BROOM v. MORGAN AND THE NATURE OF JURISTIC DISCOURSE

By J. L. MONTROSE*

I. General discussion of juristic discourse.
II. Discourse about Broom v. Morgan.
IV. Juristic discourse and extra-legal discourse.
V. Conclusion.

PART I.—GENERAL DISCUSSION OF JURISTIC DISCOURSE

Ultimately this paper constitutes an inquiry into the kinds of activities which are being carried out in university faculties of law, or ought to be carried out—an inquiry into the studies proper for teachers and students. I believe that such introspection into methods and purposes is valuable. Professor Stone on a memorable occasion doubted whether introspection is always valuable. He referred to the story of the centipede which asked itself the question how it walked, and thereafter did not move another step. The same story has been relied on by those who criticise pleas for inquiry by science students into scientific method. Professor Dingle has replied to such critics by saying that while self-consciousness may be destructive of the activities of centipedes it is a means of improving higher ranges of activity. There are not wanting those who say that full awareness of methods and purposes is an essential characteristic for activity which is truly human: and that the development of such awareness is the characteristic of a liberal education. Of course, this is Professor Stone's belief: his masterpiece, The Province and Function of Law, has as its central plan an inquiry into what it is that writers on jurisprudence do and ought to do.

An enquiry into what this paper is about is called for not merely by the principle first proclaimed, but also by the vagueness of the title. "Nature" and "juristic discourse" are ambiguous terms often used ambiguously. Many are the counts which have been made of the different ways in which Aristotle used the Greek for "nature", and of the different meanings of the phrase "law of nature". "Juristic discourse" can mean the discourse of certain kinds of people called "jurists", or a certain kind of discourse no matter who the discoursor may be. Of course, the distinction breaks down if by "jurist" we mean one whose discourse is "juristic".

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It may well be asked why such a vague title has been selected. Even if it be legitimate sport for a writer to set up his own Aunt Sally to be bombarded by his own verbal sallies, why select a creature of such impure and indeterminate character? The answer lies in the "purr-word" character of the word "juristic" in contrast with the "snarl-word" character of the word "legal". It is often said that to be a good lawyer one must be more than a mere technician, a "working-mason"; one must be a "jurist". In many contexts the word "jurist" stands to the word "lawyer" in the same relation as in other contexts does the word "statesman" to the word "politician". It is accordingly true, though tautological, to say that it is valuable to know what distinguishes the "jurist" from the lawyer. And since jurists and lawyers act in words it is valuable to know what is the nature of "juristic" discourse. Yet I should be rashly presumptuous if I thought I could state the characteristics of the excellences of laws and lawyers, of discourses about laws and about lawyers, in any paper or number of papers. I am, however, bold enough to think that this paper is an approach, albeit hesitating, to some aspects of those problems. While the phrase "juristic discourse" does have a eulogistic overtone, its ordinary range is not limited to the note of eulogy. Though I have selected a title embodying the phrase "juristic discourse" because of its evocation of more fundamental problems, I shall endeavour to discuss in exploratory manner the two different questions: (i) What are the criteria by which the discourse called "juristic" is distinguishable from other discourse? (ii) What are the functions in fact fulfilled by some specific discourse which is accepted as "juristic"?

Semantics and the Austinian definition of law

The second topic is akin to questions which "semantic logicians" ask: but it can be illustrated without calling on such writers by asking questions about the Austinian "definition" of law. A writer on jurisprudence is often called a jurist. John Austin was a jurist, and the following extracts from his lectures thus conventionally merit the name "juristic discourse". "A law is a command which obliges a person or persons generally to acts or forbearances of a class . . . A command is distinguished from other significations of desire . . . by the power and the purpose of the party commanding to inflict evil or pain . . . But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of a political superior." These passages may be summarized in the familiar formula that a law is the general command of a sovereign entailing a sanction. The following questions may be asked about this discourse. (i) Is the
statement of a linguistic character? Does it tell us about the way in which the word "law" is used, that it has the "meaning" assigned to it in the discourse on the majority of occasions when it is used, or at any rate on some of them? Does it tell us how Austin proposes to use the word, thus defining the limits of his proposed discussion? (ii) (which may not be correctly separated from (i).) Is the statement of a conceptual character? Does it tell us what are the elements required for the construction of a particular concept considered useful in the discussion of political and judicial discourse and activities? This concept, of course, may be one of the references the word "law" already has conventionally. (iii) Is it of an empirical character? Does it tell us of the common characters that are found if one examines the various "things" which are called law, thereby amounting to an inductive generalization? (iv) Is it a statement of values? Does it tell us really about "good" laws, thus constituting basically a "programme" for society, viz., that societies in order to promote the happiness of their members should be organized with sovereign bodies issuing general rules which contain sanctions, and with executive organs for enforcing the sanctions? 2

The meaning of the nature of discourse implied by these questions is that of assigning the discourse to the logical types discussed by writers to whom I arbitrarily give the name "semantic logicians". 3 Charles Morris, for example, classifies discourse by reference to "modes of signifying" which may be "designative", "appraisive", "prescriptive", "formative", and to uses which may be "informative", "valuative", "incitive" or "systemic". 4

1 The term "programme" was used by Corbett to characterize the discourse of economists in an essay in which he applies Hume's trident of "is", "must" and "ought" to determine the nature of such discourse. (Aristotelian Society. Supp. Vol. xxvii, 218).

2 Such questions, of course, may be asked about any "definition" of law, or any discourse. It is my belief that Austin, for all his proper emphasis on distinguishing between "is" and "ought", did not make explicit the type of statement he was making. There is, however, considerable scope for argument about the Austinian texts.

3 The use of this label "semantic logicians" does not indicate any belief by me in the existence of identity of views among the authors. Though I am too often guilty myself of the vulgar error of assuming that "all Chinks are alike" I react strongly to a writer who ascribes a particular proposition (sometimes his own) to "the Greeks" or "economists" or "the semanticist".

4 Signs, Language and Behaviour at p. 123. Of "legal discourse" (by which he means "the body of laws") he says (at p. 130) "The language of the law furnishes an example of designative-incitive discourse. Legal discourse designates the punishments which an organized community empowers itself to employ if certain actions are or are not performed, and its aim is to cause individuals to perform or not to perform the actions in question. Legal discourse as such does not appraise these actions nor prescribe them. . . . It does
The "semantic logicians" are but developing techniques which have long been employed by jurists as well as philosophers. An appreciation of their work may be obtained by considering the perhaps simpler approach of a modern jurist, Kelsen, and a not so modern philosopher, Hume. Analytical jurisprudence has long been concerned with exposing the deceptions committed by ordinary language which lawyers use; and English analytical jurists, at any rate, have been influenced by the empirical philosophers—Hobbes, Locke and Hume.

Though Kelsen did much of his work in Vienna, much of his thought anticipated rather than derived from the logic of the Vienna Circle. His basic teaching is concerned with the analysis of the significance of propositions employed by practising lawyers, and the fundamental analysis is of the proposition asserting that particular action is legal or illegal. What is the real character of the predicate in such a proposition? Classical logic shows that the sentences of ordinary speech are related to propositions which can be expressed in a different grammatical form of words. The distinctions between sentences and propositions and between logical and linguistic grammar are inherent in the traditional exercises of such logic. The various ways of expressing the transience of human life are translated to propositions of the form "All men are mortal", which is expressed symbolically as "S a P". The form is that of the relation of a "subject" "all men", and a "predicate" "mortal" by means of a logical copula. It is true that four different kinds of propositions are recognised, according as the subject is universal or particular, "all men" or "Socrates", and according as the relation is one of affirmation or denial as in "all men are mortal" and "Socrates is not immortal". It is also true that from the earliest times it has been recognized that predicates do not all function in the same way. Thus the Aristotelian teaching of categories classifies different functions of predicates. But the effect of classical logic is to divert attention from the different modes of operation of different predicates. There are important distinctions between the predicates in the following propositions: "this action is usual", "this action is praiseworthy", "this action is illegal". But they do not affect syllogistic reasoning and were obscured by a logic primarily concerned with the syllogism.

Kelsen did point out the nature of the distinctions between those propositions. He investigated what was involved when the ordinary man or lawyer said human behaviour was legal or illegal. His con-
clusion was that nothing was being affirmed about the intrinsic quality of the behaviour, corresponding to the assertions made in sociological or ethical statements, such as action is customary or is just. All that is posited by saying *the act x is illegal* is that there exists a rule of law dealing with actions of a class under which x can be subsumed. From this beginning he proceeds to examine the character of a rule of law. Analysis of the statement *p is a rule of law* leads to the doctrine of the hierarchy of norms. For that proposition affirms only that a proposition P exists which asserts that there may be created propositions of the form *p is a rule of law.* The existence of the higher norm, P, is the test of the validity of the postulated norm, p.

Throughout his writing Kelsen demonstrates the over-simplification and consequent confusion effected by the ordinary language and thinking of lawyers. The demonstration of the over-simplification and consequent confusion created by ordinary language and the traditional propositional logic is the task of the modern school of analytical philosophers. An illustration of the difference between "grammatical and logical form" given by one of their leaders is very much like Kelsen's analysis of the proposition that an act is legal. "'Jones is popular' suggests that being popular is like being wise, a quality: but in fact it is a relational character and one which does not directly characterize Jones, but the people who are fond of Jones." Professor Ryle is contrasting the operation of the predicate in the proposition "Jones is popular", with the operation of predicates in other propositions. He makes no endeavour to classify the types of predicates. "Jones is six feet tall" is a different kind of proposition from "Jones is wise", and both are different from "Jones

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8 Kelsen has correctly analysed one of the possible meanings of sentences like *the action x is legal, p is a rule of law*. But he repeats in a more subtle manner the Austinian fallacy of the proper meaning of law. There are uses of *law* and *legal* which do not involve references to a hierarchy of norms, but to customary behaviour and to principles to which the user believes norms ought to conform. The scholar should not ignore the folk-wisdom exhibited by actual language (even if improper). It is right to distinguish between custom, official rule, and justice. It is right also to consider their interrelations. Kelsen's statement that his theory is an analysis of the "proper" use of the word law by lawyers is to be found in his article "Law, State and Justice in the Pure Theory of Law" in (1948) 57 Yale Law Journal 377, 378. He says, "In defining the concept of law as a coercive order .... The Pure Theory of Law simply accepts the meaning that the term 'Law' has assumed in the history of mankind." But according to the Oxford English Dictionary, in the English language from the earliest times the word "Law" has been used with reference both to natural law and to custom.

8 Ryle, "Systematically Misleading Expressions" in *Logic and Language (First Series)*, (ed. Flew), 11, 33. A fuller discussion is to be found in Carnap: *Logical Syntax of Language*, at p. 308, where the dangers of "transposed speech" are set out.
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is popular”.

Sentences may have the same linguistic form, and even appear to have the same logical structure, and yet analysis discloses differences.

The lack of correlation between linguistic form and logical substance is emphasized in different ways by traditional and modern logic. Classical logic showed that despite different linguistic forms there might be identity of logical substance; the more recent logic deals with difference of logical substance which may be concealed behind similarity of linguistic structure. It is the task of semantic logicians to examine the different logical types of propositions. This involves the affirmation or elaboration of Hume’s “trident”. He discloses three basic types of propositions, which may be characterised, by reference to their basic verbs, as is, must and ought propositions.7 There are propositions which deal with facts, propositions which deal with the necessities of logic, and propositions which deal with what we now often call values.8 Propositions of one kind cannot be deduced from propositions of another kind, and propositions of each kind have their own methods of verification.

The logical classification of propositions is, of course, related to ontological and epistemological doctrines. The threefold classification of Hume can be related to a world of basic space-time particulars and of perceiving and conceiving minds which discern the patterns formed by the particulars and the values exhibited by such pattern structures. This paper is, however, concerned with the nature of discourse. It is sufficient here to assert how important is that part of juristic discourse which is concerned with the analysis of discourse, allotting each part to its distinct logical type. Actual discourse, including both legal and juristic discourse, is made up of propositions of all types, and classification is often difficult as well as important. The importance of discerning that a proposition of value may be concealed behind an apparent

7 Mises classifies propositions about human behaviour by reference to the employment of the verbs “will”, “ought”, “may”, “must”. See ch. 25 of Positivism.

8 Hume’s separation of is from ought, of fact from value, is to be found in Book III, Part I, Sect. I, of the Treatise on Human Nature, see particularly the last two paragraphs. His distinction of is and must, of fact and logical relation, is at the basis of his examination of the nature of cause and his denial of its necessity. This occupies Part III of Book I. In Sect. XI we find a distinction drawn between knowledge and probability. Knowledge—“The assurance arising from the comparison of ideas” is to be distinguished even from proofs—“those arguments, which are derived from the relation of cause and effect, and which are entirely free from doubt and uncertainty”. I would refer the necessity of logical relation to deductive logic, but from his footnote to Sect. VIII it is clear that Hume would not distinguish deduction from other “acts of the understanding”.

statement of fact has often been asserted. I give priority to the
task of making clear what sentences do express propositions of
fact. In discourse propositions of facts are too often based on
conjectures. While conjecture may have to be accepted in the realm
of values, or met by no more than counter-conjecture, there are
well developed procedures for questions of fact: historical method
can deal with existence of particular events and scientific method
with propositions which assist the existence of uniformities. To
return to the Austinian theory of law, there are often statements
made that the official pronouncement of rules for the conduct
of citizens has no effect unless sanctions are incorporated in the
rules. The empirical investigation of such statements would be
fruitful.9

Juristic Discourse as Meta-Legal Language

Modern semantics may also be invoked in considering the first
question of what are the criteria by which juristic discourse is
distinguished from other discourse. Discourse on examination
discloses that it exhibits different strata or orders. A distinction has
been drawn between object language and meta-language. The
sentences of an object-language deal directly with “things”, those
of a meta-language are about sentences in the object-language.
“Heute ist Montag” is a sentence in an object-language. “Heute ist
Montag” means “To-day is Monday” is a sentence in a meta-language.
“To-day is Monday” is an object-language statement. “To-day is
Monday” is true” is a sentence in a meta-language.10 In a similar
way discourses about “laws” may be opposed to “laws” themselves:
it is the former which is sometimes called juristic discourses, while
the phrase legal discourse may be reserved for the laws themselves
and for language that is purely descriptive of the laws. That is to
say “legal discourse” may be used to denote both the pronounce-
ments of legislators of all kinds—parliamentary, judicial, ministerial
—and the statements of others, including “jurists” and sometimes
judges, who are merely translating the language of the men of law

9 “Every proper statement of the form X is a means to Y can be supported
by empirical evidence showing that X produces or tends to produce Y, and
this evidence is statistical. It is of the form n per cent of the people who have
headaches and who take aspirins find that their headaches are relieved.”
Weldon: Vocabulary of Politics at p. 163. Weldon’s thesis is that “Aspirins
relive headache” is a “proper statement of the form”, but “Parliamentary
Institutions promote the general good” is not.

10 Waismann distinguishes between macrological and micrological features
of a language—one deals with a system of statements as a whole, the other
with single statements. “Language strata” in Logic and Language (Second
Series), (ed. Flew.), p. 11, at p. 18. This suggests other ways of classifying
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into other language for many reasons, such as for purposes of summary, to achieve greater lucidity, to attract more attention to them, or for didactic purposes, putting them into a form in which it is believed the rules may be more easily memorised or understood. In summary fashion it may be said that "legal discourse" can mean legislation and exposition of legislation. Incidentally, this approach throws some light on the nature of "laws". In juristic discourse they are sentences or propositions and as such have no spatio-temporal qualities. It is absurd to ask about the location of "twice two is four", or to ask when did the proposition occur that the first of July 1953 fell on a Wednesday. As Hart says where a judge upholds the plaintiff's claim based on contract "there is a contract in the timeless sense of 'is' appropriate to judicial decisions". It is by looking at the propositional character of laws that Kelsen is able to "depsychologise" the Austinian command, and to separate the category under which law falls from those of "is" and (ethical) "ought".

It will be noted that meta-legal discourse is not identical with the discourse of jurists. On the one hand, any one can take part in meta-legal discourse; it is not confined to students of jurisprudence, but extends to students of any branch of law. Judges are often jurists in more than a merely eulogistic sense of the term. Politicians and soap-box orators may all utter meta-legal discourse. On the other hand, all discourse by students of jurisprudence is not meta-legal: it may be about human behaviour or about values such as justice and equity. It might in those cases still be said to be about "law", for the word "law" has both empirical and valuational significations, but it would not be about "laws": we should be passing from "the concepts of a lawyer's jurisprudence" to that of a jurist's jurisprudence.

The Analysis of Legal Reasoning and Stone's Province of Jurisprudence

The statement that juristic discourse is discourse about laws conveys no information as to what the sentences of the discourse say about laws. It is, of course, an over-simplification of Professor Stone's

11 Logic and Language (First Series) at p. 155.
12 Mises regards a category of "being of the ought" as chimerical, Positivism at p. 332, but he misses the propositional character. So too the view that "laws" can only "exist" as ideas in minds, adopted by Glanville Williams in Language and the Law [(1945 61 L.Q.R. 71, 179, 293, 384 and (1946) 62 L.Q.R. 387] is concerned with a different matter. Of course, "laws" can only be applied when administrators "think" of them: but attention is there directed to an element of psycho-physiological activity.
Province and Function of Law to say that its function is to convey that information: and in view of its lack of an explicit definition of the word “law” it may be a more erroneous over-simplification to say that Stone's thesis is that “jurisprudence” consists in the relation of rules of law to logic, sociology (in so far as sociology is concerned with “social control”), and philosophy (in so far as philosophy is concerned with principles of justice). Some attention has already been given to the light that modern logic may throw on the nature of juristic discourse. Classical logic may also be called in aid.

The problem of classification is one of the traditional topics of such logic, in which it embraced both deduction and induction, for the statement that a number of particulars are all members of one class is a form of induction. Discussion is generally confined to the classification of “things”, carried out, of course, by means of words signifying the things. Applied to law this process becomes one of classifying the various legal concepts, and yields the “common notions” of legal systems, whose examination was considered by Austin to be one of the main tasks of jurisprudence. In a similar manner propositions whose terms contain particulars, “Socrates is mortal”, “Plato is mortal”, can be classified as instances of wider propositions, “Some men (query all men) are mortal.” Applied to law this process yields, when a single system of law is examined, the highest generalisations of legal systems, which Holmes envisaged in the Path of the Law as the fruit of jurisprudence.\textsuperscript{14} When all (a task no one has carried out) or some legal systems are examined we find principles common to all legal systems or to some particular legal system, whose examination receives from Mabbott the name of “jurisprudence”, and is considered by him to be one of empirical inquiry by scientific method.\textsuperscript{15} The language of English lawyers employs the terms “rules” and “principles” to indicate the distinction between particular and general propositions. It is to be noted, however, that these terms may also be used to indicate a different distinction, namely that between rules of law and the policies they implement or serve.

\textsuperscript{14} Tennyson’s “broadening down from precedent to precedent” refers to judicial legislation employing inductive generalization as part of its reasoning process. In Rylands v. Fletcher (1868) L.R. 3 H.L. 330, Blackburn J. induces the “rule” from particular propositions dealing with cattle trespass, liability for fire and nuisance.

\textsuperscript{15} The State and The Citizen, p. 172. Mabbott is concerned with delimiting the province of political philosophy, and his statement about “jurisprudence” is consequently terse. Presumably he would include within “jurisprudence” dynamic principles of evolution of legal systems, the subject matter of Maine’s Ancient Law.
The main task, however, of classical logic was the examination of inference, of the relations between propositions which are linked in a chain of reasoning in order to determine whether conclusions were validly reached or not: and its bright star is the logic of the syllogism. Stone has brilliantly demonstrated many fallacies of logical form to be found in legal reasoning, arising mainly from the unsatisfactory character of the terms employed in legal propositions. Holmes has been the inspiration for the task of examining legal reasoning in order to see what premisses have been suppressed, which are, nevertheless, required for such reasoning to attain complete syllogistic or other valid logical form. He himself, of course, recognised that minor as well as major premisses are often inarticulate. He has also been the inspiration for the task of examining the character of the various premisses for the purpose of seeing into what branch of learning they fall, for, as Finch said long ago, “the sparks of all the sciences are raked together in the ashes of the law”. Judges as well as other legislators make use of propositions which fall within the ambit, for example, of economics, medicine, political science and ethics. The criteria for the validity of such propositions, it has been suggested, are determined by “disciplines other than law”.

The concept of “legal reasoning” which has been referred to requires some comment. It is distinct from that of legal discourse which has been conceived as merely the aggregate of rules of law, constituting separate propositions not linked in a general deductive or inductive system. It is necessary to go beyond the signification of the word “law” as an aggregate of rules of law if “law” is to be examined in the light of inferential logic. As Pound has shown, the word “law” bears a meaning beyond that of “authoritative grounds of decision”. It refers sometimes to the legislative and judicial process. The judicial process involves the application of rules of law to facts in order to arrive at decisions, and this process may be said to constitute “reasoning”, which may be logically examined. But, moreover, legislators and judges in many systems of law expound reasons for the rules of law they enunciate, and it is such reasoning which can be examined in the light of inferential logic. By “legal reasoning” I mean the totality of reasoning used

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18 In Railroad Co. of Texas v. Rowan Nichols Oil Co. 310 U.S. 573 at 583 Frankfurter J. said, “The record is redolent with ... matters of geography and geology and physics and engineering ... Plainly these are not issues for our arbitrament.” Professor K. C. Davis poses some stimulating questions in the Notes and Problems to this case in his case-book (Cases in Administrative Law at p. 940) e.g. “If instead of ‘geography and geology and physics and engineering’ the problems had concerned economics and business ... would the Court have taken the position that ‘Plainly these are not issues for our arbitrament?’”
by legislators and judges in the formulation and application of rules of law. Closer examination of the concept is doubtless required, in particular, for example, to see whether all that a judge says is "legal reasoning", and to consider how much of it is juristic discourse. My immediate task, however, is to suggest a gloss on Stone's thesis that jurisprudence is the examination of law in the light of disciplines other than law. It is legal reasoning and not merely rules of law which can properly be so examined.

Let us consider, for example, the rules (a) that contracts in restraint of trade are void, (b) that irresistible impulse is no defence to a criminal charge. Let us assume (i) that economists hold that non-enforcement of contracts in restraint of trade leads to diminution of the "national income", (ii) that psychologists hold that persons may suffer from conative disease of the mind so that some impulses are irresistible. (a) The legal rule that contracts in restraint of trade are void is condemned by the science of economics if the sole policy of the legal rule is that of augmentation of the national income. If, however, the policy of the legal rule is that of the maximisation of economic freedom, because of some ethical doctrine of "freedom", then the criterion for criticism is not to be found in economics but in ethics. What, however, if the policy of the law is not single but complex—if it is to augment the national income and to maximise freedom? The rule which according to the discipline of economics increases the national income may, according to moralists, decrease the amount of freedom. A rule of law may be affected by factors from many disciplines, some empirical and some valuation. Some synthesis is required of the relations between the rule and various disciplines. Is there a meta-discipline which provides this synthesis—history, perhaps, or philosophy? Does juristic discourse involve such synthesis on the basis of common sense or intuition, or on the basis of principles which jurisprudence itself must evolve? (b) The rule of law that irresistible impulse is no defence to a criminal charge is condemned by the science of psychology if the rule of law is based on the belief that empirically no impulse is irresistible. But this particular doctrine of the science of psychology affords no criterion whereby to judge a policy of attributing criminal responsibility to those who commit crimes as the result of an irresistible impulse. A science of eugenics might indeed indicate that if the policy were accepted of the desirability of a nation free from insanity all insane persons should be eliminated. But is the "major premise" good?
The Supplementation of Stone's Province

The debt of law teachers to Stone is very great, both for his insight into the task of jurisprudence and for his masterly exposition and criticism of juristic theories. His major premise, which he has well articulated, can be expressed in the language of his lamented colleague, Professor Simpson: "Every good course in law is a course in jurisprudence". It is not the major task of juristic discourse to tidy up the statute book and the utterances of judges. In the language of Bentham, we must go beyond exposition to "censorial jurisprudence", and in so doing should be perhaps readier than Bentham to give praise where praise is due: moral and intellectual virtues exist in the law as well as defects. In my view, however, juristic discourse cannot be limited to Stone's province of jurisprudence. I would not limit juristic discourse to the examination of rules of law in relation to extra-legal disciplines. I regard the empirical study of "legal" behaviour, the sociology of law, as rightly called a "legal" discipline. Surely studies of judicial behaviour and legal etiology are "legal" disciplines. Again, I consider the examination of the nature of justice to be a "legal" discipline. However fundamental the distinction between "natural law" and "positive law" may be I do not consider the study of natural law to be an extra-legal discipline. Austin, it should be remembered, conceived that the study of the philosophy of positive law was but a stepping stone to the science of legislation, the examination of what ought to be the law. However, even if juristic discourse be limited to the evaluation of legal rules, the criteria to be employed in this task must often be determined by the jurists themselves. One reason for this has already been considered, viz., that since other disciplines deal only with particular factors involved in a total judgment about a legal rule, some synthesis is required of the conclusions of the disciplines. But other reasons are to be found in the inconclusive character of extra-legal disciplines. Many of the social sciences are still in a rudimentary state. This situation has a two-fold operation. In the first place they have not yet proceeded to the stage of formulating hypotheses about the matters which are involved in the juristic criticism of laws. In the second place, many of their formulative hypotheses are not sufficiently established. If we turn to philosophy, though much guidance is to be found, we shall also

18 Is the legal practice of disparaging philosophy at an end? Even Pollock, an admirer of Spinoza, warned lawyers against "the deep water of philosophy". But Lord Asquith has recently said "A philosopher—a term which I use in no disparaging sense, for what is a philosopher but one who, inter alia, reasons
find that the philosophers have given little attention to many matters with which laws are concerned, even though they fall within the bounds of social and political philosophy. Jurists have often to make judgments affecting laws which fall within the areas of psychology or sociology, morals or politics, but whose operation has not been formulated in propositions of those disciplines. In a similar manner judges have developed general principles of government and social welfare which are not paralleled in the works of social and political philosophers.

Juristic discourse in seeking to evaluate actual rules of law unites the two fields of what is and what ought to be. It is linked with the formulation of possible rules which are thought to be better than existing rules. Juristic commentary on proposals for changes in the law is basically no different from that on existing laws.

The task of the jurist is thus similar to that of the legislator, but the legislator, judicial or otherwise, has to observe limits in his proposals for new laws from which the jurist is free. The member of a government takes into account the attitudes of parliament and the electorate: the judge is influenced by the analogies of existing laws, the pressures arising from the facts of the case before him, and the necessity for giving a prompt decision. The fundamental choice before jurists and legislators, however, appears to me to be between the formulation of judgments based on intuition, emotion and common feelings, and the formulation of judgments based on reflective thought, science and philosophy. In order to escape from intuitionistic judgments it is not sufficient to call in aid the empirical social sciences if the view be accepted that ultimate policies,
scales of values, notions of justice, are themselves but matters of
taste and arbitrary emotion. The rejection of the doctrine that
justice is a rational concept, in other words the rejection of natural
law, leaves the jurist ultimately with no function but logical
analysis of positive law. There have, of course, always been jurists
who have accepted positivism. Kelsen, who in Vienna anticipated
the logical positivists of the Vienna school, has shown both the
strength and the limitations of the positivist approach. In England
the logical positivists have found disciples among jurists, and
Glanville Williams' articles on Language and the Law20 have been a
stimulus to juristic thought, though their value lies more in their
semantic analysis than in their ontological discussion. Outside
England the revival of natural law, heralded at the beginning of
the century by Charmont, has become widespread since the war.21
The jurist who seeks for a rational basis for his judgments on legal
rules will, of course, call in aid the empirical social sciences, but he
will also turn for assistance to the sciences of values. He will, how­
ever, find that the extra-legal disciplines are not sufficient for his
task. He will, nevertheless, find some guidance in the theories of
justice and human behaviour which have been the creation of
lawyers, working both in Courts and schools of law, even though
they have sought no higher title for their views than that of
organized common sense.

PART II.—DISCOURSE ABOUT THE PROBLEM OF
BROOM v. MORGAN

Introduction

In this part instead of dealing in an abstract and perhaps a priori
manner with juristic discourse, I shall consider three recent dis­

20 The articles are to be found in (1945) 61 L.Q.R. 71,179,293,384 and (1946)
62 L.Q.R. 387. The change of attitude to morals undergone by other logical
positivists has not yet apparently been experienced by him. In Joint Torts
and Contributory Negligence he propounds a principle justifying vicarious
liability and adds "Some may be inclined to reject this statement of policy, and
it seems that whether one accepts it or rejects it is a matter of feeling and is
not susceptible of argument". at p. 433.

21 Charmont in La Renaissance du Droit Naturel emphasizes rather the
contribution of Gény than that of Stammel. Neo-Thomism has been certainly
a powerful influence in the general revival of natural law and is possibly
the main factor in the present general interest in "natural law" in Western Europe
and the United States. But Neo-Kantianism had its place; and it certainly is
a curious classification which confines "natural law" doctrines to those deriving
from St. Thomas. Renard's rejection of eighteenth century so-called natural
law is, however, reasonable. The tradition of natural law from Aristotle on­
wards has been that of a set of principles to be utilised in the making of
positive laws. In the eighteenth century a detailed blueprint of 'laws' derived
from "reason" was propounded. Renard calls this "droit idéal": see Le Droit,
L'Ordre et La Raison, at p. 134. It is this "ideal law" which was discredited by
Savigny and other jurists in the nineteenth century.
The Nature of Juristic Discourse

courses, not for the purpose of dealing with their subject matter, but in an endeavour to show the character of the enterprise on which the authors were engaged and the methods they employed. The discourses are related by the fact that they are concerned with a common problem, which can be epigrammatically and misleadingly stated as this: is a master liable for the *torts* or for the *acts* of his servant? Two of the discourses are by law teachers writing in law reviews, the other consists in the complex of judgments of the Court of Appeal in the case of *Broom v. Morgan.* ¹ I must confess that my examination was not completely disinterested; I approached the task with certain hypotheses in mind. This may be described as either the scientific method, or as arguing from pre-established premises to pre-determined conclusions. What is certain, however, is that the conclusions, even if correct, apply only to the specific discourses examined: these discourses cannot be regarded as a "fair sample" of the opinions of law teachers and judges, and the characteristics they exhibit cannot be predicated generally of juristic and judicial discourse. The hypotheses were, however, general propositions; they were: (i) that much "juristic" discourse is description of what judges say, (ii) that much judicial discourse is "juristic" in character, going beyond exposition of what the law is to criticism and justification, (iii) that in connection with many of the problems with which juristic discourse deals little help is to be gained from the writings in other disciplines, from ethics or politics, from sociology or economics. I shall in connection with each discourse first summarize it, then assess its character and, finally, examine its method.

*The Nature of a Master's Liability in the Law of Tort: Hughes and Hudson*²

(i) *Exposition.* The first discourse to be examined is an article in the *Canadian Bar Review.* The authors are concerned about the absence of any "convincing technical statement" dealing with the law relating to the liability of a master, and the article concludes with the formulation of a statement of the doctrine of master's liability. The lack of a technical statement is demonstrated (i) by showing that text book writers are in conflict about the statement of the doctrine: some write of liability for the torts of a servant, others of liability for the acts of a servant, (ii) by constructing five hypothetical situations for which specific judicial authority is

¹ [1953] 1 All E.R. 849.
² (1953) 31 Canadian Bar Review 18. G. J. Hughes and A. H. Hudson are lecturers at the University College of Hull.
lacking, and which give rise to problems which cannot be determined while doubt as to the doctrine persists.

So far as space is concerned, the major part of the article is concerned with a review of cases. The "mass of case law on master and servant" in England is said to provide but "occasional and fragmentary assistance". It is true that in _Twine v. Bean's Express_ there is a dictum that "the law attributes to the employer the acts of a servant done in the course of his employment"; but the authors submit "that the main trend of this passage is to emphasize that the employer is not necessarily liable simply because the servant is liable"; and that the _ratio decidendi_ of the case was that the act was not in the course of the servant's employment.

Three English cases and one American case received particular attention. In _Dyer v. Munday_ the master was sued in respect of an assault committed by a servant. Criminal proceedings had already been taken against the servant, which, under s. 45 of the Offences Against the Person Act, 1861, amounted to a bar to civil proceedings against the servant. Nevertheless, the master was held liable. The authors reject the reasoning of the Court of Appeal based on the purpose of s. 45, but accept the decision: they say that the case can "be very easily explained on the ground that the servant was clearly liable in tort: the plaintiff was only procedurally barred". _Smith v. Moss_ and _Broom v. Morgan_ were cases in which a wife injured by the careless act of her husband was held entitled to recover against the husband's employer, though she herself, be-

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3 [1946] 1 All E.R. 202, 204.
4 At p. 25. There is no further examination of the distinction between master's liability for torts of the servant and acts of the servant in order to bring out that a proposition in terms of acts may both widen and narrow the master's liability. See post p. 442.
5 This is asserted to be the _ratio decidendi_ of the judgment of Uthwatt J. as well as of the Court of Appeal; and it is asserted that the Court of Appeal in _Conway v. George Wimpey and Co., Ltd._ [1951] 1 All E.R. 363 also considered this to be the _ratio decidendi_ of _Twine v. Bean's Express_. Professor Baker considers that the dictum of Uthwatt J. cited in the text was the _ratio_ for the decision of Uthwatt J. and was adopted in Conway's case. The Court of Appeal in _Twine v. Bean's Express_, he says, "complicated the issue by a ruling that the driver in giving a lift ... was not acting in the course of his employment". Glanville Williams supports Baker. These differences throw light on the certainty engendered by the doctrine of precedent. This certainty is assisted by the accuracy of reporters. The _All England Law Reports_ sets out the account of _Twine v. Bean's Express_ narrated by Asquith L.J. in Conway's case as if it were his own. ([1951] 1 All E.R. at 365 F). The _Times Law Reports_ ([1951] 1 T.L.R. 587, 589) shows that Asquith L.J. was setting out the _ratio decidendi_ of the case as if it were his own. ([1951] 1 All E.R. at 365 F). The _Times Law Reports_ ([1951] 1 T.L.R. 587, 589) shows that Asquith L.J. was setting out the _headnote_ drafted by the reporter of _Twine v. Bean's Express_ for the _Times Law Reports_: See (1946) 62 T.L.R. 458.
6 [1895] 1 Q.B. 742.
7 [1940] 1 K.B. 424.
8 [1952] 2 All E.R. 1007. This is the report of the case in the Court of first instance before Lord Goddard L.C.J.; the article was written before the decision of the Court of Appeal.
cause she was his wife, could not have recovered from her husband. They accept the decisions as correct, but consider them as “forming a particular decision on the law of husband and wife” justified by the “social expediency test”, and “not capable of forming the basis of the general principle of vicarious responsibility”. Nevertheless, they consider “the crucial difficulty is why the employer is liable in such a case”. In Schubert v. Schubert Wagon Co., in another case where a wife was held entitled to sue an employer, said “The liability of the master must remain until he satisfy it or be by rule of law relieved from the liability of his servant’s wrong”. This reasoning is rejected: our authors say: “If the servant is not liable, how can his act be said to be wrong. Any test of ‘wrongness’ outside the ambit of legal liability is a dangerous and uncertain one for a Court to adopt”.

The crucial difficulty of Smith v. Moss is overcome, and the technical statement formulated in the following manner. “In order to draw some conclusions from the case law considered, it is suggested that we use as our test a blend of legal logic and social expediency”. Two “explanations” of Smith v. Moss and two technical statements may be considered. The first is that the master’s liability is independent of that of the servant, and is based on an independent primary duty of his own: this is the doctrine of liability for acts. The second is that the master is liable if the servant is liable, but such liability includes the case where the servant has “committed a prima facie tortious act, even though he may be immune from an action based upon it”: this is the doctrine of liability for torts: but torts are extended to include prima facie torts. The doctrine that a master has an independent primary duty is said to be “logically unsound”, and a logical demonstration of its unsoundness is presented. The alternative that the master is liable for the torts of his servant must, therefore, be accepted. This results in a rule of law which “appears to be socially equitable and expedient”. It is “A master is liable in tort for the act of his servant, if the servant’s act was a breach of duty imposed on the servant by the law of tort and was done in the course of the servant’s

9 They point out that Hanbury (Principles of Agency at p. 11) and Salmond (Torts 10th edn., 1945 at p. 66) consider Smith v. Moss in conflict with the correct doctrine of vicarious liability. Powell (Agency at p. 240) considered it an exception.

10 (1928) 249 N.Y. 253.

11 The authors consider that by using the words “immune” and “immunity” they have adopted a “Hohfeldian classification”. This is no so. They envisage the servant being under a duty in respect of his acts and yet having an “immunity” from action against him. This is a departure from Hohfeld’s use of “immunity” and ignores the Hohfeldian distinction between primary and secondary rights.
employment: the fact that the servant enjoys an immunity from action does not protect the master”.

The “logical” argument, on which the authors rely, is discussed subsequently.

(ii) **Type of Discourse**

Attempts to classify discourse as descriptive of what is the law or prescriptive of what ought to be the law run into the difficulty of the ambiguity of “law”. In the discourse under review it could be said that the authors have drafted proposed legislation and submitted reasons for its acceptance. This legislation in their view, is needed not in substitution for an existing rule of law but in order to fill a “gap”, because no rule of law exists dealing specifically with the topic. In their view judicial pronouncements deal with only part of the topic they consider, viz., that part dealing with the factual situation giving rise to the litigation, and are indeterminate in relation to hypothetical situations, imagined by the authors but not yet the subject of litigation. This type of discourse formulating proposed rules of law for dealing with situations for which official legislation has made no provision, has a long tradition, being found in the discourse of Roman jurists who developed the classical law of Rome, and in the discourse of commentators on Roman law who developed the modern law of Europe. Persuasive devices employed by such commentators for the acceptance of their proposals have been the use of phrases such as “in accordance with right reason” or “natural law”: it will be noted that our authors do not use those phrases, but they do use the phrases—“legal logic”, “socially equitable”, “the interests of society”.

The discourse under review does, however, contain indications that the authors are purporting to state what the law is, not what it ought to be. They point to the absence not of “law”, but of a “technical statement”, and the rule they propose is called a “restatement of the law”. Their discourse is consistent with the acceptance by them of the view that “the law” consists not merely in already formulated “technical” rules, but also in principles or processes for the formulation of other rules. They formulate the rule for master’s liability in accordance with the official method—their argument is one which not only could

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12 This is a “restatement” of the declaratory theory of law. It was surely in relation to this theory, and this meaning of the word “law”, that Lord Jowitt was speaking when he said at the Seventh Legal Convention of the Law Council of Australia that if the problem of *Candler v. Crane, Christmas & Co.* came before the House of Lords, it would be decided in accordance with “the law”. (1951) 25 A.L.J. 296.
be addressed to a Court of law, but might be presented by a Court. Discourses of such a kind may be described as prophecies of what Courts of law are likely to say in the future, or statements of what they ought to say according to the common law doctrine of precedent. Such discourse contains much reference to past cases, to the distinctions between ratio decidendi and obiter dictum, to “explanations” of cases, and to “principles” behind cases. It may engender controversy because there is no agreement as to the nature of the judicial law-making process: if “the law” consists in principles for law-making, perhaps they are those of which the judge spoke when he said “the common law consists in half-a-dozen obvious principles, but nobody knows what they are”.

The dichotomy between what is the law and what ought to be the law dissolves if the rule-making principles which are part of “the law” are based on what the law ought to be; for example, if there be a principle that in some circumstances at least the judges are to formulate a rule “required by justice”. Differences of opinion as to the rules that judges will enunciate can, of course, be expected if the judicial law-making process involves reference to concepts such as justice and social welfare, for so far no agreement yet exists, either as to the content and mode of operation of those concepts or as to methods by which differences about those matters may be resolved. Thus there is a desire on the part of some to believe that the process is of a logical character derived from the entailments of existing rules, involving only principles about which there is as much agreement as about the rules for arithmetic. If this were so, one could rightly ask what is the law on a matter not covered by authority in the same way as one could ask what is the product of two numbers which had not previously been multiplied? Different answers might be forthcoming to either question, but with care one could see who had “got the sum right”. There is, however, an intermediate position between logico-legal rule-making for gaps and ethico-social, extra-legal rule-making. One may ask either what ought to be the law in a given situation positing freedom of choice, utilizing only extra-legal notions, or what ought to be the law taking into account not only the extra-legal notions, but also existing rules of law. This is in essence the debate about “libre recherche scientifique”.13 It also presents analogies to one

13 The classical summary of the debate is to be found in the introduction by Saleilles to Gény’s Méthode d’Interpretation. Adapting Ihering’s phrase “Through the Roman Law but beyond the Roman Law”, he says the two schools of thought are represented by (1) Par le Code civil, mais au-delà du Code civil (i.e. libre recherche scientifique), (ii) Au-delà du Code civil, mais par le Code civil (i.e. the use of analogy).
of the debates among moral philosophers denoted by "absolute" and "relative ethics". The discourse of our authors is perhaps based on the intermediate position, for they give us reasons in support of their formula (i) that "it adequately explains all existing cases", (ii) that it "appears to be socially equitable and expedient".

(iii) Method of Discourse

"Relativists" who maintain that new law should conform to existing law will in their discourse discuss existing law. Our authors, as has been seen, give much space to discussion of decided cases and to stating what they consider to be the principles behind the cases. They consider that cases can be "explained" not by reference to the actual reasoning of the judge, but by some principle they themselves elucidate. It is, of course, pertinent when submitting for acceptance a proposed rule of law to show that it produces the same beneficial results as a rule of law it is proposed to amend; but one does not repeal a rule of law by demonstrating that its effects can be produced in another way. It is a "technical" question of the doctrine of precedent whether the rule of law enunciated by a judge has binding authority. I have elsewhere supported the view of Hamson that the doctrine of precedent does not permit the "explanation" of cases by reference to rules not propounded by the judges. The authors appear to accept "explanation" as a method of exposition of case law.

The next stage in "relativist" law drafting is to consider the implications of existing law. This our authors do: and they reject a possible rule of law because, in their view, it is not "logically" consistent with existing law, or, in their own words, because it is not consistent with "legal logic". In my view, their appeal to "logic" is actually an appeal to values more or less concealed, to policies for law of which they approve, but which do not appear to me to be accepted legal policy. I elaborate this assertion in a later section where, in considering the relation of law to logic, I consider also the general question of the distinction between logic and policy.

The last comment about the method of the discourse that I make at this stage is about the manner of extra-logical justification of rules. The authors refer to a range of terms. There are single words "convenience" and "expedience", there are words qualified by

14 Sidgwick uses "absolute ethics" to refer to the conduct of perfect men in an ideal society and "relative ethics" to refer to what ought to be the conduct of actual men in actual societies (as opposed to what is their conduct, which falls within the field of sociology). See Methods of Ethics (6th Edn. 1901), at p. 18. Spencer in his Social Statics had maintained that a system of relative ethics could not be devised.
the epithet “social”, so that we have the phrases “social expedience”, “socially equitable”, “interests of society”. Nowhere, however, is there any demonstration of the relationship of a rule to the concept: apparently the relationship is self-evident. The various terms are not even defined: again it may be that they have precise meanings known to everyone. I am not sure, however, whether the terms are synonyms or refer to distinct concepts: at any rate I shall use the phrase “social welfare” to refer to the single concept or aggregate of concepts. I shall endeavour to see how “social welfare” is involved in the problem of master’s liability, and what light other social sciences throw on the relationship between master’s liability and “social welfare”.

The Importance of a Word in the Respondeat Superior Doctrine:

Baker

(i) Exposition

Professor Baker in his article is content to describe the “puzzle”, as he calls it, which has arisen in connection with the doctrine of master’s liability. He adds some comments, but makes no claim of solving the puzzle. The puzzle is the correctness of the new pattern of ripples caused by the effect on the previous uniformity of the dictum of Uthwatt J. in Twine’s case. Does respondeat superior mean that the acts of a servant are attributable to the master, or does it mean that the master is liable where a servant has committed a tort in the course of his employment. He finds a champion for the former view in Asquith L.J. who in Conway’s case exempted a master from liability because though the act causing damage was his responsibility, yet it created no liability since the master was under no duty. Professor Baker points out that this same view “solves” the difficulties which have been found in such cases as Smith v. Moss. The act is the act of the master and the immunity the immunity of the servant. The fact that the servant could not be sued is irrelevant when considering the master’s liability. Professor Baker puts forward Denning L.J. as a champion for the latter view, that of liability for torts, citing his judgment in Young v. Edward Box & Co., Ltd.  

15 (1952) 2 University of Queensland Law Journal: 1. Professor Baker’s later article in this journal was not available to me at the time of writing.  
16 [1951] 1 T.L.R. 789. The case is not cited by Hughes and Hudson, nor in Broom v. Morgan ([1953] 1 All E.R. 849) where Denning L.J. champions most vigorously what Professor Baker calls the view of Asquith L.J., to which, according to Professor Baker, he was opposed in Young v. Edward Box. For the thesis that there is no inconsistency between the two judgments of Denning L.J. see the section in the text on law and logic, post 438 ff. There is a cleavage of judicial opinion in the cases of Conway v. George Wimpey
Res Judicatae

In a survey of the case law Professor Baker deals with a number of authorities not cited by others, but finds no solution, though in his view such authority as there is supports the theory of responsibility for acts.\(^{17}\)

To throw light on the problem he turns first to the “history” of the doctrine and then to the “rationale”. As regards history he finds that “digging in the the past does not help us very much with this controversy” yielding only “isolated sentences”.\(^{18}\) The “rationale” is more helpful. He finds that “it is now generally agreed that notions of policy and justice are the only acceptable basis upon which the doctrine can rest”. Where there is no rational scheme of accident insurance, he considers it socially desirable “that the operators of vehicles should be responsible for injuries negligently inflicted even upon uninvited passengers”. He points out, as do other supporters of the “enterprise theory”, that the owner of the enterprise can easily cover the cost by insurance and pass it on in the price paid by consumers.

Finally Professor Baker lends his support to the view expressed by Denning L.J. in *Young v. Edward Box & Co., Ltd.* that since an owner of land may be under a duty to a trespasser, so too may an owner of a vehicle. In his view “logically there seems no ground for any differentiation”.\(^{ii}\)

(ii) Type of Discourse

The discourse is professedly mainly one of description of what the law is. The exposition of an alleged inconsistency between judicial statements does involve a reference to logic, albeit of a simple kind. On the other hand, the references to “history” and “rationale” are

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\(^{17}\) He “misses” *Dyer v. Munday* [1895] 1 Q.B. 742, but this can, of course, be counted as an “Asquith L.J.” case. It had to be “explained” by Hughes and Hudson, whose views on the authorities are opposed to those of Professor Baker. Professor Baker’s findings are opposed to those of Hughes and Hudson. The latter state that “the earlier cases (for example, the judgments of Holt C.J. in *Hern v. Nichols* (c. 1700) 1 Salk. 289 and *Wayland’s case* 3 Salk. 234) reveal a laconic readiness to accept the doctrine of a master’s liability for his servant’s acts as an unfortunately unnecessary solecism in the common law”. Baker finds no such reluctance, and indicates that Holt was quick to recognize the needs of a century of expansion in commerce and industry for change in the law: he developed the law and based the new law on public policy.
not necessarily extra-legal. The history referred to is very little more than a statement of early cases. There is no essential difference between exposition of early judicial statements and exposition of later judicial statements: nor does established usage of language prevent both being called “historical”. The doctrine of precedent assumes that history is law.\(^\text{19}\)

In order to decide whether discourse about “rationale” is descriptive of law or is meta-legal, it is necessary to attempt an analysis of the meaning of the word “rationale.” A number of different meanings attach to the word and to its dictionary definition.\(^\text{20}\) The reasons for a legal rule may be the social forces that have produced it, its historical causes, “rationale” being used to denote etiology. When “rationale” is used as equivalent to justification there may be a reference not to causes but effects—to the results produced by the rule. Again the meaning of “rationale” may be that of teleology—what purposes had the legislator in mind, what effects did he hope to produce by the rule? The various meanings provide us with the fundamental questions of juristic criticism of laws. They are:—

(i) what is the purpose of a rule of law? (ii) does the rule achieve its purpose? (iii) what ought to be the purpose of a rule dealing with this particular topic? (iv) what rule of law would achieve such a desired purpose?\(^\text{21}\)

Professor Baker begins his discussion of “rationale” by providing a definition when he says “Many reasons have been put forward to justify this exception to the general principles of agency”;\(^\text{22}\) nevertheless, it is clear that he has in mind purposes of the judicial legislator. He says, “It is now generally agreed that notions of policy and justice are the only acceptable basis upon which the doctrine can rest”, and the context shows that the general agreement is that of the judges. But exposition of judicial purposes is not always equivalent to exposition of rules of law. A distinction exists between what

\(^{19}\) Some writers have entertained the view that early cases have greater authority than later ones. According to them the true law is to be found in the first case: any divergence from that law is unjustified legislation. Winfield’s view, it will be recalled, was that the authority of cases was like wine; it improved with age for some time and then went off. Lord Goddard, C.J., in Terrell v. Colonial Secretary has recently rejected the view that the content of a rule is fixed by its origin. See [1953] 2 All E.R. 490, 496 C.

\(^{20}\) The Oxford English Dictionary merely substitutes (a) reasons (b) fundamental reasons for “rationale”. A rationale of dictionary definition is needed.

\(^{21}\) Weldon points out that the discovery of the purpose of a rule is more difficult than the discovery of the purpose of particular action: see Vocabulary of Politics at p. 162. The difficulty is well known to lawyers in connection with “intention of Parliament”.

\(^{22}\) Why “exception”? Is it accurate to say that there is a general principle either in contract or tort that a master is liable only for the acts of a servant which were actually authorised?
may be called extrinsic purposes and intrinsic purposes. An intrinsic purpose delimits the ambit of a rule of law and is part of the content, just as is the “purpose” in any statutory rule which contains the phrase “for the purpose of”. An extrinsic purpose is not part of the content of a rule; thus, so far as statutory rules are concerned, it may be set out in the preamble, and there is, of course, no compulsion to modify a section so that its effect may conform to the purpose expressed in the preamble, though ambiguities may be resolved by reference to the preamble. (Discourse about intrinsic purposes is exposition of law; discourse about extrinsic purposes may be considered meta-legal). How far the distinction between intrinsic and extrinsic purposes can be made for rules of common law is doubtful. It can be argued that all judicial purposes are intrinsic: it has been said that “cessante ratione legis cessat lex ipsa” is a doctrine of the common law. On the other hand, a rule may be applied to circumstances in which its effects are different from those desired by its originators but are desired by the judge who applies the rule, and rules have been applied without regard to purposes. The purposes of the doctrine of respondeat superior mentioned by Professor Baker, viz., the effectuation of “policy and justice” are, however, so vague that the distinction between intrinsic and extrinsic purposes in relation to them is without significance.

The discussion of liability to trespassers does introduce a meta-legal note. Professor Baker appeals to a criterion of “logic”: his use of the word “logic” is examined later.

(iii) Method of Discourse

Considerations of space have doubtless prevented Professor Baker from being able to do more than present in compendious manner the conclusions of his inquiry and from elaborating the exact character of the principles he has invoked. Judges are compelled to appear dogmatic in their reasoning through lack of time and jurists through lack of space. It is revealing to compare the full discussion that the analysis of a simple sentence of individual

23 A random selection has produced s. 6, 15 Geo. III c. 62: “An Act for completing and maintaining the Pier at the Town of Mevagissey in the County of Cornwall”. An article could be devoted to the juristic character of this Act.

24 This is the doctrine of Ellerman Lines v. Murray.

25 Ambiguities may also be resolved by reference to purposes, even though they have not been expressed in the preamble. This is the Rule in Heydon’s Case.

26 Stone’s doctrine that logic is extrinsic to law has been challenged. It appears to me that the terms of the proposition require analysis. The logic of inference appears to me an intrinsic part of legal reasoning. No judge would regard any reasoning as legally sound if he were satisfied that it was “logically” unsound.
perception receives from the philosophers with the terse presentation by jurists of solutions of complex problems of social organization. The bare invocation as the rationale of master's liability of the "notions of policy and justice" is insufficient in two ways. What exactly do "policy" and "justice" signify in this context, and in what manner does a rule of master's liability serve policy or achieve justice? Surely it is not only the doctrine of master's liability which has as its rationale "policy and justice", but every rule of law: is there a specific manner in which the doctrine of master's liability operates in achieving these aims, or do all rules of law operate in the same manner?27

Professor Baker, after his discussion of the rationale, asks if it is "open to decide such an issue upon policy considerations". This suggests that "policy" is used as a comprehensive term to include all purposes, all ends, all values to be achieved or maintained by rules of law. The phrase "policy and justice", however, suggests that he may consider that policy is distinct from justice. It is certainly important to know whether an opposition of "justice" to "public policy", which is asserted by some writers, is valid. Professor Baker considers that they co-operate: he says it might appear just that a master's burden should include responsibility for injury even to a trespasser, that it is socially desirable that operators of vehicles should be responsible for injuries inflicted upon even uninvited passengers. In this passage "policy" is replaced by "socially desirable", without, however, adding much precision.

(i) Exposition

This was a case where the plaintiff was injured by the careless act of her husband: (he had left open a trap door down which she fell). The act was in the course of her husband's employment and she sued his employer: (she was also employed by the defendant, but the defence of common employment has been abolished). She could not bring an action against her husband by virtue of s. 12 of the Married Women's Property Act, 1882. This was relied on by the master as a defence to the action against him. He said that a master is liable for the torts only of his servant; the husband had committed no tort, and so the master was not liable. All members of the Court of Appeal found in favour of the plaintiff.29 Singleton and Hodson L.JJ. reasoned in a similar manner. Their initial

27 If, as the cynics say, justice is a matter of taste and feeling, there is no space for reasoning.
29 They affirmed the judgment of Lord Goddard C.J. (1952) 2 All E.R. 1007 and approved of the decision of Charles J. in Smith v. Moss.
premiss is that the master would have been liable if the plaintiff had not been the spouse of the servant, or there had been no s. 12 of the Married Women's Property Act. The case thus turns upon the effect to be given to s. 12. They inquire into the content and the (extrinsic) purpose of the section. So far as content goes, the section pre-supposes that a tort has been committed, but denies suit to the spouse. Hodson L.J. (not using Hohfeldian language) says that this is "a substantive disability based upon public policy". So far as purpose goes the object is to prevent litigation between husband and wife because it would be "unseemly, distressing and embittering". The effect of the section should be limited to its purpose. If the effect were to deny suit to a plaintiff against someone other than the spouse, this would exceed the purpose: such litigation would not be "unseemly, distressing and embittering". The sartorially surprising dictum of Cardozo J. is accepted: "... Though the law exempts the husband from liability for the damage others may not hide behind the skirts of his immunity".

Hodson L.J. does in two sentences refer obliquely to the nature of a master's liability. He considers that the phrase "vicarious act" is more accurate than "vicarious liability", and is apt to cover all cases whether the master is liable "directly or liable merely through the act of his servant". This recognises that a master may be liable both for the acts and torts of his servants.

30 [1953] 1 All E.R. 856B. He disagreed with Denning L.J. who considered that s. 12 was purely procedural in the same way as the Statute of Frauds. I do not believe that there is any order of importance as between rules of substantive law and rules of procedure: both can be said to be based on public policy. But the difference is important: thus in conflict of laws different considerations apply to procedural and substantive rules.

31 The quotation is from Winfield on The Law of Tort (4th edn. 1948) at p. 100. Winfield gives this as a better reason than what he calls the fiction of the common law that husband and wife are one flesh. Denning L.J. also calls the time-honoured phrase a fiction and says "that no longer has it any place in our law". But surely even a fundamentalist would take the biblical quotation in metaphorical sense. What is meant is that husband and wife form a unity. Litigation between husband and wife is inimical to the integrity of family life. A denial of a general right to litigate is a recognition of the view that the welfare of the community is connected with the maintenance of the family as a unit.

32 The quotation is taken from the judgment of Maxwell J. in Waugh v. Waugh (1950) 50 S.R. (N.S.W.) 210. The reasoning by reference to the purpose of the section is similar to that of the Court of Appeal in Dyer v. Munday. That reasoning, in the opinion of Hughes and Hudson, "evaded the issue". They assume, however, that the effect of a section is always independent of its purpose. This is not so. Where there is doubt as to the application of a statute, it is well settled that regard may be had to the purpose, and the application limited to execution of the purpose.

33 [1953] 1 All E.R. at 856 E. The judgment of Hodson L.J. followed that of
The Nature of Juristic Discourse

The judgment of Denning L.J. is divided into two branches. In the first he affirms that a master's liability in respect of damage effected by the servant "is his own liability", resulting from his being "morally responsible" for the damage. It is not a "true vicarious liability" arising from the liability of a servant though there is a "vicarious act", because "the servant's act is his act". Consequently, a master's liability "remains, notwithstanding, the immunity of the servant". The second branch deals with the situation on the assumption that a master "is only liable if his servant is also liable". His reasoning in this case is similar to that of Singleton L.J. inasmuch as it is based on a consideration of s. 12 of the Married Women's Property Act. In his view, from which Hodson L.J. dissents, that section creates an immunity which "is a mere rule of procedure and not of substantive law". The husband "is liable to his wife, although his liability is not enforceable by action, and as he is liable so also is the employer".

Denning L.J. furnishes reasons for his view that a master is morally responsible for the harm done by a servant. "The reason for the master's liability" he says "is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. He takes the benefit of the work when it is carefully done and he must take the liability when it is negligently done."

(ii) Type of Discourse

These judgments all, of course, contain legal discourse, stating the judge's decision and the rule of law on which it is based. No one of the judges is, however, content to rely on authority for their views as to what is the law—neither their own judicial authority nor the authority of past judges: all give reasons. Singleton and Hodson L.JJ. consider the purpose of s. 12 of the Married Women's Property Act. That purpose is extrinsic to the section, but is perhaps intrinsic to a rule of law for application of statutes. Nevertheless, Denning L.J. and the purpose of this sentence, as of that quoted above (see note 28), was to dissent from views expressed by Denning L.J. who appeared to have taken the view that a master was always "directly" liable.

34 As already stated in note 15, Denning L.J. in this part of his judgment supports the doctrine of liability for acts of the servant, which Professor Baker has called the "view of Asquith L.J.", and to which he says Denning L.J. ran directly counter in Young v. Edward Box & Co., Ltd. Certainly, the two judgments of Denning L.J. the one in Broom v. Morgan ([1953] 1 All 849) and the other in Young's case, require some "explanation" if they are to be reconciled. See post p. 442.
their discourse about purpose may be classified as juristic in the sense of meta-legal. The discourse of Denning L.J. about the basis of master's liability is clearly juristic: he is propounding a justification for the rule he enunciates, of direct liability of a master in respect of his servant's acts.

(iii) Method of Discourse

As already indicated, judgments, and particularly extempore ones, as were the judgments in Broom v. Morgan, are not the place for a lengthy discussion of all the argument for and against the "goodness" of a rule of law. Singleton and Hodson L.JJ. briefly assert the purpose and justification of s. 12 of the Married Women's Property Act, 1882 without any inquiry at all into history or sociology. Denning L.J. makes a number of interesting comments about the morality of the doctrine of the liability of a master, but they are all assertions made without regard to consideration of the contrary view that a master who takes care to appoint competent servants, takes care to give them proper equipment and facilities, takes care to instruct them not to be negligent, is not morally responsible for his servant's negligence. He does not examine the meaning of morality nor does he refer to any writer on morals. I discuss his notion of morality in the section on law and justice.

PART III.—LAW IN RELATION TO LOGIC, SOCIAL WELFARE AND JUSTICE

Law and Logic

The above review of discourses has disclosed references to concepts which are considered in disciplines other than the law: there have been references to logic by the law teachers, to social welfare (under various other terms) also by them,¹ and to morality by Denning, L.J.² In the following sections I propose to consider the relation of law to logic, to social welfare and to justice, dealing with the treatment of these matters found in the articles and judgments and adding some general comments.

As Morris Cohen has shown, the difficulties as to the meaning of "law" and "jurisprudence" are equalled by those concerned with "logic".³ Nevertheless, there is one field which all agree falls

¹ Hodson L.J. also invokes "public policy": [1953] 1 All E.R. 855 H.
² Professor Baker also refers to justice in his discussion of the rationale of master's liability.
³ A Preface to Logic, Ch. 1 passim. The heading to the first section is "The subject matter of books on logic". Collingwood attaches importance to the definition of a discipline by reference to the sentences that compose it. He would regard a definition of jurisprudence as "the subject matter of Professor
within the field of logic, and whose character should be clearly appreciated when reference is made to logic. Morris Cohen has indeed limited all "logic" to this field. It is that of "the relation of implication between propositions". In this sense logic does not concern itself with the truth of individual propositions but with the consistency of propositions asserted in reasoning. There are axioms or postulates which logic employs; their validity is assumed, not demonstrated, by implication logic: such an axiom is the doctrine of classical logic that a thing cannot be both A and not A. Their number is small, even in modern logic, which admits of some freedom in the choice of postulates. Thus despite the differences among logicians as to the field of logic it is not a logician's practice to use the term "logical" as a criterion for the truth of an asserted proposition, unless the proposition is shown to follow "logically" from propositions whose truth is admitted, or unless the references be to the limited number of "logical" axioms.

When, however, we turn to Professor Baker's article we find that he uses the term "logically" not in a logician's manner. For logic "trespassers on land" and "trespassers on vehicles" are different terms, and from propositions involving one term no implication of propositions involving the other term can be made without the mediation of another proposition such as "trespassers on land are to be treated as trespassers on vehicles", which, according to Professor Baker, is a proposition which is "logically" true. It is certainly not an axiom of logic, and Professor Baker makes no attempt to establish it as a conclusion from other propositions. Whether or no there is a

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Derham's lectures on Tuesday mornings" as possible, while "the science of law and justice" would be wrong because an understanding of what law and justice are is what it is hoped to achieve through jurisprudence. See The New Leviathan, ch. 1. passim.

4 Cohen and Nagel: Introduction to Logic and Scientific Method, at p. 8.

5 In ordinary language "logic" and "reason" are often synonymous. A note by Sidgwick is relevant to the statement in the text. "We do not commonly say that particular physical facts are apprehended by the Reason: we consider the faculty to be conversant in its discursive operation with the relation of judgments or propositions: and the intuitive reason (which is here rather in question) we restrict to the apprehension of universal truths, such as the axioms of Logic and Mathematics." Methods of Ethics (6th edn.) at p. 34, note 1. The note is on the passage in his text which says "the apprehension of moral truth is more analogous to Sense-perception than to Rational Intuition (as commonly understood)". Weldon dogmatically asserts that "The Law of Reason is logic"; he does provide a striking simile to explain that logicians' logic is not concerned with the truth of isolated propositions. Logical analysis, he says, can never prove or disprove the existence of anything, and this inability is not like the inability of an aged motor car to get over the Simplon Pass: it is like the inability of a motor car to write a poem or compose a symphony". (Vocabulary of Politics at p. 116).

6 See above p. 432 for the statement of Professor Baker.
ground for differentiation is a question of law not logic. Doubtless what Professor Baker means is that no valid argument can be asserted for differentiation between trespassers on land and on vehicles, but the validity of the premisses used in the argument would not be determined by logic. So far as logic is concerned, it may be true that trespassers on vehicles are a greater source of danger to the community than trespassers on land, from which, with the aid of a number of other propositions no one would controvert, it could be “logically” shown that a ground for differentiation does exist.

The argument of Hughes and Hodson by which they purport to establish that a master's liability is a “true vicarious one in which he is only the automatic reflector of his servant's tort” also employs the words “logically” and, moreover, speaks of “inescapable conclusions”, a phrase reminiscent of logical necessity. They do, however, base some of their premises on principles other than logic. The basis of their argument is that “it is socially inexpedient and legally nonsensical to hold a master liable for harm done by a servant for which the master could not be sued had he done the act himself”. (proposition (a)): Whether or no it is socially expedient would appear to require some demonstration; is it not socially expedient to forbid the employment of agents for some purposes, e.g., because personality is important or to prevent the multiplication of acts; and if to forbid, why not to permit subject to liability for servants' acts more stringent than for one's own? But the question of social expedience comes later. What does “legally nonsensical” mean? The proposition so dubbed is certainly not illogical: “doing an act by a servant” is not identical with doing the act oneself: and so a legal proposition applicable to one may logically be inapplicable to another. If the phrase means contrary to a rule of law, the sentence merely affirms emphatically that the proposition is a rule of law. If so, what is the authority? The authors say—“damnum sine injuria done by the servant will obviously not fix liability on the master”. (proposition (b)): Where there is no question of master and servant, the actions of one individual alone being concerned, it is tautology to say that damnum sine injuria gives rise to no liability. But where there is a question of master and servant, then the fact that an act of the servant is sine injuria, so far as the servant is concerned, does not “obviously” make it sine injuria for the master; nor does the fact that the act, if performed by the master, would have been sine injuria, make it obviously sine injuria so far as the master is concerned when performed by the servant. These are the very questions in issue in the argument. Proposition (b) is indeed the proposition the authors are setting out to prove. How-
ever, what they infer from proposition (a) is that a master is not “liable for any harm that the servant does in the course of his employment (proposition (c))”. From this it certainly follows, as the authors say, that it must logically be only a certain kind of harm which can make the master liable (proposition (d)).

The authors explain that by “kind of harm” they mean harm produced by a kind of act: and they proceed to examine “what quality must be present in the servant’s act to render the master liable”. They then return to the reasoning of Cardozo C.J. for the purpose of repeating their rejection of it. They cannot accept the view that the quality of the servant’s act, which will render the master liable, is that of being “wrong”, for “there is extreme danger in any doctrine based on the idea of a ‘wrong’ as opposed to a tort”. This looks like assuming that there is only one skittle to be knocked down. But have they knocked down the skittle by “logic”? Indeed the questions arise, whether they have knocked down the skittle at all and whether “logic” cannot demonstrate that their ball has missed the mark.

The doctrine that there is extreme danger in basing a rule of law on “wrong” is one of legal policy. Our authors do not state specifically what the danger is: but it may be conjectured, though they use the phrase “dangerous and uncertain”, that the danger is that of uncertainty. The policy upon which they appear to rely is that legal rules must be in precise terms and cannot include such indefinite ideas as those of social or moral wrong. Their desire for a “technical statement” makes the conjecture more likely. But even if the policy is sound, it does not follow that legal doctrines cannot be “based on the idea of a ‘wrong’ as opposed to a tort”. Nor does their conclusion follow, viz., “the servant’s act cannot be legally regarded as a wrong unless we invest it with the technical apparel of a tort”. The phrase “based on” contains an ambiguity: it may refer either to the internal content or the external origin of a rule. An indefinite moral notion may supply the unmapped underground sources of a rule which is canalized by legal processes: specific aspects of a moral notion may be selected to form the content of a legal rule. The moral notion thus forms the basis of the rule. If one asks why the rule contains those elements, the answer is a reference to the moral notion. A rule of law may say that the careless act of a servant imposes legal liability on the master: to

7 The sequence in the text attempts to follow the “logic” of the authors. It departs from their spatial order. They set out the propositions in the order: c, b, a, d. Proposition d does, however, follow directly from c. Proposition c, however, appears more “obvious” than either a or b.

8 See above p. 427.
the question why, the answer can be made that a servant is under a moral obligation not to be careless. Indeed, it has been contended that the specific character of the legal function is to put into precise rules extra-legal notions. Whence, it may be asked, come the concepts in legal rules? Are they not derived from such considerations as social and moral wrong, administrative convenience, characteristics of human nature? Is there a specific quality of legal wrong? It is possible to oppose benevolence to justice, but the doctrine that rules of law cannot be based on general notions of wrong isolates justice completely from law.

The logical defect in the argument appears more clearly when we examine their conclusion. This is, of course, logically "based on" the general proposition that no act can be legally regarded as a "wrong" unless we invest it with the technical apparel of a tort. This is, of course, a tautology if "technical apparel of a tort" means merely "legally regarded as a 'wrong'". If it means "gives rise to an action for tort", the proposition runs counter to the facts that acts may amount to crime or breaches of contract without being torts. Even within the sphere of the law of tort, judges who do not accept the view that the categories of tort are closed, inquire whether acts are "wrong".

The question whether acts not covered by authority are tortious or not cannot be answered if the authors' proposition is followed, for it would lead one to say that they are tortious if they are tortious.

So far we have examined statements which have been explicitly said to be "logical".Implicit, however, in the two articles is the view that there is an opposition between the principle that a master is liable for the torts of his servants and the principle that he is liable for the acts of his servants. This requires examination. As a preliminary point it should be made clear that it is not suggested that anyone contends that the two propositions thus formulated are completely exclusive of each other. The act of a servant may be the breach of a duty owed by the servant, and thus a "servant's tort", and also constitute, when attributed to the master, the breach of a duty owed by him. This indeed may be the normal case: and those who maintain that the master is liable for the acts of his servant do not mean a master is never liable if the servant's acts constitute a tort of the servant. The main point is that the formula of liability for acts is too general. There are two distinct propositions included in it, deriving as legal rules from two distinct classes of cases. On the one hand, there is the rule of Smith v. Moss and Broom v. Morgan; on the other, the rule of Twine v. Bean's Express Ltd. and Conway v. George Wimpey. When Denning L.J. says in Broom v.
Morgan that the doctrine of master's liability is one of vicarious acts, he is asserting that a master may be liable notwithstanding that the act of the servant is not tort of the servant. When Uthwatt J. in *Twine v. Bean's Express Ltd.* says the law attributes to the employer the acts of a servant, he is asserting that notwithstanding that the acts of a servant constitute a tort of the servant within the scope of employment, the master may not be liable. The principle asserted by Uthwatt J. is inconsistent with the principle asserted by Denning L.J. in *Young v. Edward Box Ltd.*, that a master is always liable for the torts of a servant committed within the scope of his employment. The principle asserted by Denning L.J. in *Broom v. Morgan* is not inconsistent. It is thus both logically possible and impossible to have rules that a master is liable for the torts of his servant and for the acts of his servant: it all depends on what is meant by liability for acts.

### Table of Rules

<table>
<thead>
<tr>
<th>Status of Plaintiff</th>
<th>Relation of Act to Employment</th>
<th>Nature of Act</th>
<th>Liability of Master</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Trespasser</td>
<td>Outside the Scope</td>
<td>Tortious</td>
<td>Liable</td>
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<tr>
<td>2</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Not Liable</td>
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<tr>
<td>3</td>
<td>&quot;</td>
<td>Non-tortious</td>
<td>Liable</td>
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<td>4</td>
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<td>Not Liable</td>
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<td>5</td>
<td>Within the Scope</td>
<td>Tortious</td>
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<td>6</td>
<td>&quot;</td>
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<td>7</td>
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<td>Non-tortious</td>
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<td>8</td>
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<td>9 Licensee</td>
<td>Outside the Scope</td>
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<td>10</td>
<td>&quot;</td>
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<td>11</td>
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<td>Non-tortious</td>
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<td>12</td>
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<tr>
<td>13</td>
<td>Within the Scope</td>
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<td>15</td>
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<td>Non-tortious</td>
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<tr>
<td>16</td>
<td>&quot;</td>
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<td>Not Liable</td>
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</tbody>
</table>

The propositional logic of implications, as has been seen, cannot answer ultimate legal questions as to what is or ought to be the rule of law on a given topic. It may demonstrate errors in reasoning, but so far as the truth of individual propositions is concerned, it is confined to truths about the reasoning process. It is believed that
these remarks are true for all types of logic, the logic of terms as well as the logic of propositions, inductive as well as deductive, modern as well as classical. This, however, does not, of course, deny the utility of logic for law, but it does help to refute the claims of pseudo-logic. "Logic" is not, however, entirely destructive: one of its uses is the construction of a scheme of logical possibilities, which is essential for release from routine and for the development of the faculty of invention. The construction of such a scheme in connection with the problem of the liability of a master may serve, not only as an illustration, but also as a means of providing a warning against the pseudo-logic of "the theory of deciding cases by the application of existing concepts" (a suggested translation of Begriffsjurisprudenz).

Analysis of the problem of the liability of a master may lead to the view that three elements are involved: (i) the status of the plaintiff; is he a trespasser or licensee so far as the master is concerned? (ii) the relation of the servant's act to the scope of employment; is it within or without the scope? (iii) the nature of the servant's act; was it a tort of the servant or not? These are the elements suggested by the case law on the subject. Given these three concepts, it is a simple matter of "permuting" to see that there are sixteen possible rules of law. These are set out in the accompanying table.

The rules are logically possible: whether any particular rule should be accepted depends not on logical but legal considerations. Thus rule 3, that a master should be liable to a trespasser in respect of the non-tortious acts of a servant without the scope of his employment, is logically possible, though no one would suggest it for enactment. So too rule 14, that a master is not liable for the tortious acts of a servant within the scope of employment committed in respect of the licensee of the master, is logically possible, though, again, no one would suggest it for enactment. Though any one rule is logically possible, all are not logically possible as simultaneously valid rules: each pair of rules, e.g., 1 and 2 are contradictory. On the other hand, some of the rules may be simultaneously valid: thus rules 5, 7, 13 and 15 are cumulative.*

This cumulative possibility points to the possibility of the redundancy of some of the concepts: instead of three being determinative of a legal rule, it is possible to frame a rule incorporating only one

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* Denning L.J. considers that rules 5, 13 and 15 are all valid. For rules 5 and 13 authority is to be found in his judgment in Young v. Edward Box, Ltd. For rule 15, there is his judgment in Broom v. Morgan, but that judgment does not extend to all non-tortious acts.
or two of the concepts. It is logically possible to have as a rule that a master is liable in respect of all his servant's acts committed within the scope of employment, irrespective of whether the act be tortious or not and irrespective of the status of the plaintiff. The process of "widening down from precedent to precedent" takes the form of reducing the number of concepts in a rule. It is thus contrary to a theory of fixed concepts which is the evil aimed at when Bergriffsjurisprudenz is condemned. Legal rules must embody concepts: but it is wrong to assume that the concepts hitherto employed are necessary. Like rules of law concepts are man-made and may be altered to suit man's needs. The raw material of life may be grouped in many ways to produce a variety of concepts. Whether or not there are fixed species is a matter of natural science: that there are no fixed concepts may be regarded as part of the "logic of terms": so that Bergriffsjurisprudenz so far from being logical is only pseudo-logical. The facts of previous cases are capable of re-classification, and some later generation may find acceptable reasons for employing concepts other than those of trespasser, licensee, scope of employment and so on. There is no logical reason why the class of trespassers should not be sub-divided: thus there is no logical reason that all trespassers should be dealt with in the same way, nor is there any logical reason why they should not. Thus the master might be liable, as Denning L.J. and Professor Baker suggest, to some trespassers in some circumstances, but not liable in other circumstances. The bare classification in the table of acts as being tortious or non-tortious is clearly inadequate having regard to existing case law. While liability exists in respect of some non-tortious acts, it does not exist in respect of others. Hughes and Hodson have as their classification (a) acts which are either torts or prima facie torts, (b) acts which are neither torts nor prima facie torts. The construction of concepts involves the construction of rules of law, and the content of legal concepts is determined by legal policy not logic. The error of "mechanical" or "conceptualist jurisprudence" (to provide other translations for Bergriffsjurisprudenz) is to believe that there are concepts fixed in number and nature to which there can be neither addition nor change.

Law and Social Welfare

The theory that the purpose of law is the common good is one of the oldest doctrines of legal philosophy, and from it is derived the name of the Commonwealth of Australia. It is, however, by no means universally accepted, and among those who do accept it
there are many differences of opinion as to what is the common
good and how it may be achieved. Its critics, and some of its
supporters, indeed regard propositions asserting that actions lead
to the common good as being but matters of "opinion"! I cannot
here examine fully the doctrine of social welfare (a phrase I regard
as equivalent to "common good"), but what is said in the articles
under review needs comment.

Hughes and Hudson, as has been said, neither use the phrase
"common good" nor "social welfare". They do, however, accept
the view that the general doctrine of master's liability is based on
"public policy": the doctrine that an employer is liable for harm
carelessly done by his servant to the spouse of the servant is justified
by "social expediency", and the particular principle they advocate
is supported by the statement that it is "socially equitable and ex-
pedient". The only hint as to the meaning of these phrases is
supplied by the extract they quote from Fifoot's *English Law and
its Background*, a passage which they say "sums up the traditional
attitude of the Courts to the topic".¹⁰ Fifoot says that before 1852
"the judges were reverting to an open avowal of convenience as the
basis of their doctrine. After that date the doctrine was accepted
as a generalization to be justified not as a deduction from legal
premises but as a sacrifice to public policy". Our authors them-
selves said the doctrine was "long established on grounds of obvious
expedience and convenience". The reference, supported by their
desire to narrow the limits of the doctrine, is that they consider
there to be some opposition between legal policy and public policy,
between some basic legal principle and social welfare. Certainly
there are many who consider that "morality" and "social welfare"
may be opposed, regarding morality as individualistic. But whether
or no the English law is committed to individualism for its basic
legal policy, making concessions to social welfare on grounds of
expedience, should be expressly discussed. Holmes would surely
say that the common law no more than the United States constitu-
tion incorporates the principles of Spencer's *Social Statics*. How
far legal principles ought to be based on notions of individual
morality or social welfare is a basic issue which lawyers can only
neglect at the cost of being executives of policies created by
others.

Professor Baker, it has been seen, uses both the term "justice"
and "policy": he speaks of social necessities and requirements of

¹⁰ It will be recalled that in their view Holt C.J. considered the doctrine of
master's liability an "unfortunately unnecessary (sic) solemism on the common
law".
justice and of a rule being both just and socially desirable, it would appear that for him there is no opposition between “justice” and “social welfare”, but, of course, it is not possible from his brief remarks to say that he adopts the view that what is just is for the social welfare, and what is for the social welfare is just. He does furnish some indications as to what he means by socially desirable, though conjecture is also required. Presumably it is the sense of security of the individual against the financial consequences of injury which is considered socially desirable: those incapacitated from earning a living should be furnished with the means of subsistence. Against this view, of course, some have urged that security leads to lack of effort by the individual. But the doctrine of employer’s liability involves also the social desirability of the compensation payable to the injured plaintiff coming from the employer. The cost of this compensation, it is assumed, may be passed on to the consumer, but is it socially desirable to increase the cost to the consumer? If not, does a felicific calculus show that the social desirability of compensating the plaintiff outweighs the undesirability of increasing prices? If the cost of compensation cannot be passed on to the consumer is there a disincentive to the owner arising from the reduction in his profits? And is this disincentive socially desirable or not?

It is submitted that such questions as these, concerned with social welfare, do necessarily arise in the consideration of the problem of master’s liability as in other legal discussions. How are these questions to be answered? By the common sense of lawyers, by lawyers adopting “scientific method”, or by lawyers referring the questions to social scientists?

**Law and Justice**

Long before the rise of modern logic and semantics the difficulties surrounding the use of the word “justice” were a commonplace of learned discourse. Some of the difficulties are concerned with its range of meanings. The phrase “social welfare” has also many meanings, and thus there are many relationships which may be indicated by the phrase “the relation between justice and social welfare”. For one set of meanings identity exists between the terms, for another, contradiction, while for others the relation is that of difference. Thus, for those who regard “justice” as indicating the quality exhibited by good laws and for whom, like Austin, utility is the test of goodness of laws, “justice” is identical with “social welfare”. Some who hold this view consider that utility or

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social welfare may be determined by "experience”, in other words, that the concept is ultimately of a factual character, and though they reject the "felicific calculus" of Bentham, accept as a criterion some combination of vital statistics like infant mortality rates, judicial statistics like crime rates, social statistics like numbers of houses built, and economic statistics like productivity indexes. There are, however, many who hold that the goodness or justice of a law or a legal system is not to be determined by the desirability of its consequences. They may not proceed to the extreme of saying *fiat justitia ruat coelum*, for their faith is that so long as justice is done the skies will not fall: but they do aver that the concept of justice represents a value judgment, dependent on the intrinsic character of the action required by a rule of law rather than on its social effects, a character which cannot be wholly stated in descriptive terms, but involves the category of "ought".

In this section I am concerned with the use of the term "justice" as indicating some quality other than that of social welfare. I am, of course, not concerned with an analysis of all such uses of the term "justice", but with the way in which the concept of justice was invoked in the three discourses under review. Nevertheless, a further general note is required. Aristotle stated that the Greek for justice, *dikaiosune*, to *dikaion*, had both a general and a limited meaning. In the broader sense it was equivalent to the whole of goodness: a "just man" was one who exemplified all the virtues of the good citizen. In the narrower sense "justice" referred to but one particular virtue. It is my view that the English word "justice" is used in a similar way in both a wide and a strict meaning. Sidgwick denies this, but he must have ignored legal writings where often "justice" is the word used when a distinction is sought to be drawn between what is the law and what ought to be the law. In reading legal writing it is necessary to ask whether the writer means by "just" in accordance with what ought to be the law, or in accordance with a concept of "particular justice", one criterion of many involved in a determination of what ought to be the law. A law may be said to be "just" in a wider sense though it offends a canon of "particular

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12 It has already, I hope, been made clear that I am not using "justice" to indicate the quality of being in accordance with law.

13 *Method of Ethics* (6th edn.), ch. v, at p. 264, note 2. "Aristotle, in expounding the virtue of *dikaiosune*, which corresponds to our Justice, notices that the word has two meanings: in the wider of which it includes in a manner all Virtue, or at any rate, the social side or aspect of Virtue generally. The word "Justice" does not appear to be used in English in this comprehensive manner (except occasionally in religious writings, from the influence of the Greek word as used in the New Testament), although the verb "to justify" seems to have this width of meaning."
justice”. Thus it may be said that though a law involves hardship to innocent people “(unjust” according to one view of “particular justice”), it is, nevertheless, “just” in the wider sense. On the other hand, there are some who would say that if a law offends the canon of equality of incidence (a very commonly held notion of the nature of “particular justice”), it is to be described as “unjust” no matter what other merits it possesses.

I must confess that I am not sure whether Baker, in using the word “just”, had in mind a broad or a narrow meaning. Hughes and Hudson do not use the word “just”, but employ instead the equally vague term “equitable”, without affording me a clue as to the sense in which they employed it. Nor did Denning L.J. use the word “justice”; he employed instead the terminology of “morality”, but he did illustrate his use of that terminology. I discuss his language under the heading “law and justice”, for I apprehend that in the context he meant by “moral” a non-utilitarian view of “right”, and that his language was synonymous with that of “justice” as used by me in this section.

Denning L.J. was concerned to show that the doctrine of employer’s liability was a just one, in the strict sense of that term. It was not justified as being socially desirable for reasons of social welfare; it was in accordance with justice. “The reason for the master’s liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master’s business, and it is the duty of the master to see that his business is properly and carefully done.” On the other hand, he thought that “true vicarious liability” did not accord with morality. He described such liability as “a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another”. Both these propositions repay examination.

The injustice of vicarious liability has often been described, in language employed by Professor Baker, as consisting in the infliction of suffering on an innocent person. This, however, is to limit the

14 Hughes and Hudson consider that the principle they assert as lying behind the liability of a master is “socially equitable”, but their article also cites, apparently with approval, the view of others that vicarious liability is to be justified only on grounds of expediency, “as a sacrifice to public policy”.

15 An Arabian condemnation of vicarious liability is related by E. V. Lucas in A Boswell of Baghdad (Methuen: 1917, at p. 37). “Al-Hajjaj said to the brother of Katari ‘I shall surely put thee to death’. ‘Why so?’ replied the other. ‘On account of thy brother’s revolt’ answered Al-Hajjaj.” Al-Hajjaj did not, however, carry out his decree, for Katari showed that it was unjust; one of his arguments was: “The book of Almighty God says ‘And no burdened soul shall bear the burden of another’.”
inquiry to the morality of punishment. It is necessary to consider whether A may be "morally answerable" to pay money to B, not because A has wronged B, but for some other reason. The award of damages to B may not be the punishment of A, but the enforcement of a moral duty on the part of A to care for B. A duty to protect the children of the poor is not necessarily limited to a duty to punish the wrongdoer. There are moral notions which have been stated in the language of justice and which say that, though A is in no way to blame for the harm which B has suffered, yet it is just, and not merely benevolent or charitable, for A to relieve B's suffering.

Denning L.J. in seeking to show that a master is "morally answerable" to compensate a plaintiff for the loss he has sustained as the result of the servant's negligence, bases his argument on the morality of punishment: the master is not an innocent person, but one who has been guilty of wrongdoing since he has failed to carry out "a duty to see that care is exercised in the driving of the lorry on his business". In my opinion, however, the judgment does not take adequate account of the relevant distinctions. Three duties have to be distinguished: (i) a moral duty to see that no harm is caused to others, (ii) a "moral" duty to compensate others for harm they have suffered, (iii) a legal duty to compensate others for harm they have suffered. The justification for (iii) may be (i) or (ii), for they are not identical. According to an individualistic morality of an extreme kind no one is under a moral duty to compensate unless he has been guilty of the breach of a moral duty to see that no harm is done. While such a view would be condemned by many as unduly selfish, doubtless there are many who would regard a duty to compensate, which did not arise out of the breach of a duty against harm-doing, as being a duty of benevolence and not of justice. Among such persons there are those who accept a political doctrine that legal duties should not be based on benevolence but on "justice". But there is another moral doctrine which has found many advocates. It has been said that "social justice" may require one person to compensate another for the loss the latter has suffered though the former is not to blame for the occurrence of the loss. The "welfare state" imposes legal duties to pay taxes which are

16 On the wall of the Central Criminal Court building in London (the Old Bailey) is inscribed the text "Punish the wrongdoer and defend the children of the poor."

17 "Social justice" is, of course, also a vague term. Say Lewis and Maude (Professional People at p. 82) "The principles, and therefore the implication of this, are impossible to define for they depend entirely on the personal views or emotions of individuals. There are no absolute standards of social justice". But such a statement can be made with equal truth or falsity of "justice".
used to assist others in need through no fault of the tax-payer: and it may be that the doctrine of master's liability is based on the justice of the welfare state.\footnote{Taxation for “welfare” purposes is, of course, much older than the welfare state. Specific legal duties of benevolence were enforced in the first state of Israel “Thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard; thou shalt leave them for the poor and stranger”. \textit{Leviticus} 19, 10.}

The manner in which Denning L.J. has failed to pay regard to the distinctions between these duties is this. He has the first duty in mind when he says that the master “is himself under a duty to see that care is exercised in the driving of the lorry on his business”. Conceived as the statement of such a duty the statement is elliptic. When expanded it becomes a complex of duties. They are (a) to employ only competent drivers, (b) to give drivers adequate instructions for the careful discharge of their tasks, (c) to give drivers adequate facilities for the careful discharge of their tasks. It is possible for a master to perform those duties and yet for the servant to be negligent. It is submitted, moreover, that even if the above catalogue of a master's personal duties be incomplete, nevertheless, there is no logical connection between the discharge of the master’s personal duties and absence of negligence by the servant. The mere commission of negligence by a servant cannot necessarily involve the master in the breach of a personal duty. All moral duties are duties relating to the subject’s own acts. Nevertheless, Denning L.J. continues “If the driver is negligent there is a breach of duty, not only by the driver himself, but also by the master. In support of this view I would observe that the master and the servant are held in law to be joint tort-feasors”. This statement involves a transference from the first duty to the third duty. Denning L.J. is no longer juristically giving the reason for a rule of law, he is judicially declaring what the law is. He is asserting that a master is under a legal duty to compensate a plaintiff where his servant has been negligent; he is providing no justification for the rule. When we turn to the statement that the master “takes the benefit of the work when it is carefully done, and he must take the liability when it is negligently done”, it appears that it is a duty of the second kind to which reference is made. I would agree that the basis of the liability of a master can be explained in terms of the second class of duty, but the nature of the duty requires more elaborate exposition than that contained in the succinct statement of Denning L.J.

It is desirable in the first place to refer to a general principle involved in the relation between law and justice, between legal
duties and moral duties, which is often overlooked even by writers on the subject. I will call the principle, using a name of a phrase suggested by the *Pirque Aboth*, that of "the hedge round the law".\(^{19}\) Rules of law may have a moral justification, even though they embrace proscriptions of moral as well as immoral acts. The justification for the proscription of moral acts arises from the necessity for generality in rules of law and from the morality of proscribing the immoral acts. Thus it could be argued that the justification for making an employer liable if the servant causes harm is not that the particular employer has necessarily failed in his own duty, but that there is applied to him a general rule aimed at preventing employers generally from failing to observe their moral duties to their neighbours. The particular employer is made liable because (a) no practicable test exists for distinguishing the two types of cases, those where the employer has behaved immorally and those where he has behaved morally, (b) to allow the distinction to be made might lead to a lowering of standards by employers.\(^{20}\)

The doctrine of the "hedge" is required to supply the missing premiss in many theories where general principles are justified by means of arguments applicable only to a narrow range of instances. The "enterprise" theory of the liability of a master, invoked by Professor Baker, is an example of such a theory. The argument is that the owner of an enterprise is not harmed by a general principle of liability for the negligence of his servants for he can pass on that liability to the whole body of consumers of the products sold by the enterprise, by the simple means of including the amount of compensation in the costs of the enterprise. The consumers, moreover, do not suffer because the individual cost to each of them is so small. But the principle of employer's liability is not limited to the owners of "enterprises"; it extends also to the injury which a plaintiff suffers through the negligent act of a single domestic servant.

\(^{19}\)The opening sentences of the *Pirque Aboth* (Sayings of the Fathers) say: "Moses received the law from Sinai, and delivered it to Joshua and Joshua to the elders and the elders to the prophets and the prophets delivered it to the men of the Great Synagogue. They said three things. Be deliberate in judgment; raise up many disciples; and make a fence about the law". The principle in this text is that of imposing additional restrictions on men so that they are kept at a safe distance from forbidden ground. If they never break any of the additional restrictions, they will certainly never break any of the provisions of the law itself. If they endeavour to keep the additional restrictions, but fail through human weakness, they may, nevertheless, not commit a breach of the law.

\(^{20}\)On the other hand, it might be argued that knowledge on the part of an employer that the utmost care by him will not relieve him of liability is not an incentive to take care. The discussion is, to some extent, unrealistic because of the practice of insuring.
committed in the course of duties discharged for an infirm and needy widow.\(^{21}\)

The doctrine of the hedge suggests a possible mode of basing the doctrine of master's liability on the moral duty not to cause harm to others. The doctrine, however, appears more firmly based when it rests on a moral duty to compensate for harm done by one's blameless acts. Such a moral duty may be derived from the broader moral duty that "thou shalt love thy neighbour as thyself", an injunction to be found even in the legalistic and ritualistic context of *Leviticus*.\(^{22}\) The majority of jurists, however, deny that this moral duty can be the basis of a legal duty: and indeed would define a legal duty based on justice by contrasting it with a moral duty based on love. Lord Atkin in *Donoghue v. Stevenson*\(^{23}\) regarded it as self-evident that the only legal correlative of the basic injunction of Judaeo-Christian morality was "thou shalt not harm thy neighbour". But there have been jurists who have maintained that the moral duty of love can be, and has been, translated into legal regulations. A legal duty to compensate others for harm sustained in consequence of one's blameless actions can be regarded as one way in which the general moral obligation of positive action for the benefit of one's neighbour can be reduced to the legal rule. It is Stammler who has dealt most fully with the theory proclaimed by Shelley in the lines "... justice is the light of love And not revenge ...".

For Stammler the "pure idea" of law consists in the duty of co-operation which exists among men in society.\(^{24}\) Human life necessitates a struggle for existence in which men can only succeed as a result of social co-operation. The physical fact of inter-dependence is mirrored as the result of intellectual reflection in the idea of justice, which is made applicable by means of rules to the facts of everyday life, through the basic principles of respect of man for man as an individual and participation of man with man in social life.

\(^{21}\) At first sight it may appear that the doctrine of the "hedge" is merely that of administrative convenience and that it represents a device for the ease of administrators indifferent to the distinction between justice and injustice. The religious doctrine of the "fence about the law" calls attention to the duty of doing more than a religious obligation strictly requires in order to make sure the obligation is performed. There is a direct parallel to this in the political doctrine of the hedge, and also an indirect one. The latter arises in the following way. Where governors and governed, administrators and citizens, conceive themselves as co-operators in the maintenance of moral standards, then such social co-operation gives rise to a moral duty that the citizen accept a liability imposed on him though he personally has acted morally. The reason is that the liability is derived from a rule designed to ensure the observance of moral standards by others.


\(^{24}\) *The Theory of Justice*, ch. v., passim.
The social ideal cannot be fully set out if the principle of participation is ignored, and that principle is the legal correlative of the duty to love one's neighbour.

Stammler does not ignore the question "Who is my neighbour?" He did realise that a man has many neighbours and that duties may conflict. He dealt with this problem by the notion of different degrees of neighbourliness. A duty to a near neighbour may outweigh a greater duty to a remote neighbour. The degrees of neighbourliness are, in part, fixed by customary social practices, but they are also affected by the transactions in which a man participates and the circumstances in which he finds himself: the good citizen, like the good Samaritan, may find that his closest neighbour is not his next of kin, but the man "who cannot maintain natural existence" without assistance from him.

Stammler's theory and model of just law have been severely criticised as hopelessly vague and impracticable. His critics forget that the "model" he suggested was not a geometry of neighbourly relations or an arithmetic of duties: in order to solve a problem of just law according to the model "prout sapienti determinato". It operates not by differential equations, but by human judgment; a judgment, however, determined in its broad direction by the theory. Let us see if it helps at all in the consideration of the doctrine of master's liability. We must ask in the first place whether the master is a "neighbour" at all to a plaintiff injured by a servant. If he is a neighbour, a duty to assist arises from the mere fact of his having suffered an unanticipated loss. But in the United Kingdom, at any rate, if we consider that all members of the community are our neighbours, the obligations of a general community relationship are discharged through contributions by way of taxes to national welfare schemes. Does an employer stand in some special community relationship to the injured person? He certainly stands in relations of special community to his own employees: compensation paid to injured persons will diminish the fund available for distribution among employees. Where a person is injured by the negligence of an employee, the rough equity of common sense suggests that the claim of employees generally is deferred, though they are closer to the owner of the fund, to the claim of the injured person who usually has no claim on the fund. Thus an employer may be said to be justly liable to compensate a plaintiff injured by the negligence of a servant, but not justly liable to compensate a plaintiff whose injuries are not due to negligence.

25 Ginsberg on Stammler in Modern Theories of Law (ed. Jennings).
26 The doctrine of the hedge has to be brought in to justify positive legal
It may be considered that “sapientia” has not been displayed either in the selection of a model or in its application. Are there any other methods to be considered in an attempt to solve the problem of the justice of master’s liability? The “social engineering” of Pound has been criticized for neglecting concepts other than those of material welfare; such welfare claims, however diverse, may be regarded as basically similar so that their adjustments call but for quantitative treatment. But the theory can be extended to encompass notions other than those of “welfare” in the material sense. The structure to be built by social engineering may be regarded as having as its component elements spiritual as well as material welfare: corrective and distributive justice as well as happiness may have to be considered, freedom as well as security, peace as well as adventure. It could be argued (a) that the careful employer is morally blameless and morally irresponsible for the injury sustained by a plaintiff whether the servant causing the injury was negligent or not, (b) that it is socially desirable that an injured plaintiff receive assistance from the servant’s employer, whether the servant was negligent or not, (c) that as a resultant of these considerations, the careful employer is not liable to an injured plaintiff when his servant has not been negligent, but is liable when the servant has been negligent. But in this extended task of social engineering, how do we ascertain that all the requisite components have been assembled? How is the strength of each estimated? How do we determine the design which combines them into a stable and function-fulfilling structure?

PART IV.—JURISTIC DISCOURSE AND EXTRA-LEGAL DISCOURSE

Jurisprudence, Social Science and Philosophy

An examination of the possible justification of the doctrine of master’s liability by reference to the concepts of social welfare and justice has yielded a series of questions, which, it is submitted, the rules which make no inquiry into the financial status of the plaintiff, and give compensation of equal amount to the rich man, whose Rolls Royce is scratched and to the poor man whose barrow, on which his livelihood depends, is ruined.

27 Cardozo speaks of a judge having four methods available—the methods of logic, of history, of sociology, of philosophy. He warns against rigid adherence to the single method. “We must learn to handle our tools, to use our methods and processes, not singly, but together. They are instruments of advance to be employed in combination. The failure to combine them, the use of this method or that as if one were exclusive of the other, has been the parent of many wrongs”. *Growth of the Law* at p. 108. Is anything altered in substance if for Cardozo’s language of the employment of the methods of logic, history, sociology and philosophy we substitute the consideration of claims of certainty, adaptability, welfare and justice?
discourses under review do not answer. The questions arise as the result of an attempted analysis of the concepts of social welfare and justice which have been invoked in the discourses. It is relevant to consider whether such an analysis should be made in the course of a survey of a legal doctrine. If Stone’s thesis be correct that criticism of law is in terms of other disciplines, it may be that the analysis of the concepts under review is not for the lawyer or jurist but for the social scientist or philosopher. There is, however, in the discourses no explicit references to the work of social scientists or philosophers, nor does there appear to me to be any implicit reference. The thesis of this section of this article is that a reference to the work of social scientists and philosophers would not have proved fruitful. Social scientists and philosophers do not appear in dealing with these concepts to have considered such questions as a doctrine of master’s liability, nor to have dealt with the concepts in such a way as to make it easy for a lawyer to apply their doctrines to legal doctrines.¹ There are, indeed, social scientists and philosophers who would deny that their work has any relation to the work of lawyers. The logical positivist considers that philosophizing about “justice” leads but to the demonstration of the spuriousness of the word or concept when attempted to be used as something more than a cloak for the emotions. Other philosophers would say that philosophizing about “justice” merely exposes the real character of various problems which it is for the jurist as such and not the philosopher as such to solve.² Such philosophers form part of a larger school of scholars, including social scientists as well as “pure” philosophers, who assign to jurisprudence an area of legal topics for which specifically legal methods and approaches are to be employed. But perhaps the majority of social scientists and philosophers do consider that legal issues involve questions of social science or philosophy. Nevertheless I am not aware of an economist or sociologist whose work would be helpful in relation either to the specific problem of Broom v. Morgan or the general problem of master’s liability. Nor are philosophers much more helpful: they are more concerned with the metaphysics and epistemology of morals than with practical moral issues. Even Sidgwick’s book is

¹ Of course, one cannot expect complete “casuistry” from scientists and philosophers, nor are lawyers incapable of applying general doctrines of science and philosophy to the circumstances of legal problems: not all lawyers come from Vermont. The contention in the text is not merely that scientists and philosophers have failed to consider the kinds of facts which have given rise to litigation, but that they have not dealt with the general principles applicable to such facts.

² Cf. Part I, note 15.
entitled *The Methods of Ethics,* though we do find in it some examination of actual problems of human behaviour. While there is no treatment of the responsibility of a master for the acts of his servants, there is a discussion of the general problem of reparation for harm that has been blamelessly caused. The principle of reparation is distinguished from that of "corrective justice" which "requires pain to be inflicted on a man who has done wrong, even if no benefit result either to him or to others from the pain". Thus distinguished, the principle is not tied to cases where harm has been caused by a blameworthy act; "the question arises whether we are bound to make reparation for harm that has been quite blamelessly caused: and it is not easy to answer it decisively". Sidgwick inclines to the view that there is a moral obligation to make compensation for harm that one has blamelessly caused, but "perhaps we regard this as a duty of Benevolence—arising out of the general sympathy that each ought to have for others, intensified by this special occasion—than as a duty of strict Justice". The moral obligation to make compensation for harm intentionally or negligently caused is, he says, "a simple deduction from the maxim of general Benevolence", and, since he regards such an obligation as clearly an obligation of justice, it is clear that he does not draw a sharp line between justice and benevolence. Moreover, he adds, "If, however, we limit the requirement of Reparation, under the head of strict Justice, to cases in which the mischief repaired is due to acts or omissions in some degree culpable, a difficulty arises over the divergence between the moral view of culpability and that which social security requires".

The treatment of the problem by Sidgwick is thus suggestive rather than conclusive and definitive, and by no means precludes the need for an independent examination of the problem by the jurist. This view is strengthened when it is borne in mind that what Sidgwick purports to do is to report the findings of Common Sense on the matter, and that he treats legal doctrines as representative of Common Sense.  

The submission which I make is that the problem of master's liability is one of a number of legal problems which do give rise to questions of social science and philosophy, and for which, however,
no clear answer is to be found by reference to the writings of social scientists or philosophers. The jurist who would criticise the legal doctrine of master's liability in the light of social science or philosophy must himself become a social scientist or philosopher.

It is relevant to consider the cognate problem of the relation between law and psychology. Analysis of legal discourses will often reveal that involved in it are propositions falling within the scope of psychology. How is the lawyer to deal with them? What will the result be if he consults the psychologists? This last question can be answered not merely by reference to the writings of psychologists, but also by reference to the proceedings of a conference attended by lawyers and psychologists at which lawyers did consult psychologists about psychological questions involved in legal problems. Thus Professor Schwartz asked “Do threats of punishment deter? . . . . Does ‘motive’ have a separate existence from ‘intent’ as a psychological phenomenon?” To these and other questions Professor Dennis, a psychologist, replied “There are no ready-made answers to these stimulating questions. Years of research would be required to approach answers”. Doubtless a psychologist could show that many psychological errors are committed by lawyers, but it seems clear that psychologists are at present no more competent than lawyers in regard to the statement of many “psychological truths”. Lawyers often have to be their own psychologists.

**Lawyers, Social Scientists and Philosophers**

The jurist who is concerned with the justification of rules of law, actual or possible, with their goodness or badness, has to deal with many problems. He has to consider to what extent criteria of goodness are to be found within a specifically juristic discipline, Stammler for example, propounds the idea of law derived from reflection on the content and character of rules of law. The jurist is thus concerned with the lawyer’s introversion. On the other hand he has to consider to what extent criteria of goodness are to be found within the extra-legal disciplines which I comprehensively entitle social science and philosophy. He is to that extent concerned with the lawyer’s extroversion, as Stone terms it. He cannot ignore the practices of many lawyers, nor the doctrines of some philosophers.

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6. Lawyers are sometimes bad psychologists. Edith Swan who was subsequently proved to have been the author of obscene letters was acquitted at her first trial. “For the defence it was urged that nobody had ever heard Miss Swan use bad language. This appeared to impress the judge, Mr Justice Bailhache, so greatly that he commented ‘If I were on the jury I should refuse to convict’.” O’Dounell, *Cavalcade of Justice*, p. 76.
The Nature of Juristic Discourse

according to both of which judgments of goodness of laws are intuitive, and jurisprudence, whether introvert or extrovert, is but a systematization of such intuitive judgments, and not a collection of principles providing criteria for a rational judgment of goodness of specified laws. According to this latter view, it is good laws which are criteria for judging the soundness of juristic, scientific and philosophical doctrines, and it is not sound doctrines which are criteria for testing the goodness of laws.7 In this section, however, I wish to deal with but one situation in which such a jurist may find himself, the situation which it is suggested arises in connection with Broom v. Morgan, viz., that of the jurist who considers that the problem with which he is concerned does involve considerations of social science or philosophy, but finds that it is a problem with which social scientists and philosophers have not dealt, and for which they provide no answer.8

I have said that the jurist concerned with the goodness of a law must himself in such a situation become social scientist, philosopher, psychologist. But it may be objected that a jurist cannot properly hope always to deal with a problem of social science, for example, as efficiently as would a social scientist—to do so would properly merit condemnation as a megalomaniac.9 It is proposed to consider a number of alternative courses open to such a jurist.

In the first place, he can say that until social scientists or philosophers do provide precise answers to the question he would ask them, he must be content with the traditional methods of lawyers. He will seek to avoid mere verbalisms, dogmatism and pseudo-logic, but will rely on intuitive analogies with accepted doctrines when any new law has to be formulated, and justify an existing law by the manner in which it harmonizes with the general body of laws.10 In so doing, he may be supported by the faith that

7 "The knowledge represented in law and its administration . . . represents the testing and adaptation of psychiatry and other empirical knowledge to the solution of legal problems." Hall: "Psychiatry and the Law", (1953), 38 Iowa Law Review, p. 689.
8 By an "answer" I do not mean a proposition definitely establishing a final truth. The faith of a scholar is that it is always worth while re-examining the propositions of a discipline for unobserved error. I mean an answer given after a discussion of the problem. The lawyer who is dissatisfied with the answer of a social scientist is entitled to suggest that it is wrong but has he a specifically legal method for demonstrating its error?
9 I say "properly" for lawyers have improperly been called megalomaniacs merely for asserting that lawyers should be aware of the manner in which legal discourse may involve problems of social science or philosophy.
10 He may even reflect that the law's unscientific approach to psychology is more likely to be in the right direction than the tottering steps of the infant science of psychology. "Dealing as it does mainly with human behaviour, the law has very likely more to teach psychology than to learn from it. The law has had a long history and very able students and practitioners." Hall op. cit.
a system of positive law does embody proved values of society; he will escape the anxious doubts of those who wonder whether law is in accord with justice; he will avoid the "primal curse, the self-torture" of those who "at times ... seem to have learned nothing and wonder whether there was profit in the labour and the sacrifice". On the other hand, he may keep before himself the belief that the right solution is not to be found within the verbal framework of legal rules and that questions of social welfare or justice have to be independently considered. He may, however, deal with such questions by his native wit, reflecting on what he considers to be the answers to them of "common sense". In doing this he may be comforted by the thought that time winnows the chaff from the growth of new learning and adds the sound grain to man's store of common sense.

In the next place, the jurist without himself attempting to master all the learning of the social sciences and philosophy may yet endeavour to understand their methods and apply them to the problems he discerns as falling within their scope. He may endeavour to employ a rigorous logic, to make what causal laws (or statistical generalisations about factual sequences) are pre-supposed by particular solutions of legal problems, and to ascertain what political and ethical postulates are in like manner involved in these problems. He will eliminate from consideration such propositions about "facts" and "values", as one aware of the disciplines of social science and philosophy, though even a lawyer, will know have been emphatically repudiated as false by those disciplines. He may have to choose factual propositions and judgments of value which have not been "established", and are but hypotheses and expressions of faith. The choice must be made in partial ignorance, but if there be recognition of ignorance there is also a challenge for a better solution of the legal problem, a call to inquire into the facts needed to develop the scientific laws and for such reflection about values as may lead to settled principles of justice.

There is another course open to the jurist, one which may be pursued concurrently with the others. The challenge to jurists for the production of better solutions of legal problems based on consideration of the contributions of social science or philosophy is also a call for co-operation with social scientists and philosophers. The present

11 Cardozo: Growth of the Law, at p. 108.
12 Another simile may, however, be nearer the reality. Time deposits the detritus of brittle scientific and philosophical errors at the estuary of common sense: the wise man will seek for truth in the solid rock of scientific and philosophical doctrine or seek the source where fresh waters keep green the meadows of inspiration.
barriers between law, the social sciences and philosophy are, to a large extent, not merely artificial but unreal: they are the results of pedagogical accident not recognition of natural frontiers. In England, today, much of public law is taught outside faculties of law, while, on the other hand, in France economics is taught within faculties of law. There are said to be three separate disciplines of legal, political and social philosophy, and in Britain these subjects are found in faculties of law, arts and economics respectively: but wherein are the distinctions between the disciplines really to be found? Law, social welfare and justice may certainly be considered as distinct topics, but it does not follow that jurists, social scientists and philosophers may not be concerned with the same subject. Even if they be concerned with different aspects of one subject, or with different subjects, it yet remains true, in my opinion, that they may by collaboration assist each other. One of the themes of this article is that the jurist would be assisted by consideration of many problems jointly with the social scientist and the philosopher. It is also submitted that the social scientist or philosopher would be assisted in his work by co-operation with the jurist. Already in many places and in many ways such co-operation exists; law and philosophy at Oxford; the conference on law and psychology called by the Association of American Law Schools, to which reference has already been made is but one of many co-operative schemes in the United States; in Australia the National University has sponsored a number of joint discussions by lawyers, social scientists and philosophers, and, though there has not been wanting, at any rate in the United States, criticism of the value of general discussions, others have considered them extremely beneficial.13 Such academic co-operation but mirrors the actual co-operation between lawyers and others in legislative commissions and assemblies. What is now required is the initiation and development of projects of academic co-operation on specific topics. What is also required is the education of new generations of lawyers in awareness of the relations between law and the social sciences and philosophy, so that they may be ready to take part in or support such projects.

13 "Research psychologists over the country ought to be told about areas in which lawyers need psychological data not now available." (Professor Dennis at the conference: (1953), 5 Journal of Legal Education, at p. 359). This suggests another mode of co-operation.
PART V.—CONCLUSION

Summary

This discourse has now returned to the assertion of its first paragraph, that it is all of it ultimately concerned with the nature of legal study in institutions which are concerned with more than merely routine learning. It has been specially concerned with the part that logic, social science and moral philosophy have to play in such study and in the juristic discourse which is the outcome of such study. I hope that my views have not been too dogmatically asserted, for they are but tentative. Among the hypotheses considered in the circular tour have been the following.

Classical and modern logic have much to contribute to understanding both of the exposition and criticism of legal rules, though neither is capable of solving problems. The logic of most logicians is concerned with the forms and not the contents of propositions, and, in so far as it is concerned with truth, is concerned with truths of inference and not with truth of facts or values. Its roles are principally the detection of pseudo-problems due to linguistic confusion, the rejection of errors in inferential reasoning, the indication of the non-logical and non-legal questions involved in legal thinking, the enumeration of the possibilities of legal rules which should be considered in the solution of legal problems. It is not the role of "logic" to provide criteria for the determination of the particular rule which constitutes the best solution, the right or just solution, of a legal problem.

It is the tradition of lawyers, and particularly of judges of the Common Law, that discourse containing statements of legal rules should contain also statements of the reasons by which they may be supported. Moreover, the procedures of classical inferential logic enable inarticulated premisses for legal rules to be suggested. It is a task associated with the older speculum mentis, and now pursued in modern logic, to indicate the type of the propositions which furnish the reasons for legal rules. The premisses for legal rules often lie within the fields of recognised disciplines taught in faculties other than those of law. Partly, they lie within the field of disciplines concerned with description of social processes and of the causes of social welfare, a term whose denotation is here restricted to satisfactions of material needs, disciplines that I comprehensively term the social sciences. Partly, also, they lie within the fields of those disciplines concerned with the ethical evaluation of human behaviour, which might alternatively be phrased the examination
of justice, disciplines that I comprehensively term philosophy. It follows that any critical consideration of rules of law cannot ignore social science and philosophy. Such examination falls within the scope of jurisprudence. But for a number of reasons the scope of jurisprudence is not limited to the examination of rules of law in the light of extra-legal disciplines.

In the first place, the particular extra-legal disciplines too often deal with but particular aspects of a problem which the jurist has to survey as a whole. The task of synthesis has to be performed, and, despite the claims of some that disciplines such as history or sociology or philosophy should provide such synthesis, in fact they do not. Secondly extra-legal disciplines often provide no definitive or no reliable guide to the jurist or no answer at all to his inquiries. The topic in which the jurist is interested is one which is still being debated in the extra-legal discipline or one which it has not yet considered. Next, the topic in which the lawyer is interested may not fall within the area which has been mapped out for the extra-legal disciplines: unless the jurist investigates the topic it is not likely that it will be investigated at all. Lastly, the critical examination of reasons for legal rules has long been undertaken by jurists themselves, and their writings form a large part of jurisprudence.

Two branches of "lawyer's jurisprudence" grow out of meanings for the word "law" other than that of official rules: meanings which are used in the phrases "natural law" and "customary law". Jurists have themselves considered the nature of justice, and made contributions to theories of natural law. Indeed there have always been philosophers who, like the Oxford analysts of today, have considered that the determination of the general character of justice and of the justice of particular rules are matters not for the philosopher but for the jurist. Again, a sociology of law arises from the investigations of those aspects of human behaviour sometimes denoted by the word law. The "realist jurists", who consider law to be official behaviour and thus produce a juristic sociology, have had predecessors who have regarded customary behaviour as a subject for study by lawyers. Doubtless, the methods of general sociology are those to be employed in the study of "legal" behaviour, whether of judges or law-breakers, but for many years to come it appears as if jurists will be the only scholars to explore many areas of behaviour.

I should emphasize again the rather vague character of this classification of disciplines; but it serves the present need of asserting the "extra-legal" character of propositions in juristic discourse. In particular, I should emphasize that there is much of what in the text is called philosophy within the disciplines of economics, politics and sociology, a fact to which writers in those fields often testify.
These hypotheses have been tested by consideration of the writings of law teachers and judges dealing with a specific legal problem, viz., that which arose in *Broom v. Morgan*, involving the explanation and justification of the legal rules of employer's liability. It was seen that many parts of the discourses examined consisted but in exposition of legal rules and of the cases in which they were enunciated. But there was also critical evaluation of existing and suggested legal rules; and in such consideration there were references to logic, to social welfare and to justice. The law teachers were not content with dogmatic descriptions but sought for justification, and rightly so: the judges were not content with a judicial “*sic jubeo*”, but also sought for justification, and rightly so, and justification was expressed in language embodying the concepts of logic or social welfare or justice. Nevertheless, however sound the judgments of justification or condemnation of the legal rules may have been, it is submitted that they remained largely but bare assertions. It is my own conviction that the extra-legal references were relevant and indeed necessary, but it is my submission that they were inadequate. The reasoning, which was said to be logical, appeared to be based on unexpressed value judgments; the appeals to social welfare were not buttressed by facts or by the views of social scientists; the exposition of morality was not derived from any system of moral philosophy. If these were typical juristic discourse, it is pertinent to say that there is need of more study by jurists of logic, social science, and philosophy, and indeed it was possible to draw attention to fuller considerations of logic, social welfare and justice. A suggestion was made that the basic principle justifying the liability of an employer for the negligence of his servant was that asserting the positive duty of one person to care for the welfare of another, a duty derived, not from any fault of the employer, but from a social obligation of benevolence. Yet, while the appeals by the critics to logic would have been rejected by logicians, it could not be said that the claims that specific rules promoted social welfare or justice would have been accepted or rejected by social scientists or philosophers. Social scientists have barely considered even broad questions of the law of tort, and philosophers largely draw their opinions from the rules of legal systems. My suggestion of a legal obligation to love one's neighbour is derived from juristic, not philosophic, writing. A solution to the problem of *Broom v. Morgan* is not found in the writings of social scientists or philosophers. Certainly no specific solution is to be found, nor, it is believed, any general principle capable of yielding a solution by application to the characteristics of the particular problem. It is realized that the actual duty of an agent in a concrete situation
is said by philosophers not to be capable of determination by simple
deduction from a general moral principle, but for the particular
problem of vicarious liability it is doubtful whether the moralists
have suggested any prima facie duty, they have not suggested the
general principles to be considered in the exercise of the specific
moral judgment.

The problem thus arises for the jurist of how to proceed in ques-
tions of social welfare and morality in the absence of aid from the
social scientists and philosophers. Some via media has to be found
between the jurist endeavouring himself to become social scientist
and philosopher and between ignoring completely the issue of the
"goodness" of the law. It is suggested that more co-operation is
required between jurists, social scientists and philosophers.

As the term jurist is commonly understood, a man cannot be a
jurist and not be concerned with the goodness of laws. Implicit in
what I have written is the view that a lawyer cannot be fully a man
and indifferent to the problem of what ought to be the law. It is
contrary to the obligation of a lawyer as counsellor to advise his
clients not as to what the law is, but as to what he considers it ought
to be. It is often contrary to the duty of a judge as a judge to de-
termine a case not in accordance with what he considers the law is,
but with what he thinks it ought to be. But as human beings both
counsellors and judges are concerned with what the law ought to
be, for it is believed that the specific nature of humanity is to seek
for rationality in the control of man's actions.

It is, of course, not uncommon for statements to be made that
lawyers are not concerned with this or that aspect of some matter.
But attention should be given to a distinction well known to lawyers.
A statement that a lawyer is not concerned with what ought to be
the law may merely mean what is indicated by the more precise
phrase, that as a lawyer he is not concerned with what ought to be
the law: and clearly when the phrase "as a lawyer" means, as it often
does, "as one concerned with what is the law", then the statement
under review becomes a tautology. If a writer states that as a lawyer
he is concerned with what is the law, and that only as a jurist is he
concerned with what ought to be the law, then, undoubtedly, he
does employ a terminology apt to bring out differences in thought
and reality. But these apt distinctions of words do not deny the
unity of human personality, nor do they disprove the contention
that for the full development of personality a lawyer must also be
a jurist. It has been questioned whether a man can be efficiently
both a lawyer and a jurist. An answer is supplied by Austin who
maintained that he who seeks to improve the law must fully under-
stand what the present law is; thus to say that a man cannot be efficient both as a lawyer and a jurist is to deny that he can be an efficient jurist. This may well be so: for it is a commonplace that man cannot attain complete rationality. There is here, however, no denial of the obligation to seek for rationality.

**The Task of the Law Student**

The affirmation of faith as to the obligations of jurist and lawyer may seem not to embrace the student of law. It is my belief that it does. I conceive a university not as a collection of individuals engaged in self-improvement, nor, indeed, as merely a fellowship of men engaged in scholarly activity but detached from their fellow-men. In my view a university is an organ of society dedicated to fostering the exercise of intelligence and the advancement of knowledge, ultimately for the common good of all in the society. The ultimate task of a faculty of law is the improvement of rules of law: its instrumental tasks are the preservation and dissemination of knowledge of the law, through which cultural values of society are maintained and developed, and the education of the law student. Faculties of law are not the only agencies concerned with these tasks. Politicians, civil servants, the legal professions, various bodies of citizens—all are concerned with law reform; and indeed I have contended that all citizens should be so concerned. The family, the circle of friends, the churches, political organizations, the general sources of information, such as the press and broadcasting, the social organizations within and without universities, the professional organizations (to which the student may already belong)—all these and others play their part in the education of the law student. It is, indeed, my belief that neither the faculty of law, nor even the university as a whole, ought to be the sole educational influence affecting the student, for I believe that a university as such is not concerned with the whole personality of a student, but with his intellectual personality. His moral and artistic development, for example, are not the primary concern of the university; though a good university will provide education in morals and aesthetics, for it will contain "rounded" men and women who practise moral virtues and display artistic sensibility. In the same way a university will provide education in political activity and the religious life, for it will contain men and

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2 The maxim that scholarship knows no frontiers is regarded by me as evidence for the existence of a world society, and the development of universities evidence of the potentiality of development of more elaborate institutions of a world society. At present it must be recognized that there are not yet in existence all the institutions requisite even for the society of the members of the British Commonwealth.
women who are politically active or who lead religious lives. But
the university's responsibility extends to the whole of the intellectual
activity of the student; it is not limited to the provision of informa-
tion about the subject the student has elected to take. Law is the
medium for the general intellectual development of the law student.

Intellectual activity is not limited to the memorizing of proposi-
tions, but inquires into the criteria by which they are to be judged
as worthy of acceptance, and into the manner in which the proposi-
tions satisfy such criteria. An initial task of the law student is to in-
quire into the validity of the propositions which are asserted to be rules
of law. This is indeed a vast enterprise, requiring as part of it the
study of actual cases, rather than the study of the opinions of text-
book writers. Moreover, under our British system of law, (and under
other systems as well) inquiry into the validity of a proposition will
lead the student into questions of ethics and politics, of psychology
and sociology. For under that system criteria of validity often involve
efficacy and desirability. But even were validity not associated with
justice, the nature of intellectual activity requires that the students
do more than merely list a number of rules, acquire knowledge of
criteria of validity, and check the validity of the listed rules. Merely
to do that does not advance the student above the status of Goethe's
fact-grubber. Perception of a number of creatures and classification
of them as earthworms is not adequate intellectual activity.

"Dann hat er die Teile in der Hand.
Fehlt leider nur das geistige Band."

The task of the university teacher is to stimulate the student to
inquiry into the interrelated topics of the nature of law, the origin
and function of rules of law, and their relation to social life in
general. It is true that this imposes a vast task on the law student,

3 "When religion seeks to shelter behind its sanctity, and law behind its
majesty, they justly awaken suspicion against themselves, and lose all claim
to the sincere respect which reason yields only to that which has been able to
bear the test of its free and open scrutiny."
Kant: Kritik der Reinen Vernunft, Preface 1.

4 I am using the terminology of Kelsen with its distinction between the
validity and efficacy of a rule of law. It is valid if constitutionally authoritative:
as an Australian lawyer would say, if laid down in a statute or in some case
which has binding authority. It has efficacy when in fact the rule is enforced.
A rule, of course, may be valid but not enforced. A statute may be a "dead
letter".

5 The proof of this dogmatic affirmation requires a series of articles. They
have indeed been written by many authors; the dynamic character of our law,
so ably portrayed again by Lord Justice Denning in The Changing Law, de-


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and the wisdom of the policy has been denied. I do not doubt that much is sometimes gained by attention to a single part of a complex in interrelated parts; such a process of abstraction often merits the name of "practical", and much successs has followed this procedure. But failure to realise interrelations has led to pragmatic failures, and many successes have attended those who have attempted to deal with complexes as a whole. Analysis and synthesis have had their particular triumphs and disasters; together they may be invincible: together they constitute intellectual activity.

There is widespread agreement that students should examine the function of laws. Analysis of that function, like that of any other artefact exhibits its two components. In the case of laws there are what the laws were designed to effect, and what they do effect. These are questions of fact which are difficult to answer in many instances, but the attempt should be made. We have learnt to appreciate the importance of efficiency, and the efficiency of laws is the measure of the relation of the two components of function. It may be seen that efficiency depends on a wide range of factors, among which clarity of formulation of the laws, skill in administration and adequacy of the technical legal procedures are important, but by no means paramount. Other factors are usually classified by such terms as biological, psychological, economic, political, environmental. Study of the function of laws leads to an examination of the social sciences which investigate many aspects of social life. Moreover, even this "scientific" approach leads to one aspect of the problem of law reform, viz., that of increasing the efficiency of laws.

Analysis of the relation of law to social life in general exhibits other aspects of the problem of what ought to be the law. We are faced with the problem of the purpose of social life, the problem of the good life and its involvement with social welfare. The pursuit of the good life is itself a moral activity, but rational consideration of the nature of the good life is intellectual activity. Unfortunately, such is the social and educational system of today, that many students entering the university are unaware that such rational consideration is possible. It is, however, an activity involved in the study of any of the humanities, for the great issues of ethics and politics, of metaphysics and theology are all intertwined.

The study of law includes, therefore, not only the examination of what is the law, but also of what it ought to be. Moreover, it has been seen that there are three problems in what ought to be the law: (i) what laws would most efficiently promote the ends, preserve the values, of existing laws? (ii) what ought to be the ends of the law, what are the values of the good life? (iii) what laws would most
efficiently promote the values of the good life? In pursuit of what ought to be the law actual law cannot be ignored for many of the values of the good life are cherished and protected by existing legal systems. Nor can there be ignored the many suggestions for their improvement made by those who have reflected on legal systems and on the systematization of ideals for the ends of law made by jurists in their theories of natural law. But, as has been seen, there must also be taken into account the contributions of social scientists and philosophers to the discussion of social welfare and moral conduct. The burden of learning is heavy, but it seems cognitively clear that for the wisest solution of the great problems of what ought to be the law the co-operation of many thinkers is required. Is it not also morally certain that the toil and sacrifice involved in the learning is merited by the causes of justice and the good life?

In what manner and to what extent a student may acquire critical and creative knowledge of what is the law and what it ought to be are, of course, difficult though compelling pedagogic problems. The attempt to answer them has to be made by both teachers and students. The student who feels a moral urge to lead the good life, to promote justice and social welfare, will find the study of the law more rewarding and enriching by reason of its inclusion of what ought to be the law, and by its embracing the labours of scientists and philosophers in the field of understanding of social life. Even he may be frustrated or suffocated if too much is expected of him, though the danger is greater that he may be starved or lamed if too little is required of him. The intellectually eager student may delight in the broader fields, and be stimulated by the thought of the many prizes for the explorer of unfrequented areas. His moral self may indeed be stimulated and he may feel the urge to preserve and advance the values in law. What of the students who have no such moral desires or intellectual comprehensiveness, or who feel themselves compelled to subordinate such feelings, if not to exterminate them, in the interests of acquiring the means of subsistence. There is indeed for the teacher a moral problem of the justification of imposing consideration of what ought to be the law on the student who is interested solely in what is the law. Suggestions for such a justification have already been made. It has been suggested that a technical knowledge of what is the law involves consideration of what it ought to be; and that an intellectual understanding of what is the law compels such consideration. Various writers have

7 "The hungry sheep look up, and are not fed,
But swoln with wind, and the rank mist they draw
Rot inwardly, and foul contagion spread."
Res Judicatae

indeed stated that a juristic approach to legal study is a better approach for the actual practice of the law than one which ignores criticism in terms of social welfare and justice. But suggestions of this kind give to the consideration of what ought to be the law only an incidental and subordinate place in the study of law. I believe that the true position of such study is co-ordinate with the study of what is the law. I derive this belief from my thesis that a university is an organ of society having as one of its functions the improvement of laws by means of the exercise of intellectual ability. A university comprises the whole body of students as well as the teachers and governors. The student joins a university: he does not contract for the provision to him of information and training. He is a member of a fellowship dedicated to the objects of the association: he must play his part in the advancement of learning. But learning is not, any more than is law, an end in itself, as the medieval universities well knew. The advancement of learning is the care and prevention of sickness and disease, the advancement of bodily and mental health and all that medicine serves. It is the elimination of brute force and wasteful neglect, the advancement of order and welfare and justice and all that law serves. It is the advancement of the mind and soul of man and all that philosophy and theology serve. Perhaps this faith of mine may be shared by some students in Australia. I am well aware of the desire and ability of her universities to play their part in the fulfillment of the motto of the Commonwealth. Advance Australia.