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THE MATERIALS OF LAW STUDY.

Brainerd Currie *

PART THREE †

NONLEGAL MATERIALS IN THE LAW SCHOOL:
BEGINNINGS OF THE MODERN INTEGRATION
MOVEMENT

I

THE MOST significant development in American legal education since 1870 is the movement toward reorganization of courses along functional lines and toward the broadening of law school studies to include nonlegal materials, chiefly from the social sciences, which are relevant to legal problems. This movement may be regarded as having had its origin in the extensive studies of legal education undertaken by the faculty of the Law School of Columbia University in 1926-27 and 1927-28.†

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† Parts One (Introduction) and Two (The Relation between General Education and the Study of Law: Historical Background) were published in 3 J.LEGAL EDUC. 331 (1951). Like the first two parts, this has been submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law, in the Faculty of Law, Columbia University.

† See Part One of this study, 3 J.LEGAL EDUC. 331, 332 et seq. (1951), where the basis for and the limitations of this view are developed. Under the leadership of Professor Leon C. Marshall, of the University of Chicago School of Business, the Columbia faculty met for "extended weekly sessions" during the second half of the academic year 1926-27 and "for a number of such sessions" in 1927-28. The record of these studies is in two forms: (1) Some seventy-five mimeographed reports and other documents, totaling about 1100 pages, and known as the Memoranda of the Marshall Conferences. A set is in the library of the Law School at Columbia. The author is deeply indebted to Professor Robert L. Hale, who, in order to facilitate this study, made available a collection of the documents which he had personally preserved and, to some extent, annotated. This collection was assembled and bound, together with copies of certain missing documents, by Mr. Louis Flacenza, of the Law Library of the University of California, Los Angeles, and is deposited in that library. Wherever possible, citations to these materials will be by document number, to facilitate reference to either collection; when page numbers must be referred to, the pagination will be that of the U.C.L.A. collection; (2) a printed summary of the memoranda (SUMMARY OF STUDIES IN LEGAL EDUCATION).
The general purpose of this study is to interpret and clarify the objectives of the movement, to appraise its current practical significance, and to estimate the prospects for its further development. The immediate purpose of the present portion of the study is to examine in detail the reasoning which gave the movement impetus at Columbia and the steps which were taken to put the new program into operation.

If the movement had its origin in the Columbia studies, those studies, in turn, had origins of their own. The latter were of two kinds: (1) ideas about law—chiefly, the ideas of sociological and realist jurisprudence; and (2) specific curricular problems growing out of experiments by individual teachers with course organization and materials. An inquiry into the relationship between the developments in legal philosophy and in legal education is projected for a subsequent part of this study. For present purposes, we are concerned primarily with the immediate antecedents of the events at Columbia in the late Twenties.  

At the close of World War I, the curriculum of the Columbia Law School was, on the whole, a conventional one. There was an emphasis on constitutional law which was uncommon among law schools at that time and which may have reflected the close relationship which was...
established between the Law School and the political science department in the time of Lieber and Burgess.\textsuperscript{3} There were, and had been for some time, courses in Roman law, modern civil law, and legal history, and the "better class" of students were urged to take some of these.\textsuperscript{4} There was a course in historical and comparative jurisprudence, which may have been inspired to some extent by the Redlich report.\textsuperscript{5} Apart from these features, and predominantly, the curriculum was devoted to the doctrinal categories of equity and the common law which had long since become standard in American law schools.

In the course of the next five years, however, some unorthodox tendencies emerged. Even while bringing out a second edition of the basically doctrinal casebook on bills and notes of which he was co-editor, Professor Underhill Moore was at work on a book designed to present the subject in terms of the business function of commercial paper.\textsuperscript{6} In 1922–23, two novel courses appeared in the third-year program: Industrial Relations, taught by Professor Noel T. Dowling, and Illegal Combinations (which in the following year became Trade Regulation), taught by Professor Herman Oliphant.\textsuperscript{7} At the same time, a course in legal economics, offered by Professor Robert L. Hale, was introduced into the list of "special courses."\textsuperscript{8} To students looking forward to careers in government, the law faculty was commending courses under the Faculty of Political Science, with the objective of supplementing the instruction in "private municipal law" offered by the Law School. The attention of graduate students was being drawn to courses in the School of Political Science, the School of Business, and the Department of Philosophy by way of indicating the availability of instruction in "matters more or less intimately connected with the study of law."\textsuperscript{9}

It was the development of the courses in industrial relations and trade regulation, with their challenge to the accepted taxonomy of the law and their disturbing impact on the unity and the proportions of the curriculum, which was directly responsible for the extensive studies which

\textsuperscript{3} \textit{Columbia University Bull. of Information: Catalogue 194 et seq.} (1918–19). As to Lieber and Burgess, see Part Two, \textit{3 J. Legal Educ.} 331, 377 et seq. (1951).
\textsuperscript{4} \textit{Catalogue 194} (1918–19); Stone, \textit{Papers and Discussion Concerning the Redlich Report, 4 Am. L. School Rev.} 91, 94 (1916).
\textsuperscript{5} \textit{Catalogue 194} (1918–19); Stone, \textit{supra} note 4, at 94.
\textsuperscript{6} Llewellyn, Book Review, 22 \textit{Columbia L. Rev.} 770 (1922).
\textsuperscript{7} \textit{Catalogue 246} (1922–23); \textit{School of Law Announcement} 28 (1923–24).
\textsuperscript{8} \textit{Catalogue 246} (1922–23); \textit{School of Law Announcement} 30 (1923–24). Special courses were open to all except first-year students, but not more than six points earned in such courses could be counted toward the LL.B. degree. Other courses in the list were Admiralty, English Legal History, History of European Law, Law of Water Rights, Legal Research and the Use of Law Books, Modern Civil Law, Rate Regulation, Readings in the Digests of Justinian, and Statutes.
\textsuperscript{9} \textit{School of Law Announcement} 16, 33 (1923–24).
the faculty undertook four years later. This is a fact worthy of more than passing notice. Nowadays the phrases "functional approach" and "integration of nonlegal materials" are, to a number of law teachers, trite symbols of frustration. It is enlightening to recall that the essence of what these symbols represent is embodied in two such familiar and thoroughly established components of the law curriculum. The realization that modern legal education has profited, at least in some of its departments, from the movement toward functionalism and integration gives focus to the problem of understanding that movement: After so durable a beginning, why did the development bog down? Was it that the ideas involved were workable only in a few special areas, so that their force had been substantially spent before they became a cause? Was it because of stubborn conservatism on the part of law teachers generally? Was it because the extension of the new ideas to the entire curriculum was pressed too rapidly and with too much zeal? Was it because something of basic professional and pedagogical value was sacrificed by a method which loosed legal education's moorings in the doctrinal systematics of law—a sacrifice which could be tolerated in only a few specialties superimposed on a fundamentally doctrinal curriculum? Was it because some teachers departed from original purposes and sought to direct the development along lines unacceptable to some who had welcomed the initial experiments? Was it that the contribution of the social sciences was relatively obscure and inaccessible, or even nonexistent, so that law teachers despaired of the task they had set themselves? Was it, perhaps, because the new treatment exposed issues which the law schools were not ready to confront and revealed too sharply the element of human judgment in a system which had been widely regarded as impersonal?

Considering the sharpness of the break they made with tradition, the new courses evoked surprisingly little criticism when they were announced. They filled a need which was recognized among a wide circle of teachers and practicing lawyers, and there was no necessity for an elaborate theoretical justification of the development. The importance of

10 "For a number of years an increasing number of individual members of the Faculty... had been studying and discussing some of the major defects in legal education. This unorganized activity resulted in important changes in some of the courses offered in the Law School and in the introduction of two new courses conceived and organized along functional lines, namely, Industrial Relations and Trade Regulation. It served also to kindle general interest in the matter and resulted in the Faculty's voting to undertake a comprehensive study of the whole subject of legal education with the view to devising, and putting into effect, plans for its improvement." SUMMARY OF STUDIES 5.

11 Oliphant's casebook (Cases on Trade Regulation (1923)) did not even contain a preface. Professor Francis Sayre, of Harvard, whose book (Cases on Labor Law (1922)) was used in the course on industrial relations, devoted less than a page to preliminary explanation, the only reference to the novelty of the work being con-
labor problems and of government control of business had become apparent; equally apparent was the fact that inadequate preparation for a lawyer's dealing with such problems was afforded by the scant attention which could be given them in the standard courses through which the relevant materials were scattered. Opinion was well prepared for such a development. Indeed, neither course originated in Columbia's hotbed of discontent: both had previously been offered at Harvard. Reviewers almost with one voice welcomed the casebooks which accompanied the new courses—Sayre's *Cases on Labor Law* and Oliphant's *Cases on Trade Regulation*—though most of them were somewhat perturbed on account of the problems of curricular adjustment which were fore-shadowed. The new casebooks borrowed materials from various basic courses, and the question arose: Was there to be duplication, or were these materials to be withdrawn from the basic courses where the doctrinal context afforded the optimum setting for study? By and large, the reviewers were inclined to regard this as a minor problem when measured alongside the improvement which the new casebooks offered. Thus, Professor Cathcart was willing to accept the consequence of duplication, as he indicated in a review of Oliphant's book:  

But by including chapters on intimidation, disparaging goods and services, inducing breach of contract and boycotting, he seems, in the interest of logical completeness, to have claimed for the course in trade regulation a substantial part of the course in torts. Should these topics be omitted from torts? . . . [I]t is submitted that although important problems in
present day competitive practices are, and owing to time limitations must be, inadequately treated in the course in torts, these problems cannot be regarded as purely factual and isolated from their doctrinal setting in law. . . . The truth is that from a pedagogical standpoint much good and no substantial harm can come from treating these topics in both courses, in the one somewhat generally, in the other intensively. Here, as in the case of labor law, a certain amount of duplication will be advantageous.

One reviewer permitted his concern over this problem to develop into doubt as to the justification of the entire project:  

The recognition of these familiar cases . . . again raises sharply the question whether a course based on this collection of authorities will not prove to be, in so far as it deals with "straight law," but a rehearsal under special states of fact, of principles necessarily treated in other courses, and, in so far as it treats of sociology, out of place in the law school.

In the chorus of approval, there was only one note that sounded like intractable conceptualism. In a laudatory review of Trade Regulation, Professor Robert S. Stevens inserted a dictum questioning the development of labor law as a separate course:  

There is room for criticism, however, of the policy and need of giving isolated attention to the law with regard to the problems involved in buying and selling labor and in buying and selling commodities. The principles underlying the law of conspiracies, of restraint of trade, of competitive methods, and of illegal combinations, control the liberty of the individual and protect the public whether the individual is attempting to make his living by the sale of his goods or the sale of his labor. Vastly more important than saving the student from duplication of material presented, is the opportunity that is afforded for emphasizing the correlation of legal principles which affect the vendor of goods and the vendor of labor.

The new courses differed in three ways from the traditional pattern. The first difference, of course, consisted in the organization of materials in terms of social and economic problems rather than of legal doctrine. The course in trade regulation was based on segments of Contracts and Torts and cut across Equity, Criminal Law, Corporations, and perhaps other traditional categories; Industrial Relations borrowed from Contracts, Torts, Agency, Equity, and Constitutional Law, among others.


16 8 CORNELL L.Q. 405, 406 (1923). The comments in the text are based on the following reviews in addition to those which have been quoted: of Francis Sayre, Cases on Labor Law: Llewellyn, Book Review, 33 YALE L.J. 226 (1923); Goodrich, Book Review, 21 MICH.L.REV. 716 (1923); and Dowling, Book Review, 23 COLUM.L.REV. 202 (1923); of Herman T. Oliphant, Cases on Trade Regulation: Henderson, Book Review, 36 HARV.L.REV. 1045 (1923); Haines, Book Review, 33 YALE L.J. 224 (1923); Magill, Book Review, 21 MICH.L.REV. 825 (1923); and Frankfurter, Book Review, 72 U.P.A.L.REV. 335 (1924).
Secondly, both courses proceeded on the assumption that certain non-legal materials were directly and pointedly relevant. Oliphant’s case-book opened with thirty-three pages of economic history. Sayre, besides referring to economic and sociological studies, printed as an appendix a report on minimum subsistence and comfort budgets. A connection is traceable here which throws clear light on the purposes to be served by nonlegal studies. In his brief in *Muller v. Oregon*, fourteen years earlier, Brandeis had demonstrated how economic and sociological materials could be used to win a lawsuit; the significance of that development for the training of lawyers was beginning to be appreciated. Thirdly, both courses utilized statutory materials to an extent which was unusual. This was particularly true of Trade Regulation (Oliphant’s case-book carried the texts of the Sherman Act, the Federal Trade Commission Act, and the Webb Act as an appendix); but Sayre gave considerable attention to the historical role of legislation in labor problems, to modern regulatory legislation, to systems of compulsory arbitration in other countries, and to workmen’s compensation. In this difference, as well as in the first two, the two courses embodied the new idea in legal education; for the attention given to legislative measures emphasized the role of creative reason, as opposed to deduction from a priori principles, in the solution of social and legal problems.

The record does not show precisely the course of developments at Columbia during the next four years leading to the decision to re-examine the whole field of legal education; but the general outline can be reconstructed with some confidence. The probability is that the problems of curricular adjustment—toward which the reviewers, on the whole, had adopted a sanguine attitude—proved unexpectedly troublesome in practice. Granting that the new courses filled a need, had the Law School adequately met that need simply by adding them to a curriculum which already had more content than could be covered in three years? The student who elected one of these specialties did so at the cost of forgoing some traditional subject; the consequent loss in terms of information and of doctrinal training was bound to cause concern. As for making room for the new courses by reducing the time allotted to those from which materials had been borrowed, it is not to be supposed that the

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17 “The assumption underlying Professor Oliphant’s Cases is that a prerequisite to the law’s capacity to deal with these problems is the conscious formulation of the issues and the systematic analysis of the factors entering into any accommodation. To that end the various considerations by which the law’s balance is struck—logical coherence, history, social environment, the source and knowledge of relevant data, society’s presuppositions (‘the inarticulate major premise’)—must be brought together in a comprehensive whole and systematically tested.” Frankfurter, Book Review, 72 U.P.A.L.REV. 335, 336, (1924).


19 *208 U.S. 412* (1908).
Columbia faculty was devoid of that reasoned possessiveness which Professor Cathcart had expressed in his review, and which is always evoked by proposals to take away an hour. Yet, the student who did not take Industrial Relations and Trade Regulation was missing something of acknowledged importance. The problem must have assumed alarming proportions as the prospect of additional new courses, similarly constructed, began to open. The first two experiments had been favorably received, and numerous institutions and problems suggested themselves as susceptible of similar treatment: the family, the business organization, the marketing process, crime. The flame spread through the faculty, and there is no reason to suppose that such a crusader as Oliphant was innocent of incendiaryism. By 1926, the graduate curriculum was devoted almost entirely to seminars of the institutional type and was clearly serving as a proving ground for ideas which were clamoring for inclusion in the undergraduate course. At the same time, the list of “other officers giving instruction in the Law School” was expanded to include professors of political economy, philosophy, social legislation, business administration, finance, transportation, economics, government, and marketing.20 The problem of what was to happen to the curriculum had become acute.

At some point early in this four-year period, the idea was developed that the solution to the problem was to reorganize the entire course of study along functional lines. This is a fact of basic importance. It provides the central theme for the studies of legal education which the faculty undertook; it accounts for the paradox that inclusion of nonlegal materials in the course of study was actually advocated as a simplification device—as part of a scheme for enabling the Law School to keep pace with the skyrocketing demands of an increasingly complex legal system; and it provides, also, one possible key to understanding the fate which overtook the movement. The idea was variously expressed by spokesmen for the proposed reorganization, but it is never so intelligible as when it is considered in the setting of the familiar problem of accommodating competing demands for the law student’s time. In its simplest form, the argument went somewhat like this: The difficulty grows out of the attempt to engraft specialty courses of the functional type on a course of study that is fundamentally doctrinal. As long as the law school clings to the doctrinal classifications as the basis of instruction, duplication is inevitable; but duplication can be eliminated if functional classifications are consistently substituted throughout the curriculum. There is nothing sacred about a particular scheme of classification; since the new system has proved its utility in certain fields, it is worth trying

20 School of Law Announcement 3, 32 et seq. (1926-27).
in others and should be applied to others for the purpose of removing
an obstacle to its employment in the fields to which it has been success-
fully applied.

Dean of the Law School during the formative years of this movement
was Harlan Fiske Stone, surely no visionary pedagogical theorist. It
would be inaccurate to refer to him as the leader of the movement;
clearly, the driving force was supplied by Oliphant. Nevertheless,
Stone had appreciated the implications of sociological jurisprudence for
legal education as early as 1915; and, as the spirit of innovation began
to spread through the curriculum and to suggest an institutional policy,
he became its official spokesman. In the very act of explaining the new
directions which were being taken by the Columbia faculty’s thinking, he
took occasion to affirm his distrust of “educational nostrums” springing
from “a kind of competitive zeal . . . . [t]he desire to do some-
thing distinctive, to give some evidence of originality, to attract public
attention, or to secure patronage . . . .” At about the same time,
he openly questioned whether there could be any such thing as a method-
ology built upon sociological jurisprudence which would have utility for
either legal education or the judicial process. But the fact that he was

A graduate of the Columbia Law School in the time of Keener, Stone came
to the deanship in 1910 with seven years of experience as a partner in a New
York law firm as well as with teaching experience. In 1923, he resigned to re-enter
the practice; in 1924, he was appointed Attorney General; the following year, he
was appointed to the Supreme Court, and in 1941, became Chief Justice. See Smith,
Harlan Fiske Stone: Teacher, Scholar and Dean, 46 COLUM.L.REV. 700 (1946).

It was Oliphant who acknowledged an inspiration to this kind of reform dat-
ing from 1914. ASS'N OF AM. L. SCHOOLS, HANDBOOK 52-53 (1928); see Part One, 3
J.LEGAL EDUC. 331, 335 (1951). It was he who devised Columbia’s first functional
course and casebook (on trade regulation). The casebook, incidentally, was dedi-
cated to Professor Leon C. Marshall, of the University of Chicago School of Busi-
ness, who was later chosen to preside over the Columbia faculty’s studies. It was
Oliphant who was chosen to summarize for publication the studies made by the
faculty. The memoranda of the Marshall conferences are replete with evidences
of his leadership. And see note 36 infra.

COLUMBIA UNIVERSITY, REPORT OF THE DEAN OF THE SCHOOL OF LAW 7, 15
(1915); id. at 8 (1916).


“Growing recognition of this truth has led legal thinkers in recent years to
subject the judicial process to critical examination, and to direct their energies to-
ward the discovery of some principle, some ‘methodology’ whereby case law might
be guided to a development more systematic, more consistent with principle and
more harmonious with social needs. The result of these investigations has been to
place great emphasis on the ‘method of sociology’ or ‘sociological jurisprudence’
and to establish in our legal thinking that trinity of judicial theory—logic, history
and the ‘method of sociology’—as the source of all true legal doctrine. We are told
that the application of logic and history must be tempered by the ‘method of
sociology,’ and that we must enlarge our scheme of jurisprudence so as to embrace
within it the operations of a program of ‘social engineering.’

“It is not a novel idea, that in declaring law the judge must envisage the social
utility of the rule which he creates. In short, he must know his facts out of which
the legal rule is to be extracted and in a large sense they embrace the social and
economic data of his time. Many years ago, Mr. Justice Holmes in classic phrase
a conservative and critical participant rather than a dedicated leader makes his interpretation of the movement all the more significant. The ideas which he could advance by way of public explanation were only those which had passed the test of his skepticism.

Stone's report as dean for the year 1923 was the first comprehensive exposition of the ideas involved in the agitation for reorganization of the Columbia curriculum. Present day problems of legal education, he wrote, "... arise ... from our traditional attitude toward the law as a body of technical doctrine more or less detached from those social forces which it regulates. We have failed to recognize as clearly as we might that law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics and the social sciences generally." Then he turned, rather abruptly, from this philosophical theme to the familiar, practical problems of the expanding curriculum. The preceding fifty years had witnessed an enormous expansion in the coverage and content of the law; the response of the law schools had been to add more and more courses—Stone mentioned, among others, Unfair Competition, Restrictions on Trade, and Industrial Relations—"and withal every in-

reminded us that 'the life of the law is not logic but experience.' If this is what is meant by the sociological method and by sociological jurisprudence, it is the method which the wise and competent judge has used from time immemorial in rendering the dynamic decision which makes the law a living force. Holt, Hardwick, Mansfield, Marshall and Shaw employed it long before the phrase sociological jurisprudence was thought of. But can we in any proper sense speak of the application of this principle as a 'method'? Has sociological jurisprudence any methodology, any formulae, or any principles which can be taught or expounded so as to make it a guide either to the student of law or to the judge? History and logic are guides but has sociological engineering been reduced to a science and does it embody such formulae or principles as will enable the judge to render a just decision except by the application of that practical wisdom which characterizes the decision of the great judge and distinguishes him from those who are not so great? If not, then sociological jurisprudence will not tend to reduce the accumulation of anomalous doctrines; it may even add to it. At most it warns the judge and the student of law that logic and history cannot, and ought not, to have full sway when the dynamic judgment is to be rendered. It points out that in the choice of the particular legal device determining the result, social utility, the mores of the times, objectively determined, may properly turn the scale in favor of one and against the other; and it should lead us as lawyers and students of law to place an appropriate emphasis on the study of special data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies. Sociological jurisprudence, rightly understood, ought to give a new inspiration and a new trend to legal development, but we must have other resources if we are to make of the common law the great and abiding system which it may become." Stone, Some Aspects of the Problem of Law Simplification, 23 Colum.L.Rev. 319, 327-28 (1923).

26 Columbia University, Report of the Dean of the School of Law (1923). The substance of this report is contained in the article, Stone, The Future of Legal Education, 10 A.B.A.J. 233, 5 Am.L.School Rev. 329 (1924). References herein will be to the more conveniently available article.

structor continuously and persistently presses for an increase in the time allotted to his subject in order that he may treat adequately its ever expanding technique.”  He rejected as futile the minor mechanical expedients which had been advanced: superficial treatment of lesser courses, elimination of overlapping, and the extension of the law school course to four years. In the statement of his solution of the problem, he returned to his introductory theme:

Instead of dissipating our energies in the vain attempt to master in the brief period of three years the vast and growing mass of technical learning of our profession as an independent and detached system, we must seek a simplification of educational methods by coming closer to those energizing forces which are producing the technical doctrine of the law. We may hope to do this by reaching a clearer and more accurate understanding of the relation of law to those social functions which it endeavors to control and by studying its rules and doctrines as tools or devices created and placed in the hands of the lawyer as means of effecting that control.

In the execution of this policy, two subsidiary problems would be involved. The first was that of “so rearranging and organizing the subjects of law school study as to make more apparent the relationship of the various technical devices of the law to the particular social or economic function with which they are concerned . . . .” Such a functional classification had, of course, been basic to the concept of the courses in trade regulation and industrial relations. By way of illustrating how the idea could be applied elsewhere in the curriculum, Stone advocated the development of two other courses which have likewise become familiar: Creditors’ Rights, which would assemble materials from courses on procedure, equity, practice, trusts, and bankruptcy; and . . .

28 Ibid.
29 His rejection of the four-year course is significant in view of the point, made earlier in this study (3 J. LEGAL EDUC. 331, 332 n. 3), that the integration movement is not to be indiscriminately identified with the various four-year plans. Stone was attracted to the reorganization plan, with its resort to non-legal materials, as a promising alternative to such devices. A fourth year, merely as such, would operate only to allow the law school to catch up temporarily with the expanding mass of legal materials. Yet, the Columbia faculty did not take a position inconsistent with Stone’s when, a few years later, it reconciled itself to the probability that a program of reorganization and integration, such as Stone had suggested, would require the addition of a year to the curriculum. Stone himself doubtless would have agreed that a fourth year was justified if its addition were necessary to accommodate a type of treatment which might stabilize the curriculum and ward off indefinite expansion.
31 Ibid.
32 Id. at 235. Cf. the Preface to JOHN HANNA, CASES AND MATERIALS ON CREDITORS’ RIGHTS (1931). Some years earlier, Garrard Glenn had published a text on the same subject, containing “the substance of a special course of lectures delivered at the Law School of Columbia University. . . .” GARRARD GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR’S PROPERTY (1915).
Security, which would draw together, on the basis of their common function, all security devices, regardless of their disparate origins and conceptual classifications.\textsuperscript{33}

But no reclassification, merely as such, could rise above the level of a mechanical solution. The particular virtue of the functional classification was that it would reveal the relationship of law to social functions; it would make clear the relevance and facilitate the application of other stores of knowledge and understanding about those functions. Reclassification and the resort to extra-legal insights into social processes were inseparable parts of the simplification scheme. The second problem of execution, therefore, had to do with the training of law students in the social sciences. Stone put the problem solely in terms of prelegal education. “It is, I think, quite obvious that if law is a study of a method of social and economic control, then the student in order to be adequately prepared for its study ought, not only to have good mental discipline, but he ought to have a thorough-going knowledge of the social functions with which the law deals.”\textsuperscript{34} He expressed dissatisfaction with the training afforded by the undergraduate departments as reflected in the capacities of law students: too often that training was unsystematic, superficial, or fragmentary. In closing, he called for development in the colleges of courses of study which would provide a basic understanding of the social and economic order.

The language of Dean Stone’s report was matter-of-fact. There was no proclamation of a new era; there were only the rather worried comments of a dean on the perennial problem of how the law school is to do its job. Yet, in context, in the history of legal education, the report was a document of major significance. It affirmed a relationship between law and other social studies which had been neglected or denied for nearly a century. The relationship was one so vital that, according to this thesis, effective legal education was dependent on other social studies. What was to be done if it should develop that no satisfactory arrangements could be worked out to insure adequate pre-legal training in the social sciences? In that event, unless Stone’s thesis was to be abandoned, its logic required that the necessary social science training be provided in the law school itself. This was precisely the line along which the thinking at Columbia developed. When, three years after Dean Stone’s report, the faculty, under Dean Jervey, turned its organized energies to the task of putting the program into execution, it was confronted almost at once with the realization that to require a competence in the necessary social studies as a condition of admission to the Law


\textsuperscript{34} Stone, The Future of Legal Education, 10 A.B.A.J. 233, 235 (1924).
School would be impracticable. It would be difficult for the Law School to define the training it desired; it would be difficult to persuade colleges to offer precisely what was defined; and the Law School could control the quality of the work done only by a rigid system of entrance examinations.\textsuperscript{35} A more significant objection was also voiced: "Such training though good will always remain a background. Only the heat of contemporary study can adequately fuse the two bodies of knowledge." \textsuperscript{36} Accordingly, the faculty found itself faced with the question whether it was under "a minimum duty of partly meeting the problem by fusing (not scrambling and not making available in parallel courses) certain social science material with legal material." \textsuperscript{37} It came to answer the question in the affirmative, with enthusiasm, as the potentialities of such a program began to unfold: "Training openly directed toward the end of inculcating the scientific attitude is needed in the law school.\ldots\textsuperscript{38} That nonlegal material which is necessary for giving the course in a fertile manner is just the material which needs to be poured into the teaching of law.\ldots\textsuperscript{39} A reorganization of legal education will require the addition of much new material including methodological matter and matter drawn from philosophy and especially from the other social sciences." \textsuperscript{40} When the deliberations reached this stage, the modern movement toward integration of nonlegal materials with the law school curriculum had been defined.

\textbf{II}

This definition, it has been suggested, was, at least potentially, an epoch-making event in American legal education. When Dean Stone

\textsuperscript{35} \textit{Summary of Studies 42}; Document No. 27. See also Documents 5, 6, 12, 15, 20, 21, 22, 29, 48, 62, 64.
\textsuperscript{36} Document No. 62 (Oliphant) at 547. This document was published (Oliphant, \textit{The Future of Legal Education}, 6 AM. \textsc{Law} School Rev. 329 (1928)) with a note explaining that it had been written for private circulation \textit{six years earlier}—an explanation which sheds further light on the specific origins of the Columbia studies.
\textsuperscript{37} \textit{Summary of Studies 43}. It was thus that the four-year element came into the discussions. "It seems clear that, when there is added to the present law school curriculum the amount of new material necessary to make it a well rounded and liberalizing thing, it will be necessary for a student to spend more than three years in the Law School.\ldots\textsuperscript{40} If the time which the student spends in the law school is to be increased so that this new material may be fused with the legal material to which law students have hitherto been exposed, a year must be added either at the beginning or at the end of the present law school course." \textit{Id.} at 37, 39. This was a prospect which no one faced with enthusiasm. The feeling was that postponement of the student's entry into professional life had already gone as far as it could go consistently with the best interests of the student and of society. Document No. 27 at 114; \textit{Summary of Studies 35}. (Columbia required three years of college for admission to the three-year law course.)
\textsuperscript{38} \textit{Summary of Studies 88}. (Italics supplied.)
\textsuperscript{39} \textit{Id.} at 86.
\textsuperscript{40} \textit{Id.} at 12.
wrote his report in 1923, there lay behind him three well-marked periods in terms of attitudes toward the place and function of nontechnical studies in the university training of the lawyer. The first was the period of the “academical” professorships, beginning in 1779 with George Wythe at William and Mary and continuing with James Wilson, James Kent, George Nicholas, Henry St. George Tucker, David Hoffman, and Isaac Parker. In this period, a college education was esteemed not only for its cultural, social, and political values, but also for its practical contribution to the lawyer’s professional competence. Moreover, the university study of law itself was closely linked with philosophy, political economy, and ethics—that is, with the whole body of knowledge concerning social problems. The second period began when the university law schools, or departments, founded at Virginia and Harvard in the broad tradition of the professorships, eliminated educational requirements for admission and adopted a narrowly technical definition of the scope of legal education itself. This they did reluctantly, under the multiple pressures exerted by extreme democratic doctrine, competition from inferior institutions for law study, and the expanding mass and complexity of technical materials. Almost at once, however, enduring justification for the isolated position thus assumed was forthcoming in the analytical jurisprudence of John Austin—a declaration of the independence of legal science from philosophy and morals. During the next half-century, there was virtually no formal correlation of general education with the study of law. Law school curricula were confined to technical subjects, educational entrance requirements were nonexistent, and, except in the South, parallel work in college and law school was discouraged. The third period was that of the restoration of educational requirements for admission to law school. This change of attitude did not reflect a renewed appreciation of any vital relationship between law and other disciplines. Its purpose was to make the law school population reasonably homogeneous and as literate as possible, and to help close the “easy-swinging doors” of the profession against “the idle, the

41 See generally Part Two, 3 J. LEGAL EDUC. 331, 341 et seq. (1951).
42 “The law is a science . . . unavoidably and intimately connected with the affairs of human life. . . . Forms, however necessary an acquaintance with them may be for conducting aright the concerns of mankind, are still but the ensigns of human weakness; they are therefore to be considered only in their relative qualities; the regulations they mark out are adapted not to the elevation, but to the depression of the human intellect, which is incapable of receiving many ideas, or of comprehending many objects at once. . . . Besides, I am induced to believe, that by thus understanding the connection between the forms and the spirit of your profession, you will be enabled to act a superior part even in the very sphere which technical men have appropriated to themselves,” JOHN RAYTHY [?] , THE STUDY AND PRACTICE OF THE LAW 141, 143, 144 (1st American ed. 1800).
43 Austin’s Province of Jurisprudence Determined was originally published in 1882.
The movement reached its peak—indeed, attained almost its full development—when the Association of American Law Schools, in 1921, adopted the resolution which required its members, by 1925, to establish an admission requirement of two years of college work. Dean Stone wrote his report for 1923 just at the close of this period, and the valuation he placed on nontechnical studies draws significance from what had gone before.

It is instructive to compare the developments at Columbia in the 1920’s with those at Harvard in the 1820’s, and to do so in terms of the leading spokesmen for the respective developments: Harlan F. Stone and Joseph Story. Like Story, Stone was a leader in legal education as the head of a national law school in a time of change; like Story, he was to become, in addition, one of the great justices of the Supreme Court of the United States. Each of the two men had profound faith in the common law; each of them was apprehensive on account of its enormous and uncontrolled growth through the multiplication of ad hoc determinations. Facing this problem as jurist and educator, each expressed his distrust of codification as a remedy and placed his faith in—

44 Finch, Legal Education, 1 Colum. L. Rev. 94, 103 (1901).
45 Ass’n of Am. Law Schools, Handbook 123–133 (1921). A belated further step was taken in 1950–51, when the American Bar Association and the Association of American Law Schools advanced the requirement, or standard, to three years. After thirty years, the effective motivation of this type of requirement remained substantially unchanged. See Ass’n of Am. Law Schools, Handbook 17, 64 et seq. (1950).
46 No doubt the temptation to be precise about the preceding three periods should be resisted, but the significant dates appear to be: 1779 (establishment of the professorship of “Law and Police” at William and Mary); 1829 (reorganization of the Harvard Law School under Story); 1874–75 (establishment of educational requirements for admission by Columbia, Yale, and Harvard); 1921 (action by the Association of American Law Schools requiring two years of college for admission).
47 No more is claimed than that these men were spokesmen for the educational policies in question. The reasons for not attributing to Stone a more direct responsibility for the developments at Columbia have been stated above; as to Story, see Part Two, 3 J. Legal Educ. 331, 361–367 (1951).
48 Story, Address before the Suffolk Bar, 1 Am. Jurist 1 (1829); Story, Inaugural Discourse, Miscellaneous Writings 440 (1833); Stone, Some Aspects of the Problem of Law Simplification, 23 Colum. L. Rev. 319, 321, 326 (1923).
49 “More than one hundred and fifty volumes of reports are already published, containing a mass of decisions. . . . The danger indeed seems to be . . . that we shall be overwhelmed with their number and variety. . . . The mass of the law is, to be sure, accumulating with an almost incredible rapidity, and with this accumulation, the labor of students as well as professors, is seriously augmenting. It is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists.” Story, Address before the Suffolk Bar, 1 Am. Jurist 1, 31, 32 (1829). See also his Inaugural Discourse, Miscellaneous Writings 440, 459 (1833). For a similar lament by Stone a century later, see the article cited in note 48 supra, at page 320.
50 “We ought not to permit ourselves to indulge in the theoretical extravagances of some well meaning philosophical jurists, who believe, that all human concerns for the future can be provided for in a code speaking a definite language.” Story, Address before the Suffolk Bar, 1 Am. Jurist 1, 31–32 (1829). “Codification . . . has always been anathema to those trained in the methods and habits of thought of the English common law. . . . [B]y the very process of codification we
stead in a systematic restatement of legal principles. For Story, the "one adequate remedy" was the gradual compilation of a digest, modeled on the Pandects of Justinian, of those principles of law which had acquired scientific accuracy; by this means, he hoped "in a great measure, [to] get rid of the necessity of appealing to volumes, which contain jarring and discordant opinions . . . ."51 Stone, likewise invoking the experience of Rome, had a surer basis for his hope that a restatement of the law might be realized; the plans of Mr. Elihu Root were well advanced, and the American Law Institute was to be organized within the month.52 How closely their views coincided may be judged from the position to which each would have assigned such a digest, or restatement, in the hierarchy of authority. In Story's conception, while the digest might supersede "the immense collections of former times, and [leave] them to perish in oblivion," it was obvious that it could "apply only to the law, as it has been applied to human concerns in past times . . . .";53 it could not be relied on to provide solutions to future problems. When, in 1836, he came to recommend the "codification" of certain portions of the common law of Massachusetts, he did so with important reservations:54

1. The code is to be interpreted and applied to future cases, as a code of the Common Law of Massachusetts, and not as a code of mere positive or statute law. It is to be deemed an affirmation of what the Common Law now is, and not as containing provisions in derogation of that law, and therefore subject to a strict construction.

2. Consequently, it is to furnish the rules for decisions in courts of justice, not only in cases directly (ex directo) within its terms, but indirectly, and by analogy in cases, where, as a part of the Common Law, it would and ought to be applied by courts of justice, in like manner. . . .

And Stone, seeking to reconcile the idea of a restatement with the system of judge-made law, suggested that the restatement might "receive legislative recognition and sanction, not as a body of legal rules and doctrine imposed on the courts and litigants as a formal statute or code, but as 'an aid and guide' to the courts in formulating legal rules, with full liberty reserved to them to accept and follow any of the precepts of the restatement when they conflict with precedent but without making such action mandatory."55

would destroy those elements in the common law system which have given it its vitality and its great practical utility. . . ." Stone, supra note 48, at 329.

51 Story, Address before the Suffolk Bar, 1 Am.Jurist 1, 31 (1829).
52 The substance of the article cited in note 48 supra was delivered to the Association of the Bar of the City of New York on February 8, 1923. The Institute was organized on February 23, 1923.
53 Story, Address before the Suffolk Bar, 1 Am.Jurist 1, 32, 31 (1829).
54 The Life and Letters of Joseph Story 247 (Story ed. 1851).
55 Stone, supra note 48, at 335.
Here, however, the similarity ends, and a striking contrast appears. For simplification and mastery of the growing mass of legal materials, Story relied on "habits of generalization," to be cultivated by the study of special pleading, of equity, of foreign maritime law, of the civil law, and of the law of nations. The problem was that of applying logical, historical, and comparative methods to the mass of legal materials. Accordingly, Story acquiesced in the exclusion from legal studies of the nontechnical branches of learning with which the university study of law had formerly been associated. To Stone, on the other hand, the ideal was not coherence and simplification through internal consistency alone. The common law should be restated not only systematically but "in the light of those social and economic functions for the guidance and control of which law itself exists." Accordingly, he called for a return to those studies which would give the student "a thorough-going knowledge of the social functions with which law deals." The Jonah of nontechnical studies had been cast overside to lighten and preserve the ship. His presence on board was now earnestly desired—also to save the ship.

66 Story, Address before the Suffolk Bar, 1 Am.JurisT 1, 31 (1829).
67 Stone, supra note 48, at 330. (Italics supplied.)
69 In the summer of 1941, it was my good fortune to be able to discuss this interpretation of law school history with Chief Justice Stone. His reaction may be summarized as follows: (1) He was displeased by the suggested parallel between his career and that of Story (although no comparison in terms of abilities was intended). He applied to Story the twentieth-century equivalent of a term with which Story was familiar as a characterization of less esteemed judicial brethren: the nineteenth-century expression was "a very feeble light." (2) His faith in the efficacy of restatement as a remedy for the law's complexity had diminished considerably in the light of experience with the work of the American Law Institute. (3) His conviction as to the importance of social and economic data in the handling of legal problems had been confirmed and strengthened by his experience on the Court. Indicating with a gesture the volumes of reports lining the walls of his library, he said, in effect, that the decisions they contained were of extraordinarily little help to him in the cases that came before the Court; that a full consideration of the facts involved and of the practical effect of the judgment was, for him, the effective basis of decision. For illustration, he referred to the case of South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 58 Sup.Ct. 510, 82 L.Ed. 734 (1938). His comments were remarkably similar to what he had written in 1928: "Lawyers . . . too often go little beyond the challenged statute and the citation of authorities in supposedly analogous cases. The court is thus often left to speculate as to the nature and extent of the social problems giving rise to the legislative problem, or to discover them by its own researches. Intimate acquaintance with every aspect of the conditions which have given rise to the regulatory problems are infinitely more important to the court than are the citation of authorities or the recital of bare formulas. . . . The questions which come to us are rooted in history and in the social and economic development of the nation. To grasp their significance our study must be extended beyond the examination of precedents and legal formulas, by reading and research in fields extra-legal, which nevertheless have an intimate relation to the genesis of the legal rules which we pronounce." Stone, Fifty Years' Work of the United States Supreme Court, 53 A.B.A. Rev. 250, 271-72, 278 (1928).

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Paradoxical as this may seem, the proposal of a broader base for legal studies as a means of simplification was not altogether a novel one. Woodrow Wilson, in the early years of his professorship of jurisprudence and political economy at Princeton, thus explained his method of presenting law as a liberal study:

I am careful, in my own lecturing, to treat such subjects as strictly as possible as a part of political science—to exhibit law as an instrument of society. . . . I am punctilious to give out as little as may be of such law as could be used in court to win a case with. If you say that such studies, though no doubt very interesting, and even stimulating and enlightening, are only for the man who has the time for them; that they are a luxury, and are but so much the more added to what the lawyer will in any case be obliged to learn, I reply that you are mistaken; that such studies, besides being in themselves a liberal education, really save time. It saves time to become more than a lawyer, and be a jurist. You have just so much the readier and more various means of ascertaining and enforcing the methods and the arguments by which to win cases, if that is all you want; and you will the sooner get the best sort of practice. . . . That is what I mean by saving time; saving subsequent time. The more various the apparatus of study, the easier the study. And so I believe that, by teaching law to undergraduates thus historically and comparatively, and as a part of general political science, as if it were stuff of society, with a wealth of instructive experience wrapped up in it, a material and vehicle of life, I am making, so far as I succeed, not only enlightened men, but also successful lawyers.

I do not hesitate to say, moreover, that in general view and method professional instruction in law should be of the same kind. Just in proportion as you give, along with every principle, its history and its rational explanation, just in that proportion do you increase the ease and rapidity with which the pupil will master it, and the certainty that he will retain and be able to make accurate use of it. . . . To do this saves time, I urge again, as well as makes better, more masterful and sure-footed lawyers.

Leaving aside questions of simplification, there was still less novelty in the valuation which Stone placed on social studies as an integral part of the education of the lawyer. Although the Columbia faculty thought of themselves as innovators, this was essentially a return to the eighteenth-century conception of the relevance to law of all human knowledge relating to social affairs. In educational terms, it was a re-

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61 *Summary of Studies* 9.
turn to the principle of the professorships of the late eighteenth and early nineteenth centuries; to the ideas embodied in the curricula of Yale and Columbia in the last quarter of the nineteenth century; and to what had been a favorite theme for Mr. Justice Holmes:

An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made.

Stone's conception of the relevance of nontechnical studies to the training of lawyers differed sharply, however, from that which had dominated legal education for half a century. According to the dominant view, a liberal education was desirable for its own sake, as a cultural and humanizing experience, but it had little or nothing to do with the lawyer's professional training. In so far as educational considerations entered at all into the establishment and increase of educational requirements for admission, they were concerned with the maturity and literacy of the law school population, and with "mental training" in preparation for technical studies. Occasionally, they were concerned with equipping the student with a fund of information which would place him on

62 See Part Two, 3 J.LEGAL EDUC. 331, 377 (1951). Since that account was written, additional information on Francis Lieber's connection with the Law School at Columbia has been made available. See 3 The Diary of George Templeton Strong 13, 23; 4 id. xxii, 5-7, 9, 10, 23, 207-208, 235, 427, 441, 464 (Nevins and Thomasmss ed. 1932).
63 HOLMES, Learning and Science, in COLLECTED LEGAL PAPERS 138, 139 (1921).
64 HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 187, 195 (1921).
65 See Part Two, 3 J.LEGAL EDUC. 331, 367 et seq. (1951).
66 ASS'N. OF Am.L.SCHOOLS, HANDBOOK 35-37 (1922); Vanderbilt, A Report on Pre-legal Education, 25 N.Y.U.L.REV. 199, 216 (1950). Even this utility was denied by some: "If the only purpose of entrance requirements were to prepare students to wrestle with the complexities of technical law, then—let us be honest about it—no fixed amount of preliminary education need be insisted upon. . . . A bright high school graduate or a zealous self-educated clerk will often play around a college graduate in law school courses organized as they are today." ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 315-16 (1921). Stone sharply disagreed with this position, largely because he believed in the relevance to law study of the subject matter of liberal education. Stone, Book Review, 22 COLUM. L.REV. 284, 290, 291 (1922).
intimate terms with the subject matter of a variety of cases encountered in practice; and some law teachers, in more or less facetious mood, lamented the absence of such a common fund of culture as would permit the conduct of classes on a high plane of allusion and analogy.

Legal education, in short, had developed very much as the education of professional chess-players might be planned. All that is necessary to a complete mastery of the game is contained within the four corners of the board. Years spent in learning the rules, the potentialities of the pieces, the tested stratagems, and in constant practice—years spent, in fact, in studying historic games in which the basic openings and defenses were developed by the masters—will suffice. Of course, no one would want the professional chess-player to be just that and nothing more; he should not be deprived of the benefits of a liberal education. He should have that, and no doubt in the process of acquiring it he may take some such courses as logic, mathematics, or classical languages to develop his powers of reasoning and teach him concentration; but, after all, the way to learn chess is to study chess. Cultural studies are all very admirable, but they have nothing whatever to do with whether a man is to be a great player or not; consequently, they should be so placed in the total sequence of his education as not to divert him from his technical studies during the period assigned to them.

Chess is a jealous mistress.

67 Thus, it has been suggested that anatomy and geology be taught in the law school—for personal injury and oil and gas specialists. Ass'n of Am. L. Schools, HANDBOOK 177, 206 (1939).

68 “There have been moments when the reviewer would have been grateful for a rule which prescribed at least one subject for law school entrants, even if it were as remote from law as geology or the differential calculus, for then he could assume one common fund of information from which he could draw illustrations of facts and logical methods with confidence that all the class knew what he was talking about. At the present time any allusion to science, literature, or history is sure to be meaningless to at least half the college graduates in the room. . . . [T]he use of the relatives of Romeo and Juliet to clarify (supposedly) a complicated pedigree case led to an overheard conversation between two students: ‘Who were these Montagues and Capulets, anyhow?’” Chafee, Book Review, 41 Harv. L. Rev. 265-66 (1927). The persistence of this theme is phenomenal. See Jacob, Trusts, Future Interests, and All That: Being Again a Review of Reviews; to Which Are Both Prefixed and Appended Certain Thoughts on the Present Discontents, 18 Cornell L.Q. 331 (1933), where it is observed that Kansas law students, although they did not know the number of shillings in a pound, did know the number of feet in a fathom—a small boon for which grateful acknowledgment is made to the students' Sunday school training. Even in 1950, Judge Vanderbilt's first complaint in listing the shortcomings of prelegal education was that "no instructor in any class in any law school can make a reference to Plato or Aristotle, to the Bible or Shakespeare, to the Federalist or even the Constitution itself with any real assurance that he will be understood." Vanderbilt, A Report on Prelegal Education, 25 N.Y.U. L. Rev. 199, 200 (1950). Some sort of record in this field was set by Professor Harry Jones, who regretted the necessity of borrowing his analogies from baseball and football and yearned for law students able to understand vector analysis. Jones, Notes on the Teaching of Legal Method, 1 J. Legal Educ. 13, 10 (1948).

69 See Part Two, 3 J. Legal Educ. 331, 376-77 (1951).
It should be clear enough that the Columbia Law School's interest in nonlegal studies was far removed from attitudes such as these. It was still farther removed from the presumptuous complaint that the law schools could provide the cultural and disciplinary elements of a lawyer's training more effectively than the colleges and hence should assume a closer supervision of such aspects of the preliminary education. The fault to be remedied was fundamental and was the fault of the law teachers themselves, who had taken too narrow a view of their responsibility and of the meaning of law. The subjects which were being badly taught were not the social sciences, but the technical courses in the law schools. The difficulty, Stone wrote, arose from "our traditional attitude toward law as a body of technical doctrine more or less detached from those social forces which it regulates. We have failed to recognize as clearly as we might that law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics and the social sciences generally." New ways of looking at law were to be taken seriously in the law school curriculum. Legal classifications were to be reorganized so that the divisions of the curriculum would reflect the relationship between law and other branches of knowledge concerned with similar problems. As the relevance of these neglected bodies of knowledge became apparent, they were to be exploited for every ray of illumination they could shed on the problems of the law. The law was "stuff of society . . . a material and vehicle of life." As such it was to be studied.

70 "Only the joiner of humanistic and technical education in method and content so as to constitute a well-rounded and integrated professional education can bring this about. The responsibility of preparing professional students for effective citizenship and cultivated living is thus a responsibility of professional education that it cannot wholly delegate to general education. If this is true for students of engineering, is it not equally true for other professional students, whether of law, medicine, divinity, or business? And if this is so, should not undergraduate education for all professional students be so related to professional education as to attain these values without allowing four college years to elapse before education takes on the vitality and usefulness that it could have from the start?" Smith, The Education of Professional Students for Citizenship, in EDUCATION FOR PROFESSIONAL RESPONSIBILITY 188, 203 (1948), reviewed in 62 HARV. L.REV. 1252, 1256 (1949). See also HARVARD UNIVERSITY, REPORT OF THE DEAN OF THE HARVARD LAW SCHOOL (Landis) 7-10 (1938-39).


72 Wilson, supra note 60.

73 In 1952, the Association of American Law Schools adopted a Statement of Association Policy on Pre-Legal Education. ASS'N OF AM. L. SCHOOLS, HANDBOOK 109, 107, 109 (1952). This excellent document rises far above the motivations which have stimulated criticism of various aspects of the movement to establish general educational requirements for admission to law schools. It is concerned with qualitative rather than quantitative aspects of pre-legal education. It emphasizes education for "a full life" and for "citizenship in the world community" rather than training for later professional study and practice. It recommends that the student seek the best teaching available rather than specific courses. It lists as one of the primary objectives of pre-legal education "critical understanding of the
The Columbia faculty, like others who have attacked the problem of integrating law and the social sciences, had difficulty in reaching that level of discussion which is concerned with specific course content and materials. In the beginning, there was a great deal of discussion of law school objectives and "methodology" in the broad sense. In addition, the studies ranged over a wide variety of subjects germane to the general re-evaluation of the curriculum, but not necessarily to the specific problems of functional course organization and integration of non-legal materials. There was a study of the junior college movement, one of the development of collegiate schools of business, a re-examination of the values of the case method, a study of the development of the social sciences, and an analysis of existing law school programs.

There was discussion of devices for easing the transition to the new curriculum, and the structure and content of the new program were conceived in broad terms. But committees were quickly established to deal concretely with specific divisions of the subject matter; and, sooner than might be supposed, they were coming to grips with specific problems. The list of committees indicates both the general nature of the functional classification and its incompleteness: Labor (Dowling, Hale); Finance and Credit (Llewellyn, Moore); Marketing (Oliphant, Llewellyn); Form of Business Unit (Moore, Shanks, Douglas); Risk and Risk-bearing (Patterson, Smith, Oliphant); Law Administration (Magill, Smith, Medina); Criminal Law (Kidd, Moley); Family and Familial Property (Powell, Moe, Johnson); Legislation (Parkinson, Chamberlain, Dowling); and Historical and Comparative Jurisprudence.

human institutions and values with which the law deals; but it makes no demand that the colleges provide any specific training in subject matters which might be thought relevant to professional education. Consistently with the ideas developed at Columbia, any such training is left to the law schools themselves.

At the outset, a difference of opinion which was to assume significance for the fate of the project became apparent. It concerned the question whether the school was to become primarily a "research school" or to remain one primarily for training for professional careers. The issue and its effect on the program are dealt with more fully below.

The curriculum was conceived as having three phases, involving primarily (1) "orientation and tool-getting," (2) "analysis and assimilation," and (3) "synthesis, evaluation, and specialization." The subject matter was outlined not in terms of courses but of "functional" categories.
The general studies and those which explored collateral matters were to continue, and are replete with statements of the working educational policy as it was conceived by individuals or committees. The chief value of the records which have been preserved, however, lies in the light they throw on the solution of practical problems of course construction and on factors affecting the success or failure of the reorganization program and its constituent parts. The procedure to be followed in this review of the records, therefore, will be to consider the work done in the subject-matter categories in turn (tracing the development, where that is possible, beyond the period of the faculty's organized discussions), with the objectives of determining what measures were considered desirable and practical, and of gathering clues as to the reasons for success or failure. Statements of educational policy or of legal theory will be referred to only incidentally.

1. Business Units. The first committee to report was that on the form of the business unit. A seminar in the law of business organization was already being offered; and the report was entitled: "Business Associations: Devices for Organizing for Management, for Limiting Risk, and for Assembling Capital." Since this is one of the functional classifications which survived to become a familiar component of the law curriculum, the general nature and purpose of the proposed grouping of materials needs no elaboration. It was designed to treat problems traditionally covered in Agency, Partnership, Corporations, Mortgages, and Bankruptcy, and in various courses in the School of Business. The implications with respect to staff and library suggest, not surprisingly, that financial problems may be a major obstacle in the way of such comprehensive reorganizations:

According to the plans already adumbrated, there will be organized a group of investigators and teachers for work in the field of business and the law relating thereto. A division of this group should be devoting its attention to that part of the field of business and law delineated in the accompanying outline. Continuous work in this division would require the services of a statistician, an accountant, several specialists in business, and a number in law. At the disposal of those in this division should be research assistants and necessary stenographic and clerical help. The Scudder Library should be built up.

83 Document No. 4. Four committees were assigned to work not based on classifications of subject matter. Of these, the most significant were concerned with Methodology (Smith, Oliphant, Llewellyn, Moore, Jervey) and with Intra-University Relations (Jervey).


85 Document No. 26, at 93.
The committee's original report contains two interesting hints of what was to come:

The efforts of such a group should in large part be devoted to business-law research projects. Particularly suggested are: the shift of control from "ownership" to managers; social incidents of the doctrine of ultra vires; the isolation of the unit characters of corporate securities; determination of unit characters of business administration. The study in Judicial Valuation at present carried on under the direction of Professor Bonbright suggests what may be done in their field.

The reference to the Bonbright studies was presumably intended only to indicate the type of joint research that might be undertaken, for, apart from questions of corporate finance, no other relationship between valuation of property and the problems of business organization is apparent. But, since the matter has been mentioned in this connection, this is as good a place as any to note that the monumental volumes which resulted from the study of valuation provided a brilliant demonstration, by its fusion of legal and economic analysis, of the potentialities of the kind of interdisciplinary research which the faculty was proposing to undertake. The suggestion that research be done on the shift of control from ownership to managers was "molded into concrete form" by Professor Edwin F. Gay of Harvard; in 1928, the study was begun, financed by the Social Science Research Council of America and directed by the Columbia University Institute for Research in the Social Sciences. In 1932, it resulted in the publication of the well-known work by A. A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property. The problems of interdisciplinary research were thus de-

86 Id. at 93-94.
87 JAMES O. BONBRIGHT, THE VALUATION OF PROPERTY (1937). The work was done under the auspices of the Columbia University Council for Research in the Social Sciences. For a list of separate monographs and articles produced by the study, see the Preface.
89 Among the many reviews were those by Ballantine, Book Review, 21 CALIF. L.REV. 78 (1933); Isacs, Book Review, 42 YALE L.J. 463 (1933); Frank, Book Review, 42 YALE L.J. 699 (1933); Meyers, Book Review, 42 YALE L.J. 697 (1933); Wormser, Book Review, 19 A.B.A.J. 113 (1933); and Dodd, Book Review, 81 U.PA. L.REV. 752 (1933) ("This study of the modern corporation is unusual in its attempt to fuse the point of view of the lawyer and the economist in a single work. That the fusion has been largely successful is due to the fact that both Mr. Berle and Mr. Means think in terms of the corporation as it actually exists today rather than of what legal or economic tradition has said about it."). The background of the project is sketched in the Preface. Earlier, Berle had published his Studies in the Law of Corporation Finance (1928), and in 1934, he published, in collaboration with Miss Victoria J. Pederson, a book on Liquid Claims and National Wealth.
scribed by Professor Berle:

Difficulty in such cooperation is extreme; for technicians in different fields must first agree on a common language; then endeavor to apply their respective methods of approach, keeping in mind the shortcomings and advantages of the different methods; and finally work out conclusions to which both are prepared to subscribe. Since a lawyer is primarily concerned with the justice of the individual case and can never ignore the problem of what ought to be done; and since an economist is primarily descriptive and analytic, the chasm is not easy to bridge.

In the year following the intensive faculty studies (i.e., in 1927–28), two new courses in business associations were added, and a third was planned for the following year. A course designed to “consider the advantages and disadvantages of different types of business associations as devices for allocating risk” was given in the first year. Another, “approaching business associations as finance devices,” was offered to second- and third-year students. In the latter, the use of economic data was emphasized. The third course, planned but not offered in 1927–28, was to deal with problems of business management. The course in corporation finance was given in 1928 and 1929 with mimeographed materials, which were published in 1930. Although the book was greeted as being, both in the arrangement and in the selection of materials, “a challenge to traditional methods of legal classification,” the extent to which it utilized nonlegal materials was not notable. About 75 per cent of its bulk was devoted to cases. The “materials” took the form of introductory notes indicating the business problems involved and summarizing the technical uses of particular devices, of corporate forms, and of incidental background material. In the Preface, the author mentioned the importance to the student of “some sense of the financial process in action, fortunately available to him through the newspapers dealing with current business activity,” and recommended Dewing’s *Financial Policy of Corporations* as collateral reading.

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92 A. A. BERLE, CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE (1930). A report by Professor Berle on his early experience in giving the course is in *The Memoranda of the Marshall Conferences* at 832 (1929).
94 BERLE, op. cit. supra note 92, at iv (1930).
95 Thirty-nine pages were devoted to a form of corporate trust indenture. BERLE, op. cit. supra note 92, at 498. The rules of the Committee on Stock List of the New York Stock Exchange were reprinted. *Id.* at 700. One reviewer found “intensely interesting” the financial history of Nash Motors Company, printed at 555, and welcomed the inclusion (at 793) of a “business precedent” consisting of an analysis by accountants of the fairness of the terms of a merger agreement. Katz, *Book Review*, 40 YALE L.J. 1125, 1126, 1127 (1931).
One thing is clear: the ideal of simplification of the curriculum through functional reorganization was not being achieved. With substantial unanimity, the reviewers noted that the old, unitary course on corporations must now become three courses—as, indeed, it had become at Columbia. Functionalism had split the study of corporations into three phases—risk, finance, and management—and enough legal and nonlegal materials had been found to stretch it throughout the three years of the curriculum.

A tentative “source book” for the course on business organization, prepared by Professor Magill, was first printed in 1930–31 and was followed by the publication, in 1933 and 1935, of Magill and Hamilton’s *Cases on Business Organization*. The original division of the law of business units into the three phases—risk, management, and finance—was abandoned. Corporation finance was temporarily established as a separate course, but risk and management problems were to be combined in the course on business organization. Experience with the effort to maintain the division between risk (or losses) and management had been “not altogether satisfactory.” The course covered materials (other than those dealing with corporation finance) ordinarily contained in the courses on agency, partnership, and corporations, and, in addition, ma-


97 Twelve years later, a revised edition of the casebook was published by Professor Roswell Magill. A. A. BERLE & ROSWELL MAGILL, CASES & MATERIALS IN THE LAW OF CORPORATION FINANCE (1942). The plan of organization had been substantially modified by the development of the course in business organization, and by the passage of the Federal Securities Act of 1933 and the Securities Exchange Act of 1934. There was a distinct diminution of the nonlegal content; while many of Berle’s textual notes were retained, a practicing reviewer complained of the omission of those on the investment banking operation and the processes of corporate promotion. Zilnikoff, Book Review, 42 COLUM.L.REV. 1380, 1382 (1942). And, ironically, the same reviewer regretted the relinquishment of certain portions of the earlier edition to the course on business organizations, noting that they were “basically interrelated” with the subject of corporation finance, notwithstanding any “artificial division within the law school courses.” Id. at 1381.

98 COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 17 (1931).

99 I ROSWELL MAGILL & R. P. HAMILTON, CASES ON BUSINESS ORGANIZATION IV (1933). At Yale, however, the original functional classification was being fully implemented. See the Preface to W. O. DOUGLAS & C. M. SHANKS, CASES AND MATERIALS ON THE LAW OF MANAGEMENT OF BUSINESS UNITS (1931), where the origin of the general idea is attributed to Underhill Moore. The treatment of nonlegal materials is indicated in the Preface to the casebook cited: “In view of the fact that the realignment of materials made herein suggests new considerations and raises new problems not finding ready answer in statutes or decisions, much nonlegal material has been cited. Limitations of space forbade extensive use of such material, but enough has been cited to supply some information on those points about which economists, sociologists and accountants, as well as lawyers and judges, have been concerned. In some instances where the problem demanded it the non-legal material has been brought to the fore. An example is the treatment of the dividend questions in Ch. III (8) avowedly for what they are—accounting problems—accompanied by an exposition of elementary accounting concepts.” P. IV.
The primary objective being to "bring realistically before the student the relative advantages and disadvantages of the various forms of business association." If use was made of nonlegal materials, they elude the scrutiny which can be given to the book for purposes of this paper by one who is not a specialist in the field; nor was the use of such materials remarked by the principal reviewers.

In 1948, Professors Berle and Warren published their Cases and Materials on the Law of Business Organizations (Corporations). This event marked the demise not only of the "functional" combination of corporations with other devices for business organization, but also of the separate course in corporation finance—and so, finally, of the triumvirate of risk, management, and finance. In their Foreword, the authors said:

Twenty years ago the Columbia Law School concluded that the study of corporation law had been too severely limited by tradition. It undertook to augment the classic corporations course by adding a new course called "Corporation Finance." In course of time this arrangement was widely accepted in many law schools. As it gained recognition, corporation finance established itself as a branch of coordinate standing with the conventional course in corporations.

Yet, from the beginning it was clear that there was no real line between the principles of corporation law and the principles applicable to those financial situations which are conventionally a part of the life-experience of most corporations. In time the courses could and should be integrated.

This collection of materials is an endeavor to accomplish that integration.

Here was integration with a new twist: the joining together of that which had been put asunder for the sake of integration of law and other social disciplines. On the surface, at least, the Columbia Law School had come full circle. Prior to 1927-28, it had offered a course in corporations; now it offered one in corporations—in parentheses.

It would be naive, however, to assume lightly that these two decades of experiment were without significant effect on the teaching of corporation

100 Id. at iii.
102 Steffen, Book Review, 82 U.P.A.L.Rev. 190 (1933); Frey, Book Review, 83 U.P.A.L.Rev. 1037 (1935). Steffen vigorously questioned the classification which lumped agency, partnership, and corporations together: "The trouble seems to have come from an ill considered and somewhat hasty adoption of the business school categories of Management, Risk, and Finance as sufficient guides for the redistribution of the entire mass of legal materials. The difference between the business school objective—more and bigger profits—and that of the leading law schools should perhaps have warned against too prompt adoption."
law. Even to one having no particular familiarity with the subject, it is apparent that the course in corporations had come a long way; but the differences were not manifested in any very tangible way in terms of either "functional approach" or nonlegal materials. The importance of the corporation as a social institution was stressed in the Foreword; but, as one reviewer remarked, the book did not attempt to treat the larger questions: the social and sociological implications of the modern corporation were left to be developed by the individual teacher according to his own ideas and concepts. Notes were included "relevant to the sociological as well as to the financial and property aspects of the corporate problem," and a tentative effort was made to acquaint the student with some fundamentals of accounting. Thus, some of Berle's earlier use of nonlegal materials was preserved, although perhaps with less emphasis and more modesty: the objective was to supply business background rather than social science. The chief difference between this book and its "classical" predecessors consisted in its more faithful reflection of the problems actually encountered in modern corporate practice, its sensitiveness to social implications, and its receptiveness to enlightenment from sources outside the formal materials of the law.

2. The Family and Familial Property. On February 22, 1925, Professor Herman Oliphant submitted a "Memorandum concerning a Proposed Study of Familial Law"; he resubmitted it on November 16, 1926, when the faculty had organized for its re-examination of the curriculum.

All rules of law [he said], both statutory and customary, should be judged by legislators and courts by their effects upon the human relations which they regulate or promote, and should be approved or changed accordingly. It is not enough to consider them merely as ideas; how, as such, they came about; and how they fit into some body of abstract doctrine. In order to judge rules of law by their effect it is necessary:

1. To discover what human relation is actually being affected by the operation of a given rule of law and

103 See Latty, Book Review, 1 J. LEGAL EDUC. 622 (1949).
104 Zilnikoff, Book Review, 8 LAW. GUILD REV. 428 (1948).
105 A. A. BERLE & W. C. WARREN, CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATION (Corporations) viii (1948).
106 Id. at 192.
107 Zilnikoff, supra note 104, spoke too strongly when he criticized the editors for "omitting] the collection of law review and nonlegal material which has in recent years so often made casebooks such a valuable tool to the practitioner." A good example of the background note appears at p. 922 of the casebook. A more accurate appraisal of the textual material is given by Hornstein, Book Review, 48 COLUM. L. REV. 815 (1948). See also Field, Book Review, 62 HARV. L. REV. 100 (1948).
108 Document No. 28.
2. To marshal the contemporary data of the other social sciences concerning that human relation and consciously to weigh such data in passing upon the rule in question.\(^{109}\)

Taking family relations as a case in point, he proposed\(^ {110}\)

- a study of the whole of our law aimed at attaining two objectives:
  1. The primary object is to uncover those areas of the law now affecting the family without our being aware of the fact and to reclassify this material in a way more significant for a study of these rules of law as social forces actually shaping human relations and conduct. Present classification tends merely to facilitate the study of these rules of law as concepts, as parts of the history of legal thought or as parts of a body of abstract doctrine.
  2. The secondary objective is to disclose to students of law the major bodies of pertinent knowledge as to the family in the other social sciences and to consider methods of using such knowledge in judging rules of law. For illustrative purposes the study will include a detailed examination of one or more rules of law in this manner.

The report of the committee on the family and familial property began with a discussion of the reasons for the committee's existence and with problems of definition.\(^ {111}\) It then undertook a brief survey of the nonlegal literature on the family, indicating that its members had canvassed and classified a remarkably large body of sociological, anthropological, historical, and economic material—without, so far as appears, the aid of experts in those fields. It found that only a very few law-trained persons had worked on the production of such materials, and that the interaction between law and the family had been considered only in connection with marriage.\(^ {112}\) It found, for that matter, that little was known about the nature and organization of the modern family.\(^ {113}\) The committee, therefore, concluded that "the approach to familial law is at least two or three decades behind the present state of wisdom as to business law, and that the painful efforts of the pioneers in that field during the past thirty years must be duplicated in the field of familial law before a report on this topic can approximate the definiteness and excellence now obtainable in the fields of business organization and market-

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\(^{109}\) Id. at 125B.

\(^{110}\) Id. at 125C.

\(^{111}\) Document No. 42.

\(^{112}\) Id. at 320.

\(^{113}\) Ibid. The report quoted the following passage from Ernest R. Mowrer's *Family Disorganization*: "Our ignorance of the life of the present-day family is none the less colossal because of the vast and increasing literature upon sex and marriage and the family. For much of this literature deals with family life of other societies than our own, the best of it with marriage and the family among preliterate peoples, and the remainder of it with the large patriarchal family, the type of familial organization of the ancient Israelites, Romans and Greeks ...." Foreword viii (1st ed. 1927).
It, nevertheless, proposed a program based upon the assumption "that familial organization and law have interacted and are now interacting with resultant modifications of each." Its first concern was with the organization of law materials into a course-classification which would "center the student's attention upon an inquiry as to the social tendency of the law in question when such law impinges on the family..."; the second was with extensive research, which was held vital to the ultimate success of the proposed reorganization of the curriculum.

In planning an outline for the curricular offering, the committee rejected an approach based upon the various functions—biological, educational, economic, and political—supposed to be served by the family, and adopted instead the following plan:

If, however, the body of law now functioning be examined and the parts thereof are selected out (1) which look as if they are attributable in part or in whole to familial factors, or (2) which seem likely to account for existing phenomena in the familial organization, or (3) which help to define the existing familial organization, and the material thus selected is arranged, for teaching, in an organization which brings vividly to the attention of the student variations in the generalized type fact situation and seeks to arouse an inquiry as to the fact, degree and significance of this interaction, it is believed that a step forward will have been made.

The course plan thus suggested was frankly a transitional effort; its hypotheses were to be continually tested by the concurrent research. A questionnaire was submitted to the faculty, seeking out every phase of the law which might bear upon the family, and a detailed course outline was constructed.

The range of this outline, owing to the diversity of the laws which may affect the family, was formidable, and in one respect caused the committee—and its chairman, Professor Richard R. Powell—some concern. Substantial parts of what had been "Real Property" were so far included as to receive adequate treatment, but many phases of land law and its special techniques were left out. At this stage, however, that circumstance did not lead the committee to the old doubts about duplication and loss of doctrinal training which the first functional courses had aroused among their critics; the committee's faith in the efficacy of total functionalization was strong: "In the judgment of this committee, this merely

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114 Document No. 42 at 320.
115 Id. at 321.
116 Ibid.
117 Id. at 322. (Italics in the original.)
118 Document No. 28.
119 Document No. 42, at 328.
means that other foci or typical fact situations must be thought out, about which these other essential materials may be grouped." A note of caution was sounded, however, against carrying too far the functional grouping of all laws that may bear, even significantly, on the family. Thus, the course might include a study of permissible testamentary dispositions by the creation of trusts and future interests, on the theory that the relation between the family and the law of testamentary disposition would be accordingly illuminated. "It is certain, however, that [if this were done] we would be dealing with material which today is quite as significant in instruments unrelated to familial problems as in instruments affecting these relationships. It would be strained, if not impossible, to relate these techniques, so important in present law, to familial factors. The body of law thus sought to be annexed is so bulky quantitatively that our resultant structure would justify an assertion that the tail is wagging the dog." 121

Thus, the scheme of functional classification of the law was found to have difficulties of its own, fundamental enough, as it turned out, to amount to real trouble for the reorganization program as a whole. In addition, the committee was confronted with formidable problems of finance, personnel, and execution in connection with the research program which was to be an indispensable supplement to the course. It dealt only briefly with those problems, and its air was one of confidence. But it noted that the work to be done would require "the cooperative efforts of social historians, sociologists, economists, statisticians, and lawyers, or . . . persons who combine sufficient equipment in several of these fields"; 122 and it was aware that the task involved not merely the assimilation of existing knowledge in the areas of social science, but the discovery of knowledge about the modern family. Finally, this committee likewise saw the goal of simplification receding: "More time would be needed to teach the outlined material than is now devoted to the parts thereof distributed about in our present curriculum." 123 This meant not only that the course in domestic relations would be enlarged, but also that, since only minor segments would be taken out of other courses, there would be no compensating reduction in other offerings, such as the course in business organizations, with its envelopment of Agency, Partnership, and Corporations, was originally intended to achieve. Still the committee was sanguine. "This," it said, "is to be expected and is one of the liabilities incident to the acquisition of new assets. It is believed that time will prove the bargain a good one." 124

1\textsuperscript{20} \textit{Ibid.}
1\textsuperscript{21} \textit{Ibid.} at 329.
1\textsuperscript{22} \textit{Id.} at 330.
1\textsuperscript{23} \textit{Ibid.}
1\textsuperscript{24} \textit{Ibid.}
In at least some respects, the committee's confidence that the necessary research could go forward was quickly vindicated. The family was chosen as a case "typical of the need of correlated study," and as one which promised fruitful results when so studied. A research proposal was drafted, and a grant of $25,000 was obtained from the Laura Spelman Rockefeller Memorial Foundation to support the project for one year. A staff was organized under the direction of Professor Albert C. Jacobs, with two legal assistants, and Professor Robert C. Angell, of the Sociology Department of the University of Michigan, with one assistant in sociology. A distinguished advisory committee of experts in law and sociology was set up for purposes of criticism and suggestion. Having begun its work in September, 1928, the staff submitted a progress report on April 2, 1929, and a comprehensive report was published in 1930. As a basis for research, and especially for drawing together the diverse laws affecting family relationships, the staff followed a suggestion contained in the committee report and constructed a "fact situation outline." For purposes of teaching, a quite different outline was developed after considerable wrestling with problems of classification. Having considered and rejected several possibilities, including the one employed in the progress report and one suggested by Professor Oliphant, the staff finally settled upon a plan of organization which it regarded as a compromise which was "by no means entirely satisfactory." At this point, the goal of simplification was receding even more rapidly, for each of the five main headings of the curricular outline was referred to as a course—although two of them were thought suitable for seminar treatment, and one might be made into a book for

125 See generally Document No. 55 (A Type-Case Request for Resources—Memorandum concerning a Proposed Probing Study of Family Law); COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 20-21 (1928); ALBERT C. JACOBS & ROBERT C. ANGELL, A RESEARCH IN FAMILY LAW 3 et seq. (1930). Additional material bearing on the family appears in the Memoranda of the Marshall Conferences at 923 (Remarks on Method and Value of Socio-legal Research) and 925 (Seminar in Family Law).
126 JACOBS & ANGELL, op. cit. supra note 125, at 7-8.
127 MEMORANDA OF THE MARSHALL CONFERENCES 927 (1929).
128 ALBERT C. JACOBS & ROBERT C. ANGELL, A RESEARCH IN FAMILY LAW (1930).
129 Id. at 10, 40. The main headings were:
I. Single Individuals with Reference to Possible Future Family Founding
II. Non-Marriage Families
III. At Marriage
IV. The Husband and Wife in the Organized Family
V. The Child in the Organized Family
VI. The Organized Family as a Whole
VII. Family Disorganization.
130 Id. at 19, 20. See also id. at 275. The main headings (id. at 21) were:
I. Family Organization and Disorganization
II. The Biological Relations of the Family
III. Personality Development and Family Solidarity
IV. The Economic Relations of the Family
V. The Family and Other Institutions.
collateral reading. ¹³¹ Not surprisingly, in view of the committee’s report in 1927, the most intractable problem was the disposal of the law of property. “This, we must admit,” said the final report, “has been the most discouraging part of our investigation. It is our belief that with the knowledge and tools available, to attempt to treat a great part of the field of property law on a functional basis, would not be very fruitful.”¹³² The temporary solution was to abandon the treatment of those areas of property law which interact with other institutions as well as the family, while retaining those which are peculiarly family law and which could be treated functionally; even so, this left in the plan much of the law of future interests and of wills, on the theory that, though it could not be treated functionally, it clearly affected and was affected by the family institution.¹³³

The final report included a bibliography on the family containing 940 entries, of which 413 represented nonlegal materials; in addition, there was a bibliography of materials in English and Russian on the contemporary Russian family.¹³⁴ Finally, the staff had undertaken, as a pilot project in socio-legal research, a study of the relationship between husband and wife with reference to the wife’s services and earnings within and outside the home. The results of that study (which, on the sociological side, was conducted by means of interviews and questionnaires) were included in the report,¹³⁵ together with a frank and critical assessment of its defects and the difficulties encountered in its execution.¹³⁶

¹³¹ Id. at 21–27. The course in family law which was inaugurated in 1929–30 was based on only the first of the five divisions: Family Organization and Disorganization. Id. at 28.
¹³² Id. at 23.
¹³³ Ibid.
¹³⁴ Id. at 651, 654, 734. In view of the scope of the task undertaken, it would not be surprising if questions should arise concerning the extent to which it was possible to make critical judgments concerning the nonlegal material that was assembled. Professor Jacobs was impressed with the work of Westermarck, whose History of Human Marriage is characterized in the first and second editions of the subsequent casebook as “one of the monumental works dealing with the development of marriage in its various forms.” Albert C. Jacobs, Cases and Materials on Domestic Relations xx (1933); id. at xxii (1939). The casebook contained no reference to Briffault, whose work, The Mothers (1927), has been regarded as a “valid and devastating” criticism of Westermarck’s thesis. Calverton, Modern Anthropology and the Theory of Cultural Compulsives, in The Making of Man 8, 9 et seq. (Calverton ed. 1931). See also Cairns, Rober Briffault and the Rehabilitation of the Matriarchal Theory, in An Introduction to the History of Sociology 688 (Barnes ed. 1948). Briffault’s work had been listed in the comprehensive bibliography prepared by the research staff, with the comment: “A study of the origins of sentiments and institutions.” This was the subtitle of The Mothers. Jacobs & Angell, op. cit. supra note 128, at 671 (1930). In the third edition of the case book (Jacobs & Goebel, 1952), The History of Human Marriage is dropped from the bibliography, and The Mothers is included. See generally George P. Murdock, Social Structure c. 8 (1949).
¹³⁵ Jacobs & Angell, op. cit. supra note 128, at 468.
¹³⁶ Id. at 646.

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In their general conclusions on the year's work, Jacobs and Angell reaffirmed their faith in the efficacy of the sociological approach to both legal research and teaching. Their judgment as to the utility of the functional classification of law, however, was qualified. For research purposes, the classification was considered fundamentally sound. The problem of controlling its tendency to get out of hand, as in the case of property law, was one to be solved not by abandoning the classification principle but by limiting the range of rules to be considered as family law. For teaching purposes, however, the functional classification must be modified substantially:

Law schools have two main functions: (i) the teaching of law, and (ii) legal research. These are as distinct as the teaching of geography and exploration. In the one case, students are stimulated to achieve as much proficiency in the use of legal tools and as much understanding of the current rules of law as a part of the larger social whole as possible. This requires close organization and economy of time in the presentation of the material. Legal research, on the other hand, requires the exhaustive study of some particular aspect of the law and may require the cooperation of other scientists in the quest. . . . It may very well be that the [functional] approach will be useful as far as the research aspect of a law school is concerned and yet not so useful from the angle of teaching. Law parallels life. . . . The result is that one can expect no easy form of classification. If our research is aiming to discover the effectiveness of law in meeting needs, it must organize about social units—these will in general be institutions. Hence the family is a proper field for research of this character. However, it must be realized that our law is abstracted from life and therefore that many laws are established to meet needs in all sorts of situations—contracts, for instance. Hence a classification by institutions will never suffice. The individual as such, apart from all institutions, is sometimes an object of law. Also, inter-institutional relations are subject to law. . . . In other words, the complexity of life must be matched by a complexity of fields of social research.

While the final judgment as to the appropriateness of these methods was left to experience, the conviction was clearly growing that patterns appropriate to research were not suitable to teaching, and that the results of research, if they were to be assimilated into the curriculum, would have to be adapted to something like the existing structure of legal ideas; for that structure had, after all, advantages of its own, not the least of which were pedagogical. Nevertheless, the objective of vitalizing the teaching of law through a sociological approach based on the results of functional research was strongly reaffirmed: "[T]he more the law is taught as evolving out of life situations the more vital it will be to the student."
Geography cannot be taught by the methods of the explorer; - but where would it be without them?

The resulting coursebook was published in 1933. The plan of organization was a chronological arrangement of some of the elements which had been included in the research staff's curricular outline. There was a bibliography containing thirty-eight nonlegal entries. The cases were liberally interlarded with sociological materials, and the editor regretted that more could not be included. The investigation of attitudes and practices concerning the earnings and services of married women found a place in an extended footnote and in four pages of the text.

Although this was the boldest product, so far, of the effort to reorganize the law curriculum and bring the social sciences to bear on it, only five reviews appeared in legal periodicals, two of which were quite superficial. One of the remaining three was by Professor Angell, who, of course, was biased, and who spoke as a sociologist and not as one concerned with teaching law in a professional school. His chief reaction was one of regret that Professor Jacobs had been led by the facts of law school life to "steer a middle course between tradition and radical innovation"; more, not less, emphasis should have been given to sociological arrangement and materials. In similar vein, Professor Donald Slesinger of the University of Chicago Law School was sharply critical.

The major divisions and subdivisions of the book give it a specious sociological framework. On close examination they turn out to be merely new names and not new classifications. The non-legal material, mainly sociological, is uneven, and badly co-ordinated with the cases. Much of what is presented is common-sense and historical interpretation with relatively few concrete data. A statement of sociological conclusions, without the data on which they are based is likely to make the tough minded legal student a little contemptuous of the tender minded so-

139 Albert C. Jacobs, Cases and Materials on Domestic Relations (1933).
140 Note 129 supra. The main headings in the book were:
   I. Family Organization
   II. Relations among the Members of an Organized Family
   III. Family Disorganization.
141 Id. at 686, 694. The length and complexity of the footnotes produced some outlandish typography, as at 189-191.
143 Angell, Book Review, 33 Colum.L.Rev. 1086, 1088 (1933).
144 Slesinger, Book Review, 1 U.Chic.L.Rev. 650-660 (1934). Professor Slesinger had been co-author, with Robert M. Hutchins, of a series of articles attempting (without, in Hutchins' judgment, significant results) to apply modern psychology to the evaluation of rules of evidence. See note 290 infra.
Another law teacher, the author of a comprehensive reference work on family law, wrote a perfunctory comment, quite oblivious to the book's objectives and to the serious thought that had gone into the solution of its problems. Pursuant, no doubt, to the dictates of current fashion, he professed adherence to a verbal formula: "That the law of domestic relations must be taught in the light of its economic and sociological background seems hardly debatable." Yet, in the same breath, he added: "In view of the practical fact that very few classroom hours can be devoted to discussion of this non-legal material it would seem that it would be sufficient to cite and summarize, instead of quoting in extenso." Professor Jacobs must have found this rather discouraging.

The conventional law teacher's original response to the demand for integration of law and the social sciences had been to approve the idea in principle and to take shelter in its unworkability: what nonlegal materials are to be included, who will find them, and how will they be made available? After Professor Jacobs and his colleagues, with prodigious effort and at great expense, had provided an answer of sorts to such questions in one field, the response from the same type of teacher was, not that the wrong materials were provided; not that they were not enlightening; but that they should merely be cited, and not put right between the covers of a coursebook, where they would demand attention from students and instructors. Plainly, an obstacle to the progress of the movement consisted in the fact that law teachers simply did not want to be bothered.

The second edition, published in 1939, was little different in outward appearances. The Preface was substantially the same as that to the first edition, with the addition of short passages commenting on modifications. The same subject matter was covered, although the chronological arrangement was abandoned. The bibliography of nonlegal materials

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147 Ibid.
148 The same reviewer missed the whole point of the functional classification by complaining that elimination of some of the nonlegal material would have permitted inclusion of legal material on the contracts of infants—a standard element of the traditional course on persons and domestic relations, but one having, in the judgment of the editor, nothing to do with the problems of the family. Ibid.
149 Albert O. Jacobs, Cases and Materials on Domestic Relations (2d ed. 1939). The principal parts now were:

I. Family Organization
II. Family Disorganization
III. Husband and Wife
IV. Parent and Child.

The materials on "solidarity" and economic relations were distributed under parts III and IV.
was expanded to include forty-three entries. The treatment of
c confidential communications was relinquished to the course on evidence.
The emphasis on nonlegal materials was quietly diminished: gone was
the introductory chapter devoted exclusively to social background; the
study of the wife’s earnings and services was given only half a dozen
lines in a note. Apart from one unsigned and entirely routine notice,
there were five reviews. Two were by newcomers to teaching, both of
whom received the book approvingly, one with perception and one
with no apparent appreciation of its significance. Two more experi-
enced teachers also approved, one taking the unorthodox features
almost for granted, and the other, who has a penchant of his own for
sociology, regretting with the editor the impracticability of including
more nonlegal material, though he thought that, with normal methods,
it was impossible to cover the book as it was in the time available.
The fifth reviewer, a practicing lawyer, sought to reassure his readers
with the comforting intelligence that the sociological emphasis was but a
horrid mask, underneath which they would find pretty familiar stuff.

In 1952, a third edition was published, with Professor Goebel as co-
editor. The basic organization was unchanged. The bibliography of
nonlegal materials was enlarged to include fifty-four entries, and was
considerably modernized. Nonlegal materials were still used, but their
presence was not very evident, and nothing was said of them in the
Foreword except that some selections from recent sociological writing
had been added. The reaction of the law teachers who reviewed this
edition was startling. Dean Kingsley discussed the problems of
bringing social science materials into law school courses, but that was
because he was reviewing, at the same time, a new book by Professor
Fowler Harper in which the social sciences (and sex as well) were
rediscovered and placed prominently on display. Concluding that such

150 Id. at 694. A humorless reviewer had begrudged the space given in the first
edition (p. 366) to Lord Neaves’s verse on Gretna Green marriages. Vernier, Book
Review, 47 Harv.L.Rev. 732, 733 (1934). In response to other pressures (one
hopes), the second edition devoted to the verse only the space required for citation
(p. 107).
152 Schopflocher, Book Review, 40 Colum.L.Rev. 1126 (1940).
156 Albert C. Jacobs & Julius Goebel, Cases and Other Materials on Dom-
estic Relations x (3d ed. 1952). Exactly the same treatment was given to the
study of the wife’s earnings and services as in the second edition (p. 708); even the
citation to Lord Neaves’s verse was dropped (p. 108).
157 There was one review by a practicing lawyer, who was fashionably, if some-
what uncritically, commendatory with respect to the nonlegal content. Pilpel,
materials were not adapted to the teaching methods of "conservatives" like himself, he affirmed his confidence in Jacobs and Goebel—that "reasonably traditional law book." And Professor Paul Sayre complained that the treatment of family relations was too detached from life, suggesting that the editors appeared to think of the law of domestic relations as "a purely verbalistic and logical system of rules put together under (preferably) Aristotelian influence."  

3. Property. In the Columbia faculty's organization for attack on the problems of the curriculum, no provision was made for a committee on property. The assumption, presumably, was that, when the process of organizing law studies around significant "type-fact situations" had been completed, the elements of property law would find their appropriate places. The staff for research on family law, however, early announced its conviction that "to attempt to treat a great part of the field of property law on a functional basis, would not be very fruitful." Indeed, one member of the committee on the family had already submitted a memorandum in which the difficulties of classification had been made to appear in some detail. Noting that, after the distribution of substantial parts of property law to the courses on the family and on security, much of the field would remain unaffected, he explored the possibilities for disposition of the remainder. As a further functional classification—or, at least, a classification which would facilitate the integration of real property law with the study of economic and social phenomena relating to land—he proposed a course in land utilization. Still, a residuum comprising "a large body" of the property law in the existing curriculum would remain to be disposed of. "This is due . . . to the fact that the problem of teaching real property law is one primarily of a professional method or technique which cuts across the facts of land utilization. Whether a man buys land for a house, factory, or farm, the conveyance will be the same. . . . If this is true, we must frankly recognize the need for certain technical courses in real property which will give to the student some knowledge of the peculiarities of English real property law. All we can hope to do with such courses is to make them as realistic as possible, to give them a content and approach

160 Kingsley, Book Review, 5 J.LEGAL EDUC. 400, 401-402.
161 Sayre, Book Review, 5 J.LEGAL EDUC. 399, 400 (1953).
162 The Columbia research staff had recommended a study of divorce law in action. Jacobs & Angel, op. cit. supra note 128, at 35 (1930). It is reasonable to assume that Llewellyn’s articles, Behind the Law of Divorce, 32 COLUM.L.REV. 1281 (1932), and 33 id. 249 (1933), as well as the work of Marshall and May at Johns Hopkins (The Divorce Court: Maryland (1932); Ohio 1933)), grew out of the general discussions at Columbia.
163 See note 120 supra; SUMMARY OF STUDIES 125-27.
164 Note 132 supra.
165 Johnson, Some Suggestions as to the Place of Real Property Law in the Revised Curriculum, Document No. 72.
them from other than a purely legalistic point of view and refuse to let them be set up as an end in themselves." 166 No less than three such courses would be required: Interests in Land, Conveyancing (or Vendor and Purchaser), and Future Interests, 167 and, in addition, some historical matter ought to be included in an introductory course.

This attack on the problem appears not to have been coordinated with some plans that were being made by Professor Powell, although perhaps the two were not wholly inconsistent. Teaching Future Interests with his own conventional casebook, Professor Powell had "learned some Trust law"; he also "had some slight knowledge as to Wills"; and he found himself "edging over into these twilight zones." 168 He began to think of the relationship between these three fields of law and the process of wealth distribution, of the social phenomena and policies involved, and of a course which would draw all of these together. Such a course, if not functionally organized in the sense of the grouping of materials around a "type-fact situation," would at least be so in the sense of focusing on a "cluster-spot" and would encourage the study of law in the context of realistic social considerations. Such a course was inaugurated in the spring of 1928 (though it was modestly called only Future Interests and Non-commercial Trusts), and Professor Powell found himself confronted with a task of "immediate and appalling urgency"—exploration of the relevant nonlegal data. In a careful and soul-searching memorandum, 169 he reported to the faculty his progress during the ensuing two years. The paragraph that follows extracts from that memorandum some of the portions most relevant to the present inquiry, paraphrasing Professor Powell's language:

In 1928, an assistant, Mr. Charles Looker, assembled a bibliography of nonlegal materials consisting of about 100 books and pamphlets. It was thus possible to include in the materials which were being prepared for the part of the course dealing with trusts an introductory chapter of fifteen pages and very occasional sidelights on the problems subsequently treated; but by the end of the year 1928–29, little or nothing had been done on the problem of correlating the nonlegal material nor on the problem of welding into an integrated, coherent whole the materials of Future Interests, Wills, and Trusts. In 1929–30, the search for the nonlegal material was pressed with one full-time and two part-time assistants. No one knew just what was wanted nor where to find it. The

166 Id. at 633.
167 "Because of the complexity of this subject, nothing will be gained by attempting to split it up." Id. at 634.
169 Supra note 168.
The objective could only be to discover what was in existence, outside cases and statutes, that seemed relevant to the objectives of the course. An examination of the literature concerning trust companies yielded some twenty-five promising volumes, but the publications by trust companies, with the exception of the Trust Company Magazine, proved of little value. It was found useful to have an assistant attend the courses offered by the American Institute of Banking, for light on the transaction of trust business. In these ways, and through consultation with a trust officer, helpful information was obtained about the behavior of trust companies. This, however, was only one phase of the problem; another was to find out more about the problems arising in actual life and to bring the course into closer relation to them. Two assistants were assigned to gather data as to (1) the distribution of wealth; (2) the percentage of dying persons who leave assets administered in probate courts; (3) the prevalence of testate disposition; (4) the extent to which wills are declared invalid; (5) the types of assets constituting estate; and (6) the shrinkage in estates between the death of the owner and the final distribution. The researches, confined to the Surrogates' Courts in New York, Kings, and Bronx counties, resulted in the publication of a law-review article which has since become well known. Further research was done on current practices in testamentary disposition, on the possibilities of corporate organization in estate management, and on accounting practices affecting the relative interests of life tenants or beneficiaries and holders of subsequent interests.

In a supplemental memorandum, Professor Elliott E. Cheatham, who had participated in the course in 1929–30, took the view that the course was “a clear success,” and that students would thereby be “better fitted to handle as practitioners the problems of their clients in the important and difficult field covered, and also will have a clearer comprehension of the social settings of the problems, than men exposed to the courses this one supplements.” He emphasized, however, a doubt which Professor Powell had suggested: the trust was a remarkably flexible device, suitable to manifold uses other than the distribution of privately accumulated wealth; and to treat it solely in that context would be somewhat

170 Selected for special mention were: Thomas Conyngton, Harold C. Knapp, & Paul W. Pinkerton, Wills, Estates and Trusts (1921); Clay Herrick, Trust Department in Banks and Trust Companies (1925); Willford I. King, Wealth and Income of People of the United States (1922); Franklin B. Kirkbride, J. E. Sterrett & H. P. Willis, The Modern Trust Company (1905); James L. Madden, Wills, Trusts, and Estates (1927); James G. Smith, The Development of Trust Companies in the United States (1928); and Gilbert T. Stephenson, Living Trusts (1926).


172 Memoranda of the Marshall Conferences 707 (1929).
like treating the law of contracts solely in the course on insurance. The suggestion was not that the experimental treatment be abandoned, but that it be supplemented by specific attention somewhere in the curriculum to the trust concept and its potentialities.

The casebook for this course evoked from the reviewers no doubts which the editor had not himself anticipated. The critics questioned whether any significant integration of the three superseded courses had been accomplished (but one eminent reviewer referred specifically to instances in which fusion had been effectively executed); and they regretted the omission, or compressed treatment, of some subjects, notably those which would have illustrated the versatility of the trust. Although the nonlegal research which had been done was reflected in a chapter entitled “Some Material Facts and Trends in Current American Life,” the nonlegal content was not sufficiently obtrusive to excite much comment.

In 1937, Professor Powell published a second edition of his casebook on future interests, although that subject matter had been included in the volumes on trusts and estates; and this was followed, in 1940, by a separate casebook on trusts. The idea of the integrated course had not taken hold at other schools, and the new books were designed primarily for them. At Columbia, the course in trusts and estates was continued until 1943-44, when it was divided into Trusts and Estates I, given by Professor Powell with the 1937 casebook on future interests, and Trusts and Estates II, given by Professor Cheatham with the 1940 casebook on trusts. In 1948-49, however, the course in trusts and estates was reinstated.

174 Mechem, Book Review, 19 Iowa L. Rev. 146 (1933); Griswold, Book Review, 34 Columbia L. Rev. 287 (1934).
176 Reviews cited supra notes 171 and 172. The book contained a chapter introducing the trust concept in its substantive and remedial aspects.
177 Professor Mechem, however, took a rather scornful view of the statistics on testamentary practices and of some of the “functional” terminology. Mechem, Book Review, 19 Iowa L. Rev. 146, 150. Chapter 7 of the casebook also contained philosophical and economic materials on inheritance.
180 Columbia University Bull. of Information, Announcement of the School of Law 41 (1943-44).
181 Id. at 40 (1948-49). The division of the integrated course into two separate courses had been solely a response to administrative problems raised by the accelerated wartime program, and as soon as the emergency had passed the integrated course was restored. Again for administrative reasons, the materials relating to trust administration have been made into a separate elective course; but the prin-
4. Crime and Criminology. Crime was not, in itself, a ready-made functional category. Some crimes were to be comprehended in the materials organized about type-fact situations—the family, marketing, and labor. The residue posed for the committee formidable problems of internal classification. On one point, there was early agreement: it was desirable to continue the separation between criminal procedure and the substantive treatment, treating procedure as a method of state control.

The problem of how to treat the substantive content was more troublesome. The committee considered a classification which would entail the cataloging and separate treatment of particular crimes, and one which would "view the totality from the point of view of the person committing the act and the social conditions under which he committed it." But the literature on the causes of crime was in an unsatisfactory state:

Obviously, progress along these lines depends on the work of specialists in all these fields [medicine, psychiatry, psychology, eugenics, sociology, an- ciple of the integrated course has been preserved. The materials now used consist of the two recent casebooks on trusts and future interests, supplemented by mimeographed material on wills and on taxation aspects of trust drafting.

In 1938, Professor Powell made a factual and legal study of title registration in New York. Beginning with "a strong predisposition favorable to title registration," he was led by the facts discovered to quite different conclusions. Richard R. Powell, Registration of the Title to Land in the State of New York, 74-75 (1938). See McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 Yale L.J. 1125 (1939). In 1948, Professor McDougal, with Professor Haber, published his own functional-sociological property casebook. Myres S. McDougal & David Haber, Property, Wealth, Land: Allocation, Planning, and Development (1948). For a later statement of Professor Powell's view on the institutional approach to property, see 1 Richard R. Powell on Real Property 7-34 (1949).

In the three other basic property courses (Possessory Estates, Vendor and Purchaser, Landlord and Tenant), no significant innovations were attempted. Possessory Estates and Vendor and Purchaser, in fact, seem to have been designed to accommodate portions of property law not susceptible of functional treatment. The position of Landlord and Tenant was ambiguous. Professor Johnson had regarded it as a course that ought to be absorbed in one dealing with land utilization. Memoranda of the Marshall Conferences 624, 634. But both Professor Handler and Professor Jacobs wished that their subjects could be presented more functionally and more in social context. See Milton Handler, Cases and Materials on the Law of Vendor and Purchaser vii (1933); Albert C. Jacobs, Cases and Materials on the Law of Landlord and Tenant v (1932).

182 Document No. 31.
183 Id. at 133, 136; Summary of Studies 119-120. A proposed outline appears at p. 139 of the Memoranda of the Marshall Conferences.
184 Document No. 3, at 124.
185 Id. at 136. Notwithstanding this state of mind in the committee, we are told by Professor Oliphant that in 1927-28, the course in criminal law was "undergoing a reorganization, one of the objects being to introduce into the course such material as will illuminate the social background of the criminal law." It had not been possible to make a comprehensive outline of the revised course. The first term was to be devoted to procedure. "For the second term experimental type work is planned. . . . How to utilize the data of courts, prisons, probation and parole officers, juvenile courts, mental hygiene and child guidance clinics, psychopathic hospitals, etc., in the study of the individual has not yet been worked out. Perhaps a series of case histories may be the best solution." Summary of Studies 119-20. See Columbia University, Report of the Dean, School of Law 16 (1928).
The Materials of Law Study

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The committee turned its attention to a research program, proposing projects to determine the effects of certain legal rules, to inquire into the actual administration of prosecutions and trials, to study methods of detection and apprehension, and to be concerned with various sociological questions and problems of the treatment of criminals. Personnel trained in law, sociology, psychiatry, administration, and statistics would be required. The committee suggested the establishment of a school for the training of law enforcement officers, and later a full-fledged proposal was made for the establishment of a school of criminology.

With matters in this somewhat inconclusive state, an arresting development occurred. At the request and with the financial support of the Bureau of Social Hygiene, the Law School extended its auspices to a survey for the purpose of determining whether or not it was desirable to establish an institute of criminology and of criminal justice in the United States, and of planning such an institute if it should prove to be desirable. Professor Jerome Michael was selected as director, with a staff of fourteen (including Professors Kidd and Moley, who constituted the faculty committee on crime and criminology). The survey report, "written as if with a battle-ax," flung down a formidable

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186 Document No. 31, 145 et seq.
187 Id. at 152.
188 Id. at 138.
189 Document No. 74. Olliphant says that the faculty had "adopted" a plan of action including the establishment of an Institute of Crime and Criminology, to begin with a staff of eight full-time experts in the various disciplines; and that "the assembling of the necessary physical facilities and staff of experts for the study and teaching of Criminal Law, of its administration, of crime and its causes, and of the individual criminal is a project upon which the Law Faculty is in complete agreement and which it proposes untiringly to pursue." SUMMARY OF STUDIES 113, 115-16, 119.
190 Originally published as JEROME MICHAEL & MORTIMER J. ADLER, AN INSTITUTE OF CRIMINOLOGY AND OF CRIMINAL JUSTICE (1932); republished in somewhat revised form as JEROME MICHAEL & MORTIMER J. ADLER, CRIME, LAW AND SOCIAL SCIENCE (1933). See COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 12-13 (1929); id. at 10 (1930); id. at 6 (1932).
challenge to the suppositions underlying the entire scheme of reorgan-
ization. In the view of the authors, their pivotal theme was the relation
of law to the social sciences in general; and it was laid down that “[t]he
relation of criminology to the criminal law can . . . be taken as
typical of the relation, for instance, of economics and psychology to the
law of contracts, and, generally, of the relation of social science to
law.” 192 After a devastating examination of the literature of criminol-
gey, they announced these conclusions: 193

I. There is no scientific knowledge in the field of criminology.

II. Empirical, scientific research in criminology cannot be undertaken at
the present time.

They did go on to recommend the establishment of an institute, in the
belief that it was possible to develop an empirical science of criminology,
but only on condition that such an institute would forswear the “raw
empiricism” of previous research and devote itself, with radical changes
in existing methodology, to the development of theory and analysis in
psychology and sociology, on which criminology was dependent. 194
In addition, the institute should endeavor to construct a “rational science”
of the criminal law, 195 based upon the principles of the “sciences” of
ethics and politics. 196

The business of the survey was to inquire into the desirability of a
research institute, not into the problems of undergraduate professional
education; but the implications of the report for the pending reorganiza-
tion of the curriculum were obvious and were sometimes made ex-
plicit. Some portions bearing specifically on legal education require
full quotation:

We have chosen to orientate this book around the theme of the relation
of law and social science because of its contemporary importance. The rise
of what has been called sociological jurisprudence followed the development
of the social sciences in the latter half of the nineteenth century. More re-
cently American university law schools have undertaken and projected re-
forms in legal education in the belief that the study of law should be more
closely affiliated with the study of the social sciences. Associated with this
movement in legal education, if not responsible for it, have been attempts
to make jurisprudence “realistic” or “scientific,” to formulate the problems
of legal research as if they were problems in empirical social science. In

192 JEROME MICHAEL & MORTIMER J. ADLER, CRIME, LAW AND SOCIAL SCIENCE IX,
X (1933).
193 Id. at 390.
194 Id. esp. at 391, 396, 399.
195 Id. at 397.
196 Id. at xiii.
short, the effort has been to introduce both the content and the methods of
the social sciences into the study and practice of the law. Current contro-
versy of the issues thus raised has been profoundly unclear, largely because
empirical science has not been defined and distinguished from other kinds
of knowledge, and because of the ambiguity of the word “law” as denoting
both the body of propositions created by legislators and judges and the in-
stitutions and processes by which law in this first sense is made and admin-
istered. When such definitions and distinctions are made, it is readily seen
that none of the so-called social sciences are yet established as empirical
sciences; that the study of law in the first of the above senses is utterly
independent of them; and that empirical knowledge of social phenomena,
whether descriptive or scientific, is relevant to the practice, not the study,
of law.197

A rational science of the Anglo-American criminal law does not now
exist. . . .198

These text books and case books reflect the level of instruction in the crim-
inal law which currently prevails in American law schools. . . . In so far as American law schools are beginning to supplement the traditional
instruction in criminal law or procedure, they are doing so by offering in-
struction, of a more or less superficial character, in criminology and in the
empirical aspects of the administration of the criminal law, using for the
latter purpose materials gathered from research such as we surveyed in Chap-
ter IX [i.e., the Cleveland, Missouri, Illinois, New York, and Virginia crime
surveys]. There is no tendency discernible to study or teach the criminal law
as the subject matter of a rational science. Indeed, the whole contemporary
movement in legal research and education is in the direction of the empirical
and away from the rational. In so far as realism emphasizes the utility of
empirical knowledge in the solution of the practical problems which con-
front the legislator, the judge and the lawyer throughout the entire domain
of law, and the need for empirical sciences which will supply that knowledge,
realism or realistic jurisprudence is performing a real service. But in so
far as it ignores or underestimates the importance of the development of a
rational science of law and the utility of rational knowledge in the solution
of such problems, it is performing a disservice.199

Since the turn of the century the law schools of this country have been in-
terested in the rapprochement of law and the social sciences. This interest
has unfortunately not been enlightened by the clear realization that no em-
pirical sciences exist with which law could be profitably allied. . . . While there is no question that the study and practice of law can employ

197 Id. at xii–xiii.
198 Id. at 371.
199 Id. at 372 n. 60.
knowledge to be gained from the fields of psychology and social science, valid
and significant knowledge must exist in order to be employed.

The raw empiricism which has prevailed in psychology and social science
has its counterpart in the research of legal scholars. It goes by the name of
legal realism or realistic jurisprudence. It has been developed under the
influence of psychology and sociology; in fact, the precursor of realistic
jurisprudence was called sociological jurisprudence. It has, in addition, been
guided in its aims and methods by current American pragmatism. . . .
It is only when this movement becomes extremist and doctrinaire in its ex-
clusive insistence upon the empirical study of "law in action" that it is a
serious evil. It has in some quarters exerted this unfortunate influence;
it has depreciated and discouraged rational legal analysis.200

The scope and purpose of the law school course in criminal law were
rather clearly defined by this position. It must be confined to the study
of Anglo-American law as a "rational science," on the basis of history,
comparative law, and analysis.201 It could not be concerned with data
from nonexistent empirical sciences. The survey affirmed rather than
denied the existence of "descriptive knowledge" relating to the causes of
crime and to criminal law administration;202 lawyers might even find
such knowledge useful; but, since it was not science, "a university
[would] consult its own dignity in declining to teach it." 203

Had these findings been as conclusive as the tone of the authors, there
would presumably have been a sudden end of the attempt to reorganize
the curriculum on functional lines and to relate it to the social sciences.
This, however, was not quite the case. In a spirited counter-attack,
Professor Karl Llewellyn summarized his reaction: "Altogether: as
stimulating, irritating, vitally wise and hopelessly absurd a book as I
have read." 204 Acknowledging that the authors had "with utter co-
gency" demonstrated the weaknesses of crude empiricism, he charged
them with a tendency toward crude rationalism.205 The "Himalayan"
standards which Michael and Adler had erected for empirical science
had led them to reject the substantial progress made by criminological
research in discovering some causes of crime and controlling some crim-
inal behavior.206 Much of the knowledge dismissed by the authors as

200 Id. at 422-23.
201 Id. at 367-70.
202 Id. at 398-99.
203 This, of course, is the language of Langdell (address delivered November 5,
1886, 3 L.Q.Rev. 123, 124 (1887)), not of Michael and Adler; but it conveys the Im-
port of their note 37, at 422.
204 Llewellyn, supra note 191, at 291. Other contributors to the symposium were
Beardsley Ruml, then dean of the Social Sciences at Chicago (The Subject Matter
of Criminology, 34 Colum.L.Rev. 273 (1934)), and Richard McKeon, then Assistant
Professor Philosophy at Columbia (The Science of Criminology, id. at 291).
205 Llewellyn, 34 Colum.L.Rev. at 292, 291.
206 Id. at 295.
mere common sense was "not the stock of knowledge common to the people, but that common rather to the skilled in a given line." 207 In the end, he concluded that "Evidently the most careful and trained common sense skepticism is needed to make either the rational or the empirical attack at all viable. Evidently, each needs the other, also, as a complement. And that is good to know." 208

The survey report had its effect. No new casebook on criminal law grew immediately out of the faculty's organized attempt to revise the curriculum. Until 1929–30, Beale's casebook was used, as before; thereafter, through 1934–35, the casebook was "to be announced"; not until 1935–36 was it announced as Michael and Wechsler's Cases and Materials on Criminal Law and Its Administration, in mimeographed form.209 And it is reasonable to surmise that it may have had a generally moderating effect, injecting an element of skepticism into the quest for answers from the social sciences and a note of caution into the process

207 Id. at 286.
208 Id. at 291.
209 See the Law School announcements for the years in question. See also Columbia University, Report of the Dean, School of Law 10–11 (1935). The casebook (Jerome Michael & Herbert Wechsler, Criminal Law and Its Administration: Cases, Statutes and Commentaries (1940)) belongs to a later and more mature period than that under consideration in this paper, but its principal characteristics require mention. While it built on the conclusions of Crime, Law and Social Science, it was by no means a vehicle for the crudely rationalistic study of criminal law. The concept of law as a means of attaining social ends was made explicit and central. The assertion, evaluation, and exploration of propositions concerning social values was held to be the province of ethics and politics, and it was believed that such propositions could be objectively established. With respect to the tendency of law to attain the ends sought, and with respect to the causes and the control of crime, existing knowledge might be mere common sense or merely descriptive, but it was not, therefore, despised. "Though the extent to which the investigations that have been made have substantially enlarged our fundamental knowledge of the causes of crime may be disputed, they certainly have contributed a wealth of material descriptive of those members of the convict population who have been examined." (p. 21) The use made of relevant nonlegal material was more extensive (see the table at p. 1337) and more discriminating than in any previous casebook, regardless of its pretensions. Indeed, the reviewers, with varying degrees of insight, regarded the book as a direct product of the socio-functional approach:

"[F]unctional approach ..., modernistic ..., Strahorn, Book Review, 54 Harv.L.Rev. 1414, 1415 (1941); "Instructors who do not feel conversant with literature on the sociology of law need not be filled with consternation when they read of this book as a splendid example of the fruitfulness of that approach," Gausewitz, Book Review, 26 Iowa L.Rev. 908, 914, (1941); "[S]ocial engineering ..., Stumberg, Book Review, 89 U.Pa.L.Rev. 1123, 1125; "[D]efinitely the fartherest movement yet on the functional approach side," Puttkammer, Book Review, 8 U.Chic.L.Rev. 386, 387 (1941); "Their book is proof that the progressive elements in Sociological jurisprudence and in legal realism have finally overcome the period of growing pains and can pass free and adult among men," Riesman, Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration, 50 Yale L.J. 636, 653 (1941). In fact, the book was a fulfillment of expectations which might justifiably have been based upon a union of the rational and empirical methods, fortified by common-sense skepticism.
of scrapping classifications which had utility for the rational study of law.\textsuperscript{210}

5. Marketing. The whole area of “business relations” was conceived of as falling into four or more divisions: Marketing, Business Organizations, Finance and Credit, Labor Relations, and possibly Risk and/or Production.\textsuperscript{211} Nonlegal scholarship in the field of business relations was regarded as (1) theoretical, and unrelated to the data of economic life; or (2) devoted to the collection of unrelated business or economic facts; or (3) devoted to “an attempt to see the entire business mechanism as a homogeneous composite of specialized and interacting agencies, performing inter-dependent processes in the total business of getting the world fed, clothed, housed, educated, and amused.”\textsuperscript{212} The first two kinds were rejected as having no contribution to make to a scheme of classification which would facilitate the reception of vital nonlegal data. The third was found more promising, and the principal divisions of the classification were selected because research of this kind tended to center about them as focal points.

There were three basic documents on marketing.\textsuperscript{213} They proceeded, though tentatively, on the “assumption that marketing is a worth-while grouping of materials, legal and nonlegal, for purposes of curriculum building.”\textsuperscript{214} They were primarily concerned with problems of internal organization. Confronted with fact situations of extreme complexity, the committee decided to “attack the division of this field primarily on the fact side, leaving, for the moment, untouched, the question of integrating the fact material with the law.”\textsuperscript{215} After examining the literature of marketing, the committee considered three possible bases of

\textsuperscript{210}For Dean Smith’s evaluation of the survey report, see Columbia University, Report of the Dean, School of Law 6–7 (1932). Somewhat incongruously, he referred to it, along with Berle & Means’s Modern Corporation and Private Property, as furnishing “proof of the value of coordinated research in law and related fields, the need of which has been urged by the Faculty of Columbia Law School during the last seven years. . . .”

The researches of Professor Moley (Columbia University, Report of the Dean, School of Law 22 (1929); id. at 13 (1929); id. at 10 (1930)) on criminal law and procedure appear to have resulted in three articles, an address, and two semi-popular books: The Vanishing Jury, 2 So. Cal. L. Rev. 97 (1928); The Initiation of Criminal Prosecutions by Indictment or Information, 20 Mich. L. Rev. 403 (1931); The Use of the Information in Criminal Cases, 17 A.B.A.J. 292 (1931); The Prosecutor and the Plea of Guilty, 53 A.B.A.J. 541 (1931); Politics and Criminal Prosecution (1929); and Our Criminal Courts (1930).

Professor Jerome Hall’s significant book, Theft, Law and Society (1935; 2d ed. 1952), was clearly an application of the kind of thinking suggested in Document No. 31. See Columbia University, Report of the Dean, School of Law 17 (1935).

\textsuperscript{211}Summary of Studies 128.

\textsuperscript{212}Id. at 130.

\textsuperscript{213}Documents 33, 34, and 35.

\textsuperscript{214}Document No. 33 at 168.

\textsuperscript{215}Ibid.
classification. The first was that of the processes (or functions or activities) involved in marketing; the second was that of the classes of commodities involved; and the third was that of the agencies (functionaries organized and acting in typical, largely standardized positions and in typical, largely standardized ways) found active in the processes of marketing.\textsuperscript{216} The preliminary preference seems to have been for the organization based on processes, or functions, as best facilitating the integration of legal and nonlegal materials.\textsuperscript{217} Later, however, opinion seems to have shifted to the view that “[s]o far as we have developed in our society well differentiated specialized marketing agencies or functionaries, and so far as a sufficient number of important legal problems cluster about them, such agencies should be treated in special courses.”\textsuperscript{218} Examples were to be found in transportation, storage, and risk-bearing. Only the residue left after this type of allocation would be organized in terms of basic marketing processes.

But the curriculum was little affected by such labors in this field. Trade Regulation, which of course concerns the marketing process, was already a well established course; indeed, the committee appears to have regarded it almost as one of the traditional courses which would raise problems if the broader functional classification were adopted.\textsuperscript{219} The only course outline offered by the committee was one on Competitive Practices.\textsuperscript{220} No new casebook in that segment of the field was published by a member of the Columbia faculty until 1937.\textsuperscript{221} It was gratefully reviewed by both practicing lawyers and teachers, and, although it made significant use of “secular”\textsuperscript{222} material, it was not regarded as unconventional.\textsuperscript{223}

Llewellyn's Cases and Materials on Sales, published in 1930, was a radical departure from precedent. It focused on the business transaction rather than on traditional legal categories, but it was a far cry from the functionalism of the faculty seminar. It can hardly be said to have utilized social science materials directly, however rich it was in the flavor of the market and however keen its Mansfieldian sensitiveness to mercantile usage. On the premise that Llewellyn is his own best reviewer, I quote portions of the Introduction relevant to the questions under discussion:

\textsuperscript{216}Id. at 15.
\textsuperscript{217}Document No. 35.
\textsuperscript{218}SUMMARY OF STUDIES 134-35.
\textsuperscript{219}Document No. 33, at 189.
\textsuperscript{220}Id. at 186.
\textsuperscript{221}HANDLER, CASES AND OTHER MATERIALS ON TRADE REGULATION (1937).
\textsuperscript{222}Hamilton, Book Review, 38 ColuM.L.REv. 953, 954 (1938).
\textsuperscript{223}See reviews by Kirsch, 25 A.B.A.J. 64 (1939); McAllister, 23 Iowa L.Rev. 138 (1937); Derenberg, 15 N.Y.U.L.Q.Rev. 147 (1937); McClintock, 5 U.Chi.L.Rev. 328 (1938); and Payne, 24 Va.L.Rev. 701 (1938).

\textsuperscript{8} Journal of Legal Ed.No.1-4
Doctrine is therefore emphasized, as doctrine must be; but it is emphasized as the first step in a wider process of seeing what law means and of bringing it to bear on facts. The picture is not complete. To fill it out would need a vast body of descriptive and statistical economic material which is as yet lacking. Partly the lack moves from the prohibitive amount of time required in turning out what seemed a worthwhile teaching tool. Partly it moves from the fact that the book is directed to law students, not to students of business; legal technique thus moves into the foreground, and an understanding of the business situation becomes not a primary object, but a means to making the legal job intelligible. Finally, there is the question of space and technique. Sooner or later we must learn to bring to bear on our law curriculum an increased body of fact information; but the art is not easy, and we have to reckon, while it is being learned, with limitations of time and space. In the meantime, the descriptions of fact background inserted in the book must serve as best they can.

The book therefore approaches Sales law as a matter of marketing, as a tool of modern business in a credit economy in which future contracts are the rule. So far as concerns seeing the law in the light of its effects, the book takes up the practices of the laymen who are interested and views the contract as a device for allocating various business risks; it takes up the presumptions of Sales law as a device for allocating risks which the parties have not expressly covered. The book errs, I think, in too happily assuming the needs of buyers and sellers to be the needs of the community, and in rarely reaching beyond business practice in evaluation of the legal rules. There again, time for building a wider foundation for judgment has been lacking.

224 Karl N. Llewellyn, Cases and Materials on the Law of Sales xi (1930). "In this same aspect of deepening the student's insight into the ways of the law, an effort has been made to draw on suggestions from the other social sciences. From modern psychology, especially in reference to the processes of decision and to the use of rationalization to make the decision appear acceptable to bar and other benches. From experimental logic, in the attempt to present each new case as in fact a new case, and to show 'rules' as formulae the actual content of which varies with each new decision which is made. From social psychology, in the effort to show how patterns of thought, and especially legal concepts, influence the course of decision; as also to show how changes of fact background alter old legal concepts, or bring forth new. From anthropology and sociology, in relation to the 'diffusion' or 'contagion' of a 'culture complex'; this includes the process that we know in law as reasoning from analogy, but includes a deal beyond; it is a line of thought which brings peculiar light into the field of documents of title. Nowhere does the utility of such borrowed suggestions appear more clearly than in the historical aspects of the book." Id. at xi-xii. But the book did not offer social science materials in homeopathic doses. The author had himself assimilated and brought to bear the contributions of nonlegal disciplines, and had utilized them in preparing background materials which a lawyer or law student could appreciate without special conditioning.

225 Id. at xv (the last two sentences being taken from n. 3). Llewellyn's dissection of the concept of title, clearly a product of the treatment of sales law as a matter of allocating business risks, has since become a standard tool of sales law analysis. And Mr. Llewellyn is my authority for the statement that the Sales article of the Uniform Commercial Code is another direct product of the type of treatment exemplified by the casebook.
Three reviewers complained of the secular content. One, identifying it with economics, thought that such matters could be included in the curriculum only at the expense of good professional training; the others could neither understand nor accept the implication that prelegal education did not supply sufficient understanding of the social and economic background. In general, however, the business background materials were accepted with enthusiasm, perhaps, in part, because they were offered simply as such, with a minimum of the trappings of social science.

6. Finance and credit. The basic memorandum on this, the third of the broad divisions of the field of business relations, treated the topic as divisible into three parts: commercial bank credit, security devices, and corporate finance. The third of these was promptly relinquished to the business organization group. So complex were the problems of internal organization that they led the committee to include in its report one of the most searching analyses of the general problem of curricular organization to be found in the records. Primary emphasis was given to the first of the three internal divisions: "The Medium of Exchange: Commercial Bank Credit." One passage in the committee's report is of special interest:

The organization proposed has curious and suspicious resemblance to the present plans of the two members of the committee. The arguments sound curiously like defense reactions against those same two members being forced to rethink their field in new and different terms. Despite these facts, the committee are disposed to believe their arguments both honest and sound.

228 Turner, Book Review, 30 Colum. L. Rev. 904, 905 (1930). See also reviews by Havighurst, 36 W.Va. L. Rev. 310 (1930); Waite, 28 Mich. L. Rev. 947 (1930); Townsend, 39 Yale L.J. 1080 (1930); McCurdy, 44 Harv. L. Rev. 140 (1930); Hamilton, 8 N.Y.U. L. Rev. 341 (1930); Britton, 79 U.Pa. L. Rev. 377 (1931); Moore, 5 Tul. L. Rev. 504 (1931).

Professor Hanna's treatise, THE LAW OF COOPERATIVE MARKETING ASSOCIATIONS (1931), may perhaps be regarded as an outgrowth of the faculty's deliberations in this field, although Dean Smith treated it as being "in the general field of security law." Columbia University, Report of the Dean, School of Law 14-15 (1929).

229 Document No. 40.
230 Id. at 258, 286. Another memorandum, contemplating an organization from the point of view of the financial executive in an industrial or commercial concern and positing the functional necessity of including corporate finance, appears to have had little influence. Document No. 69.
231 Id. at 259 et seq. where an eighteen-page course outline is reproduced. In Oliphant's summary, almost exclusive attention is given to this topic; he notes that corporate finance was to be subsumed under business organizations, but makes no reference to security, merely stating that no agreement was reached as to the disposition of matters not included in commercial bank credit or corporate finance. SUMMARY OF STUDIES 157.

232 Llewellyn and Moore. See note 5 supra.
For the inquiry into bank credit assumed its present form as a result of hard, long thinking along lines substantially similar to those which we find at the basis of our present proposal for reorganization. And the line-up in terms of security devices has assumed its present shape as a result of similar thinking, colored not by a traditional approach to legal material, but by insistent suggestion derived from sociology, anthropology, and behaviorism, and by the light that insistent suggestion sheds on the activity of men and judges.\textsuperscript{233}

In 1927–28, a course on commercial bank credit was substituted for the old course on bills and notes;\textsuperscript{234} but in 1929, Underhill Moore went to Yale, and thereafter the place of Bills and Notes in the Columbia curriculum remained unchallenged.\textsuperscript{235}

Security, the somewhat slighted twin of commercial bank credit, was another matter. The committee's preliminary conception had been of a category called commercial credit—chiefly, credit as between buyer and seller.\textsuperscript{236} But a modification of the strictly functional or institutional approach was thought to be necessary because of the complexity and the technical character of legal security devices. In this field, legal concepts were so important and intricate a part of the fact situation that

\textsuperscript{233} Document No. 40 at 259.

\textsuperscript{234} Columbia University, Report of the Dean, School of Law 17 (1928). The announcements, however, continued to list Bills and Notes, with Commercial Bank Credit as a seminar. In 1928–29, the vehicle for the course in bills and notes was announced as Moore, Cases on the Checking Account (mimeographed).

\textsuperscript{235} Professor Moore set forth his views on this area of the law in Moore & Hope, An Institutional Approach to the Law of Commercial Banking, 38 Yale L.J. 703 (1929). See also Moore & Sussman (sic), The Lawyer's Law, 41 Yale L.J. 566 (1932). At Yale, he developed a set of mimeographed materials on Commercial Bank Credit. In 1932, a third edition of his Cases on Bills and Notes was published, but does not appear to have been reviewed. Beginning in 1927, he published a remarkable series of articles based on his institutional approach: Moore & Shamos, Interest on the Balance of Checking Accounts, 27 Colum. L.Rev. 633 (1927); Moore & Sussman, The Current Account and Set-offs between an Insolvent Bank and Its Customer, 41 Yale L.J. 1109 (1932); Moore & Sussman, Legal and Institutional Methods Applied to the Debting of Direct Discounts—I. Legal Method: Banker's Set-off, 40 Yale L.J. 851 (1931); II. Institutional Method, id. at 555 (1931); III. The Connecticut Studies, id. at 752 (1931); IV. The South Carolina and Pennsylvania Studies, id. at 828 (1931); V. The New York Study, id. at 1035 (1931); VI. The Decisions, the Institutions, and the Degrees of Deviation, id. at 1219 (1931); Moore, Sussman, and Brand, Legal and Institutional Methods Applied to Orders to Stop Payment of Checks—I. Legal Method, 42 Yale L.J. 817 (1933); II. Institutional Method, id. at 1198 (1933); Moore, Sussman, & Constvct, Drawing against Uncollected Checks: I, 45 Yale L.J. 1 (1935); II, id. at 260 (1935). To attempt an analysis of these writings would, among other things, take us far from present concerns, which have to do with the faculty deliberations and their effect on the Columbia curriculum, and I shall not make the attempt.

Some idea of the intensity of Moore's devotion to the institutional and factual approach is conveyed by the fact, related to me by Professor Llewellyn, that when Moore embarked upon such studies, he burned the contents of a roomful of filing cabinets, representing some eighteen years of effort to annotate all the American cases on bills and notes. The material had been gathered on the basis of rejected hypotheses.

\textsuperscript{236} Document No. 40 at 10–11.
special attention had to be given to a plan of organization which would bring them clearly into focus. Accordingly, the category was redefined as "legal security devices, with special reference to commercial credit." A course on security was offered for the first time in 1927–28 by Professors Llewellyn and Douglas, and was continued by Professor Hanna, who, in 1932, published his Cases and Other Materials on Security. The book treated, in addition to suretyship and real estate mortgages, pledges, letters of credit, trust receipts, chattel mortgages, and conditional sales. "Much effort," the editor said, had been expended "to explain the contemporary business background, partly by cases containing exposition of business practice, partly by current business forms, and partly by notes on non-legal topics." But insight into the problems of constructing such a casebook was afforded in the Preface:

My original outline was based more on business uses than the outline that finally determined the contents of this volume. It is hard to escape from the tyranny of one's own training in suretyship and mortgages. The diversity of the uses of third person and land security makes it difficult, if not impossible, to organize these topics except on a basis of legal analysis. The leading business schools have accomplished much in collecting, classifying, and cataloguing business materials, but even when one supplements their achievements with expensive research, the results are often disappointing when they are not merely negative. Some of the most exacting of legal scholarship has always been devoted to suretyship and real estate mortgages. The existing organizations of these courses represent so nearly a consensus of the opinions of authorities that one may not lightly disregard them. After much experiment and discussion I have followed for the most part a conventional outline of both suretyship and real estate mortgages.

The reviewers were unanimously enthusiastic, welcoming both the plan of organization and the background materials. The second edition, published in 1940, was similarly received, although by that time a reviewer could refer to its arrangement as "orthodox." In short, the

237 Ibid. It will be recalled that Dean Stone had suggested the organization of a course assembling the law relating to various security devices. See note 33 supra. Professor Hanna had been doing research directed to this possibility for some time. See Columbia University, Report of the Dean, School of Law 17 (1928); id. at 14 (1929); id. at 14 (1930); id. at 9 (1932).

238 Columbia University, Report of the Dean, School of Law 17 (1928).

239 John Hanna, Cases and Other Materials on Security vii (1932). It was not the first such casebook. See Wesley A. Sturges, Cases and Materials on Credit Transactions (1930).

240 Id. at vii–viii.

241 See the reviews by Payne, 82 U.Pa.L.Rev. 85 (1933); Kidd, 21 Calif.L.Rev. 641 (1933); Grade, 28 Ill.L.Rev. 306 (1933); Billig, 46 Harv.L.Rev. 1351 (1933); Cormack, 6 So.Calif.L.Rev. 357 (1933); and the brief notice in 17 Minn.L.Rev. 460 (1933).

242 Meriwether, Book Review, 29 Calif.L.Rev. 447 (1941). See also reviews by Crane, 30 Geo.L.J. 224 (1941); Gerber, 89 U.Pa.L.Rev. 998 (1941); and the brief notice in 25 Minn.L.Rev. 819 (1941). In 1952, a "re-edited second edition" appeared in response to the need for abbreviation.
book achieved, if not an elegantly functional treatment, (1) a material saving of time by compressing into one course the materials of suretyship and mortgages and more besides (although no attempt was made to “merge” the various devices); and (2) a framework in which the available legal devices could be viewed comparatively in the light of their commercial utility.

Nowhere in the Memoranda of the Marshall Conferences nor in the Summary of Studies is there reference to the problem of the unsecured creditor and the insolvent debtor, although that problem would seem to be relevant to the general area of finance and credit. Dean Stone, however, had suggested a course on creditors’ rights; such a course was offered in 1929–30; and in 1931, Professor Hanna published his Cases and Materials on the Law of Creditors’ Rights. The book was designed to facilitate the “comparative study of the various ways of protecting an unsecured creditor” and covered enforcement of judgment, fraudulent conveyances, general assignments, creditors’ agreements, and receivership in addition to bankruptcy. “In the nature of things the materials are largely legal, in contrast to the book on Security in which there seems a legitimate occasion for the inclusion of a generous amount of non-legal discussions.” One reviewer called the book “epoch-making,” and all were enthusiastic. Here is an instance, it seems to me, in which a tough-minded lawyer, dealing with essentially procedural materials, succeeded in being more functional than the faculty planners, and succeeded very well indeed.

243 See the Preface to the second edition.
244 See note 32 supra.
246 JOHN HANNA, CASES AND MATERIALS ON THE LAW OF CREDITORS’ RIGHTS (1st ed. 1931). The statement (p. viii) that the organization was primarily from the viewpoint of law administration suggests that the faculty was thinking of that pigeonhole as the ultimate destination of such topics.
247 Ibid.
249 Glenn, Book Review, 32 COLUM.L.REV. 240 (1932); Lloyd, Book Review, 81 U.PA.L.REV. 240 (1932); Radin, Book Review, 21 CALIF.L.REV. 182 (1933); Cordasco, Book Review, 7 So.CALIF.L.REV. 559 (1933). The second edition (1935) was likewise approved, Glenn, Book Review, 36 COLUM.L.REV. 176 (1936), though it was suggested that the arrangement of materials might be more “imaginative and intricate,” McDougall, Book Review, 45 YALE L.J. 1169 (1936), and even that the book should be supplemented by clinical training. Billig, Book Review 25 GEO.L.J. 246 (1936). This was followed by JOHN HANNA & JAS. A. MCLAUGHLIN, CASES AND MATERIALS ON CREDITORS’ RIGHTS (3d ed. 1939); HANNA & MCLAUGHLIN, CASES AND MATERIALS ON CREDITORS’ RIGHTS (4th ed., two volumes, 1948, 1949); and a consolidated fourth edition, in one volume, in 1951. Also in 1935, Professor Hanna published separately the portion of the casebook dealing with bankruptcy, under the title Cases and Materials on Bankruptcy.

Reference should also be made to HERMAN N. FINKELSTEIN, LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT (1930), a graduate dissertation with an introduction by Professor Llewellyn treating the business and economic background.
7. Labor. Since Industrial Relations was a firmly established component of the curriculum, the task of the committee assigned to this fourth division of the field of business relations was not to innovate but to suggest methods and directions for further progress. Typically, further progress in such a venture means broadening scope and searching for additional nonlegal material of relevance, in the face of multiplying legal materials, and is not easily attained. The committee's report, accordingly, took a long-range view instead of suggesting immediate changes. It suggested a marshalling of the University's personnel assets, in all departments, for a cooperative attack on the problems of research and course organization. Its comprehensive outline and discussion of the economic aspects of labor problems was intended as a basis for continuing research rather than for immediate course construction. It was not until 1944 that a member of the Columbia faculty published a new casebook on labor law.

8. Risk and risk-bearing. In 1921, Professor Frank H. Knight, then of the University of Iowa, published his *Risk, Uncertainty, and Profit*, a highly abstract, but today still significant, contribution to economic theory. The concepts of risk and uncertainty were carefully analyzed and differentiated, and given position in the systematic theory of profit and capital. The focus was upon the "role of the entrepreneur . . . the recognized 'central figure' of the system, and o[n] the forces which fix the remuneration of his special function." This essay in pure economic theory was written without the remotest reference to the problems of professional education in schools of business, to say nothing of law schools. But, at the suggestion of Dean Leon C. Marshall, Professor Charles O. Hardy, a colleague of Professor Knight's, undertook to prepare the materials for a course on risk and risk-bearing, which was to become a major functional category in the curriculum of the University of Chicago School of Business. From the beginning, there was some doubt as to the soundness of this grouping of materials; and nothing in Professor Knight's analysis called very obviously for centering professional business instruction around the concept of risk as a functional category. The subjects covered were distinctly miscellaneous from any point of view except that which concentrated on the common element of risk or uncertainty: elimination and transfer of risk; the business cycle; business forecasting; investment of

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250 Document No. 41 at 293-294.
251 MILTON HANDLER, CASES AND MATERIALS ON LABOR LAW (1944), continued as MILTON HANDLER & P. R. HAYS, CASES AND MATERIALS ON LABOR LAW (1950), with a revised 1951 edition by the same editors.
252 FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT ix (1921).
253 CHARLES O. HARDY, RISK AND RISK-BEARING viii, xi, xv (1923).
254 Id. at xii.
capital; security markets; speculation; hedging; life, fire, and miscellaneous property insurance; guaranty and suretyship; and risks of labor.

In 1924, Professor Edwin W. Patterson published an article entitled, "The Apportionment of Business Risks Through Legal Devices." At the outset, he cited Hardy's *Risk and Risk-Bearing*, but guardedly—as an example of a possible tendency on the part of some economists to overemphasize the importance of the concept. Accepting risk as a pervasive and significant phenomenon in economic activity, he set out to trace, in a tentative and experimental way, the manner in which the courts, by applying or purporting to apply certain legal norms, were consciously or unconsciously determining the apportionment of risks. The objective was to gain some insight "into the extent to which the operation of the legal system facilitates the apportionment of risks in accordance with economic needs and practices, into the economic policies which are fostered or retarded by the operation of legal devices, and chiefly into the smoothness and precision, or lack of it, with which legal devices operate as technical instruments." The approach was modest and skeptical, and the legal concepts examined were limited to four associated with contract and other consensual relations: (1) impossibility of performance, (2) the duty of care imposed on a bailee, (3) mutual mistake, and (4) implied warranties. Each of these was regarded as a doctrinal device for risk apportionment, and it was suggested that the problems involved might advantageously be stated as problems of risk-bearing rather than as "problems in the application of legal concepts which are based upon an abstraction of purely physical or other adventitious factors in the business relation in question." Whether the results reached by the courts were socially and economically expedient could be judged only by the standards of the arm-chair philosopher: "Only when we have adequate data as to business practices and their social and economic consequences, will we be in a position to formulate new concepts and rules for the apportionment of risks. Meanwhile, the apportionment of risks will be carried on through the jurist's traditional method of 'casual observation' and we may only hope that the law's cultural lag will be minimized."
Here was insight that could enrich the study of law: insight into the operation of law as a means of dealing with the fundamental hazards of life and business. Here was a framework for criticism; but, typically, and necessarily, it stopped short of supplying standards for criticism. Those the law could not supply, and they were hard to find. There the matter rested until the faculty's mobilization for attack upon the problems of reorganization of the curriculum summoned all such resources to the firing line. If risk was a pervasive and significant problem of economic life, and if rules of law could be fruitfully treated as devices for risk apportionment, why not group the rules about the problem for study? Such a classification had its counterpart in the business schools, and one might hope that parallel statement of the problems and parallel study would bring to light economic theory and factual information which would supply standards of criticism. The committee's report 260 pursued this possibility with enthusiasm. It stated twelve reasons for believing that the conception of risk was a valuable method of approach to many legal problems. It included a short bibliography of economic materials.261 Its forty-page outline of "a course or courses on risk and risk-bearing" 262 set forth an overwhelming diversity of subject matter relating to risks: the doctrine of respondeat superior in agency; workmen's compensation acts; implied warranties in sales; the doctrine of Price v. Neal; 263 liability for negligence; liability without fault; hedging; a series of matters regarded as risks created by the imperfect operation of legal machinery, including the retroactive effect of judicial decisions, supervening illegality, vexatious and unfounded litigation, erroneous judgments, and ignorance or mistake of law; the Statute of Frauds, the parol evidence rule, and the best-evidence rule ("devices to minimize the risks of oral transactions"); laws relating to risks incurred in the production of goods, including nuisance, building codes, zoning ordinances, etc., from the selection of the plant site to the marketing of the product; contract, as the pervasive device for apportioning business risk; and, of course, insurance. 264

260 Document No. 45. See SUMMARY OF STUDIES 160.
261 Including JOHN D. BLACK, INTRODUCTION TO PRODUCTION ECONOMICS (1926); CHARLES O. HARDY, RISK AND RISK-BEARING (1923); FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT (1921); and L. C. MARSHALL, BUSINESS ADMINISTRATION (1921). Document No. 45, at 363.
262 Document No. 45, at 364.
264 Compare the restraint of Professor Patterson's article, supra note 255, and of his comment on type-fact situations, Document No. 54, in which he said (at p. 452): "My present hypothesis is that I cannot come anywhere near to enumerating all of the type-fact situations which will be found significant for the training of super-lawyers for their professional activities." See also Patterson, Can Law Be Scientific? 25 ILL.L.REV. 121, 122 (1930): "...I am addressing those who...have felt a sense of frustration in their efforts to use scientific methods in law.”
Risk was a pervasive phenomenon indeed; around it could be clustered a startling miscellany of legal topics, and there would result encroachment not only on traditional courses but on newly defined groupings as well. Moreover, while large segments of the existing curriculum were included, they were not provided for in their entirety; and this was notably true of torts. It is not surprising that the adoption of such a conception as a basis for course organization was "much debated," nor that, after the fervor of the concerted faculty exploration had abated, and he was confronted with the preparation of materials for the use of law students, Professor Patterson limited himself to recognition of the fact that the course in insurance was already a functional organization of materials bearing on the important core of vocational risk-bearers.

His casebook on insurance, now in its third edition, was "designed to present current problems of insurance law in their relations to insurance institutions and business practices without sacrificing either the historical development or the technical analysis of legal doctrines." The organization featured the principal aspects of the insurance business: the carrier in its legal and financial structure and its relation to the state; the interests of those insured; the selection and control of risks; the marketing of insurance protection; and the settlement of claims. A bibliography, chiefly of nonlegal materials, was included; nonlegal materials were interspersed with the cases and collected in an appendix, which included mortality tables; information on classes of life policies, with life insurance premium tables; material on the selection of risks; policy forms; and material on fire insurance rates. The basic features were retained and supplemented in the later editions. The reviewers, warm in their praise, were expressly appreciative of the arrangement and of the "pertinent and valuable economic information."

265 Torts were not considered elsewhere except in the report of the committee on labor, which dealt with industrial accident and disease. Document No. 41 at 207. Professor Patterson had earlier remarked that the business administrator's risk did not exhaust the problem, "but it includes a large and, if volume of litigation is the test, the most important part of it." Patterson, The Apportionment of Business Risks through Legal Devices, 24 Colum.L.Rev. 335 (1924). A special effort seems to have been made to encompass as much tort law as possible. Thus a consideration of the risks of special types of enterprises, such as publishing, would have brought libel (and also a bit of copyright) into the fold.

266 Summary of Studies 160.

267 Ibid. Professor Douglas, who attributed his inspiration to Professor Moore, was also impressed by the analysis of legal concepts in terms of the allocation of business risks. See Douglas, Vicarious Liability and Administration of Risk I, 33 Yale L.J. 584 (1929); II, id. at 720 (1929). Professor Patterson's continued interest in the subject is indicated by his articles, Unsecured Creditor's Insurance, 31 Colum.L.Rev. 212 (1931), and Hedging and Wagering on Produce Changes, 40 Yale L.J. 843 (1931).


269 Id. at v (1st ed. 1932).

270 Goble, Book Review, 43 Yale L.J. 688, 690 (1934). See also reviews by Langmaid, 21 Calif.L.Rev. 189 (1933); Updagraff, 18 Iowa L.Rev. 578 (1933); and
I am indebted to Professor Patterson for the following comment on
the fate of the projected course on risk and risk-bearing: 271

These main factors were influential:

1. The initial enthusiasm for behaviorism and logical positivism was tem-
pered by the sober reflection that legal evaluations cannot, or should not,
dispense with the ideas of fault, willfulness and other conscious motivations
of human conduct. This led to the conclusion that a broad course in risk
and risk-bearing would sever tort and contract problems from their traditional
legal and moral roots and would thus require that many problems be taken
up twice in different courses. . . . Still, the effect of our faculty dis-
cussions was, I believe, to give greater emphasis to the risk-approach in both
torts and contracts, and in commercial law as well.

2. To organize a course in risk-bearing would have aroused (quite under-
standable) opposition from “vested interests,” especially from my esteemed
colleague, Professor (later Dean) Young B. Smith, who was devoted to the
course in Torts. He was, I believe, influenced by the risk-approach. . . .

3. After Oliphant, Moore, Yntema and Marshall left, the Columbia facul-
ty, which had been “lost in the stars” (an exciting excursion, by the way),
came down to reorganizing the content of courses and preparing casebooks,
often with conventional titles but with some substantial innovations in con-
tent. Our departed colleagues had stimulated us more, perhaps, than we
recognized.

It remains to be added that the Chicago Business School’s descent
from the stars, though longer delayed than that of the Columbia faculty,
was no less inevitable. Until 1948–49, risk and risk-bearing persisted,
at least nominally, as a major functional specialty, with three component
courses: Theory of Risk and Risk-Bearing, Business Cycle Prediction

Gardner & Merrick, 46 Harr.L.Rev. 1387 (1933), the last being a joint review by an
instructor who was using the book and a student in his class. It contains (p. 1359)
the following comment, not in derogation, but by way of emphasizing the advanced
treatment: “Indeed it seems that one may not unfairly ask the question whether
the ‘sociological’ and ‘functional’ approaches to law study are not inconsistent with
the educational principle of proceeding from the elementary to the complex.” The
second edition was similarly received: see Dalzell, Book Review, 47 ColuM.L.Rev.
1057 (1947); Dunker, Book Review, 26 Neb.L.Rev. 664 (1947); Goldberg, Book Re-
L.Rev. 1012 (1947), the last being a renewal of the collaboration mentioned above,
the former student being in practice in Chicago.

In 1927, Professor Patterson published his treatise on The Insurance Commis-
sioner in the United States, the culmination of a study begun when he was a grad-
uate student at Harvard. The last page (548) contains a delightful paragraph on the
problems of legal-sociological-economic research.

In this connection, mention should be made of the historic Report by the Com-
mittee to Study Compensation for Automobile Accidents (1932), made under the auspices
of Columbia University Council for Research in the Social Sciences. Among the
members of the committee were Professors Dowling and Chamberlain. See ColuM-
bia University, Report of the Dean, School of Law 7–8 (1932); Smith, Lilly,
and Dowling, Compensation for Automobile Accidents: A Symposium, 32 Colum.
L.Rev. 783 (1932).

and Control, and Insurance. In 1951–52, the course alignment was altered, two courses in insurance being offered and one in investment. In 1952–53, the speciality was dropped, and a single elective course in risk management was scheduled. Since that time, both the course and the terms “risk” and “risk-bearing” have disappeared from the curriculum of the school. The broad “functional” category of risk and uncertainty, based on an idea borrowed from pure economic theory, proved unserviceable not only for law schools, but for the business schools as well; but the law school discovered its limitations at the outset.

9. Miscellaneous matters. The group of courses dealing with procedural subjects presented a different problem from that presented by the courses in substantive law. As we have seen, some procedural law was caught up in the ultimate organization of courses on security and on criminal law and its administration. Leaving these aside, there appears to have been no discussion of resort to nonlegal materials in the procedure field, and, therefore, any extended discussion of the deliberations on the organization of the curriculum in this respect would be beyond the scope of this paper. There were problems of organization of this material, however, and because they tend to throw some light on the issues raised by the reorganization effort in general, they must be briefly noted.

The report of the committee was in three main parts. Three possible plans of organization were discussed: (1) one based on the point of view of the lawyer in practice; (2) one which would distribute the materials among other courses, to relate them to the functions of substantive rules; and (3) one based on the social viewpoint, treating procedural matters as a means of effectuating the purpose of law to control human behavior. The second was considered only to be rejected.

The tension was between the first, supported by a separate statement by Professors Michael and Smith, and the third, advocated in a supple-

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273 Id. at 23 (1951–52).
274 Id. at 23 (1952–53).
275 Presumably, the effect of procedural rules might have been studied with a view to comparing their actual effects with those assumed by “judicial empiricism,” as it was proposed to study substantive rules; but this possibility did not enter the discussions.
276 Document No. 43 (styled a “preliminary” report, but no other was filed).
277 “Disintegration of the material in the field of law administration is too great to pay for its complete integration with that in other fields. . . . We suppose that a husband’s failure to support his wife may be regarded as a type-fact situation in the field of the family and that a breach of a contract to sell may be so regarded in the field of marketing. However, actions for maintenance and for breach of contract are largely governed by the same rules of pleading, practice, and procedure.” Statement of Michael and Smith, id. at 341, 348.
278 Id. at 341.
For Oliphant, the logic underlying the reorganization of the substantive parts of the curriculum extended equally to the procedural parts. "Granted we know from a study of substantive law how we want people to behave, what is the totality of devices, whether direct or indirect, calculated to cause them so to act?" This kind of treatment would comprehend under law administration not only pleading, practice, procedure, and evidence, but also administrative procedure, legislation, and the constitutional limitations on legislative action. It would go even farther. Oliphant had come to be impressed by the important role played in the control of social behavior by indirect sanctions, such as taxation and the denial of civil remedies. The emphasis he placed on such matters indicates that a large part of the study of law administration, as he visualized it, would have been concerned with them; and the range of that kind of study is indicated by his reference to the law on promises to perform pre-existing legal duties as consideration, by way of showing how the denial of civil remedies may affect behavior. Professors Michael and Smith, after a sympathetic and cogent statement of the general objectives of curriculum revision, argued that the treatment of procedural matters from a systematic standpoint was quite consistent with those objectives.

Law administration is itself an activity and the legal material in the field is already organized functionally, that is, in terms of the various subsidiary activities which occur in the course of the major activity of executing, enforcing, and applying the law. In both respects, in the organization of legal material and in terminology, the field of law administration differs radically from those fields to which a functional approach may be made only by translating legal concepts into their corresponding activities and by applying a new terminology.

'A reorganization of the materials was desirable, but primarily in order to focus attention on the purpose of the rules and so avoid the tendency to concentrate on the rules themselves and on logically perfect systems of rules. For purposes of the curriculum, these members of the committee proposed to exclude from the category legislation, administration by nongovernmental agencies, and also administration by nonjudicial agencies or devices. Their purpose was to integrate the various pro-

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279 Id. at 350.
280 Id. at 352.
281 Id. at 352.
282 Id. at 353.
283 Id. at 344.
284 Id. at 345.
285 Id. at 342-43. In Classifying Oliphant's indirect sanctions under the head of "The Automatic Administration of Law," also to be omitted from the course outline, they seem to have failed to meet his point squarely.

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procedure courses as much as possible, to present judicial and quasi-judicial administration of law as a continuous process, to make that process more vivid and realistic, and to bring out more clearly the relationship between devices for law administration and the substantive law.286 The main body of the report, prepared by Professor Magill,287 was an exercise in diplomacy, designed to compose these divergent viewpoints—a feat which was accomplished by omitting such matters as indirect sanctions from the proposed course outline and relegating them to a schedule of matters to be investigated by the faculty.288

In 1927–28, in cooperation with a research group at the Yale Law School headed by Dean Hutchins, Professor Michael and Professor Adler (of the Department of Psychology) participated in a study of the logical and psychological foundations of the rules of evidence.289 This activity resulted in the publication of a series of articles290 which were thus characterized by the principal author, Robert M. Hutchins, a few years later:291

. . . . the law of evidence is obviously full of assumptions about how people behave. We understood that the psychologists knew how people behave. We hoped to discover whether an evidence case was “sound” by finding out whether the decision was in harmony with psychological doctrine. What we actually discovered was that psychology had dealt with very few of the points raised by the law of evidence; and that the basic psychological problem of the law of evidence, what will affect juries, and in what way, The committee on legislation never filed its report, perhaps because of the early decision as to the disposition of that topic. In 1928–29, it was decided to include a course on legislation in the required curriculum of the first year. COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 24 (1929).

286 Document No. 43, op. cit. supra note 276, at 349.
287 Who in the same year published his rather orthodox Cases on Civil Procedure (1927).
288 Document No. 43, op. cit. supra note 276, at 336. A second edition of the casebook cited in note 287 supra was published in 1932 and a third (with Professor Chadbourn as co-editor), in 1939. Michael's Elements of Judicial Controversy and Hays's Cases and Materials on Civil Procedure were published in 1948 and 1947, respectively. These materials furnish no evidence that the Columbia curriculum was directly influenced by the more radical thought on functionalism of the 1920's.
289 COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 21-22 (1928); id. at 15-16 (1929); id. at 13 (1934); id. at 14 (1935); id. at 17 (1936).
was one psychology had never touched at all. Thus psychologists could teach you that the rule on spontaneous exclamations was based on false notions about the truth-compelling qualities of a blow on the head. They could not say that the evidence should be excluded for that reason. They did not know enough about juries to tell you that; nor could they suggest any method of finding out enough about juries to give you an answer to the question.

Hutchins concluded that the proper approach to the study of law was through analysis of its basic concepts and principles, which are derived from the rational sciences of ethics and politics. Similar conclusions were apparently reached by the Columbia participants; for the volume which resulted from their activities in this direction was a highly formalized analysis which "could not have been developed without the aid of symbolic notation."

Finally, the faculty gave attention to the construction of a general introductory course and to the study of historical and comparative jurisprudence. Jurisprudence was broadly conceived as comprehending not only legal philosophy, but ancient law, legal history, and comparative law. The committee, sensing a threat to such studies implicit in the particularistic approach to curricular organization, made a bold plea for an elaborate research organization and for attention in the undergraduate curriculum to such matters as logic, Roman law, and the history of the common law. It affirmed that the study of jurisprudence could and should be "directed along functional or sociological lines, i.e., it should concern itself not with legal institutions as such but with legal institutions in their social and economic milieu"; and it suggested that one of the major features of work in jurisprudence would be to correlate work in the social sciences with the study of law. Professor Oliphant's summary reflected more of his own point of view than of the committee's enthusiasm:

Except for the training of teachers and research workers, and for the student tool stuff which they yield, we are not primarily interested in historical, comparative and analytical jurisprudence for their own sakes. We are primarily interested in these three phases of juristic study as means to other ends. Teleological jurisprudence stands upon another

294 Id. at v. See Michael & Adler, The Trial of an Issue of Fact: I, 34 Colum. L.Rev. 1224 (1934); II, id. at 1462 (1934), where the authors set forth their analysis and vigorously maintain that there is no incompatibility between the realist and the idealist approaches to law.
295 Documents 21, 22, and 65; Summary of Studies 61.
296 Document No. 32.
297 Id. at 156.
298 Id. at 162.
299 Summary of Studies 165.
footing however. One of our definite and most important objectives is to enable a student to see that rules of law need to be judged from the standpoint of their practical utility, while seeing, at the same time, the temptations to make over-hasty judgments of this sort.

But as the curriculum developed, it followed very much the lines set out in the committee’s report.300

IV

Any attempt, at this stage, to pass final judgment on the functional-sociological approach to legal education would be premature.301 On the basis of this examination of the innovations considered at Columbia in the most intense phase of the movement, however, some tentative and limited observations may be made. Two things are clear: first, the events of the late Twenties were the stimulus to a remarkable productivity, imaginativeness, and vitality in legal education; and second, the goals of the more ambitious planners were far from realized. We are interested in the reasons for the successes, and (since there is no disguising the pathological aspects of this study) perhaps even more interested in the reasons for the failures. Some of the observations which seem appropriate at this stage may conveniently be permitted to emerge as we trace the course of development of the official attitude over the immediately succeeding years.

It was in the spring of 1927, in the deanship of Huger W. Jervey, that the faculty did its most intensive work on revision of the curriculum. Because of Dean Jervey’s illness, there were no reports of the dean in the years 1926 and 1927. Accordingly, Dean Smith, in his report for 1928, set forth a full account of the faculty studies and the events leading to them. The account was a sympathetic exposition of the dominant objectives, and, in general, the tone was one of quiet pride in what had been accomplished and of confidence that further progress was forthcoming. Nevertheless, even this early, troublespots were visible. Plainly evident was the fear that the result of the radical revision of the curriculum, and even the purpose of some of its more ardent supporters, might be to impair the professional training afforded by the school and turn Columbia into a mere research institute for the “scientific” study of law as an aspect of social organization. There were grounds for such a fear. While some members of the faculty adhered to the view that the major objective should remain that of providing an adequate

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300 A course on the development of legal institutions was first offered by Professor Goebel in 1928-29. Columbia University, Report of the Dean, School of Law 16 (1928). His Development of Legal Institutions was published in 1931, and its seventh revision, in 1946.

301 The plan of this study calls for examination of the underlying legal philosophy and of later educational developments, at Columbia and elsewhere, before conclusions are attempted. See Part I, 3 J. Legal Educ. 331 (1951).
scientific preparation for public service in law, others asserted that it should be to build a “community of scholars” for the study of law as an aspect of social organization. Moreover, the latter held that no single university could effectively pursue both objectives.\textsuperscript{302} Dean Smith discussed fully the merits of the two views on objectives and stated firmly that, in the opinion of the faculty, it was both feasible and desirable for the School to pursue both: \textsuperscript{303}

Whatever may be said in favor of establishing elsewhere a school or institute devoted exclusively to research in law, the present important position now occupied by Columbia Law School in the field of legal education, coupled with the fact that it is outstanding as a first-grade professional school in the state of New York, makes it socially desirable that it should not relinquish its hold upon prospective members of the Bar. At the same time, it is also desirable to build up at Columbia a community of scholars who, unhampered by teaching responsibilities, may devote their time to the study of law as an aspect of social organization.

Few things could have been more calculated to hamper acceptance of the basic educational policy, at Columbia and elsewhere, than such a conflict. The movement was not confronted merely with uninformed opposition on the part of people who misinterpreted its objectives; some of its most ardent supporters were expressly proclaiming its nonprofessional purpose. Among those who recalled how narrowly the professional character of the school under Dwight had escaped dissipation (supposedly) at the hands of Lieber and Burgess,\textsuperscript{304} consternation must have been substantial. Yet any suggestion that the professional purpose of the school should be abandoned or made secondary was a needless and reckless deviation from the basic theme. No such suggestion was even remotely in the mind of Dean Stone; the changes he proposed were designed to strengthen and improve education for the practice of law. Dean Smith, in reporting the faculty’s rejection of the suggestion, might

\textsuperscript{302} See \textit{Columbia University, Report of the Dean, School of Law} 18–19 (1928). In Document No. 3, unnamed members of the faculty were reported as holding that “The time has arrived for at least one school to become a ‘community of scholars,’ devoting itself ‘primarily to the nonprofessional study of law, in order that the function of law may be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life.’” \textit{Id.} at 9. The contention was taken seriously: “What are our objectives to be? Are we to accept the objective of establishing a community of scholars for the study of law? If so, must we accept it as our sole objective, if we wish the work to be effectively done?” \textit{Id.} at 22. See also Documents 10, 11, 22, 56, 61 (by Professor Oliphant, incorporating at p. 524, Walter Wheeler Cook’s \textit{Scientific Method and the Law}, published in 13 A.B.A.J. 303 (1927)), 62, and 63. In the summary, the competing views were set out fully (\textit{Summary of Studies} 18), with the statement that the faculty had not formally adopted one to the exclusion of the other; but the general attitude was said to be reflected in the conclusion that Columbia should pursue both objectives concurrently. \textit{Id.} at 22–24.

\textsuperscript{303} \textit{Columbia University, Report of the Dean, School of Law} 20 (1928).

\textsuperscript{304} See Part II, 3 \textit{J. Legal Educ.} 331, 350–51.

8 \textit{Journal of Legal Ed.} No.1—5
have made clearer than he did the fact that the changes in the undergraduate curriculum were calculated to strengthen rather than to undermine professional training.

In the same year, two supporters of the basic educational philosophy—Professors Yntema and Douglas—resigned from the faculty; and Professor Kidd returned to the University of California. Problems of finance came to the fore: the new program would require substantial additions to the library's collection and staff, and manpower was needed for research.

In 1929, Dean Smith again discussed fully the plan of reorganization, this time taking care to emphasize the objective of improving training for law practice. Problems of personnel and of cost were again pressing. Referring to the research program, Dean Smith said: "The chief obstacles to be overcome in making such work effective are the finding of men who are willing and competent to undertake the work and the securing of funds sufficient to finance it." In this year, two of the principal architects of the reorganization, Professors Moore and Oliphant, resigned from the faculty, prompting the observation: "To the extent that the men who have left have aided in building up the faculties of other institutions, the cause of legal education has been served; but it is highly desirable, in the interests of legal education as well as in the interests of the School, that those members of the present Faculty who are familiar with the history of the various changes which have occurred and who are the key men in the developments which are now taking place should be held together during the next decade."

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305 Columbia University, Report of the Dean, School of Law 28-29 (1928). Yntema left to join the "originating faculty" of the Johns Hopkins Institute for the Study of Law, whose purposes were announced as the study of the economic and social aspects of law; the clarification and simplification of law; the training of jurists and codifiers; and the guidance of writers of textbooks and thinkers upon the human effects of law. Other members of the "originating faculty" were Walter Wheeler Cook, of Yale; Herman Oliphant, of Columbia (see note 309 infra); and Leon C. Marshall, of Chicago. Editorial, "The Human Effects of Law", 14 A.B.A.J. 530 (1928). "It is not without significance that when the Institute of Law was established by The Johns Hopkins University each of the four men selected to plan and start the institute had at one time been a member of the Columbia Faculty." Columbia University, Report of the Dean, School of Law 28 (1928). See also The Johns Hopkins Institute for the Study of Law, 6 Am.L.S. Rev. 336 (1928).

306 Columbia University, Report of the Dean, School of Law 25 (1928).

307 "That these changes do not operate to lessen the student's knowledge of what may be termed strictly professional matters is evidenced by the unusually large proportion of the class graduating in June, 1929, who passed the New York bar examination with high scores. I mention this fact not because I regard the results of bar examinations as a proper criterion for measuring the educational value of the kind of training which is being given, but solely for the purpose of dispelling the possible idea that such training will, in its effect, impair the student's knowledge of rules of law." Id. at 18 (1929).

308 Id. at 9.

309 Id. at 29. Professor Oliphant was on sabbatical leave during the spring session of 1928-29. Id. at 29 (1928).
In 1930, a new tone dominated the report—one of disillusionment and even annoyance. After recapitulating his earlier accounts of the faculty's experiments, Dean Smith said: 310

The results which had been obtained in 1929 were most encouraging, and equally gratifying are the achievements during the year just ended, but the consummation of our undertaking will depend largely upon the extent to which the Faculty continues to be capable of that self-criticism which is essential to the proper development of an educational program. The only danger in the Columbia experiment is the danger of a premature conviction regarding the desirability of objectives or the effectiveness of particular methods of attaining them. . . . If we are to accomplish the aims which have inspired the developments which are taking place, the hypotheses upon which we are proceeding must be constantly tested against actual results. There must be the same zeal to recognize and admit error as there is to proclaim success. A new hypothesis is usually assumed to be better than the one which it supplants, but its truth is not established by turning it into a dogma.

No academician will fail to identify this as smoke betraying the fire of personal conflict below the horizon. It is no secret that there was such conflict. How could it be otherwise, given the strong personalities and the strong convictions involved? There is, of course, no record of the details, and that is just as well, since to explore them would serve no useful purpose. Any faculty that undertakes a major revision of its curriculum and its educational policy may expect personality conflicts, and it cannot hope to solve them by resort to precedent.

The sheer magnitude of the task had become oppressive.311

It is easy to draw an indictment of the law and the administration of justice. It is simple to point out defects and indicate changes which promise much. It requires no great ingenuity to assail legal doctrine or legal methodology or legal education and expose fallacies and ineffectiveness. It is not difficult to rationalize the propositions that improvement is more likely if there is a closer integration of law and economics, law and history, law and government, law and philosophy, law and logic, law and psychology, law and engineering, and that the university law school should aid in effectuating the integration, but it is no easy task to bring these things to pass.

The contribution of the social sciences had proved disappointing: 312

310 Id. at 4-5 (1930).
311 Id. at 5. Cf. KARL N. LLEWELLYN, CASES AND MATERIALS OF THE LAW OF SALES ix (1930): “I have lifted my own voice to the lone moon, more than once. Yet it is a far cry from desire to fulfillment. . . . [T]heories take on a different aspect when they are matched against a concrete effort to apply them.”
312 COLUMBIA UNIVERSITY, REPORT OF THE DEAN, SCHOOL OF LAW 5-6 (1930). Michael and Adler's report on crime and criminology, supra note 190, had been written at the time of this report. Id. at 10.
[W]hile the pooling of knowledge derived from related fields is *prima facie* a sound working hypothesis, this does not mean that the members of the Faculty are so naive as to think that the other social sciences are superior to legal science either in experience, in knowledge, or in method. Indeed, it has not been an uncommon experience for the dissatisfied legal scholar, who has made excursions into the realm of economics, or of philosophy, or of psychology, to return with a feeling of relief to the more settled and orderly domain of the law.

Access to such assistance as the social sciences might be able to offer was impeded by formidable barriers:

At the outset, we called in the economist, the philosopher, and the psychologist, to assist. They were helpful, they were stimulating, they gave us ideas, they aided greatly in formulating a plan. But the economist, the philosopher, or the psychologist, who knows little or nothing about law, is as helpless as the lawyer, who knows little or nothing about economics or philosophy or psychology, to bring about an integration of any real value. These scholars have worked in isolation so long that they have developed dissimilar disciplines, dissimilar techniques, and dissimilar languages. Methods valuable for one purpose may be useless for another. Data highly significant for one purpose may be meaningless for another. Moreover, due to a difference in terminology or the meaning of concepts, it is exceedingly difficult for a specialist in one field to interpret correctly the data in another.

The progress which has been made is due to the fact that some economist or some philosopher acquired a working knowledge of law, or some member of the Law Faculty acquired a working knowledge of one of the other social sciences. Only in this way has it been possible to make effective use of non-legal materials in the study of law.

Finally, much of the research undertaken had produced findings without significant value:

... a considerable amount of fruitless research is inevitable in the quest for new knowledge that has value. I believe, however, that much of the waste incident to research in the social sciences could be avoided if more attention were paid to the methods proposed for conducting particular projects. ... Too often does it appear that the results of research in the social sciences are findings which represent nothing more than the opinions of the investigators.

In 1931, Dean Smith returned with renewed confidence to the theme that legal education should be improved by broad training in the social sciences. His emphasis was on the effects of specialization in knowledge and in labor, and on the need for coordination of specialized fields of knowledge. The engineer had served to some extent as a coordinator.

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\[313 \text{Id. at 6-7.}\]

\[314 \text{Id. at 9.}\]
in the fields of physical science; the lawyer, formerly the foremost co-
ordinator in the field of social science, had been transformed by increas-
ing specialization “from a social philosopher into a legal technician.” 315
The task of the law school was now conceived as that of developing a co-
ordinating agent in the fields of law and government—a task to be ac-
complished only by improving the law student’s “knowledge of the so-
cial sciences as a whole.” 316

Of course, no sane person would contend, in this day, that it is possible
for any one man to examine critically all the content of the existing bodies
of knowledge even in the domain of the social sciences. But it is possible
for an individual to become sufficiently familiar with the related parts of the
different fields to give him perspective and understanding of the problems
created by the needs and the activities of interdependent social groups; at
least he would be aware of the existence of the various bodies of knowledge
and would know how to draw upon them as occasion required.317

In 1932, Dean Smith spoke only briefly of the integration program.
Setting it against the history of legal education, he seemed to suggest
that the new outlook was common to good, modern, full-time law schools,
although he also seemed to suggest that it was manifested principally
in the research activity of faculty members; and he was careful to add
that the study of legal history and the analysis of legal concepts had
not been abandoned.318 In 1933, he was able to point to developments
under the New Deal as demonstrating “the interdependence of law and
of government, and the importance of relating more closely the study
of law and of its application, to the study of those social, economic and
political ends but for which there would be no rational basis for the ex-
istence of law.” 319 It was in this year that he reported the establishment
of a board of visitors: 320

In view of the important changes that have occurred in legal thought and
in legal education during the last decade, particularly those developments
with which Columbia Law School has been conspicuously identified, it was
proposed last spring by the Standing Committee of the Alumni Association
of the School of Law that a Board of Visitors, consisting of representative
alumni and other members of the bench and bar, should be selected from year

315 Id. at 7 (1931).
316 Ibid.
317 Id. at 9. Dean Smith also argued that emphasis on the function of law in
society was the surest way of inculcating a sense of professional responsibility. Id.
at 13.
318 Id. at 5 (1932).
319 Id. at 3 (1933). Calls upon members of the faculty to perform governmental
service in this period diverted a substantial amount of energy from research and
course-building. Professors Berle, Dowling, Handler, Hanna, Deak, and Magill were
all doing governmental work. Id. at 7.
320 Id. at 7–8.
to year to visit the School, to study and appraise its work, to report on its condition and needs, and to make recommendations to the Faculty and to the Trustees of the University.

Clearly, the doubts which had been raised (with what justification we have seen) concerning the quality of professional education at Columbia had not been allayed, and the alumni mounted guard.321

In 1934, for the first time, the Dean's Report contained no discussion of the program of curriculum revision; it was devoted to other problems of legal education. There was reference to research work in progress, but the only relevant development in the curriculum was the inauguration of Professor Hale's course on Legal Factors in Economic Society.322 By 1935, a new theme of curriculum revision was engaging the faculty's attention: increased emphasis on public law and on the public implications of private law.323 In 1936, the absorbing problem was overcrowding of the bar. Finally, in 1937, in his tenth annual report, Dean Smith summed up the developments of the decade. Of Oliphant's Summary of Studies he said: 324

. . . [It] presented the most pervasive analysis and challenging discussion of legal education that had been put forth up to that time. While many of the proposals contained in that document have since been modified or rejected by the Columbia Faculty, it nevertheless served as a basis for experimentation during succeeding years by our own Faculty and it stimulated similar inquiries and activities in other schools.

On the extent to which the curriculum had been functionally organized and on the incorporation of nonlegal materials, he did not dwell; but he could point to the fact that, of the forty courses offered in the school, thirty-six were taught with collections of materials prepared by members of the Columbia faculty within the past ten years—twenty-six of them in the form of published casebooks, many of which had been widely adopted by other schools.325 In the same period, members of the faculty had published twenty-eight treatises and 356 articles in legal periodicals and other scientific journals.326 Not all of this product, by any means, represented progress in the integration of law and the social sciences; but much of it was stimulated by the climate engendered by the faculty's determined attack on that problem. A concrete idea of the cost of the program was afforded by the fact that some $440,000 in grants had been

321 Subsequent reports regularly mention the meetings of the Board of Visitors, and it is recorded that on occasion reports were read and discussed; but there is no indication of their content.
322 Id. at 10 (1934).
323 Id. at 4 (1935).
324 Id. at 4 (1937).
325 Id. at 5–6.
326 Id. at 8–9.
obtained during the ten-year period for research on law as a social institution and for the compilation of integrated teaching materials.\textsuperscript{327} Dean Smith's general conclusion was: \textsuperscript{328}

The accomplishments are not all that one might desire, but they are, in many respects, extraordinary. As a whole they are impressive. Certainly they represent a contribution to legal education the significance of which is only beginning to be appreciated. The ultimate effects cannot be fully appraised for some years to come.

Nor can they yet be fully appraised; but certain observations in addition to those suggested by Dean Smith's reports may be ventured.

To begin with, it seems clearly unfortunate that the new movement was so ambitious and so highly organized, and that it took the form of an attempt to reorganize and revamp the entire curriculum. Such an attempt would have encountered major difficulties in a far less complex situation. Imagine what would have happened if the Harvard faculty in the 1870's, inspired by the success of Langdell's experiments with the case method, had by a majority vote adopted a resolution calling for the adoption of that method forthwith throughout the curriculum. The most enthusiastic supporters of such a resolution would have discovered soon enough that the construction of a casebook is no overnight matter; they would have learned, too, as we have learned since, that not every topic is best treated by the case method. Among the majority would have been teachers who supported the resolution not because they were deeply convinced of the soundness of the method, or even understood it fully, but because they were influenced by the leaders and because they sensed in it the way of the future; these would have had special difficulty in making the adjustment. In the minority would have been men like Washburn, who, "while never showing the least opposition or resentment . . . felt that he was too old to come into complete sympathy with all these novelties." \textsuperscript{329} What the effect would have been on Thayer, who adopted the case method only in his own good time,\textsuperscript{330} no one can tell; he might have been alienated entirely. The verdict of history is that the Washburns were wrong; but even if that had been clear at that time, who will say that the light should have been thrust upon them? Certainly Langdell did not. He was "firm in his own belief, so firm that he left the system to prove its own value, utterly without aid of argument. As has been well said, 'one of the most striking facts in the life of Professor Langdell is the deep silence which surrounds his work. He accomplished a revolution without getting into a contro-

\textsuperscript{327} Id. at 8.
\textsuperscript{328} Id. at 5.
\textsuperscript{330} Id. at 449.
versy. As Professor Ames has pointed out, he never wrote anything in explanation or defense of his system after the brief statement made in the preface to his collection of Cases on Contracts. The bitter criticism directed at his methods by law reviews and Law Professors was never answered by Langdell. He allowed his system absolutely to speak for itself.331

The Columbia faculty adopted no such resolution, of course, and no pledges of conformity were exacted of its members. But the fierce evangelism of the leaders and the corporate character of the campaign to remake the curriculum according to a master plan produced difficulties of much the same sort. The intellectual differences between Oliphant and Michael, certainly, were such that a man of Michael's integrity could make no use of Oliphant's brilliant conceptions until, in his own way and in his own time, he found place for them in his thinking. Meanwhile, he must speak his mind. In addition, the Columbia reorganization involved problems far beyond those of the transition to the case method: Langdell could apply his method to existing courses in contracts, equity, and sales;332 but a radical reclassification of the subject matter of law was thought to be basic to the Columbia program. The selection, classification, and arrangement of the cases "which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines"333 was a formidable task, but at least the cases were there, in the reports. The materials sought by the Columbia faculty were relatively inaccessible, written in different technical languages, and in some instances nonexistent. Moreover, all this was undertaken precipitantly, as witness Professor Powell's sense of "immediate and appalling urgency"334 and the scheduling of a reorganized course in criminal law before an outline or a plan of even experimental treatment was in existence.335

The only justification for this concerted and urgent attack on the problem—the ideal of simplifying the curriculum and avoiding duplication—turned out to be an illusion. Some areas of the law could be

331 Id. at 393.
332 As it happened, however, Harvard did invent a new course, with reactions similar to those encountered at Columbia: "We are inclined to think that Torts is not a proper subject for a law book," said the American Law Review (as quoted by Warren, op. cit. supra note 329, at 376). "Under this title we expect to find some or all of the wrongs remedied by the action of trespass, trespass on the case and trover. But we cannot help believing that the cohesion or legal relationship, say of trespass quare clausum, is closer with the duties to him in possession enforced by real actions than with assault and battery. . . . Seduction, which we find in the next chapter of this book, belongs at the other end of the corpus juris." Escape from the tyranny of classifications is never a new problem, and never an easy one.
333 Introduction to C. C. Langdell, Cases on Contracts vii (1871).
334 Supra note 168.
335 Supra note 185.
functionally organized with spectacular success; others were not susceptible at all of functional treatment; and any thorough-going functional organization would have threatened duplication on a scale far beyond anything suggested by the superimposition of a few special courses on the traditional curriculum. One reason for this was that "functional" did not have, and perhaps could not have, a fixed meaning. Sometimes it had an institutional connotation, as in the case of the family; but the course on security was functional in a different sense, and "wealth distribution" in still another, and "risk and risk-bearing" was so in a sense different from any of these. Nor did successful functional classifications often result, as they were expected to, in the saving of time sufficient to accommodate the new material in the curriculum. On the contrary, like so much of the fruitful work that is done, the successful efforts tended to expose the overgeneralization of law and the need for more detailed, discriminating, and selective treatment. The functional concept of the business organization did not fuse Agency and Partnership with Corporations; it did threaten to make Corporations into three separate courses. When compression was achieved, as in the course on future interests and trusts, it was the product of legal scholarship which, while it was stimulated by the functional approach, was by no means dependent on it. Some of this had been foreseen from the beginning; when the truth became increasingly evident, and the prospect of even ultimate simplification seemed increasingly remote, the faculty was undismayed. As Professor Powell had pointed out, new knowledge is to be welcomed and not shunned because it may complicate the problems of teaching. When Enrico Fermi withdrew the cadmium rod from the pile at Stagg Field he was doubtless concerned about many things, but not, I imagine, about the effect of the experiment on the curriculum of the Department of Physics. Professor Powell's attitude was the only one possible; but as the evidence mounted against the theory that the key to simplification had been found, it was equally clear that there was no longer any reason for proceeding under forced draft nor for the inverted procedure of defining courses first and searching for content later. The rather abrupt moderation of the movement which had started so pretentiously probably brought relief to conservative law

337 "[..] We shall not at the outset be able to cut from, as well as we shall be able to add to the curriculum. After five or ten years' boiling, we may have worked out a wholly new curriculum of something like present size. But two years hence we shall have added more than we have cut. Partly, because that is how men's minds work. Partly, because much now taught is really vital. Partly because progressive reorganization almost certainly involves overlapping." Llewellyn, Dreams in Response to Professor Marshall's Questions, in Memoranda of the Marshall Conferences 38, 89 (1929).
338 Supra note 128.
teachers; but the abandonment, when its justification failed, of a plan of action which had at best been questionable was neither failure nor surrender.

A related difficulty was the excessive emphasis on business as the dominant concern and justification of law. This was attributable not to any hypothetical orientation of the Columbia Law School toward Wall Street, but to the undoubted orientation of Marshall and Oliphant toward the University of Chicago School of Business. It showed itself in the *Summary of Studies*, where seven chapters were devoted to the main components of the curriculum, five of which were devoted to business categories: Marketing, Business Associations, Finance and Credit, Labor Relations, and Risk and Risk Bearing. The sixth dismissed such matters as jurisprudence, legal history, and comparative law with the remark that they were important only in so far as they contributed to the teleological criticism of law—largely in terms, it must be presumed, of commercial and economic ends. In the seventh, Professor Oliphant gathered together, under the ampersand heading, “Communal Standards and Political Relations,” some odds and ends not otherwise provided for, such as the family, crime, real property, public law, and taxation. It showed itself most plainly in the proposal to treat the law of torts almost entirely from the standpoint of the risks of business enterprise. This was understandable, given the prevailing enthusiasm for the business-school curriculum as the model of functional elegance; but even in Wall Street, law is concerned not only with business, but with ordinary human relations and—as the faculty was reminded by the advent of the New Deal—with government and politics.

The greatest of the manifold difficulties associated with the assimilation of nonlegal materials seems to me to have been the lack of any sharp conception of the purpose to be served by such materials and, more particularly, the frustrations and defections which resulted when the more ambitious conceptions of the goal were disappointed. Sometimes the felt need was simply for a descriptive account of the business background against which legal doctrine operated; sometimes it was for a detailed account of the behavior of business executives or housewives; sometimes it was for the accumulation in one place of all knowledge concerning an institution, such as the family, so that all possible interactions could be observed and appreciated; and, too often, it was for ultimate verity concerning such problems as the causes of crime and the efficacy of law as a corrective. The tendency to ask the wrong questions of other

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339 Law administration, embracing most of procedure, was referred to only incidentally in another chapter. *Summary of Studies* 74. But compare the chart at p. 64, which suggests a more balanced distribution of emphasis.
disciplines and to expect too much of the replies is persistent. When the Court of Appeals for the District of Columbia last year made its history-making appeal to medicine and psychiatry, it was seeking light on the true nature of insanity or the true criteria for determining criminal responsibility.\footnote{Durham v. United States, 214 F.2d 862 (D.C.Cir.1954).} When it announced, with considerable flourish, that the century-old M'Naghten test was fallacious and inadequate and that a new test, in harmony with the findings of modern medicine, was to be erected in its place, the triumph of science over medievalism was greeted with much rejoicing. No one, however, could be very sure that the results of criminal trials would be materially affected by the change nor, if they were, whether the change would be a welcome one.\footnote{See generally the symposium, Insanity and the Criminal Law—A Critique of Durham v. United States, 22 U.Chi.L.Rev. 317 (1955), especially Wechsler, The Criteria of Criminal Responsibility, id. at 367.} Perhaps we would be on sounder ground if it had been possible for the court to refer to a body of literature which would have revealed something about how the old rule had worked in practice; how many defendants were acquitted and how many convicted on pleas of insanity; what the record showed as to mental condition in each case; and what the history of the defendants was after their release, imprisonment, or commitment. We might likewise feel more confident if we could expect such studies to be made of experience under the new rule. The collection of such information would be laborious and expensive; the results might be neither complete nor conclusive; and the project would not further significantly the quest for the ultimate answer to that fascinating and somewhat mystical question concerning the true nature of insanity, or the true test of criminal responsibility. Nevertheless, when the issue is whether to discard the old rule and substitute a new one, the experience under the old and the probable experience under the new seem more relevant than any other considerations. Similarly, when Professor Fuller discusses the relationship between psychology and the rules relating to frustration and impossibility of performance, he neglects, it seems to me, one of the more productive insights developed in the course of the Columbia studies, namely, the characterization of such rules as devices for the apportionment of risk.\footnote{L. L. Fuller, Basic Contract Law 606 (1947). Cf. Patterson, The Apportionment of Business Risks through Legal Devices, 24 COLUM.L.REV. 333 (1924).}

The frustrations and defections stemming from the failure of the social sciences to yield promptly the solutions which were desired created an impression far out of proportion to their importance. Indeed, it is not easy to determine whether the most influential defection was due to a philosophical rejection of the empirical method, to financial obstacles, or simply to faulty logic. When Robert Hutchins, in 1933, spoke of his
researches of 1928 and 1929 as of a youthful indiscretion, his reasoning was:

1. Psychology cannot tell us that certain rules of evidence are predicated on assumptions which are demonstrably fallacious;

2. But psychology cannot tell us whether the rules should be changed, because that depends on how the jury evaluates the evidence in question, and neither the psychologist nor anyone else has studied the jury;

3. Therefore, we should abandon experimental and interdisciplinary efforts, and return to an attempt to construct a systematic science of law on the principles of ethics and politics.

As a logician, Hutchins must have known a non sequitur when he saw one. When he made the statements paraphrased above, he was president of the University of Chicago. It seems peculiarly appropriate that it is the Law School of that University which has taken up the thread of his reasoning at the point where it broke, and which is conducting an experimental and interdisciplinary study of the jury. But then, 1933 was a year of deep depression, and the Ford Foundation had not yet been established.

The prospects for further progress in the interrelation of law and the social sciences, so far as the law school curriculum is concerned, rest primarily, but not exclusively, on the enterprise of individual teachers.343 It is no longer necessary, if it ever was, to classify the curriculum functionally in order to call attention to the relevance of knowledge developed in other disciplines or to remind us that law is a means to an end. The individual teacher, preparing the materials for whatever course may be assigned to him, will seek insights and syntheses where he can find them. He will frequently question the validity of his assumptions; he will be curious about business practices, about family customs, about testamentary dispositions, and about the effects and the justification of legal rules. Since he will not often be able to obtain or evaluate the information he needs without the aid of experts in other fields, there must be adequate research facilities at his disposal. If he is

343 "Further substantial progress in the integration of law and social science for the purposes of legal education will not result from the efforts of essayists, nor even from the deliberations of curriculum committees, but from the painstaking and particularized efforts of those who organize our course materials." Part I, 3 J. LEGAL EDUC. 331, 340 (1951). "Many of our Benthamite expectations for social engineering through law have been millenarian. As in any area of living, great expectations are bound to create moods of frustration or disillusion, of tired admission that the tried and tested ways are best after all. What has been wanting has been someone who would tackle the job of social science integration, not in fitful law review articles or books, but in methodical and tangible material to be used in teaching in a particular field." Riesman, Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration, 60 YALE L.J. 630 (1941).
thus able to compile a set of materials which significantly brings non-legal learning to bear on some classification of the problems with which law deals, room will be found for his course in the curriculum, and his book will sell. If he does not do so, someone else will. Oliphant compiled a pioneering casebook which required the addition to the curriculum of a new course, based on a novel grouping of materials; the novel course is now standard in almost every law school. If he had devoted his energies to the improvement of that book and to the construction of others, instead of to building fires in the camps of his colleagues, he might have been remembered, like Langdell, as the founder of a new era in legal education rather than as the leader of a movement which foundered. Oliphant did not originate the idea of the case method, he compiled the first successful casebooks. Since that is what counts, he deserves every bit of the recognition he has received as the true inventor; but it is instructive to state the achievement accurately.

Not only must research facilities be available to individual teachers to be used as the need arises, but there must, of course, be organized and systematic research in law and the social sciences directed toward the discovery of new knowledge without reference to the law school curriculum. The product will inevitably be reflected in the training of undergraduate law students, as it is incorporated by the compilers of teaching materials; but there is no more reason for harnessing research of this kind to the curriculum than there is for similarly conditioning research in the physical sciences. So long as the product of such research is not known, it is hard to see how anyone can, with confidence, look forward to a time when it will make possible a new synthesis and permit the construction of a neat and comprehensive three-year law curriculum, unembarrassed by the problem of elective courses. It is much

344 During his entire career at Columbia following the publication of his casebook, Oliphant published nothing which directly furthered the objects of the reorganization plan. He wrote a great deal in advocacy of the movement (not all of which was good public relations: his plea for a Return to Stare Decisis (Ass'n of Am. L. Schools, Handbook 61 (1927)) was transparently disingenuous); but his technical product consisted of just two articles on the law of contracts, in which his approach was based on logic, on the analysis of precedents, and on strictly "arm-chair" evaluation of the practical considerations. Oliphant, Mutuality of Obligation in Bilateral Contracts at Law, 25 COLUM. L. REV. 705 (1925); id., 28 COLUM. L. REV. 997 (1928).

345 "At New York University Law School between 1865-1867 young Elihu Root studied law under John Norton Pomeroy. The course consisted in reading assigned cases and participating in discussion of them in a small class under the lead of Pomeroy's questions. Pomeroy's approach was radically different from the prevailing text-and-lecture method. But it did not fail to him to shape . . . . the course of law training in the United States." WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 261 (1950). See also ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 371-72 (1921).
more likely that new insights, new knowledge, and new relationships will make the task of the law teacher increasingly complex and call upon him to employ all his ingenuity and all the resources of educational experience in building a program of undergraduate training. It may be that the profession which once learned to place method above subject matter will have to learn to do so again. At all events, there is no necessity to revise the curriculum in anticipation of the fruits of research to come.