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INSTITUTE PRIESTS AND YALE OBSERVERS—A REPLY TO DEAN GOODRICH

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Most of the literature of jurisprudence, to paraphrase William James, is tedious, not as hard subjects like physics and mathematics are tedious, but as throwing feathers, endlessly, hour after hour, is tedious. Therefore it had been the habit of the more red-blooded students at Yale to ignore the subject. With the advent of the February issue of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, this attitude suddenly changed. It was discovered that fighting words might lie concealed in the dreary terminology of legal theory. Whereupon sales of Professor Robinson's recent book, *Law and the Lawyers*, increased at the local bookstore, the UNIVERSITY OF PENNSYLVANIA LAW REVIEW had to be put on reserve to meet the student demand, and interest in Jurisprudence at Yale achieved a new high.

The proximate cause of this intellectual renaissance was a paragraph by Dean Goodrich in his article, *Institute Bards and Yale Reviewers*, reading as follows:

"In all the pages of writing concerning the project as a whole, a particular subject of the law, or an individual point or doctrine, the examination of issues has been on a high plane of impersonal discussion. The one exception seems to me to be that by Professor Edward Stevens Robinson, professor of psychology at Yale University, in his recent book on *Law and the Lawyers*. His interest in the Institute, it should be said, is incidental to a broader consideration of the shortcomings of those who follow the law. But speaking of the Institute and its Restatement he says: 'Our main interest, however, is in the general philosophy of the undertaking, which is plainly founded upon the belief that too much truth about the law is disastrously confusing and that the remedy may be found in an authoritative suppression of

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the facts rather than in better education of the public and the bar as to the actual psychological and sociological nature of the law.' These are fighting words, clearly passing the limit of fair comment. If the expression 'authoritative suppression of the facts' does not charge intellectual dishonesty against those responsible for the Institute's Restatement, I can think of no words which will do so. Such vituperations are still bandied about in the political arena, but it is a novel thing to see them appear in the field of scholarship. Whether Professor Robinson likes the American Law Institute and its works or not is a matter with which he is alone concerned. But all of us who have put in a share of the sweat and tears which have gone into the effort thus far, bitterly resent such an attribution of malignancy to our motives as the one quoted above."¹

The interest created by this paragraph offers a rare pedagogical opportunity to restate the point of view which Professor Robinson takes in his recent book, and which the writer reflects in his companion volume, *The Symbols of Government*. Dean Goodrich completely misunderstands what Professor Robinson is trying to say, and interprets the paragraph, quoted out of context, as a personal attack on himself and his collaborators. It is not important to discuss whose fault this is. On Dean Goodrich's behalf it should be said that an objective examination of any institution always appears irritating to its devout supporters, and hence his reaction is entirely natural. It is the same type of reaction experienced by moral and ethical philosophers when they first examined the psychoanalytical approach to love and morals. They felt that the whole foundation of human character was being attacked by these objective observations. It should be expected that this same sort of approach to institutional habits and behavior would provoke the same sort of hostility. An objective or naturalistic approach taken by Professor Robinson emphasizes the effects of ideals on human or institutional conduct. It has as yet no recognized place among the conventional "fields" of the law. It has no accepted terminology. Hence it is bound to be confusing to devout and sincere scholars like Dean Goodrich, concerned not with the effects of ideals, but with their dialectic expression and their proper veneration.

There is, however, no reason why a legal scholar should be alarmed by an objective description of what he is doing, in spite of the fact that it seems to contradict all the assumptions on the basis of which legal dialectic is written. His difficulty is that he instinctively feels that everything which concerns the law should be capable of presentation in court. A point of view which must be concealed behind the scenes, and which would look out of place in any formal statement of the law seems to the conventional scholar either to be wrong or to prove the law is wrong. Confronted by such a

1. (1936) 84 U. OF PA. L. REV. 451.

dilemma the scholar naturally rallies to the defense of the law against what seems to him an unjustified attack.

This spiritual trouble would be avoided if the scholar realized that there is need for both a science of law and a science about law—the one for ceremonial use inside the institution and the other for observation from above. An objective or naturalistic attitude toward human institutions is one that can be taken only by one writing about them from the outside. It is not pragmatically successful as a public attitude for one working as a minister of the institution. An objective history of a church can scarcely be written by its bishop, if he wishes to maintain the church as it is. He may use the understanding which he derives from such an attitude in order to make the operation of the church more effective, but while he is on the public stage he must play his part in accordance with the assumptions underlying the lines which he speaks. The reason is obvious. It applies to the law, the church, the speech of a college football coach to inspire his team before a game, indeed to any activity which represents the symbols and ceremonies which are the cement binding human institutions together.

The symbols of the law, both primitive and modern, arise out of a series of contests which dramatize the various conflicting ideals hidden under the term "justice." Out of those contests parables are spun, and maxims derived which reflect the contradictory moral and economic notions of the man on the street. These maxims can never get far from those notions, or the man on the street will complain of the law as unjust or uneconomic. The man on the street is not one character, but a whole cast of characters. His firmly held beliefs contradict each other, and he reconciles them in mysticism, or loses them in elaborate dialectic. The most important institution wherein such conflicts are reconciled, either by ceremony or logic, is the judicial system. It cannot, therefore, be a place where hard, cold truth is sought, yet it must be a place where everyone thinks that truth is searched for. For this paradoxical function the technique of trial by battle seems admirably fitted. Both sides state their positions with the utmost exaggeration possible, and the ordinary decision permits all the conflicting ideals to stand which may be reconciled with its decision. When the Supreme Court upheld the *T. V. A.* on the theory that the distribution of electricity at the Wilson Dam was really a continuation of the World War, it left all the conflicting economic ideals represented by the parties still arguable. Where the Court itself decides to uphold some general ideal and oppose another the doctrine making a distinction between decision and dicta still permits opposing ideals to be argued. The Restatement is seeking formulae through which those functions can be performed. It is not seeking the "truth" about the institutional habits of our complex judicial system. The very necessities of its task in seeking a formula to reconcile contra-

dictory ideals, prevents it from stating, as part of that formula, the reasons why such a formula is necessary.

Dean Goodrich is a disciple of a science *of* law. Mr. Robinson is talking in terms of a science *about* law.² What is the relationship of these two attitudes? It is a relationship easy to feel, but difficult to state, and therefore we will use a simple and familiar analogy. The King of England appears as a symbol of the Government of the British Empire. Certain ceremonies are enacted, with perfect seriousness, which dramatize that very necessary ideal embodied in the King. It takes skill to conduct those ceremonies, and you may, if you like, call that skill a science. It is a very different sort of an endeavor however from that of Walter Bagheot, who *explained* the English King. No conflict between the ceremonies attending the king and the phenomenon of his Kingship is felt in England. Therefore the English can be practical about planning these ceremonies and reverent and mystical about their observance at the same time. There is no antagonism between those who pull the strings behind the stage and those who play a part on the stage. For this reason they give a better show.

The Emperor of Japan fulfills a function similar to the English King. Yet in Japan a certain lack of objectivity prevents the publication of a description of that function such as was given for England by Bagheot. A Japanese Bagheot who denied the ultimate truth of the divine power of the Mikado, while pointing out his symbolic significance, would probably get into trouble.

The traditions of America give a mystical significance to a "rule of law" rather than to a "personality" as a symbol of the unity of our institutions. We feel safer thinking in this way. We dramatize that rule of law in our judicial system and in our constitution. We do not conduct parades as they do both in England and Japan. Our ceremonies are built on the pattern of a feast of pure reason. The spectacle of a hundred or so prominent lawyers and scholars sitting in a great hotel listening to the Restatement discussed section by section is congenial to our protestant way of looking at the symbols of our government. It was this love of dialectic and fear of ceremony which made the Restatement take the form it did. Yet that same distrust of ceremony forced the members of the American Law Institute to deny that their function was ceremonial at all. They were compelled to take the attitude toward the "rule of law" that the Japanese take toward the Mikado, rather than the attitude which the English take toward their King.

Of course the Law is a much more complicated symbol than the English King or the Japanese Mikado. It shades all the way from the

2. Professor Robinson summarizes the distinction in *JOURNAL OF SOCIAL PHILOSOPHY*, October, 1935.

dramatization of conflicting ideals to practical and detailed directions. One can always tell where a Jubilee ceremony begins and ends. One can never tell just where rules of law are primarily pure symbols and where they are detailed instructions. Most of them are used in both ways. However, the necessities of the Institute's task forced them to leave out the more practical element as much as possible.³ The Restatements have been criticized for the fantasy of some of their parables—for instance, the parable of the man leading a lion with a small rope⁴ is thought to be helpful in the Restatement of Agency. Yet, those who find such parables humorous forget that wherever the Institute was confronted with a choice between discussion of a modern practical situation and the dramatization of conflicting moral, economic, or procedural ideals, the nature of their task compelled it to emphasize the latter. It was this reason that compelled them to abandon consideration of statutes and to leave out the citation of authorities. A parable which becomes too complicated ceases to be a parable.

It is impossible to make such observations within the confines of a science of law, because the emotional necessity which creates that science binds it to certain narrow dramatic canons. That is the reason why the so-called realists were usually voted down in all their major suggestions. The reaction was due to an unconscious realization that nothing but black letter type, supported by parables, would work. Yet, within the science of the law the matter could not be stated quite so frankly.

On the platform of a science *about* the law, however, all these things can be said and discussed. It permits observation to the best of the ability of the observer. Such observations, like the observations on any political situation, can not be proved by induction or made more accurate by a vote of learned men. Possibly many will quarrel with the observations made in

3. For example, much of the Restatement of Torts is actually concerned with instructions to juries, when it sets out the concepts surrounding the law of negligence. The practical problem of how a judge may best conduct himself in talking to the jury is naturally omitted. The different methods of instructing juries on negligence now extant, and the doctrines of what constitutes reversible error after the instructions are given are no part of the concern of the Restatement of Torts, though practically they are much more important than the definitions of the standards of care which are found in the Restatement. In the same way when the parol evidence rule is restated, there is no hint as to the questions which counsel may ask under that rule in the various types of situations. These important matters to both trial counsel and the judge are regarded as tricks of the trade, not attaining to the dignity of "law".

4. RESTATEMENT, AGENCY (1934) § 355, Comment *b*: "So, a person appointed to guard the patrons of a circus from a lion is not liable because the pike with which he is supplied as a preventive means is obviously insufficient. If, however, such agent is a participant in causing the thing over which he has such partial control to cause harm, he is subject to liability for such harm (see Comment *c* on § 343). Thus, if the agent were to lead a lion down the street holding him by a small rope, this being the means supplied by his employer, he would be guilty of affirmative negligence and therefore would be liable to a person harmed by the lion after escaping."

The picture of two men walking down the street, one leading a lion with a small rope, and the other guarding him with an obviously insufficient pike has all the appeal of a new testament parable, and the answer is so ingenious and so unexpected that it sticks indelibly in one's mind.

this article. The situation will seem to some to be different from what is here described. Yet, on the level of a science *about* law critics will judge such observations from the standards of diagnosis of a complicated mental case. Observations about the psychology of institutions have no certainties or fixed techniques—yet that does not mean that they may not be illuminating and useful. The random observations made here, however, are made for the purpose of illustrating the intellectual differences between a science *about* law and a science *of* law. For that purpose they may bring home the difference between the two platforms, regardless of their accuracy.

From the point of view of a science *of* law, the Restatement by the American Law Institute is as near perfection as human things can make it. They have employed the most distinguished experts available and submitted the results to the most distinguished practical lawyers. Where experts disagreed both sides were given a hearing, and even the minority has not been foreclosed, as is evidenced by Dean Goodrich's reactions to the criticisms of the Restatement by Professor Lorenzen:

"It is a relief to turn from the patronizing loftiness of Professor Robinson to the vigorous and sturdy forthrightness of Professor Ernest G. Lorenzen."⁵

Dean Goodrich does not wish to foreclose anyone's opinion about the law, provided he plays the game according to the conceptions of a science *of* law. This is not a code which is being prepared, but a great adventure in co-operative group reasoning, and if this reasoning will only go on and on, even after the Restatement has appeared, the law will get better and better. His faith in the indefinable expansion of knowledge about the ideology of conflicts of laws through the writing of more and more articles resembles the hope that the theologians of another day pinned on the multiplication of religious tracts in clarifying the Word. He says:

"One hundred years from now our successors will know more about the subject than we do at present. But nothing urged by Messrs. Lorenzen and Heilman leads me to think that those same successors will not be better off for having had the result of twelve years of very hard work on the subject by a large number of people in the American Law Institute."⁶

It is cheerful to think how much more about the fundamental principles of conflicts of laws our grandchildren will know than Professor Beale. On the other hand, it is depressing to consider how little must have been known about this subject when the writer first took it in law school before the "twelve years of very hard work on the subject by a large number of people" had

5. Goodrich, *supra* note 1, at 454.

6. *Id.* at 456.

taken place. One is consoled, however, by consulting one's notes of twenty-one years ago and finding that the general ideology of the subject has changed little, if at all, during the period. In any event, the above quotation illustrates that simple underlying faith of the science of law that the more articles you write on a word like "jurisdiction" or "domicil" the clearer it becomes as the years roll by.

The abstract picture in the background of the Restatement is something like a mining operation, by which gold is extracted from that vast body of ore, the judicial opinion. There is gold in those hills but experts are needed to extract it. The refuse is then relegated to an ore dump where it will be out of the way, and instead of huge unwieldy lumps of ore only pure gold will pass back and forth in the exchange of ideas between court and counsel. The idea is slightly different from the formulation of a code, which resembles a manufacturing process, producing a new and fabricated product, rather than a mine. It was not the function of the Restatement to fabricate but only to assay and extract the nuggets which, being pure gold, did not even need gilding. The notion of nuggets being dug up from unassayed literary material was familiar to those who had listened to the sermons of the last half of the nineteenth century. The idea behind the religious dialectic was to dig truths out of the Bible by the light of pure reason, and it was sustained by the faith that the more truths that were dug out, classified and stored away, the less doubt there would be in the world, and the clearer religion would become. The theologians would no more have dreamed of legislating their religious principles than the restaters would have advocated a code of substantive law.⁷ A stream can rise no higher than its source. The source of religion was the Bible, which needed only exposition. The source of the law was the cases, which needed only to be boiled down. The completed product of the Restatement which is now before us represents the results of that great intellectual smelter. Perhaps it has not extracted all the gold, but the up-to-date machinery and the care with which it was assembled should lead any reasonable man to assume that they got most of it. To deny this is to express doubt on the efficiency of organized cooperative logical analysis.

From the point of view of a science *about* law, the picture is entirely different. To understand the problem as an observer of human affairs rather than as a priest, it is necessary to describe the great post-war legal inflation of cases and concepts which has not yet reached its peak. It is a characteristic of all inflations that those who are in power while they are going on never realize that they are inflations. In 1928 substantial men were proving that we were on a permanently high level in the stock market.

7. We refer of course to the protestant theologians of the 19th century. At an earlier date church creeds had the aspects of legislation passed by bodies specially ordained for that purpose.

Today legal scholars act constantly on the assumption that a system which pours out 25,000 cases a year can be kept in control by West Publishing Company digests and the smelting and assaying operations, conducted on a grand scale every so often by an American Law Institute and on a continuous smaller scale by a hundred law reviews. The complaining consumer of all this literature, the practicing lawyer, like all consumers, was at first inarticulate. He cut down on his amusements to pay the growing cost of his library and accepted the explanation that the reason law was getting so much more complicated was that life is so much more complicated. Certainly legal scholars were doing all they could for him by clearing up the various fields of the law one by one in law reviews. They were also getting out new law reviews as fast as they could be supported. A few binding precedents could run a simple country like Sweden; eight hundred volumes could supply the intellectual gasoline for a small island like England; but a great complex social machine like America needed about twenty-five thousand cases a year to keep it within the principles of the common law.

As time went on this explanation wore a trifle thin. The lawyers demanded relief from the huge burden of unorganized cases, articles and texts. Naturally they sought help from the scholars, and so the Restatement was launched as a great philanthropic undertaking. A practical man facing the practical problem would have seen several possibilities. If there are too many cases for the lawyers to read, one obvious remedy would be to limit Supreme Courts to ten opinions a year on their favorite topics. Or the system in France might be adopted by publishing only a few of the cases. The association of law schools might have been asked to refuse admission to a school which published articles without a certificate of public convenience. This certainly would have cut down the flood of literature. Yet if the legal profession had been in a frame of mind to consider such suggestions, that very fact would have ended the legal inflation, and the suggestions would not have been needed. Since it was not in such a frame of mind, the inflation has to take the accustomed course of all uncontrolled inflations. A code would have been a way of control, but we were not yet ready for such an amount of governmental interference with private law. The rugged individualism of separate cases, each standing sturdily on its own four legs in a little empire of its own, whose boundaries were fixed by *stare decisis* and maintained by constant fighting, could not be destroyed without loss of national character.

The course of legal inflations is not difficult to trace, and like monetary inflations they repeat approximately the same curves. If one turns back to the great pleading inflation of the 19th century, when lawyers and laymen alike were flooded by a complexity of pleading precedents, one discovers that the first remedy tried was the Hilary Rules. This was an honest

and sincere attempt to restate the logical principles on which pleading was theoretically conducted and to force lawyers to follow it. Every cult, when it gets in trouble, assumes that the thing to do is to follow the same principles as they did in the past, only more conscientiously and logically. That this is true of economic faiths is evident from the course of every great economic inflation and depression. It is an obvious prediction which can be made by anyone who has seen groups of men bound together by any set of ideals. In the 19th century it was pleading that was breaking the back of the average lawyer. Like the complicated substantive law of today, it was regarded as sacred. Excrescences could be removed, but change in fundamental structure was unthinkable. Today we feel this way about the vast mass of so-called "substantive" law. At the time of the Hilary Rules lawyers felt the same way about the science of pleading. The difference between substantive law and procedure is nothing but a difference in attitude, and in an earlier day the science of pleading was regarded as *substance* and not as mere rules of convenience.

Therefore, it was probably inevitable that the same sort of thing attempted by the Hilary Rules in procedure should have been repeated by the American Law Institute in substantive law. The idea that the old system was perfect and needed only clearness and accuracy on the part of lawyers and judges was so fixed that had anything else been tried it would not have obtained even a scattering support. For it is important to note that the realists were as unaware that they were seeing a repetition of the pleading inflation of the 19th century as were the so-called fundamentalists. Neither they nor their opponents regarded the substantive law as a series of parables by means of which conflicting moral and economic ideals were dramatized. It was disrespectful to speak of the law as an argumentative technique. Realists wanted only a classification according to their own terms, a different set of Hilary Rules. And like all members of the opposition, they could not get together. Some wanted to force the courts to talk in figures and statistics, unmindful of the fact that this is a language congenial only to expert accountants. Others, whose myopia the writer shared, wanted a reclassification along the lines of practical problems, unaware that when legal objectives become sufficiently clear to talk practically about them they are automatically turned over to administrative tribunals, where the whole formal atmosphere of a law court disappears and the need of restatement with it. It is difficult to see how the Restatement could have taken any other form in the climate of opinion in which it was created.

Of course the Hilary Rules did not stop the great pleading inflation, nor has the Restatement stopped the great post-war substantive law inflation. It has become another book which must be consulted, while the cases and texts pour out as before. No sooner is the Restatement of Trusts com-

pleted than Bogert produces seven volumes on trusts in place of his one volume work, backed by 22,000 cases. Rumor has it that Austin Scott is preparing another work on the same subject which will supplement and clarify the Restatement of Trusts. No sooner is the Restatement of Contracts off the press than lawyers find a new edition of Williston, increased in size from four volumes to eight. It is obvious what the result will be. No practicing lawyer will dare rely on the earlier work of Williston in the Restatement, when a later work, theoretically improved by all of the ideas which Williston obtained in writing the Restatement, is at hand. The Restatement is becoming buried in the larger efforts of its reporters and commentators just as the Hilary Rules were buried. Only the progress seems faster.

Are students relieved of their labors? The answer is found by looking at the footnotes of any law review. Compare the notes of the Harvard, Yale and University of Pennsylvania Law Reviews today with those of 1900. The increase in labor is appalling. Students slave to the detriment of their general education in law, piling up case after case in footnotes, without which they cannot make the most simple and obvious statements. The average law review article has become almost unreadable. Cases whirl like snowflakes in a blizzard, and one hasn't the least idea where the article is drifting until finally the wind dies down, the cases cease to fall, and one emerges into the calmer air of the concluding paragraph. Here one finds a statement that the law seems to be somewhat confused, but a few tentative generalizations which must not be relied on too heavily may be cautiously stated.

Are lawyers relieved of their labors? The answer is found in any great law office. In one law office a young lawyer told me that it was the custom to prepare elaborate and lengthy memoranda on all questions for the benefit of the partners. These memoranda are carefully preserved for future reference, but their indexing is so difficult and their quantity so formidable that it is easier to start afresh with the digests. However, they do offer just one more source which the young lawyer is expected to consult, and he is usually afraid to omit the step lest he might have overlooked some cases which some one else has found.

Are the professor's labors relieved? The answer is found in the fact that the number of legal articles written by members of his craft which the brethren are supposed to read (because no one else can be expected to read them) are increasing daily. The existence of one hundred law reviews staggers the imagination. No such number of journals exist in any other field of scientific or learned endeavor. All this has advanced the art of advocacy since the time of Daniel Webster in the same manner as the inflation of the German mark advanced business in Germany.

The writer is no prophet or the son of a prophet, but it occurs to him that within the next twenty-five years this legal inflation must break, and the enormous literature which has risen with it come tumbling down. That is what happened to pleading within fifty years of the Hilary Rules, and today Chitty's ponderous volumes are interesting only to the student of legal history. It happened in the protestant sermons and the religious tracts which flooded the libraries of the eminent divines of fifty years ago. There was a time when the prestige of a minister, like that of a legal scholar today, depended on the number of elaborately annotated tracts which he produced, and sermons went on to sixthly and seventhly in an unwearied search for the truth through dialectic techniques. Today these tracts are not even found in libraries, and one must search the second-hand book stores where they may be obtained for five cents apiece. True, no West Publishing Company arose to digest these sermons, but groups of eminent clergymen were constantly forming themselves into bodies for the restatement of theology in order to still endless controversy about fundamental principles and to make the Word simple and easy so that preachers with the proper training could apply it. Perhaps the present legal inflation is on a firmer foundation, but that always appears to be true at the height of any inflation, as may be evidenced by the remarks of eminent economists in 1928.

The writer, however, suspects that the end may be somewhere in sight. We are passing through the Hilary Rules stage with the American Law Institute. It seems, if one studies legal history, a very necessary stage. Therefore, I think that the phenomenon of burying the Restatement under a host of further texts and comments should be welcomed. In this Dean Goodrich seems to agree, when he says:

"In the meantime, if the teachers of Conflict of Laws in our law schools disagree with conclusions reached in the Restatement, they know that the editors of our many law reviews are clamoring for copy and everyone has full opportunity to obtain a medium of expression for what is on his mind."⁸

By this means we can build as big a literature as possible, both pro and con, on top of the Restatement in the quickest possible time. I see no alternative to such endeavors, either from the point of view of a science of law, represented by Dean Goodrich, or from the point of view of a science about law. The one advocates it on the theory that there are still little corners of the law requiring attention and repair or reexamination, still undeveloped "fields" which lack the clarifying light of legal scholarship after the German tradition. The other point of view predicts the same result from an observation of similar phenomena in the past. It would

8. Goodrich, *supra* note 1, at 458.

indeed be curious, if the climate of opinion which produced the Florida Boom and the 1928 stock market should not achieve something similar in the field of scholarship. And perhaps the mysterious psychological forces which cause all these booms to rise and fall have something in common.

The present legal inflation has been worse than any in the past, yet that seems true of all inflations. It was achieved by adding the techniques of German scholarship to the very practical system of common law which we inherited from the English. Had our law schools retained the somewhat casual atmosphere of Oxford, and the Inns of Court, it is possible that we might have escaped it as England has. But to the English system of *stare decisis* the German scholarly technique of piling up detail was added at the beginning of the century. The English emphasized the ability to write and talk gracefully. They took their legal language as it was and used it. Our law schools scorned good writing as mere journalism and affected a distaste for the mere techniques of advocacy as something unworthy of a learned man. They emphasized footnotes and research in piling up cases. Courts followed them. The result is as you see it today.

When the writer was in law school, Williston's treatment of contracts was in one volume which seemed adequately to state the general dialectic of that every general subject. There were only eighteen American law school reviews. Immediately after the war Williston had increased to five volumes, and there were twenty-four law school reviews. Then followed the Restatement of Contracts. Today Williston's new edition has increased to eight volumes and there are over sixty law school reviews published in America, and about two hundred and fifty current Anglo-American legal periodicals. The Restatement is as perfect as scholarship can make it. Williston on Contracts is certainly a very necessary addition to the perfection of the Restatement or he would not have published it. And the law reviews are known to contain the very pearls of the law. Yet the whole is beginning to be a great burden, particularly when it is repeated in all the other so-called legal fields. And the only thing that can stop it is a complete change of attitude which will produce a different and simpler type of legal literature. Toward such an attitude, a science *about* law, which includes in its subject matter the narrower science *of* law, may contribute much.

These observations are thrown out as the type of observation which may be made from the point of view of a science *about* law and which may not be made from the point of view of a science *of* law. They are not regarded by the writer as fundamental truths, but as political guesses. In a moving political situation (and certainly the law is always in the midst of such a situation) such guesses are all that we can go on. They are not scientific in the sense that observations on physics are scientific because that is impossible in psychological diagnosis today, even of individuals

where the techniques have been studied for years. Therefore, for the purpose for which this article is written, it is not important whether the reader agrees with the statements about the present legal inflation, its course and causes, or not. If he disagrees, let him make his own observations. It is only pertinent here to illustrate a point of view from which it is possible to make a type of observation different from that which can be made within the four walls of a legal argument or a strictly legal philosophy because a legal philosophy must necessarily suppress facts which interfere with its assumption. Certainly a realization that there must be a science *about* law as well as a science *of* law, just as there must be both stage managers and actors in a play, ought to help both actors and managers.

The fact that the Restatement has not stopped the flood of legal literature is certainly not the fault of the reporters, if one believes as the writer does that no other type of restatement was possible in the intellectual atmosphere of the time. It has to be tried, just as the Hilary Rules had to be tried, and after the Hilary Rules came practical procedural reform. Therefore nothing but praise should be accorded those who worked so conscientiously within the narrow confines of the peculiar artificial reasoning of the law. Yet after the failure of the Hilary Rules it was discovered that procedural reform required more than the restatement of the principles of pleading. Pleading did not work itself out by induction. It required certain practical changes in organization; it was found in England, and the inclusion of laymen in the deliberations of lawyers introduced a more practical and matter-of-fact attitude. It is beginning to be evident that the flood of legal literature will not control itself by constantly restating itself and that the argumentative technique of the law is becoming more and more cumbersome for student, lawyer, and professor. There are numerous practical ways of cutting down that flood which as yet fit into none of our assumptions about the law. Yet as attitudes toward precedents in pleading changed, so may the attitude toward piles of books in substantive law change, and the day may come when more practical measures may be taken.

The writer suggests no formula because at present it is only too evident that no new formula will be accepted. It is sufficient to illustrate the possibilities of a science *about* law by an analogy. The so-called Copernican revolution had a significance in human culture far beyond the specific astronomical discovery. For the first time, in ceasing to think of the earth as the center of the universe, men began to look at it from the outside. Amazing advances in man's control over his physical environment followed that change of attitude. Discoveries were made which would have been impossible for men bound by fetters of earlier pre-conceptions. Today there is beginning to dawn a similar change in attitude towards creeds, faiths, philosophies and law. Looked at from within, law is the center of

an independent universe with economics the center of a co-ordinate universe. Looked at from outside, we can begin to see what makes the wheels go round and catch a vision of how we can exercise control not only of physical environment but of mental and spiritual environment. When men begin to examine philosophies and principles as they examine atoms and electrons, the road to discovery of the means of social control is open.

The small problem of legal inflation which the American Law Institute strove to deal with so sincerely, so gallantly and so ineffectually, could easily respond to practical treatment, if it were not for our fear that such practical treatment would destroy the independent universe of the law. And with the solution of small problems created by the misuse of faith and symbols the solution of larger problems may come.

We are attempting here only to suggest the outline of what Professor Robinson calls an objective or naturalistic point of view about law. A few short pages are not sufficient to restate that point of view as a rounded logical philosophy. Hence, we have sought analogies only to catch the imagination of the reader rather than to lead him to our conclusion through inescapable logic. It is our hope that by means of these analogies we can convince Dean Goodrich that we are not attacking his motives but simply standing on a different platform and trying to explain them.

This article is not an attack on the Restatement, but an explanation of the forces which moulded it. If it appear to some to be an attack, it will be only because they do not understand that a naturalistic point of view toward any institution requires that we temporarily shed our customary habits of reverence. Indeed, the conclusion reached is actually a defense of what has been done because it appears that nothing else would have been possible in the intellectual atmosphere of the day. Looking back on the course of the pleading inflation of the last century we can now see that the Hilary Rules were a step in the process resulting in the institutional changes of the Judicature Act. Perhaps the Restatement will occupy a similar place in this century, serving to awaken the bar to a realization that the incredible number of precedents and texts, now pouring out in increasing numbers from hundreds of presses, cannot be stopped by prayer or redefinition. In that event let us hope that the American Law Institute may continue, as a unifying force to lay the foundation for the institutional changes in the collection and citing of precedents which the writer predicts will follow the collapse of the present legal inflation.