

SOME CURRENT TRENDS IN LEGAL RESEARCH*

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DURING THE last few years, we have witnessed both a surge of scholarly interest in and the rapid growth of research designed to achieve a better understanding of the role of the legal process in society. It is the purpose of this paper to draw the attention of students of legal processes to some current trends in legal research; to point up the relative emphasis by law professors engaged in legal research upon technical legal doctrine; to trace in broad outline the development of law-behavioral science research in the law schools; and to offer some tentative explanation for the continued emphasis upon legal doctrine in current legal research.

I. Some Basic Trends

There is a clearly discernible trend in the law schools to accept greater responsibility for basic or pure research.[†] Indicative of the trend

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** Professor of Law, University of Florida. I am indebted to the Director of Walter E. Meyer Research Institute of Law, Inc., Professor Ralph S. Brown, Jr., for the use of his outline of a comprehensive study of the status of legal research in America today. Possibly in more ways than those of which I am aware, Professor Brown's outline influenced the preparation of this paper. Of course, the present paper does not aim at the completeness of coverage and thoroughness of evaluation that Professor Brown's projected study envisions. Undoubtedly, too, a comprehensive study will show that in many respects, this paper is impressionistic and commits sins of omission. It is quite possible that I have overlooked much small-scale empirical research in several fields of law. In fact, the present paper is an adaptation of a paper read in February 1961 to a faculty interdisciplinary seminar on American Civilization at the University of Florida. Both because it was assumed that it would be more interesting to an interdisciplinary group and because of the direction of my interest, the paper was slanted toward an inquiry into what I refer to as non-doctrinal research. I am also grateful for the constructive criticisms of my colleague, Karl Krastin.

1. By basic or pure research, I am referring not to research designed to serve either pedagogical needs of the practicing lawyer, but to research designed to achieve a better understanding of the role of the legal processes in society. The most important questions concern the impact of legal processes upon people, their values and institutions, and how legal processes may be made more effective instruments for achieving the good life. See Hurst, "Research Responsibilities of University Law Schools", 10 *J. Legal Ed.* 147 (1957).

is the 1955 conference at the University of Michigan on aims and methods of legal research.² Acceptance of responsibility for basic research figured again, although this time less prominently, in a 1959 conference on legal education at the University of Michigan.³ The same theme of the responsibility of the law schools for research has prompted a rush of articles in periodicals such as the *Journal of Legal Education*⁴. Another indication is the recent ASSOCIATION OF AMERICAN LAW SCHOOLS, THE ANATOMY OF MODERN LEGAL EDUCATION (1961), three Chapters of which are devoted to the problem of providing for the needs of research.⁵ Finally, in December, 1959, the Association of American Law Schools adopted a standard for member schools that affirmatively imposes responsibility upon faculty members "to advance . . . ordered knowledge," and proclaims an obligation upon member schools "to assist its faculty to discharge this responsibility."⁶

Another trend in legal research is the recent growth of project research. Formerly a legal scholar worked alone, or with one or two student assistants if he was fortunate enough to be located in one of the law schools that would supply assistants. Today, the Universities of Chicago, Pennsylvania, Columbia, and a number of others have research programs under way that operate with directors, separate budgets, and that may have several disciplines represented on their research staffs. The University of Chicago's Law and Behavioral Science Project, Columbia's Project for Effective Justice, and Pennsylvania's Institute of Legal Research are examples.

Mention of project research leads to a third trend—the trend toward foundation support of legal research. Thus the University of Chicago began its Law and Behavioral Science Project with a Ford Foundation

2. Alfred F. Conard (Ed.), *Proceedings of University of Michigan Conference on Aims and Methods of Legal Research* (1957).

3. Charles W. Joiner (Ed.), *The Law Schools Look Ahead* (1959).

4. Hurst, *supra* note 1; Schwartz, "Field Experimentation in Sociolegal Research", 13 *J Legal Ed.* 401 (1961); Harper, "Caution, Research Ahead", 13 *id.* at 411; Godfrey, "Some Notions for a Regime of Woodshed Legal Research", 13 *id.* at 1 (1960); Cavers "Science, Research, and the Law: Bentel's "Experimental Jurisprudence," 10 *id.* at 162 (1957); Harris, "Legal-Economic Interdisciplinary Research", 10 *id.* at 452 (1958); Cavers, "Manpower for Research", 8 *id.* at 267 (1956); Emerson, "Organized Research Programs for the Medium Sized and Smaller Law Schools", 9 *id.* at 213 (1956); Llewellyn, "On What Makes Legal Research Worthwhile", 8 *id.* at 399 (1956).

5. Cc. 11, 12, and 13.

6. See Association of American Law Schools, *Proceedings* 194-95 (1959). The committee that proposed the new standard did not indicate a preference among interdisciplinary, non-doctrinal research; "good, old-fashioned treatises"; or largescale project research. Fortunately, the Committee need not choose between these protagonists. But the Committee is convinced that Association of American Law Schools should do more than it has to stress the research responsibilities of American legal scholarship." *Id.* at 91.

grant of \$ 500,000. Unfortunately, however, this trend is not as pronounced as many would like to see it. While Ford, Rockefeller, and other foundations have furnished some financial aid, it would seem that most support has gone to research in international and comparative law. Thus, to qualify for the Ford Foundation's Law Faculty Fellowship Program, an applicant must fit his research prospectus under the rubrics of law and public affairs or international legal studies. In general, the foundations seem to have shown little interest in legal research. A colleague tells me that foundation representatives present at a roundtable at the 1959 meeting of the Association of American Law Schools explained their relative lack of support of legal research by pointing to two factors. First, they had received surprisingly few requests. Second, many of the applications received were considered to have little or no merit. I suspect that the second reason reflects the fact that most applications sought support for doctrinal research and that the foundations generally regard such research as pretty sterile. A most encouraging indication that foundation support of legal research will increase, however, is the recent appearance of the Walter E. Meyer Research Institute of Law, which specializes in underwriting legal research in other than international and comparative law.

A more depressing development in legal research is the long-term trend for research, with its attendant foundation and financial support, to concentrate in a very few of the national law schools. To illustrate a recent survey of the Association of American Law Schools⁷ reports that for the academic year, 1956-57, one school accounted for more than one-fourth of the total expenditure for research by the eighty-six schools responding to a questionnaire. Three schools accounted for one-half and eight schools accounted for three-fourths of the total expenditure. While this survey found that expenditures for the decade ending in 1957 had increased in amount and that more schools were now reporting some expenditure for research, the fact of extreme concentration is evident. It seems reasonable to infer that research productivity bears some relationship to research expenditures.

A happier trend in legal research is the movement toward a closer working relationship between legal scholars and scholars from other disciplines, particularly the behavioral scientists, the recent upsurge of interest in law for undergraduate students has also brought legal scholars and scholars of the humanities closer together for teaching purposes. For example, Morton A. Kaplan, a political scientist, and Nicholas deB. Katzenbach, then a University of Chicago law professor, recently collaborated in a study of international law.⁸ Of course, some law schools

7. Association of American Law Schools, *Anatomy of Modern Legal Education* 375-76 (1961).

have had representatives of other disciplines on their teaching staffs for a long time. Thus, since the early thirties, Yale Law School has had economist historians, psychologists, philosophers, political scientists, anthropologists, sociologists and psychiatrists on its staff.⁹ But the practice of including other disciplines on law school staffs usually has been aimed at collating the existing materials of nonlegal disciplines that have a bearing on legal problems (which, by the way, represents greatly improved pedagogy and not a stimulating basic, scientific non-doctrinal research into legal problems).

Perhaps a highpoint of the trend toward interdisciplinary work in law and behavioral science was the conference held at the Center for Advanced Study in Behavioral Sciences in August 1956. Eleven social scientists representing psychiatry, political science, social psychology, anthropology, sociology, and economics met with law professors from the Universities of Chicago, Nebraska, Michigan, Virginia, Yale, Harvard, Columbia, Pennsylvania, Stanford, and Rutgers to discuss among other things, "the limits and promise of interdisciplinary work in law and social science."¹⁰

Another indication of the trend may be the behavioral science programs under way at the Universities of Chicago, Yale, Columbia, and Pennsylvania. But because of the necessity of relying, very largely, on rather sketchy reports in periodicals, or on brochures for information about the programs in these schools, this indication of the trend toward interdisciplinary work must be stated in a most tentative way.

Finally, there is a trend for scholars of other disciplines that regard legal phenomena as part of their subject matter to engage in their own independent research into the legal order. I am referring principally to political scientists, sociologists, and anthropologists, although other disciplines have been involved. In the last few years, we seem to be witnessing both an upsurge of interest by other disciplines in the study of legal phenomena, especially as part of a system of social control, and an acceleration of field studies of judicial, legislative, and administrative processes.

It should not be surprising that political scientists have figured most prominently in this trend, because the subject matters of the political scientist and the scholar of law appear largely to overlap. I am, of course, by no means qualified to assess the full contribution of political science to the study of the legal order; but I am under the impression

8. Morton A. Kaplan & Nicholas deB. Katzenbach, *The Political Foundations of International Law* (1961).

9. See Donnelly, "Some Comments Upon the Law and Behavioral Science Program at Yale", 12 *J Legal Ed* 83 (1959).

10. Kalven & Tyler, "The Palo Alto Conference on Law and Behavioral Science", 9 *id.* at 366 (1956).

that, historically, political scientists have had to struggle against a tendency to make political science a branch of literature, or of social philosophy, much as law professors have tended to conceal the lack of careful, painstaking, well-designed empirical inquiry under the cover of literary flair and clever verbalization. The newer breed of political scientists on the other hand, seems to be taking the word scientist in his discipline seriously, and his training apparently includes both a thorough grounding in the use of modern tools of inquiry into human relations and a scientific orientation to his thinking. The works of Harold D. Lasswell, Robert A. Dahl, and David B. Truman are examples.

Political scientists have begun to produce concrete case studies of the enactment of statutes¹¹ and of the activities of pressure groups and lobbyists.¹² For more than a decade, political scientists have been trying to perfect models (bloc analysis, scalogram analysis, small group theory, game theory, etc.) with which to predict decisions by the United States Supreme Court. C. Herman Pritchett, Glendon A. Schubert, Fred Kort, and Joseph Tanenhaus are well known for such work. While most such work has been confined to the United States Supreme Court, Dr. Kort has extended his work to the Supreme Court of Pennsylvania.¹³ And at the University of Florida, Rondal G. Downing recently employed small group theory to study decisions by lower federal courts sitting in panels or divisions in National Labor Relations Board enforcement suits.¹⁴ Finally, the field studies of the distribution of effective (as distinguished from formal) power that political scientists are making¹⁵ may tell us some important things about legal phenomena.

Unfortunately, there are very few empirical studies, by any discipline, of the consequences or impact of legislative, judicial and administrative decisions upon people, their values, and institutions. As Dr. Dahl has stated,¹⁶ it is enormously difficult to measure such effects, and this may be the principal reason for the dearth of such research. Although I have been unable to locate any empirical studies of the impact of statutes; studies of the impact of administrative and judicial decisions exist. Corwin D. Edwards, an economist, recently tried to trace the impact of cease and desist orders of the Federal Trade Commission,¹⁷ and political

11. Eg. Stephen K. Bailey, *Congress Makes A Law* (1949).

12. Eg. Earl Latham, *The Group Basis of Politics: A Study in Basing Point Legislation* (1952).

13. Kort, *Quantitative Context Analysis of Judicial Opinions* (unpublished paper).

14. Downing, *The Collegial Effect of Decision-Making in the Federal Courts* (unpublished paper).

15. Sociologists are also making a contribution in this field. See Floyd Hunter, *Community Power Structure* (1953).

16. Dahl, "Business and Politics; A Critical Appraisal of Political Science", 53 *Am. Pol. Sci. Rev.* 28 (1959).

17. Corwin D. Edwards, *The Price Discrimination Law* (1959).

scientists have begun to investigate the impact of judicial decisions, principally decisions by the United States Supreme Court.¹⁸ Richard Arens and Harold D. Lasswell recently published a definitive treatment of the need for studying impact.¹⁹

We are beginning to see highly intensive investigations, in context, of individual cases as they move through the legal process. Alan F. Westin, a political scientist, recently published an intensive inquiry into the steel seizure case.²⁰ Carl Kaysen, an economist, published a contextual study of the *United Shoe Machinery Corp.* case after acting as a consultant to the federal court that decided that case.²¹ We are also beginning to see empirical inquiries into the work of trial courts. The Law and Behavioral Science Project at the University of Chicago included systematic observation of trial court proceedings, followed by interviews of judges, counsel, and jurors. The deliberation process of a jury was secretly recorded. The researchers at Chicago also developed an experimental jury technique. Recordings were made of mock trials based on actual trials, which recordings were then played to regular juries. Afterwards, systematic recordings and observations of the deliberation process of these juries were made.²² Richard Arens is presently conducting in the District of Columbia a study of criminal trials in which defendants have interposed an insanity defense. His basic aim is to identify and appraise the key variables which determine outcomes of the insanity issue.²³

Sociologists are also making a contribution to the study of the legal order. Arnold M. Rose, of the University of Minnesota, Philip Selznick, of the University of California, Fred L. Strodbeck and Hans Zeisel of the University of Chicago Law and Behavioral Science Project, and David Reisman, of Harvard University, are perhaps the sociologists most widely known for such research. Of course, sociology of law has been a part of sociology for a long time. Modern students of the sociology of law apparently agree, however, that research in the field was largely

18. Murphy, "Lower Court Checks on Supreme Court Power", 53 *Am. Pol. Sci. Rev.* 1017 (1959); Murphy, "Civil Liberties and the Japanese American Cases", 11 *W. Pol. Sci. Q.* 3 (1958); Patric, "The Impact of a Court Decision", 6 *J. Pub. L.* 455 (1947); "Sorauf, *Zorack v. Clauson: The Impact of a Supreme Court Decision*", 53 *Am. Pol. Sci. Rev.* 777 (1959); Jack W. Peltason, *Federal Courts in the Political Process*, esp. c. 6 (1955); *Fifty-Eight Lonely Men* (1961). See also Clement E. Vose, *Caucasians Only* (1959).

19. Richard Arens & Harold D. Lasswell, *In Defense of Public Order* (1961).

20. Alan F. Westin, *The Anatomy of a Constitutional Law case* (1958).

21. Carl Kaysen, *United States v. United Shoe Machinery Corporation*, 1961

22. Kalven, *Report on the Jury Project*, in Conard, *supra* note 2, at 155.

23. It is reported that Paul Tillet, of Rutgers University, is preparing a study entitled, "Research in Public Affairs—Political Science and Law." See American Bar Foundation, *Index to Legal Theses and Research Projects* 53 (1961).

neglected until quite recently. Morroe Berger's inquiry into legal attempts to control prejudice and discrimination is rich with suggestions of hypotheses for research.²⁴ Peter Blau's investigations of bureaucracy are bringing a depth of understanding of administrative behavior that is most welcome to students of the administrative process.²⁵ The recent case study by a sociologist, then on the Yale Law School faculty, Richard Schwartz, of the social factors in the development of legal controls in two Israeli settlements is an important contribution.²⁶ Reginald A. H. Robson and Alan Bates with Julius Cohen, a law professor, recently surveyed community attitude in Nebraska concerning what the law should be with respect to parental control of a child's earnings and closely related issues.²⁷ The study demonstrates an objective technique for ascertaining preferred value systems.²⁸ Charles L. Robbins, of the University of Florida, is participating in a study of the practices, values and expectations of the participants in the process of awarding public construction contracts in Florida.²⁹

Although I am under the impression that professional historians have tended to slight legal phenomena, some recent work is of particular value for students of the legal process. An outstanding example is Louis Hartz' study of the development of economic policy in Pennsylvania until 1860 which was one of a series on the role of the states in economic development.³⁰ Dr. Hartz's placement in historical context of *Sharpless v. Mayor, etc. of Philadelphia*, from which developed the concept of public purpose in governmental fiscal matters, is superb. Included in this series of inquiries into the role of the state in economic development are

24. Morroe Berger, *Equality by Statute* esp. c. 5 (1952).

25. Peter Blau, *The Dynamics of Bureaucracy* (1955); *Bureaucracy in Modern Society* (1956).

26. Schwartz, "Social Factors in Development of Legal Controls: A Case Study of Two Israeli Settlements", 63 *Yale L.J.* 471 (1954).

27. Julius Cohen, Reginald A.H. Robson & Alan Bates, *Parental Authority: The Community and the law* (1958).

28. See Charles W. Morris, *Varieties of Human Value* (1956), for another technique for ascertaining preferred value systems.

29. The American Bar Foundation reports that William M. Evan is preparing a book, *The Applications of Sociology in the Field of Law*. See American Bar Foundation, *Index to Legal Theses and Research Projects* 53 (1961). There is no intention to slight the contribution of criminologists to legal research, nor to overlook the unmerciful criticism of criminology in Jerome Michael & Mortimer J. Adler, *Crime, Law, and Social Science* (1933). Scholars investigating the efficacy of legal sanctions will also find a study by two social psychologists, Blake & Mouton, "Present and Future Implications of Social Psychology for Law and Lawyers", 3 *J. Pub.L.* 352 (1954), of particular value because of its experimental design.

30. Louis Hartz, *Economic Thought and Democratic Policy: Pennsylvania, 1766-1860* (1948).

valuable studies of Georgia,³¹ Missouri,³² and Massachusetts.³³

Since 1950, the field of legal history has seen some really outstanding research, principally due to J. Willard Hurst, of the University of Wisconsin Law School, undoubtedly the outstanding American legal historian of this day.³⁴ Former students of Professor Hurst are making important contributions. Among others, Spencer Kimball recently investigated the development and control of the insurance industry in Wisconsin from 1835 to 1959.³⁵ George J. Kuehnl developed the history of the Wisconsin business corporation.³⁶ Francis W. Laurent analyzed the work of a Wisconsin trial court from its establishment to date, a period of over 100 years.³⁷ The recent studies by George L. Haskins³⁸ and E. Merrick Dodd³⁹ have also enriched the field of legal history.

E. Adamson Hoebel recently attempted to summarize the many anthropological publications that have paid careful attention to the legal systems under observation.⁴⁰ In 1955, Herman M. Gluckman published his *The Judicial Process Among the Barotse of Northern Rhodesia*. James G. March's review of this book⁴¹ contains a convincing argument that comparative studies of the legal systems of primitive cultures can make important contributions to our knowledge of modern legal phenomena as well. More specifically, anthropological inquiry can generate new hypotheses about our legal system, and it can test hypotheses about our system in the context of primitive cultures.

The last decade has seen a burst of interest, especially from the law schools' side, in the implications of psychology and psychiatry for the study of the legal order. Hans Toch's recent book⁴² is an excellent illustration of this interest from the standpoint of psychology and psychiatry. Temple, Rutgers, Yale, Pennsylvania, Michigan, Northwestern, and Chicago law schools each have some kind of program in law and psychiatry or law and psychology.

31. Milton S. Heath, *Constructive Liberalism: The Role of State in Economic Development in Georgia to 1860* (1954).

32. James N. Primm, *Economic Policy in the Development of a Western State: Missouri, 1820-1860* (1954).

33. Oscar Handlin & Mary F. Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (1947).

34. See J. Willard Hurst, *Growth of American Law* (1950); *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956); and *Law and Social Process in United States History* (1960).

35. Spencer Kimball, *Insurance and Public Policy* (1960).

36. George J. Kuehnl, *The Wisconsin Business Corporation* (1959).

37. Francis W. Laurent, *The Business of a Trial Court* (1959).

38. George L. Haskins, *Law and Authority in early Massachusetts* (1960).

39. E. Merrick Dodd, *The American Business Corporation Until 1861* (1954).

40. E. Adamson Hoebel, *The Law of Primitive Man* (1954).

41. 8 *Stanford L. Rev.* 499 (1956).

42. Hans Toch, *Legal and Criminal Psychology* (1961).

Work on broad models of the social process has been proceeding. Talcott Parsons, Conrad M. Arensberg, and Harold D. Lasswell and Myres S. MacDougal are names that stand out. Professors Lasswell and MacDougal, who since the 1940's have been developing materials in a seminar called Law, Science, and Policy, have paid more attention to the role of law in social processes. Their work should appear in print shortly. The recent study of Messrs. Arens and Lasswell⁴³ marks out for research purposes the whole field of the efficacy of legal sanctions, summarizing most of the studies to date. Also very valuable to students of model building as a prelude to empirical inquiry into administrative behavior is Herbert Simon's work.⁴⁴

II. Doctrinal and Nondoctrinal Research

For this paper, it is necessary to try to distinguish doctrinal from nondoctrinal legal research, even though this distinction obscures the fact that much legal research falls somewhere between these two categories.⁴⁵ Nevertheless, the distinction points up the extent to which doctrine (legal concepts of all types, whether from statutes, cases, administrative rules, etc.) dominates the legal scholar's research designs.

Typically, a legal scholar undertaking doctrinal research takes one or more legal propositions as a starting point and focus of his study. For example, a scholar interested in the law of contracts might start with the proposition that action in reliance by a promisee is a sufficient reason for the courts to enforce the promise. Research then takes place in the law library, where the legal scholar tries to locate all relevant appellate decisions⁴⁶ and all discussions of his proposition in treatises, texts, encyclopedias, and legal periodicals. After reading and "analyzing" these materials, the scholar formulates his conclusions and writes up his study. The report of the study may offer a new formulation of the action

43. Arens & Lasswell, *supra* note 19.

44. Herbert Simon, *Administrative Behavior* (1959).

45. A friendly critic objects to the distinction between doctrinal and nondoctrinal research and suggests that we "think of research into legal principles standing alone, and research into facts, connected with such principles, as usually mixed with the principles themselves. While the expression "research into legal principles standing alone" is another way of referring to what I have termed doctrinal research, the observations in the text concerning doctrinal "research still appear applicable. But the expression "research into facts, connected with such principles, as usually mixed with the principles themselves" does not catch the meaning I intend with the expression nondoctrinal research. Nondoctrinal research is not necessarily concerned with legal principles; but if in a given study it is, legal principles become one of several fact variables. And the facts of interest to the nondoctrinal researcher are not limited to facts declared relevant by legal principles, if I construe the expression "connected with such principles, as usually mixed with the principles themselves" correctly.

46. Sometimes from a single jurisdiction, sometimes from all American jurisdictions, and sometimes including non-American jurisdictions.

in reliance concept, or occasionally a model statute to replace the concept may be proposed. If the scholar takes a concept from a statute as the focus of his research, the sources of his data likely will include not only that statute, but its legislative history and, if they exist, comparable statutes in other jurisdictions. Otherwise the research procedure closely resembles the procedure followed in studying case law doctrine. The essential characteristics of doctrinal research are : (1) the scholar organizes his study around legal propositions; and (2) appellate court reports and other conventional legal materials readily accessible in a law library are the principal, if not the sole, sources of the data from which the scholar's conclusions are drawn. The bulk of legal research is a product of this approach.

On the other hand, a legal scholar undertaking nondoctrinal research typically takes either some aspect of the legal decision process, or the people and institutions supposedly regulated by law as the focus of his study. Because the approach of a legal scholar undertaking nondoctrinal research is much broader and the questions he asks are more numerous, the data necessary to attempt an answer is not ordinarily available in conventional legal sources. Hence, field work is usually required for this type of research.

Legal doctrines may be included in a nondoctrinal study; but if so, they are treated simply as one of the many variables that may influence decisions, or affect the practices and attitudes of people, or affect the operation of institutions. Most nondoctrinal research seeks : (a) to assess the impact of nonlegal events (*e.g.*, economic developments, growth of knowledge, technological changes) upon legal decision processes; or (b) to identify and appraise the magnitude of the variable factors influencing the outcomes of legal decision-making; or (c) to trace the consequences of the outcomes of legal decision making in terms of value gains and deprivations for litigants, nonlitigants, and nonlegal institutions.⁴⁷

In legal research aimed at assessing the impact of nonlegal events, legal doctrines may appear either as a response to nonlegal events or as a factor conditioning the impact of nonlegal events. If research is aimed at identifying and appraising factors influencing outcomes, legal doctrine becomes relevant, if at all, simply as *one* of such factors. If research is aimed at tracing the consequences of outcomes, the scholar may discover that one consequence, among many, was the formulation of new doctrine.

The distinguishing characteristics of nondoctrinal research are : (a) it lays a different and lesser emphasis upon doctrine; (b) it seeks answers to broader and more numerous questions; (c) it is not anchored exclusively

47. Cf. Schwartz, "Field Experimentation in Sociological Research", 13 *J. Legal Ed.* 401, 402, (1961).

to appellate reports and other traditional legal sources for its data; and (d) it may involve the use of research perspectives, research designs, conceptual frameworks, skills, and training not peculiar to law-trained personnel.

The distinction just drawn between doctrinal and non-doctrinal legal research probably has caused doctrinal research to suffer by adverse comparison. I must confess to a rather limited appreciation of the great bulk of doctrinal research with which I am familiar. Much doctrinal research suffers because of the failure of the researcher clearly to distinguish, both in his research design and for the benefit of readers, whether and when he purports to describe past legal behavior, to predict future legal behavior, or to prescribe future legal behavior. It also suffers from an overemphasis upon appellate reports and other conventional legal materials as the sources of the data from which it draws its conclusions. Each of these limitations of doctrinal research are perhaps necessary reflections of what appears to be a more fundamental defect—namely, the lack of a basic conception of legal research that provokes more meaningful questions about legal order. As Professor Hurst puts it: "Legal research has moved within very limited borders, relative to its proper field because it has not been grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present."⁴⁸

Equally fundamental, in my view, is the need for legal scholars, particularly law professors as subsidized students of the legal order, to develop a conception of legal research that imposes upon them the responsibility of continuously auditing the extent to which legal processes in fact serve the needs of a community that aspires to be democratic. While this view does not rule out basic research into why and how legal decisions are made, it would insist that such research be designed primarily to obtain knowledge for assessing the impact of legal processes upon community life, and not for its usefulness in the teaching or practice of law. The basic questions for legal research, according to this view, concern the impact of legal decisions upon people, their values and institutions, and how legal processes may be made more effective instruments for achieving the good life.

Irrespective of the deficiencies of most doctrinal research, I submit that conventional legal materials contain a lot of data with which legal scholars may make a significant contribution to our understanding of legal processes. The basic need is for a conception of research that, even if it is confined to traditional legal materials, asks the most meaningful questions that such materials may help answer. The theories of decision-

48. Hurst, "The Role of Law in United States History", *Student Lawyer*, 4, 6 Dec. (1961). Although Professor Hurst was addressing himself to the adequacy of research into legal history; I think his remarks are also applicable to the bulk of existing doctrinal research.

making that behavioral scientists have been spinning out over the last two decades appear to suggest a fruitful framework for doctrinal inquiry. Decision theory suggests that the legal scholar should seek to identify the component parts of the legal decision-making process. All legal doctrines are products of a legal decision-making process. Hence, it is possible that careful content analysis, qualitative and quantitative, of case reports and other conventional legal source materials can identify the following components of the process through which a doctrine is formed :

1. The scheme of articulated and preferred values at which a doctrine was aimed.
2. The problem or problems posed by the gap between policy goals and the present state of achievement.
3. The alternative courses of action apparently available to implement goals.
4. The choice of action in fact made—*i. e.*, creation of the doctrine.
5. The operative values, conscious and subconscious, and other factors that influenced the choice. While content analysis can arrive at some good approximations of operative values, even on the subconscious level, and other influential factors, better research techniques are obviously needed for the purpose.
6. The models, explicit or implicit, with which the decision-makers predicted the consequences of creating, invoking, and applying the doctrine.
7. The prediction of consequences that, in fact, was made.

Conventional legal materials are also of some help in tracing the actual consequences adopting a doctrine. One obvious consequence is its use as a precedent in later cases. It is apparent, however, that traditional legal source materials supply an inadequate basis for ascertaining doctrinal impact, especially upon people and institutions outside the legal arena.

III. Law-Behavioral Science Research in Law Schools

Philosophical and jurisprudential interest in social science theory and research go back before the time of Roscoe Pound. But Dean Pound's sociological jurisprudence is one of the first, if not the first, systematic American formulation of the relevance of the social sciences to the study of legal order. Apparently, however, Dean Pound's ideas led to a lot of philosophizing, a few scattered minor pedagogical changes, and little or no non-doctrinal research.

The first large-scale effort to take advantage of the new insight that other disciplines might contribute to the study of legal phenomena occurred at the Columbia Law School in the 1920's.⁴⁹ The most striking

49. The Columbia experiment is evaluated by Currie in "The Materials of Law Study", 3 *J. Legal Ed.* 331 (1931), and 8 *id.* at 1 (1955).

characteristic of the Columbia experiment was its almost exclusive emphasis upon the significance of other disciplines for more enlightened teaching approaches. The experiment was stimulated in part by the need of making adjustments in an already over crowded curriculum to accommodate increasing demands for new courses. The basic idea of the experiment apparently was to reorganize the curriculum along the functional instead of doctrinal lines. In doing so, law and social science were to be integrated so as to become part of course study.

The Columbia experiment produced a very valuable study of the law school curriculum.⁵⁰ And it stimulated a great deal of nondoctrinal research.⁵¹ But it never could escape its pedagogical origin. Originally enthusiastic law professors began to turn their efforts almost wholly toward the production of casebooks and more or less traditional doctrinal research; and the leaders of the movement, Herman Oliphant, Leon C. Marshall, Hessel E. Yntema, William O. Douglas, and Underhill Moore, resigned. By the early 1930's, the experiment had run its course.

Another significant milestone in nondoctrinal legal research was the establishment in 1928 of the Johns Hopkins University Institute of Law.⁵² A major purpose of the Institute of Law was to put the study of the social impact of doctrines and legal institutions upon a scientific basis. Unfortunately, however, after only four years of operation, the Institute was suspended apparently because the advent of the Depression led to a withdrawal of its financial support. Although Frederick K. Beutel's study of the Institute led him to conclude that it was dominated by legally-trained personnel, that it overemphasized the role of the judiciary, and that the design of its studies were defective, he felt that it was "a tragedy that the Institute went out of existence before it had completed the cycle of its attempted research."⁵³

After the passing of the experiments at Columbia and Johns Hopkins Universities, little was done until the 1950's, although a great deal of talk continued in the law schools, especially at Yale, about the need for nondoctrinal research and the need to integrate the social sciences. There were, as usual, some exceptions. Underhill Moore, at the Yale Law

50. Faculty of Law of Columbia University, *Summary of Studies in Legal Education* (1928).

51. E. g., Adolph A. Berle & Gaston B. Means, *The Modern Corporation And Private Property* (1932); James C. Bonbright, *The Valuation of Property* (1937); Powell & Looker, "Decedents' Estates: Illumination from Probate and Tax Records", 30 *Colum. L. Rev.* 919 (1930); Albert C. Jacobs & Robert C. Angell, *A Research in Family Law* 469 (1930); and Committee to Study Compensation for Automobile Accidents, Report to the Columbia University Council for Research in the Social Sciences (1932).

52. For a succinct discussion of the Institute of Law, see Frederick K. Beutel, *Experimental Jurisprudence* 105-13 (1957).

53. *Id.* at 111.

School, conducted his famous parking studies midst the sneers and ridicule of most legal educators.⁵⁴ Charles E. Clark made mass statistical studies of the activities of trial courts.⁵⁵ Jerome Hall conducted his famous study of theft.⁵⁶ And Sheldon and Eleanor T. Glueck, at Harvard Law School, continued their work in crime and juvenile delinquency.⁵⁷

Since 1950, the record of the law schools in non-doctrinal research has shown improvement, primarily because foundations have begun to underwrite such research.⁵⁸ But looking back over the past, it seems to me that Professor Hurst is quite correct in concluding that on the whole the record is still disappointing. For the future, then, the pertinent question is what are the major factors inhibiting non-doctrinal legal research.

IV. Factors Inhibiting Non-doctrinal Research

The lack of adequate financial support is, of course, a major reason for the relative lack of non-doctrinal research. But other factors have been operative. The following explanations are suggested most tentatively, with no intent to be categorical.

First, other disciplines, by and large, have shied away from the study of the legal order. Why this has been true is not clear. But a sustained interest by other disciplines in legal phenomena appears to be a development of the last decade. Even today, interest is by no means widespread. Criminology is an exception, of course, but modern sociologists agree that sociology of law has hardly left the theorizing stage of inquiry. Because political science has always included the operation of governmental systems as part of its subject matter, it may also appear to be an exception. Until quite recently, however, political science has been mostly a theoretical science, with a heavy emphasis upon literary impressionism; and it is certain that the discipline still neglects vast areas of the legal order. The newer generation of political scientists, on the other hand, have begun to follow through with empirical inquiry into legal phenomena. On the whole, I believe that this is the discipline that can and most likely will make the most important contributions to the study of legal phenomena. I say this not only because young political scientists seem to have the greatest interest in legal phenomena, but

54. Moore & Callahan, "Law and Learning Theory, A Study in Legal Control", 53 *Yale L. J.* 1 (1943).

55. See Conard, *supra* note 2, at 176.

56. Jerome Hall, *Law, Theft and Society* (1935).

57. The Glueck's recent book, *Predicting Delinquency and Crime* (1960), reaffirms my faith that models can be invented with which social behavior can be predicted with a sufficient degree of accuracy to improve greatly the administration of the legal order.

58. Professor Beutel's studies also need to be mentioned. See Beutel, *supra* note 52.

because political scientists are being indoctrinated with a faith in empirical inquiry and seem relatively free of the vocationalism and practice-oriented professionalism that permeates the law schools.

Second, I suggest that a major reason why law professors have contributed so little to nondoctrinal research is that they are almost obsessively preoccupied with the teaching function. I think Harry Kalven is right when he suggests that law professors have, in fact, been committed "to an odd view that the only test of the relevance of research . . . is whether you can teach it."⁵⁹ And I think he is right in concluding that this is a mistaken view. The Columbia experiment also suggests that pedagogical emphasis can inhibit nondoctrinal research.⁶⁰ This thesis becomes more plausible when it is recalled that national law schools offer the best environment, in terms of financial aid, secretarial and research assistance, lower teaching loads, and the like for such research. But law professors in national law schools spend an enormous amount of time in preparing teaching materials for sale on a national market. Indeed, national law schools have enjoyed virtually a monopoly on casebooks, hornbooks, treatises, and the like. It is still the case that such publications enhance a law professor's prestige and income.⁶¹ Even more unfortunate, for teaching materials to sell on a national market, they cannot ordinarily be concerned solely with a single jurisdiction. Consequently, national teaching materials generally purport to be useful in all law schools. The result is that particular decision processes and contexts are often neglected; the myth of a national common law for everything is, perhaps unwittingly, perpetuated; and with fifty state jurisdictions, plus the federal system to account for, an enormous amount of the author's time is consumed. While there are many desirable attributes of national casebooks, the point is that professors in national law schools, the group most advantageously located to undertake nondoctrinal research, are virtually pushed by ongoing system of legal education into the preparation of pedagogical materials, with a consequent neglect of nondoctrinal research.

59. Kalven, "Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania", 11 *J. Legal Ed.* 94, 98 (1958).

60. It may be significant that the leaders in the Columbia experiment resigned to participate in Johns Hopkins experiment, where they were presumably relieved of teaching burdens. 15 *J. Legal Ed.* No. 2-2 (1962).

61. "For a generation, the typical, almost the exclusive, book-size production of legal scholarship has been the casebook. A casebook in print is the symbol of professional contribution and status. The generation of legal scholars finds that the challenge to master a field of law consists in showing that it can be reduced to teachable proportions. It is a commentary upon how little serious commitment to basic research there is in the law school world that casebook production should so long have enjoyed the prime claim of our creative energies." Hurst, "Research Responsibilities of University Law Schools," 10 *J. Legal Ed.* 147, 158 (1957).

Third, many legal educators, no doubt usually unwittingly, inculcate an arrogant attitude toward non-doctrinal research, especially non-doctrinal research into the legal order by other disciplines.⁶² While good legal training creates a general attitude of skepticism toward generalizations, the arrogance referred to goes much beyond this. As Professor Kalven put it, "... we appear to be making methodological discoveries against the scientists rather than with them."⁶³ Further, as he puts it "... the critical posture is too seductive. It is too easy for us, as lawyers, to play the hardheaded role of picking up the logic and method—of finding out that the method has shortcomings in operations—and then to do nothing at all, to blame the difficulties of method, and sit back to wait for another thousand years until the method is sufficiently improved."⁶⁴

Fourth, most law professors conceive of themselves as lawyers or legal educators, rather than as scholars. Their identifications are more with the practicing bar than with a scholarly community.⁶⁵ The law professor's world seems to include little of the scholarly and scientific traditions of a university, except, of course, that he accepts the classics and art sufficiently to parade the status symbols that mark him off as a member of a professional class. These remarks apply to a class and do a disservice to many individual law professors. But I am speaking against a background of membership and exposure to several different law faculties. Frankly, I find a high degree of anti-intellectualism and vocationalism among the law teacher fraternity.

Fifth, law schools and law professors lack a tradition sustaining non-doctrinal research. There is little of the outlook that characterizes scientific method, virtually no tradition of taking research failures for granted, much less an attitude of regarding abandoned or disproved hypotheses as a stage in the progression of learning; and there is too little genuine intellectual humility about what we do not know about the legal order. Lacking these scholarly traditions, there is little to buffer a law professor interested in non-doctrinal research from the ridicule of his colleagues (it is said that Underhill Moore was unmercifully attacked when he made his parking studies) and from the feeling of futility that

62. Cohen, "Factors of Resistance to the Resource of the Behavioral Sciences," 12 *J. Legal Ed.* 67-68 (1959). See also Michael & Adler, *op. cit. supra* note 29.

63. Kalven, "Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania," 11 *J. Legal Ed.* 94, 96 (1958).

64. *Ibid.*

65. Many law professors in dress and manner appear to accept the successful lawyer, usually a lawyer with an exclusive practice, as their model. Many others appear unable to decide whether to "join" the faculty or to enter the practice. The result is often a compromise under which a "full-time" law professor devotes much of his energy to "consultation." And is it significant that we often refer to ourselves as "lawyers"?

arises from doubting that such research can make a worthwhile contribution. It is probable that much non-doctrinal research, although conceived and planned, simply does not get done because of an excess of preliminary criticism. "What is the use of such research?" "Courts, legislators, and other decision makers won't consider my findings." "Decisions will continue to be a matter of practical politics." Such an attitude, of course, nips a research urge in the bud. We need a research tradition that eschews the practical possibility that findings will necessarily and immediately figure in important decisions and that sets up the ideal of making a contribution to knowledge.

Sixth, on the whole, law professors are not adequately trained in the techniques of non-doctrinal empirical research. I say this with an acute awareness of my own inadequate training. Our distrust of generalization may have biased us against the role of conceptualization to the point of causing us inadequately to appreciate the need for theory as a guide inquiry. We perceive through the conceptual spectacles that our mind wears, so to speak. The more conceptual spectacles, the more perception—and, hopefully, understanding. We need training and experience in model building of all types as steps in the investigation of legal phenomena. We also need training in designing field research, formulating verifiable hypotheses, the techniques of data collection, mathematical and statistical techniques, and the like.⁶⁶ There are a few law professors with good training in a behavioral science discipline, but too few. It is encouraging to note however, that more schools are beginning to look for such people when recruiting new faculty. It is also true, of course, that law professors and scholars from other disciplines may collaborate in the study of legal phenomena. Perhaps some such arrangement is the best short-term solution for the law professor's lack of training for non-doctrinal research.

Conclusion

Although the road ahead for non-doctrinal research into legal phenomena is almost completely uncharted, there is reason to believe that in such research lies our best hope of important contributions to the study of the legal order. And the trends that have emerged since 1950 support the optimistic hope that little by little, something appropriate to the name "science of law" can be developed.

66. Abraham Kaplan has warned that a general understanding of the social sciences may not be possible much longer: "Many significant areas of these disciplines have already been removed by the advances of the past two decades beyond the reach of anyone who does not know mathematics; and the man of letters is increasingly finding to his dismay, that the study of mankind proper is passing from his hands to those technicians and specialists." Kaplan, "Mathematics and Social Analysis," in Martin Shubik (Ed.), *Readings in Game Theory and Political Behavior*, 16 (1954).

CONCERNING THE RELATION OF LOGIC TO LAW*

*Leonard G. Boonin***

QUESTIONS CONCERNING the relation of logic to law have been of perplexing concern to legal theorists, jurists, and others seeking to understand and make intelligible the basic structure of the law. The problems which have arisen concerning their relation have been due largely to a failure to clarify conceptually the nature of the "legal logic". The purpose of this article is both to explain how some of this confusion concerning the relation of logic to law arose, and to introduce certain distinctions as a way of clarifying their relation.

I

Very broadly speaking, and with some notable exceptions, the general legal theory which prevailed from the time of Blackstone until the Twentieth Century treated the law as a coherent and complete rational system.[†] It was thought to contain legal rules, principles, standards, **maxims**, by the application of which one could deductively arrive at the appropriate decision in any given case. The rules and the principles were sometimes conceived as eternal and unchanging natural laws, at other times as the historically authentic "living law" embedded in the customs of society, and again as simply the valid enactments of the sovereign. These three representative views as to the source and criteria of the validity of legal rules are, respectively, natural law doctrine, historical jurisprudence, and legal positivism. While proponents of these varying views disagreed as to the criteria of valid law, there seems to have been general agreement in the view of the law as coherent and complete, and of the judicial process as essentially a deductive application of existing rules of law.

While this conception of the law may appear more fitting for a legal system based on a code developed by legal authorities consciously

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† Frank, "A Sketch of an Influence," in Paul Lombard Sayre (ed.), *Interpretations of Modern Legal Philosophy: Essays in Honour of Roscoe Pound* 189 (1947).

seeking to systematize the law, it was also a widely held view of Anglo-American legal theorists.² These theorists were in some way able to reconcile this conception of the law with the fact that in Anglo-American law legal decisions are authoritative sources of legal rules and law grows, to a large extent, out of such legal decisions.

Law was even compared with mathematics and the judge was considered a kind of geometrician, which implied that judges' decisions were as bound by rules and as logically necessary as mathematical proofs.³ In addition, legal decisions were justified as logically following from the application of those principles and rules. An important corollary of this view of the law was that there is as little justification for holding the judiciary responsible for judicial decisions as for holding mathematicians personally responsible for simply deriving what is implicit within a given mathematical system. The judge's function is simply to apply existing principles of law, whether such principles be conceived in terms of natural law, living law or valid legislative enactments. The judiciary does not make or create law, but rather finds it and applies it. Even cases in which a judge reverses a previous interpretation of the law are not to be characterized as changing the law. What is being done in such cases is simply to restore the "true" rule and remove its previous misinterpretation. That this "traditional theory" did permeate the conception of law until recently can be gathered from the reflections of an American lawyer.⁴

In days that men of my generation can remember, it was popular for lawyers to assert that judges do not make the law; they merely find it as it already exists in law books and other source material of recognized authority. This notion went unchallenged and exercised a dominant influence over the practical life of the law.... That it is a myth is now generally recognized. The breakdown of its effect on the law, not yet complete but far enough advanced to be unmistakable, represents a major change in the climate of professional legal opinion within my generation.

II

It is perhaps fair to identify the beginnings of the systematic attack on the rational deductive model of the law in the United States with the

2. *Id.* at 231 *et seq.*

3. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 11 (1960): "The ingrained practice of that time was to write an appellate court opinion as if the conclusion had followed of necessity from the authorities at hand and as if it had been the only possible correct conclusion."

4. Margold, "Morris R. Cohen as a Teacher of Lawyers and Jurists," in Salo W. Baron, Ernest Nagel, and Koppel S. Pinson (eds.), *Freedom and reason: Studies in Philosophy and Jewish Culture in Memory of Morris Raphael Cohen* 36 (1951).

writings and legal opinions of Justice Oliver Wendell Holmes.⁵ Holmes can best be understood in the context of the general "revolt against formalism" that occurred in various disciplines at the turn of the century. The influence on Holmes of the doctrines of evolution and pragmatism is unmistakable. Holmes was even a participant in the "Metaphysical Club" of C. S. Pierce.⁶ His concern with legal history and the evolution and development of legal principles made it difficult for him to conceive the law as based on eternal and unchanging rational principles. His pragmatic concern with the operative effects and consequences of legal doctrine is clearly expressed in his famous address, "The Path of the Law."⁷

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

It is this concern with the actual consequences and operative effects of legal doctrine, as opposed to the mere formal normative content, that becomes the central concern of the movement called "legal realism." Professor Max H. Fisch has even suggested that, historically, Holmes's "prediction theory" may have been more than an application of pragmatic principles to law, and that pragmatism itself arose as a generalization of the prediction theory of the law.⁸

Holmes, in addition to pointing out the need to examine the actual operation of legal rules, emphasized the importance of values in judicial decision-making. He stressed the need for weighing competing values in the judicial process, and recognized the role played by unarticulated values in arriving at judicial decisions:⁹

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for

5. Mention should be made of Nicholas St. John Green, who exercised some influence on Holmes. See Philip P. Wiener, *Evolution and the Founders of Pragmatism*, ch. 7 (1949). See also Frank, "A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism," 9 *Rutgers L. Rev.* 425-63 (1954).

6. Wiener, *op. cit.*, *supra* note 5, at 173-74.

7. Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 460-61 (1897).

8. Fisch, "Justice Holmes, The Prediction Theory of Law and Pragmatism," 39 *J. Philosophy* 94 (1942).

9. Holmes, "The Path of the Law", 10 *supra* note 7 at 460, 465-66.

repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

It is this emphasis on values that one can find elaborated and systematized in "sociological jurisprudence," the companion movement of legal realism. Although Holmes was not himself a systematic legal philosopher, he exercised a considerable influence on the movements which have characterized much of contemporary American jurisprudence.

If it now appears self evident that legal decisions do not merely involve logical processes of applying existing legal rules, it is partly because of the influence of Holmes. Subsequent legal theorists, while disagreeing on many points, joined forces in rejecting the traditional theory of law. Whatever be the distinguishing characteristics of sociological jurisprudence and legal realism, writers such as Roscoe Pound and Julius Stone as well as Karl Llewellyn and Jerome Frank are not one on this point. Philosophers such as Morris R. Cohen early attacked what was called the "phonograph theory of law," and Felix S. Cohen forcefully and repeatedly argued against the conception of law as a self sufficient and completely autonomous discipline. Justice Cardozo, both in his writings and legal opinions, clearly exhibited the creative role a judge can play in the interpretation and application of law. The dramatic action of the United States Supreme Court in reversing its position on various constitutional issues left little doubt about the potentially creative role of the judiciary. In a way, the acceptance of the "Brandeis brief" as a legitimate source of legally relevant material symbolized the gradual acceptance, even among the judiciary, of the idea that the law is not, a "closed" and self sufficient system.

III

While the traditional view of the judicial process was apparently widely expressed, one can perhaps raise questions as to how literally it was meant. In a way, it seems implausible that anyone with the least familiarity with the judicial process could have conceived it in such a simple manner.

While the traditional theory may appear more plausible in a period characterized by relatively stable conditions, as opposed to one in which great changes and developments are clearly evident, it is still difficult to see how one could literally believe the law to be a coherent and complete system, and the judicial process to be only a logical application of existing rules of law. Professor Cooperrider has made the plausible suggestion that the traditional theory was not intended as an accurate descriptive account of the judicial process :¹⁰ '... I am also inclined to doubt that it is sound to think of it as a conscious attempt at scientific description. It did, however, represent a view which at one time was generally held as to the *attitude* which the judge should bring to his task : that it should be his *objective* to deal with the case before him in that way which was indicated by an interpretation of existing authorities, rather than in that way which seemed to him on the facts to be the fairest or most desirable from a social point of view. It called for the subordination of his judgment to that of the collectivity of his predecessors, for a primary reliance on a reasoned extrapolation of accumulated experience.' According to this interpretation, the traditional theory represents more a practical regulative *ideal* of how the judicial process *ought* to be conceived by the judiciary than a theoretical analysis of its actual structure and functioning.

If this analysis adequately explains why the traditional theory was, and perhaps to some extent still is, deeply embedded in the legal consciousness, it of course does not constitute a justification for it. Part of the message of contemporary jurisprudence is that the judge does, to some extent, unavoidably exercise a creative "legislative" choice, and that he has the responsibility to exercise it in an intelligent manner. To conceal the inevitable elements of discretion involved in the judicial process behind a theory which denies their existence cannot contribute to a responsible use of that discretion. The attack on the traditional theory has been valuable and important in making us sensitive to the variety and complexity of values involved in the judicial process. It has also led, unfortunately, to some confusion concerning the relation of logic to law.

IV

The attack on the conception of law as a coherent and complete system has often shifted into an attack on logic itself. One can find numerous instances in legal literature and legal opinions in which logic is deprecated and its value questioned. One of Justice Holmes' most

10. Cooperrider, "The Rule of Law and the Judicial Process", 59 *Mich. L. Rev.* 505 (1961).

famous remarks has often been employed by those objecting to logic in the law:¹¹

The life of the law has not been logic : it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

While this statement is perhaps susceptible to more than one interpretation, Holmes can be construed as making two points which are essentially sound and true. First, that the changes and development of legal rules and principles cannot be fully explained and made intelligible in terms of purely logical analysis of legal concepts. Second, that such logical analysis is not a sufficient tool for rationally deciding legal controversies.

Whether Holmes intended it or not, his remark has been repeated in many contexts that import a sharp antithesis between "logic" and "experience." Holmes himself appears to adopt this interpretation elsewhere when he says :¹²

... the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.

This antithesis between logic and experience is developed at great length by Professor Max Radin in his Storrs lectures.¹³ Radin contends they are two different methods for resolving legal problems. He asserts that, if a conflict should arise between them, we should be guided by experience and not logic. Radin repeatedly attacks what he interchangeably calls the mathematical, logical, and rational method in the law. His attack is more than an attack on treating law as a complete system. Radin sometimes speaks of a choice between decisions based on immediate experience independent of all conceptual analysis, and one based on such analysis. He implies that immediate judgments are more authentic and reliable.¹⁴ Radin often conceives of logic as having a specific and definite content, instead of being a highly formal discipline concerned with general principles of valid reasoning?¹⁵ He appears to identify logical method in the law with the method of extending the application of legal rules and standards on the basis of analogies. To many legal theorists,

11. Oliver Wendell Holmes, *The common Law* 1 (1881).

12. Oliver Wendell Holmes, "Agency", in *Collected Legal Papers* 50 (1920).

13. Max Radin, *Law as Logic and Experience* (1940).

14. *Id.* at 97-98.

15. *Id.* at 111.

logic becomes identified with reasoning by analogy, and criticisms of logic are often criticisms of procedures for deciding legal issues on the basis of analogies alone. Such theorists characterize the decision not to apply an analogy, when experience indicates it is not justified, as a choice of experience over logic.

Judge Cardozo, in a more refined analysis, also distinguishes the logical method of developing legal rules from other methods:¹⁶

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

Here again, in case of conflict, logic is to be sacrificed or subordinated to some more important value. The difficulty with this type of analysis (an analysis adopted by many legal theorists) is that it assumes, and fails to explain, how logic is a method with independent content. But is the logical or analogical method an independent method capable of being compared with these other methods? Cannot analogical development take place on the basis of the other three methods or any other principle of legal development? Cardozo in a later work recognizes that the method of analogical extension does not, in itself, represent an independent method.¹⁷

No doubt there is ground for criticism when logic is represented as a method in opposition to the others. In reality, it is a tool that cannot be ignored by any of them. The thing that counts chiefly is the nature of the premises.

Many legal theorists and jurists seem to have shifted from the sound proposition that logic is not a sufficient tool for rationally deciding cases to the questionable assertion that logic is not a necessary tool.¹⁸ Perhaps one can avoid the sharp antithesis between logic and experience by saying, "The life of the law is not logic, but experience as structured by logic." The problem remains, however, of clarifying the different conceptions of logic and explaining how they are related to the law.

16. Benjamin N. Cardozo, *The Nature of the Judicial Process* 30-31 (1921).

17. Benjamin N. Cardozo, *The Growth of the Law*, 62 (1924).

18. Cohen, "My Philosophy of Law", in *My Philosophy of Law: Credo of Sixteen American Scholars*, 39 (1941): "Once we get rid of the false assumption that experience and logic are mutually exclusive, we can express the precise truth of our dictum by saying that logic is necessary but not by itself sufficient for the human experience we call law."

V

That there has been a lack of clarity in the way many legal theorists and jurists speak of logic has not gone unnoticed, but few attempts have been made systematically to unravel the distinctions which are meshed within this concept. A study of legal reasoning by O. C. Jensen, which discusses the relation of logic to law, can be used here as a point of departure for further analysis of the problem.¹⁹

In response to the many charges that logic is responsible for various kinds of unjust decisions, Jensen points out that deduction plays a minor and rather subsidiary role in the judicial process. The crucial issues in legal reasoning, he maintains, revolve around issues of classification, and generally such issues cannot be resolved by logic. There is valuable insight when Jensen argues the importance of classification in analyzing legal decisions.²⁰ Legal decisions can often be looked upon as processes of enriching the content of legal rules by making the range of their application more determinate, rather than simply deductive applications of existing rules. Legal theorists often fail to distinguish questions of classification from questions of logical inference, and include a discussion of both under the undifferentiated notion of logic. Jensen performs a valuable service by clearly showing the differences between the two processes.

He further points out that if there are abuses in legal decision-making, they cannot be ascribed to logic.²¹

Formal logic cannot be blamed for these disasters, for it simply shows the formal implications of a statement. It does not say that these implications were necessarily intended by the author of the statement or that the implications should be acted upon if objectionable, *i.e.* that they should be accepted as anything more than implications.

Clearly, from this point of view, one cannot ascribe any responsibility to logic for any kind of legal decision, good or bad. In this sense, logic does not "force" or "compel" any particular legal decision. The problem which remains, however, is to discover the concept of logic held by legal theorists who feel that it is a determining force in arriving at legal decisions. In this respect, Jensen's account offers no assistance. He simply points out that legal theorists misunderstand the nature of logic.

That Jensen does oversimplify some of the issues can be seen in his criticism of Julius Stone. Stone speaks of an "abuse of logic," that consists of making logical deductions from existing legal propositions

19. O.C. Jensen, *The Nature of Legal Argument* (1957).

20. *Id.*, ch. 1.

21. *Id.* at 9-10.

and assuming without further analysis that such deductions are law.²² Jensen argues that Stone is contradicting himself when he speaks of abuse of logical deduction:²³

This will not do. If two premises are unobjectionable, as regards either their truth or their legal soundness, and if the conclusion follows logically from them, it too is unobjectionable; for it simply brings out what is "contained" in the premises. Stone must either find fault with the premises he gives, or with the process of derivation, or give up his objection to the conclusion, or he must admit that his syllogism misrepresents the legal argument. To do otherwise is flatly to contradict himself.

Does it follow, as Jensen maintains, that if the conclusion is "contained" in the premises, and the premises are unobjectionable, then the conclusion must also be unobjectionable? Disregarding the problem of what "unobjectionable" means, there is a fatal ambiguity in the notion of "contained" in the premises. Logical[y, a conclusion brings out what is "merely" implicit in the premises; psychologically, the drawing of a particular inference may be a real and genuine discovery. It is possible to discover legal consequences implicit in a legal rule which are objectionable, and which were not known at the time the rule was created.

VI

The attack on logic and formalism in the law is more than an attack on a theoretical conception of the law as a complete normative system. It is an attack on the purported practical consequences of conceiving the law in this manner. The cries of "mechanical jurisprudence", "arid conceptualism", "transcendental nonsense," as well as "abuse of logic," are essentially attacks upon the use of legal concepts and rules in an inflexible way without adequate regard for their propriety. The attack emphasizes that legal decisions are *judgments*, and not merely logical processes for deriving inferences.

When legal theorists complain about abuses of logic in the law, they are usually complaining about decisions that are somehow not considered fitting. One can classify five typical situations where this charge is frequently made: (1) where resort is had only to a fixed set of existing legal rules in resolving a controversy, when it would have been better to introduce a new rule; (2) where a rule that is sound in general is held to

22. Julius Stone, "The Province and Function of Law: Law as Logic", *Justice and Social Control*, 196 (1950).

23. Jensen, *supra* note 19, at 15. Jensen's criticism of Stone revolves around the interpretation of a particular case, *Rose v. Ford*, [1937] A.C. 826, which Stone maintained exemplified an abuse of logical deduction. For our purposes what is important is not the correct interpretation of this case, but whether such an abuse can exist.

apply to all situations that literally fall within its meaning, or otherwise stated, where a literal application of the rule fails to carry out the underlying purpose of the rule; (3) where a decision is based on an analogy without regard to whether the analogy leads to a fitting result; (4) where the circumstances of the particular case arouse considerable personal sympathy but no attempt is made to "bend" the application of the legal rule in order to arrive at an equitable result; (5) where due to changing conditions the original purpose of the rule can no longer be fulfilled or where there is a changed attitude toward fulfilling this purpose, the rule is still vigorously applied without attempted modification. This last situation in which legal rules lose their connection with "social reality" is sometimes called "arid conceptualism."

The diverse kinds of criticisms of logic by legal theorists can only be made intelligible in terms of some material sense of legal logic. Jensen was clearly right in saying that formal logic is not responsible for the kinds of decisions made by judges. But the real question is whether there is some kind of material logic which *does* "compel" and "force" judges to make decisions in a particular way. If logic be conceived as a set of principles in terms of which we evaluate the validity of arguments, the question remains whether the law provides a set of principles in terms of which we can evaluate the validity of legal inferences and arguments. If there are such standards of legal validity they would, in a sense, force and compel the kinds of decisions made by judges.

VII

One can distinguish three types of evaluations of legal decisions in terms of their soundness and validity. We shall call them procedural validity, substantive soundness, and extra-legal fittingness. To call a legal decision procedurally valid is simply to indicate that the decision was arrived at by a court having authority to adjudicate the matter, and that its decision has not been reversed by a court of higher authority. In this sense, whatever is actually decided is by definition legally valid, irrespective of whether the judge has made mistakes in the characterization of the facts of the case or in the interpretation of the law that is deemed applicable. All that is required is some minimum state of affairs, such as a "decision" of a "court" having "jurisdiction" and not "reversed" by a "higher court." One can perhaps state the minimum requirements in terms of what is needed to have a decision entered on the judgement rolls so as to be legally entitled to enforcement. This procedural sense of validity presupposes that the legal system is generally effective, *i.e.* capable of enforcing its judgments.

Legal evaluations are usually made in a more material sense. Legal theorists often seek to evaluate the soundness of a legal decision in terms

of the existing legal rules and principles which are assumed to be "the law." Thus, a legal decision can be substantively unsound because it is inconsistent with enacted statutory provisions, established precedent, or general legal principles, and still be a procedurally valid decision.

The third kind of legal evaluation concerns the fittingness of a legal decision in terms of some extra-legal standard. A legal decision may be substantively sound in terms of legal rules and principles, and yet not be a fitting legal decision in terms of some other standard. For examples, it would be a legally sound decision in many jurisdictions for a person found guilty of first degree murder to be sentenced to death. If the death penalty is mandatory, it would be legally unsound for the judge to give any other sentence. However, the sentence may not be fitting in terms of some extra legal standard that disapproves of capital punishment. In fact, the judge himself may personally subscribe to such an extra-legal standard. Yet he can recognize that what is legally sound does not necessarily have to conform to his own personal standards.

A legal system can authoritatively adopt some extra-legal standard and hence make it part of the legal standards of evaluation. Thus, those jurisdictions which have abolished capital punishment have authoritatively adopted standards of legal validity which previously were extra-legal. Clearly the standards of legal evaluation are in many ways influenced by the values held by various groups in society. Interactions in which they mutually influence each other are constantly taking place. Despite this, it is necessary for purposes of legal analysis to recognize that logically they constitute two different kinds of evaluations. The test by which we distinguish them is the basis or grounds of the evaluation and not the motive for making the evaluation. If the critic bases his criticisms on legal principles and standards, it is a legal evaluation, despite the fact that his motive for making the judgment may be based on his extra-legal beliefs about what is socially desirable. There is clearly a difference between saying capital punishment is not legally sound because it is not consistent with legal rules governing punishment and saying that it is not fitting in terms of ethical or social principles. It is true, however, that in areas where the legal rules and standards are vague it is not always easy to determine whether an evaluation relates to legal soundness or extra-legal fittingness or both.

It is the legal standards of procedural validity and substantive soundness which constitute the material legal logic with which lawyers, jurists and legal theorists are concerned. It is the law as a system of authoritative rules, principles, standards, doctrines, received ideals, and canons of interpretation that make up this material logic. These are some of the standards by which the legal soundness and validity of a decision are measured.

Logic is concerned with the general and formal principles of valid reasoning. Legal logic is correspondingly concerned with the particular principles of legally sound and valid reasoning and decision-making. The whole body of authoritative legal material constitutes a complex network in terms of which legal inferences can be made and evaluated. It is this material sense of legal logic that underlies most of the remarks of legal theorists concerning the relation of logic to law.

When legal theorists say that the law is not logical, one of the main things they mean is that the law is not a wholly consistent and complete system. A legal system is open-textured in the sense that new rules and principles can be created and old ones changed. In addition, it is often the case that competing rules have applicability to the same set of facts. To say that law is not wholly logical is a way of saying that judges are not merely tools for deriving legal conclusions. Judges exercise a creative function in various ways. The basic problem, is one of setting up rational standards to guide judges in exercising their creative functions. This is a fundamental problem for normative jurisprudence.