical lawyer know-how may vitally affect policy. In 1935-37, the constitutionality of the PWA statute was under attack in litigation in the federal courts. When I entered that litigation for the Government,

39. McDougal, *The Law School of the Future: From Legal Realism To Policy Science in the World Community*, 56 *YALE L. J.* 1345, 1348 (1947).

40. "We should achieve a positive pity," wrote Anatole France, "for economists arguing with one another about the cost of the furniture in a burning house." "[A] domestic policy is in itself a secondary matter. . . . Yes, we must minimize domestic policies. A crisis which tears the whole world apart must be met on a world scale." Camus, *Neither Victims Nor Executioners*, *POLITICS*, No. 4, pp. 141, 145 (1947).

41. One of them replied that he would inject a new approach to policy by inserting a footnote in a brief. Another said that, if a client proposed to do something he, as a lawyer, considered undesirable, he would advise against it.



I found that the cases were on appeal. They had not been tried on evidence, because my book-lawyer predecessor had demurred to the complaints, thereby admitting the factual allegations made by the plaintiffs in those complaints. Those admitted allegations were to the effect that the PWA Administrator, Harold Ickes, had, in dozens of ways, shockingly misused his powers under the statute. I feared, and I convinced the Solicitor General, Stanley Reed (now Mr. Justice Reed), that, with those facts admitted, the defense of the statute's validity was in danger, since there would be such a bad atmosphere as to arouse marked hostility on the part of even the most liberal Justices when the cases were argued in the Supreme Court. Through considerable maneuvering, we managed to have the suits remanded, by several circuit courts, to the district courts for trial. We won those trials, obtaining findings of fact, based on the evidence, which flatly contradicted the plaintiffs' factual allegations, thus completely dissipating the bad atmosphere. Then in the Supreme Court we were victorious. I strongly suspect that, but for those trial tactics, PWA and the valuable policy it represented would have been judicially destroyed.

Trial-court fact-finding is exceedingly difficult.<sup>42</sup> It can never be perfect. But it can be much improved. Today it is defective to a tragically needless extent. The law schools, due to their bookishness, largely neglect it.<sup>43</sup> Even their courses in procedure, practice and evidence are usually restricted to what upper courts have said on those subjects.

#### APPRENTICE SYSTEM AND THE TEACHERS

When in 1931 I first broached my idea of a revised apprentice system, the university law teachers sneered at it. More recently, some of them have taken it somewhat more seriously. But they still, most of them, refuse to consider apprenticeship as the central part of the law school curriculum. Here, for example, is my good friend, Professor Karl Llewellyn, who has one of the best seminal minds in the law school world. As early as 1930 he confessed to his students in some lectures, published as *The Bramble Bush*, that he was deficient as a teacher because of his lack of knowledge of the doings of trial courts, which he admitted were the guts of the whole judicial process. So what? So in 1935-36, Llewellyn took a long journey with an anthropologist, from New York to the West, to study the legal system of the Cheyenne Indians. Then he and the anthropologist wrote a stimulating book about it.<sup>44</sup> But by spending a few nickels on subway fares from Columbia Law

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42. See *United States v. Forness*, 125 F.2d 928, 942-3 (C.C.A. 2d 1942).

43. Much the same can be said of the "procedural reformers." See *In re Fried*, 161 F.2d 453, 462 (C.C.A. 2d 1947).

44. LLEWELLYN AND HOEBEL, *THE CHEYENNE WAY* (1941).

School to lower New York City, he could have studied the trial courts of that city, and could have written a book on the anthropology of Tammany-Hall Indians—many of whom are first-rate trial judges.

In 1935, Llewellyn, referring in part to what I had previously written, published an article<sup>45</sup> in which he said: "Let us concede that practice-courts have thus far been successes only in the hands of notable teachers. Let us concede that the artificiality of the atmosphere is too great for most instructors to overcome. What of that? There remains the fact that law school is needlessly abstract, and needlessly removed from life. There remains the fact that seeing-it-done gives reading-it-in-books new flavor, new perspective. If one afternoon a week, during one semester of one year, were free of other classes, and the students with an instructor should visit various courts; if written critiques of what had been observed were followed by the instructor's comment and criticism; if the lawyers concerned were invited to explain their own views on their strategy. Or if law schools would deliberately set to work to plan an interstitial apprenticeship." He went on to propose "post-school apprenticeship." But as yet he has done nothing about either of those projects.<sup>46</sup>

My friend Professor Simpson, erstwhile of Harvard, now at New York University, in an article written with Miss Field, published in in April of this year, dubbed legal apprentice education "nostalgic," and described it as an effort to "turn back the clock." In a footnote (resulting from a criticism I made of his piece before publication), he added that a "clinical approach is indispensable to any realistic program" of legal education. But he says he would put it off until after graduation from law school. He states that an American Bar Association Committee is considering the "possibility of post-law-school internship."<sup>47</sup>

In other words, the idea is this: Have law students spend three long years being mis-educated—*i.e.*, receiving incorrect impressions of how courts and lawyers conduct themselves—and then have the students spend another post-graduate year unlearning those false impressions. Langdell's ghost still controls these professors. I should like to see someone make an anthropological study of law schools, with a full account of their institutional inertia.

The law schools do a pretty good job of training men to be upper-court judges. My law clerks could soon creditably serve on an appellate bench. But American law schools do nothing specifically to edu-

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45. Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 *Col. L. Rev.* 651, 675-6 (1935).

46. Incidentally, the differences between Llewellyn and me as to legal education serve to illustrate the lack of homogeneity among the so-called "legal realists."

47. Simpson and Field, *Social Engineering Through Law: The Need For a School of Applied Jurisprudence*, 22 *N.Y.U. L. Q. Rev.* 145, 184 (1947).

cate men to become trial judges, although the job of such a judge is far more demanding than that of an upper-court wearer of the ermine. I suggest that such training should include some work with a psychiatrist, so that a student, who is a potential trial judge, would learn to know something of his own concealed prejudices and how to control them.<sup>48</sup> Such a student should, even while in school, act as an apprentice to a trial judge. Many trial judges would be pleased to lend such educational assistance. I hasten to add that I intend no denigration of trial judges; many of them are conscientious men of the highest order of ability. But the duties of such judges require unusual aptitudes; and our present trial methods, for which the trial judges cannot be held responsible, are amazingly antiquated.

#### LAW OFFICES AS LABORATORIES

I have said that litigation is the lawyer's ultimate reference, his excuse for differentiating himself from other men, the core of his speciality. But, although no lawyer should be unversed in the way courts function, it is true that many lawyers never get into court. They advise clients, draft their contracts and wills, attend corporate directors' meetings, help to negotiate business transactions, settle disputes without recourse to litigation, engage in arbitrations. Successful lawyers thus engaged have learned much about human nature. They are working psychologists, working anthropologists. They know that, while the ultimate "sanction" of a "legal right" may be a court decision, there are other sanctions some of which at times are more powerful than court orders; I refer to such social compulsives as the customs of a trade, or the beliefs and attitudes of particular sub-groups in the community. Most university law schools do not even hint at the skills such lawyer-activities demand. For instance, some of Columbia's graduates, honor men in their day at school, and now, experts in such skills, successfully practising in New York City, have told me they would be delighted to talk about their experiences to Columbia law students. Yet Columbia never thinks of inviting them to do so. Such talks would have some slight educational value. But the only way for students really to learn those skills would be to see them in operation and to participate in those operations. Near at hand to every law school are those lawyer-laboratories known as law offices, where students could learn the relation of their theoretical studies to the realities of a practicing lawyer's life. A few university law school teachers take their students to look inside those laboratories. Such visits are indeed desirable. But they are pale substitutes for the real thing. The real thing would be to have such laboratories inside the law school. I do not mean the so-called

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48. See Frank, *Scientific Spirit and Economic Dogmatism*, in *SCIENCE FOR DEMOCRACY* 11 (1946); FRANK, *LAW AND THE MODERN MIND* 147 (1931).

"Practice Laboratory," now in vogue in some schools, where students draft documents for supposititious or paper clients. I mean, as I've said, law schools which are themselves, in part, law offices dealing with flesh-and-blood clients.

Here I must warn against a dangerously fallacious notion advanced by many professors, and too, alas, by some practicing non-court lawyers. They say that skill in draftsmanship vastly reduces litigation, since a client with a well-prepared document is so very likely to win a lawsuit, should one occur, that it seldom occurs. This unverified thesis rests on the assumption that carefully prepared documents successfully prevent the raising of disputed issues of fact in lawsuits. An experienced trial lawyer smiles at that naïve assumption. It derives from a fatuous faith in the parol evidence rule. But that is the leakiest of rules.<sup>49</sup> It permits of dozens of exceptions, any one of which lets in an issue of fact, and thence of credibility for a jury, thereby putting the document at the mercy of a jury's guess.

#### WORDS TO BE SHUNNED—HEREIN OF "LEGAL SCIENCE" AND "SOCIAL SCIENCES"

In the kind of school I envision, three words would be used with great caution. The first is "law." It oozes ambiguity. If you want to waste time, contrive a definition of it. You'll discover—I have—that dozens of other men, each with his own pet definition, will hotly attack you, and that the ensuing debate will be unbelievably futile. The best plan is never, when possible, to use the word; the second best, is to give your own definition each time you use it.<sup>50</sup>

Another word which should be taboo is "science" when applied to matters legal (as in the phrases "legal science" or "the science of law") or to social studies (as in the phrase "the social sciences"). To be sure, "science" can be so defined as to bring within its scope what is done by many lawyers and legal scholars, and also by students of government, economics, history, psychology and anthropology; so, for instance, one can say, if one wishes, that "science" means "the persistent and skilled use of the mind" or "knowledge that accrues when methods are employed which deal competently with problems." To most persons today, however, "science" signifies a large measure of exactitude, and methods which yield much reliable prediction; the word evokes, for most men (many lawyers among them), a central image of something like physics, so that, to them, "science," the "physical sciences," and "exact science," are all but synonymous. But social studies, including

49. See the brilliant article by Corbin, *The Parol Evidence Rule*, 53 YALE L. J. 603 (1944); cf. Frank, *Scientific Spirit and Economic Dogmatism*, in SCIENCE FOR DEMOCRACY 11 (1946); FRANK, LAW AND THE MODERN MIND 147 (1931).

50. FRANK, IF MEN WERE ANGELS 279-80 (1942); Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 17, 45 (1931).

studies of matters legal, deal with data which permit little exactitude and thus yield only a dismayingly small quantity of reliable predictions.

Of scientific "laws," similar to the "laws" developed by the physicist,<sup>51</sup> there are virtually none in economics, politics or sociology. Har, in his book, *Social Laws*, examined 168 alleged "social laws." He found at most a few generalizations possessed of a reasonable degree of probability—"Gresham's Law" and the Malthusian population conjectures, for instance. Even these few generalizations, Har believes, should be called "statements of tendencies" rather than "scientific laws." For they must be accompanied by such phrases as, "other things being equal," "it tends to," "by and large," "on the whole," or "in the long run." "What," asks Har, "do these phrases mean? Let us take, for example, 'the long run.' The 'long run' cannot be a short run; the 'long run' cannot be eternity, for eternity can only be thought of, but not lived through. The 'long run' is not a period of time which can be marked off with any precision." For otherwise "we would not find it necessary to take refuge in such a vague phrase. . . . There remains only one possible meaning which might render the expression sensible; namely, that the 'long run' is such a length of time as is just sufficient to fulfill the conditions implied in the expression. Any social law which contains the phrase . . . in this sense may be a circular statement. The same may be said of the other phrases such as 'on the whole' . . . ; and a law of this type . . . is always, 'other things being equal,' characteristically too vague to be much of a law; and if it be made a little more explicit, it frequently turns out to be a circular statement . . . ; other things are rarely equal, and the various tendencies continually counteract one another."<sup>52</sup>

The trouble is that basically all the so-called "social sciences" are but phases of anthropology.<sup>53</sup> For they consist of attempted generalizations relating to the customs, social beliefs and group beliefs (the mores, the folkways),<sup>54</sup> matters which, especially in a changing modern society, are not readily predictable, because of the numerous elusive and accidental factors, including the fortuitous effects of forceful ("earth-

51. As to the constant interaction of such "laws" and "facts," see FRANK, FATE AND FREEDOM c. 14 (1945).

52. Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 255 (1931); see also FRANK, FATE AND FREEDOM 33-6 (1945).

53. See Frank, *Experimental Science and The New Deal*, 78 CONG. REC. 12412 (1933).

54. "Too few economists perceive that fact. As a consequence, two thirds or more of the 'laws' of conventional economics represent generalizations, drawn from descriptions, often not too accurate, of some selected customary conduct, beliefs, and attitudes of a given social group within a limited period, the selected data having what the economists call an 'economic' character." Frank, *Scientific Spirit and Economic Dogmatism*, in SCIENCE FOR DEMOCRACY 11, 13 (1946); see also FRANK, SAVE AMERICA FIRST 8-9 (1933).

quake") personalities.<sup>55</sup> There can be, I think, no exact "science of custom." As I have suggested,<sup>56</sup> "The art of government, at bottom, is a branch of anthropology. . . . The statesman thus appears as a working anthropologist. If a sagacious statesman, he is a careful student of customs. . . . The political economist who wants to serve the statesman must understand that his work is . . . anthropological, that he must become an inventor of new acceptable customs. . . . The spirit of science employed in our national affairs today means the maximum of attainable wisdom in the examination of our traditions to determine which of them should be modified to meet present critical needs and to foster our values—and, at the same time, to understand which of them are so central, so precious to the majority in our society, that to impair them will invite disaster."<sup>57</sup>

True, as the better educated 20th century man knows, the physical sciences now show up as far less exact than they seemed to all but a few thinkers during the preceding three centuries.<sup>58</sup> Nor can it be gainsaid that the practitioners of those sciences successfully utilize "ideal" concepts (e. g., "frictionless engines") which involve notions such as "other things being equal." It might therefore be suggested that the difference between physics, on the one hand, and the "social sciences" (including "law") on the other, is merely one of degree. That is a tricky suggestion, because of the width of the degree. It is said that the difference between a difference of kind and a difference of degree is not itself a difference of kind but one of degree—a "violent" one, however.<sup>59</sup> The difference here under discussion is peculiarly "violent."

The talk of "social sciences" began with men who thought a "social physics" could be created, and that dream still persists. Talk of "legal science" has its peculiar dangers, since, for a long period, the belief in a mathematically-based "science of law" was widespread among learned lawyers,<sup>60</sup> and that belief has recurrently revived in divers forms. The labels "social sciences" and "legal science" therefore arouse hopes which have never been realized and which, inherently, cannot be realized.

55. See FRANK, *FATE AND FREEDOM* 44 (1945).

56. Frank, *Scientific Spirit and Economic Dogmatism*, in *SCIENCE FOR DEMOCRACY* 11, 12-3 (1946).

57. For development of this theme, see FRANK, *SAVE AMERICA FIRST*, Preface, cc. 2-4 and 19 (1938).

58. I must here content myself with the above brief reference to changed attitudes toward physics. But, since one law teacher who heard me read this paper chided me for ignorantly adhering to an outmoded notion of the physical sciences, I here cite, by way of reply to that criticism, FRANK, *FATE AND FREEDOM* 145-87, 298-308, 309-37, (cf. 38-41, 87-105, 115-42, 216-7, 275-6) (1945); FRANK, *LAW AND THE MODERN MIND*, app. III (1930).

59. See Williams, *Language and the Law*, 61 L.Q.REV. 179, 192 (1945).

60. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 114-5 (1927). FRANK, *LAW AND THE MODERN MIND* 94-7 (1930).

To avoid illusions and disappointments, we should speak, modestly, of the "social studies" or "social arts." Above all, lawyers should be on their guard against thinking of themselves as engaged in an exact science, since theirs is, in large part, the study of the often unpredictable ways of trial judges and juries.<sup>61</sup> I agree with the Lasswell-McDougal intimation<sup>62</sup> that the concept of a "science of legal prediction," envisioning techniques for predicting most specific decisions, ought to be laughed out of existence.<sup>63</sup>

For related reasons, I think that lawyers and law students should not use the phrase "legal engineering." An engineer can't build a bridge without the help of physics. Engineering is thus an applied science and thus relies on the so-called exact sciences. As there does not now exist—and almost surely will never exist—a legal science, or any other social science, comparable to physics, nothing but confusion can be engendered by the phrase "legal engineering."

### THE SCIENTIFIC SPIRIT

I do not mean that judges should not avail themselves of the fruits of physical science. Nor do I mean that they and lawyers should not cultivate the "scientific spirit." For the scientific spirit of the physicist can be differentiated from his products and his mathematical methods, from his use of scientific "laws" which, it is said, express "abstract universals dealing with repeatable elements."<sup>64</sup> That spirit, at

61. Compare Keyser, *On the Study of Legal Science*, 38 YALE L. J. 413 (1929).

62. Lasswell and McDougal, *supra* note 34, at 237.

63. Not that the techniques of trial lawyers and trial courts have been without value in the development of scientific method. "Bacon's logic of invention or discovery," writes McKeon, "which has been returned to good repute in the pragmatic logic of the twentieth century, was criticized in the nineteenth century for applying improper and inoperable legal methods to scientific problems in an effort to supply a method of invention from the techniques of law. The relation is well grounded, for Bacon's inductive logic is based on his special places or topics which he relates to and differentiates from the common-places of rhetoric. The complexity of the historical derivations of the logic of discovery may therefore be seen in Bacon's use of instruments derived from forensic oratory in his revolt against scholastic logic, which he represented as purely verbal and syllogistic, whereas the scholastic logicians in turn had learned from Boethius to repeat Cicero's distinction of logic into two parts, invention and judgment, and to find the great virtue of Aristotle in his discovery and development of the logic of invention. The logic of discovery or invention, both in the Middle Ages and in the revolt of the Renaissance, derived not only its terminology and the orientation of its method but its application of utility as a criterion to science from the influence of Cicero's legal and rhetorical method. The Roman's philosophy in turn is a more simple practical adaptation of Aristotle's rhetoric and Socrates' cross-questioning elenchus, both of which have obvious derivations from legal procedure." McKeon, *Democracy, Scientific Method, and Action*, 55 ETHICS 235, 252 (1945).

64. See FRANK, *FATE AND FREEDOM* 40-1 (1945); FRANK, *LAW AND THE MODERN MIND* 93 *et seq.*, 285 *et seq.* (1930); Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 232, 257 (1931).

its best, entails, we are told, the discipline of suspended judgment, distrust of dogmas, a serene passion for verification. Lawyers imbued with such a spirit deny that they are or ever will be scientists—not because lawyers are inferior mentally to physicists, but because they deal with matters far more complex than physics.<sup>65</sup>

#### ANTHROPOLOGICAL STUDIES OF THE EFFECTS OF LEGAL RULES

The scientific spirit among lawyers will foster the notion that existing or proposed legal rules should be evaluated respectively in terms of their actual or potential social consequences. Unfortunately, the courts, although sententiously they talk much of those consequences, possess no adequate means of ascertaining them.<sup>66</sup> Nor, unfortunately, has anyone else much of such knowledge. I therefore heartily favor the kind of research once conducted at Johns Hopkins Law School and which the University of Chicago Law School, I think, is about to undertake—research in the social effects of legal rules.<sup>67</sup> Such anthropological studies—which should cover the reciprocal interaction of legal rules and social habits—deserve the highest approbation and encouragement.<sup>68</sup> But such efforts will be dangerously misleading if they ignore the impact of trial-court fact-finding on the operation of the rules in the courts.

Moreover, those who undertake such studies should acknowledge, to themselves and others, that those studies are affected by subjectivity to a far greater extent than the physical sciences.<sup>69</sup> Social statistics, which, to the unsophisticated, may seem indubitably certain and “objective,” usually rest on someone’s selection of “data,” and the selector’s choice is seldom indisputably correct. Chance, we are told, frequently determines the statistical results. The investigator may “be compelled to employ data . . . because of their availability”; or “his

65. “We must not look for the same degree of accuracy in all subjects; we must be content in each class of subjects with accuracy of such a kind as the subject matter allows, and to such extent as is proper to the inquiry. . . . An educated person will expect accuracy in each subject only so far as the nature of the subject allows”. ARISTOTLE, *Nicomachean Ethics*, Bk. 1, c. VII, Bk. 1, c. II. See McKeon, *Aristotle’s Conception of the Development and Nature of Scientific Method*, 8 J. OF HISTORY OF IDEAS 3 (1947).

66. See *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 769–70 (C.C.A. 2d 1946). For the danger in a democracy of applying the natural science analogy too strictly when dealing with social problems, see McKeon, *Democracy, Scientific Method and Action*, 55 ETHICS 235, 270–86 (1945).

67. For bibliography and discussion see CAIRNS, *LEGAL SCIENCE* 6–7 (1941).

68. Such anthropological studies should include an inquiry into the factors which prevent litigation, in general and in particular social groups. Cf. FRANK, *IF MEN WERE ANGELS* 102–4 (1942).

69. That even in the “exact” sciences there is more of subjectivity than many “exact” scientists will admit, see FRANK, *FATE AND FREEDOM* c. 14 (1945); cf. *id.* at 76–7, 312–5. See also FRANK, *THE PLACE OF THE EXPERT IN A DEMOCRATIC SOCIETY* (1944); Zell v. American Seating Co., 138 F.2d 641, 646 n. 20b (C.C.A. 2d 1943).



preconceptions" concerning the subject may lead "him to believe that certain significant relationships existed," and, without sufficient verification, he may smuggle those preconceptions into his selections of "data" and his conclusions. "In either event, the results of the research are not conclusive with respect to other, unperceived and possibly more important relationships"; the results may be "largely dependent upon the chance sampling of many factors." The "sampling" may not be "representative," the data may have mere "pseudo-objectivity."<sup>70</sup> As one writer sagaciously comments: "Our power of measurement of social tendencies is limited to their external and visible manifestations; and this limitation restricts the scope of the questions that a social statistician may be expected to answer. In social phenomena, the 'effects' of several 'causes' operating together may be very different from the sum of their effects"; there may be "disturbing factors whose effects cannot be eliminated by experimental or statistical techniques."<sup>71</sup> An experienced social investigator, who deservedly enjoys high esteem, says that one who plots a curve of a "trend" should "not fail to admit that the determination of the 'best' trend is largely subjective." Writing of one of her own elaborate studies, she states that most of her charts "could have been given many different interpretations by many different readers," adding, "[I]t is difficult to tell by reading the result of another's investigations just what assumptions he made; just how his interpretation can be made in the light of the particular application of statistical method to particular data; just how often convenience has dictated procedure."<sup>72</sup>

#### "TREND THINKING" AND THINKFUL WISHING

I keep these cautions in mind when I read the valuable article on legal education by Lasswell and McDougal. They urge the need of "trend thinking." The "task is to think creatively," they say, "about how to alter, deter, or accelerate probable trends in order to shape the future closer to our ideals. . . . A trend is not a course of change" but a "register of the relative strength" of the several factors that produce it. "When we look toward the future our aim should not be to draw a fatalistic series of trend curves in the direction they have been moving in the past." To draw such curves, to see what the uncontrolled future might be, is wise, but (they continue) only as "a prelude to the use of creative imagination . . . in deciding how to influence the future." For the "very acts of taking thought and of acting on the basis of

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70. Rice, *Behaviour Alternatives as Statistical Data* in *METHODS IN SOCIAL SCIENCE* 586, 595, 597, 598, 607 (1931).

71. Kemp, *Mathematical Treatment of Social Data* in *METHODS IN SOCIAL SCIENCE* 566, 571, 574-5 (1931).

72. *Id.* at 575, 578, 580.

thought are among the factors that determine the future trend of events." <sup>73</sup> That is splendid counsel. Yet, recalling the remarks, quoted above, of trained social investigators, we ought to be somewhat more modest than these sage thinkers, Lasswell and McDougal, sometimes appear to be, about believing that anyone can know what all the trends are, that anyone can accurately foretell what the uncontrolled future would be, that the injection of thought-created purposive plans will have a nicely foreseeable "influence on the future" and nicely predictable consequences. <sup>74</sup>

Man cannot help planning; not to plan is but one kind of planning. But efforts to control the future should be made with the utmost of tentativeness, with a weather eye constantly open for signs that factors have been overlooked and for indications of new, unexpected, emerging factors which warn that revisions of our plans are desirable. The more modest we are about our ability to discern tendencies, and the more "scientific" we are in admitting that we cannot know them with much exactitude, the better use we can make of those tendencies we do observe. Over-confidence in what we know is the twin sister of ignorance.

I am not espousing anti-rationality, but expressing a healthy respect for the non-rational and chance factors in social behavior and in human experience generally. The hardest foe of the increased effective use of reason is false rationalism—the fatuous belief that reason already plays a larger part in human affairs than it does in fact, and the concomitant delusion that man's finite reason can ever comprehend all that occurs in the universe. "The point is," I have said elsewhere, "that the rational and ethical factors are thwarted . . . by the tendency to ignore the non-rational and non-ethical" factors. <sup>75</sup> "There is no greater obstacle to the development of rationality than the illusion that one is rational when one is the dupe of illusions." <sup>76</sup> Only "by recognition of the immense stretches of unreasons" can "its proportions . . . be reduced." <sup>77</sup>

73. Lasswell and McDougal, *supra* note 34.

74. As to the effects of accidents, see, *e.g.*, FRANK, FATE AND FREEDOM c. 4 (1945); see *id.* c. 5 as to the way in which plans have often miscarried, with consequences which the planners did not foresee and which they would have loathed. The anthropological view points up a troublesome fact: "A culture is a congeries of discrete elements having, often, no necessary or rational connection . . . In a given culture, a custom may have grown up in such a way that it becomes associated with another custom . . . The associated customs may . . . fundamentally contradict one another . . . 'Man's brain,' said De Gourmont, 'is a museum of contradictory truths . . . There are no ideas so remote, no images so ill assorted, that an easy habit of association may not bring them together.'" FRANK, SAVE AMERICA FIRST 17 (1938). See also Frank, Book Review, 57 HARV. L. REV. 1120, 1121 (1944).

75. Frank, Book Review, 40 YALE L. J. 1120 n. 1 (1931).

76. Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233 (1931).

77. Frank, *Experimental Jurisprudence and the New Deal*, 78 CONG. REC. 12412 (1934).

The books are strewn with social predictions that went wrong. Burke scored a happy guess in 1790 when he prophesied that the lax relations of the French government with the French army would lead to the rise of a "popular general" who would become a dictator. But many wise men have made erroneous forecasts. Palmerston and Disraeli thought Germany would be defeated in the Franco-Prussian war of 1870; Morley believed Australia would never fight to aid Belgium. Many predictions of Marx and Engels misfired.<sup>78</sup> Particularly in our dynamic society are long-range social predictions difficult, because today the time-span of continuity is shorter. New medicines can poke holes in the life-tables. Consider the accidental and unforeseeable origin of several major scientific discoveries which have revolutionized our society.<sup>79</sup> (A banker once defined an invention as something which ruined his investments.) Even short-range forecasts are not too easy: recently many of our ablest economists went far wide of the mark in their prophecies of unemployment in 1946-47.

It would be interesting to have Lasswell and McDougal publish some of their own social predictions, with special reference to the conduct of the courts. If their program is to succeed, it must I think have as its foundation the kind of work to which Underhill More has for years devoted himself. In an exquisitely cautious manner, he has tried to discover and accurately describe the interplay of social and strictly legal phenomena. I more than suspect that he is willing to confess that, except as to very simple social happenings, his efforts have largely (yet valuably) proved a negative; and I would add (as probably he would) that, even as to those simple happenings, the vagaries of trial-court fact-find-

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Repugnance to recognition of the immense stretches of unreason accounts for some of the criticism of some of the "realists." Thus Bodenheimer takes them to task for paying too much attention to the trial courts. The result will be, he says, to expose the irrational elements (the existence of which he grudgingly admits) in the judicial process, thereby shaking confidence in the rationality of "law." He adds that "realist jurisprudence" exhibits a distrust in the powers of human reason. BODENHEIMER, *JURISPRUDENCE* 310, 315 (1940). Akin is the attitude of those who decry efforts to acquaint the public with the deficiencies of court-house government. That attitude I think thoroughly undemocratic. See FRANK, *IF MEN WERE ANGELS* 107-S (1942). With the pessimistic conclusions and the analyses of such writers as Pareto, Burnham and Hans Morgenthau, I basically disagree. But anyone who pretends to a "scientific" attitude towards social problems cannot afford to forego reading what such writers say of the impediments to rational thinking about such problems. See PARETO, *THE MIND AND SOCIETY* (1935); BURNHAM, *THE MACHIAVELLIANS* (1943); MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* (1946). For a provocative discussion of the rationality of nonlogical (non-verbal) symbolism, see LANGER, *PHILOSOPHY IN A NEW KEY* (1942).

78. See, e.g., FRANK, *FATE AND FREEDOM* 73-5 (1945); SCHWARZSCHILD, *THE RED PRUSSIAN* 400-1 (1947).

79. See, e.g., FRANK, *FATE AND FREEDOM* 50-1, 182-4 (1945); CANNON, *THE WAY OF AN INVESTIGATOR* c. VI (1945); cf. Frank, *Accounting For Investors*, 53 *JOURNAL OF ACCOUNTANCY* 295 (1939).

ing render highly dubious most prophecies concerning specific court decisions.

Beware of the notion of averages in predicting such specific decisions.<sup>80</sup> For any such average which makes sense must be based on knowledge, by the person who contrived the average, of the actual past facts of each case considered. Averages, yielding some reliable predictions of the legal rules which the courts will use, can be compiled.<sup>81</sup> But such predictions will not help one to pre-know what "facts" will be "found" in specific cases; and without such pre-knowledge the outcome of particular law suits cannot be foretold.<sup>82</sup>

Nevertheless, we must not cease trying to discover—even if often the results will necessarily be crude—the effects of existing or proposed legal rules (statutory or judge-made) on social conduct, and also the effect of that conduct on such rules. Guess we frequently must, but our guesses should be educated guesses. We should use the scientific approach to our ideals, and, so far as possible, the scientific method. As I have said elsewhere, "An ideal represents an aspiration, a wish. The scientific-minded idealist does not indulge in wishful thinking, but he does indeed engage in what Neurath calls thoughtful wishing. Instead of using an ideal as a daydream, such an idealist regards it as a wish postulate. He tries to ascertain what changes can and must be brought about in order to make his wish come true. He may discover that no feasible means exist to reach that end, or that it can only be partially reached. He may find the adoption of the necessary means would entail such devastating social consequences that his ideal should be abandoned. As Aristotle put it: 'In framing an ideal we may assume what we wish, but we should avoid impossibilities.' 'Political writers,' he commented, 'although they have excellent ideas, are often impractical.' The statesman-like economist . . . inventively . . . suggests possible innovations to meet current needs," but "imbued with the scientific spirit . . . does so without dogmatism. He knows that his desires may color his theories and that his theories, if he is incautious, will excessively govern his selection of facts. He does his best to counteract such subtle influences. He seeks imaginatively to envision the way in which his . . . social inventions will operate; for his is the experimental method, applied, as far as it can be, to social facts. His method is scientific in that he looks for available means to attain desired ends."<sup>83</sup>

80. As to the difference between the use of averages in physics and in social studies, see FRANK, *FATE AND FREEDOM* 43-5, 150-7, 33-4 (1945).

81. Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233 (1931).

82. Averages here are, therefore, far less trustworthy than many employed in social studies.

83. Frank, *Scientific Spirit and Economic Dogmatism*, in *SCIENCE FOR DEMOCRACY* 11, 13, 17 (1946). See also FRANK, *IF MEN WERE ANGELS* 119, 364-5 (1942); Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORN. L. Q. 568, 584-5 (1932); FRANK, *FATE AND FREEDOM* 216-7 (cf. 139) (1945).

I agree with Kallen that those persons err who "deny that values and facts are com-

Here, then, as in respect to all man's efforts to guess the future, we should avoid the sin of perfectionism, which mutilates life by demanding the impossible.<sup>84</sup> No truly intelligent person rejects the possibility of reducing uncertainty because it cannot be completely obliterated—just as no sane man will turn his back on physicians merely because the flesh is heir to many diseases for which cures have not been and may never be discovered.

Opposition to labelling as "sciences" legal and other social studies does not signify a belief that the "scientific spirit" is hostile to ideals and ethics. On the contrary, the lack of true scientific spirit among many of those men called "economists" induced them to picture "economics as a science, a notion which worked much harm ethically. Bent on achieving what they falsely considered scientific dispassionateness, disinterestedness and objectivity, they have long been striving to cut themselves off from ethics and politics. In producing 'economics,' they gelded 'political economy'; and gelding, as usual, caused sterility. . . . Scientific method . . . entails awareness of the 'personal equation' so that due allowance can be made for it. Most economists have not borrowed that wisdom from the natural scientists.<sup>85</sup> By pretending to themselves and to others that their alleged science rests on a complete indifference to ethical values and ideals, many economists have concealed the ever-present activity, in their thinking and observations, of their own social ideals. Their suppressed ethical attitudes and assumptions thereby become the more pronounced in their effects. Asserting that they were dispassionate, the economists become peculiarly passionate."<sup>86</sup>

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measurable or that the method of science has any import for the existence of values." I also in the main agree with him that the "method of science . . . is the form that debate receives when it treats alternative claims as equal and gives each the fullest opportunity to make itself good in consequences."; and that "a fact is made a value when some one clings to and cherishes it in spite of consequences, when he declines to risk it on equal terms against the competition of alternatives according to the methods and tests of scientific discourse, while per contra, a value is made a fact when its validity is freely submitted to these validations." Kallen, *Modernity and Liberty*, 18 U. OF BUFFALO STUDIES 73, 104 (1947). See also Hook, *Abstractions in Social Inquiry*, 34 ILL. L. REV. 13, 18 (1939).

However, in considering the views of such Deweyites as Kallen and Hook, it is well to heed the observations of McKeon. See McKeon, *Democracy, Scientific Methods, and Action*, 55 ETHICS 235 (1945); McKeon, *Discussion and Resolution in Political Conflicts*, 54 ETHICS 235 (1944); McKeon, *Economic, Political, and Moral Communities in the World Society*, 57 ETHICS 79 (1947).

84. As to "positive" and "negative" perfectionists, see FRANK, IF MEN WERE ANGELS 136-9 (1942).

85. To be sure, even some of the greatest natural scientists have, at times, been shockingly personal and prejudiced, with adverse effects on their scientific work. See FRANK, FATE AND FREEDOM 180-1 (1945). Cf. CANNON, THE WAYS OF AN INVESTIGATOR 98-9, 126-7 (1945).

86. Frank, *The Scientific Spirit and Economic Dogmatism*, *op. cit. supra* note 83, at

## CONSTRUCTIVE SKEPTICISM AND PLANNING

Years ago, I suggested that, for the misdescriptive label "legal realism," there be substituted "constructive skepticism." It is that attitude I would, if I could, inculcate in law students. Roughly speaking, it fuses these two elements: (1) an eagerness to contrive, or to make operable, social inventions which will improve the workings of our democratic society; (2) an unceasing awareness of the difficulties of that undertaking (because of its complexity and inescapably guessty qualities) and of the consequent need ever to be tentative, experimental, in the formulation of ways and means. Accordingly, I dissent when McDougal seems to say that "realism" represents a "destructive" phase of legal scholarship which must now be superseded by another phase which will "center its energies upon conscious efforts to create the institutions, doctrines and practices of the future," and give prime emphasis to policy.<sup>87</sup> For constructive skepticism is not at odds with but essential to such policy making. To be personal for a moment, I think that my own modest "policy" activities (however incompetent) during some eight years of governmental service in Washington, and my writings concerning government and "economics," are evidence of an intense interest in the construction of solutions to one of the two problems McDougal considers of "overwhelming urgency": how to "preserve our domestic strength and prevent economic depressions."<sup>88</sup> And my experience in government taught me that, without skepticism, only pessimism and cynicism can come from efforts to "clarify community values and . . . the conditions of their achievement."<sup>89</sup> McDougal seems to present to the law schools as mutually exclusive alternatives (or as successive phases, the first of which he says is *passé*) what I think are

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12, 19. As to the evil effects of the "religion of science" on social thinking see FRANK, *FATE AND FREEDOM passim* (1945), and especially c. 11.

87. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 *YALE L. J.* 1345, 1349 (1947).

88. *Id.* at 1348.

89. *Id.* at 1346. McDougal asserts that the "chief contribution" of "legal realism" was "to establish the fact that the doctrines, the verbal propositions, commonly called law are meaningful only when located in the total context in which they are being used—in the community process in which people are using these doctrines to effect, or justify, some specific distribution of values." He refers, in this connection to "cynics" who "deride language as meaningless." Doubtless the so-called "realists" did promote the study of legal semantics. But, unless one incorrectly takes the "realists" as a homogenous group, this was not their "chief contribution." In their writings and governmental activities, some of them, as indicated in the text, tried also to "clarify community values and to identify the conditions of their achievement"—so far as that task was feasible. Nor is it true that all the "realists" derided language as meaningless. See, *e.g.*, FRANK, *IF MEN WERE ANGELS* 312-4 (1942); Frank, *Are Judges Human?*, 80 *U. OF PA. L. REV.* 232, 264-5 (1931).

complementaries. (Perhaps I have misunderstood McDougal.<sup>93</sup> I sincerely hope so, for I consider his educational program, properly qualified, profoundly right.)

The old anarchistic regime of ultra-let-alone-ism can no longer serve our needs. Increased social cooperativeness, both domestically and on a planetary scale, has become imperative. Plan, then, we must.<sup>91</sup> As to our domestic future, our traditions and values put us in a position where we have to choose either (1) chaos, or (2) civil war, or (3) some sort of democratic planning inside a profit system, planning which seeks a working compromise.<sup>92</sup> Government "must be efficient . . . without being despotic . . . , it must ensure individual political freedoms without crumbling into anarchy."<sup>93</sup> Our planning should, then, be exceedingly flexible and circumspect.<sup>94</sup> When someone says, "We know how to clarify values into blueprints for action,"<sup>95</sup> we should answer, "Yes, we know a little about it."<sup>96</sup> Since act we must, our attitude ought to be, as Kallen says, that "The important thing is to have faith but not illusions and to risk action on this faith."<sup>97</sup>

As I've written elsewhere, if we are not "cocksure about what we know and can know, we can be more sure that our choices will be real, not illusions. Thereby . . . we shall become both more humble and

90. His earlier article, *Fuller vs. the American Legal Realists*, 50 *YALE L. J.* 827 (1941), encourages that hope.

91. Even Hayek favors "good" planning, *THE ROAD TO SERFDOM, passim* (1944).

92. See FRANK, *SAVE AMERICA FIRST, passim* (1938). Despair (engendered by the aftermath of World War I) of the possibility of coping with political-economic problems elsewhere in the world, induced me in that book to urge that Americans concentrate on western-hemispheric planning. Until the fall of France in World War II, I failed to see that the industrial technology which seemed to make that program feasible had an evil twin, military technology, which rendered that program hopeless. I so confessed in several writings published before Pearl Harbor.

93. FRANK, *IF MEN WERE ANGELS* 18-9, 164-78 (1942).

"Sage political thinkers have always considered as the chief problem of government the reconciliation of the conflicting demands of liberty and authority. They have sought to find an escape from the twin evils of anarchy and tyranny. No perfect escape can be found. But, as Jefferson and Lincoln recognized, democracy offers the best way out. It can, of course, fully satisfy neither of the opposing yearnings of man, since, in its very nature, democracy represents a compromise between the two. But a democracy alone affords an opportunity to achieve a working balance." FRANK, *FATE AND FREEDOM* 204-5 (1945). (1945).

94. For an excellent example, see Keyserling, *Must We Have Another Depression*, *N. Y. Times*, June 8, 1947.

95. McDougal, *supra* note 87, at 1349.

96. Strangely enough, considering McDougal's criticism, McKeon writes that the "realists" have "argued that the treatment of human actions and institutions will become 'scientific' only when the facts of action and association are formulated in laws comparable to those discovered in mathematics and the physical sciences." McKeon, *Economic, Political and Moral Communities in the World Society*, 57 *ETHICS* 79, 83 (1947). McKeon's criticism is misdirected so far as some of the "realists" are concerned.

97. Kallen, *supra* note 83, 129.

more effective. . . . We shall be wise only if we recognize the inherent imperfections and instability of our solutions. The major obstacles to human progress center in the beliefs that our progress is destined and that men, necessarily limited in knowledge, can attain perfection. The only absolute knowledge on which we can count is the knowledge that human knowledge will never be absolute, will always be relative and limited. That awareness, however, while it will eliminate much blundering, will not enable us to elude our limitations. Thus we come to the basic paradox of the American faith: humility in the face of our limitations but faith that our will can move us forward on the road to the good life. The impossibility of arriving at perfection does not justify indifference to the aim of constantly bettering man's lot."<sup>98</sup>

#### BREAD-AND-BUTTER SCHOOLS

In almost every large city, there is at least one bread-and-butter "local" law school, attended by students who lack the financial means to attend a university school. Most of the students, in addition to going to school, work in law offices. The university schools look down their noses at these "local" schools, despite the fact that some of our ablest, most successful, and most nationally public-spirited lawyers—Randolph Paul and Morris Ernst, for instance—were graduated from such institutions.

Some persons believe it may be easier to produce a satisfactory, well-rounded, legal education by supplementing the curriculums of the "local" schools than by revising the studies at the university schools, remote as the latter are from lawyerdom. The former, it is argued, are already closer to the essentials of a sound legal education: Many of their teachers are, or once were, in active practice; they therefore have no fear of the realities. Most of the students, in their out-of-school hours, perforce have daily direct contacts with the lawyer-laboratories. I earnestly suggest that the legal profession consider carefully whether those schools could not be transformed into admirable apprentice schools. If such a school were to call in as teachers some of its prominent alumni and were to supplement its present courses with some first-rate courses in psychology, history, political science, economics, ethics and anthropology, it might well be a path-maker to a good legal education.

#### EXCEPTIONS

To avoid misunderstanding, I want to say, emphatically, that all university law schools and all their teachers do not deserve my strictures. I believe that, as a whole, Yale Law School, for example, comes closer to grips with lawyers' realities than Harvard.<sup>99</sup> And Harvard,

98. FRANK, FATE AND FREEDOM 336-7 (1945).

99. Yale's tolerance is evidenced by the fact that I am permitted to teach there, and in my teaching, to state the view expressed in this paper.



as Columbia and many another school, has professors who are outstanding exceptions to my description of the genus law teacher.

One such exception is Morgan of Harvard who, in 1936, said in reviewing Goldstein's book on *Trial Techniques*:

"If only some lawyer could rise up and honestly denounce Mr. Goldstein as a defamer of his profession. . . . If only a reviewer could assert that this book is a guide not to the palaces of virtue but to the red-light districts of the law. But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without a pretence of shame and (God save us!) without the slightest suspicion of its shamefulness. He has shown by his own unperturbed frankness with what complaisance the profession, which would smile the superior smile of derision at the suggestion of a trial by battle of bodies, accepts trial by battle of wits. In all innocence, he has produced a volume which is a devastating commentary upon an important aspect of our administration of justice." <sup>100</sup>

Teachers with Morgan's courage and insight strive to preserve law students from the bitter disillusionment which comes to too many when they emerge from school, a disillusionment like that described by Silone in the following passage: "Don Paolo went back to his room to reflect on the peasants and their lives. . . . The idea occurred to him of using his remaining time at Pietrasecca to finish his essay on the agrarian question. He took his notebook from his bag and started reading the notes he had started. . . . He read them through, and was astonished and dismayed at their abstract character. All these quotations from masters and disciples on the agrarian question, all those plans and schemes, were the paper scenery in which he had hitherto lived. The country which was the subject of those notes of his was a paper country, with paper mountains, paper hills, fields, gardens, and meadows. The great events recorded in them were mostly paper events, paper battles, and paper victories. The peasants were paper peasants." <sup>101</sup>

#### LEGAL MAGIC

The reluctance of most law teachers to look squarely at real lawyers and at court-house realities recalls a letter Galileo wrote Kepler several hundred years since. "Here at Padua," he said, "is the principal professor of philosophy, whom I have repeatedly and urgently requested to look at the moon and planets through my glass, which he pertinaciously refuses to do. Why are you not here? What shouts of laughter we should have at this glorious folly! And to hear the professor of philosophy at Pisa laboring before the Grand Duke with logical arguments,

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100. Morgan, Book Review, 49 HARV. L. REV. 1387, 1389 (1936).

101. SILONE, BREAD AND WINE 131 (1937).

as if with magical incantations to charm the . . . planets out of the sky."

I have a real hope that the law schools will soon stop trying to use logical arguments as magical incantations to prevent law students from observing what goes on in the legal cosmos.<sup>102</sup> With the cessation of that legal magic,<sup>103</sup> we shall have true lawyer-schools.<sup>104</sup>

102. A law professor who heard this talk remarked critically that looking at planets differs from looking at human beings (including judges and juries and witnesses) because humans talk but planets do not. That comment is grist for my mill. It confirms my thesis that legal study is far more difficult than study of astronomy or physics, that observation of courts in action will show law students that the quantum of prediction open to lawyers is bound to be far less than in the physical sciences, that we should shun the words "legal science" and "social sciences."

The following comments by Johnson on Jefferson's predictions are illuminating: "Taking the facts, and nothing but the facts; taking the rate of change as it had proceeded between 1607 and the Revolution and assuming—as he had every right to assume—that it would continue at something in the order of the same rate; he worked out a prophecy of the development of the country that events fulfilled with remarkable precision for more than a generation. He realized that the trend toward centralization was bound to be opposed by the development of particularist interests, and his calculations convinced him that if both trends continued unchecked, stresses would develop that would rend the country. All this was logical and accurate. The trends did continue, the stresses did develop, and the country was rent. Nevertheless, Jefferson, although an admirable logician, was a false prophet, for the country survives. Yet the error was not in his logic. *The error was in that inescapable, irremovable factor that every logician faces when he assumes to deal with human beings. He may predict the movements of a planet or of an electron for a thousand years with almost absolute accuracy. He may predict the development of fruit-flies, or of guinea-pigs through many generations with a factor of error of negligible proportions. But the moment humanity enters the equation, mathematical calculation loses its authority; in the presence of this incalculable element, the realistic approach may be anything but real.*" JOHNSON, *AMERICAN HEROES AND HERO WORSHIP* 64-5 (1943). (Emphasis added). See also Cox, *Business Forecasting* in 6 *ENCYC. SOC. SCI.* 348 (1931).

103. As to the persistence in much modern legal thinking and legal education of magical notions not unrelated to those which gave rise to the ordeals, see FRANK, *IF MEN WERE ANGELS* 114-8 (1942). This thesis is developed in my course-book on *FACT-FINDING* which I use in teaching at Yale Law School.

104. Only after this article had gone to press did I read BRADWAY, *CLINICAL PREPARATION FOR LAW PRACTICE* (1946). Inexcusably, I had previously been unaware of the clinical teaching methods, there described, which apparently he has used for some years at Duke University Law School. In large part, those methods supply what I consider wanting in most university law schools. I say "in large part," because it seems that (1) the clinical work at Duke comes late in the student's law-school career, (2) is not closely integrated with "social studies," psychology and philosophy, and (3) does not stress the importance of policy-making in general and of reform of trial-court fact-finding in particular. Nevertheless, I recommend that everyone interested in legal education read Bradway's book.