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Legal Theory and Legal Education

The current call for a legal profession and a legal education dedicated to such values as the public interest and social justice raises in a dramatic way well-known themes in our professional history. For at least forty years—arguably for much longer—American lawyers have been struggling with the realization that our legal system is not a closed, formal system of rules.¹ On the contrary, a distinguishing feature of the American legal system and legal profession has always been their close and complex relationship with openly political issues. De Tocqueville's famous observation in 1835 that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"² was echoed a century later by Morris Cohen's argument that "we cannot pretend that the United States Supreme Court is simply a court of law .... [T]he issues before it generally depend on the determination of ... facts, their consequences, and the values we attach to these consequences. These are questions of economics, politics, and social policy which legal training cannot solve unless law includes all social knowledge."³ While these questions are particularly apparent in Supreme Court decisions, they are also increasingly present throughout the work of the legal profession in the lower courts and in numerous agencies, commissions, and private organizations whose goals include making and influencing legal-political decisions.⁴ The nagging question for the law schools is: what kind of professional training is appropriate to this kind of legal system?

¹. A recent example of this argument which has excited great interest among law students is Nader, Law Schools and the Law Firms, The New Republic, Oct. 11, 1969, at 20 (reprinted in 54 MINN. L. REV. 493 (1970)). For a general review of educational debates in the profession and law schools, see Stevens, Aging Mistress: The Law School in America, 2 CHANGE IN HIGHER EDUCATION 32 (1970). Dissatisfaction with formal conceptions of law among some practitioners has been paralleled by developments in jurisprudence and specialized branches of legal theory. See, e.g., Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14 (1967); Hughes, Rules, Policy and Decision Making, 71 YALE L.J. 411 (1968); Stone, Towards a Theory of Constitutonal Law Casebooks, 41 So. CAL. L. REV. 1 (1963); J. SELLAR, LEGALISM (1964). The dating of the origins of this realization is somewhat arbitrary. An important example of it, including a discussion of earlier views, can be found in Llewellyn, A Realistic Jurisprudence—the Next Step, 30 COLUM. L. REV. 451 (1930), K. LLEWELLYN, JURISPRUDENCE 3 (1962) (hereinafter articles by Llewellyn which also appear in K. LLEWELLYN, JURISPRUDENCE (1962) will also be cited to JURISPRUDENCE).

². A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (P. Bradley ed. 1945).


This question has proved to be exceedingly difficult to answer, and when answers have been proposed, it has been equally difficult to translate them into actual reforms. Various reasons have been advanced to explain this impasse in professional thought and training. A common explanation locates the obstacles to creative change outside the law schools: in the anti-intellectualism and narrow interests of the practicing Bar, or in the refusal of government and other social institutions to support legal research on the model of the social and natural sciences. Others have noted certain “structural” problems within the law schools themselves: the long tradition of faculty “independence” which frustrates coordination, and the ambiguous status of the law teacher as both a trainer of practitioners and a scholar or researcher. Many law school deans and professors have accordingly concluded that the road to reform lies in specifying, at last, that research of an academic (rather than vocational) nature is one legitimate function of law schools as institutions, and cannot be left only to the idiosyncratic interests of individual teachers. Major reforms have been proposed to achieve this new institutional goal: the acquisition of funds to support academic scholars and students and the establishment of multi-disciplinary divisions or “law centers” devoted to research on pressing social problems and how law can contribute to their solution.

In making these proposals, many critics of legal education recognize that money and institutional structure are not the only elements of
the problem. The effort to redefine legal scholarship and legal training for a “public policy” branch of the profession necessarily involves conceptions of the legal system and of the entire society—of how they are operating at present, and of what should be done (if anything) to change them. The clue as to how these conceptions should be developed is taken not from jurisprudence and intellectual history, but from the pressing social problems with which the critics are rightly concerned: consumer protection, environmental regulation, criminal law reform, and a host of other issues. Law work in these areas frequently involves the use of theories and methods from the social and natural sciences, particularly behavioral sciences such as psychology and sociology and “hard” disciplines such as economics and statistics.

It is in this framework that the intellectual explosion of law centers is expected to take place, while the major philosophical questions of previous years, concerning the nature and function of law, are increasingly regarded as settled, impenetrable, or irrelevant. There appears to be a broad consensus that efforts should be turned toward developing more precise, more empirically-based “legal studies” in particular areas of social pressure and change.

There can be little doubt that such research into “the law in action,” while called for long ago, is still very much needed and worthwhile. What is less clear is the theoretical or intellectual framework in which this research should take place. By “theoretical or intellectual framework” is meant a set of ideas which relates studies of particular prob-

11. A rare example of an effort to make these underlying conceptions explicit can be found in Lasswell & McDougall, supra note 5. Recent arguments which recognize the intellectual dimension of law school reform include J. Stone, supra note 10, at 24; Goldstein, supra note 10, at 160; and Nader, supra note 1, at 21.


13. A report of this attitude can be found in Stevens, supra note 1, at 37.

14. See, e.g., Cavers, supra note 10, at 145; L. Friedman & S. Macaulay, supra note 12, at vii. Examples of such studies are provided in Kalven, The Quest for the Middle-Range: Empirical Inquiry and Legal Policy, in Law in a Changing America 56 (G. Hazard ed. 1968): “The relevant shelf... now includes... Jerome Carlin’s two studies of the legal profession and Erwin Smigel’s study of the Wall Street lawyer; the study of auto accident reparation in Michigan by Alfred Conrad and his associates; the participant-observer study of the Oakland police by Jerome Skolnick, and the study of police procedures in arrest by Wayne LaFave; the experimental study of the pre-trial conference by Maurice Rosenberg... the study of the American jury by Hans Zeisel and myself; and the experimental study of the jury and the insanity defense by Rita James Simon.” Id. at 57; see also bibliography at 72-73. Professor Kalven’s article is one of the most careful recent discussions of law and the social sciences; his concern is not to dismiss jurisprudence or theories of law, but to define the proper relationship between empirical studies and the formation of legal policy. I agree with his concluding slogan that we must “‘empiricize’ jurisprudence and intellectualize fact finding.” Id. at 72. This essay is in part a discussion of the pragmatist and realist efforts in that direction.

15. The phrase “law in action” is taken from Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12 (1910).
lems to a level of social and professional significance; which tells us, in other words, why we want to study (for example) police arrest procedures, and which supplies the concepts and values through which we understand what we observe. Such frameworks function on a number of levels: as general orientations to particular problems (e.g., the concept of “due process” in the criminal law);\(^1\) as the “boundaries” of a discipline or a profession (e.g., the appropriate structure of a “legal” question);\(^17\) and as models of practice and investigation (e.g., the “Brandeis brief” as a model for certain kinds of constitutional litigation). Taken as a whole, a framework provides what Professor Thomas Kuhn has termed a “paradigm” for the practitioners of an intellectual craft.\(^18\) By Kuhn’s definition, a paradigm is both a “constellation of beliefs, values, techniques, and so on shared by the members of a given community [of practitioners],” and “one sort of element in that constellation, the concrete puzzle-solutions which [are used] as models or examples” for further research.\(^19\)

Many of the current proposals to establish empirical research about particular socio-legal problems in the law schools carry with them an implicit paradigm which attempts to serve these general professional functions. Like the proposals themselves, this paradigm is drawn from a long tradition of American legal thought and activity which was born in the intellectual-political movements of pragmatism and progressivism before the First World War, and which later shook the law schools under the slogan of legal realism. This paradigm, which with historical license shall be called “legal pragmatism,” neither was nor is the only strand in legal thought about social problems, but it is clearly the dominant approach in this century.\(^20\) Its dominance rests

\(^{16}\) For a discussion of how the concept of due process functions as part of an intellectual framework in the criminal law, see Griffiths, Ideology in Criminal Procedure, or A Third Model of the Criminal Process, 79 YALE L.J. 359 (1970).

\(^{17}\) This problem has usually been dealt with in the context of jurisprudence; see, e.g., H. L. A. Hart, The Concept of Law (1961); Dworkin, supra note 1; and Hughes, supra note 1. It has also received attention, however, in terms of the way lawyers think about the social implications of legal decisions. See, e.g., Professor Bickel’s discussion of the shift in constitutional theory from the “faith” of the nineteenth century to the “Progressive realism” of the twentieth in A. Bickel, The Supreme Court and the Idea of Progress 14-29 (1970), and the sociological analysis of professional identity in D. Rueschmeyer, Lawyers and Doctors: A Comparison of Two Professions, in Sociology of Law (V. Aubert ed. 1969).


\(^{19}\) Id. at 175. In the natural sciences works such as Aristotle’s Physica, Newton’s Principia, and Lavoisier's Chemistry served as paradigms; they provided general rules governing inquiry and particular theories which generated coherent traditions of research. Id. at 10.

on its treatment of the theoretical issues which underlie a public policy
approach to law: the role of values in the law, the concept of utility
or the public good, the relationship of law and politics, and the rela-
tionship of law and empirical or scientific method.

What follows is by no means a history of the pragmatist and related
movements in law, but rather a schematic brief for a number of ideas:
that such history is relevant to current reform efforts; that basic
theoretical questions about law, society, and the social sciences are not
closed; and hence that legal studies, in the sense of research linked to
the behavioral sciences, should not be the exclusive focus of educa-
tional reform. The belief of many reformers seems to be that the prag-
matist tradition has weathered its early difficulties and is now ready
for a flowering of academic research and plans for social change. The
argument of this essay is that on the contrary, legal pragmatism has
been declining in scope and coherence since its inception, and that if
the law schools are serious about intellectual engagement with social
problems (as they should be) they will find themselves, like the social
sciences, drawn into a theoretical crisis of large dimensions.

I. The Pragmatist Origins of Legal Realism

The last large-scale professional effort to change the content and
methods of legal education occurred in the 1930s under the slogan of
"legal realism,"21 and most of the current reformers of legal education

Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism, 9
RUTGERS L. REV. 425 (1954); J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 6-15
(1964); A. BICKEL, supra note 17, at 11-42; Woodard, The Limits of Legal Realism: An
Historical Perspective, 54 VA. L. REV. 653 (1968). Informal remarks supporting this
view are expressed in Corbin, Principles of Law and Their Evolution, 64 YALE L.J. 161
(1954).

21. A major statement describing the views of the realist "group"—including what
they shared and how they differed—can be found in Llewellyn, Some Realism About
Realism, 44 HARV. L. REV. 1222 (1931), JURISPRUDENCE 42. The setting of a date for the
emergence of legal realism is somewhat arbitrary. Many realists of the 1920's and 1930's
repeatedly acknowledged their debt (albeit with qualifications) to Hohfeld, Pound, Powell,
Cardozo, and Holmes. See K. Llewellyn, The Study of Law as a Liberal Art, in JURIS-
PRUDENCE 375, 378, and id. at 491-519; J. FRANK, LAW AND THE MODERN MIND 270-281
(Anchor ed. 1965) [hereinafter cited as LAW AND THE MODERN MIND]. Professor Morton
White in SOCIAL THOUGHT IN AMERICA 6 (1949), uses the term "legal realism" to describe
the views of Holmes set forth in THE COMMON LAW (1881) and THE PATH OF THE LAW,
10 HARV. L. REV. 457 (1897). A factor which distinguishes the post-World War I realists
from the earlier critics was the realists' attempt to "translate their jurisprudential ideas
into concrete educational patterns." Twining, Pericles and the Plumber, 83 LAW QUARTERLY

By terming legal realism the "last large-scale" professional effort at changing legal
theory and legal education, it is meant to refer only to the "quantity" of professional
involvement, and not to underrate the importance and quality of numerous later efforts
and proposals.

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consider themselves heirs of this movement, rather than of the earlier period suggested by the term "pragmatism." 22 The realist inheritance is not, however, accepted uncritically. It is now generally recognized that realism, both as an intellectual movement and as an effort at educational reform, was misguided in several respects. 23 For example, it is increasingly doubted that a single "method" or "theory" can serve as an educational program for all law schools and all varieties of legal practice; 24 similarly, the realist effort to formulate a general "scientific" approach to law is now regarded as too abstract and polemical, and the issues involved either inherently unscientific or obvious to the point of sterility. 25 These criticisms are valid, and should be pushed further. The ambiguities and weaknesses of legal realism were not aberrations, but reflected important problems in the pragmatist tradition of which realism was a part, and which still dominates legal thinking about social problems.

The realists' critique of established legal thought was based on several perceived symptoms of professional malfunctioning. First, the law schools were having difficulty teaching the skills necessary for effective practice; modern law work, the realists saw, was far more complex and varied than the practice of the "country-plus-city lawyer of about 1870" whose "blurred composite photograph" seemed to lurk behind the law schools' exclusive focus on case analysis and legal doctrine. 26 Second, the process of judicial decision was not as "mechanical" as many lawyers and judges seemed to believe; what "really" happened when a judge decided a case was far more complex, uncertain, and policy-oriented than the picture given by traditional law professors and by judges themselves. 27 Third, the profession's intellectual focus on the

22. See, e.g., Woodard, supra note 20, and Goldstein, supra note 10. For a friendly criticism of pragmatic or sociological jurisprudence's failure to influence legal education in the pre-Realist period, see M. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 158-162 (1954).

23. A sympathetic discussion which suggests some of the problems can be found in Gilmore, Legal Realism: Its Cause and Cure, 70 YALE L.J. 1097 (1961). A much more detailed critique is presented in J. SHKLAR, supra note 1, at 18-21, 93-110.

24. See, e.g., Stevens, supra note 1, at 35, 41, and Cavers, supra note 10. As Professor Stevens points out, this insight is hardly new; it was first put forward by Alfred Reed in TRAINING FOR THE PUBLIC PROFESSION OF LAW (1921).


27. Realist versions of this observation and argument can be found in LAW AND THE MODERN MIND at 3-12 & passim; Llewellyn, A Realistic Jurisprudence—The Next Step, supra note 1; On Reading and Using the Newer Jurisprudence, 49 COLUM. L. REV. 581 (1949), in JURISPRUDENCE 1928. The point was not, of course, original with the realists. See, e.g., J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 191 (Library of Ideas ed. 1954), and the discussion of Austin's views on judicial legislation in H. L. A. Hart,
rigid application of legal rules blocked reform efforts generated by the changing needs of large numbers of Americans from many social classes.  

All of these perceptions reflect what has been called "the revolt against formalism." The realist message, directed at such diverse professional points as teaching students how to read cases, showing judges the true significance of applying doctrine, and developing a new jurisprudence, reiterated basic pragmatist themes: distrust of rules, abstract concepts, "the word," deductive logic, and mechanical application of doctrine; enthusiastic interest in "the facts," behavior, "dynamic" analysis and "experimental" decision-making. But at the core of the often passionate debate about what was to be done lay a disturbing vagueness about the precise nature of the formalist malady. On close examination realism appears as a many-layered attack on formalism: on empirical ignorance, doctrinal abstraction, and oppressive social values.

In challenging these related but different elements in orthodox legal thought, the realists built on the earlier critique presented by the pragmatists, and shared—indeed, magnified—the pragmatists' intellectual weaknesses: a failure to distinguish different levels and points of criticism, and a core ambiguity about the role of values in social and legal thought. One result was the realists' failure to develop a consistent understanding of formalism both as an intellectual system and as an historical episode in American law. Another was a gap in the


29. See M. White, Social Thought in America: The Revolt Against Formalism (1957 ed.). Professor White sees the "revolt" of legal realism (by which he means the work of Holmes) as part of a broad intellectual movement in late nineteenth-century America which affected philosophy, history, economics, and psychology as well as law. "Pragmatism, instrumentalism, institutionalism, economic determinism, and legal realism exhibit striking philosophical kinships. They are all suspicious of approaches which are excessively formal; they all protest their anxiety to come to grips with reality, their attachment to the moving and vital in social life." Id. at 6. For discussions of the realists of the 1930s in terms of their attack on formalism, see Gilmore, supra note 23, at 1038-1059, J. Shear, supra note 1, at 93-99; Dworkin, supra note 1, at 16-17.

30. See Llewellyn, A Realistic Jurisprudence—The Next Step, supra note 1; Some Realism About Realism, supra note 21; On What is Wrong With So-Called Legal Education, supra note 26, at 655, 659; Law and the Modern Mind, passim; cf. Frank, Book Review, 54 Harvard Law Review 905, 910 n.18 (1941). A classic statement of these pragmatist themes can be found in W. James, Pragmatism (1907).
realist reform proposals between the level of empirical method and the level of educational and professional change.

To make this argument this essay will first trace the pragmatist origins of the revolt against formalism, and attempt to sketch its social as well as its intellectual implications. Then it will turn to what two members of the realist movement—Jerome Frank and Karl Llewellyn—did with the pragmatist tradition, and examine their anti-formalist ideas about law and legal education.

A. *The Pragmatist Critique of Formalism*

A broad intellectual revolt occurred around the turn of the century against nineteenth-century “formalism” and its treatment of politics, law, social change, and knowledge itself. The core of this revolt was the argument that people should formulate ideas and relate them to the world of experience in a “pragmatic” fashion. A classic statement of this new method was presented by William James in 1907, in a lecture which anticipated many of the ideas which were to occupy the realists in the 1930’s:

Metaphysics has usually followed a very primitive kind of quest. You know how men have always hankered after unlawful magic, and you know what a great part in magic words have always played. If you have his name, or the formula of incantation that binds him, you can control the spirit . . . or whatever the power may be . . . .

But if you follow the pragmatic method, you cannot look on any such word as closing your quest. You must bring out of each word its practical cash-value, set it at work within the stream of your experience. It appears less as a solution than as an indication of the ways in which existing realities may be changed.

*Theories thus become instruments, not answers to enigmas*. . . . Being nothing essentially new, [pragmatism] harmonizes with many ancient philosophic tendencies. It agrees with nominalism . . . in always appealing to particulars; with utilitarianism in emphasizing practical aspects; with positivism in its disdain for . . . metaphysical abstractions.

No particular results then, so far, but only an attitude of orientation, is what the pragmatic method means. *The attitude of looking away from first things, principles, ‘categories,’ supposed*
necessities; and of looking towards last things, fruits, consequences, facts.  

The liberating energy of a philosophy which treated ideas as instruments was readily apparent to lawyers struggling with the fixed conceptions of legal formalism. According to Pound, legal thought had been dominated for much of the nineteenth century by varieties of historical idealism. In post-Civil War America this took the form of a curious mixture: a ruthless desire to analyze the law rigorously in terms of a few fundamental principles, many of which reflected the core value of "free individual self-assertion," coupled with an almost mystical method of justifying or legitimating these principles on the basis of the divine or natural order, oracular fragments from medieval law, and dubious uses of history and "strong" precedent. The result was what Llewellyn was later to call the Formal Style, and which other writers branded as a "logical," "mechanical," or "fundamentalist" method of judicial decision.

The pragmatist attack on this tradition in law was stated in its purest version by Pound. "All the nineteenth-century schools," he wrote, "were agreed upon the futility of conscious action. They conceived of a slow and ordered succession of events whereby things perfected themselves by evolving to the limit of their idea." Pragmatism, in contrast, "sees validity in actions, not in that they realize the idea, but to the extent that they are effective for their purpose and in purposes to the extent that they satisfy a maximum of human demands." The task of law was the adjustment of human conflict, "a great task of social engineering;" the method of pragmatic jurisprudence was "the adjustment of principles and doctrines to the human conditions they are

33. Interpretations of Legal History 10 (1929).
34. Id. at 54, 64-65. See also J. Hurst, The Growth of American Law: The Law Makers 357-358 (1930).
35. See A. Bickel, supra note 17, at 14-15.
36. Interpretations of Legal History, supra note 33, at 49, 50-52.
38. For Holmes' discussion of the fallacy of the logical form of judicial decisions, see The Path of the Law, in Holmes Papers at 180-181; for Frank's discussion of "legal fundamentalism," see Law and the Modern Mind 53-61, 127-158.
39. Interpretations of Legal History, supra note 33, at 11.
40. Id.
41. Social Control Through Law 64 (1942). The engineering metaphor was also used in Interpretations of Legal History 141-165 (1923). Professor Lach sees adjustment of conflict through social engineering as a major theme of the "new radicalism" [progressive pragmatism]; see C. Lach, supra note 31, at 162.
to govern rather than to assumed first principles . . . ."42 Justice, in this approach, was conceived as "such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste."43

Pound saw pragmatism's great contribution as restoring man's belief in the efficacy of "conscious action" to adapt the social system to utilitarian ends.44 Pragmatism thus implied a particular direction of human action—conscious reform of the social ground rules of private competition—which broke with the assumptions of nineteenth century legal thought. "Action" itself was no novelty. The most fervent supporters of legal formalism were the great corporation lawyers of the turn of the century, such as William Guthrie and Elihu Root.45 However, these "formalist" practitioners were not Dickensian barristers mumbling ancient formulas, but aggressive business lawyers who, under the banner of immutable legal principles, had no qualms about helping radically to transform American industry, politics, urban life, and ultimately our entire culture.46 What distinguished pragmatism from formalism as a social theory was its argument that man could act not only within the faith of "free individual self-assertion" but that he could question that faith and change it in order to establish a more just, humane, and efficient social system.47

The intellectual source of the pragmatists' new self-confidence in social reform lay in their attempt to collapse the rigid distinction between "concepts" and "facts"; to make the world of thought more open to the harsh realities and "dramatic insecurity" of human experience,48 and conversely, to make the world of fact more amenable to experiment and change in the light of reason.49 Intellectually it was an attempt, in William James' words, to "mediat[e] and reconcil[e]" the

42. Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 609-610 (1908).
43. Social Control Through Law 65 (1942). A substantially similar statement of the task of the legal order, citing William James for support, can be found in Interpretations of Legal History 157 (1923).
44. Interpretations of Legal History, supra note 33, at 11.
45. See, e.g., W. Guthrie, Magna Carta and Other Addresses (1916); Root, Some Duties of American Lawyers to American Law, 14 YALE L.J. 63 (1904); see also M. Cohen, The Conservative Lawyer's Legend of the Magna Carta and The Legal Calvinism of Elihu Root, in LAW AND THE SOCIAL ORDER (1933).
47. See R. Hofstadter, supra note 31, at 125; A. Bickel, supra note 17, at 19.
49. One of the best expositions of this pragmatist theme is C. Lasch, supra note 31, at 141-180. See also M. White, supra note 29, passim.
ancient strands of idealism and empiricism, of faith and science. Politically it implied an effort to create, or at least to contribute to, a party of “critical intelligence” and moderate reform; in legal terms, to mediate between the ideas of law as an “intelligible norm” and law as pure command. It is not surprising that intellectuals found pragmatism attractive; it defined a theory of knowledge in such a way as to justify their intervention in social and political affairs. It should be even less surprising that many lawyers, being among the most activist intellectuals, explicitly or implicitly adopted pragmatism as their framework for thinking about law and social problems.

The ties between legal thought and philosophical pragmatism are obvious in the explicit relationship between Pound and James. Less obvious, but perhaps more influential in the legal profession, was the special twist given to pragmatism in the work of Holmes. Holmes was less optimistic than Pound about man’s capacity to maximize his collective well-being; his approach to law emphasized the skeptical and positivist strands in pragmatism’s intellectual coalition. He attacked the formalists’ moral absolutism in his controversial “bad man” approach to the law; he advised young lawyers to “look at [the law] as a bad man, who cares only for the material consequences which such knowledge [of the law] enables him to predict . . . .” In a somewhat similar vein, he argued that the “logical form” of judicial decisions did not guide lawyers to the actual processes by which judges decided cases; “the felt necessities of the time, the prevalent moral and political


51. For sources of quotations and a detailed analysis of the ties between pragmatism and political moderation, see C. W. Mills, *Sociology and Pragmatism* 262-76, 325-37, 428-65 (I. Horowitz ed. 1964). James’ account of the psychology of pragmatism suggests a political metaphor of moderate change. “[A] new idea is then adopted. . . . It preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty. . . . New truth is always a go-between, a smoother-over of transitions.” *Pragmatism,* supra note 32, at 50-51.

52. See F. Neumann, *The Change in the Function of Law in Modern Society,* in *The Democratic and the Authoritarian State* 22, 26 (1957), for a discussion of the classic conflict between these two conceptions of law.


54. See R. Hofstadter, * supra* note 28, at 157-164. Explaining the progressive reforms espoused by some corporation lawyers, Professor Hofstadter notes that in the East “Progressivism was a mild and judicious movement, whose goal was not a sharp change in the social structure, but rather the formation of a responsible elite . . . . [a] leadership occupying, as Brandeis so aptly put it, ‘a position of independence between the wealthy and the people, prepared to curb the excesses of either.’” *Id.* at 163-164.


56. *Holmes Papers* at 171.
theories...have had a good deal more to do than the syllogism in determining the rules by which men should be governed."\(^{57}\)

Holmes' attacks on logical formalism and moral absolutism identified, on a theoretical level, the forces which would lead to succeeding waves of reform efforts, from sociological jurisprudence through legal realism to "public interest law" in our own times. The proposition that the life of the law was "not logic but experience"\(^{58}\) had large implications for judicial decision-making and legal scholarship. It placed a responsibility on the judge, as Holmes noted, to be the conscious master of previously inarticulate intuitions of public policy; it charted a new direction for legal scholarship in which Holmes' own work was an important step—"the exploration and exposure of the social and ethical roots of doctrine."\(^{59}\) The later efforts of the realists to expand legal scholarship and reform legal education followed a basic pragmatist theme: the practical and theoretical pressures of "experience" on thought in general, and in particular on the specialized machinery of the law.

The intellectual price of the pragmatist approach, however, was high. The effort to connect ideas and experience, reason and power, continually raised problems which could not be contained in the pragmatist framework of intelligent perception of concrete consequences. These problems were generally evaded through ambiguous mixing of the descriptive and the normative, the political and the philosophical.\(^{60}\) Holmes, for example, was often cryptic about his "stance" as a critic and about the objects of his criticism. In *The Path of the Law* he at times assumed the role of the positivist observer, the "judge as spectator,"\(^{61}\) concerned only with dispassionate observation and prediction. At other times he took the position of the judge as interpreter.

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57. *The Common Law*, supra note 55, at 1. Holmes repeated this point in several essays, notably in *The Path of the Law*: "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion...Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment...yet the very root and nerve of the whole proceeding." *Holmes Papers* at 181.

58. "The life of the law has not been logic: it has been experience." *The Common Law*, supra note 55, at 1.


60. A discussion of the tension between the ethical and empirical strands in pragmatism can be found in M. Whitte, supra note 29, at 203-219, 236-246. For a parallel analysis of the progressive-pragmatists' confusion of the political and the cultural, see G. Lassii, supra note 31.

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of community values, concerned with constructing a more "rational and civilized" legal system. The pragmatists, including Holmes, tried to link the levels of description and prescription with an intellectual method which appealed to common-sense standards of experience and effectiveness, but which actually contained quite complex (and ambiguous) assumptions about the nature of knowledge and its relationship to the word of action. Perhaps the best symbol of this attempted resolution is the metaphor of the social engineer—a craftsman who embodies both scientific rationality and the skills of practical implementation. The danger in such a metaphor is its definition of the social function of reason as prediction and control; it "substitute[s] a technocratic slogan for what ought to be a reasoned moral choice . . . [and] assume[s] the bureaucratic perspective within which—once it is fully adopted—there is much less moral choice available."  

B. The Realists' Approach to Theory and Education

The realists followed Holmes in seeing that the formalist paradigm of "applying rules" was not an adequate model of the legal system. Without clearly recognizing the complexity of the effort, the realists attempted to develop an alternative paradigm of scholarship and education which incorporated the effects of the "many non-rule ingredients in the making of court decisions." Thus much of the realist work on legal education was concerned with establishing "post-formalist" methods of study and practice. These proposals were influenced by two metaphors: that of the scientific method and that of skilled craftsmanship. Both metaphors embodied a pragmatic model of the

62. See HOLMES PAPERS at 186, and the discussion of Holmes' views in Howe, The Positivism of Mr. Justice Holmes, 64 HARV. L. REV. 529 (1951) and Holmes' Positivism—A Brief Rejoinder, 64 HARV. L. REV. 987 (1951)


63. For examples of the engineering metaphor, see sources cited in note 41 supra. See also Professor White's discussion of Dewey's concepts of "creative intelligence" and "political technology" in M. WHITE, supra note 29, at 128-146 and 249-246.


65. J. FRANK, Preface to the Sixth Printing, LAW AND THE MODERN MIND at XXXVII.

66. The scientific method was seen as a way of bringing legal doctrine into contact with the facts of social behavior: through focus on the "behavioral uniformities" of officials and laymen (see, e.g., Llewellyn, The Theory of Legal 'Science', 20 N.C.L. REV. 1, 23 n.27 (1941), and the views of Walter W. Cook quoted in LAW AND THE MODERN MIND
relationship between ideas and practice. The scientist and the craftsman were conceived as flexible and experimental; above all, they were concerned with particular and concrete phenomena, and their method was to adapt theory and ideas to the reality of nature and human needs. The realists wanted to inject a similar spirit into legal study and practice; hence their insistence that realism was not a "philosophy" or a "theory," but was rather, like pragmatism, a "method" which Jerome Frank called "experimental" and which Llewellyn termed "the descriptive or the technological branch of [the] discipline."

The strengths and weaknesses of this approach can be seen dramatically in the work of Jerome Frank. Rules, argued Frank, were not the key to judicial decisions, particularly at the trial level where the vast majority are made. The most important factor affecting a decision was the process by which the judge perceived facts—a process linked to personal biases and intuitions, and about which the legal profession was largely ignorant. Frank recognized that there was often no general agreement about social values and their appropriate weight in interpreting legal rules. But he preferred to leave that abstract struggle to others; what absorbed his attention was the problem of applying any rule, settled or not, to a concrete fact situation.

By focusing on this level of analysis, Frank's work remained within the limits of the pragmatist tradition. This is not to say that he was unaware of issues beyond those limits; for example, he quite correctly criticized Cardozo for confusing the problem of formal logic with the problem of fixed legal premises. This point was later developed by H. L. A. Hart, and is central to understanding formalism as an intellectual system.

What precisely is it for a judge to commit this error, to be a "formalist" . . .? It is said that in the formalist error courts make an excessive use of logic. . . . But just how in being a for-

at 139-140), the effort to construct predictive hypotheses (see, e.g., Llewellyn, The Theory of Legal 'Science', supra, and LAW AND THE MODERN MIND, supra), and the skepticism of the "scientific spirit" (see J. FRANK, COURTS ON TRIAL 219 (Princeton Univ. Press ed. 1949) [hereinafter cited as COURTS ON TRIAL]. Some of the realists, such as Jerome Frank and Karl Llewellyn, also attempted to articulate a post-formalist "art" or "craft" of law work which would integrate empirical knowledge with legal ideals (see, e.g., COURTS ON TRIAL at 221; Llewellyn, On the Good, The True, The Beautiful in Law, 9 U. Chi. L. Rev. 224 (1942), JURISPRUDENCE at 191).

68. See LAW AND THE MODERN MIND 140-141; COURTS ON TRIAL 317; Cardozo and the Upper Court Myth, supra note 28, at 374-75.
69. See COURTS ON TRIAL 369.
70. Cardozo and the Upper Court Myth, supra note 28, at 371-372.
malist does a judge make an excessive use of logic? It is clear that the essence of his error is to give some general term an interpretation which is blind to social values and consequences. . . . But logic does not prescribe the interpretation of terms. . . . Logic is silent on how to classify particulars—and this is the heart of a judicial decision. So this reference to logic . . . is a misnomer for something else. . . . [The judge] either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. Instead of choosing in the light of social aims, the judge fixes the meaning in a different way. He either takes the meaning that the word most obviously suggests in its ordinary nonlegal context. . . . or still worse, he thinks of a standard case and then arbitrarily identifies certain features in it . . . as [necessary and sufficient for the use of the term] irrespective of the social consequences of giving it this interpretation.7

But for Frank, this point was of only marginal importance. What concerned him was Cardozo's (and most of the profession's) fixation on the intricacies of rule interpretation, and their failure to recognize the uncertainty and apparent irrationality of many trial court decisions. Frank hoped that by directing the profession's attention to the realities of the lower courts he would generate energy for reform.72 His points about delay, dishonesty, unbridled discretion, and ignorance of the subtle processes of perception were important and worth making, and perhaps still are. But taken as an exclusive focus, they limited reform to the construction of an honest and efficient system of adjudication. By defining the judicial process in terms of finding facts and doing equity between individual parties,72 he assumed that substantive values would somehow emerge from the impartial judge's perception of the facts of a case. Such an assumption makes Frank's approach largely irrelevant to decisions involving public policy, for what is at issue in such decisions is not primarily facts, but the weighing of values and principles, and the core of the decision is what rule or policy should govern the case. Even in the area of private law, Frank's strong distrust of the tyranny of rules and concepts led him to underestimate the problems of value conflict, of adjudicating individual claims in the light of community interests, and of the subtle

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73. For Frank's own preferred model of the judicial process (i.e. the trial courts), see *Law and the Modern Mind* at 148-49, 168; and his discussion of the European theory of "free law" in *id.* at 301-306. For an analysis of the concept of equity as an organizing principle of judicial decisions, see R. Wasserstrom, *supra* note 37, at 84-117.
difficulty of classifying particulars, which involves not only the perception of facts, but the simultaneous interpretation of the meaning of rules.\textsuperscript{74}

Frank's concern with the effective administration of individualized justice heavily influenced his ideas about the reform of legal education. The core of his proposed lawyers' school was an effort to sensitize law students to the "realities"—in Holmes' language, the "material consequences"—of the legal system. Training by observation and supervised practice would serve the double purpose implied by Holmes' theory: law students would become simultaneously better practitioners (through accurate knowledge of reality) and more vigorous reformers (through concrete experience with courthouse abuses).\textsuperscript{75} The gap in Frank's program occurred precisely at this juncture between "effective practice" and "effective reform"—the same point at which Holmes had lapsed into cryptic ambiguity. Frank never specified how knowledge of courthouse realities alone would necessarily lead to ideas of reform. Aside from breaches of elementary honesty, it is hard to see how students could conceive of certain kinds of "inadequacies" (such as unbridled discretion) without reference to general concepts of the legal process. Frank implicitly recognized the need to transcend the observation of concrete particulars by advocating the study of legal problems "in the light supplied by the other social studies . . . history, ethics, economics . . . psychology [etc.]"\textsuperscript{76} But here he failed not only to specify what he meant conceptually, but also to indicate as a practical matter who could supply such intellectual syntheses and what a student would do with them professionally even if they could be obtained. At this point Frank's pragmatism failed even on the level of the practical, for he did not incorporate into his proposals for legal education any analysis of the political or professional difficulties, dangers, and costs of reform.

Jerome Frank's work reflects the realist tendency to abandon general concepts and become submerged in the very reality it seeks to change. Karl Llewellyn arrived at a similar position by a somewhat different route. For Llewellyn, like Frank, the essence of the formalist error

\textsuperscript{74} Cf. Positivism and the Separation of Law and Morals, supra note 27, at 610-611. At times Frank noted that the determination of facts and the interpretation of rules were "intertwined" (see Law and the Modern Mind at 144) but he did not make this point a systematic part of his approach.

\textsuperscript{75} See Courts on Trial 235, 240.

\textsuperscript{76} Id. at 239.
was rigid adherence to abstract rules. But unlike Frank, Llewellyn based his realist approach on the possibility of formulating instrumental concepts or rules, flexible doctrines with specific purposes informed by broad intellectual inquiry and precise attention to behavior and consequences. To achieve this he had to go beyond the model of individual equity and examine the general role of concepts as used in the judicial process.

The sense impressions which make up what we call observation are useless unless gathered into some arrangement. Nor can thought go on without categories.

A realistic approach would, however, put forward two suggestions on the making of such categories. The first suggestion rests primarily upon the knowledge that to classify is to disturb. It is to build emphases... which obscure some of the data under observation... True relevancy [of the data] can be determined only as the inquiry advances. For this reason a realistic approach to any new problem would begin by scepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution... The suggestion then comes to this: that with the new purpose in mind one approach the data afresh, taking them in as raw a condition as possible, and discovering how far and how well the available traditional categories really cover the most relevant of the raw data... The [other] counsel of the realistic approach... would be the constant back-checking of the category against the data...

In this passage Llewellyn is wrestling with the problem which occupied Holmes and Cardozo before him, and Hart, Wasserstrom, and many others afterwards: when does the judge have a “choice” about the meaning of legal concepts and rules, and what is the nature of the choice legitimately open to him? For Llewellyn, the answer appeared to lie in the “science” and “craft” of law, which together formed the


78. The above summary is based on A Realistic Jurisprudence—The Next Step, supra note 1, and Some Realism About Realism, supra note 21. See also On Reading and Using the Newer Jurisprudence, supra note 27, at 583-4, 594-5, JURISPRUDENCE 131 and 143.


realist method. Llewellyn's concept of science, like Holmes', serves a double purpose. It functions first as an empirical cue to the judge that precedent must be re-examined, and second, as a normative method for determining the real rule or purpose embedded in social practices. At the first stage, the judge examines doctrine to see if it accounts for "all the results" (presumably results in past cases); if it does not, he must look beyond rules to the "right Reason" of the social and legal practices in question. In determining the content of "Reason," the judge uses science in the second sense of finding values; the real rule and its purposes are discovered through countless close studies of social practices and the consequences of implementing different shades of doctrine.

Llewellyn himself recognized that his statement of the realist method was but a partial suggestion about where the techniques of "best practice" might lie. The process of "checking" or "squaring" doctrine against "the raw data," for example, was never clearly spelled out, and seemed to imply that certain kinds of meaning were inherent in the data "itself." The concept of craft was based heavily on general values such as "the felt duty to justice" and "right Reason" which Llewellyn fleshed out only with vigorous adjectives and aesthetic analogies. The result was similar to other work in the pragmatist tradition: an undefined mixing of the descriptive and the normative, and a tendency to conceive of harmonious ideas and values as somehow "inherent" in the infinite variety of particular detail.

The assumption of a community of interest, a harmony of ends, was also prominent in Llewellyn's proposals for educational reform. Like

81. See On Reading and Using the Newer Jurisprudence, supra note 27, at 587, Jurisprudence at 135.
82. Id. (emphasis in the original).
83. See On the Good, The True, The Beautiful, in Law, supra note 77, in Jurisprudence at 186; see also id., at 179-180.
84. See The Theory of Legal 'Science,' supra note 66, at 13-14, 23.
85. See On Reading and Using the Newer Jurisprudence, supra note 27, in Jurisprudence at 156-157.
87. Id. at 121.
88. Jurisprudence at 186.
89. This tendency was realized in The Common Law Tradition, in which Llewellyn presented judicial craftsmanship in terms of the judge "finding" norms and principles in the "type-situation" exemplified in the particular case. See id. at 121-128. Such norms and principles can of course be found in relevant social practices. But Llewellyn went further; he approvingly quoted Levin Goldschmidt's argument that:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, for it is not external, not changeless or everywhere the same, but it is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.

Quoted in id. at 122.
Frank, Llewellyn sought to achieve both increased technical competence and more professional commitment to the public good through immersing students in the concrete details of law work. He urged teachers of the case method to reject abstract analysis of rationalizations and to attack cases “from the front,” as they appeared to the lawyer as he handled them. The focus on the practitioner’s art, in Llewellyn’s hands, opened out into broad intellectual inquiry. For in order to “mak[e] the situation come alive enough . . . to any student, so that he can begin to think actively, instead of listening passively, on points of prediction, advocacy, and inventive counselling,” the student had to know a great deal about the “situation” in which the case arose, and to have some sense of the complex “craft” through which the law related to the situation. To accomplish this Llewellyn proposed intensive studies, rather than surveys, of current legal developments and related non-legal practices, such as changes in commercial and corporate law in the light of major trends in the American economy. He also insisted that “background”—i.e., history—was essential for an understanding of law as a social institution; he sketched a course on American Institutions whose purpose would be to provide the historical background for all of private law. Its scope can be grasped from his description of its first section: America from 1830 to 1860; its economic and political institutions—“the going whole”—against which “the simpler, older forms of such concepts as pledge, chattel mortgage, realty mortgage, bill, note, suretyship, take on life and meaning.”

While Llewellyn was thus more explicit than Frank about the need to go beyond the case method of training, he too did not clearly distinguish and then connect the problems of technical proficiency and social theory, particularized description and general values, educational reform and professional change. Like Frank, he proposed to transcend the case system by immersing students even further in its

90. This perspective is urged both in On What is Wrong With So-Called Legal Education, supra note 26, at 669-670, and in On The Problem of Teaching ‘Private’ Law, 54 Harv. L. Rev. 775 (1941).
91. On the Problem of Teaching ‘Private’ Law, supra note 90, at 791.
92. Id. at 793.
93. Cf. Judith Shklar’s argument that
   one may doubt the efficacy of the many schemes devised to reorient the thinking of lawyers by altering legal education in America. . . . Many academic lawyers would like to see a public-spirited political elite replace the private-law practicing lawyers whom they now teach . . . .

That changes in the curriculum are the answer to all public deficiencies is, of course, in keeping with the great American tradition of painless reform . . . . What has not been shown, however, is that changes in the content of courses alter the social behavior and attitudes of students once they enter upon their professional life.
LEGALISM, supra note 1, at 18-19.
details; a broad reality, in effect, was to be refracted through the marginal growth of legal doctrine. This approach to teaching and analyzing law contained a potential merging of “doctrine” and “reality,”\textsuperscript{94} paradoxically undercutting the basic realist impulse to separate words and behavior and to use behavior as a basis for criticizing established rules and realizing new ones.

There is a rough analogy between the realists’ conception of their intellectual enterprise and their conception of educational reform. In their work on the legal process, the realists focused on empirical investigation and the conceptual framework for such investigation: behavior studies, “squaring” doctrine against facts, “pragmatic statesmanship,” judicial fact-finding. Some of them, particularly Frank and Llewellyn, were aware that something larger than empirical method was needed to supply a professional model for making, practicing, and studying law, and that this model or paradigm involved values, concepts, and theories as well as contact with “reality.” But they thought very little about the probable connections between the level of finding out “how it works” and the level of constructing a paradigm. Similarly, in education they realized that a new “method” of interpreting cases opened up large questions about how to study society and the legal system. But they tended to evade these questions through vague ideals of craft addressed primarily to pragmatic technique, and not directly to the difficult issues of what values the profession should support, how manpower should be allocated and paid for, and what kinds of intellectual, material, and political developments were required to realize their social and educational ideals.

II. The Legacy of Pragmatism

The pragmatists (both inside and outside the law) and legal realists addressed themselves to some of the most important social problems of their time: the structure and content of education, including legal education; the meaning of the “public interest” in the political and economic systems; and the nature and function of law. Their intellectual framework for thinking about these problems was a supposedly neutral method which rejected absolute categories and emphasized the interplay of reason and reality in terms of particular problems and concrete consequences. This framework included, however, a number

\textsuperscript{94} For evidence of such merging, see Levin Goldschmidt’s views as adopted by Llewellyn in The Common Law Tradition, supra note 89.
of submerged and difficult questions. What was never clear, for example, was the nature and source of the "ends" for which instrumental theories were to be used, or of the standards by which the "effectiveness" of solutions was to be measured. The pragmatists proposed, in effect, a methodological (or even epistemological) solution to political problems; the nature of knowledge, and the meaning of law, was asserted to be particular, concrete, and experimental. As heirs of this tradition, it is not surprising that the realists (despite their focus on practice) found themselves caught up in philosophical debates; that they often blended the descriptive and the normative; and that they had difficulty "following through" on the level of educational reform.

The political effects of submerging value questions under pragmatic technique were striking. Pragmatism, which presented itself as a neutral method for enhancing man's capacity to act, tended to become distorted in one of two directions. If the pragmatist used his instrumental theory to dominate reality, i.e. to change social practices so as to conform with his ideas, he could be criticized for violating democratic values of self-determination. "The new radicals [progressive-pragmatists] could speak of the need to liberate the creative energies of mankind and in the same breath talk of 'adjusting men . . . in healthful relations' to one another. The study of the inner man could degenerate into a technique of manipulating him in accordance with your own designs . . . ."96

The temptation of abusive power, however, was rarely available to liberal intellectuals in a pure form; the price of power was almost always the second distortion of pragmatism, namely the general domination of the instrumental theory by the established reality it was supposed to transform. Instead of changing social institutions on the basis of pragmatic reason, the pragmatic reformer often became their apologist and technician. A dramatic example of this "subordination" of thought to power97 occurred in World War I, when the progressive-

95. See W. JAMES, supra note 32, at 45, 158, and the analysis of the political implications of Dewey's philosophy and psychology in C. W. MILLS, SOCIOLOGY AND PRAGMATISM, supra note 51, at 432-33. Expressions of this position by legal realists can be found in LAW AND THE MODERN MIND at 105 and in Llewellyn, Some Realism About Realism, supra note 21, in JURISPRUDENCE at 67.

96. C. LASCH, supra note 31, at 145-146.

97. On "counterrevolutionary subordination," see N. CHOMSKY, Objectivity and Liberal Scholarship, in AMERICAN POWER AND THE NEW MANDARINS (Penguin ed. 1969); O'Brien, Politics and the Morality of Scholarship, in THE MORALITY OF SCHOLARSHIP (Black ed. 1967). Chomsky discusses not only gross examples of scholarship in the service of state power (e.g. "experiments with population and resources control methods' in Vietnam," CHOMSKY, supra at 24), but also an example "of a much more subtle and interesting sort"—the effect of unconscious ideological biases on historical perception of a radical movement. (Id. at
pragmatists around The New Republic, including John Dewey, supported the war as justifiable and beneficial. Randolph Bourne saw in Dewey's stand the end of pragmatism as a critical social philosophy; it could only work, he concluded, in "a society at peace, prosperous, and with a fund of good will."98 In any serious social crisis, "this philosophy of intelligent control just does not measure up to our needs."99

Is there something in these realistic attitudes [pragmatism] that works actually against . . . concern for the quality of life as above the machinery of life? Apparently there is. The war has revealed a younger intelligentsia, trained up in the pragmatic dispensation, immensely ready for the executive ordering of events, pitifully unprepared for the intellectual interpretation or the idealistic focusing of ends . . . . Their education has not given them a coherent system of large ideas, or a feeling for democratic goals. They have, in short, no clear philosophy of life except that of intelligent service, the admirable adaptation of means to ends.100

What divided Bourne from his pragmatist contemporaries was his insistence on considering the submerged questions of value in the pragmatist approach. For Bourne, "efficiency," "least waste," "workability" and other technological expressions of the public good were fraudulent and destructive; the pragmatic "instruments" turned out to mask value choices in much the same way as the logic of the formalists,101 and to serve destructive ends. Bourne's judgment about American involvement in the First World War depended, of course, on his pacifist values and his political analysis. But he could not even state his position until the questions of value which pragmatism masked could be arti-

103) While they did not use the term "subordination," both C. Wright Mills and Robert Lynd made substantially the same point about social science research in America. See The Sociological Imagination, supra note 64, at 119-132, and Knowledge for What?, supra note 64, at 182-185. See also A. Gouldner, supra note 62a, at 490-502.


100. Id. at 128, 130. In our society where intellectuals of many kinds are increasingly employed as technicians of war and social control, Bourne's thoughts have a strikingly contemporary ring. They are quoted, for example, in the introduction to N. Chomsky, supra note 97; see also McDermott, Technology: Opiate of the Intellectuals, N.Y. REV. OF BOOKS, July 31, 1969, at 23.

101. Cf. the discussion of what might be called "the natural law of experts" in J. Shklar, supra note 1, at 96-98. "[T]he concept of 'scientific' expertise] assumes that there is a 'public good' which a wise man—now an 'expert'—can discover and to which all must agree as a proved necessity. It is 'there,' as the law was 'there' for the old courts. . . . The neutrality of expertise is not different from that of the idealized bench. Both demand a politically antiseptic atmosphere in order to deliver decisions that are inescapable by virtue of their rational necessity." (Id. at 97.)
culated clearly, until the level of debate was shifted from the administrative to the political. The core of Bourne’s debate with Dewey was not about the First World War; it was about the social function of reason.\textsuperscript{102}

The outlines of this debate can be seen in the endemic struggle over the role of values in the social sciences;\textsuperscript{103} in the United States, this has often taken the form of a duel between pragmatism and its critics. The critics’ basic point is that any intellectual analysis of a social situation, whether conceived as “purely observational” or as part of a broad social theory or as somewhere in the “middle range,” is necessarily linked to values and carries moral and political implications.\textsuperscript{104} “Reason” can indeed serve, as the pragmatists and realists advocated, as a kind of instrumental technique, finding its values among the products of concrete practices. But this function is not “objective” or “natural;” it is itself a choice with intellectual assumptions and political implications.

As some law schools become increasingly concerned with what is called “social policy,” it seems inevitable that legal scholarship and education will be drawn into the history and contemporary versions of this debate. First, social science, to which many lawyers look for theories and methods, has itself responded to increased social conflict with critical re-examination of its empirical tradition. In political science and sociology, where pragmatist paradigms have been strong, “normative theory” is currently undergoing a renaissance as the limita-

\textsuperscript{102} Rare examples of efforts in American legal scholarship to incorporate this level of analysis include Lasswell & McDougal, supra note 5, and Reich, The Law of the Planned Society, 75 Yale L.J. 1237 (1966). For an analysis of the tendency of “legalistic thought” or “legalism” to assume, promote, and (where possible) enforce an ideology of consensus and agreed-upon rules, see J. Sklar, supra note 1. Discussions of the social function of reason as seen by the progressive and pragmatist reformers can be found in C. Lasker, supra note 31, and M. White, supra note 25. For general discussions of the social function of reason in the social sciences, see, e.g., R. Lynd, supra note 64; C.W. Mills, supra note 64; Marcuse, supra note 64; R. Dahrendorf, Essays in the Theory of Society (1965); Nettl, Ideas, Intellectuals, and Structures of Dissent, in On Intellectuals (P. Rieff ed. 1969); N. Chomsky, supra note 97; and McDermott, supra note 100.

\textsuperscript{103} An excellent discussion of this debate, which assumed a highly structured form in Germany, can be found in R. Dahrendorf, supra note 102, at 1-18.

\textsuperscript{104} See, e.g., R. Lynd, supra note 64, at 185; C.W. Mills, supra note 64, at 87-112. Mills surveys the ideological and bureaucratic uses of economics, statistics, history, and political science, and concludes that “the ideological relevance of social science is inherent in its very existence as social fact. Every society holds images of its own nature—in particular, images and slogans that justify its system of power... The images and ideas produced by social scientists may or may not be consistent with these prevailing images, but they always carry implications for them.” (Id. at 92) “I mention these... implications neither in criticism nor in an attempt to prove bias. I do so merely to remind the reader that social science is inevitably relevant to bureaucratic routines and ideological issues, that this relevance is involved in the variety and confusion of the social sciences today, and that their political meanings might better be made explicit than left hidden.” (Id. at 95-96).
tions of “value-free” science become increasingly evident. And as Kuhn’s work indicates, developments in philosophy and the history of science are generating a more complex picture of what it means to do “empirical observation.” Thus at the very least, if legal scholars are serious about adopting the methods of science and the social sciences, they will find themselves embroiled in debates about the assumptions of the pragmatist tradition.

Second, the pressures of social and political conflict on the law and legal institutions are making it increasingly difficult to accept the pragmatic idea that there are widely-shared values (such as the “public interest”) under which questions of public policy can be settled by rational technique. At least two law professors have recently written about the impact of these pressures on legal education, and have arrived at opposite conclusions. Professor Charles Black has pointed out that the work of the legal profession has been traditionally defined in our culture as work within a social consensus, a kind of fine-grained implementation and generation of social values, and he traces much of the current anxiety in the law schools to the sense that many current “legal issues” born of social conflict cannot be resolved within the standard limits of the legal system.

[T]he lawyer can see that the culture in which he lives, and in which his law must grow or not grow, is light-years away from being ready to put forth the kind of effort and sacrifice it would take to give relief against the injustice of poverty. I have implied that a decent living ought to be a civil right. With this concept, if the society workingly accepted it, lawyers could deal. But the society does not accept it . . . and the lawyer who would mold it into the shape of law feels no clay coming into his hands.

The lesson, as I read Professor Black, is that lawyers cannot rush in with realist enthusiasm to “solve social problems”; the struggle for their solution, at this time, requires skills and efforts far different from what the legal profession has ever done or could reasonably be expected to do. The job for the law schools, in such a period of social conflict, is to contribute their special and traditional skills of “keen


thought and research . . . about the rational governance of our polity" to the necessarily larger and essentially "non-legal" efforts at social change.

Professor Black's argument is directed at protecting a tradition of analysis and evaluation—"the reason of the law"—against movements to transform legal education into a vehicle for "involvement" and the "present relief of misery." Professor Paul Savoy is also critical of certain kinds of reform efforts in the law schools, but his criticism leads in a very different direction. He too takes sharp issue with the assumption "that lawyers have all the theoretical structures they need . . . and only require the janitorial services of other disciplines to collect and [process] the facts with which to confirm the visions they have already fashioned . . . ." Such an assumption is particularly untenable in times of social conflict, when traditional legal concepts of reasonableness and general utility serve to mask deep divisions not only about the solutions of social problems, but also about their very definition. The "reason of the law" thus appears to Savoy not as the skills of rational criticism, but as an ideological tool in the service of particular interests and values. Arguing that traditional legal education is psychologically destructive as well as intellectually bankrupt, Savoy advocates radical revision of theory, practical techniques, and the day-to-day details of the educational experience.

Despite their different implicit values, the positions of both Professors Black and Savoy raise the problem of how law and politics are to be studied and understood in a time of social conflict and change. For the pragmatists, such understanding was to be achieved primarily by avoiding rigid doctrines and testing concepts against an easily-understood reality. Their approach assumed an underlying harmony of values in which there was broad agreement about the "meaning" of particular controversies and the nature of their just or equitable resolution.

107. Id. at 510.
108. Id. at 511.
109. Id. at 506.
110. Id. at 510. Professor Black's article makes it quite clear that he is a strong supporter of lawyers who devote their energies to the "present relief of misery." His point is only that law schools serve particular intellectual functions which should not be weakened in favor of more "activist" forms of education.
112. Id. at 470-71.
113. Id. at 451, 471, 497-98.
114. Id. at 457-62, 481-84.
115. See id. at 485-96.
Such agreement cannot easily be assumed today. The result is a difficult challenge for the teachers and students of an intellectual craft: the need not for new facts alone, but for new ways of understanding facts and for working with that understanding.